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3:03-CV-01460 PARTNOY V. SHELLEY

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FRANK PARTNOY, an individual; LAURA ADAMS, an individual; PETER STRIS, an individual; JASON WILSON, an individual; and CALIFORNIA INFORMED VOTERS GROUP, an unincorporated association,

Plaintiffs,

vs.

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

Defendants.

CASE NO. 03CV1460 BTM (JFS)

MEMORANDUM DECISION AND ORDER GRANTING MOTION ON THE PLEADINGS AND DECLARING CALIFORNIA ELECTIONS CODE § 11382 UNCONSTITUTIONAL

I. INTRODUCTION

This case involves the recall election of California Governor Gray Davis which is currently set for October 7, 2003. By bringing this suit Plaintiffs are not, however, trying to halt or delay the recall election. Rather, Plaintiffs seek to have one discrete provision of the California Elections Code, involving how the votes are to be counted, declared unconstitutional. The challenged provision, section 11382 of the California Elections Code, states that "No vote cast in the recall election shall be counted for any candidate unless the

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voter also voted for or against the recall of the officer sought to be recalled." The question before the Court is whether this provision violates Plaintiffs' First and Fourteenth Amendment rights of free expression and their right to vote for the person who will govern them.

II. BACKGROUND

On July 23, 2003, the California Secretary of State certified that a petition to recall Governor Gray Davis had obtained the requisite number of signatures to require a recall election ("the Davis Recall"). Consistent with California law, Lieutenant Governor Cruz Bustamante set an election date of October 7, 2003. On July 23, 2003, Plaintiffs filed the instant lawsuit seeking to enjoin the enforcement of California Elections Code § 11382 ("section 11382") and a declaration that section 11382 violates the United States Constitution. On July 24 and 25, 2003, the Court held several status conferences to coordinate the proceedings in this case. During these status conferences the parties made several representations, waivers, and stipulations in order to expedite the resolution of this case: (1) Defendants waived all objections to venue; (2) Defendants represented to the Court that they will not print, mail or distribute any ballots or instructions on the recall voting procedures until August 20, 2003, at the earliest;[1] (3) all parties agreed that the appropriate method for resolving this issue was on a motion for judgment on the pleadings and Defendants agreed to waive any objection to Plaintiffs filing such a motion prior to Defendants serving their answer; and (4) the parties agreed that because there were no disputes of fact and that this case involves purely a matter of law, if the Court were to order any sort of injunctive relief, it should be on a permanent, and not preliminary, basis.

The Court set an expedited briefing schedule so that this matter could be resolved by the district court and allow for appellate review. Los Angeles County and San Diego County contend that they must send the ballots to the printer no later than August 16, 2003, and

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[1] Plaintiffs contend that Defendants are required by section 3103 of the California Elections Code to send out certain ballots 60 days before the election, which in this case would be on August 8, 2003. Defendants contend that they are not bound by this provision in a recall election and that, in any event, such a deadline is unworkable because the names of any successor candidates will not be certified until August 9, 2003. The applicability of section 3103 is not an issue in Plaintiffs' complaint.

August 20, 2003, respectively.

III. DISCUSSION

The California recall procedure is set forth in the California Constitution and the California Elections Code. Article 2, section 14 of the California Constitution provides:

> (a) Recall of a State officer is initiated by delivering to the Secretary of State a petition alleging reason for recall. Sufficiency of reason is not reviewable. Proponents have 160 days to file signed petitions.
> (b) A petition to recall a statewide officer must be signed by electors equal in number to 12 percent of the last vote for the office, with signatures from each of 5 counties equal in number to 1 percent of the last vote for the office in the county.

Article 2, section 15 provides for the recall election:

> (a) An election to determine whether to recall an officer and, if appropriate, to elect a successor shall be called by the Governor and held not less than 60 days nor more than 80 days from the date of certification of sufficient signatures.
>
> . . . .
>
> (c) If the majority vote on the question is to recall, the officer is removed and, if there is a candidate, the candidate who receives a plurality is the successor. The officer may not be a candidate, nor shall there be any candidacy for an office filled pursuant to subdivision (d) of Section 16 of Article VI.

Section 11320 of the Elections Code provides that the recall ballot shall have the following question: "Shall Gray Davis be recalled (removed) from the officer of Governor?" The voter shall mark "yes" or "no" to the right of the question. Section 11384 of the Elections Code provides that, "If a majority of the votes on a recall are 'Yes', the officer sought to be recalled shall be removed from office upon qualification of his successor." Section 11385 provides that "If at a recall election an officer is recalled, the candidate receiving the highest number of votes for the office shall be declared elected for the unexpired term of the recalled officer."

The provision in question here, section 11382, provides that, "No vote cast in the recall election shall be counted for any candidate unless the voter also voted for or against the recall of the officer sought to be recalled." Section 11382 is derived from the 1911 amendment to the California Constitution which provided that:

> [N]o vote cast shall be counted for any candidate for said office unless the voter also voted on said question of the recall of the person sought to be

recalled from said office.

1911 Cal. Const., art. XXIII, § 1. The provision at issue here was removed from the California Constitution but enacted in its present form in section 11382.

Plaintiffs contend that section 11382 violates their rights under the United States Constitution because it requires them to vote either "yes" or "no" on the issue of whether Governor Davis should be recalled as a prerequisite for counting their votes on any successor candidates for Governor. Plaintiffs allege that while they fully intend and desire to vote on who will be the next Governor, should Governor Davis be recalled, they do not want to vote on the recall issue itself. Some of the Plaintiffs state that they are morally and/or politically opposed to voting on the recall because "the recall is either an illegitimate political process in general, or especially in the Davis Recall," and believe that participating in the process by voting "yes" or "no" "either legitimates the process or is untenable as a matter of personal principle." Motion at 19. Other Plaintiffs state that they are "agnostic on the merits of the recall" and therefore prefer not to vote one way or the other on the issue.

Plaintiffs allege that section 11382 violates their Constitutional rights to due process and equal protection under the Fourteenth Amendment because if they do not vote on the recall issue, their votes on potential successors will not be counted. Plaintiffs contend that their rights under the First Amendment are also violated because they are being forced to speak on the recall decision despite their wishes not to do so. Additionally, Plaintiffs allege that this provision violates their right "not to vote" which is "implicitly recognized in the Ninth, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments." Motion at 3.

It is clear to the Court, and not contested by Defendants, that the case is ripe for determination and that Plaintiffs have standing to challenge section 11382. Since the petition for the Davis Recall has been certified, an election date has been set, and the challenged election provision is still in effect, there is an actual "case or controversy." The named Plaintiffs are all registered voters, either in San Diego County or Los Angeles County and have stated both their intention to vote for any successor to the current Governor and their intention not to vote on the issue of the recall, or their opposition to being coerced into

having to vote on the recall issue. This is sufficient to meet the standard for individual standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

California Informed Voters Group ("CIVG"), an unincorporated association, is also a plaintiff in this suit. An association has standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit. Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). It is clear from an examination of the pleadings, and the fact that the individual plaintiffs have standing, that CIVG has standing to sue as well. See Fair Housing in Huntington Committee, Inc. v. Town of Huntington, 316 F.3d 357, 363 (2nd Cir. 2003) (explaining that because "at least two of FHHC's members have standing . . . thus, [FHHC] may bring suit in a representative capacity.").

A judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is properly granted "when, taking all allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." Nelson v. City of Irvine, 143 F.3d 1196, 1200 (9th Cir. 1998) (citing McGann v. Ernst & Young, 102 F.3d 390, 392 (9th Cir. 1996)). A motion for judgment on the pleadings brought pursuant to Rule 12(c) may be brought "[a]fter the pleadings are closed but within such time as not to delay the trial . . . ." Fed. R. Civ. P. 12(c).

In order to be granted a permanent injunction, a party must demonstrate (1) the likelihood of substantial and immediate irreparable injury, and (2) the inadequacy of remedies at law. See G.C. and K.B. Investments, Inc. v. Wilson, 326 F.3d 1096, 1107 (9th Cir. 2003).

While Plaintiffs base their challenges on 42 U.S.C. § 1983 and various Constitutional amendments, all these claims can be addressed under a single analytical framework.[2] See LaRouche v. Fowler, 152 F.3d 974, 987 (D.C. Cir. 1998) ("[W]e have previously recognized

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[2] The "state action" prong of the section 1983 analysis is clearly met here because Defendants are state officials who are sued only in their official capacities. Therefore, the only issue is whether Defendants' actions violate Plaintiffs' Constitutional rights.

that the case law relating to section 1983 claims, and that relating to claims brought directly under the Constitution, have been assimilated in most . . . respects.'"). Furthermore, the Supreme Court's recent election law cases direct that Constitutional challenges brought under the First and Fourteenth Amendments be addressed "using a single basic mode of analysis." Id. at 987-88 (citing Anderson v. Celebrezze, 460 U.S. 780, 787 n.7 (1983) ("[W]e base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis."); see also, Republican Party v. Faulkner County, 49 F.3d 1289, 1293 n.2 (8th Cir. 1995) ("In election cases, equal protection challenges essentially constitute a branch of the associational rights tree.").

Although the Supreme Court has stated that Constitutional challenges to specific provisions of state elections laws "cannot be resolved by any 'litmus-paper test,'" the Court has identified the proper analytic framework for addressing these issues. As the Court stated in Anderson v. Celebrezze, 460 U.S. 780 (1983):

> [A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 789.

The "rigorousness" of the inquiry, however, depends on "the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." Burdick v. Takushi, 504 U.S. 428 (1992). The Court in Burdick outlined a two-tier approach to this issue:

> [W]hen those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions.

Id. at 434 (internal citations omitted).

Therefore, this Court must first determine the extent to which section 11382 burdens

Plaintiffs' First and Fourteenth Amendment rights and whether such a burden is either "severe" or only a "reasonable nondiscriminatory restriction."

Plaintiffs are certainly correct that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555 (1964). Furthermore, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." Westbury v. Sanders, 376 U.S. 1, 17 (1964). Implicit in the right to vote is the right to have that vote counted. See Davis v. Bandemer, 478 U.S. 109, 124 (1986) ("[E]veryone ha[s] the right to vote and to have his vote counted.").

This does not mean, however, that states cannot effect "substantial regulation" of their elections so that they may be "fair and honest" and to ensure that "some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730 (1974). As a practical matter, states have "evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways . . . the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." Id. In this case, Plaintiffs are not challenging any of these types of election regulations. In fact, it is uncontested that the individual Plaintiffs meet all the qualifications to be registered voters and fully intend to comply with the time and place requirements to vote in the Davis recall. Plaintiffs are only challenging the requirement that they must vote on one issue in order for their vote to be counted on another issue.[3]

Defendants, however, challenge Plaintiffs' basic assertion that the recall election presents two separate and distinct questions to be voted on. According to Defendants, "voters are asked to answer only one, albeit compound, question: should the incumbent be recalled and, if so, who should replace him or her." Kevin Shelley, Secretary of State of the

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[3] The Court does not consider the procedure in section 11382 to be analogous to the successive ballots a person may be required to cast in a primary and a general election or to an attempt by a state to fairly and efficiently channel and limit the generalized expressive functions the voting process itself serves.

State of California's Response to Plaintiffs' Motion for Judgment on the Pleadings ("Shelley Response") at 4. At the heart of this argument is the contention that the recall and the successor election are in fact the same process. As Defendants state in their response:

> When an official is recalled, his or her successor is elected by a plurality vote from among a group of successor candidates appearing on the same ballot. This eliminates the need for a subsequent special election. And even though the recalled official cannot appear as a candidate to be his or her own successor, he or she is a 'candidate' for their office, and a vote against the recall is a vote for the incumbent. Thus, by facing a vote on the issue of the recall Governor Davis is, in essence, a candidate for Governor on the recall ballot.

Id. at 3, n.8. The Court finds this argument without merit because an incumbent who wins 49% of the "no" vote can still be replaced by a candidate who receives a mere 34% plurality of the votes in a three-way race for a successor or 26% of the vote in a four-way race. Therefore, it cannot be contended that the incumbent is, in effect, on the same ballot as the potential successors.

Defendants also proffer two analogies in support of their position that no unconstitutional pre-qualification exists in this case. First, they contend that the recall process is similar to "voters' consideration and approval or rejection of proposed bond acts." Id. While it is true that such proposals are often multi-faceted as to the projects the bond will authorize, and voters do not have a choice to limit which projects the bond may support, Defendants have provided no evidence that such bonds, or any other ballot propositions, allow for or require two or more separate votes. In the case of a bond it is certainly reasonable for a state to inform the electorate as to which project or projects the allocated money will fund. In this case, the voters are not told who will be the new governor should they vote to recall the incumbent. Rather, voters are given a choice of candidates to select from if the recall passes. Therefore, the Court does not find the bond analogy to be apposite.

Defendants' second analogy is to a presidential election where "a voter - speaking with one vote - makes a choice for both the President and Vice President." Shelley Response at 4, n.9. The Court finds this analogy equally inapposite. In a presidential election, votes are cast for electors, not directly for the candidates. Members of the electoral

college are bound to vote for the candidates of their party. While it is clear that this procedure passes Constitutional muster, it is sufficiently distinguishable from the recall process at issue in this case. See U.S. Const., art. II, § 1, cl. 2; Ray v. Blair, 343 U.S. 214 (1952).

Defendants argue that even if the Court construes the recall process to include two separate questions, the requirement that a person vote on both questions "imposes only a minimal burden on voters." Shelley Response at 7. Defendants contend that because "a recall election is a drastic form of 'impeachment by the voters,' California can impose the minimal burden of requiring a voter who chooses to participate in the recall process to participate in deciding whether [the elected] official should be removed from office in order to participate in deciding on the officer's successor." Id. To the extent this argument simply repeats Defendants' contention that the recall presents only one question and that requiring a voter to check two boxes to answer it is only a minimal burden, the Court has already addressed and rejected this proposition. To the extent that Defendants seek to justify the requirement that a person vote on both questions, i.e., because it is a "drastic form of impeachment," the Court considers this argument more properly analyzed as one of the State's justifications for the burden on a voter's rights, not as indicative of the weight of that burden. Accordingly, the Court finds that this argument does not justify the determination that section 11382 imposes "only a reasonable, nondiscriminatory restriction[ ] upon the First and Fourteenth Amendment rights" of California voters. Burdick, 504 U.S. at 434.

The Court also finds Defendants' reliance on the actual holding of Burdick to be unavailing. In Burdick, the Supreme Court held that Hawaii's prohibition on write-in voting did not unreasonably infringe upon its citizens' rights under the First and Fourteenth Amendments because it was a reasonable regulation of the election process. However, the Court also stated that while it is not the function of the election process to "provide a means of giving vent to short-range political goals, pique, or personal quarrels," the "[r]easonable regulation of elections *does not* require voters to espouse positions that they do not support . . . ." 504 U.S. at 438 (discussing reasons for finding state law banning write-in candidates

not to be a severe burden on plaintiff's right to vote) (internal citations omitted). In Burdick, the Court construed the burden on voting rights to be an issue of timely access to the ballot and found that because Hawaii's electoral system provided "easy access to the ballot . . . any burden on voters' freedom of choice and association is borne only by those who fail to identify their candidate of choice until days before the primary." 504 U.S. at 436-37. This is not the case here. Plaintiffs are not seeking to have any particular candidate put on the ballot. Nor is this an issue of timing. Plaintiffs' rights will be affected to the same degree regardless of when Plaintiffs seek to assert them. Plaintiffs in this case want to vote on one of the issues that is actually presented on the ballot. They simply do not want to be forced to vote on a different issue in order for that vote to be counted.

Because section 11382 will effectively bar Plaintiffs from having their otherwise valid vote for a gubernatorial successor counted, or compel them to vote on a separate issue upon which they do not wish to vote, the Court determines that section 11382 effects a severe restriction on their Constitutional right to vote. Id. at 434. Indeed, if Plaintiffs decline to vote on the question of recall as a protest of the recall process, they are denied the right to have their vote counted on the question of who shall govern them. In order to have a condition precedent to the exercise of the right to vote for who will be one's Governor, California must advance evidence it is "narrowly drawn to advance a state interest of compelling importance." Id.

Defendants contend that the recall election is a special interest election where the State need only show an important regulatory interest rather than a compelling interest. However "special" and historic the present recall election is, it is not a special interest election as that term is used by the Supreme Court. In Hill v. Stone, 421 U.S. 289 (1975), the Supreme Court noted that a special interest election could limit voters to those sharing that special interest. But the Court construed special interest election as those limited circumstances such as a water district where the disproportionate effect of the governing body's activities was on specific landowners as a group. 421 U.S. at 295 n.5. The selection of a governor is not an interest special only to those favoring recall. Rather, it is of

paramount interest to all of California's voters. As the Supreme Court in Hill v. Stone held, in a general interest election, "restriction on the franchise other than residence, age, and citizenship must promote a compelling state interest in order to survive constitutional attack." 421 U.S. at 289.

In offering a sufficiently compelling state interest to justify the restriction imposed by section 11382, Defendants proffer several reasons. First, Defendants argue that "[a]ssuring that an elected official is not removed from office unless a majority of those voters who choose to participate in the recall process vote for his or her removal furthers the important state interest of fostering an effectively functioning government and guarding against disruption in state government." Shelley Response at 8. Defendants explain that "[r]emoving an elected official and replacing him or her without the certainty that a majority of those voters who chose to participate in the recall process actually voted to recall the officer, could lead to chaos and disruption in the functioning of state government." Id.

While Defendants are correct in their assertion that a state has a permissible and compelling interest in "the stability of its political system," Storer v. Brown, 415 U.S. 724, 736 (1974), they have not adequately demonstrated that chaos will result without section 11382 or how section 11382 will stem the flow of any such "chaos and disruption." Regardless of the applicability or non-applicability of section 11382, whether or not Governor Davis is recalled will be decided by a majority of those who vote on that issue. Likewise, if Governor Davis is in fact recalled, his successor will be chosen by a plurality of those who vote on that issue regardless of whether section 11382 is in effect or not.

Indeed, under section 11382, one can vote on the recall but not on the election of a successor. This possibility seems to create the same concern that Defendants argue section 11382 was designed to prevent. Modern vote counting procedures will provide a tally of the "yes" and "no" votes and the votes for the several potential successors. It is hard to imagine any chaos that will truly result.

It is possible that Defendants are really arguing that unless a great number of people vote on the recall issue, then the successor election will appear to be illegitimate and, as

such, will have a destabilizing effect on the running of the State government. To the extent section 11382 remains in force, however, it actually undermines this argument because it will likely discourage those voters who, like Plaintiffs, would otherwise vote for a successor. To the extent the state is using access to voting for a successor as a carrot to entice people to legitimize the recall process or a stick to punish those who do not, such a rationale is unjustified. As the Supreme Court stated in Burdick, it is not a reasonable regulation of elections for a state to "require voters to espouse positions that they do not support." 504 U.S. at 438.

Defendants also argue that the State has an important governmental interest in ensuring that only those voters with a "direct" interest in the successor election are allowed to vote and an interest in making certain that those votes are not diluted. The Court finds these arguments unpersuasive. Simply because a person is either opposed to the recall election process or agnostic to its merits, does not mean that that person is not directly interested in who will be their next Governor. Defendants' supporting argument, that without section 11382 the public will never know whether an elected successor was validly recalled by a majority of those who participated in the recall process, is not in fact true. As noted above, the tally on both recall and successor will be clear and apparent.

Defendants argue that section 11382 furthers the important interest of the State in protecting the integrity and continuity of validly elected officials. They argue that "[s]ection 11382 also protects the peoples' interest in seeing their elected officials remain in office unless the voters show a substantial interest in whether the official is removed or not." Shelley Response at 8. However, section 11382 actually does not serve this purpose and has the opposite effect.

First, there is no requirement as to the number of voters who must vote on the recall. While twelve percent of those who cast their vote in the preceding gubernatorial election must sign a recall petition, Cal. Const., art. II, § 14(b), there is no requirement that any number of voters actually cast a recall vote. Thus, if only one percent of voters who voted in the last gubernatorial election vote in the recall, the recall could be decided by as little as

slightly more than one-half of one percent of the votes cast in the regular election. Neither section 11382 nor the recall provisions mandate a recall only when the vote demonstrates that the "voters show a substantial interest in whether the official is removed or not."

Second, section 11382 has the effect of reducing the vote on who shall lead the State as Governor as it disallows votes by otherwise properly registered voters. Thus, section 11382 allows the present Governor to be removed by a smaller vote than by which he or she was elected and the successor governor elected by even less votes. Section 11382 actually would discourage persons who wish to abstain from voting in the recall from participating in the overall recall process entirely.

Defendants also argue that without section 11382 persons who only have "an indirect or remote interest" in the recall will decide who will replace a recalled officer. Shelley Response at 9. However, it must be underscored that voters are not merely voting on who will be replacing a recalled officer, they are voting on who will be their Governor - that is, who will govern the people of California. All of the registered voters of California have a separate and paramount interest in that decision.

Finally, Defendants argue that if the Court strikes down section 11382 as unconstitutional, this may create a situation where uncertainty arises in the interpretation of another section of the statute, namely California Elections Code section 11383. Section 11383 states: "If one-half or more of the votes at a recall *election* are "No", the officer sought to be recalled shall continue in office." (emphasis added). In contrast, section 11384 states: "If a majority of the votes on a recall *proposal* are "Yes", the officer sought to be recalled shall be removed from office upon the qualification of his successor." (emphasis added). Defendants contend that because section 11384 uses the words "recall proposal", whereas section 11383 uses the words "recall election", it is possible that an ambiguous situation could arise "if the number of 'No' votes cast on the *recall proposal* exceed the number of 'Yes' votes but do not total 'one-half or more' of the total votes cast in the *recall election*." Sally McPherson, Registrar of Voters for the County of San Diego's Joinder in Opposition to Plaintiffs' Motion at 3.

It is clear to the Court that the words "recall election" in section 11383 and "recall proposal" in section 11384 are synonymous and refer solely to the question of whether or not the incumbent official shall be recalled. Both sections 11383 and 11384 refer to the vote tally of "yes" or "no" votes and not to the votes cast for successors. See Wells v. Marina City Properties, Inc., 29 Cal.3d 781 (1981) (a construction which makes sense of an apparent inconsistency is to be preferred to one which renders statutory language useless or meaningless); Hough v. McCarthy, 54 Cal.2d 273 (1960) (a court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistences in them and construe them to give force and effect to all their provisions); Kydd v. City and County of San Francisco, 37 Cal. App. 598 (1918) (statutes must be so construed that the whole, if possible, may stand).

The Court holds that section 11382 substantially burdens the right of citizens of California to vote on a successor governor in the event of a recall by conditioning the counting of that vote on whether the voter cast a ballot on the question of recall. The Court finds that the precise interests put forward by the State as justifications for the burden imposed by section 11382 neither advance a state interest of compelling importance nor even an important regulatory interest of the State. Burdick at 434 (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

Section 11382, however, does more than unconstitutionally burden Plaintiffs' right to vote. It forces them to take a position on the question of recall, of which the failure to do so results in the cancellation of their vote of who should be their governor. Such an effect violates Plaintiffs' First Amendment Right of free expression. See, e.g., Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all . . . . The right to speak and the right to refrain fro speaking are complementary components."); Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1, 16 (1986) ("[T]he choice to speak includes within it the choice of what not to say.").

The parties have not cited nor has the Court found any case directly on point. While this is a case of first impression, the words of the Court of Appeals for the First Circuit in

Ayers - Schaffner v. DiStefano, 37 F.3d 726 (1st Cir. 1994) seem apropos. There a school board election was invalidated and only those who voted in the original balloting were permitted to vote in the re-election. The Court declared this restriction unconstitutional saying:

> The right to vote "is of the most fundamental significance under our constitutional structure" . . . and depriving a qualified voter of the right to cast a ballot because of failure to vote in an earlier election is almost inconceivable."

37 F.3d at 727 (internal citations omitted).

Here too, what is at stake is the right of a voter to decide who shall succeed the Governor, if recalled. Every voter, whether they voted for or against that recall has a paramount interest in choosing the person who will govern them. Whatever reasons for section 11382 existed in 1911, they fail to pass Constitutional muster ninety-two years later.

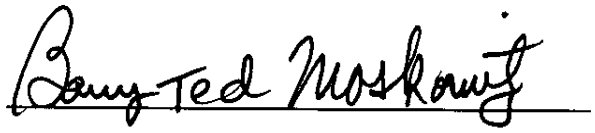
IV. CONCLUSION

Plaintiffs' motion for judgment on the pleadings is GRANTED. The Court holds that California Elections Code section 11382 is unconstitutional. Furthermore, the Court finds that Plaintiffs have made the requisite showing for a permanent injunction, namely that they have demonstrated (1) the likelihood of substantial and immediate irreparable injury, and (2) the inadequacy of remedies at law. See G.C. and K.B. Investments, Inc. v. Wilson, 326 F.3d 1096, 1107 (9th Cir. 2003). Defendants, as well as any individual, agency, or entity acting on their behalf or pursuant to their authority, or any other individual, agency or entity with actual notice of this order, are permanently enjoined from (a) enforcing in any manner and in any recall election conducted in the State of California the provisions of California Elections Code section 11382, (b) preparing, approving, or disseminating to any individual, agency or entity any ballots, sample ballots, voter instruction materials, or other documents that state, in sum or substance, that a voter must cast a vote on the recall for their vote for any successor candidate to be counted, or otherwise attempt to persuade or inform voters that their vote on a successor candidate will not be counted unless they also cast a vote for or against the recall; and (c) failing to count any otherwise valid ballot or vote based on the fact that the voter did not vote either "yes" or "no" on the question of recalling the Governor.

Finally, the Court holds that the words "recall election" in California Elections Code section 11383 refer only to the "yes" or "no" vote for or against recalling the incumbent official.

IT IS SO ORDERED.

Dated: July 29, 2003



HONORABLE BARRY TED MOSKOWITZ
United States District Judge

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