

1 SCOTT RAFFERTY
2 2439 Alvin Street
3 Mountain View CA 94043
4 (650)-814-2257
5 rafferty@alumni.princeton.edu

FILED
03 AUG 15 AM 11:12
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

BY: *W. Manner* DEPUTY

7 FRANK PARTNOY, LAURA ADAMS,
8 RACHANA PATHAK, PETER STRIS,
9 JASON WILSON, and CALIFORNIA
10 INFORMED VOTERS GROUP

11 Plaintiffs,
12 SCOTT RAFFERTY,
13 Intervenor

14 vs.

15 KEVIN SHELLEY, in his official capacity as
16 Secretary of State for the State of California;
17 SALLY MCPHERSON, in her official capa-
18 city as the Registrar of Voters for the County
19 of San Diego; and CONNY MCCORMACK,
20 in her official capacity as the Registrar-Recorder
21 County Clerk for County of Los Angeles,
22 Defendants

) Case No.: No. 03-CV-1460K BTM

) COMPLAINT OF SCOTT J. RAFFERTY IN
3) INTERVENTION
4) VIA FAX

) Date: August 20, 2003
5) Time: 10 AM
6) Ctrm: 15

17 The above-named intervenor, Scott J. Rafferty, by leave of court first had and obtained,
18 files this complaint:

19 1. Frank Partnoy, Laura Adams, Rachana Pathak, Peter Stris, Jason Wilson, and
20 California Informed Voters Group filed this complaint on July 23, 2003 against Kevin Shelley,
21 as California Secretary of State, Sally McPherson, as Registrar of Voters for San Diego County
22 and Connie McCormick, as County Clerk for Los Angeles County for the purpose of (a) a
23 declaration that California Election Code §11382 is unconstitutional, (b) a general declaration
24 that voters in California recall elections are entitled have their votes for successor candidates
25 counted regardless of whether that voter cast a ballot for or against the recall of an officer, (c) an
26 injunction against enforcement of 11382 by defendants, (d) an injunction that prevents defen-
27 dants and their agents from informing or persuading voters that their votes for successor
28 candidates would not be counted if they failed to vote for or against a recall, and (e) an

38

1 injunction that prevents defendants from failing to count any ballot based on actual or alleged
2 noncompliance with §11382.

3 2. Defendant Shelley filed an answer on July 28, 2003 asserting that plaintiffs did not
4 state a claim, that §11382 was a valid law, and that there was no substantial federal question.

5 3. On July 29, 2003, this Court issued a judgment on the pleadings, granting the relief
6 sought in prayers (a), (c), (d), and (e). The Court failed to grant the relief sought in prayer (b).
7 The court entered a permanent injunction extending to any "individual, agency, or entity with
8 actual notice of this order." The Court's opinion held that the words "recall election" in §11383
9 refer only to the "yes" or "no" vote for or against recalling the incumbent.

10 4. On August 1, 2003, by letter brief, and on August 6, 2003 by formal motion, Rafferty
11 moved to intervene with concurrent motions to reconsider the order, vacate the injunction, or in
12 the alternative to stay the order pending appeal. In a reply paper filed August 13, 2003, Rafferty
13 indicated that he would not seek reconsideration of the declaratory portion of the judgment in
14 this Court "without prejudice to possible appeal." The reply also indicated that Rafferty would
15 no longer contend that pending state actions required this Court to abstain, in light of the
16 resolution of these actions by the California Supreme Court. The papers contained no limitation
17 on the scope of intervention sought as of right.

18 5. On August 14, this Court granted Rafferty intervention "for the limited purpose of
19 seeking the relief requested in his reply." In a conference on that day, the Court indicated that it
20 was denying leave to intervene for the purpose of appealing the declaration that §11382 is
21 unconstitutional.

22 6. During the conference on August 14, 2003, defendants confirmed that they had
23 agreed not to seek an appeal. Article III, §3.5 of the California Constitution prohibits
24 defendants, as a result of their election not to seek an appellate determination, from failing to
25 enforce §11382 in any election based on this Court's declaration of unconstitutionality.

26 CLAIMS IN INTERVENTION

27 7. Rafferty is a Democratic Party activist resident in Mountain View and Santa Clara
28 County. He is an elector in these jurisdictions, as well as the 22nd Assembly District, the 13th

1 Senate District, the Mid-Peninsula Open Space District, and in a number of districts for local
2 authorities with elective officials. Rafferty seeks to persuade and inform voters to vote against
3 the recall of Governor Davis, including the provision of advice and the preparation and dis-
4 semination of documents that recommend casting negative votes.

5 8. As a Democratic Party activist, Rafferty had argued and seeks to continue to argue
6 that voters had a civic duty to vote "yes" or "no" on the question of recall, and intends to inform
7 voters that their vote for a successor would not count unless they voted on the question of recall,
8 which would be a true statement of California law but for this Court's order.

9 9. As a voter, Rafferty objects to being required to vote in any election other than an
10 election called and conducted according to laws established by the People or their Legislature.

11 10. As a resident of California, subject to the authority of the Governor, Rafferty objects
12 to the removal of the Governor through any process not enacted into the State's Constitution or
13 enabling legislation. Rafferty seeks to maintain Governor Davis in office until and unless he is
14 removed through a process that (1) the Legislature has enacted and (2) is in conformity with the
15 United States Constitution.

16 11. Plaintiffs lack standing to challenge the implementation of §11382 to local recalls, as
17 they have failed to allege that they are electors or residents of any locality other than the counties
18 of Los Angeles and San Diego, in which recalls are subject to charter provisions that the Califor-
19 nia Constitution (Art. II, §19) preserves from application of recall provisions in the Election Code.

20 12. Plaintiff claim to be "morally and/or politically opposed to voting in the recall
21 because 'the recall is either an illegitimate process in general or especially in the Davis recall'" or
22 claim to be "agnostic on the merits of the recall." Plaintiffs produced no evidence of any person
23 who supports the removal of Governor Davis, but who seeks to abstain.

24 13. Section 11382 is not "one discrete provision of the California Election Code,
25 providing how votes are to be counted." Rather, it is an integral and non-severable part of a
26 legislative balance struck in 1911 and reaffirmed by the voters in 1974, now codified as Election
27 Code §11381(c), 11382, and 11384. One essential part of this legislative compromise was that
28 §11381(c) prohibited the incumbent from running for "successor" because §11382 ensured that

1 every voter eligible to vote for successors had already voted for (or against) the incumbent in the
2 same recall proposal. Section 11382, working in conjunction with §11384, ensured that an
3 officer would not be removed from office unless a majority of all persons voting on his successor
4 also voted to recall him, since it guaranteed that no person who had not voted for (or against) his
5 recall would vote for a successor. Although this political compromise still allowed for the
6 election of a successor with less than an absolute majority, it sought to achieve a collective
7 determination that the successor was preferable to the incumbent.

8 14. Working in conjunction, these non-severable provisions avoided certain undesirable
9 outcomes that the Legislature foresaw as possible. But for the interplay of these sections, an
10 incumbent recalled by 75% (and supported by 25%) could remain in office because no potential
11 successor polled more than 25%.

12 15. A failure to enforce §11382 would destroy this integrated political balance. For
13 example, if 40% voted to recall, 35% voted to retain, and 25% declined to vote on the basis that
14 they regarded the recall as “illegitimate . . . especially in the Davis recall,” it could very well be
15 the case that an absolute majority (35%+25%) preferred Davis to any alternative. In this
16 scenario, the Governor is recalled solely because of the new process established by this Court.
17 Worse yet, if the election were conducted pursuant to the current injunction, this 60% majority
18 would be prohibited from voting for their first choice, Davis, resulting in the almost random
19 selection of a candidate whose total vote (perhaps 20% in a field of 135) represented the first
20 choice of some and the second choice of a portion of the 60% who preferred Davis.

21 16. The opinion (at 13) indicates that defendant McPherson claimed in her joinder in
22 opposition that an ambiguous situation could arise “if the number of ‘no’ votes cast on the *recall*
23 *proposal* exceed[s] the number of ‘yes’ votes but do[es] not total one-half or more of the total
24 votes cast in the *recall election*.” The only way that any actual conflict could occur is if the
25 terms “recall election” and “recall proposal” are defined such that there are fewer votes in the
26 recall election than there are on the recall proposal – and there is no conceivable basis for such a
27 construction. Otherwise, §11384 determines whether an officer is removed from office whether
28 or not §11383 redundantly provides for the officer’s continuation in office.

1 17. It does not appear that the Secretary of State, who will interpret the election results
2 and certify the outcome, sought any ruling as to the scope of §11383 or §11384. There is no
3 basis for pendant jurisdiction of this state law issue unless the Court finds that its construction
4 mitigates adverse effects of the remedy proposed for the constitutional violation.

5 18. Section 11384 provides for removal from office "If a majority of the votes on a recall
6 proposal are 'Yes'." The authors of this provision did not anticipate that §11382 would be
7 stricken and therefore understood that §11382 guaranteed that the number of persons voting for
8 successors could never greater than the number voting for or against the incumbent. Further-
9 more, in distinction to "votes on the question of whether to recall the officer," the phrase "maj-
10 ority of votes on a recall proposal" suggests a meaning that includes votes for successor
11 candidates by persons who do not vote for or against the incumbent. Therefore, even if the Court
12 concludes that §11382 is "discrete," the correct construction of "majority of votes on a recall
13 proposal" is the majority of the total number voting either (1) for or against the incumbent or (2)
14 for a successor, since this corresponds most closely to the legislative and popular intent.

15 19. Section 11383 guarantees that an incumbent will continue in office if "one-half or
16 more of the votes at a recall election are 'no.'" The provision is not part of the integrated and
17 non-severable political balance of §§ 11381(c), 11382, and 11384. In fact, it is surplus, since an
18 incumbent continues in office unless removed by a "majority of votes on a recall proposal."
19 §11384. Legislators in 1911 would have understood "votes at a recall election" to include
20 persons who abstained from the entire recall proposal and voted only on other ballot questions.
21 But it is impossible to get a negative majority (against recall) of this larger group without
22 avoiding a positive majority (for recall) among the smaller group measured by §11384, which
23 also results in continuation in office. The Court's construction of §11383 is inconsistent with
24 California law, independent of the constitutional dispute, and unnecessary.

25 20. Plaintiffs did not claim, and do not have, any constitutionally protected interest in
26 whether abstentions are, or are not, included in the number of votes of which §11384 requires a
27 majority to remove an officer. A determination of how the Secretary of State should calculate
28 the number of votes needed to remove an officer relates to the constitutional remedy only if this

1 Court finds that one interpretation would mitigate the disruption of the political balance caused
2 by invalidating §11382 without regard to its non-severable interrelationship with §§11381(c) and
3 11384. By construing “votes in the recall proposal” to include all persons who vote either for or
4 against Gray Davis or for a successor, the Court would mitigate the disruption of the political
5 balance and minimize the disruption of the legislative and popular intent that enacted the
6 integrated and non-severable process. If the Court is unable to support this construction (or to
7 find grounds to reform §11384 to obtain this result), it should leave §11384 for construction by
8 the Secretary of State subject to the review of state courts pursuant to California law before or
9 after the election.

10 21. Because §§11381(c), 11382, and 11384 are parts of an integrated, non-severable
11 political balance, this Court cannot properly declare §11382 unconstitutional without declaring
12 the integrated entire electoral scheme unconstitutional. Any injunction should enjoin the conduct
13 of recall elections entirely until the Legislature conforms the process to the United States
14 Constitution, determining how to make any changes to the political balance that the current
15 legislation reflects.

16 22. Even if the injunction is not vacated, an election that defendants may conduct under
17 its terms will be ultra vires and will not produce a valid result. Cal. Const. III, §3.5. Unless this
18 Court enjoins the conduct of recall elections entirely until the Legislature conforms the process
19 to the United States Constitution, the Secretary of State will be compelled to spend funds (in the
20 case of the Davis recall, approximately \$67 million) to conduct elections the results of which
21 cannot be given effect under California law.

22 23. As to the imminent gubernatorial recall, Plaintiff's claims are barred by laches.
23 Section 11383 and its predecessors have been in effect continuously since October 7, 1911. No
24 person challenged the statute until July 23, 2003 – 76 days prior to the election.

25 24. As to the recall of local officials, Plaintiffs lack standing, since they fail to allege that
26 they reside within any local jurisdiction subject to §11382 or the related provisions of the Electoral
27 Code and California Constitution. In particular, they do not allege that they are electors in any
28 special interest district, to which the Court's order purports to extend.

1 25. There is no indication that plaintiffs or any other person brought the alleged
2 unconstitutionality of the recall scheme to the attention of the Legislature.

3 26. Defendants have an obligation to enforce state laws designed to ensure that electors
4 vote “fairly and honestly.” Stoerer v. Brown, 415 U.S. 724, 730 (1974). Plaintiffs have admitted
5 that the “the recall is either an illegitimate process in general or especially in the Davis recall,”
6 and cannot complain that §11383 compels them to record this admission “fairly and honestly” as
7 a “no” vote on Governor Davis’s proposed recall.

8 27. The pleadings fail to allege, and the Court had no basis to conclude, that “modern
9 vote counting procedures” would make “chaos . . . hard to imagine.” Evidence may exist that
10 vote counting procedures will not be modern. Furthermore, the Attorney General (Brief at 9)
11 represented that “chaos” would ensue §11382 was not used to insure that a clear majority
12 favored recall. Plaintiffs do not appear to have denied this allegation.

13 PRAYERS FOR RELIEF

14 28. In the interests of expedition, Rafferty indicated that he did not intend to seek
15 reconsideration of declaratory relief “without prejudice to a possible appeal.” In the conference
16 of August 14, 2003, the Court indicated that intervention for purposes of appealing declaratory
17 relief was denied. This denial is an appealable final order. In the interests of expedition,
18 Rafferty prays for reconsideration to permit an immediate appeal of the merits.

19 29. To the extent not inconsistent with any limitation on Rafferty’s right to intervene
20 expressed in the conference of August 14, 2003, Rafferty prays that the Court find §11381(c) to
21 be a non-severable and integrated part of the electoral scheme it has condemned and that the
22 Court issue a declaratory relief directing the Secretary of State to list the incumbent as a
23 successor candidate as part of its constitutional remedy.

24 30. Rafferty prays for this Court to reconsider its conclusion that the “terms ‘recall
25 election’ in §11383 and ‘recall proposal’ in §11384 are synonymous and refer solely to the
26 question of whether or not the incumbent shall be recalled.” Because §11384 is an integral part
27 of the non-severable political balance, the Court should construe “votes on the recall proposal” in
28 §11384 as including all ballots voting for or against the incumbent or for any successor

1 candidate. In the alternative, the Court should leave the construction of this section to possible
2 adjudication by a state court before or after the election.

3 31. No injunction should issue in this case because plaintiffs' claims are barred by the
4 doctrine of laches, in that they failed to seek timely relief, (paras. 23, 25) and unclean hands
5 (para. 26), in that they admit that they are opposed to the recall and seek to avoid casting an
6 honest vote.

7 32. Any injunction issued in this case should enjoin the entire conduct of any recall
8 election until and unless the Legislature corrects the constitutional infirmity, since §11382 is not
9 a discrete provision, but part of an integrated and non-severable political balance enacted by the
10 People in the California Constitution and codified by the Legislature as Election Code
11 §§11381(c), 11382, and 11384.

12 33. Any injunction issued in this case should enjoin the entire conduct of any recall
13 election until and unless the Legislature corrects the constitutional infirmity, since the failure of
14 defendants to enforce §11382 in any recall election would (in light of their undertaking not to
15 appeal this decision) render the results of such an election ineffective under the California
16 Constitution and waste substantial resources.

17 34. Any injunction issued in this case should enjoin the entire conduct of any recall
18 election until and unless the Legislature corrects the constitutional infirmity, because this Court
19 lacks authority to implement a legislative remedy without having provided the state legislature
20 an opportunity to enact conforming legislation.

21 35. Any injunction issued should not apply to any local recall, since there has been no
22 allegation that any plaintiff is an elector in any local jurisdiction subject to §11382.

23 36. Rafferty prays for such further relief as the Court may deem proper.

24 Dated this 15th day of August, 2003

25 By 

26 SCOTT RAFFERTY
27 2439 Alvin Street
28 Mountain View CA 94043
(650)-814-2257
rafferty@alumni.princeton.edu