No. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

GOVERNOR GRAY DAVIS, CONGRESSMAN XAVIER BECERRA, CONGRESSMAN TOM LANTOS, COUNCILMAN BEN WONG, DANNY J. BAKEWELL, SR., and JORGE CORRALEJO,	)
Petitioners,	)
vs.	)
KEVIN SHELLEY, in his official capacity as Secretary of State of the State of California and CONNY McCORMACK, in her official capacity as Registrar-Recorder-County Clerk of the County of Los Angeles,	)
Respondents.	)

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

EMERGENCY STAY REQUESTED
CRITICAL DATE: AUGUST 31, 2003

Robin B. Johansen, Bar No. 79084
Kathleen J. Purcell, Bar No. 84992
James C. Harrison, Bar No. 161958
Thomas A. Willis, Bar No. 160989
Karen Getman, Bar No. 136285
Remcho, Johansen & Purcell
201 Dolores Avenue
San Leandro, CA 94577
Phone: (510) 346-6200
FAX: (510) 346-6201

Michael Kahn, Bar No. 057432
Folger, Levin & Kahn
275 Battery Street, 23rd Floor
San Francisco, CA 94111
Phone: (415) 986-2800

Kathleen Sullivan
559 Nathan Abbott Way
Stanford, CA 94305-8610
Phone: (650) 725-9875
(pro hac vice application pending)

Attorneys for All Petitioners

No. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

GOVERNOR GRAY DAVIS, CONGRESSMAN XAVIER BECERRA, CONGRESSMAN TOM LANTOS, COUNCILMAN BEN WONG, DANNY J. BAKEWELL, SR., and JORGE CORRALEJO,	)
Petitioners,	)
vs.	)
KEVIN SHELLEY, in his official capacity as Secretary of State of the State of California and CONNY McCORMACK, in her official capacity as Registrar-Recorder-County Clerk of the County of Los Angeles,	)
Respondents.	)

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION

EMERGENCY STAY REQUESTED
CRITICAL DATE: AUGUST 31, 2003

Robin B. Johansen, Bar No. 79084
Kathleen J. Purcell, Bar No. 84992
James C. Harrison, Bar No. 161958
Thomas A. Willis, Bar No. 160989
Karen Getman, Bar No. 136285
Remcho, Johansen & Purcell
201 Dolores Avenue
San Leandro, CA 94577
Phone: (510) 346-6200
FAX: (510) 346-6201

Michael Kahn, Bar No. 057432
Folger, Levin & Kahn
275 Battery Street, 23rd Floor
San Francisco, CA 94111
Phone: (415) 986-2800

Kathleen Sullivan
559 Nathan Abbott Way
Stanford, CA 94305-8610
Phone: (650) 725-9875
(pro hac vice application pending)

Attorneys for All Petitioners

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

INTRODUCTION

Californians soon will be asked to vote on whether they want to keep in office the same man they elected Governor only a few short months ago. The conditions for this second election are very different, however, from the first and fatally unconstitutional.

First, the recall election will be conducted in such a manner as to deny equal protection to certain voters and denigrate their fundamental right to a fair election. The recall election has been set for October 7, 2003, only 75 days after the Secretary of State's certification. It will cost the citizens of this State an additional $53 million or more. For that hefty sum, they will get a vastly inferior election process, depending on how much their county of residence is willing and able to spend, and how quickly their election officials can prepare. In Los Angeles, only 1,800 polling places will be staffed, instead of the 4,922 open during the 2002 gubernatorial election. In Los Angeles, voters will be using punchcard machines that, pursuant to court order, cannot be used in the March 2004 primary or any subsequent California election. As a result, voters in Los Angeles will face more burdens in voting, and a greater chance of errors in their ballot, than will voters in other counties.

There is another problem: The recall violates the rights of Governor Davis and his supporters to have their votes counted equally with those of the other candidates. Governor Davis is barred from appearing on the ballot as a candidate. Thus he needs a majority of the vote on the first part of the ballot to remain in office. Anyone else, however, can become

Governor on the second part of the ballot with any percentage, no matter how small, so long as it represents the top number of votes on that second part. Thus Governor Davis can be recalled from office if he receives 49.9 percent of the vote, yet Larry Flynt can be elected to that same office if he receives only 20 percent, or even less.

Unless these twin defects are corrected, California's first statewide recall election will be so lacking in legitimacy that it violates the Guarantee Clause of the federal Constitution. California's recall procedures are already far less rigorous than those in other states, making it much easier to qualify a recall for the ballot and thereby disrupt the entire Executive Branch. Moreover, once the recall qualifies, virtually anyone can run for office, with none of the filters used in an ordinary gubernatorial election. The October ballot promises to contain many candidates, who will split the vote, allowing someone who receives as little as a single digit plurality of the vote to govern. If the recall election is allowed to go forward on October 7th and Governor Davis is not allowed to appear as a candidate on the ballot, California's new Governor will not represent the interests of a majority or even a significant plurality of the State, as the Guarantee Clause requires.

Preelection Review is Essential. No public purpose will be served by having an unconstitutional recall election, conducted under unconstitutional conditions. Yet the severely truncated election calendar leaves little time for review. In order to prevent the substantial impairment of voting rights that will result from a compressed election schedule and to allow sufficient time for the Court to consider the substantial questions raised by this Petition, the Court should postpone the election until the

March 2004 primary and permit Governor Davis to appear as a candidate on the succession election ballot.

By this verified petition, petitioners allege as follows:

JURISDICTION

1. This Court has original jurisdiction over this matter pursuant to Article VI, section 10 of the California Constitution, Code of Civil Procedure sections 1085 and 1086, and California Rule of Court 56, to decide a constitutional dispute where, as here, the case presents issues of great public importance that should be resolved promptly.

2. This petition is filed with the Court in the first instance because of the statewide importance of the issues presented and the need for immediate and final resolution.

3. Petitioners are entitled to a writ of mandate because they do not have "a plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc., § 1086.) If this Court does not act, the recall election will move forward in violation of the federal guarantees of equal protection of the laws and a republican form of government.

PARTIES

4. Petitioner GRAY DAVIS is the Governor of the State of California. He was first elected Governor at the November 5, 1998 General Election. He was re-elected Governor at the November 7, 2002 General Election and inaugurated on January 6, 2003. He is a resident and registered voter of the County of Los Angeles. He brings this action to vindicate his right and the right of the voters of California to a fair election consistent with the state and federal Constitutions.

5. Petitioner XAVIER BECERRA is a member of the United States House of Representatives, serving the 31st Congressional

District of California. He is a resident and registered voter of the County of Los Angeles and supports retaining Gray Davis as Governor. He brings this action to vindicate his own and other California voters' right to a fair election consistent with the state and federal constitutions.

6. Petitioner TOM LANTOS is a member of the United States House of Representatives, serving the 12th Congressional District of California. He is a resident and registered voter of the County of San Mateo and supports retaining Gray Davis as Governor. He brings this action to vindicate his own and other California voters' right to a fair election consistent with the state and federal Constitutions.

7. Petitioner BEN WONG is a member of the West Covina City Council. He is a resident and registered voter of the County of Los Angeles and supports retaining Gray Davis as Governor. He brings this action to vindicate his own and other California voters' right to a fair election consistent with the state and federal Constitutions.

8. Petitioner DANNY J. BAKEWELL, SR. is a resident and registered voter of the State of California, and supports retaining Gray Davis as Governor. He brings this action to vindicate his own and other California voters' right to a fair election consistent with the state and federal constitutions.

9. Petitioner JORGE CORRALEJO is a resident and registered voter of the County of Los Angeles, and supports retaining Gray Davis as Governor. He brings this action to vindicate his own and other California voters' right to a fair election consistent with the state and federal Constitutions.

10. Respondent KEVIN SHELLEY is the Secretary of State of the State of California and its Chief Election Officer. He is sued in

his official capacity. Under Government Code section 12172.5, the Secretary of State is responsible for "assuring the uniform application and administration of state election laws." Unless this Court issues a stay or writ of mandate, respondent SHELLEY will conduct a statewide recall election on October 7, 2003, including but not limited to preparing ballots and ballot materials, instructing local elections officials, distributing information to voters, counting votes and declaring the outcome of the election in violation of the First and Fourteenth Amendments to the United States Constitution.

11. Respondent CONNY B. McCORMACK is Registrar of Voters for the County of Los Angeles and is sued in her official capacity. Unless this Court issues a stay or writ of mandate, respondent McCORMACK will conduct a recall election on October 7, 2003, in the County of Los Angeles, to determine whether to recall Governor Davis and to elect a successor, in violation of the First and Fourteenth Amendments to the United States Constitution.

FACTUAL ALLEGATIONS

A. The Recall of Governor Davis

12. California voters elected petitioner Gray Davis to serve as Governor of the State of California at the regularly scheduled General Election conducted on November 5, 2002. (Statement of the Vote, Request for Judicial Notice ("RJN"), Exh. E.) Governor Davis received 47.3 percent of vote. (*Id*., RJN, Exh. E.) Governor Davis took the oath of office on January 6, 2003.

13. Less than a month later, on February 5, 2003, recall proponents served a Notice of Intention to Circulate Recall Petition on Governor Davis. (RJN, Exh. F.)

14. On March 25, 2003, the Secretary of State notified the proponents of the recall that they could begin to circulate the petition to recall Governor Davis. (Secretary of State, *FAQ About Recalls*, RJN, Exh. N.) Under article II, section 14(a), the proponents of the recall had 160 days from March 25, 2003, or until September 2, 2003, to collect and submit 897,158 valid signatures. (*Id., See also* Recall Petition, RJN, Exh. G.)

15. On June 24, 2003, the Secretary of State determined that county elections officials had reported receiving 10 percent of the signatures required to qualify the recall for the ballot. Pursuant to Elections Code section 11104, the Secretary of State instructed county election officials to begin verifying recall petition signatures and to report the results every 30 days.

16. Proponents of the recall filed a petition for writ of mandate in the Third District Court of Appeal on July 10, 2003. (*Recall Gray Davis Committee v. Shelley*, Case No. C044487.) Petitioners argued that the Secretary of State had erred in interpreting Elections Code section 11104 to permit county elections officials to wait until the end of a 30-day reporting period before beginning to verify signatures received during that period. On July 18, 2003, the Court of Appeal issued an alternative writ instructing the Secretary of State and county elections officials to verify all signatures received as of July 16 and to report the results by July 23. (RJN, Exh. U.)

17. On July 15, 2003, a group of voters opposed to the recall filed a complaint for declaratory and injunctive relief in the Los Angeles Superior Court charging that recall proponents had submitted petition sections circulated by out of state signature gatherers who lied

under penalty of perjury about their qualifications to circulate the petitions and about the conditions under which they obtained signatures. (*Robins, et al. v. Shelley, et al.*, Los Angeles Sup. Ct. No. BC 299066.) The complaint challenges the Secretary of State's instruction to registrars that the signatures on such petitions should be counted whether or not the circulator is a registered voter or resident of this State, as required by law.

18. On or about July 18, 2003, the *Robins* plaintiffs filed an Ex Parte Petition for a Temporary Restraining Order ("TRO"), asking the trial court to hear their motion for a preliminary injunction on or before July 23, or issue an order enjoining the Secretary of State from certifying the recall for the ballot pending the court's ruling on petitioners' motion for a preliminary injunction. The Superior Court denied the application, and both the Court of Appeal and this Court denied the *Robins* plaintiffs' request for extraordinary relief. As a result, county elections officials verified signatures on the recall petition without checking the registration or residence of the persons who signed the Declaration of Circulator required by Elections Code sections 11045 and 11046.

19. On July 23, 2003, the Secretary of State certified the recall for the ballot after having determined that the proponents had submitted more than 110 percent of the total number of signatures required for qualification. (RJN, Exh. H.)

20. On July 24, 2003, the Lieutenant Governor set the recall election for October 7, 2003, 75 days after the Secretary of State's certification of the measure. (RJN, Exh. I.) If the Secretary of State had certified the recall for the ballot on or after September 4, 2003, the Lieutenant Governor could have consolidated the recall with the March 2004 primary election. (Cal. Const., art II, § 15(b).)

21. The Special Election Proclamation provides that the recall ballot will include two parts.* (RJN, Exh. I.) The first part poses the following question: "Shall (name of officer sought to be recalled) be recalled (removed) from the office of (title of office)?" (Elec. Code, § 11320.) The second part consists of a list of replacement candidates. (*Id*., § 11322.)

22. Under article II, section 15(c) of the California Constitution, the target of a recall is prohibited from being a candidate.

23. The Governor intends to file timely nomination papers and a declaration of intention to be a candidate for Governor on or before August 9, 2003.

24. On July 30, 2003, the United States District Court for the Southern District of California held that Elections Code section 11382, which prohibits a voter who has not voted on the first question from voting for a successor candidate, violated the First and Fourteenth Amendments of the United States Constitution. (*Partnoy v. Shelley*, Case No. 03CV1460 BTM (JFS), RJN, Exh. S.) Respondent SHELLEY does not intend to appeal the court's decision.

B. <u>Preparations for the Recall</u>

25. Elections officials ordinarily begin preparations for a statewide election approximately 158 days before the election. (Elec.

---

* Two petitions now pending before the Court ask the Court to prevent the Secretary of State from conducting a successor election on the ground that the Constitution designates the Lieutenant Governor as the successor in the event the Governor is recalled. (*Frankel v. Shelley*, Case No. S117770, and *Byrnes v. Shelley*, Case No. S117832.)

Code, §§ 12000, 8061, 8106.) They have only 75 days, however, to prepare for the October 7, 2003 recall election.

26. This means that county elections officials will have to find 25,000 polling places and hire and train 100,000 workers before the election in half the time they would normally have had.

27. Due to the lack of lead-time, some counties plan to reduce the number of precincts they open and the number of poll workers they hire. In Los Angeles County, for example, respondent McCORMACK plans to open only 1,800 polling places and hire and train only 10,000 poll workers for the October 7, 2003 election. For the 2002 gubernatorial election, respondent McCORMACK opened 4,922 polling places and hired and trained approximately 20,000 poll workers.

28. Other counties plan to open the same or nearly the same number of precincts as they opened for the 2002 gubernatorial election.

29. In *Common Cause, et al. v. Jones* (C.D. Cal. 2002) 213 F.Supp.2d 1106, voters and civic groups sued the Secretary of State alleging that "because punch card voting systems are less reliable than the other voting systems permitted by the secretary of state, those individuals living in counties where the punch-card system is used are substantially less likely to have their votes counted." (213 F. Supp.2d at 1107.) They also alleged that because those same counties "have high racial minority populations in comparison with counties using other voting systems," the use of the punch-card system violates the federal Voting Rights Act and 42 U.S.C. § 1983. (*Id*. at 1108)

30. In response to the lawsuit, the Secretary of State decertified the voting machines used in nine counties (Los Angeles,

San Diego, San Bernardino, Sacramento, Alameda, Mendocino, Santa Clara, Shasta and Solano). These nine counties include 8.4 million voters. (*Common Cause, et al. v. Jones* (C.D. Cal. 2002) 2002 WL 1766436, *2, ¶ 11, RJN, Exh. T.)

31. On May 9, 2002, the District Court entered judgment on a consent decree and ordered the counties to convert to other systems by March 1, 2004. (*Common Cause, et al. v. Jones* (C.D. Cal. 2002) 2002 WL 1766410, RJN, Exh. T.)

32. Because the new system is not yet in place, however, Los Angeles County plans to use its "decertified" Votomatic machines for the recall election, if more than 18 replacement candidates qualify for the ballot. If not, Los Angeles will use a plain card ballot, which will include the candidates' names alongside a punch-out hole. San Diego, Sacramento, Santa Clara, Solano and Mendocino Counties also plan to revert to punchcard voting systems because their conversion to new voting systems will not be complete until March 2004.

33. Other counties, such as Alameda and Shasta, have already completed their conversion to touch-screen voting systems, which are significantly more reliable than punchcard voting systems.

34. As of August 1, 2003, 296 individuals have taken out papers to run for Governor on the recall election ballot. (Secretary of State, Statewide Special Election – Candidate Status Report, RJN, Exh. K.) Because qualification requires only 65 signatures and $3,500, the ballot is likely to be one of the longest in California history. Depending upon the final number of candidates, some counties will be unable to use their current voting systems.

35. Counties are also struggling to meet printing deadlines for sample ballots and actual ballots and to process military and absentee voter ballot applications. Ordinarily, the printing process begins 68 days prior to the election and continues around the clock until it is completed. The identity of the replacement candidates will not be final, however, until 55 days prior to the election. Furthermore, the ballot titles for Propositions 53 and 54, which will also appear on the October 7, 2003, ballot will not be final until August 31, 2003. As a result, counties cannot finalize sample ballots until 36 days before the election.

36. Counties must print 15 million ballots, including 4 million absentee ballots, and print and mail 15 million sample ballots at least 29 days prior to the election. This process is complicated by the fact that some counties, such as Los Angeles and San Francisco, must print sample ballots in six languages in addition to English. Multilingual ballots are mailed approximately ten days after English language ballots are mailed.

37. Counties must also contend with other responsibilities. Forty-three counties are scheduled to conduct elections in November. San Franciscans will elect a mayor, a district attorney, and a sheriff in November and decide the fate of several ballot measures. Voters in Stanislaus County will fill 155 seats open on various county boards and commissions on November 4, 2003. More than one and a half million Los Angeles County voters will also go to the polls on November 4, 2003. In order to comply with the Elections Code, the counties must mail millions of sample ballots for the November election between September 25 and October 14, the same period of time during which county elections officials will have to cope with the recall election. Furthermore, county elections

officials will have to tally and canvass the results of the recall election at the same time that they are preparing for the November election. Finally, if the recall election is so close that it requires a recount, it will overwhelm elections officials and jeopardize the integrity of the November elections.

FIRST CAUSE OF ACTION
[Voting and Vote Count Procedure Denial of Equal Protection and First Amendment Rights due to October Election]

38. Petitioners reallege and incorporate by reference as if fully set forth herein the allegations contained in paragraphs 1 through 37 above.

39. Petitioners and others will be deprived of the equal protection of the law and the fundamental right to vote, in violation of the Fourteenth Amendment, if the recall election is conducted on October 7, 2003.

40. Voters who reside in counties in which punchcard voting systems are used, including voters who reside in Los Angeles County, are substantially less likely than citizens in other counties to have their votes counted than residents of other counties that use more reliable voting systems. African Americans, Asian Americans, and Latinos will be disproportionately denied the right to have their votes counted because they are more likely to reside in counties, like Los Angeles, that plan to use punchcard voting systems for the recall election, and these groups are disproportionately affected by the use of punchcard voting systems.

41. Voters who reside in counties, including Los Angeles County, that plan to reduce the number of precincts and poll workers, are also substantially less likely to have their votes counted than residents of other counties. Voters who have to travel to new polling places are more

likely to encounter crowds, confusion, and delay, and are less likely to vote than voters who can vote at their normal polling places. African Americans, Asian Americans, and Latinos will be disproportionately denied the right to have their votes counted because they are more likely to reside in counties, like Los Angeles, that plan to reduce the number of precincts and poll workers.

42. Petitioners have a right under the First and Fourteenth Amendments to the United States Constitution to have their votes counted on the same terms as voters in counties that use more reliable voting systems and that are better prepared to accommodate voters on election day. There is no rational, substantial or compelling justification for this differential treatment, and petitioners are denied their right to equal protection of the law.

SECOND CAUSE OF ACTION
[Equal Protection and Due Process]

43. Petitioners reallege and incorporate by reference as if fully set forth herein the allegations contained in paragraphs 1 through 42 above.

44. For purposes of equal protection analysis, Gray Davis is in all salient respects similarly situated to other individuals who will appear on the recall ballot as nominees for the office of Governor of the State of California. Yet, recall election procedures set forth in article II, section 15 of the California Constitution and Elections Code sections 11381, 11382, 11383, 11384 and 11385, require 50 percent of the vote for petitioner Davis to remain Governor, but only a plurality vote for any other nominated individual to become Governor. Further, petitioner Davis is barred from being considered with others who seek to be elected to

the office of Governor if more than 50 percent of the voters vote "yes" on the recall question.

45. These procedures impose a direct, severe and disproportionate burden on the fundamental rights to vote and to associate for political purposes of those individuals who support Governor Davis. Petitioners have a right under the First and Fourteenth Amendments to the United States Constitution to have their votes counted on the same terms and with the same weight as the votes of individuals who support other candidates for Governor. Because there is no rational, substantial or compelling justification for the differential treatment imposed by these election procedures, petitioners are denied their right to equal protection of the law.

46. Petitioner Gray Davis wishes to be Governor of the State of California and to be considered for the position of Governor on the same basis and under the same terms as others who seek that office. The recall election procedures described above impose a direct, severe and disproportionate burden on petitioner Davis's right and ability to be considered as a candidate for Governor. Because there is no rational, substantial or compelling justification for the differential treatment imposed by these election procedures, petitioner Davis is denied his right to equal protection of the law.

47. The recall is not based upon any wrongdoing or malfeasance by petitioner Davis.

48. The recall election procedures set forth in article II, section 15 of the California Constitution and Elections Code sections 11381, 11382, 11383, 11384 and 11385, by requiring 50 percent of the vote for petitioner Davis to remain Governor but only a plurality vote

for any other nominated individual to become Governor and by barring petitioner Davis from being considered with others who seek to succeed to the vacancy created by a "yes" vote on the recall question, violate the First and Fourteenth Amendments to the United States Constitution.

THIRD CAUSE OF ACTION
[Denial of Republican Form of Government
United States Constitution, art. IV, section 4]

49. Petitioners reallege and incorporate by reference as if fully set forth herein the allegations contained in paragraphs 1 though 48 above.

50. Even under normal circumstances, California's recall procedures undermine petitioners' right to a republican form of government by permitting: (a) a tiny minority of registered voters to disrupt the results of valid election by demanding a recall election and (b) a small minority to determine, by plurality vote, the selection of the state's Governor. Thus, the recall permits majority rule to be overwhelmed by fringe and marginal minorities.

51. The threat to a republican form of government is exacerbated by recent federal court action invalidating an important aspect of California's recall procedures. On July 29, 2003, the Federal District Court for the Southern District of California entered a final judgment enjoining the Secretary of State from enforcing Elections Code section 11382, which provides that a voter must vote for or against the recall of the target officer in order to have his or her vote for a successor counted. The court held that section 11382 violated the First and Fourteenth Amendment rights of California voters. Respondent SHELLEY has decided not to appeal the court's judgment.

52. The prohibition in section 11382 ensures that a majority of those participating in the recall election favor the recall of the target officer.

53. The invalidity of section 11382 undermines the state's interest in fostering an effectively functioning government and guarding against disruption in state government.

54. Unless voter participation is increased by consolidating the recall with the March 2004 statewide election and allowing the Governor to appear as a candidate on the ballot, the legitimacy of the recall election will be so undermined that petitioners will be denied their right to a republican form of government.

WHEREFORE, petitioners pray for relief as follows:

1. That this Court issue its alternative writ of mandate or prohibition:

(a) prohibiting respondent SHELLEY from conducting the recall election on October 7, 2003, and

(b) ordering respondents SHELLEY and McCORMACK to consolidate the recall election with the statewide election scheduled for March 2, 2004, and

(c) ordering respondents SHELLEY and McCORMACK to place petitioner Davis's name on the ballot as a candidate for succession and, if petitioner receives a plurality of the vote, to certify him as the winner of the election; OR

(d) ordering respondents SHELLEY and McCORMACK to show cause why a peremptory writ should not issue as set forth above;

2. IN THE ALTERNATIVE, if the Court does not issue the relief requested in paragraph 1 above, that this Court issue its alternative writ of mandate or prohibition:

(a) prohibiting respondents SHELLEY and McCORMACK from conducting a recall election; OR

(b) ordering respondents SHELLEY and McCORMACK to show cause why a peremptory writ should not issue prohibiting them from conducting a recall election;

3. That this Court set this matter for hearing on an expedited basis so that it can be resolved on a timely basis;

4. That upon hearing and return, this Court issue its peremptory writ prohibiting respondents Shelley from conducting the recall election on October 7, 2003 and ordering respondents Shelley and McCormack to (1) consolidate the recall election with the statewide election scheduled for March 2, 2004, and (2) place petitioner Davis's name on the ballot as a candidate for succession and, if petitioner receives a plurality of the vote, to certify him as the winner of the election, or, in the alternative, that the Court issue its peremptory writ prohibiting respondents SHELLEY and McCORMACK from conducting a recall election.

5. That this Court order such other and further relief as is just.

Dated: August 3, 2003

Respectfully submitted,

REMCHO, JOHANSEN & PURCELL

By: _____
Robin B. Johansen
Attorneys for Petitioners

VERIFICATION

I, ROBIN B. JOHANSEN, hereby declare as follows:

I am one of the attorneys for Petitioners herein and I make this verification because the petitioners are absent from the county in which I have my office.

I have read the foregoing Petition for Writ of Mandate and/or Prohibition and know the contents thereof. I certify that the same is true of my own personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 3, 2003, at San Leandro, California.

_____

Robin B. Johansen

No. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

GOVERNOR GRAY DAVIS, CONGRESSMAN XAVIER BECERRA, CONGRESSMAN TOM LANTOS, COUNCILMAN BEN WONG, DANNY J. BAKEWELL, SR., and JORGE CORRALEJO,

Petitioners,

vs.

KEVIN SHELLEY, in his official capacity as Secretary of State of the State of California and CONNY McCORMACK, in her official capacity as Registrar-Recorder-County Clerk of the County of Los Angeles,

Respondents.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION

EMERGENCY STAY REQUESTED
CRITICAL DATE: AUGUST 31, 2003

Robin B. Johansen, Bar No. 79084
Kathleen J. Purcell, Bar No. 84992
James C. Harrison, Bar No. 161958
Thomas A. Willis, Bar No. 160989
Karen Getman, Bar No. 136285
Remcho, Johansen & Purcell
201 Dolores Avenue
San Leandro, CA 94577
Phone: (510) 346-6200
FAX: (510) 346-6201

Michael Kahn, Bar No. 057432
Folger, Levin & Kahn
275 Battery Street, 23rd Floor
San Francisco, CA 94111
Phone: (415) 986-2800

Kathleen Sullivan
559 Nathan Abbott Way
Stanford, CA 94305-8610
Phone: (650) 725-9875
(pro hac vice application pending)

Attorneys for All Petitioners

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS: (continued) **Page(s)**

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES: (continued) **Page(s)**

TABLE OF AUTHORITIES: (continued) **Page(s)**

TABLE OF AUTHORITIES: (continued) **Page(s)**

CONSTITUTIONS:

United States:

Alaska:

Arizona:

TABLE OF AUTHORITIES: (continued) **Page(s)**

TABLE OF AUTHORITIES: (continued) **Page(s)**

STATUTES:

TABLE OF AUTHORITIES: (continued) **Page(s)**

TABLE OF AUTHORITIES: (continued) **Page(s)**

MISCELLANEOUS:

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

On October 7, 2003, Californians will be asked to vote – again – on who should be their Governor. They voted on the same issue only months ago, on November 5, 2002 at a regularly scheduled statewide election. The legitimacy of the outcome of that first election is undisputed; no one has seriously questioned that Gray Davis won the election fair and square.

The legitimacy of the October 7th election, however, will be very much in dispute. Registrars in many counties lack the time and resources to prepare and conduct a fair election. Some will be forced to use the same punchcard systems that produced the furor over hanging chads in the Florida presidential election and that will soon be illegal in California. Other counties will drastically reduce the number of polling places and pollworkers either because they simply cannot get them in place before October 7th or cannot afford them, or both. The result is a disparity of voting opportunity that makes Florida's election procedures look almost pristine by comparison.

The logistical problems are compounded by equal protection violations in the recall procedures themselves. Under California law, supporters of Gray Davis need a majority for their preference to be realized. Supporters of Bill Simon, Darrell Issa, Larry Flynt, or any other contestant for the office need only a plurality. Indeed, under the procedures currently in place, *any* plurality of the vote may be enough to elect one of these candidates Governor.

These procedures create a system in which the votes favoring Gray Davis as Governor are given less weight than other votes for exactly

the same office. That this is accomplished through a two-step process of recall and succession does not alter its substance. "[T]he Constitution forbids 'sophisticated as well as simpleminded modes of discrimination.'"[1] The fact remains that supporters of Gray Davis must reach a higher bar if their candidate is to be Governor. This differential requirement burdens the voting and associational rights of Davis supporters and the related rights of Governor Davis himself.

There are other problems with California's recall procedures. The procedures for qualifying and conducting a statewide recall are so lax that one wealthy individual can throw the state and county election systems into disarray, wreak havoc with the stability of the state's chief executive, and force expenditures of vast sums so that he can have another shot at a gubernatorial election. If this recall succeeds, it will almost certainly spawn others, including that of whoever becomes Governor as the result of the recall election. Such political instability is the antithesis of a republican form of government and violates the Guarantee Clause of the federal Constitution.

As almost every Californian knows by now, this is the first statewide recall election ever held in California. Thus, although our recall procedures have been in the state Constitution for more than 90 years, they have never been employed at the state level, much less interpreted. It comes as no surprise that untried procedures enacted so long ago may run afoul of modern constitutional guarantees. When that has happened in the past, this Court has not hesitated to intervene. Whether the issue is

---

[1] *Reynolds v. Sims* (1964) 377 U.S. 533, 563, citation omitted.

redistricting,[2] the form of the ballot itself,[3] or postponing election deadlines,[4] this Court has acted swiftly and definitively to protect the fundamental right to vote.

In this case, petitioners ask the Court at a minimum to consolidate the recall election with the next already regularly scheduled statewide election, namely the March 2, 2004 primary election. Petitioners also ask the Court to allow the Governor to appear on the ballot with the other candidates who will seek to replace him if the recall succeeds, as he would be able to do in most of the other states that employ similar recall procedures. These are the minimal requirements necessary for this election to comply with federal constitutional requirements. Without them, the election can have no legitimacy, and the federal guarantees of equal protection and of a republican form of government will have been violated.

It is rare that a Court is asked to step in to prevent what are sure to be error-prone procedures in an upcoming election. It is rarer still that the Court knows in advance that such errors are virtually certain to occur in an election of this importance. Had the Florida Supreme Court known beforehand what was likely to occur in the November 2000 presidential election, it could and likely would have prevented many of the errors that required intervention by the United States Supreme Court. Surely the Florida court could have spared the nation great pain had it had the opportunity to issue a ruling in advance of the election ordering the

---

[2] *Assembly v. Deukmejian* (1982) 30 Cal.3d 638.

[3] *Gould v. Grubb* (1975) 14 Cal.3d 661.

[4] *Wilson v. Eu* (1991) 54 Cal.3d 546.

State of Florida to impose consistent statewide ballot counting rules and to redesign the "butterfly ballot."

This Court has just such an opportunity. The political pressure to speed-up this election has been enormous and dysfunctional. Yet "[t]he press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees." (*Bush v. Gore* (2000) 531 U.S. 98, 108.) The harm, if any, from delaying the election surely pales in comparison to the harm that all in California will suffer if this election is rushed and then decided after the fact by the courts rather than the electorate.

The alternative writ should issue.

STATEMENT OF FACTS

On November 5, 2002, California voters re-elected Governor Gray Davis, giving him 3,533,490 votes. (Statement of the Vote, RJN, Exh. E.) Governor Davis took the oath of office on January 6, 2003. One month later, on February 5, 2003, the Governor's political opponents served the Governor with a Notice of Intention to Circulate Recall Petition. (RJN, Exh. F.)

A. The Recall Drive

On March 25, 2003, the Secretary of State notified the proponents that they could begin to circulate the petition to recall Governor Davis. (Secretary of State, *Frequently Asked Questions About Recalls*, ("*FAQ About Recalls*") RJN, Exh. N.) Under article II, section 14(a) of the California Constitution, the proponents of the recall had 160 days from March 25, 2003, or until September 2, 2003, to collect and submit 897,158 valid signatures.

In litigation now pending in the Los Angeles Superior Court, several voters and taxpayers filed sworn declarations demonstrating that the signature-gatherers who circulated many of the recall petitions were bused in from out-of-state and therefore not legally entitled to circulate petitions in California. The plaintiffs in that action also submitted documentary evidence that many of the circulators lied when they declared under penalty of perjury that they had actually witnessed the signatures as they were placed on the petitions. (*Robins v. Shelley,* L.A. Superior Court No. BC299066.)

When the Superior Court declined to set a hearing on the *Robins* plaintiffs' motion for a preliminary injunction before August 8, 2003, the plaintiffs sought extraordinary relief from the Court of Appeal and from this Court. Both petitions were denied. (Order Denying Petition for Review [*Robins v. Shelley*, No. S117661].) As the *Robins* plaintiffs predicted, the recall petition qualified for the ballot before their motion could be heard.

B. <u>Certification of the Recall</u>

On June 24, 2003, the Secretary of State determined that county elections officials had reported receiving 10 percent of the signatures required to qualify the recall for the ballot. Pursuant to Elections Code section 11104(d), the Secretary of State instructed county election officials to begin verifying recall petition signatures. Despite the evidence of illegal signature-gathering presented by the *Robins* plaintiffs, the Secretary of State continued to advise registrars to count signatures whether or not the petitions had been circulated by unqualified signature-gatherers.

On July 23, 2003, the Secretary of State certified the recall for the ballot after having determined that the proponents had submitted more

than 110 percent of the total number of signatures required for qualification. (RJN, Exh. H.) One day later, on July 24, 2003, the Lieutenant Governor called the recall election for October 7, 2003, 75 days after the Secretary of State's certification of the measure. (RJN, Exh. I.)

The recall ballot includes two parts. The first part poses the following question: "Shall (name of officer sought to be recalled) be recalled (removed) from the office of (title of office)?" (Elec. Code, § 11320(a).) The second part consists of a list of replacement candidates. (*Id*., § 11322.)[5]

Replacement candidates must file their declarations of candidacy and their nomination papers no later than 59 days before the election, or by August 9, 2003. (Elec. Code, § 11381(a).) In order to be a candidate for statewide office, a person must collect 65 valid signatures and pay a filing fee equal to 2 percent of the first-year salary for office. (*Id.*, §§ 8062(a)(1), 8103(a)(1).) Currently, the filing fee for candidates for Governor is $3,500. A candidate may avoid this fee, however, by submitting 10,000 valid signatures. (*Id.*, § 8106.)

The Governor intends to file nomination papers and a declaration of intention to be a candidate in the recall election on or before August 9, 2003. At the election itself, the California Constitution provides that if a majority of the voters vote to recall the officer, the officer is removed, and "if there is a candidate, the candidate who receives a plurality is the successor." (Cal. Const., art. II, § 15(c).) The target of a recall is prohibited from being a candidate. (*Id.*, art. II, § 15(c).)

---

[5] An election to recall a judicial officer poses only the first question. (Cal. Const., art. II, § 15(c).)

C. Preparations for the Recall Election

Elections officials ordinarily begin preparations for a statewide election 158 days before the election. (Declaration of Rosa Garcia-Viteri ("Garcia-Viteri Decl."), ¶ 5; *see also* Elec. Code, §§ 12000, 8061, 8106.) They have only 75 days, however, to prepare for the recall election. Ordinarily, this would mean that county elections officials would have to find 25,000 polling places and hire 100,000 workers before the election in less than half the time they normally would have had.

As described in more detail below, Los Angeles and other counties will drastically reduce the number of polling places and poll workers for the October 7th election. (Garcia-Viteri Decl., ¶ 6.)
Six counties, including Los Angeles, will be forced to use punchcard voting systems that have been decertified for use in California after March 1, 2004 because of their proven inaccuracies. (Declaration of Henry E. Brady ("Brady Decl."), ¶¶ 11, 16.) These are the same type of systems that produced the hanging chads that figured so prominently in the Florida presidential election of November, 2000. (*See Bush v. Gore* (2000) 531 U.S. 98, 104; Brady Decl., ¶¶ 9-10; Garcia-Viteri Decl., ¶ 4.)

The compressed election calendar puts enormous pressure on the process for printing and mailing sample ballots. Some counties, such as Los Angeles and San Francisco, must print sample ballots in six or seven languages. (Garcia-Viteri Decl., ¶ 8.) Ordinarily, they have 85 days in which to print voting materials, a process that continues around the clock until it is complete. (*Id.*) For the October 7th election, they will have 37 days to print and mail 15 million sample ballots and print another 15 million ballots, including 4 million absentee ballots. (*Id.*, ¶ 8; *see also*

San Francisco Chronicle, "Early recall election sounds like doomsday to officials" (July 23, 2003).)

Finally, all this must be accomplished while the registrars in 43 counties are preparing for regularly scheduled local elections that will occur less than a month after the recall election, on November 4, 2003. (Garcia-Viteri Decl., ¶ 9.)

ARGUMENT

I.

ORIGINAL MANDAMUS IS APPROPRIATE

This State has never before faced the real possibility of an election to recall its elected Governor.[6] Now that it must, serious questions have arisen regarding the constitutionality of the recall provisions. If ever there were a time for this Court to exercise its original jurisdiction to order preelection review, this is it.

Mandamus in this Court is appropriate when the questions presented are of broad public interest and resolution cannot await ordinary appellate review. (*See, e.g., Legislature v. Eu* (1991) 54 Cal.3d 492, 500 [original writ issued; "issues of sufficient public importance"]; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340 [same; "issues are of great public importance and should be resolved promptly"]; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 731 [same; "importance of the issues and the need for their speedy resolution"]; *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816 [same; "compelling circumstances . . . widespread interest"];

---

[6] According to the Secretary of State, there have been 31 attempts to recall California Governors, but none before this ever qualified for the ballot. (Secretary of State, *FAQ About Recalls*, RJN, Exh. N.)

Britt v. Superior Court (1978) 20 Cal.3d 844, 851 [same; "significant and novel constitutional issues of general importance"].) The recall of a sitting Governor under unconstitutional procedures unquestionably presents issues of great public importance.

This Court has recognized the need for preelection review when the challenge is based on a claim that a proposed measure may not properly be submitted to the voters. Most recently, in *Senate v. Jones* (1999) 21 Cal.4th 1142, 1154, the Court acknowledged that deferring a decision on an unconstitutional initiative until after an election "may contribute to an increasing cynicism on the part of the electorate . . ."

> As this court explained in a previous decision providing preelection review of an initiative measure: "The presence of an invalid measure on the ballot steals attention, time, and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure." (*American Federation of Labor v. Eu* [(1984)] 36 Cal.3d 687, 697.) In our view, this state's experience with successful postelection challenges to initiative measures in the 15 years that have elapsed since the *American Federation of Labor* decision amply confirms the accuracy of these observations. (Accord, *Joytime Distributors and Amusement Co. v. State of South Carolina* [(1999) 338 S.C. 634, 652, 528 S.E.2d 647, 656] ["'[If an initiative measure] is facially defective in its entirety, it is "wholly unjustified to allow voters to give their time, thought, and deliberation to the question of the desirability of the legislation as to which they are to cast their ballots, and thereafter, if their vote be in the affirmative,

> confront them with a judicial decree that their action was in vain. . . .”’ [Citations.]”].)
>
> (*Id*. at 1154-1155, fn. omitted.)

The justifications for preelection review are even more compelling in the context of this gubernatorial recall election. Where, as here, the illegality goes to the very procedures used to set and decide the election, there is no reason to wait. If the election itself is patently unconstitutional, as this is, and if it seriously affects the functioning of the Executive Branch and indeed of the entire state government, as this does, surely the better course is to make that decision now.

In order to give adequate consideration to these issues, however, the Court must have time to deliberate. This Court has not hesitated to assert its jurisdiction, adjust election deadlines, and even change nomination requirements, when necessary to consider issues of statewide importance. (*Wilson v. Eu* (1991) 54 Cal.3d 471 and 54 Cal.3d 546, 549-550.) In *Wilson*, the Court moved from December 27 to February 10 the date to begin circulating in lieu petitions, in order to accommodate anticipated district boundary changes resulting from a redistricting plan to be drawn up by Special Masters and ultimately approved by the Court. (54 Cal.3d at 549-550.) The Court also allowed a reduction in the number of required signatures proportional to the reduction in the number of days allowed for circulating the petitions. (*Id.* at 550). Most tellingly, while the Court noted its “hope and expectation” that it would approve the Special Masters’ plan by the January 28 deadline given by the Secretary of State to prepare for the June primary election, the Court refused to commit to that deadline if doing so would interfere with the Court’s “reserved power to make appropriate changes in the plans

ultimately submitted by the Masters." (*Id.*; *see also Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 678-679 [adjusting election filing deadlines to accommodate Court's decision on redistricting plan].)

As discussed more fully below, the Court should take similar action here, to protect the fundamental interests at stake and to ensure that it has adequate time to deliberate.

II.

THE COURT SHOULD POSTPONE THE ELECTION

A. An October Election Will Violate the Equal Protection Rights of Millions of California Voters

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.
>
> (*Bush v. Gore* (2000) 531 U.S. 98, 104-105.)

With those words, the Supreme Court of the United States held that the recount procedures adopted by the Florida Supreme Court in the last presidential election were not "consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate." (*Bush v. Gore*, 531 U.S. at 105.) Noting that "[t]he problem inheres in the absence of specific standards to ensure . . . equal application" of Florida's rule that a vote will be counted if it is possible to determine the intent of the voter, the Supreme Court held that "[t]he formulation of uniform rules to determine intent . . . is practicable and, we conclude, necessary." (*Id.* at 106.)

The upcoming recall election poses a similar problem for this Court. First, six counties intend to use punchcard voting systems. (Brady Decl., ¶ 16.) Although the Secretary of State has decertified the systems because they "fail[ ] to meet the standards set forth in California election law," Los Angeles, Santa Clara, Sacramento, San Diego, Solano and Mendocino plan to bring their punchcard systems out of retirement because they will not complete their conversion to new systems until March 2004, as required by a federal consent decree. (*Common Cause v. Jones* (C.D. Cal. 2002) 2002 WL 1766436, RJN, Exh. T.) This will result in the disenfranchisement of a disproportionate number of minority voters. (*See* Brady Decl., ¶¶ 8(b), 11-20.)

Second, several counties plan to reduce the number of precincts they open for the recall election by as much as two-thirds, because they do not have sufficient time to reserve polling places. (Brady Decl., ¶¶ 21-29; Garcia-Viteri Decl., ¶ 6.) Thus, voters in counties such as Los Angeles will have to find their new polling places, travel a greater distance to get there, and wait longer in line to vote. The net effect is that poor, elderly, disabled, and minority voters who must rely on public transportation to get to the polls will be disproportionately affected by precinct consolidation. (Declaration of Darry Sragow ("Sragow Decl."), ¶¶ 6-9; Brady Decl., ¶ 34; *see also* Declaration of Andrew Jon Westall ("Westall Decl."), ¶¶ 6-8.)

The recall election also poses another problem: sheer feasibility. Many large counties simply cannot ramp up in time to run a minimally adequate election. (*See* Garcia-Viteri Decl., ¶¶ 5-11.) Seventy-five days is not enough time in which to reserve 25,000 polling places, hire and train 100,000 poll workers, print and mail 15 million sample ballots,

process absentee ballots and special absentee ballots, and educate the voters about a ballot that is likely to confound many of them, all while preparing for November elections in 43 counties. This problem is particularly acute in the counties that are home to the largest number of minority and non-English-speaking voters.

The Supreme Court cautioned in *Bush v Gore* that its "consideration [was] limited to the present circumstances" of the Florida recount, and that it was not seeking to constitutionalize all of state election law, for "the problem of equal protection in election processes generally presents many complexities." (531 U.S. at 109.) But the scheduled October 7 recall election is the rare case to which the equal protection holding of *Bush v. Gore* precisely applies. Here, as in *Bush v. Gore*, there is a special election procedure that departs from the ordinary orderly course of regular elections. Here, as in *Bush v. Gore*, there is deliberate use of voting technologies known in advance to be likely to cause unacceptably high risk of inequality in ascertaining voters' intentions. And here, as in *Bush v. Gore*, there is a severely compressed time schedule that exacerbates the likelihood of inconsistency and error in counting the vote. Unlike in *Bush v. Gore*, however, this Court has ample opportunity to stop the train wreck before it occurs, simply by postponing the recall vote in order to allow county officials adequate time to reduce the risk of arbitrary and discriminatory disparities among voters in the administration of the election.

1. Los Angeles and five other counties will use punchcard voting systems that have been decertified by the state

As a result of the difficulties in Florida, punchcard voting systems have come under substantial scrutiny across the United States.

(Brady Decl., ¶ 10.) Notwithstanding abundant evidence demonstrating that punchcard systems lead to higher rates of invalid ballots, including a disproportionately high rate of invalid ballots among minorities (Brady Decl., ¶ 11), when they head to the polls on October 7, 2003 voters in six California counties, including Los Angeles County, will find the same punchcard systems that caused so much trouble in Florida. (*Id*., ¶ 16.) If the election were postponed until March 2, 2004, by contrast, voters in these counties would find new, more accurate systems that are easier to use. (Brady Decl., ¶ 16; Garcia-Viteri Decl., ¶ 4.)

All six counties are subject to a consent decree requiring the counties to replace their punchcard voting systems on or before March 1, 2004.[7] In *Common Cause v. Jones* (C.D. Cal. 2001) 213 F.Supp.2d 1106 ("*Common Cause I*")*,* voters and civic groups sued the Secretary of State alleging that "because punch card voting systems are less reliable than the other voting systems permitted by the secretary of state, those individuals living in counties where the punch-card system is used are substantially less likely to have their votes counted." (*Id*. at 1107.) They also alleged that because those same counties "have high racial minority populations in comparison with counties using other voting systems," the use of the

---

[7] The six counties are Los Angeles, San Diego, Sacramento, Mendocino, Santa Clara and Solano. (*Common Cause v. Jones* (C.D. Cal. 2002) 2002 WL 1766436, *2 ("*Common Cause II*"), ¶ 11, RJN, Exh. T; Brady Decl, ¶ 16.) The consent decree also covers Alameda, San Bernardino, and Shasta counties. (*Id*.) Alameda converted to a touch screen voting system in time for the November 5, 2002 gubernatorial election. (Brady Decl., ¶ 16.) Shasta County intends to use a touch screen system on October 7, 2003, and San Bernardino officials are 98 percent certain that the county will use an optical scan ballot for the recall election, if they can find a commercial printer to print the optical scan ballot. (Brady Decl., ¶ 16.)

punchcard system violated the federal Voting Rights Act and 42 U.S.C. § 1983. (*Id*. at 1108.)

The Secretary of State was hard put to deny these allegations, given that he had essentially found them to be true. As the federal District Court found:

> 8. On September 18, 2001, Defendant [Jones] decertified Votomatic and Pollstar pre-scored punch card voting systems for use in California pursuant to Cal. Govt. Code § 12172.5 and Cal. Elections Code § 19222. Decertification was made effective January 1, 2006. The Secretary's decertification of these voting systems reflects his conclusion that they "fail[] to meet the standards set forth in California election law." California Voting Systems Certification Procedures § 1201 (stating the standard for decertification), Exh. 537. On December 17, 2001, the Secretary announced that decertification would be advanced to July 1, 2005.
>
> (*Common Cause II*, 2002 WL 1766436, *1 (C.D. Cal.), RJN, Exh. T.)[8]

Rather than contest the issue, the Secretary of State entered into a consent decree that calls for the elimination of the punchcard voting

---

[8] Then Secretary of State Bill Jones was not the only one to conclude that punch card voting systems are unreliable and unfair. In 2002, the voters approved Proposition 41, a bond measure to provide $200 million to "replace outdated punch card (chad) systems." (March 5, 2002 Ballot Pamp., RJN, Exh. D.) The members of Congress agreed. In 2002, Congress passed and the President signed the Help America Vote Act (Pub. L. No. 107-252 [October 29, 2002] 116 Stat. 1666), a key component of which provides funding for states to replace punchcard and other outdated voting systems with systems that reduce the error rates in vote counting to acceptable levels.

system in the nine counties, leaving it to the District Court to determine the earliest feasible date for that to occur. On February 19, 2002, the District Court found that the counties could convert to other systems by March 1, 2004. (*Common Cause II*, 2002 WL 1766436, *3, RJN, Exh. T.)

Three of the counties have already converted, or are in the process of converting, and plan to use their new voting systems in time for a special election on October 7, 2003. (Brady Decl., ¶ 16.) Others, including Los Angeles, have not, although they will have completed their conversion to new systems by March 2, 2004. (*Id.*; Garcia-Viteri Decl., ¶ 4.)

As described in detail in the declaration of Professor Henry E. Brady, punchcard voting systems increase the number of invalid ballots, as compared to other systems. (Brady Decl., ¶¶ 8(a), 9-20.) Data obtained following Fresno County's conversion from a punchcard system to an optical scan system demonstrate that the average difference between the systems was 2.65 percent, meaning that the punchcard system simply failed to record 2.65 percent of the votes. (*Id.*, ¶ 13.)

There is also strong evidence that the use of punchcard systems discriminates against minorities. (Brady Decl., ¶¶ 8(b), 11-20.) The data from Fresno show that the number of invalid or unrecorded ballots increases dramatically with the percent of minority voters, from less than 3 percent in census tracts with virtually no minorities to 6 percent in tracts with nearly 100 percent minorities. (*Id.*, ¶ 14.) The same results have also been found in other California counties that have converted from punchcard systems to more reliable systems, and in other states. (*Id.*, ¶ 15.)

Thus, the use of punchcard systems on October 7, 2003, will mean that there will be a higher rate of invalid or unrecorded ballots in

these six counties, as compared to other counties, and that this rate will be highest in minority communities. (Brady Decl., ¶ 17.) As in Florida, the disenfranchisement of voters resulting from the use of punchcard systems is particularly problematic in a close election, where as here, the difference between whether a candidate is retained or recalled could be determined by one-tenth of a percentage point. (*Id*., ¶ 35.)

2. Los Angeles County plans to reduce the number of precincts by 64 percent

Los Angeles County is the nation's largest single electoral jurisdiction, with more ballots cast in the 2000 general election than were cast in all but nine states. (Garcia-Viteri Decl., ¶ 3.) On November 5, 2002, the last gubernatorial election, Los Angeles County opened 4,922 precincts, staffed by approximately 20,000 poll workers, to accommodate the county's four million registered voters. (Garcia-Viteri Decl., ¶ 6.) Because of the difficulty of reserving an adequate number of precincts in just 75 days, however, county elections officials plan to open approximately 1,800 precincts, staffed by half as many poll workers. (*Id.*) Ordinarily, elections officials rely heavily on schools to provide space for polling stations, but most schools are closed for the summer and administrators are on vacation. (*Id.*) This makes reserving an adequate number of precincts extremely challenging, if not impossible. (*Id.*)

Under Elections Code section 12241, elections officials may consolidate as many as six precincts into one for special elections.[9] Although the recall election is a special election, it is unlike any other election ever conducted in this state. (Sragow Decl., ¶ 7.) In past special elections, elections officials have consolidated precincts in response to predictably low voter turnout. (*Id*., ¶ 11.) Due to widespread media coverage and public interest, however, the turnout for the recall election is likely to be significantly higher than in past special elections (though not as high as the turnout in a regularly scheduled election). (*Id*., ¶ 7.) Consequently, the need for a sufficient number of precincts to accommodate those who wish to vote is great, and unlike most special elections, a reduction in the number of precincts will itself become a major causal factor inhibiting voter turnout. (*Id*., ¶¶ 7, 11.)

This risk is particularly acute in a horizontal city like Los Angeles, where many people commute long distances to and from work. (Sragow Decl., ¶ 8.) Reducing the number of precincts means that

---

[9] In a general or primary election, the number of voters per precinct may not exceed 1,000 in counties with a population of less than one million or 1,250 in all other counties. (Elec. Code, ¶ 12223(a).) In Los Angeles County, the average precinct in the November 2002 gubernatorial election included approximately 805 voters. (Brady Decl., ¶ 23.) For the purposes of the recall election, by contrast, the number of registered voters per precinct, excluding the City of Los Angeles, ranges from 1,245 in Hidden Hills to 7,452 in Sierra Madre. (Westall Decl., ¶ 5.) There are a number of cities with very high minority populations, particularly Latino and African American, that also have a high ratio of registered voters per precinct. (*Id*., ¶ 6.) In Los Angeles County, districts that are predominantly minority are also predominantly Democratic. The racial and ethnic disparities are therefore accompanied by similar disparities based upon party affiliation. (*Id.*, ¶ 7.)

voters in between 50 and 75 percent of the precincts will have to travel more than one-half mile to their polling places. (Brady Decl., ¶ 29.) This changes a short walk or drive into another commute, possibly to an unfamiliar neighborhood. (Sragow Decl., ¶ 8.) The increased effort will deter many people from voting, but the elderly, the disabled, and the poor will suffer disproportionately. (*Id*., ¶¶ 8-9.) To get to the polls, many in these communities will have to rely on public transportation in a county that is notorious for its minimal public transit. (*Id.*; Brady Decl., ¶ 28; Westall Decl., ¶ 8.)

The Latino and African American populations of Los Angeles will also be severely disadvantaged by the consolidation of precincts. (Sragow Decl., ¶ 9.) It is unreasonable to believe that people who work two jobs to support their families, many of whom are from these communities, will add to the length of their day and travel time in order to vote unless the polling place is near at hand, as it is in a regularly scheduled general or primary election. (*Id*., ¶ 9.)

The consolidation of precincts also has another deleterious effect. In addition to having to travel farther to their polling place, voters must also face the additional problem of finding polling places whose locations have changed. (Brady Decl., ¶ 30.) Voters are creatures of habit. Many voters will simply go to their normal polling place. (*Id*., ¶ 31.) Those who are willing to persevere will have to ask around or call the registrar's office. If they are on a lunch break or they wait until the end of the day, they may not have enough time to correct their error. (*Id.*) If they make it to their new polling place, they are likely to encounter long lines, particularly at the end of the day. (*Id*., ¶ 32.) The disruptive impact of the consolidation of polling places is likely to affect the poor, the elderly and

the poorly educated disproportionately, and it is likely to interact with the increased travel time to further reduce voter turnout among these groups. (*Id*., ¶ 33.)

The net effect is that Los Angeles voters – the elderly, the poor, and minorities in particular – will be disproportionately burdened by having to go farther and wait longer to vote in this gubernatorial election than will other voters.

3. Many counties lack the time and resources to conduct a fair election on October 7th

The disparities in reliability among voting systems and precinct consolidation are enough in themselves to violate the equal protection rights of the voters who must use punchcards to vote on the recall or who must contend with a new, far-away polling place.

Los Angeles is not alone, however, in taking drastic action to meet the extraordinary challenges in preparing for the recall election. These actions, differing among counties, are sure to subject voters to unequal opportunities to cast a ballot, depending on the accident of where they are registered.

Normally, elections officials start to prepare for an election five months before election day. (Garcia-Viteri Decl., ¶ 5.) They need this lead-time in order to hire and train 100,000 poll workers, to reserve 25,000 polling places, to prepare, print, and mail 15 million sample ballots, to process absentee and special absentee (military) ballots, and to educate voters. (*Id.*; *see also San Francisco Chronicle*, "Early recall election sounds like doomsday to officials" (July 23, 2003).) The schedule for the recall election forces them to complete these tasks in half the time they would ordinarily have. (Garcia-Viteri Decl., ¶ 5.)

In Los Angeles County, for example, the printing process usually begins 68 days prior to the election and continues around the clock until it is completed. (*Id.*, ¶ 7.) The identity of the replacement candidates will not be final, however, until 55 days prior to the election, and the ballot labels for the two ballot measures will not be finalized until August 31, 2003, only 37 days before the election.[10] (Secretary of State Press Release, RJN, Exh. O; Garcia-Viteri Decl., ¶ 8.) This means that counties cannot begin a final print until a little more than a month before the election. (Garcia-Viteri Decl., ¶ 8.) Any delay, printing error, or mechanical failure could prevent elections officials from mailing sample ballots in sufficient time for voters to have a meaningful opportunity to review the sample ballot.

In Los Angeles and other counties with substantial minority populations, this process is complicated by the fact that the counties must print voting materials and sample ballots in six languages in addition to English. (*See* 42 U.S.C. § 1973aa-1a; Garcia-Viteri Decl., ¶ 8.) Elections officials in Los Angeles generally mail multilingual sample ballots 10 days after mailing English language ballots. (Garcia-Viteri Decl., ¶ 8.) As a result, these voters will have even less time to review the sample ballot than will English-speaking voters.

Counties must also contend with other responsibilities. Forty-three counties are scheduled to conduct elections in November. (Garcia-Viteri Decl., ¶ 9.) More than one and a half million Los Angeles County

---

[10] Depending upon the number of candidates, some counties may need to create a new ballot or use a different voting system. (Garcia-Viteri Decl., ¶ 4; Brady Decl., ¶ 7.)

voters are eligible to go to the polls in November. (*Id.*) San Franciscans will elect a mayor, a district attorney, and a sheriff in November and decide the fate of several ballot measures. (Secretary of State, 2003 Local County Election Dates, RJN, Exh. J.) Voters in Stanislaus County will fill 155 seats open on various county boards and commissions on November 4, 2003. (*Id.*, Exh. J.) Sample ballots must be mailed to voters between September 25 and October 14, the same window of time during which county elections officials will have to cope with the recall election, including tallying and canvassing the vote. (*Id.*, ¶ 9.) If the recall election is subject to a recount, it will overwhelm elections officials and threaten the integrity of the November elections. (*Id.*)

The voters, of course, must also have sufficient time to prepare for the election. Voter education is particularly important in connection with the recall election because voters have never before confronted a statewide recall ballot. (Sragow Decl., ¶ 13.) Many voters are simply confounded by the recall. There is a widely held misconception, for example, that in order to vote for a successor, one must vote in favor of recalling Governor Davis. (*Id.*, ¶ 19.) Minorities, the poor, the less educated, and people for whom English is a second language will be particularly disadvantaged by the unfamiliarity of the ballot. (*Id.*, ¶ 15.) With so little time to prepare for the election and so much to do, however, county elections officials will be hard-pressed to engage in any voter education, let alone the major effort an election like this demands. (Garcia-Viteri Decl., ¶ 11.)

In isolation, any one of these problems would threaten the state's ability to conduct a fair election. The combination of these factors, however, ensures that the voters will be denied their rights to equal

protection and a fair election under the state and federal Constitutions unless this Court postpones the recall election until March 2, 2004.

B. The Court Has the Equitable Power to Postpone the Election

If the enemy of adequate preparation is lack of time, the solution is simple: postpone the election until the next, already regularly scheduled statewide election on March 2, 2004.

This Court in the past has acknowledged that consolidating special elections with regularly scheduled ones is permissible – even when the delay is inconsistent with the statutory scheme underlying the election, as is not the case with the recall scheme at issue here. (*See, e.g., Jenkins v. Knight* (1956) 46 Cal.2d 220, 226 [holding that Governor did not abuse his discretion in postponing a special election to fill a vacancy, in order to coincide with an upcoming presidential primary, despite statutory mandate that he issue writ of election "at once": "[I]t certainly cannot be said that the Governor acted unreasonably in fixing the date at June 5 to coincide with the presidential primary, thus sparing the counties involved the expense of holding two elections within a three-month period."]; *Ault v. Council of City of San Rafael* (1941) 17 Cal.2d 415 [taxpayer failed to show any injury resulting from city council's decision to postpone an election on a charter amendment to coincide with the next general municipal election]; *see also Wilson v. Eu*, 54 Cal.3d at 549-550 [postponing election deadlines to assure sufficient time to review redistricting plans developed by special masters].)

Some years ago, this Court determined that statutory election requirements must give way to the constitutional mandate to put qualified initiatives on a special election ballot. (*Hart v. Jordan* (1939) 14 Cal.2d 288, 292.) But it noted that in the case before it, "[i]t does not appear that

the statutory requirements cannot be either fully or substantially complied with . . . in preparing material for the coming election . . ." (*Id*.) Later, when those practical considerations were raised, the Attorney General opined that a statewide initiative could be submitted at a special election only "if it qualifies in sufficient time to be included in the ballot pamphlet without impeding timely preparation and distribution of the pamphlet." (49 Ops.Atty.Gen. 137 at 29 (1949).)[11] That opinion was based in part on the practical considerations of trying to "prepare, print and distribute the ballot pamphlet," a concern that pales in comparison to the problems presented here. (*Id*. at 33.)

C. Postponement is Entirely Consistent with the Recall Provisions of the Constitution

An order postponing the election would be entirely consistent with the recall provisions of the California Constitution. Indeed, had the recall proponents taken only a little more of the signature-gathering time contemplated by the Constitution, the Lieutenant Governor would have had full discretion to order the election consolidated with the March, 2004 presidential primary.

Article II, section 14(a) of the Constitution allows recall proponents 160 days in which to qualify their measure for the ballot. In

---

[11] At the time of the Attorney General opinion, the requirement that a ballot pamphlet be sent to all voters was in the Constitution, while other requirements about the content and mailing of the pamphlet were statutory. (*See* 49 Ops.Cal.Atty.Gen. 137 at 33.) Those requirements are now in the Elections Code. (*See* Elec. Code, §§ 9080 *et seq*.) The Political Reform Act of 1974, a voter-sponsored initiative, added additional statutory requirements, the purpose of which was "so that voters will not be entirely

(continued . . .)

this case, the deadline for the proponents to turn in their signatures was September 2, 2003. (*FAQ About Recalls*, RJN, Exh. N.) Under article II, section 15(b) of the California Constitution, the recall election could be consolidated with the March 2, 2004 election if it qualified on or after September 4, 2003. Elections Code sections 11104, 9030, and 9031 allow the registrars 38 working days within which to verify signatures. Thus, if the proponents and the registrars took the full time allotted to them, certification would have occurred sometime in mid-October.

Instead, as the *Robins* plaintiffs have demonstrated[12] the proponents resorted to illegal means in their rush to gather signatures. They used paid signature-gatherers from out of state who were not qualified to circulate petitions and who lied on their declarations saying they did. They then sued in the Third District Court of Appeal to force the registrars to verify the signatures as quickly as possible. (*Recall Gray Davis Committee v. Shelley*, No. C04487, RJN, Exh. U.) The proponents were bent on forcing an early election, knowing full well that in doing so they could count on a lower voter turnout than they would have in March. The result is the cost and the chaos of a special statewide election, something the voters of California made clear that they wished to avoid when they amended the Constitution to add article II, section 15(b) in 1994.

Proposition 183 was passed at the November 8, 1994 election. The measure provided that a recall election can be consolidated with a

---

(. . . continued)
dependent on paid advertising for information regarding state measures." (Gov. Code, § 81002(d).)

[12] *Robins v. Shelley*, No. S117661.

statewide election scheduled within 180 days of the date the recall qualifies. The argument in favor or Proposition 183 equated a "Yes" vote with a "VOTE TO SAVE TAXPAYERS' DOLLARS." It noted that "cities and counties have been scrambling for ways to maintain minimum funding for essential services like police and fire protection, education, and health care." It then went on:

> Yet on April 12, 1994, Los Angeles County was forced to spend nearly *one million dollars* on a special recall election even though the regular June primary election was less than two months away. [¶] Why couldn't the county save virtually all that money by holding the recall election on the same day as the statewide primary? Because an obscure provision of the state constitution wouldn't allow it.
>
> (Nov. 8, 1994 ballot pamphlet, emphasis in original, RJN, Exh. C.)

The voters in adopting Proposition 183 also made clear that they wanted to enhance voter turnout for recall elections. They expressly wished to avoid situations in which proponents "can manipulate the timing of the recall in order to guarantee that it *cannot* be combined with a regular election," noting that "[t]hese special interests may be counting on a low turnout to help their cause." (*Id.*, emphasis in original.)

D. Postponing the Election Serves Other Important Interests

As demonstrated above, the California Constitution itself acknowledges that while a timely election is of some import in the recall process, one held six months after qualification still falls within the constitutional guidelines for timeliness, while simultaneously furthering other important state interests. In this case, those interests are very strong.

1. The cost of a special election

The first of those interests is the matter of cost. In *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, the Governor called a special statewide election for the voters to consider an initiative that would have readjusted state legislative and congressional districts after the Legislature already had done so. This Court issued an alternative writ of mandate to consider a preelection challenge, ultimately determining that the initiative was beyond the authority of the voters to enact. Its decision to intervene prior to the election was based in part on what state and local election officials had noted were "the dire consequences of delay. They point, in part, to the high costs – estimated at $15 million – which both state and local governments will be required to absorb if this special election is allowed to proceed, and suggest that if the initiative is in fact invalid this expenditure will be for naught." (*Id.* at 666.)

The Secretary of State has estimated here that a special election to consider the recall will cost far more – at least $53 million dollars. (*FAQ About Recalls*, RJN, Exh. N.)[13] Much of that cost will fall on the counties, already suffering from severe budget cuts and the downturn in the state's economy. In *Wilson v. Eu* (1991) 54 Cal.3d 546, 548, the Court declined to delay or split a statewide primary election to accommodate redistricting litigation because holding an extra election would have cost the State $40 million. The opposite is true here – *not* delaying the election to accommodate this litigation will cost the state and

[13] According to recent reports, the cost will be as high as $67 million. (*San Francisco Chronicle*, "Tab on recall election doubles to $67 million" (August 2, 2003).)

counties $53 million, at least. Given the fiscal problems of this state and its counties, surely there is no reason to spend that kind of money on a special election when there is a high probability that the election itself will be declared illegal.

2. The effect on other measures that must be on the ballot

Allowing the recall election to be consolidated with the March primary also avoids the legal and practical clashes that will result through operation of another, unrelated provision of the Constitution. That provision – article II, section 8(c) – requires that any statewide initiative already qualified for the ballot also be voted on at the special recall election. Pursuant to article II, section 8(c), the Secretary of State has assigned ballot proposition numbers to two measures that will appear on the October 7, 2003 ballot. Proposition 53, entitled "Infrastructure: Finance," was placed on the ballot by the Legislature. Proposition 54, entitled "Classification by Race, Ethnicity, Color or National Origin," was placed on the ballot by initiative and would bar state and local government from collecting or using racial data. The inclusion of these measures on the ballot has generated enormous controversy and national interest, including a petition for writ of mandate filed in this Court.[14] (*Eisenberg v. Shelley*, No. S117763.)

---

[14] The Mexican American Legal Defense and Educational Fund filed a lawsuit in federal district court in San Jose on August 1. (*Salazar v. Monterey County*, Case No. 03-03584.) The plaintiffs in that case argue that elections officials violated the federal Voting Rights Act by changing the date of the election for Proposition 54. Deferring the recall election until March 2, 2004, would cure this problem and avoid violations of the Voting Rights Act.

The petitioner in *Eisenberg v. Shelley* has asked the Court to postpone the election on Propositions 53 and 54 until the March 2004 primary election. The petitioner argues, among other things, that elections officials cannot meet the deadlines for submission of the measures to the voters. Indeed, the Secretary of State's calendar drastically reduces the opportunity for members of the public to submit arguments in favor of, and in opposition to, the measures. Under Elections Code section 9061, the Secretary of State is required to notify the public of the opportunity to submit ballot arguments 120 days before the election. Because the recall election will occur only 75 days after the date it was called, however, the Secretary of State cannot meet this deadline. Instead, he issued a press release inviting members of the public to submit arguments less than a week later. (RJN, Exh. O.)

The Elections Code also requires that a ballot pamphlet containing the full text of the initiative measure, plus all the summary materials and arguments for and against, be mailed to each registered voter in the State. (Elec. Code, § 9094.) As of February 10, 2003, there were 15,168,263 registered voters in the state.[15] That mailing "shall commence not less than 40 days before the election and shall be completed no later than 21 days before the election . . . ." (*Id.*, § 9094(a).) The ballot pamphlet also must be provided to county elections officials who do not use computerized registration materials "not less than 45 days before the election" to facilitate mailing by those counties to the registered voters. (*Id.,* § 9094(b).) Materials for the ballot pamphlet must be provided to the

[15] Secretary of State, Report of Registration, Feb. 10, 2003, available on-line at http://www.ss.ca.gov/elections/ror/regstats_02-10-03.pdf.

State Printer 40 days prior to delivery to the county elections officials (meaning 85 days prior to the election), and must be made available for public inspection 20 days before that. (*Id.*, §§ 9082, 9092.) It is obvious that these timetables cannot be met within the 75-day truncated schedule provided for the recall election.

The petitioner in *Eisenberg v. Shelley* suggests that the answer to these problems is to postpone the election for the ballot measures. The problems arising from a rushed election, however, are common to the recall election as well, and the answer is to postpone the October 7 election until the next statewide election in March, 2004.

3. <u>Postponing the election will assure greater voter participation</u>

Holding the recall election during the March 2004 primary also serves the important state interest in ensuring a high voter turnout to decide a matter of such public import. The Court of Appeal in *De Bottari v. Melendez* (1975) 44 Cal.App.3d 910 made the point: "As a rule, voter turnout at special elections is lighter than at general elections. . . . [I]t seems reasonable that this rule would also apply to recall elections." (*Id*. at 920, fn. 8.) The state has elsewhere recognized the desirability of having issues of significant importance decided during regularly scheduled elections, with their higher turnout. (*See* 1994 ballot, Prop. 183 Argument in Favor, RJN, Exh. C; Gov. Code, § 36502(b) [cities may vote on term limits measures only at "a regularly scheduled election."]; cf. *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 658, fn. 15 [declining to split a primary election because it "could have a serious impact on the state treasury, voter turnout, . . . [and] the timing of other ballot measures . . ."].)

4. Postponement will allow the Court time to deliberate

Finally, a postponement is necessary if this Court is to have sufficient time to decide the important issues before it. In addition to the equal protection violations caused by the truncated election schedule, California's statewide recall procedures impair the First and Fourteenth Amendment rights of significant groups of voters. As discussed more fully below, a federal court has already declared one part of the recall process invalid. This petition raises other issues of even greater constitutional import.

In *Senate v. Jones* (1999) 21 Cal.4th 1142, 1169, 1172, Justice Kennard worried about "hasty" preelection review of a ballot initiative, because the six weeks allowed for the litigation "leav[es] insufficient time for the normal deliberative process." She is not the first to express such concerns.[16] (*See, e.g., Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4-5 [Broussard, J., concurring and noting that, with expedited pre-election review, "[t]ime is lacking for the careful study and consideration, the collegial discussion, and the mutual criticism of opinion drafts which an issue of this importance requires."].)

Elections require a great deal of preparation. Constitutional and statutory deadlines must be balanced against practical realities and substantive constitutional concerns. (*See Wilson v. Eu*, 54 Cal.3d at 549-550 [election deadlines extended and nomination requirements modified, with possibility of further postponement, to allow time for deliberate consideration of redistricting plans.].)

---

[16] At the same time, Justice Kennard agreed with the majority that the high cost of a special election is a factor that the Court could weigh in deciding (continued . . .)

Our point is this: while the Court ordinarily gives great weight to election deadlines, it has the authority to change those deadlines when necessary to ensure the fairness of the election. That authority can and should be exercised here.

III.

CALIFORNIA'S RECALL PROCEDURES VIOLATE THE EQUAL PROTECTION GUARANTEE OF THE UNITED STATES CONSTITUTION

Article II, section 15(c) of the California Constitution provides a two-step process for a statewide recall election:

> (c) If the majority vote on the question is to recall, the officer is removed and, if there is a candidate, the candidate who receives a plurality is the successor. The officer may not be a candidate, nor shall there be any candidacy for an office filled pursuant to subdivision (d) of Section 16 of Article VI.[17]
>
> (Cal. Const., art. II, § 15(c).)

Under these rules, supporters of Governor Davis could garner 49.9 percent of the vote on the recall question, but the Governor's successor could be elected with a single-digit plurality depending upon the number of candidates. The candidate of the near-majority of voters who favor Governor Davis, however, is barred from the ballot altogether.

(. . . continued)
whether to grant preelection review. (*Id.* at 1170-1171.)

[17] Subdivision (d) of Section 16 of Article VI refers to the method of choosing judges of this Court and of the courts of appeal.

The process need not have been set up this way. Nothing inherent in the concept of a recall prevents a targeted official from running to succeed himself. To the contrary, most of the states with recall succession elections permit the recalled official to be elected to the vacancy caused by the recall.

California is one of only eighteen states that provide for the recall of state officers.[18] Only twelve of those eighteen states either require or in some instances provide for an election to fill a vacancy caused by recall of a statewide officer.[19] Five states expressly permit the recalled official to be considered along with and on the same terms as other candidates to fill the vacancy.[20] The law of three states is silent on the

---

[18] The others are Alaska (Alaska Const., art. XI, § 8), Arizona (Ariz. Const., art. VIII, pt. 1, § 1), Colorado (Colo. Const., art. XXI, § 1), Georgia (Ga. Code Ann., § 21-4-4(a)), Idaho (Idaho Code, § 34-1701(1)(a)), Kansas (Kan. Stat. Ann., § 25-4301), Louisiana (La. Rev. Stat. Ann., § 18:1300.1), Michigan (Mich. Comp. Laws Ann., § 168.951), Minnesota (Minn. Const., art. VIII, § 6), Montana (Mont. Code Ann., § 2-16-603(1)), Nevada (Nev. Const., art. II, § 9), New Jersey (N.J. Const., art. I, ¶ 2b; N.J. Rev. Ann. Stats., § 19:27A-2), North Dakota (N.D. Const., art. III, § 10), Oregon (Ore. Const., art. II, § 18(1)), Rhode Island (R.I. Const., art. IV, § 1), Washington (Wash. Const., art. I, § 33) and Wisconsin (Wis. Stat., § 9.10(1)(a)).

[19] Arizona (Ariz. Const., art. VIII, pt. 1, § 4; Ariz. Rev. Stat. Ann., §§ 19-212(A), 19-216), California (Cal. Const., art. II, § 15), Colorado (Colo. Const., art. XXI, § 1; Colo. Rev. Stat. Ann., § 1-12-118), Georgia (Ga. Code Ann., § 21-4-13(g)), Louisiana (La. Rev. Stat. Ann., § 42:373), Michigan (Mich. Comp. Laws Ann., § 168.971), Nevada (Nev. Const., art. II, § 9), New Jersey (N.J. Const., art. V, § 1, ¶¶ 6, 9), North Dakota (N.D. Const., art. III, § 10), Oregon (Ore. Const., art. V, § 8a), Washington (Wa. Const., art. III, § 10) and Wisconsin (Wis. Stat., § 9.10(5)(b)).

[20] Arizona (Ariz. Rev. Stat. Ann., § 19-216), Georgia (Ga. Code Ann., § 21-4-13(g)), Nevada (Nev. Const., art. II, § 9), North Dakota (N.D. Const., art. III, § 10), and Wisconsin (Wis. Stat., § 9.10(5)(b)).

subject.[21] Only California and three other states bar the target of the recall from being considered in the election to fill the vacancy.[22]

Notably, all three of these other states require more signatures than California to qualify a recall petition. (*Compare* Cal. Const., art. II, § 14(b) [12%] *with* Colo. Const., art. XXI, § 1 [25%]; Mich. Comp. Laws Ann., § 168.955 [25%]; Ore. Const., art. II, § 18(2) [15%].) Additionally, in Oregon, it appears that the succession election, because it occurs at the next biennial election, has both a primary and general election. (Ore. Const., art. V, § 8a.) In Michigan, replacement candidates must be nominated by the political parties. (Mich. Comp. Laws. Ann., § 168.973.) This is all in sharp contrast to California's virtually unregulated free-for-all system for nominating replacement candidates and virtual guarantee of a fractured vote on succession.

In short, California stands at an extreme, with qualification requirements so lax, voting requirements so disparate, and replacement nominations so unfiltered that one need only look at the practices in other states to conclude that the inequalities in California's recall election cannot be justified.

The New Jersey Supreme Court has ruled that when a majority vote is necessary to beat a recall and only a plurality is necessary for succession, a recalled officer should be able to run to succeed himself.

---

[21] Louisiana (*See* La. Rev. Stat. Ann., § 18:16300.1 et seq.; La. Rev. Stat. Ann., § 42:373), New Jersey (*See* N.J. Const., art. V, § 1, ¶¶ 6, 9; N.J. Stat. Ann., § 19:27A-16), and Washington (*See* Wa. Const., art. III, § 10.)

[22] Colorado (Colo. Rev. Stat. Ann., § 1-12-117), Michigan (Mich. Comp. Laws Ann., § 168.974(l)), and Oregon (*Recall Bennett Comm. v. Bennett* (Or. 1952) 249 P.2d 479, 493 [construing constitution to bar].).

(*Grubb v. Wyckoff* (N.J. 1968) 247 A.2d 481.) Although the court in *Grubb* did not need to reach the constitutional issue, it identified the essential flaw in this system:

> If a majority vote were required for election, then it could be argued that a majority vote to recall sufficiently reveals the will of the electorate that the incumbent should not serve. But if a successor may be elected by a plurality, rather than a majority, then a majority vote for recall does not reveal the plurality feeling of the voters. The votes against the recall of incumbent, although less than 50% may well exceed the votes in favor of each candidate to succeed him. In such circumstances, if the incumbent may not run, the successor may be the choice of a minority less than a plurality as revealed by the votes to retain the incumbent. Indeed, to bar the incumbent from succeeding himself where a plurality vote suffices might encourage those defeated in the regular election to seek to recall the victor in the belief that, he having received less than a majority, it is likely a majority will vote to recall him, thereby leaving the field to candidates who did not best the incumbent in a direct contest with him.
>
> (247 A.2d at 483.)

Because a recall petition is essentially a demand to set aside the result of the last election and make the winner run again, the California process discriminates against the voters who support the Governor, in violation of the Fourteenth Amendment, by refusing to allow the Governor to run against his challengers.

Whether considered as a matter of vote dilution or access to the ballot, the challenged recall procedures trigger strict scrutiny under the federal Equal Protection Clause and cannot be justified.

A. California's Recall Procedures Impermissibly Dilute the Votes of Those Who Support the Governor

That each citizen's vote must have equal weight is a fundamental precept of equal protection. The Supreme Court has made this plain many times and in many contexts:

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.
>
> (*Bush v. Gore* (2000) 531 U.S. 98, 104-105.)

> [T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.
>
> (*Reynolds v. Sims* (1964) 377 U.S. 533, 555.)

> "None would deny that a state law giving some citizens twice the vote of other citizens in either the primary or general election would lack that equality which the Fourteenth Amendment guarantees. * * * The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government."
>
> (*Id.* at 564, fn. 41, quoting with approval, *MacDougall v. Green* (1948) 335 U.S. 281, 290 (dis. opn. of Douglas, J.).)

> This law applies a rigid, arbitrary formula to sparsely settled counties and populous counties

> alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights. The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.
>
> (*Moore v. Ogilvie* (1969) 394 U.S. 814, 818-819.)

> [A]ll who participate in the election are to have an equal vote – whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.
>
> (*Gray v. Sanders* (1963) 372 U.S. 368, 379-80.)

This principle of equal value for every person's vote has guided the one person, one vote cases. (*See, e.g., Karcher v. Daggett* (1983) 462 U.S. 725, 731-734; *Reynolds v. Sims*, 377 U.S. at 563-564; *Wilson v. Eu* (1992) 1 Cal.4th 707, 718, 753-754.) The constitutional suspicion of any system that values votes differently has been the basis for invalidating a city charter provision that required voter approval of certain housing ordinances but not of others,[23] for striking down the practice of

[23] *Hunter v. Erickson* (1969) 393 U.S. 385.

placing incumbents' names at the top of the ballot because it automatically disadvantaged supporters of other candidates,[24] and for holding the Illinois Election Code unconstitutional insofar as it required independent candidates and new political parties to obtain more signatures in the city of Chicago than in other parts of the state. (*Illinois State Board of Elections v. Socialist Workers Party* (1979) 440 U.S. 173.)

In *Gray v. Sanders*, this constitutional insistence on equally weighted votes meant the invalidation of Georgia's long established county-unit system whereby state officials were elected by a majority of counties voting as units rather than by the underlying individual votes. (372 U.S. at 379.) It has meant that in elections of broad interest, voters may not be excluded based on factors such as property ownership or whether they had children in school. (*Phoenix v. Kolodziejski* (1970) 399 U.S. 204; *Kramer v. Union Free School Dist.* (1969) 395 U.S. 621; *Cipriano v. City of Houma* (1969) 395 U.S. 701.) Most recently this principle was invoked to disapprove election contest procedures in the Florida vote count for the 2000 Presidential election. (*Bush v. Gore*, 531 U.S. at 98.)

The California recall procedure violates this fundamental equal protection principle by weighting the votes of those who support retention of the Governor less than the votes of those who support any of his challenges. The incumbent must receive 50 percent of the vote to remain in office; other candidates can assume the same office with as little as a few percentage points of the vote. Treating two groups of voters so

---

[24] *Gould v. Grubb*, 14 Cal.3d 661

differently tilts the political playing field against the Governor's supporters in violation of equal protection.

There can be no doubt that, for this equal protection analysis, the requirements for voting against the recall (and hence in favor of Governor Davis) are properly compared with the succession vote requirements. (*See De Bottari v. Melendez* (1975) 44 Cal.App.3d 910, 923, fn. 14 ["a vote against the recall question is a vote for the challenged official and therefore the challenged official is a candidate even in the recall election."].)

In evaluating voting systems under equal protection, the Court has looked to their practical effect, not just their formal structure. (*See*, *e.g., Anderson v. Celebrezze* (1983) 460 U.S. at 799-800 [court assesses burdens and benefits of election requirements based upon practicalities]; *Hunter v. Erickson*, 393 U.S. at 391 ["although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority."]; *Knoll v. Davidson* (1974) 12 Cal.3d 335, 347, fn. 5 [court looks to the "realities of the electoral process"].)

In a recall, whether the question is posed as "Should Gray Davis be recalled" or "Who should replace him," the issue is exactly the same: who should be Governor of the State of California? Each person voting is identically situated in relation to that question. "Presumptively, when all citizens are affected in important ways by a governmental decision . . . the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise." (*Phoenix v. Kolodziejski,* 399 U.S. at 209.)

In *Hendon v. North Carolina State Board of Elections* (4th Cir. 1983) 710 F.2d 177, the Court invalidated a statute that directed that when a voter marked his or her ballot for a straight party ticket but also voted individually for another party's candidate for one particular office, the straight party vote would be counted across the board. This rule was unconstitutional because it constituted "[t]he imposition of a legislative preference for the straight party candidate . . ." (*Id.* at 180.) Similarly, here, the differential voting standard imposes on the voters a preference for other candidates over the sitting official, regardless of whether the electorate supports such a preference.

In *Gould v. Grubb* (1975) 14 Cal.3d 661, this Court, relying on federal equal protection doctrine, invalidated a provision that gave the incumbent first position on the election ballot because first listing gave the incumbent an advantage and thus "substantially dilute[d] the weight of votes of those supporting nonincumbent candidates. . ." (14 Cal.3d at 672.) Here the discrimination is much more blatant and is literally written into the law.

Having chosen to apply a plurality vote standard for succession, the state may not impose more onerous vote requirements on those who support the sitting Governor. (*Hunter v. Erickson*, 393 U.S. at 392-393; *see also Gray v. Sanders*, 372 U.S. at 381 ["once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded."]; *Harper v. Virginia State Bd. of Elections* (1966) 383 U.S. 663, 665 [state may not be required to provide for voters' direct input, but "once the franchise is

granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."].)[25]

Gray Davis is the only one among all those seeking to be Governor for whom a 50 percent vote requirement applies. The governmental action at issue here is choosing a governor; within that single governmental action the state has placed a heavier burden on some voters based entirely upon their political beliefs and associations. Even if one treats the removal action as distinct from replacement, there is no logic nor rationale for making it easier to remove a sitting Governor than to select a replacement. The recall provisions providing for differential vote requirements are, therefore, invalid.

B. California's Recall Procedures Impermissibly Deny the Governor and His Supporters Access to the Ballot

Even if this case is analyzed as a ballot access case under *Legislature v. Eu* (1991) 54 Cal.3d 492, *Burdick v. Takushi* (1992) 504 U.S.

---

[25] In *Fortson v. Morris* (1967) 385 U.S. 231, the Court upheld a Georgia provision that if no candidate for governor receives a majority of votes at a general election, the General Assembly shall elect the governor from the two persons having the highest number of votes. In *Rodriguez v. Popular Democratic Party* (1982) 457 U.S. 1, the Court upheld Puerto Rican statutes providing that a vacancy in the state House of Representatives would be filled by the deceased member's political party. In both cases, the decision was based upon the state's prerogative to establish selection procedures that do not include a popular vote. (*Fortson*, 385 U.S. at 234; *Rodriguez*, 457 U.S. at 9.) Once a state chooses to select its officials by election, however, it may not discriminate among voters. (*Rodriguez*, 457 U.S. at 10, citing cases; *Kramer v. Union Free School Dist.*, 395 U.S. at 628-629 ["The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment."].)

428, and *Anderson v. Celebrezze*, 460 U.S. 780, California's recall procedure, violate equal protection under the appropriate standard of strict scrutiny.[26] (*De Bottari v. Melendez*, 44 Cal.App.3d at 910 [one-year disqualification of recalled official from running for same office held unconstitutional.];[27] *see also Anderson v. Celebrezze*, 460 U.S. 780 [early filing deadline for independent candidates held unconstitutional]; *Williams v. Rhodes* (1968) 393 U.S. 23 [procedures burdening the ability of additional parties to have their candidates on the ballot held unconstitutional]; *Choudhry v. Free* (1976) 17 Cal.3d 660 [invalidating requirement that candidates for director of an irrigation district own real property.].)

In evaluating the constitutionality of California's recall procedures as a ballot access case, a court must engage in a several-step process. (*Anderson v. Celebrezze* (1983) 460 U.S. 780.)

> It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of

---

[26] In ballot access cases, the Supreme Court has sometimes conducted its analysis "directly on the First and Fourteenth Amendments" without "a separate Equal Protection Clause analysis," but nonetheless relied upon "election cases resting on the Equal Protection Clause. . ." (*Anderson v. Celebrezze*, 460 U.S. at 786, fn. 7.)

[27] As explained more fully below, in *Legislature v. Eu*, 54 Cal.3d at 522, cert. den. (1992) 503 U.S. 919, upholding term limits, the Court acknowledged and distinguished the decision in *De Bottari.*

> those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.
>
> (*Id.* at 789.)[28]

Even when an election provision "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights" of voters, the state must come forward with "'important regulatory interests.'" (*Burdick v. Takushi* (1992) 504 U.S. 428, 434, quoting *Anderson,* 460 U.S. at 788.) When a rule "imposes a very 'real and appreciable impact' on the equality, fairness and integrity of the electoral process," the state bears a correspondingly heavy burden of justification. (*Gould v. Grubb* (1975) 14 Cal.3d 661, 670, quoting *Bullock v. Carter* (1971) 405 U.S. 134, 143.)

1. <u>The burden on voting rights is severe</u>

Under California's recall procedures, the votes of citizens are weighed lightly or more heavily depending entirely upon whom they support for governor. Davis supporters need a majority; others need far less. Additionally their candidate is completely barred from the replacement ballot. Because the burden on voting rights is "'severe,'" "the regulation must be 'narrowly drawn to advance a state interest of

[28] *See also Storer v. Brown* (1974) 415 U.S. 724, 730.

compelling importance.'" (*Burdick v. Takushi,* 504 U.S. at 434, quoting *Norman v. Reed* (1992) 502 U.S. 279, 289.)[29]

Additionally, under California law the right to hold and run for office, is a "'fundamental right' . . ." (*Zeilenga v. Nelson* (1971) 4 Cal.3d 336, 349, citation omitted; *see also Carter v. Commission on Qualifications, etc.* (1939) 14 Cal.2d 179, 182 [93 P.2d 140] ["'[T]he right to hold public office, either by election or appointment, is one of the valuable rights of citizenship.'"].) As a result, disqualification from public office is disfavored, and any uncertainties must be resolved in favor of continued eligibility. (*Helena Rubinstein Internat. v. Younger* (1977) 71 Cal.App.3d 406, 418-419; *see also Woo v. Superior Court* (2000) 83 Cal.App.4th 967, 975 [city councilman could run for a third term of office notwithstanding the fact that the city charter explicitly limited members to serving two terms].)

At a minimum, this rule requires the Court to view the applicable laws in a manner most favorable to the Governor remaining in office, particularly when, as here, a recall was initiated just one month after his inauguration and there is no allegation of malfeasance. The recall is unique because it is the only procedure under which a sitting elected official can be removed from office without any allegation of wrongdoing. (*Compare* Cal. Const., art. IV, § 18(b) [state officers subject to impeachment for "misconduct in office"]; *id.*, art. IV, § 8(b) [officers disqualified from office upon conviction for bribery, perjury, forgery,

---

[29] This standard of review applies whether one approaches the issue as a question of equal protection or due process. (*See Anderson v. Celebrezze*, 460 U.S. at 786, fn. 7.)

malfeasance or other high crimes].) Precisely because the recall provisions can so arbitrarily subject a sitting state officer to removal, and because they constitute a complete bar to the right to run for office, they must be closely scrutinized.

2. The Burden on Voting Rights Cannot Be Justified

(a) Procedures in other states demonstrate the lack of justification

As discussed above at pp. 33-34, California is in a small minority of states, and in significant respects constitutes a minority of one, in the severity of the burden that it places on the voting interests of those who support a sitting governor. The practice in other states demonstrates the absence of any need for California's prohibition. (*See*, *e.g.*, *Phoenix v. Kolodziejski,* 399 U.S. at 212-213 ["That there is no adequate reason to restrict the franchise . . . is further evidenced by the fact that only 14 States now restrict the franchise in this way[.]"]; *Williams v. Rhodes,* 393 U.S. at 33, fn. 9 [comparing provisions in other states: "It appears that no significant problem has arisen in these States which have relatively lenient requirements for obtaining ballot position."]; *Fortson v. Morris,* 385 U.S. at 234-235 [thirty-eight other states provided procedures similar to those upheld as constitutional]; *Stewart v. Parish School Board* (E.D. La. 1970) 310 F.Supp. 1172, 1178, affd. (1970) 400 U.S. 884 ["Thirty-six states have not considered property a necessary qualification for voting in a bond election."].)

(b) Traditional state interests do not justify barring the Governor from the ballot

In *De Bottari v. Melendez*, 44 Cal.App.3d 910, the Court of Appeal invalidated a statute that disqualified recalled city council members

from running in the special election held several months later to fill the vacancies left by the recall. The city council recall was not governed by the provisions at issue here, but by statutory provisions governing general law cities.[30] The court held that strict scrutiny applied and found the state justifications unpersuasive. (44 Cal.App.3d at 917, 919-922.) In response to the assertion that the exclusion was necessary to prevent persons lacking support from appearing on the ballot, the court stated: "The real danger which alarms the city, and which it argues section 27521 was designed to meet, is that the recalled official will have too much popular support rather than too little. In other words, the recalled official might be elected even though a majority of the electorate find him unacceptable." (*Id.* at 919.) The court then turned to the claim that the recalled official should be excluded in order to assure a winner who enjoyed majority support:

> Nor would elimination of recalled officials guarantee that each election winner has majority support for the possibility of a plurality victory is inherent in our system of municipal elections. If plurality votes following recall elections present a substantial danger, then a statute may be tailored to meet this problem in a manner which does not single out the recalled candidate or severely limit voter choice, such as by providing for a run-off election.
>
> (*Id.* at 921.)

---

[30] Under those provisions, recall petitions required signatures from 25 percent of the electorate, a recall could not be brought during certain time periods, and the recall ballot presented the question whether any vacancy should be filled by appointment or special election. (*Id.*, 44 Cal.App.3d at 918-919.)

Finally, the *De Bottari* court addressed the claim that exclusion of the officeholder from the special election was necessary to governmental stability; namely to avoid encouraging repeated recalls:

> [T]he deterrent effect . . . on the frequency of recalls and therefore on the stability of local government is neither simple nor obvious. [¶] More fundamentally, if the danger is repeated recalls, the appropriate remedy is limiting the frequency of the recall itself, not barring the candidacy of the recalled official.

(*Id.* at 922.)[31]

The prohibition on recalled officials running as candidates does not serve any of the other interests that have been advanced in the ballot access cases either, namely to help avoid a lengthy ballot or fractured vote. (*See*, *e.g., Burdick v. Takushi*, 504 U.S. at 439-440; *Storer v. Brown,* 415 U.S. at 732-733.) If anything, it is the ease with which other individuals may gain a place on the ballot that encourages a lengthy ballot and fractured vote.[32]

Nor can this prohibition be compared to term limits. In *Legislature v. Eu*, this Court emphasized that the government interests in term limits are quite different from, and more weighty than, any interest in

---

[31] In *Mink v. Pua* (Haw. 1985) 711 P.2d 723, the Hawaii Supreme Court upheld a local charter provision barring recalled councilmen from running in a special election to succeed themselves. The decision offers virtually no analysis of the constitutional claims and, thus has no "persuasive value" here. (*Bianchi v. Westfield Ins. Co.* (1987) 191 Cal.App.3d 287, 291; *see also Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499, 1509, fn. 2.)

[32] It requires only the signatures of 65 registered voters and $3,500 (or valid in-lieu signatures) to nominate a candidate for the recall ballot. (*FAQ About Recalls*, RJN, Exh. N; Elec. Code, §§ 8062, 8103, 8106.)

barring a recalled official from the ballot. (54 Cal.3d at 522.) As the Court described them, "the state's strong interests in protecting against an entrenched, dynastic legislative bureaucracy, and in thereby encouraging new candidates to seek public office" are "legitimate and compelling" interests served by legislative term limits. (*Id.* at 520.) The state's interests in keeping a recalled official from the ballot, by contrast, are "insubstantial or . . . could easily and conveniently be protected by means less burdensome to fundamental rights." (*De Bottari*, 44 Cal.App.3d at 924.) The former justify exclusion from the ballot; the latter do not. (*Legislature v. Eu*, 54 Cal.3d at 520; *De Bottari*, 44 Cal.App.3d at 919-922.)

IV.

FAILURE TO CHANGE THE PROCEDURES FOR THIS ELECTION WILL VIOLATE THE GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT

California stands alone in the ease with which a statewide recall can be invoked and a new Governor elected with only a small percentage of the vote. Given the decline in voter turnout over the years, it now takes only 6 percent of registered voters to qualify the recall of a duly elected statewide officer. Anyone who is willing to pay enough and bring in an army of unqualified signature gatherers from out of state can get the job done. If, as expected, the October 7 election has even less turnout than the November 2002 election, the next recall will be that much easier to qualify.

Once a recall qualifies, the procedures are so structured that the voters' attention is quickly diverted to the jockeying of replacement candidates, who need produce only 65 signatures and $3,500 to see their names on the ballot. The only provision designed to demand electoral

focus on the question of retention was recently held unconstitutional by a federal court.

The result is that California's current recall system is nothing like what its proponents intended. The recall is no longer a system about which one can confidently assert, as its original supporters did, that it "will not be lightly sought nor triflingly applied." (1911 ballot pamphlet, "Reasons Why Senate Constitutional Amendment No. 23 Should Be Adopted," RJN, Exh. A.) Originally conceived as a tool to be invoked as a last resort by a "patient and long suffering" electorate (*id.*), it has become a ready weapon in the hands of an angry few, who with relatively little effort can initiate an electoral circus in their attempt to reverse the will of the majority expressed at regularly held elections.

The threat to majority rule and the ability of government to function implicates every citizen's right to a republican form of government. These failings can be mitigated if the Governor is allowed to appear on the ballot as a candidate and the counties are given enough time to conduct a free and fair election. If those two things do not occur, however, the result will violate the federal Constitution.

A. Under the Best of Circumstances the Recall Procedures Barely Satisfy the Guarantee Clause of the Federal Constitution

The Guarantee Clause states:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.
>
> (U.S. Const., art. IV, § 4.)

> The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.
>
> (James Madison, Federalist Number 43, explaining the need for the Guarantee Clause.)

While the federal courts have generally held Guarantee Clause claims to be nonjusticiable,[33] the state courts, including this one, have been willing to undertake such review. (*See, e.g., Ventura Group Ventures, Inc. v. Ventura Port Dist*. (2001) 24 Cal.4th 1089, 1101 [noting that California Supreme Court has reviewed Guarantee Clause claims]; *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 227 [rejecting claim that article XIII A would "result in a change from a 'republican form of government.'"].)[34]

The most fundamental requirement of a republican form of government is that majority rule be preserved against assaults by fringe and

---

[33] *See, e.g., Luther v. Borden* (1849) 48 U.S. [7 How.] 1 (declining to displace state charter government); *Pacific States Tel. & Tel. Co. v. Oregon* (1912) 223 U.S. 118 (declining to invalidate state initiative and referendum); *City of Rome v. United States* (1980) 446 U.S. 156 (challenging section 5 of the Voting Rights Act of 1965); *but see New York v. United States* (1992) 505 U.S. 144, 184-185 (not all claims under the Guarantee Clause are nonjusticiable.).

[34] Supreme Courts in other states have also been willing to entertain claims under the Guarantee Clause. (*See, e.g., State v. Montez* (Ore. 1990) 789 P.2d 1352, 1377; *VanSickle v. Shanahan* (Kan. 1973) 511 P.2d 223, 231-241; *Heimerl v. Ozaukee County* (Wis. 1949) 40 N.W.2d 564, 567.) For the argument that "republican governance [is] a binding obligation for state officials" notwithstanding federal courts' refusal to review such

(continued . . .)

marginal minorities. As Alexander Hamilton wrote in The Federalist Number 22, "the fundamental maxim of republican government [requires] that the sense of the majority should prevail." (*See also* Federalist Number 58 [If a legislative quorum requires more than a majority, "[t]he fundamental principle of free government would be reversed. It would no longer be the majority that would rule. . . .].)

The opportunity to recall an elected official is not, of course, per se opposed to these principles. Nevertheless, the extraordinary ease with which the California recall system can be abused and manipulated by small minorities – with massive attendant disruptions at every level of government – constitutes a tangible threat to the republican form of government. This is so for two reasons. First, under California law as interpreted and implemented by the Secretary of State, signatures from a mere 6 percent of registered voters can disrupt the orderly results of an election by majority vote. Second, under California law pertaining to the succession election, a small minority may determine, through plurality rather than majority vote, the choice of the state's preeminent elected official. Both of these aspects of the law threaten the government by majority that the Republican Guarantee Clause aims to protect.

The recall itself is a detour from traditional forms of state government, with only 18 of the 50 states providing for recall of state officers.[35] Of those 18, only 12 states permit recall of state officials without

---

(. . . continued)
claims, see Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking* (1998) 45 UCLA L.Rev. 1735.

[35] *See* Section III and footnotes 18-22 above.

some allegation of illegal conduct or malfeasance in office.[36] California, however, stands virtually alone in the alarming ease with which a statewide recall can be initiated.[37] In California, proponents of a recall need only obtain signatures amounting to 12 percent of the votes cast at the last gubernatorial election in order to force a statewide election, a number that now constitutes a mere 6 percent of the total registered electorate. Only Kansas has a lower signature requirement of 10 percent of votes cast.[38] As

---

[36] Six states require some allegation of illegal conduct or malfeasance in office. (Alaska Stat., § 15.45.510 [lack of fitness, incompetence, neglect of duties or corruption]; Kan. Stat. Ann., § 25-4302(a) [felony, misconduct in office or failure to perform duties prescribed by law]; Minn. Const., art. VIII, § 6; Minn. Stat. Ann., § 2116.02 [serious malfeasance or nonfeasance or conviction of a serious crime while serving in office]; Mont. Code Ann., § 2-16-603(3) [physical or mental lack of fitness, incompetence, violation of the oath of office, official misconduct, or conviction of a felony offense]; R.I. Const., art. IV, § 1 [felony indictment, misdemeanor conviction, or upon a finding of probable cause of an ethics violation]; Wash. Const., art. I, § 33 [acts of malfeasance or misfeasance in office or violations of the oath of office].)

[37] Recall of local officials in California requires signatures amounting to 10-30 percent of *registered voters*, depending upon the population of the local jurisdiction. (Elec. Code, § 11220.)

[38] Kan. Stat. Ann., § 25-4306 [10 percent or more of the votes cast for the office of the officer sought to be recalled at the last general election for the current term of office of the officer sought to be recalled]. The requirements in other states are these: (Alaska Stat., § 15.45.610 [25 percent of those who voted in the last previous general election]; Ariz. Const., art. VIII, pt., § 1 [25 percent of the number of votes cast at the previous general election for the office of the officer sought to be recalled]; Colo. Const., art. XXI, § 1 [25 percent of the number of votes cast in the preceding general election]; Ga. Code Ann., § 21-4-4(a)(1) [15 percent of the number of registered voters at the last election for the office]; Idaho Code, § 34-1702(1) [20 percent of the number of registered voters at the last general election for governor]; La. Rev. Stat. Ann., § 18:1300.2(B) [33-1/3 percent of the total electors in the voting area where the recall election is petitioned]; Mich. Comp Laws Ann. § 168.955 [25 percent of the number

(continued . . .)

the recall petition now before the Court demonstrates, it takes fewer than 900,000 signatures, 6 percent of the state's registered voters and only 2.6 percent of California's population, to trigger an impossibly compacted election schedule and an overflowing ballot of would-be successors. The result has been complete disarray. (*See* Section II above.)

This is truly the tail wagging the dog, government by marginal and extreme political forces. With the 12 percent requirement, a small minority can upset the orderly results of a regularly-held election and hamstring the ability of government to function. If the state is going to have a recall, then surely it must do so by procedures that avoid or at least minimize these anti-republican consequences.

(. . . continued)
of votes cast for candidates for the office of governor at the last preceding general election of the officer sought to be recalled]; Minn. Const., art. VIII, § 6 [25 percent of the number of votes cast for the office at the most recent general election]; Mont. Code Ann., § 2-16-614 [10 percent of the registered voters at the preceding general election]; Nev. Const., art. II, § 9 [25 percent of the number of voters voting in the prior election for the office]; N.J. Stat. Ann., § 19:27A-5 [25 percent of the registered voters in the jurisdiction on the date of the previous general election]; N.D. Const., art. III, § 10 [25 percent of voters at the preceding general election for the office of governor]; Ore. Const., art. II, § 18(2) [15 percent of the voters voting for governor in the previous gubernatorial election]; R.I. Const. art. IV, § 1 [15 percent of total votes cast at the preceding general election for that office]; Wash. Rev. Code Ann., § 29.82.060 [25 percent of the votes cast for all candidates for the office at the last preceding election]; Wis. Const., art. XIII, § 12(1) [25 percent of the total votes cast for the office of governor at the last election for the office]; DC Code Ann., § 1-1001.17(h)(2) [10 percent of registered voters provided that signatures include 10 percent or more of registered voters in each of five or more of the eight wards].

Former Justice Hans Linde of the Oregon Supreme Court has described the importance of the republican Guarantee Clause to the Framers:

> "[T]hey feared that governmental power would be misused from motives of "interest" and "passion," which they meant to contain by designing divided and deliberative institutions of government. The two terms had a long and familiar history in eighteenth century political theory. Interest meant the pursuit of personal self-interest, mainly in the form of wealth. Political "passions" were not selfish personal desires but collective emotions such as love, fear, or hatred. The politics of collective passion appeals to people's identification with one or rejection of another social group for reasons transcending an ordinary political disagreement about policy."
>
> (Linde, *Guaranteeing A Republican Form Of Government: Who Is Responsible For Republican Government?* (1994) 65 U. Colo. L.Rev. 709, 723.)

Few procedures could invite government by faction as readily as a recall election triggered by a mere 6 percent of the electorate, and capable of installing a new governor based on no greater a percentage of support.

There is no rational – let alone substantial or compelling – justification for California's unusually low 12 percent requirement for signatures on a recall petition for statewide offices, especially when elections officials are instructed to ignore the legality of methods used by the proponents to obtain them. Local recall procedures and those in other states require more than twice as many signatures. (*See* footnotes 37

and 38, *supra*.) If one adds to this the prospect of a Governor chosen by a small plurality at a hastily and unfairly organized special election, the result cannot be consistent with a republican form of government. The fear of government by faction that animated the republican Guarantee Clause counsels against the cession of government power to an official who commands such a trivial percentage of the state's popular support.

The courts of this state have recognized as much in analogous settings. For example, this Court's opinion in *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, emphasizes the state's interest in having a winning candidate whose ascendance to office represents more than just the desires of a small fraction of the electorate. The precise question before the Court was the constitutionality of San Francisco's ban on write-in candidates during the mayoral runoff. In upholding the ban, the majority identified the cornerstone of the city's interest as "the centrality of the concept of majority rule in the founding documents of American democracy," even while stating that "[p]lurality rule is not anathema to the federal or state Constitutions." (*Id*. at 183.) Three justices believed that an even more important interest was that of the government in avoiding "the selection of [ ] candidates who are less able to govern because they have received a small proportion of the vote." (*Id.* at 187.) Here, no one can argue that Governor Davis's initial win was any less valid because he received 47 percent of the vote rather than 51 percent. The real problem is that, under the recall provisions, a recall election can be demanded by so few, who can then elect the next Governor with such a small plurality of the vote. As the concurring justices concluded in *Edelstein*, the state's interest in preventing that result is even "weightier" than its interest in a majority vote. (*Id*.)

B. A Federal Court Order Invalidating a Key Component of California's Recall Scheme Exacerbates the Threat to Majority Rule

On July 29, 2003, the federal District Court for the Southern District of California enjoined the Secretary of State from enforcing Elections Code section 11382, which provides:

> No vote cast in the recall election shall be counted for any candidate unless the voter also voted for or against the recall of the officer sought to be recalled.
>
> (Elec. Code, § 11382.)[39]

The practical effect of the federal court's ruling is that the Governor could be recalled by far less than 50 percent of those who vote in the recall election, if a significant number of voters decide to vote only on the succession question itself.

Section 11382 has been part of California's recall procedure since its inception in 1911. Until 1974, it was in the Constitution. As part of the Constitution Revision Commission's effort to simplify the California Constitution, the requirement that a voter vote on the recall issue in order to be able to vote on a successor was placed in statute, but the voters were assured that their rights under the recall process would remain unchanged.[40] Consequently, this section and its invalidation are directly linked to the viability of the recall procedures as a whole.

---

[39] *Partnoy v. Shelley* (S.D. Cal. 2003) ___ F.Supp.2d ___, 2003 WL 21749418, S.D. Cal. No. 03 CV 1460 BTM (JPS), Slip Op., RJN, Exh. S.

[40] Ballot Pamp., November 5, 1974 Election, Prop. 9, RJN, Exh. B. Before the 1974 revision, article XXIII, section 1 of the Constitution stated:

(continued . . .)

During the 90 years in which the recall has been part of California law, section 11382 has been the only assurance that a majority of those participating in the recall election actually want the sitting official removed. That mandatory focus on the question of whether to retain the sitting official is central to the process. Without it, the recall election can easily become something quite different – an election in which the question of retention is merely a side show and the focus is almost entirely on the contest among would-be successors, a group from which the sitting official is excluded. This is not what the people, in adopting the recall, had in mind. The whole point of the recall is the notion that "as the *majority* elects the officer, the *majority* can remove him after election. . . ." (1911 ballot pamphlet (opposing argument), emphasis in original, RJN, Exh. A.)

The Attorney General, in the briefs filed on behalf of the Secretary of State in defense of the statute described it this way:

> Allowing voters to abstain on the recall question would allow those with only an indirect or remote interest in this crucial question to decide who will replace a recalled

---

(. . . continued)

> On [the recall] ballots, . . . there shall also be printed the names of those persons who have been nominated as candidates to succeed the person recalled, in case he shall be removed from office by said recall election; *but no vote cast shall be counted for any candidate for said office unless the voter also voted on said question of the recall of the person sought to be recalled from said office*.
>
> (*Id.* at 33, emphasis added.)

> officer. For example, assume 100 people participate in the recall election, but only 10 of them take a position on whether the official should be recalled, with 6 of them voting "yes" on the recall and 4 of them voting "no." Assume further that all 100 of [the] voters participate in selecting the successor candidate. Neither the recalled official nor California's citizens would ever know whether the official was validly recalled by a majority of the 100 voters who chose to participate in the recall process.
>
> (*Partnoy v. Shelley*, S.D. Cal. No. 03 CV 1460-BTM (JPS), Secretary of State's Response to Plaintiffs' Motion for Judgment on the Pleadings, at 9-10, RJN, Exh. R.)

The only justification for the disruptions caused by a recall is that the people "[h]aving the right 'to hire,' the people should also have the right 'to fire.'" (1911 ballot pamphlet, (argument in favor), RJN, Exh. A.) Because it takes out a central feature of the recall system, the invalidity of section 11382 undermines the integrity of the recall process and jeopardizes "the important state interest of fostering an effectively functioning government and guarding against disruption in state government," and "protecting the integrity and continuity of those officials who were validly elected to office." (Attorney General brief, at 8-9, RJN, Exh. R [explaining the state interests served by section 11382.].)

The Attorney General explained:

> Removing an elected official and replacing him or her without the certainty that a majority of those voters who chose to participate in the recall process actually voted to recall the officer, could lead to chaos and disruption in the

> functioning of state government. [fn.] For example, state constitutional officers are elected every four years (Cal. Const., art V, §§ 2, 11), and those general elections simply present an expected and smooth transition from one administration to the next. By contrast, removing a constitutional officer mid-term would obviously be disruptive to not just that particular office, but all of the constitutional and statutory duties the officer is mandated to carry out.
>
> (*Id.* at 8, footnote omitted.)

The invalidity of section 11382 means that the number of voters who actually vote on the recall is further decreased. At some point, the number falls below the minimum necessary for a government to be able to claim legitimacy as a republican form of government based upon majority will. Unless the Governor is allowed to appear on the ballot as a candidate to assure that the succession election reflects the voter intent, that minimum will no longer be satisfied in California.

CONCLUSION

There can be no doubt that a recall election will be costly – to the state, the counties and the candidates. A recall election will be divisive, no matter what the outcome. And the days leading up to a recall election will be those in which the government of this state is distracted from its ordinary functions by the uncertain fate of its Chief Executive. The citizens of the state should bear these significant costs only if the election itself

passes constitutional muster. To bear these costs, only to learn afterwards that the election never should have taken place, would be a tragedy.

Dated: August 3, 2003

Respectfully submitted,

REMCHO, JOHANSEN & PURCELL

By: _____
Robin B. Johansen
Attorneys for Petitioners