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U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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

18 Plaintiffs,

19 vs.

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

Defendants.

SCOTT J. RAFFERTY,

Intervenor.

CASE NO. 03CV1460 BTM (JFS)

ORDER GRANTING IN PART AND  
DENYING IN PART JUDGMENT ON  
THE PLEADINGS

29 I. INTRODUCTION

30 The Court entered a final judgment in this case on July 29, 2003. On August 1, 2003,  
31 Scott Rafferty ("Rafferty") faxed a letter directly to chambers purporting to seek to intervene.  
32 He was directed to file a proper motion to intervene by August 6, 2003, which he did. The

1 Court granted his motion to intervene on August 14, 2003. Rafferty filed his Complaint In  
2 Intervention on August 15, 2003. The Court *sua sponte* set this matter for expeditious  
3 resolution on cross-motions for judgment on the pleadings. Plaintiffs filed a motion to  
4 dismiss the complaint in intervention ("Pl. Mot."), Rafferty filed a motion for judgment on the  
5 pleadings ("Rafferty JMP") and Defendant Shelley, Secretary of State, filed an opposition to  
6 Rafferty's motion for judgment on the pleadings ("Shelley Op."). The Court held a hearing  
7 on the matter on August 20, 2003.

8 The Court finds there is no dispute of fact at issue in this case. The Court *sua sponte*  
9 set the matter for cross-motions for judgment on the pleadings. See Sitarek v. Shalala, 1994  
10 WL 175116, \* 1 (W.D.N.Y.) (approving simultaneous filing of cross-motions and answers);  
11 The Court placed all parties on notice that it was entertaining the entry of a final judgment  
12 on the papers filed pursuant to its scheduling order.

## 13 II. DISCUSSION

14 Mr. Rafferty contends that once the Court made the determination that California  
15 Elections Code Section 11382 was unconstitutional, it should not have proceeded to  
16 construe the term "election" in Section 11383 to mean "proposal." (7/29/03 Mem. Order at  
17 13-14.) Rafferty contends that Section 11382 is an integral part and not severable from  
18 other provisions of the recall system because Sections 11381(c), 11382, and 11384 were  
19 part of a "legislative compromise" in which the current official was prevented from running  
20 to succeed himself because Section 11382 "ensured that every voter eligible to vote for  
21 successors had already voted for (or against) the incumbent in the same recall proposal.  
22 Section 11382, working in conjunction with §§ 11383 and 11384, ensured that an officer  
23 would not be removed from office unless a majority of all persons voting on his successor  
24 also voted to recall him, since it guaranteed that no person who had not voted for (or  
25 against) his recall would vote for a successor." Complaint at ¶ 13.

26 Because the Court's decision ostensibly strikes down one part of this legislative  
27 compromise, but not the other, he seeks to have the Court either (1) not enjoin the Secretary  
28 of State from applying Section 11382 to the current election and, instead, allow the state

1 legislature to devise a constitutionally appropriate replacement "compromise"; or (2) enjoin  
2 the entire recall election.

3 A. RULE 59(e)

4 Both Plaintiffs and Defendants contend that Rafferty's Complaint is "jurisdictionally  
5 time-barred from altering the existing Final Judgment" by Rule 59(e) of the Federal Rules  
6 of Civil Procedure.<sup>1</sup> (Pl. Mot. at 13; Shelley Op. at 2.) Furthermore, Plaintiffs claim that  
7 because Rafferty was not a party to this action on August 6, 2003, his Motion for Leave to  
8 Intervene cannot qualify as a Rule 59(e) motion. (Pl. Mot. at 14); See In Re NASDAQ  
9 Market-Makers Antitrust Litigation, 184 F.R.D. 506, 511 (S.D.N.Y. 1999) (Rule 59(e) motions  
10 can only be brought by parties; possible intervenors are not deemed parties permitted to  
11 bring motion). The Court finds neither of these arguments persuasive.

12 Although Rafferty delayed in filing his motion to intervene, the Court nonetheless  
13 allowed him to intervene in large part.<sup>2</sup> While there is case law supporting the proposition  
14 that a party can intervene for the purposes of filing an appeal after the ten-day period for a  
15 Rule 59(e) motion, see Romasanta v. United Airlines, 537 F.2d 915, 919 (7th Cir. 1976), in  
16 this case the Court did not allow Rafferty to intervene for purposes of appeal of the  
17 determination of the constitutionality of Section 11382 because in that respect his motion to  
18 intervene was both untimely and highly prejudicial.<sup>3</sup> The Court did grant Rafferty leave to  
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20 <sup>1</sup> Under Rule 59, "[a]ny motion to alter or amend a judgment shall be filed no later  
21 than 10 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

22 <sup>2</sup> As the Court explained in its status conference on August 14, 2003: "I am not  
23 allowing you to intervene to take an appeal, because what you will have done, you will have  
24 disrupted this schedule to allow for orderly processing of this before the printing of the  
25 ballots. You will have entered it late in such a way . . . as to cause immense prejudice to the  
26 state and the county election boards, because they have to print the ballots. . . . [B]ut if you  
27 had entered it at a time earlier, then there would have been the opportunity for appellate  
28 review. You could have intervened, and then you could have appealed and there would  
have been time for appellate review, but you didn't do that." 8/14/03 Tr. at 23: 9-21. The  
Court also noted that in addition to failing to file a proper motion to intervene, Rafferty did not  
comply with Civil Local Rule 5.3 as to the proper manner to fax file documents with the Clerk.  
It also appears that there is no proof of service for his August 1, 2003 letter.

<sup>3</sup> When questioned by the Court as to why it took him three days to first contact the  
Court – from the July 29th decision to his August 1st letter – and over a week to file a proper  
motion to intervene, Rafferty first stated: "I sent a single-spaced document to the Court

1 file a complaint in intervention attacking the injunctive relief granted in the July 29, 2003  
2 order. The parties contend that Rafferty is out of time because he can only seek relief under  
3 Fed. R. Civ. P. 59(e) by a motion filed within 10 days of the entry of the order.

4 The Court concludes that Rafferty's request to reconsider the injunctive relief is not  
5 untimely. First, by filing his motion to intervene on August 6, 2003, he was in essence  
6 simultaneously moving for reconsideration and was within the 10-day period. To contend  
7 that his request for reconsideration was untimely because intervention had not been granted  
8 until August 14, 2003, would effectively bar persons wishing to intervene and seek  
9 reconsideration from timely doing so. The motion to intervene was effectively a motion for  
10 intervention and reconsideration. Secondly, even if his request for relief under Rule 59(e)  
11 was untimely, relief is still appropriate under Fed. R. Civ. P. 60(b)(6) (relief from judgment  
12 for "any other reason justifying relief from operation of the judgment."). See Beentjes v.  
13 Placer County Air Pollution Control Dist., 254 F. Supp. 2d 1159, 1161 (E.D. Cal. 2003) (A  
14 "court may construe an untimely motion for reconsideration brought under Rule 59(e) as a  
15 motion based on Rule 60(b).") (citation omitted); Spacey v. Burgar, 207 F. Supp. 2d 1037,  
16 1048 (E.D. Cal. 2001) ("Rule 60(b)(6) serves as the catch-all provision, conferring on the  
17 court broad discretion to relieve a party from final judgment upon such terms as are just.")  
18 (citations and internal quotations omitted). Therefore, the Court finds Rafferty's request for  
19 reconsideration by intervention not to be untimely.

#### 20 B. SEVERABILITY

21 Because Rafferty's complaint in intervention is premised on Section 11382's non-  
22 severability, the Court must examine its prior implicit determination that this section was  
23 severable. As the Supreme Court stated, "[u]nless it is evident that the Legislature would  
24 not have enacted those provisions which are within its power, independently of that which

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26 within hours of discovering [sic] of the decision and it was styled Motion to Intervene. I  
27 realize it did not comply with the local rules, which frankly, I did not have so much as an  
28 opportunity to consult. I tried to get this in front of you as quickly as possible." 8/14/03 Tr.  
at 24:11-17. Upon further questioning, however, Rafferty admitted: "Okay, it was in the  
newspapers on the 30th. I saw it on the 30th. It was referred to in a brief that we filed late  
that afternoon." Id. at 26: 6-8.

1 is not, the invalid part may be dropped if what is left is fully operative as a law." Brockett v.  
2 Spokane Arcades, 472 U.S. 491, 506 n. 15 (1985) (citation omitted).

3 A federal court is empowered to determine whether an unconstitutional provision of  
4 a state statute can be severed. See Brockett, 472 U.S. at 506 (discussing a lower federal  
5 court's ruling on the constitutionality of a Washington state statute). In doing so, federal  
6 courts apply state law. See Leavitt v. Jane L., 518 U.S. 139 (1996); Valley Outdoor, Inc. v.  
7 County of Riverside, No. 02-55475, slip op. 8539, 8540 (9th Cir. Aug. 1, 2003). "The  
8 California Supreme Court has held that there are three criteria for severability under  
9 California law: the provision must be grammatically, functionally, and volitionally separable."  
10 Id. at 8540 (citing Calfarm Ins. Co. V. Deukmejian, 48 Cal. 3d 805, 821 (1989)). As the  
11 California Supreme Court has stated, "[a]lthough not conclusive, a severability clause  
12 normally calls for sustaining the valid part of the enactment, especially when the invalid part  
13 is mechanically severable." Gerken v. Fair Political Practices Comm., 6 Cal.4th 707, 714  
14 (1993) (internal citation and quotation marks omitted); see, also, In re Blaney, 30 Cal.2d 643,  
15 655 (1947) ("In considering the issue of severability, it must be recognized that the general  
16 presumption of constitutionality, fortified by the express statement of a severability clause,  
17 normally calls for sustaining any valid portion of a statute unconstitutional in part.").

18 The California Elections Code does contain a severability clause, thus giving rise to  
19 a legislative presumption in favor of survival of the remaining valid recall provisions.  
20 California Elections Code, Section 3 provides that, "[i]f any provision of this code or the  
21 application thereof to any person or circumstance is held invalid, the remainder of the code  
22 and the application of that provision to other persons or circumstances shall not be affected  
23 thereby."

24 1. *Grammatically Separable*

25 Under the first step of California's severability test, it is clear that Section 11382 is  
26 mechanically and grammatically separable from the rest of the statute. The Court did not  
27 excise a single word or a phrase from any sentence. Nor did it remove one sentence from  
28 a paragraph. Rather, the Court struck down the entirety of one of many separately

1 numbered sections of the recall chapter. None of the parties contend that Section 11382  
2 is not grammatically separable.

3           2.     *Functionally Separable*

4           Second, the Court finds that the constitutionally invalid section is functionally  
5 separable from the other recall provisions. Section 11382 prevents the counting of votes  
6 for a successor unless that voter also cast a vote on the recall question itself. No other recall  
7 provisions explicitly deal with this same proposition. In particular there is no mention of how  
8 the votes on the recall or selection of a successor will be counted in Section 11381.

9           Rafferty contends that if Section 11382 is eliminated, Sections 11383 and 11384 will  
10 lose their meaning. These sections provide:

11           § 11383. If one-half or more of the votes at a recall election are "No", the  
12 officer sought to be recalled shall continue in office.

13           § 11384. If a majority of the votes on a recall proposal are "Yes", the officer  
14 sought to be recalled shall be removed from office upon the qualification of his  
15 successor.

16           Rafferty focuses on the use of the term "recall election" in Section 11383 and "recall  
17 proposal" in Section 11384. He contends that if Section 11382 is removed, confusion arises  
18 as to how the recall election is determined. He contends that since Section 11382 required  
19 all voters on the successor candidate to first vote on the issue of recall, the number of votes  
20 on the "recall election" and on the "recall proposal" would be the same. With the elimination  
21 of Section 11382, a different number of votes can be cast on the issue of recall and the  
22 issue of a successor. Rafferty contends that the officer, here the governor, can be removed  
23 only if a majority of the total ballots cast at the October 7, 2003 recall election (whether they  
24 be on the recall proposal only, the successor only, or both) are yes on the question of recall.  
25 The Secretary of State, however, contends that the governor is removed if a majority of the  
26 votes cast on the single "yes-no" question of whether the governor should be recalled is  
27 "yes." However, the Court need not determine how the majority is determined as long as it  
28 can be determined without Section 11382.

          Unlike a state court, a federal court cannot explicitly "reform" a state statute. See

1 Tucker v. State of Calif. Dept. of Education, 97 F.3d 1204, 1217 (9th Cir. 1996) (stating that  
2 it is "not within the province of [a federal] court to 'rewrite' [a state law] to cure its *substantial*  
3 constitutional infirmities.") (emphasis added); see also, Kopp v. Fair Political Practices  
4 Commission, 11 Cal.4th 607 (1995) (exhaustively discussing the various means for  
5 reforming an otherwise unconstitutional statute). A federal court can, however, employ a  
6 range of interpretive tools to permissibly interpret or construe a state statute.<sup>4</sup> See, e.g.,  
7 Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975) (a federal court can apply a  
8 narrowing construction on a state statute if the language is "easily susceptible of a narrowing  
9 construction."); 3570 East Foothill Blvd., Inc. v. City of Pasadena, 912 F. Supp. 1268, 1281  
10 (C.D. Cal. 1996) ("As a general rule, a court is bound to construe a statute to avoid absurd  
11 results and favor public convenience.") (internal citation omitted); Legislature of the State of  
12 California v. EU, 54 Cal.3d 492, 534 (1991) (construing resulting language so that the invalid  
13 provision can be grammatically severed without affecting the operation of the remaining  
14 clauses).

15 In its earlier order, this Court construed the term "recall election" in Section 11383 to  
16 mean the same thing as the term "recall proposal" so that Section 11383 would effectively  
17 read "If one-half or more of the votes [on the recall proposal] are 'No', the officer sought to  
18 be recalled shall continue in office." Therefore, the Court interpreted Sections 11383 and  
19 11384 as effectively working as reciprocal measures. See Section 11384 ("If a majority of  
20 the votes on the recall proposal are 'Yes', the officer sought to be recalled shall be removed  
21 from office upon the qualification of his successor."). An examination of the California  
22 Constitution and the legislative history of these sections strongly supports this interpretation.

23 The recall procedure was originally added to the California Constitution in 1911 and  
24 provided that: "If a majority of those voting on *said question of the recall* of any incumbent  
25 from office shall vote 'No,' said incumbent shall continue in said office. If a majority shall  
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27 <sup>4</sup> See California Pro-life Council Political Action Committee v. Scully, 989 F. Supp.  
28 1282, 1290-91 (E.D. Cal. 1998) (stating that it is unnecessary to determine whether federal  
or state rules of construction apply under federal question jurisdiction because the "general  
rules of statutory construction are apparently identical under federal and California law.").

1 vote 'Yes,' said incumbent shall thereupon be deemed removed from such office, upon the  
2 qualification of his successor." Cal. Const., former art. XXIII, § 1, par. 6 (emphasis added).  
3 The statutory embodiments of this provision set forth the same sort of mechanism for  
4 deciding how the votes in the recall would be counted. See Cal. Pol. Code § 4021a, added  
5 by Stats. 1911, c. 342 p. 581 ("If the majority of those voting on said question of the recall  
6 of any incumbent shall vote 'No,' said incumbent shall continue in said office. If a majority  
7 shall vote 'Yes,' said incumbent shall thereupon be deemed removed from such office, upon  
8 the qualification of his successor."); Cal. Elec. Code § 11065, added by Stats. 1939, c. 26,  
9 p. 301 ("If a majority or exactly half of those voting on the question of the recall of any  
10 incumbent from office vote 'No,' the incumbent shall continue in office. If a majority vote  
11 'Yes,' the incumbent shall be deemed recalled from office, upon the qualification of his  
12 successor."); Cal. Elec. Code § 27007, added by Stats. 1974, c. 233, p. 439 ("If a majority  
13 of those voting on said question of the recall of any incumbent from office shall vote 'No',  
14 said incumbent shall continue in said office. If a majority shall vote 'Yes, said incumbent  
15 shall thereupon be deemed removed from said office, upon the qualification of his  
16 successor."). It was not until the Elections Code revision of 1976 that this binary mechanism  
17 for counting the votes was split into separate sections and the words "recall election" used  
18 in one and "recall proposal" used in the other. See Cal. Elec. Code § 27343, added by Stats.  
19 1976, c. 1437, p. 6451 ("If one-half or more of the votes at a recall election are 'No', the  
20 officer sought to be recalled shall continue in office."); Cal. Elec. Code § 27344, added by  
21 Stats. 1976, c. 1437, p. 6451 ("If a majority of the votes on a recall proposal are 'Yes' the  
22 officer sought to be recalled shall be removed from office upon the qualification of his  
23 successor.").

24       None of the parties have provided the Court with an authoritative explanation for this  
25 change much less any legislative history that would illuminate such an alteration in this  
26 heretofore consistent phraseology. The Report of the Joint Committee for the Revision of  
27 the Elections Code (which was incorporated into the Legislative Counsel's Report to the  
28 Governor on Assembly Bill No. 3467, which enacted these revisions) made no mention of



1 these two provisions, nor did it provide an explanation for these changes.

2 Finally, the Court views the current California Constitution as being highly instructive  
3 as to the meaning of these terms. Article 2, Section 15 of the Constitution states that: "If the  
4 majority vote on the question is to recall, the officer is removed and, if there is a candidate,  
5 the candidate who receives a plurality is the successor." West's Ann. Cal. Const. Art. II, §  
6 15 (2002).

7 Based on a clear and common-sense reading of the language of Sections 11383 and  
8 11384, the legislative history, and the current California Constitution, the Court finds that the  
9 words "recall election" in Section 11383 and "recall proposal" in Section 11384 are meant  
10 to be the same thing. While there is a difference of opinion as to whether the officer is  
11 recalled only if the yes votes constitute a majority of all the ballots cast on both the recall  
12 question and election of the successor or just the recall question, that difference does not  
13 affect severability.

14 In the Court's July 29, 2003 decision, the Court construed both Section 11383 and  
15 Section 11384 to refer to the number of yes or no votes cast on the question of whether the  
16 officer should be removed. The Court vacates that interpretation and holding (Memorandum  
17 Decision at page 14 lines 1-10 and page 16 lines 1-3) for two reasons. First, it is  
18 unnecessary to resolve this construction issue in determining whether Section 11382 can  
19 be severed from the remaining recall provisions, as votes for a successor will be counted  
20 even if the voter did not vote either "yes" or "no." The same rule of determining the outcome  
21 of the recall applies whether or not the voter did or did not vote "yes" or "no." Thus, the  
22 question of how to determine the result, that is, whether the proper denominator is the total  
23 ballots on the recall, successor or both, does not depend on whether Section 11382 remains  
24 effective.

25 Second, the California Courts, not this Court, should resolve the question of whether  
26 Sections 11383 and 11384 and California Const. Art. II, § 15 refer to the majority of votes  
27 cast on the sole question of whether the officer should be recalled or the majority of the  
28 combined number of ballots cast solely on recall, plus those cast solely on successor, plus

1 those cast on both issues. Since the outcome of the issue of severability does not depend  
2 on that question, this Court should not make that constructional determination. The Court's  
3 previous holding construing the meaning of Sections 11383 and 11384 is therefore vacated  
4 as unnecessary to a decision in this case.

5 3. *Volitionally Separable*

6 Finally, the Court finds that Section 11382 is volitionally separable. The test of  
7 volitional separability is whether it is "reasonable to suppose that those who favored the  
8 proposition would be happy to achieve at least some substantial portion of their purpose."  
9 Gerken v. Fair Political Practices Com., 6 Cal.4th 707, 715 (quoting Santa Barbara Sch. Dist.  
10 v. Superior Court, 13 Cal.3d 315, 331 (1975)). Rafferty provides a spirited account of how  
11 backroom deals in the 1911 California Legislature might have resulted in a legislative  
12 compromise from which Section 11382 can not be severed. (Rafferty MJP at 4-7.)

13 According to Rafferty, the state legislature struck a deal whereby the number of  
14 signatures required to institute a recall election would be reduced "provided that the  
15 incumbent would not be removed without a clear, affirmative majority" of those voting on the  
16 recall question. (Rafferty MJP at 5.) On this basis, the legislators replaced "a conventional,  
17 one-part election with a two-part question – the 'yes/no' vote followed by the election of a  
18 successor by plurality. As part of this package, the incumbent lost his right to run to succeed  
19 himself." (*Id.*) Rafferty contends that the inability of the officer to run to succeed himself is  
20 inextricably tied to the requirement that a voter vote on recall before he or she can vote on  
21 a successor.

22 Rafferty cites to Franklin Hichborn's Story of the Session of the California Legislature  
23 of 1911 (1911) for support for his historical analysis.<sup>5</sup> However, it is unclear from Hichborn's  
24 account whether the requirement that one vote on recall before the vote counted as to a  
25 successor was inextricably tied to the provision that a recalled officer could not replace  
26 himself. Furthermore, there is no evidence that the legislators would not have proposed the

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28 <sup>5</sup> The California Supreme Court has found the views of Hichborn, an observer of the  
1911 legislative session "to be particularly illuminating." Rossi v. Brown, 9 Cal. 4th 638, 700  
n.7 (1995).

1 balance of the recall provisions without the Section 11382 requirement.

2 Even if there were sufficient evidence of the legislature's intent in 1911, a question  
3 which the Court need not reach,<sup>6</sup> Rafferty's analytical lens is focused on the wrong subject  
4 because this provision had to be approved by the voters not the legislature. As the  
5 California Supreme Court stated in Delaney v. Superior Court, 50 Cal.3d 785, 798 (1990),  
6 "In the case of a constitutional provision adopted by the voters, their intent governs." See  
7 also Jahr v. Casebeer, 70 Cal.App.4th 1250, 1254 (1999) (stating the same). In this case  
8 it is clear that in passing the recall provisions to the California Constitution, the voters wanted  
9 to effect a mechanism for removing state officials before the expiration of their terms of  
10 office. There is no evidence before the Court that the voters were aware of the allegedly  
11 interlinking "legislative compromise" described by Rafferty, nor is there anything apparent in  
12 the plain text of the language adopted that would have signaled such.<sup>7</sup>

13 Finally, and conclusively, in the view of this Court, California's voters approved  
14

15 <sup>6</sup> The Court does note, however, that such statements of individual legislators, while  
16 they might be "illuminating," are not dispositive. See Quintano v. Mercury Casualty  
17 Company, 11 Cal.4th 1049, 1062 (1995) (the statements of an individual legislator, including  
18 the author of a bill, are generally not considered in construing a statute, as the court's task  
19 is to ascertain the intent of the legislature as a whole in adopting a piece of legislation); In  
re Marriage of Bouquet, 16 Cal.3d 583, 589-90 ("[I]n construing a statute we do not consider  
the motives or understandings of individual legislators who cast their votes in favor of it. [ ]  
[N]o guarantee can issue that those who supported his proposal shared his view of its  
compass.").

20 <sup>7</sup> In Rossi v. Brown, the California Supreme Court noted that when construing  
21 constitutional provisions:

22 [T]he intent of the drafters may be considered by the court if there is reason  
23 to believe that the electorate was aware of that intent . . . and we have often  
24 presumed, in the absence of other indicia of the voters' intent such as ballot  
25 arguments . . . or contrary evidence, that the drafters' intent and understanding  
26 of the measure was shared by the electorate. . . . The historic context in which  
a measure is drafted is also relevant in construing the 1911 amendments  
which added the initiative, referendum, and recall to the Constitution. We  
have found the views of Franklin Hichborn, a contemporary observer of the  
1911 and subsequent legislative sessions, to be particularly illuminating.

27 9 Cal.4th at 700 n.7 (internal citations omitted). There is no evidence as to what was  
28 actually conveyed to the electorate in 1911 concerning the recall provisions. Moreover,  
Hichborn's account may aid in interpretation, but not on the question of volitional severance.  
Most importantly, whatever was the intent in 1911, the voting requirement of Section 11382  
was in fact severed from the Constitution in 1974.

1 constitutional amendments to the recall process in 1974 that effectively retained crucial  
2 aspects of the recall process in the Constitution and moved others, of lesser significance,  
3 into statutes. See Ballot Pamph., Gen. Elec. (Nov. 5, 1974) Proposition 9, at pp. 32-35, 86-  
4 87 (stating that the proposition removes procedural or technical details from the  
5 Constitution).<sup>6</sup> As part of this amendment, the constitutional language requiring voters to  
6 vote on the question of the recall in order for their vote on a successor to count was deleted  
7 from the Constitution and moved to the Elections Code (presently Section 11382). As part  
8 of a state statute, this section could thenceforth be amended or completely repealed by the  
9 enactment of legislation rather than the more difficult procedure necessary to amend the  
10 Constitution.

11 The removal of the substance of Section 11382 from the California Constitution's  
12 provisions on recall is the most powerful indicia of severability. The people of California  
13 evidently believed the provisions of Section 11382 were not necessary to continue to  
14 effectuate the recall procedures as they severed them from the Constitution and relegated  
15 them to statutes that could be repealed more easily, even without voter consent.  
16 Notwithstanding what a few legislators had in mind in 1911, the California voters did not  
17 attribute such significance to the requirement that one must first vote on the recall question  
18 in order for one's vote on a successor to count.

19 Indeed, the California Constitution retains the provision that a recalled officer may not  
20 run to replace himself. West's Ann. Cal. Const. Art. II, § 15(c) (2002) ("The officer may not  
21 be a candidate . . ."). While this provision was deemed essential, the provision in Section  
22 11382 was not.

23 Under settled California Supreme Court law, an invalid recall provision is severable  
24 if the remainder of the recall initiative would likely have been adopted by the people had they  
25 foreseen the invalidity of the provision. Gerken at 716. As stated by the California Supreme  
26 Court in Santa Barbara Sch. Dist. v. Superior Court, 13 Cal.3d 315, 331-332 (1975), "If the  
27

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28 <sup>a</sup> The ballot materials regarding Proposition 9 are available at  
[http://holmes.uchastings.edu/ballot\\_pdf/1974g.pdf](http://holmes.uchastings.edu/ballot_pdf/1974g.pdf).

1 remainder of the law reflects a substantial portion of the electorates' purpose that part should  
2 be severed from the invalid provision and given effect." Stated another way, "the test is  
3 whether it can be said with confidence that the electorate's attention was sufficiently focused  
4 upon the parts to be severed that it would have separately considered and adopted them in  
5 the absence of the invalid portions." Gerken at 715-716 (quoting from People's Advocate,  
6 Inc. v. Superior Court, 181 Cal. App. 3d 316, 332-33 (1986)).

7 Here there is no reason to believe that the California voters did not want the remaining  
8 recall procedure in the absence of Section 11382. Therefore, the invalidity of Section 11382  
9 does not affect the validity of the remaining recall provisions in the California Constitution  
10 and Elections Code and Rafferty's request to either vacate the injunction and allow the recall  
11 election to proceed with Section 11382 operational or enjoin the entire recall election is  
12 denied.

13 C. COURT'S POWER TO ISSUE AN INJUNCTION

14 Rafferty argues that legal precedent, including Supreme Court cases, precludes  
15 injunctive relief against imminent elections, even where the right to vote has been abridged.  
16 Clearly, this is not the case. See, e.g., Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966)  
17 (holding that the district court should have enjoined an election where a number of African-  
18 Americans were denied the right to register to vote as a result of Mississippi laws imposing  
19 a four-month registration requirement and a poll-tax requirement).

20 The cases Rafferty cites do not support the proposition that a court cannot issue  
21 injunctive relief in connection with an imminent election. For example, in Chisom v. Roemer,  
22 853 F.2d 1186 (5th Cir. 1988), the court held that it would not be proper to enjoin a judicial  
23 election, in large part because of uncertain consequences to Louisiana's judicial system.  
24 However, the court noted: "It cannot be gainsaid that federal courts have the power to enjoin  
25 state elections." Id. at 1190.

26 Rafferty's reliance on the Supreme Court cases is similarly misplaced. None of these  
27 cases hold that an injunction is an improper remedy in the face of unconstitutional election  
28 laws. In Fortson v. Morris, 385 U.S. 231 (1966), the Supreme Court reversed the three-

1 judge district court panel's order enjoining the state assembly from electing a governor  
2 because the Supreme Court found the challenged election law to be constitutional. In  
3 Whitcomb v. Chavis, 396 U.S. 1064 (1970), the Supreme Court stayed pending appeal the  
4 district court's order which redistricted the state. The Court did not hold that district courts  
5 cannot enjoin elections. The caselaw is replete with instances where federal courts have  
6 issued injunctions against unlawful election practices. See, e.g., Lucas v. Townsend, 486  
7 U.S. 1301, 1303-05 (1988) (Kennedy, J., Circuit Judge) (enjoining election); Gilmore v.  
8 Greene County Dem. Party Exec. Comm., 368 F.2d 328 (5th Cir. 1966) (staying election).

9 At any rate, here, the Court is not enjoining an election. Rather it is enjoining the  
10 refusal to count certain votes. Again, it is well-established that federal courts may take such  
11 actions. See, e.g., Matsumota v. Pua, 775 F.2d 1393, 1398 (9th Cir. 1985) (reversing district  
12 court and ordering entry of injunctive relief on remand that prohibits enforcement of Section  
13 12-203 of election law); Perry v. Bartlett, 231 F.3d 155, 162 (4th Cir. 2000) (permanently  
14 enjoining State from enforcing Section 12A of Election Law given violation of First  
15 Amendment); California Democratic Party v. Lungren, 919 F. Supp. 1397, 1405 (N.D. Cal.  
16 1996) (permanently enjoining enforcement of Article II, Section 6 of California Constitution  
17 in state elections).

#### 18 D. INJUNCTION AS APPLIED TO LOCAL JURISDICTIONS

19 Rafferty also claims that the Court's injunction improperly covers the recall of local  
20 officials because "Plaintiffs lack standing since they fail to allege that they reside within any  
21 local jurisdiction subject to § 11382 . . . ." Rafferty Complaint at ¶ 24. Rafferty has not  
22 presented any support for his implicit proposition that Section 11382 is applied any differently  
23 to local recall elections than it is in state-wide recall elections. Section 11382 applies to all  
24 recall elections in California except those provided for under city or county charters. See  
25 West's Ann. Cal. Const., Art. II, § 19; see also Cal. Elections Code § 11000. Rafferty has  
26 not demonstrated that the effect of the application of Section 11382 to local elections is any  
27 different than as to state-wide elections or that there is a compelling basis for its application  
28 to local elections. Since Section 11382 does not apply to recall elections provided for by a

1 city or county charter, or ordinance adopted pursuant to such a charter, the Court's decision  
2 does not affect those recall elections. Therefore, the Court finds no reason to modify its  
3 determination that the declaratory and injunctive relief applies to all future recall elections  
4 covered by Elections Code, Section 11000.

5 **E. INJUNCTION AS APPLIED TO RAFFERTY AS AN INDIVIDUAL**

6 Rafferty alleges that the Court's injunction is overbroad in that it applies to him as a  
7 private person and restricts his First Amendment rights. As the Court explained at the  
8 hearing on Rafferty's motion to intervene, the injunction was only meant to reach state  
9 officials carrying out their official duties. However, in order to prevent any possible further  
10 confusion on this issue, the Court will modify the language of its injunction so as to remove  
11 any possible reference to the actions of private individuals.

12 **F. LACHES/UNCLEAN HANDS**

13 In his Complaint Rafferty alleges that "plaintiffs' claims are barred by the doctrine of  
14 laches, in that they failed to seek timely relief, (paras. 23, 25) and unclean hands (para. 26)."  
15 (Rafferty Complaint at ¶ 23.) Both of these arguments lack merit. Rafferty does not allege  
16 that Plaintiffs intentionally delayed bringing their suit after the recall election was certified,  
17 only that they could have brought their suit earlier. The Court has serious doubts as to  
18 whether Plaintiffs' suit would have been ripe for adjudication prior to the official certification  
19 of a recall election. In any case, Plaintiffs filed their suit the same day the Lieutenant  
20 Governor certified the Davis Recall election. The Court is satisfied that Plaintiffs did not  
21 improperly delay filing their claims in this case, and, thus, their action is not barred by the  
22 doctrine of laches.

23 As for Rafferty's unclean hands argument, the complaint in intervention alleges no  
24 facts that support the denial of injunctive relief. Therefore, this argument is wholly without  
25 merit.

26 **III. CONCLUSION**

27 The Court has accelerated these proceedings given the extraordinary nature of the  
28 matters addressed and to allow for orderly appellate review. The complaint in intervention

1 is ripe for adjudication on the merits as no facts are in dispute and only purely legal issues  
2 remain. Rafferty is not entitled to the relief he seeks, that is, to vacate the injunction as to  
3 applying Section 11382 or enjoining the entire recall election. The Court does, however,  
4 modify the injunction to clarify that it does not apply to Rafferty or any private citizen. The  
5 Court further vacates its July 29, 2003 holding construing the meaning of California Elections  
6 Code Sections 11383 and 11384 as unnecessary to a decision in this case and more  
7 appropriately left for the California courts. Other than the limited relief granted, judgment  
8 shall be entered dismissing Scott Rafferty's complaint in intervention with prejudice.

9 Although Defendants filed an opposition to Rafferty's motion for judgment on the  
10 pleadings, they did not make their own motion for judgment on the pleadings. It is proper,  
11 however, for the Court to *sua sponte* enter judgment on the pleadings dismissing the case.  
12 The Court set this matter for expeditious resolution on cross-motions for judgment on the  
13 pleadings and fully informed all the parties that, if appropriate, the Court would enter a final  
14 judgment so that the case would be ripe for appellate review. All three Defendants have filed  
15 their answers. Because the Court has determined that there are no factual disputes at issue  
16 and Rafferty is not entitled to relief as a matter of law on any of his remaining claims, it is  
17 proper for the Court to enter final judgment. See Flora v. Home Fed'l Sav. & Loan Ass'n,  
18 685 F.2d 209, 212 (7th Cir. 1982) (As long as both parties have the opportunity to be heard,  
19 the legal sufficiency of the complaint may also be raised by the court *sua sponte*, and  
20 judgment entered accordingly); Schwarzer, Tashima, & Wagstaffe, Cal. Practice Guide:  
21 Fed. Civ. Pro. Before Trial, § 9:329 (the Rutter Group 2003) (stating the same).

22

23 **IT IS SO ORDERED.**

24 Dated: August 21, 2003

  
HONORABLE BARRY TED MOSKOWITZ  
United States District Judge

25

26 Copies to:  
27 All Parties and Counsel of Record

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