

S117770

**IN THE SUPREME COURT OF CALIFORNIA**  
**En Banc**

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JAMES B FRANKEL et al., Petitioners,

v.

KEVIN SHELLEY as Secretary of State etc., Respondent.

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

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

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

Accordingly, the petition is denied.

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Chief Justice