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SOUTHERN DISTRICT OF CALIFORNIA

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DEPUTY

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11 UNITED STATES DISTRICT COURT FOR THE
12 SOUTHERN DISTRICT OF CALIFORNIA
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14 FRANK PARTNOY, an individual; LAURA
ADAMS, an individual; RACHANA
15 PATHAK, an individual; PETER STRIS, an
individual; JASON WILSON, an individual;
16 and CALIFORNIA INFORMED VOTERS
GROUP, an unincorporated association,

CASE NO.

'03 CV 1460 K JFS

COMPLAINT

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18 Plaintiffs,

19 v.

20 KEVIN SHELLEY, in his official capacity as
Secretary of State for the State of California;
21 SALLY MCPHERSON, in her official
capacity as the Registrar of Voters for the
22 County of San Diego; and CONNY
MCCORMACK, in her official capacity as the
23 Registrar-Recorder/County Clerk for the
County of Los Angeles,

24 Defendants.
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COMPLAINT

1 Plaintiffs, for their complaint herein, allege as follows:

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3 Jurisdiction

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5 1. This action arises under the laws and Constitution of the United States, and
6 federal subject matter jurisdiction over this action exists pursuant to, inter alia, 28 U.S.C.
7 § 1331, 28 U.S.C. § 1343, and 42 U.S.C. § 1971, as more fully appears herein.

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9 Summary

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11 2. This action principally seeks to declare unconstitutional and enjoin the
12 enforcement of California Elections Code § 11382 ("Section 11382"). Section 11382
13 provides: "No vote cast in the recall election shall be counted for any candidate unless
14 the voter also voted for or against the recall of the officer sought to be recalled." Section
15 11382 both (a) unconstitutionally deprives voters in the State of California of their right
16 to vote for successor candidates in recall elections, as well as (b) illegally compels voters
17 to cast a ballot on an issue upon which they cannot or do not wish to record a vote.

18 3. Recall elections conducted in the State of California require simultaneous
19 votes regarding (a) whether or not to recall a selected official, and (b) the selection of the
20 candidate(s) to replace that official, if recalled. Section 11382 expressly compels voters
21 who wish to vote on the second of these issues (i.e., the identity of the successor) to vote
22 on the first (i.e., whether to recall the current official), even if the voter does not wish to
23 record such a vote. Voters may be, and often are, agnostic or morally opposed to voting
24 on the recall of a particular official, but nonetheless have strong feelings (and wish to
25 vote) on the proposed successor(s) to that office. To take a contemporary example, a
26 voter may have no desire to vote regarding whether to recall Gray Davis but nonetheless
27 feel strongly – and wish to vote – about the identity of the new Governor of the State of
28 California if Davis is successfully recalled. Section 11382 states that unless such an

1 individual affirmatively casts a vote whether to recall Davis, his or her vote "shall [not]
2 be counted." Section 11382 thereby deprives eligible citizens of the State of California
3 of their constitutionally protected right to vote.

4 4. By depriving eligible voters of their right to vote for successor candidates,
5 Section 11382 violates the Fourteenth Amendment of the United States Constitution, and
6 denies citizens of California both equal protection and due process. Section 11382
7 further compels eligible voters who wish to vote on the identity of successor candidate(s)
8 to cast a ballot on issues regarding which they do not wish to vote in violation of both the
9 First and Fourteenth Amendments, as well as the right not to vote implicitly recognized
10 by the Ninth, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments.
11 Application of Section 11382 is finally inconsistent with due process, equal protection
12 and federal law by compelling individuals to understand and effectively manifest
13 participation in the recall vote as a precondition to counting their vote for a successor
14 candidate.

15 5. This action accordingly requests issuance of (a) a judicial declaration that
16 Section 11382 is unconstitutional and conflicts with federal law, (b) a judicial declaration
17 that eligible voters are entitled to have their votes for successor candidates in California
18 recall elections counted regardless of whether or not that voter cast a ballot for or against
19 the recall of the officer sought to be recalled, (c) an injunction that prohibits defendants
20 from enforcing Section 11382, (d) an injunction that prohibits defendants from preparing
21 actual ballots, sample ballots, or voter instruction materials for California recall elections
22 that inform voters that they must cast a vote on the recall for their vote for any successor
23 candidate to be counted, and (e) an injunction that precludes defendants from failing to
24 count any vote based upon noncompliance with Section 11382.

25 6. Every vote counts. Every vote should be counted. This action seeks the
26 vindication of these longstanding, hard-fought democratic principles.

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The Parties

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3 7. Plaintiffs Laura Adams and Frank Partnoy are individuals, are citizens of
4 the State of California, reside in the County of San Diego, are eligible and registered
5 voters in the County of San Diego, and are eligible and intend to vote in any future recall
6 election for any statewide or local office, including but not limited to any recall election
7 regarding the Governor of the State of California. Plaintiffs Rachana Pathak, Peter Stris
8 and Jason Wilson are individuals, are citizens of the State of California, reside in the
9 County of Los Angeles, are eligible and registered voters in the County of Los Angeles,
10 and are eligible and intend to vote in any future recall election for any statewide or local
11 office, including but not limited to any recall election regarding the Governor of the State
12 of California.

13 8. Plaintiff California Informed Voters Group is a voluntary, unincorporated
14 association whose membership consists, inter alia, of individuals who are citizens of the
15 State of California who are eligible and registered voters and who intend to vote in future
16 recall elections for statewide and local offices, including but not limited to recall
17 elections of the Governor of the State of California.

18 9. Defendant Kevin Shelley holds public office as Secretary of State of the
19 State of California, and is sued herein exclusively in his official capacity. Defendant
20 Sally McPherson holds public office as the Registrar of Voters of the County of San
21 Diego, and is sued herein exclusively in her official capacity. Defendant Conny
22 McCormack holds public office as the Registrar-Recorder/County Clerk of the County of
23 Los Angeles, and is sued herein exclusively in her official capacity. Defendants have
24 performed each act identified herein, and have applied and enforced and will continue to
25 apply and enforce, Section 11382 in their official capacities and under color of state law.

Factual Allegations

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3 10. Section 11382 has been applied in every previous local and statewide recall
4 election conducted in the State of California. Absent judicial action, Section 11382 will
5 continue to be applied and enforced according to its mandatory terms in each and every
6 future local and statewide recall election. Pursuant to Section 11382, in each such local
7 and statewide recall election, no vote cast has been or shall be counted for any candidate
8 unless the voter also voted for or against the recall of the officer sought to be recalled.

9 11. Defendants have previously and will continue to apply and enforce Section
10 11382 pursuant to its terms absent judicial action. Defendants have refused to count and
11 shall continue to refuse to count any vote cast for any candidate in any local or statewide
12 recall election unless the voter also voted for or against the recall of the officer sought to
13 be recalled.

14 12. Plaintiffs include individuals who are eligible and desire to cast valid and
15 counted votes for successor candidates in local and statewide recall elections but whose
16 votes will not be counted pursuant to Section 11382 because these individuals will not
17 simultaneously vote for or against the recall of the officer sought to be recalled. Some of
18 these individuals are morally opposed to voting on the recall itself, some are agnostic on
19 the merits of the recall, and others will for a variety of other reasons not cast a ballot on
20 the issue of the recall. Each such individual nonetheless desires to and will cast a vote
21 for a successor candidate. Plaintiffs also include individual eligible voters who would
22 prefer not to vote on the recall itself but who, when informed of the dictates of Section
23 11382, feel compelled to and hence will cast a ballot on the recall notwithstanding their
24 contrary preference exclusively to avoid the possible non-counting by defendants of their
25 vote for a successor candidate pursuant to the mandatory provisions of Section 11382.
26 The efforts of California Informed Voters Group to ensure informed participation by
27 eligible voters have also been harmed by Section 11382, particularly given the efforts
28 required to be diverted by this group to assessing how preferences can be effectively

1 manifested notwithstanding Section 11382 rather than addressing the merits of these
2 underlying preferences. Plaintiffs finally have been and will be adversely affected by the
3 confusion resulting from application of Section 11382; in particular, from voters who
4 believe that Section 11382 requires a particular vote on the merits of the recall in order to
5 have their vote on the successor counted.

6 13. Plaintiffs allege, on information and belief, that the next local or statewide
7 recall election in the State of California will involve the present efforts to recall Gray
8 Davis, the current Governor (the "Davis Recall"). On March 25, 2003, Defendant Kevin
9 Shelley certified the recall petition in the Davis Recall for circulation. On June 24, 2003,
10 Defendant Kevin Shelley certified that 376,008 unverified signatures on this recall
11 petition had been reported, and instructed county elections officials to begin verifying
12 signatures. By July 16, 2003, proponents of the Davis Recall presented to elections
13 officials petitions that they indicated had been validly signed by over 1,600,000 eligible
14 registered voters, a figure in excess of the 897,158 signatures required to compel a recall
15 election. Further, California Elections Code § 11011 provides: "Unless and until it is
16 otherwise proven upon official investigation, it shall be presumed that the petition
17 presented contains the signatures of the requisite number of registered voters." On July
18 19, 2003, Defendant Kevin Shelley directed county elections officials to verify and report
19 by July 23, 2003, all signatures received on recall petitions through July 16, 2003. On
20 July 22, 2003, at 9:53 p.m., Defendant Kevin Shelley reported that local election officials
21 had officially reported 1,156,448 signatures and had verified 678,472 of these signatures
22 as valid, with substantial additional signatures and verifications (particularly from Los
23 Angeles and Orange County) due to be reported on July 23, 2003. On July 23, 2003, on
24 information and belief, elections officials reported to Defendant Kevin Shelley a total
25 number of valid signatures sufficient to require him to perform the mandatory acts
26 required by California Elections Code §§ 11108 & 11109 and to compel the Lieutenant
27 Governor of California to perform the mandatory acts required by California Elections
28 Code § 11110 and, as a result, conduct the Davis Recall and place the Davis Recall

1 before the voters, including but not limited to the application and enforcement by
2 defendants of Section 11382 in this statewide election.

3 14. Defendants will apply and enforce Section 11382 pursuant to its terms in
4 the Davis Recall, as required by California law and their official duties. Defendants
5 Sally McPherson and Conny McCormack, and subordinates acting at their direction and
6 under color of their offices and as a result of their official dictates, will, pursuant to
7 Section 11382, refuse to count votes, including those of the above-identified plaintiffs,
8 for any candidate in the Davis Recall unless the voter also voted for or against the recall
9 of Gray Davis. Defendant Kevin Shelley, and subordinates acting at his direction and
10 under color of his office and as a result of his official dictates, will compile, prepare, file,
11 and certify the results of the Davis Recall, and shall mail any certificate of election,
12 pursuant to Section 11382, without the counting of any votes, including those of the
13 above-identified plaintiffs, for any candidate in the Davis Recall unless the voter also
14 voted for or against the recall of Gray Davis.

15 15. Further, in each local and statewide recall election, both past and future,
16 including but not limited to the Davis Recall, defendants have prepared and will prepare
17 and disseminate to each registered California voter, as required by law, voter instructions
18 and a sample ballot, and have and will further prepare the actual ballots to be used in
19 such recall elections. Each such document has stated and shall state that in order for the
20 voter's ballot on the successor candidate to be counted, that voter is required to vote on
21 the merits of the recall itself, as required by Section 11382.

22 16. Section 11382 unconstitutionally deprives plaintiffs of their right to vote
23 and the right to have their votes counted, in violation of both equal protection and due
24 process protected by the Fourteenth Amendment to the Constitution. Furthermore,
25 Section 11382 does so through express discrimination based upon the content of the
26 voter's beliefs, and deprives the right to vote only from individuals who hold particular
27 political convictions; i.e., voters who are agnostic or opposed to voting on the recall.
28

1 This content discrimination only furthers the unconstitutional deprivation of the
2 plaintiffs' rights to vote and to have their votes counted.

3 17. Section 11382 further violates the First Amendment to the Constitution by
4 compelling plaintiffs to cast an affirmative ballot on the recall – a matter on which they
5 do not wish to vote, speak, or manifest an opinion – as a precondition to their ability to
6 cast a valid ballot for a successor candidate. Section 11382 thereby penalizes plaintiffs
7 from engaging in constitutionally protected speech and conduct, including their right to
8 abstain on a particular ballot issue (the recall), in violation of the First Amendment. This
9 statute also compels individuals who wish to cast a valid ballot regarding the identity of a
10 successor candidate to take an affirmative stand on an issue (the recall) upon which they
11 prefer not to express an opinion, in further violation of the First Amendment.

12 18. Finally, by failing to count the votes of individuals who choose to abstain
13 on the merits of the recall, Section 11382 deprives plaintiffs of their right not to vote, a
14 right both protected by the First and Fourteenth Amendments and implicitly recognized
15 by the Ninth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments. Plaintiffs have the
16 right not to vote on the merits of the recall without a consequent deprivation of their right
17 to vote for the identity of a future elected official (e.g., the Governor).

18 19. Section 11382 not only unconstitutionally deprives plaintiffs of their right
19 to vote and to have their votes counted, but does so without justification. Voters who are
20 agnostic on the merits of a recall have an equal ability and right to express a preference
21 amongst competing successor candidates as those voters who are either for or against the
22 recall. That a voter wishes to abstain on the merits of the recall says nothing whatsoever
23 about her ability or desire to vote for or against proposed successor candidate(s). There
24 is simply no adequate governmental justification for the deprivation of the right to vote
25 that is deliberately affected by Section 11382.

26 20. Section 11382 instead works only to distort the electoral and democratic
27 process. By depriving selected individuals of their rights to vote and to have their votes
28 counted, Section 11382 unconstitutionally deprives plaintiffs of the right to a regime of

1 "one person, one vote." Furthermore, rather than advance an accurate reflection of voter
2 preferences, Section 11382 serves only to distorts electoral results. Voters who prefer to
3 abstain on the merits of a recall but who wish to have their votes for a successor counted
4 are compelled to cast a ballot on the recall even though the resulting ballot does not in
5 fact express their preferences. For example, a voter who is in fact agnostic on the merits
6 of the recall may decide to cast a "Yes" ballot not because she actually so believes, but
7 merely because she wishes to have her vote for a particular successor candidate counted.
8 Section 11382 may similarly compel a committed agnostic to flip a coin on the recall –
9 voting "Yes" for heads or "No" for tails – in order to permit their vote for a successor
10 candidate to be counted. That Section 11382 counts – indeed, encourages – the votes of
11 the coin-flipper, but refuses to count the votes of the principled voter who abstains on the
12 recall, only highlights the irrationality of Section 11382.

13 21. Section 11382 both confuses voters and effectively deprives individuals of
14 their constitutional right to vote, to have their vote counted, and to a democratic regime
15 of "one person, one vote." Moreover, to the degree that Section 11382 deprives eligible
16 voters of their right to vote based upon their inability to understand the ballot instructions
17 that describe Section 11382 or their inability to come to a conclusion regarding the merits
18 of the recall, Section 11382 further conflicts with 42 U.S.C. § 1973aa, and is additionally
19 invalid for that reason as well.

20 22. Section 11382 engenders additional deleterious electoral consequences as
21 well, ones that are only highlighted by recent electoral events. Voters occasionally cast
22 invalid votes by mistake; for example, they may accidentally punch both the "Yes" and
23 "No" holes on the recall proposition (an "overvote"), may overlook that portion of the
24 ballot entirely or forget to vote thereupon notwithstanding their contrary intention (an
25 "undervote"), or for a variety of reasons may fail to vote on the recall in a manner that
26 will effectively be recorded by defendants (e.g., an "hanging chad"). Section 11382 both
27 irrationally and unconstitutionally declares that any voter who casts an undervote, marks
28 an overvote, or leaves a hanging chad on the first (recall) portion of the ballot cannot and

1 will not have their vote for a successor candidate counted on the second portion of the
2 ballot even if that voter has completed the second portion of the ballot in an entirely
3 proper manner and in a way that indisputably manifests the voter's intent. There is no
4 justification for the deprivation of the constitutional right to vote in such a setting.

5 23. The application and enforcement of Section 11382 by defendants threatens
6 immediate and irreparable injury to plaintiffs. On information and belief, within the next
7 90 days, the recall and successor candidates will be presented to the voters (including the
8 plaintiffs) in connection with the Davis Recall; most likely, on Tuesday, September 30,
9 2003. Defendants will enforce and apply Section 11382 thereto. Defendants will also
10 enforce and apply Section 11382 substantially prior to the actual election, and will soon
11 commence, inter alia, (a) the preparation and dissemination of sample and actual ballots
12 in connection with the Davis Recall that contain instructions to the voters that no vote for
13 a successor candidate will be counted unless the voter also casts a ballot for or against
14 the recall itself, and (b) the preparation and installation of computerized programs and
15 other counting instructions, alongside the dissemination of such items, that compel the
16 counting (and non-counting) of votes consistent with the dictates of Section 11382.
17 Absent judicial action, plaintiffs will accordingly be both harmed and unconstitutionally
18 deprived of their rights, under color of state law, in connection with the application and
19 enforcement by defendants of Section 11382 in the Davis Recall, and will and are
20 suffering irreparable injury therefrom.

21 24. The need for prompt judicial action in connection with the application and
22 enforcement of Section 11382 to the Davis Recall is especially necessary given the harm
23 that would arise from any failure to issue injunctive, pre-election relief. Because Section
24 11382, as well as the threat that Section 11382 might apply, will compel particular voters
25 to cast an affirmative ballot on the merits of the recall even if these voters hold a contrary
26 preference in order to ensure that their vote on a successor candidate will be counted, the
27 issuance of injunctive, pre-election relief is essential.

28


1 persuade or inform voters that their vote on a successor candidate will not be counted
2 unless they also cast a vote for or against the recall;

3 (e) Issuance of a preliminary and permanent injunction that bars defendants, as
4 well any individual, agency, or entity acting on their behalf or pursuant to their authority,
5 from failing to count any ballot based upon actual or alleged noncompliance with Section
6 11382;

7 (f) All costs and attorneys' fees incurred by plaintiffs herein; and

8 (g) Any such further relief as this Court deems proper.
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12 DATED: July 23, 2003

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14 By 
15 _____
16 Shaun P. Martin
17 Counsel for Plaintiffs
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