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6 UNITED STATES DISTRICT COURT
7 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

8 FRANK PARTNOY, et. al,) Case No.: No. 03-CV-1460K JFS
9 Plaintiff,) MOTION FOR LEAVE TO INTERVENE,
10 vs.) TO RECONSIDER ORDER, TO VACATE
11 KEVIN SHELLEY, et al.,) INJUNCTION, OR IN THE
12 Defendant) ALTERNATIVE TO GRANT STAY
13) PENDING APPEAL
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26 Scott J. Rafferty (hereinafter "Rafferty" or
27 "Intervenor"), who appears in proper person, seeks to intervene
28 for the purposes of requesting reconsideration of the Memorandum
29 Decision dated July 29, 2003 and the accompanying Final Judgment
30 of Declaratory and Injunctive Relief. In the alternative to
31 vacation by this Court, Rafferty seeks a stay of the order and
32 injunction pending appeal.

33 I. STATEMENT OF INTERESTS

34 Rafferty is a Democratic Party activist resident in
35 Mountain View and Santa Clara County. He is an elector in these
36 jurisdictions, as well as the 22nd Assembly District, the 13th
37 Senate District, and in a number of districts for local
38 authorities with elective officials. Rafferty seeks to persuade

1 and inform voters to vote against the recall of Governor Davis,
2 including the provision of advice and the preparation and
3 dissemination of documents that recommend casting negative
4 votes. He intends to include arguments that California law (but
5 for this decision) prohibits casting or counting votes for
6 replacements on ballots that fail to vote "yes" or "no" on the
7 question of recall. He believes prospective candidates and
8 voters should assume a possibility that this injunction will be
9 vacated prior to the election; therefore he intends to persuade
10 and inform voters that there vote for a successor candidate may
11 not be counted unless they cast a vote for or against a recall.

12 The Final Judgment imposes a prior restraint on
13 intervenor's right to make such advocacy to encourage persons to
14 vote against the recall of Governor Davis. This information is
15 material to decisions currently being made by political
16 organizations in which Rafferty is a member, including decisions
17 on whether to recruit candidate and which candidates to recruit,
18 which are affected by changes in California Election Law that
19 the judgment effects. The injury is immediate, since
20 candidates must file on or before August 9. The loss of
21 intervenor's free speech rights has occurred and will continue
22 to occur, whether or not any recall election is ever held
23 statewide or in any jurisdiction in which he is an elector.

24 The order also appears to effect the manner in which
25 the intervenor's vote would be counted in the event a recall

1 election is held. The order enjoins persons, including election
2 officials, from enforcing Election Code §11382, which prohibits
3 counting votes for replacement candidates cast by persons who do
4 not vote "for or against the recall." It also enjoins the
5 Secretary of State from including the provisions of Election
6 Code §11382 in voter instruction materials, as he is required to
7 do under California Law. The order enables persons to cast
8 votes in violation of California Law, which could alter the
9 result of any gubernatorial recall election. The standing of
10 electors to compel accurate ballot materials in well-established
11 in the state courts, which for the reasons stated below, have
12 exclusive jurisdiction over this dispute. See Miller v. Greiner,
13 (1964) 60 Cal. 2d 824, 830.

14 Intervenor's interests are not adequately represented
15 by other parties. Defendants McPherson and McCormick have no
16 authority to represent the interests of residents of Santa Clara
17 County in any capacity. Defendant Shelley may not properly
18 represent intervenor's interests as a Democratic Party activist
19 and an advocate against the gubernatorial recall, since this
20 would interfere with his role to enforce the election law
21 impartially. Additionally, it appears that Defendant Shelley
22 did not suggest the absence of subject matter jurisdiction in
23 this Court, which demonstrates a failure adequately to represent
24 intervenor's interest as a California elector.

25 II. REASONS THIS COURT SHOULD VACATE ITS JUDGMENT

1 A. The Court Lacks Subject Matter Jurisdiction Under
2 Settled Abstention Doctrines

3 The California Supreme Court is currently considering
4 two petitions for writ of mandate, which would eliminate the
5 selection of candidates in any gubernatorial recall. Byrnes v.
6 Bustamante, No. S117832 and Frankel v. Shelley, No. S117770. A
7 grant of relief in either of these cases would moot the
8 controversy asserted by plaintiffs, because no election of
9 candidates to replace the governor would occur. There is no
10 indication that the Supreme Court will fail to decide these
11 cases in a timely manner, prior to the preparation of any
12 ballots that may be required.

13 The State of California has a powerful interest in
14 avoiding unnecessary federal intrusions into the most severe
15 constitutional crisis of its history. This Court may retain
16 jurisdiction to act in case the Supreme Court determines that
17 the immediate election will proceed in the form to which
18 plaintiffs have objected. However, the order (as currently
19 written) makes an unnecessary determination that state
20 legislation violates the United States Constitution. Instead of
21 simply staying the unconstitutional election or granting
22 declaratory relief limited to the constitutional question, which
23 is the only appropriate form of relief, the decision
24 affirmatively imposes a new recall process that could result in
25

1 the removal of the governor or other officials in the future who
2 might not be removed under the current scheme.

3 The Court does not merely enjoin the recall election
4 that it has found to be unconstitutional. It prescribes how the
5 Secretary of State is to count the vote. The result is that a
6 single federal judge, not elected to any state office, may
7 determine the identity of the next governor of California. This
8 is an unacceptable result that has no basis in the law of
9 federal jurisdiction.

10 To fashion its injunctive relief, the Court construed
11 an additional statutory question - the "apparent
12 inconsistencies" between two statutory sections (and implicitly
13 resolved a related ambiguity in Article II, §15 of the
14 California Constitution as to the calculation of "majority").
15 This improperly places the Court in the role of legislator,
16 altering the political balance inherent in the recall procedure
17 in ways that may not be predictable in this case, or future
18 cases. The Court extended the injunction to apply to "any
19 recall election in California" administered by any agency with
20 actual notice of the Order. It has done so despite the fact
21 that all of the plaintiffs appear to reside in charter counties,
22 in which the challenged statute does not apply to local recalls.
23 See Scheafer v. German (1916) 172 Cal. 338. It is not
24 appropriate affirmatively to prescribe recall machinery for both
25 state and local elections based on the very limited record of

1 this expedited case. None of the plaintiffs appears to have
2 standing to contest how statutory recalls are conducted at the
3 local level, because they all live in charter counties, to which
4 the statute does not apply.

5 This decision is an affront to the California Supreme
6 Court, which has shown every indication of deciding all
7 constitutional questions regarding the recall in an expedited -
8 but fully informed - manner. As the Supreme Court explained in
9 Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 500
10 (1941),

11 In this situation a federal court of equity is asked to
12 decide an issue by making a tentative answer which may be
13 displaced tomorrow by a state adjudication. . . . The reign
14 of law is hardly promoted if an unnecessary ruling of a
15 federal court is thus supplanted by a controlling decision
16 of a state court. The resources of equity are equal to an
17 adjustment that will avoid the waste of a tentative
18 decision as well as the friction of a premature
19 constitutional adjudication.

20 This Court has assumed that the respondents in this
21 case will conduct an election to choose a provisional successor
22 to the governor in the event a recall is successful. This is
23 nothing more than a "forecast of state law." *Id.* A decision by
24 the California Supreme Court that the Lieutenant Governor and
25 the Secretary of State cannot conduct a two-part election moots
the constitutional issue. While this decision may not come
tomorrow, the state court determination will almost certainly be
made prior to August 16, 2003, since the California Supreme
Court is aware of the same deadline and appears to be acting

1 with extreme expedition. (Responses from the state were
2 required by noon, Monday, August 4, 2003).

3 A definitive ruling on the state issues could obviate
4 the need for this constitutional determination. It is difficult
5 to imagine a more "sensitive" area of state concern than the
6 integrity of its executive authority. For these reasons, this
7 Court must abstain until the California Supreme Court resolves
8 existing state law challenges to "part 2" of the gubernatorial
9 recall. Fireman's Fund Ins. V. City of Lodi, 302 F.3d 928, 939
10 (9th Cir. 2002).

11 Alternative bases for abstention exist. In Byrnes v.
12 Bustamante, petitioners have invoked the exclusive jurisdiction
13 of the Supreme Court to resolve issues of gubernatorial
14 succession. This brings the case within the additional basis
15 for abstention stated in Burford v. Sun Oil, 319 U.S. 315 (1943)
16 as construed by United States v. Morros, 268 F.3d 695, 705 (9th
17 Cir. 2001). This state has concentrated disputes about
18 gubernatorial succession "in a particular court [here, its
19 highest court]; the federal issues cannot be separated easily
20 from complex state issues with respect to which state courts
21 might have special competence; and third, that federal review
22 might disrupt state efforts to establish a coherent policy." No
23 state policy has more importance than the integrity and
24 continuity of the State's own executive authority. To the
25 extent that the order applies to hypothetical future recalls in

1 jurisdictions in which none of the plaintiffs live, it "presents
2 difficult questions of state law bearing on policy problems of
3 substantial public importance whose importance transcends the
4 result in the case then at bar," Colorado River Water Cons.
5 District v. United States, 424 U.S. 800, 814 (1976), citing
6 Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25
7 (1959)

8 The expedited nature of the process in this Court has
9 deprived California citizens of the normal opportunities to be
10 heard. In this circumstance, it is appropriate to take an
11 especially restrained view of federal jurisdiction.

12 The undersigned has notified the California Supreme
13 Court of this decision as it was reported in newspapers and will
14 submit copies of the decision and order, which were received
15 today. The opinion will have persuasive effect even if the
16 injunction and the holdings interpreting California statutes are
17 vacated. The plaintiffs in this case are free to present their
18 federal constitutional arguments to the California state courts
19 or to reserve the right to invoke the jurisdiction of this Court
20 in the event that a live controversy exists after the Supreme
21 Court decides issues of state law. The undersigned expects to
22 argue that the challenged characteristic is not a severable part
23 of the carefully balanced electoral process and that only
24 appropriate federal remedy is to enjoin the affected recall
25 elections until a state court order or state legislation

1 establishes a process consistent with the United States
2 Constitution. Any other result places a federal judge in the
3 position of potentially determining the outcome of state
4 elections.

5 Therefore, the undersigned requests that this Court
6 vacate its opinion and order and reserve jurisdiction over
7 plaintiffs' claims without prejudice to the reinstatement of
8 relief in the event that the California Supreme Court decides
9 the state law issue in a manner that allows voters to elect a
10 replacement for the governor. See NAACP v. Button, 371 U.S.
11 415, 427 (1963).

12 B. THE COURT SHOULD NOT SPECIFY HOW ABSTENTIONS ARE
13 TALLIED, WHICH RAISES A COMPLEX ISSUE OF STATE
14 ELECTION LAW THAT IS WHOLLY INDEPENDENT OF THE FEDERAL
15 CONSTITUTIONAL JURISDICTION CLAIMED BY THIS COURT.

16 If either Frankel v. Shelley or Byrnes v. Bustamante
17 prevail, there will either be no recall election or there will
18 be no second question. In either event, the hypothetical
19 dispute created in a two-part election will be avoided, so there
20 is no case or controversy. In this event, the Court lacks
21 jurisdiction to issue a permanent injunction and declaratory
22 judgment that purports to affect all future recalls in the State
23 of California.

24 However, legislating a reformulated recall procedure is
25 inappropriate even if the California Supreme Court allows a two-
part recall to proceed. The authority of this Court is limited
to an injunction of the federal constitutional violation; it may

1 not properly reconstitute the recall process in a manner that
2 alters the political balance that the Legislature and electorate
3 struck in adopting and amending the provision.

4 Furthermore, the purported conflict between sections 11383
5 and 11384 is completely independent of the constitutional
6 dispute. Prior to this Court's ruling, the number of votes on
7 the first question was, by operation of law, no less than the
8 number of votes on the second question. However, the phrase
9 "votes at an election" was a term of art well understood to the
10 framers of the recall provision in 1911.¹ It requires a majority
11 of all ballots cast at the same election, including those that
12 abstained from both questions of the recall proposal. So, if 20
13 people voted "no" on the question of recall and 10 voted "yes,"
14 but 70 other voters came and voted only on other measures,
15 Section 11383 would not affirmatively provide that the officer
16 would continue in office. However, Section 11384 would clearly
17 not provide for the officer's removal, no matter how term
18 "recall proposal" is construed. Therefore, the two sections do
19 not collectively exhaust all conceivable outcomes - whether or
20 not persons abstaining on the first question (to recall) are

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23 ¹ Prior to 1911, a number of electoral laws required a majority of "votes cast" in an election to effect legislative
24 action, such as an initiative, referendum, or adoption of a charter or organizational law. The language "one-half or
25 of total ballots, not a majority of persons voting "yes" or "no" on the specific questions. As such, abstentions had
the same practical effect as "no" votes in counting against direct action. People v. Town of Berkeley, 102 Cal. 298,
305-07 (1894), Santa Rosa v. Bower, 142 Cal. 229, 301 (1904). "Ballot majorities" had the effect of preventing
constitutional or charter changes from occurring without a clear majority of the electorate. Where an absolute
majority of all ballots cast was not required, the law referred to a "majority of votes on the question."

1 allowed to vote on the possible second question (to elect a
2 replacement).

3 Although intervenor has not had an opportunity to review
4 the complaint or transcript, there is no conceivable basis for
5 this Court to exercise jurisdiction over the issue of how
6 abstentions are counted on the first recall question. There is
7 no federal constitutional reason presented why removal cannot
8 require an absolute majority of ballots cast at the "recall
9 election." In this case, abstentions have the same effect as
10 votes against recall. If either plaintiffs or defendants have
11 disputes about the tabulation of votes, they need to be resolved
12 in a state court.

13 It is particularly ironic that the Court claims that this
14 extraordinary intrusion into state election law is justified by
15 the maxim that "statutes must be so construed that the whole, if
16 possible, may stand." This principle restrains judicial power
17 to annul the will of the people as expressed in legislation.
18 This legislation did not stand. After declaring a state statute
19 unconstitutional, a federal court does not have a license to
20 construe parts of the statute that are both independent of the
21 constitutional infirmity and inseparable parts of the political
22 balance sought by the offensive legislation. This is the very
23 opposite of deference to the elected Legislature.

24 In the event that a gubernatorial recall election is held
25 on October 7, 2003, there may be few abstainers. However, the


1 effect of this ruling in a close election would be to change the
2 identity of the next Governor of a sovereign state. The ruling
3 is likely to have very dramatic effects in future local recalls,
4 which may be buried in lengthy ballots and have large numbers of
5 abstainers. A federal court should not extend its jurisdiction
6 to interpret state law when the result has such dramatic
7 political consequence.

8 For both reasons, this Court has only one option should the
9 California Supreme Court rule that the two-part recall can
10 proceed - to enjoin the conduct of any statutory recall until
11 the Legislature has enacted a constitutional recall statute.

12 III. GROUNDS FOR STAY PENDING APPEAL

13 In the alternative to an order vacating the injunction and
14 opinion, intervenor requests a stay pending appeal pursuant to
15 Rule 62(c). The stay will permit plaintiffs or other parties to
16 seek appropriate construction of the independent state law
17 questions from state courts on an emergency basis.

19 Dated this 6th day of August,
20 2003

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