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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FRANK PARTNOY, et. al, Plaintiff, vs. KEVIN SHELLEY, et al., Defendant	Case No.: No. 03-CV-1460K JFS REPLY IN SUPPORT OF MOTION TO INTERVENE

I. SUMMARY OF RELIEF REQUESTED

The Court should (1) grant Rafferty leave to intervene, (2) amend its opinion to remove the construction of §11383, and (3) vacate clauses (2), (3) and (4) of the permanent injunction dated July 29, 2003 on the basis that precedent precludes this Court from altering political rules in an imminent state election. This outcome will serve important values of federalism by allowing the State Legislature to conform the political mechanism that it has enacted to the requirements of the United States Constitution. In the event that the Court concludes that it may enjoin the imminent election, it should enjoin its conduct altogether until the Legislature has adopted compliant electoral procedures.

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Rafferty is not seeking reconsideration of the Court's determination that the existing regime is unconstitutional, without prejudice to a possible appeal on this issue. Although Rafferty believes that his argument in favor of abstention had merit when made[1], in light of further review of the current status of these cases, he no longer contests the jurisdiction of this Court on this basis.

Rafferty continues to believe that precedents, including Supreme Court authority, prevent this Court from altering the rules of an imminent election based on a constitutional violation. This is particularly the case whether the court's injunction could result, or appear to result, in the removal of the Governor of a state who would not be removed under the political process that has been embedded in the state constitution and statutes for 92 years. Rafferty prefers the less radical intervention of enjoining recall elections until the Legislature has conformed the statute. However, he acknowledges convincing authority that the Court must allow the imminent election to proceed according to state law, even if it contravenes the Constitution. These precedents are particularly compelling here where plaintiffs have attacked a 92-year old statute just 76 days before a gubernatorial election.

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[1] Plaintiffs' authority for the proposition that state actors can waive abstention (Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 479 (1977)) involves Younger abstention, which can require protracted state proceedings. The same case allows an intervenor to argue Pullman abstention notwithstanding the purported "waiver." We now know that the price paid for recognizing the important values of federalism would have been two days' delay in a case that was never timely.

Unless plaintiffs successfully distinguish these precedents, there is no "emergency" because the Court cannot alter the rules in the upcoming election. The "rush to judgment" in six days has seriously prejudiced both the procedural rights of Rafferty and other electors and their substantive right to continue to be governed by Gray Davis until and unless he is removed from office in accordance with state law.

II. PROCEDURAL BACKGROUND

a. The Challenged Statute Has Existed for 92 Years.

In 1911, Senator Gates amended Senate Constitutional Amendment No. 23 to strike a political balance in the recall mechanism for state officers: (1) the officer sought to be recalled would not be allowed to run to succeed himself, and (2) voters who failed to vote "yes" or "no" on the officer's retention would not vote for his successor. Prior to this amendment, it was unambiguous that abstentions on the first question were counted as "no" votes.[2] The legislative compromise was adopted by the voters. In 1974, the constitutional recall provisions were extended to some local jurisdictions (but not San Diego and Los Angeles Counties) and the terms of the legislative compromise was removed to statute. The statutory language also required a majority of votes "in the . . .

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[2] This understanding is based on Hichborn's commentaries, and is subject to further research. The California Supreme Court has found his views "particularly illuminating" Rossi v. Brown, 9 Cal. 4th 688, n.7 (1995).

election," which is a term of art in California law for including abstentions as part of the denominator from which a majority is calculated. Except for numbering changes, the statute has been unchanged for almost 29 years.

b. The Challenge to an Imminent Election was Untimely.

Plaintiffs waited until July 23, 2003 to challenge this 92-year old statute. By this time, the Secretary of State had certified that there were sufficient signatures to require an election to determine whether to recall Governor Davis. Although the complaint recites that the plaintiffs "intend to vote in any future recall election for any statewide or local office," they offer no explanation for delaying their action until a period less than 80 days before a statewide recall. Plaintiffs successfully sought expedited action from this Court without disclosing Supreme Court authority that has precluded injunctive relief against imminent elections, even where the right to vote has been abridged on account of race. See, e.g., Fortson v. Morris, 385 U.S. 231, 236 (Dec. 12, 1966), reh. denied 385 U.S. 1021 (Jan. 9, 1967) (extended grace period to allow malapportioned legislature to select governor); Whitcomb v. Chavis, 396 U.S. 1064 (1970) (mem.) (state given time to enact statutes to correct the constitutional infirmity); Oden v. Brittain, 396 U.S. 1210 (1969); *see also* Chisom v. Roemer, 853 F.2d 1186, 1189 (5th Cir. 1988) and cases cited therein.

The Supreme Court's principles in Whitcomb and Forston apply with special force to this case, in which the Court has expressed uncertainty as to the "reasons for §11383 [that] existed in 1911." Non-expedited judicial procedures can permit development of the historical record. Even in Roe v. Wade, 410 U.S. 113 (1973), which involved the safety of literally millions of affected women, the Court did not rush to declare state statutes unconstitutional in six days solely because a single constitutional violation presented itself. It is frivolous for plaintiffs to suggest that "drop dead date" exists that compels this Court casually to disregard the potent concerns of comity and federalism. This political process that has already been underway for more than six months; intervention was already untimely on July 23, 2003.

c. The Court's Opinion and Injunction Creates a Significant Possibility that Governor Davis Will be Removed Based on a Process Never Enacted by the People or their Legislature

This Court issued an opinion and permanent injunction on July 29, 2003, six days after the filing of the complaint. In lieu of (1) entering a prospective injunction without effect on the impending election or (2) enjoining the impending election until the legislature could enact a constitutional recall mechanism, this Court red-pencilled the unconstitutional regime, removing part of the political balance that could help the Governor remain in office (allowing "part 1" abstainers to vote in "part 2") while continuing the balancing provision that

excludes him from running in "part 2." The Court did not restore the status quo, as it was before the unconstitutional Gates amendment, which would have counted these abstentions as "no" votes. Instead, the Court construed "votes at the . . . election" in Election Code §11383 to mean the same as "votes on the question," without acknowledging any awareness of contrary state law authorities, which define "votes at the election" to include abstentions. The complaint did not seek this relief.

The Court also entered a permanent injunction prohibiting, inter alia, "any individual, agency, or entity with actual notice of this order . . . {from} attempt[ing] to persuade or inform voters that their vote for a successor candidate will not be counted unless they also cast a vote for or against the recall." This complaint did not seek this relief.

It is difficult to understand why the Court went beyond the complaint to alter certain recall provisions, but not others that were more integral to the political balance that the people enacted in 1911. The Court did not resolve Governor Davis's claim that his exclusion from Part 2 also violates the equal protection clause, although it was an integral part of the Gates Amendment. On the other hand, the purported ambiguity in Election Code §11383 exists independent of the current dispute;[3]

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[3] The opinion attributes to "defendants" the proposition that "strik[ing] down §11382 may create a situation where uncertainty arises in the interpretation of [§11383]." This argument does not appear in the Secretary of State's Points and Authorities and it appears that the Court may not have had the benefit of California caselaw addressing the alleged "uncertainty." People v. Town

given its technical meaning, "votes in the election" would include blank ballots and ballots that voted in no part of the recall, but only on other propositions. The only unifying theme behind the Court's order is that each component makes it more difficult for Governor Davis to survive the court-structured recall process and to remain in office.

If, on October 8, 2003, the vote is 40% to remove, 35% to retain, and 25% abstaining, the People of California will know that Governor Davis was removed not by any legislation that they enacted (or by any interpretation of the state courts), but by the construction of Election Code §11383 prescribed by this Court in the course of a collateral constitutional challenge. The removal of an integral part of the recall scheme has already had indirect effects on candidate selection, campaign strategy and voter behavior. For example, one candidate who had decided not to run changed his mind after the Court's decision and now promotes his candidacy as a "second option," adapting his strategy to the new court-created rules under which significant numbers of voters may abstain.

Not even the Supreme Court has been willing to alter the process for selecting a state's governor in midstream, even when it has found a far more serious constitutional violation, which

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of Berkeley, 102 Cal. 298, 305-07 (1894), Santa Rosa v. Bower, 142 Cal. 229, 301 (1904) ("votes in the election" refers to all ballots cast in the election). Any alleged ambiguity preexisted the constitutional dispute because persons who abstained from both elements of the recall proposal (voting on other ballot propositions or casting blank ballots) counted as "votes in the recall election."

it had given the state six years to correct. Fortson v. Morris, 385 U.S. at 236; *see also* Cano v. Davis, 191 F.Supp.2d 1135 (C.D.Cal. 2001) (constitutional relief deferred). This Court should not attempt to legislate changes to a constitutional recall mechanism at the cost of disrupting the political balance of a "long-standing state constitutional provision." Chisom, 853 F.2d at 1189. If the federal constitutional impairment is that serious, the Court should consider the extraordinary (but less drastic) remedy of enjoining recall elections until the Legislature conforms the process to the Constitution.

The Court can and should allow the Legislature to fix any constitutional problem. For example, the Legislature could clarify that removal really does require a majority of "votes in the election" and allow part 1 abstainers to vote in part 2. In this case, the constitutional infirmity disappears with minimal impact on the political balance enacted by the People in 1911. Since the People removed most elements of the constitutional provision to statute in 1974, the Legislature could also adopt other changes to conform the process to the federal constitutional requirement, even if they made recall easier or more difficult in some or all cases. To the extent that the Legislature fails to conform the statute prior to the imminent election, it is only because plaintiffs' action is inexcusably untimely, precluding the intrusive judicial relief that they have sought.

d. Rafferty is Seeking to Intervene as of Right

On August 1, 2003, eight days after the filing of the complaint, Rafferty sought leave to intervene. In compliance with Rule 24(c), Rafferty's claims are set forth as follows:

(1) As a Democratic Party activist, Rafferty had argued and sought to continue to argue that voters had a civic duty to vote "yes" or "no" on the question of recall, and intended to inform voters that their vote for a successor would not count unless they voted on the question of recall, which would be a true statement of California law but for the opinion. Rafferty seeks to vacate the injunction as it applies to him.

(2) As a voter, Rafferty objects to being required to vote in any election other than an election called and conducted according to laws established by the People or their Legislature. Rafferty seeks to cancel the court-designed process and to allow the immediate election to proceed, if at all, under the process the Court has found to be unconstitutional.

(3) As a resident of California, subject to the authority of the Governor, Rafferty objects to the removal of the Governor through any process not enacted into the State's Constitution or enabling legislation. The Court's order establishes such a process. Rafferty seeks to maintain

Governor Davis in office until and unless he is removed through a process that the Legislature has conformed to the United States Constitution or, if authorized by this court, through the process this court has found to be in conflict with the United States Constitution.

III. PLAINTIFF HAS STANDING

a. Rafferty states a claim to vacate the injunction.

Plaintiffs' opposition miscites numerous authorities. For example, citing City of Los Angeles v. Lyon, 461 U.S. 95 (1982) they claim that it is "frivolous" for Rafferty to attempt to dissolve the injunction that applies to him unless he "alleges that he is currently being prosecuted for its violation." In fact, Lyon involves plaintiffs who are trying to obtain an injunction against prosecution for various criminal offenses. Rafferty is trying to vacate an injunction that threatens prosecution for otherwise lawful First Amendment conduct in which he intends to engage. His preemptive action is not only permitted by law; it is required procedure to preserve a constitutional defense in the event of any subsequent prosecution. Walker v. City of Birmingham, 388 U.S. 307, 319 (1967).

Plaintiffs argue that this Court lacks authority to issue an injunction that binds Rafferty, citing Fed. R. Civ. P. 65(d). This is simply an additional reason to vacate the injunction, not a reason to preclude Rafferty from initiating an

action that the Supreme Court has established as an essential precondition to the free exercise of First Amendment rights.

b. Rafferty states a claim as a constituent of Governor Davis

Plaintiffs seem incapable of separating the analysis of standing from their disputes about the merits of Rafferty's claims. They argue that he "has no standing to complain that the votes of other citizens will now be counted rather than ignored." A citizen does have standing to protest if officials with authority over him were elected by the votes of non-residents, minors, or other persons who are not eligible to vote under state law - or even if his vote was "diluted" by ineligible votes without a provable impact on the outcome. *See* Reynolds v. Sims, 377 U.S. 533 (1964).

In Dillard v. Baldwin County Commissioners, 225 F.3d 1271, 1277 (11th Cir. 2000), the Court of Appeals made clear that not only candidates, and not only voters, but even non-citizen residents, have "standing to participate in an action challenging the constitutionality of the election scheme to which they were subject." All residents have a legally cognizable interest in ensuring that they are governed by persons who are elected constitutionally. In Dillard, for example, residents were granted leave to intervene to protest a reapportionment scheme that had been decreed by a federal judge. They alleged that the court "exceeded its authority granted by the Voting Rights Act and violated the 10th and 11th amendments."

225 F.3d at 1275; *see also* Meek v. Metropolitan Dade County, 989 F.2d 1471 (11th Cir. 1993). In this case, Rafferty contends that the Court's remedy exceeds its authority under the 14th amendment, and therefore violates the 10th and 11th amendments.

c. Rafferty states a claim as an elector.

Rafferty has a separate interest in ensuring that unconstitutional elections are not held, compelling him to go to the polls on pain of losing his franchise. See Miller v. Greiner, 60 Cal.2d 824 (1964).

The Secretary of State has indicated that it will enforce this Court's mandate and require Rafferty and other electors to participate in a recall process which has never been enacted by the People or Legislature of California. Therefore, this case has no similarity to plaintiffs' precedent, in which a private party lacked standing to appeal the state's decision not to enforce unconstitutional health and safety standards. Associated Builders & Contractor v. Perry, 16 F.3d 688, 690-93 (D.C. Cir. 1994). The Secretary of State is altering instructions that it is issuing Rafferty and other voters, affirmatively requiring them to vote in the recall election under rules that have no basis in state law.

d. There is no "categorical standing problem."

Plaintiffs contend that "because the original parties have not decided to appeal, there is no longer an Article III 'case or controversy; in which Mr. Rafferty may intervene." Of course, the failure of the "original parties" to decide to appeal has nothing to do with the existence of an Article III controversy. None of the citations support any proposition

remotely like this, which would bar any appeal by any intervenor in any case.

There is also no basis for the contention that Rafferty can intervene only if he possesses a claim with an "independent basis" for subject matter jurisdiction. Smith Petroleum Service Inc. v. Monsanto Chemical Co., 420 F.2d 1103 (5th Cir. 1970). Intervenors have standing whenever litigation impairs their ability to protect interests in the transaction that is being litigated.

IV. RAFFERTY HAS GROUNDS TO INTERVENE

a. Rafferty's motion is timely.

Having chosen the most inconvenient time to challenge a 92-year old state law, plaintiffs argue that Rafferty's attempt to intervene eight days later is "untimely."

Plaintiff's cite two First Circuit cases. In Caterino v. Berry, 922 F.2d 37, 40 (1st Cir. 1990), the putative intervenor ignored press coverage for 21 months. In Narragansatt Indian Tribe v. Ribo, Inc., 868 F.2d 5 (1st Cir. 1989), intervenors waited 13 months before attempting to join the action on the eve of trial. Plaintiffs then cite a footnote for the proposition that this Circuit approves of First Circuit authority. Empire Blue Cross & Blue Shield v. Janet Greeson's A Place for Us, Inc., 62 F.3d 1217, 1221 n5 (9th Cir. 1995). This case actually states that limited-purpose interventions, such as this motion, are generally not denied as untimely.

Furthermore, post-judgment motions to intervene are timely in this Circuit if they are filed before the time for filing an appeal has expired. Tocher v. City if Santa Ana, 219 F.3d 1040, cert. denied., 121 S.Ct. 1085 (200*). This action was filed two days after judgment - or 58 days in advance of the deadline for timeliness. By extension, a motion to intervene for the purpose of reconsideration should be timely if filed within 10 days of final judgment. Of course, this motion was presented two days after final judgment and only eight days after the case was filed.

b. Rafferty is not adequately represented by the Secretary of State.

In his response to this motion, the Secretary of State does not purport adequately to represent Rafferty in any capacity. It is clear that he did not effectively represent and other citizens of California in failing to object to the broad coverage of the injunction. Given his official function, he cannot appropriately represent Rafferty's interest as a Democratic Party activist or Rafferty's interest in making all good-faith legal arguments for procedures most likely to retain Gray Davis in office. Finally, the positions taken by the Secretary of State demonstrate that he has placed the timeliness and apparent "good order" of the impending election above the more fundamental interests of the voters in preventing the

conduct of elections under rules that the voters and their Legislature have never authorized.

As is often the case, the failure of state parties adequately to represent persons with standing becomes "apparent only after the district court issued its final judgment." Tocher, 219 F.3d 1040. If, as plaintiffs claim, the Secretary of State has decided not to appeal, this decision standing alone would entitle voters to intervene for that purpose. *See* Dillard, 225 F.3d at 1277.

c. Rafferty's intervention does not prejudice plaintiffs.

Parties are not free to block intervention simply because it might prevent them from obtaining remedies they might like, but which are not justified by the law. In this case, plaintiff has demanded - and received - extraordinary procedural expedition to the prejudice of Rafferty and every other elector who may not be adequately represented by the Secretary of State. Although plaintiffs claim "extensive press coverage," they do not cite any reference in the Northern California press prior to final judgment. Rafferty did not delay 13 or 21 months from actual notice of the suit, but acted within 24 hours. There is no trial scheduled. Reconsideration and appeal are both timely. Their claim of "prejudice" dissolves into a concern that the merits of plaintiffs' claim might not survive reconsideration or appeal.

Plaintiffs have inflicted upon themselves the risks that they now face, which they incorrectly label as "prejudice." They could have filed their constitutional challenge at any time during the past 92 years, and allowed this Court to consider it with appropriate deliberation and a fair opportunity for all interested parties to intervene. Rafferty has responded to the Court's two orders within 48 hours and 24 hours, as instructed. By contrast, plaintiffs' counsel enjoyed almost five calendar days to respond - and refused Rafferty's proposal to negotiate a more expedited cycle. While Rafferty has attempted to present all of his arguments on the merits as promptly as possible, plaintiffs' counsel has stood by his right not to provide an "exhaustive[]" response even after five days because Rafferty "is not currently a party." Plaintiffs have created every time pressure of which they now complain.

Most seriously, plaintiffs' counsel has not met his legal duty to disclose compelling authority that neither the relief he has obtained nor the complete injunction that Rafferty prefers is available to cure a constitutional impairment in an imminent state election. *e.g.*, Whitcomb v. Chavis, supra. As Justice Black wrote, "Intervention by the federal courts on state elections has always been a serious business." Oden v. Brittain, 396 U.S. 1210 (1969), as quoted in Chisom, 853 F.2d at 1189 (federal court should "sparingly use its awesome powers to

. . . brush aside . . . long-standing state constitutional provisions, statutes, and practices" in elections).

V. PLAINTIFF'S ACTION IS UNTIMELY AS TO THIS RECALL AND THEY LACK STANDING TO CHALLENGE FUTURE LOCAL RECALLS.

There is no doubt that the existence of a federal constitutional infirmity in a state recall process vests standing in any person entitled to invoke the recall process or to circulate petitions. To the extent that plaintiffs invoke standing as electors or constituents, they present a case that is "capable of repetition, yet evading review." *See* Roe v. Wade, *supra*. Rafferty does not dispute that plaintiffs, like himself, have standing to assert a ripe controversy with respect to future recalls of state officers.

Plaintiffs do not assert that they are electors in any local jurisdiction other than San Diego and Los Angeles Counties. Neither of these charter jurisdictions has ever been subject to the constitutional recall provisions or the implementing state legislation.[4] In 1974, the voters preserved the reservation of recall procedures that charter counties have always enjoyed. Cal. Const. Art. II, §19. By contrast, Rafferty has alleged that he is an elector in local jurisdictions that

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[4] *Schaefer v. Gorman*, 172 C. 338, 343 (1916); *Muehlein v. Forward*, 4 C2d 17 (1935)

are subject to the general recall law. As such, he has standing to assert the failure of plaintiffs to assert a "case or controversy" regarding local recalls.

VI. CONCLUSION

This Court should not place the federal judiciary in the position of having altered the political rules of a long-standing recall mechanism less than two months before a scheduled election. To piece-part a complex electoral process in ways that alter the political rules for voters, candidates, and persons seeking to influence voters is even more drastic a remedy than to enjoin the election altogether. Although it is Rafferty's preferred outcome that this court enjoin any recall election until the Legislature repairs the infirmity, he recognizes and has disclosed to the Court compelling authority indicating that imminent elections should be allowed to proceed under state law, even if there is a constitutional violation.

The Court should (1) grant Rafferty leave to intervene, (2) amend its opinion to remove the construction of §11383, and (3) vacate clauses (2), (3) and (4) of the permanent injunction dated July 29, 2003 on the basis that it is not appropriate for this Court to alter the political rules in the imminent gubernatorial recall election. This outcome will serve important values of federalism by allowing the State Legislature

to conform the political mechanism that it has enacted to the requirements of the United States Constitution.

Dated this 13th day of August, 2003

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