21-55930

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A.W. CLARK,

Plaintiff-Appellant-Petitioner,

vs.

SHIRLEY N. WEBER,

Defendant-Appellee-Respondent.

COMBINED OPENING BRIEF AND PETITION FOR WRIT OF MANDAMUS

EMERGENCY RELIEF REQUESTED BY SEPT. 8, 2021

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA, IN A FEDERAL QUESTION ACTION, IN CASE NO. 21-cv-06558-MWR(KSx),
HON. MICHAEL WALTER FITZGERALD, PRESIDING

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CERTIFICATE FOR EMERGENCY RELIEF

(i) Information as to the parties is as follows:

Defendant Shirley N. Weber:

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(ii) The facts that give rise to the existence of the claimed emergency are that the California recall election is to be had on Sept. 14, 2021, plaintiff seeks to enjoin it going forward, and the district court denied plaintiff's motion for an injunction on Fri., Aug. 27, plaintiff immediately filed a notice of appeal, drafted these papers the next day, Aug. 28, and will have filed them as soon as a case number was assigned to the appeal. Whether of not the recall election goes forward is an issue of great importance.

(iii) Counsel for defendant were notified and served with the combined opening brief/petition for write of mandamus via email before it was filed.

(iv) The relief sought herein was sought in the district court and was denied, as set forth in the excerpts of record, at ER-51.

YAGMAN + REICHMANN, LLC

By: /s/ Joseph Reichmann
JOSEPH REICHMANN

VERIFIED PETITION

1. I am one of the counsel for the plaintiff-appellant-petitioner, A.W. Clark.

2. On Aug. 27, 2021, the district court denied the motion for a preliminary injunction, to prevent the California gubernatorial recall election from being held, on Sept. 14, 2021.

3. On even date therewith, I filed a notice of appeal, and completed this opening brief/petition for mandamus the next day, Aug. 28.

4. I shall file it as soon as a case number is assigned, or sooner, on Mon., Aug. 30, if when I contact the clerk's office I am instructed how to do that.

5. The recall election is being held in violation of plaintiff's Fourteenth Amendment rights to both Equal Protection and Due Process, because it is being held in violation of the process that is supposed to be provided to the plaintiff under the Cal. Const., specifically Proposition 14, as explained in the following opening brief/petition for write of mandamus.

I declare the foregoing to be true under penalty of perjury, pursuant to 28 U.S.C. § 1746, at Los Angeles, California, on Aug. 28, 2021.

YAGMAN + REICHMANN, LLC

By: _____/s/ Joseph Reichmann_
JOSEPH REICHMANN
Attorney for Plaintiff, Plaintiff-Appellant-Petitioner

Plaintiff-appellant-petitioner A.W. Clark submits this combined opening brief and petition for writ of mandamus.

I. INTRODUCTION

> The Top Two Candidates Open Primary Act is hereby adopted by the People of California to protect and preserve the right of every Californian to vote for the candidate of his or her choice.
> . . .
> All registered voters otherwise qualified to vote shall be guaranteed the unrestricted right to vote for the candidate of their choice in all state . . . elections.

California Proposition 13 (2011) (proposed and put on the ballot by the Legislature and approved by the voters).[1] Prop. 14 governs *all* State elections, including recall elections, and it trumps Cal. Const. Art. III, § 15(c). The court below refused to rule on this.

Plaintiff challenges California's recall election process, on the grounds, *inter alia*, that it violates his right under the California Constitution, as set forth in Prop. 14, and thus violates his federal, Fourteenth Amendment rights to equal protection and due process. State laws populate

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[1] One of the direct effects of Proposition 14, as well as one of the intentions of both the Legislature and the voters, when placing it on the ballot and then approving it, when enacting Proposition 14, was that ***all statewide officials*** must be *elected with* ***the majority*** of the vote. This is because by having only two candidates advance from the primary into the general election, the candidate who receives the most votes in the general election will have the **majority** of the votes, as well, since there is only one other candidate receiving votes. *See infra*. Simple, ordinary language analysis shows this to be the case.

and provide the substance to what the process is that is protected by the Fourteenth Amendment, that is, what process is "due."

Specifically, plaintiff contends that, as to the alleged equal process violation, "2010's Proposition 14 (Top Two Primaries Act), which amended sections 5 and 6 of Art. II of the California Constitution, invalidated and rendered unconstitutional the recall sections, because Prop. 14 mandated that all California state-wide offices be chosen by a majority of voters, whereas the recall sections allow a plurality of electors to choose statewide officers[,]" Complt., ER-1, Doc. 1, at aver. 105, and that [t]his violates both the Equal Protection Clause of the Fourteenth Amendment, and the Equal Protection Clause [*sic*] of the Fourteenth Amendment, as interpreted by the United States Supreme Court. *Id.* at 106. Cal. Const. Art. II, is attached as the Appendix hereto.

Specifically, plaintiff also contends that, as to the alleged due process violation, "2010's Proposition 14 (Top Two Primaries Act), which amended sections 5 and 6 of Art. II of the California Constitution, invalidated and rendered unconstitutional the recall sections, because Prop. 14 mandated that all California state-wide offices be chosen by a majority of voters, whereas the recall sections allow a plurality of electors to choose statewide officers[,]" Complt., ER-1, Doc. 1, at aver. 107, and that [t]his violates both the Due Process Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment [*si*], as interpreted by the United States Supreme Court." *Id.* at 108.

The district court refused to address these contentions, stating that "[t]he Reply [on the subject motion] raises for the first time the argument that California's Top Two Candidates Open Primary Act (Proposition 14) amending Cal. Const. art. III, §§ 5-6, is inconsistent with the lack of a run-off for the dozens of replacement candidates[,] (Reply at 10-11)[,] [that p]rocedurally, this Court will not consider an argument raised for the first time in the Reply[,] [and that s]ubstantively, it is an issue for the California courts and does not involve federal constitutional issues." Ord. denying motion, ER-51, Doc. 30, at 59:13-18.[2]

The court below erred as a matter of law by declining to address plaintiff's contention because it properly was before the court, in the complaint, and therefore was not "raise[d] for the first" in the reply. Moreover, it is incorrect as a matter of law that this issue that was raised is an issue for the California courts that does not involve federal constitutional issues, because federal courts have an "unflagging" obligation to exercise the jurisdiction conferred on them, and California courts do not have exclusive jurisdiction to rule on federal constitutional issues, here Fourteenth Amendment issues.

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[2] In order for a federal court properly to refuse to hear an issue that it maintains is an issue for state courts, and not a federal issue, both conditions of such a decision must be correct. Here, both stated conditions are *in*correct, since the federal, Fourteenth Amendment issues presented are not issues solely for state court and are federal issues. The district court erred, as a matter of law, by refusing to render decisions on these issues.

(Time does not permit plaintiff to address separately the other issues on which the district court ruled, but since all of them are issues of law that require de novo review, *see infra*, plaintiff rests on the arguments he made on those other issues, as set forth in his motion and reply papers, all of which are contained in the excerpts of record).

II. DISTRICT COURT JURISDICTION

The district court had jurisdiction of this action under federal question jurisdiction, 28 U.S.C. § 1331, under the All Writs Act, 28 U.S.C. § 1651, and under the Declaratory Judgments Act, 28 U.S.C. §§ 2201-02.

III. APPELLATE JURISDICTION

Appellate jurisdiction is based on the district court having denied a preliminary injunction, pursuant to 28 U.S.C. § 1292(a)(1). That disposition was by the Aug. 27, 2021 order denying the injunction. ER-51, Doc. 30, as to which the notice of appeal timely was filed on even date therewith. ER-64, Doc 31.

IV. STATEMENT OF ISSUES ON APPEAL

The issues on appeal are:

1. Did the district court err as a matter of law in its effective denial of plaintiff's Fourteenth Amendment contentions, based on Cal. Prop. 14, by refusing to rule on them?

2. Did the district court err as a matter of law in its denial of plaintiff's other, non-Prop. 14 claims?

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V. NATURE OF THE CASE

This is a federal question action, in which the underlying, substantive claims are that, for various reasons, by not permitting Cal. Gov. Gavin Newsom's name to appear on the second issue of California's, Sept. 14, 2021 recall election ballot, California has violated plaintiff's federal rights.

VI. COURSE OF PROCEEDINGS AND DISPOSITION

The action was filed on Aug. 13, 2021, ER-1, Doc. 1; a motion for declaratory relief and preliminary injunction promptly was made the next day, Aug. 14, 2021, ER-7, Doc. 10, the motion was denied on Aug. 27, 2021, ER-51, Doc. 30, and the notice of appeal from that dismissal timely was filed on that same day, Aug. 27, 2021, ER-6427, Doc. 31.

VII. STATEMENT OF RELEVANT FACTS AND ALLEGATIONS

The relevant facts are set forth in the complaint at pp. 3-10 thereof, and are that defendants collected monthly payments on a void *ab initio* real property mortgage. ER-3-10; Doc. 1.

VIII. ARGUMENT

A. STANDARD OF APPELLATE REVIEW

All of the issues presented are issues of law, and, therefore, the standard of appellate review is de novo review. *Johnson v. Fed. Home Loan Mortg. Corp.*, 793 F.3d 1005, 1007 (9th Cir. 2015) (per curiam). *Brown v. Civil Serv. Comm.*, 818 F.2d 706, 708 (9th Cir. 1987) ("federal law [is] clearly subject to de novo review." (Citation omitted.)).

B. ISSUE 1:

Did the district court err as a matter of law in its effective denial of plaintiff's Fourteenth Amendment contentions, based on Cal. Prop. 14, by refusing to rule on them?

The United States Supreme Court most recently has held that "our recent reaffirmation of the principle that 'a federal court's "obligation" to hear and decide' cases within its jurisdiction 'is "virtually unflagging."'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (citations omitted).

This restated its holding in *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013), that "[f]ederal courts, it was early and famously said, have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.' [Citations omitted.] Jurisdiction existing, this Court has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.' [Citation omitted.] Parallel state-court proceedings do not detract from that obligation. [Citation omitted.]" "[T]he pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction[,] . . . [which] stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them[,] . . . [and i]t has been held . . . that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976) (citation

omitted). *See Cohens v. Virginia*, 6 Wheat. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."). In a case of concurrent jurisdiction, the order in which jurisdiction was obtained is the most important factor. *Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. 440, 447 (1916).

The law in the Ninth Circuit, of course, is the same. In *United States v. State Water Resources Control Bd.*, 988 F.3d 1194, 1208 (9th Cir. 2021), the court held that "'[g]enerally, as between state and federal courts, the rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . ."'" (Quoting *Colo. River*, 424 U.S. at 817.) This is the case because "[f]ederal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Ibid.*

Thus, it is clear that the district court should have decided the federal issues presented, it did not, it now is too late for it to do that, and therefore, this court should rule on the pure issues of law. *See Fry v. Melarango*, 939 F.2d 832, (9th Cir. 1991) ("As a general rule, we will not consider an issue raised for the first time on appeal, although we have the power and discretion to do so. *Bolker v. Commissioner,* 760 F.2d 1039, 1042 (9th Cir.1985); *In re Wind Power Systems, Inc.,* 841 F.2d 288, 290 n. 1 (9th Cir.1988). We will exercise this discretion when the 'issue presented is

purely one of law and either does not depend on the factual record developed [in the district court], or the pertinent record has been fully developed.' *Bolker,* 760 F.2d at 1042. Because the issue of whether these defendants enjoy absolute immunity is a purely legal question, which may be dispositive of some of the claims, we are satisfied that it would be appropriate to consider the issue in this case.").

Proposition 14 (2009), a legislatively-referred constitutional amendment, provides: "Senate Constitutional Amendment 4 of the 2009-2010 Regular Session (Resolution Chapter 2, Statutes of 2009) . . . **PROPOSED LAW** . . . [t]he People of the State of California hereby find and declare all of the following: . . . All registered voters otherwise qualified to vote shall be guaranteed the *unrestricted right to vote for the candidate of their choice* in all state . . . elections." (Approved, June 10, 2010.) (Emphasis added.) *See* Addendum hereto. Here, this is the relevant legislative finding. Having been passed *after* passage of § 15(c), it supersedes it, to the extent that § 15(c) impinges on "the unrestricted right to vote for the candidate of [any registered voter's] their choice in [a] state . . . election[,]" and here this is the case because § 15(c) would restrict plaintiff's right to vote for Gov. Newsom in the recall election.

C. THE INTENT AND EFFECT OF THE "TOP TWO CANDIDATES OPEN PRIMARY ACT" IS THAT A CALIFORNIA STATEWIDE OFFICER MUST BE ELECTED BY *MAJORITY* VOTE.

The "Top Two Candidates Open Primary Act," passed by California voters as Prop. 14, on June 10, 2010, and amending Cal. Const. Art. II, §§ 5 & 6,

overrode the Constitution's prior recall provision, set forth in Art. II, § 15(c), because it post-dated § 15(c), and there is a legal presumption that a legislature, including the California Legislature, knew of prior legal provisions when it passed later legal provisions. *See Hall v. U.S.*, 566 U.S. 506, 516 (2012) ("'We assume that Congress is aware of existing law when it passes legislation,' *Miles v. Apex Marine Corp.,* 498 U.S. 19, 32 . . . (1990)."). *Cf. Forest Grove Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) ("'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.' *Lorillard v. Pons,* 434 U.S. 575, 580 . . . (1978)."); *People v. Valencia*, 3 Cal.5th 347, 369 (2017) (there "is a presumption, which we also apply to the Legislature, that the voters, in adopting an initiative, did so being 'aware of existing laws at the time the initiative was enacted.' (*Professional Engineers in California Government v. Kempton*, *supra*, 40 Cal.4th at p. 1048, 56 Cal.Rptr.3d 814, 155 P.3d 226; see also *In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11, 210 Cal.Rptr. 631, 694 P.2d 744.)"). Both the California Legislature and the California electorate were aware of § 15(c), and voted to override it, to the extent it was in conflict with Prop. 14. Prop. 14 supersedes and trumps the provisions of § 15(c) that are inconsistent with the provisions of Prop. 14. Since Prop. 14 requires that California statewide officers be elected by a *majority* vote, and § 15(c) provides for election of a statewide officer -- the Governor -- by a mere "plurality" vote, § 15(c) no longer is operative to this extent, and its non-applicability, therefore, must be declared and its use enjoined.

Put another way, the Top Two Candidates Primary Act in effect means all statewide officers are elected with a majority of the votes because there are only two candidates in a general election. One candidate will receive more votes and since there is only one other candidate, the candidate with the most votes also has a majority of votes. This means that the intent of the voters was that statewide officers are to be elected only with a majority of the vote.

D. ISSUE 2:

Did the district court err as a matter of law in its denial of plaintiff's other, non-Prop. 14, claims, based on the Fourteenth Amendment?

The two issues on the recall ballot are (1) whether or not Gov. Newsom should be recalled as California Governor, and, if so, then (2) who should replace him as Governor.

Cal. Const. Art. II, § 15(c) prohibits Gov. Newsom from being a candidate for Governor, should a majority of the electors/voters vote in the affirmative on issue one, so that Gov. Newsom's name does not appear on the recall ballot as a person whom the electors/voters can select to be Governor, should issue one receive a majority of votes.

Specifically, § 15(c) provides that "[i]f the majority vote on the question is to recall . . . [t]he officer [who is recalled] may not be a candidate . . . for . . . [the] office [of Governor] . . . ."

Section 15(c) also provides that "if there is a candidate [as to issue two] who receives a plurality [of the votes she or he] is the successor."

Thus, although Gov. Newsom could receive more votes against his recall on issue on, still a candidate who seeks to replace him, and who receives fewer votes on issue two, would be chosen to be Governor.

This process is violative of the Equal Protection and Due Process Clauses of the Constitution's Fourteenth Amendment, because it flies in the face of and is violative of the federal legal principle of "one person, one vote," and it gives to voters who vote to recall the Governor on issue one two votes -- one to remove him and one to select a successor. But limits to only one vote the franchise of those who vote to retain him and that he not be recalled, so that a person who votes for recall on the same ballot has twice as many votes as a person who votes against recall. This is unconstitutional both on its face and as applied.

E. CALIFORNIA CONSTITUTION ARTICLE II, § 15(c) IS UNCONSTITUTIONAL, UNDER THE FEDERAL CONSTITUTION.

"Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state . . . elections." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). All qualified voters have a constitutionally protected right to vote. *See e.g. Ex parte Yarbrough*, 110 U.S. 651 (1884) ("*The Ku Klux Klan Cases*").

Plaintiff is a qualified citizen, who has a right to vote in the Sept. 14, 2021 California recall election.

Indeed, and crucial here, is that "[t]he 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[,]

[a]nd the right of suffrage can be denied by debasement or *dilution* of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555 (emphases added).

Here, under § 15(c), plaintiff is barred and prevented from voting freely for the candidate of his choice, Gov. Newsom, and thus he would be denied the "essence of democracy," because his right to vote is denied by debasement and dilution, so that he would be prohibited and prevented from the free exercise of his franchise. Plaintiff would get to vote only once, while all voters who vote in favor of recall, should they prevail on question one, will get two votes for governor on the same ballot.

This cannot stand and fails federal constitutional scrutiny.

Voters who are similarly-situated have a right under the federal Constitution to have their votes given the same weight. *See e.g. Wesberry*, 376 U.S. at 3, and voters who are denied that right have a right to enjoin elections that violate that right. *Ibid. See Reynolds*, 377 U.S. at 541 (issuance of mandatory injunction warranted when right to vote is impaired).

When voters will be deprived of the full benefit of their right to vote, as here plaintiff would be by Cal. Const. Art. II, § 15(c), which violates the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment, those voters have a right to injunctive relief. *Ibid.*

When state law grossly discriminates against some voters, by contracting the value of their votes, and expanding the value of other voters votes, as here is the case, then, since the U.S. Constitution provides that "each vote be given as much weight as any other vote," *Wesberry*, 376 U.S.

at 7, then such state law "cannot stand." *Ibid.* This is so because "one man's [or woman's] vote . . . is to be worth as much as another's" *Id.* at 8.

Under the present regime, those who vote for recall get two votes, and those who vote against recall get one vote, so that § 15(c) impermissibly and federally-unconstitutionally restricts, and thereby dilutes, the votes of those voters who are against recall, denying them the equal protection of the laws, so that an overall majority of voters, as many as 49.9% voting to retain Gov. Newsom (with 50.1% of voters voting for recall), and a 1.09% plurality of voters (were California's entire population of just over 22,000,000 registered all to vote) could elect a replacement governor, with about 1,270,000 votes, in a State with a population of about 39,700,000. This disproportionate regime is federally-unconstitutional.

This is so because "one man's [or woman's] vote . . . is to be worth as much as another's." *Wesberry*, 376 U.S. at 7. Put another way, equal protection is embodied by the principle that "equals ought to have equality." Aristotle, *Politica*, Book III, 1282b, 20. *The Works of Aristotle Translated into English* (Oxford Univ. Press, 1963), Vol. X (*Politica*). Aristotle's principle is the basis for the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment. *See also* Declaration of Independence, Preamble ("all Men are created equal . . . .").[3]

[3] The Fourteenth Amendment Equal Protection Clause was the basis for both *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (state laws establishing segregation in public schools are unconstitutional, even if the segregated schools are equal in quality), and *Obergefel v. Hodges*, 576 U.S. 644 (2015) (the fundamental right to marry is guaranteed to same-sex couples). *See*

The analytical framework for disposition of the issues in this matter is that the court "must first consider the character and magnitude of the asserted injury to the rights protected by the . . . Fourteenth Amendment that the plaintiff seeks to vindicate[,] . . . [and] then [it] must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Moreover, "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[,] [and, o]nly after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Ibid.*

"[W]hen th[e] rights [in issue] are subjected to severe restrictions[,]" as here they are, then the regulation must be narrowly drawn to advance a state interest of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Hence, here there must be strict scrutiny: "rigorousness," *id.* at 428, and strict scrutiny "is a demanding standard." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011).

Therefore, this court first must determine the extent to which § 15(c) burdens plaintiff's Fourteenth Amendment rights, and whether such burden is "severe." Here, the recall severely burdens the right to vote or otherwise

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also, *Bolling v. Sharpe*, 397 U.S. 497 (1954) (Court held that the Equal Protection Clause of the Fifth Amendment imposes various equal protection requirements on the federal government).

violates the principle of one person, one vote as discussed both *supra* and *infra*. In short, voters who wish to remove the Governor get two votes, while voters who support the Governor get only one vote, so that the right to vote is diminished, diluted, and is "severely" burdened.

There are no evident state interests at all: indeed, the policy that underlies Prop. 14 is the opposite, to wit, that voters "shall be guaranteed the *unrestricted right* to vote for the *candidate of their choice* in all state . . . elections." (Emphasis added.) *See supra*.

The way the ballot is set up, based on the instruction of § 15(c) that the name of a governor sought to be recalled may not appear on issue two on the ballot, furthers no government interest at all, much less any legitimate interest, and it denies plaintiff the right to vote for the Governor of plaintiff's choice. Thus plaintiff's right to vote is subjected to deadening restriction, much less severe restriction, in an election that is a drastic form of non-legislature impeachment.

Since use of § 15(c) would bar plaintiff from having plaintiff's valid vote for a gubernatorial successor counted, this court should determine that § 15(c) is a "severe" restriction on both plaintiff's state, and hence federal constitutional right to vote. *Burdick*, 504 U.S. at 434.

A voter may not be denied the right to have their vote count on who should govern, and defendant has failed to advance any evidence that § 15(c) is "narrowly drawn to advance a state interest of compelling importance[,]" *ibid.*, much less any admissible evidence at all.

Every voter has a paramount interest in choosing the person who will govern them, and since the right to vote "is of the most fundamental significance under our [federal] constitutional structure[,]" *Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 727 (1st Cir. 1994), plaintiff's right to vote must be enforced and declaratory and injunctive relief should be granted. Section 15(c) does not pass constitutional muster, and it should be enjoined from use in the recall election.

F. THE *WINTER* FACTORS WEIGH IN FAVOR OF AN INJUNCTION.

Plaintiff is *likely to succeed on the merits* of plaintiff's claims, for the reasons already set forth in his motion. Notwithstanding that "the right to vote . . . [is] not absolute[,]" and that "the Court therefore has recognized that States retain the power to regulate their own elections[,]" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), (citations omitted), this never has meant that states can conduct unconstitutional elections. Indeed, *Burdick*, recognizes that "[c]ommon sense, as well as *constitutional law*," (emphasis added), must be adhered to: hence, when "government must play an active role in structuring elections," it is presumed that the carrying out of elections must be pursuant to federal constitutional principles. Here, that is not the case.

What *Burdick* actually states on this point is that when it is just a "*mere* fact that a State's system creates barriers . . . tending to limit the field of candidates from which voters might choose . . . [this] does not of itself compel close scrutiny." *Ibid.* (emphasis added). Here, what defendant is

doing, *see supra*, hardly is "mere," but deprives plaintiff and class members of fundamental rights, so that close scrutiny is warranted.

Defendant admitted that *Pub. Integrity All, Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016), stated the proposition that "the 'appropriate standard of review for laws regulating the right to vote[,]" Opp. at 7:24-26, is set forth in *Burdick*, but omitted to state that *Pub. Integrity All, Inc.* states just before this that "state and local government election laws that violate the [federal] Constitution are impermissible, *See Wash. State Grange*, 552 U.S. at 451, 128 S.Ct. 1184; *Moore v. Ogilvie*, 394 U.S. 814, 818, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969)[,]" *id.* at 1023-24, as here they are. The Ninth Circuit has interpreted *Burdick*: "not *every* voting regulation is subject to strict scrutiny." *Id.* at 1024.

Here, the State could have no interest at all in holding an *unconstitutional* recall election. Thus, strict scrutiny applies. Forcing a voter to participate in an unconstitutional election constitutes a "'severe' restriction," *Burdick*, 504 U.S. at 434, and it is for this reason that strict scrutiny applies. There is no compelling state interest, and there is a severe burden on constitutional rights, so that under strict scrutiny defendant loses.

Defendant's characterization of *Burdick* that "[s]trict scrutiny applies to a state election law only when First ***and*** Fourteenth Amendment rights 'are subjected to "severe" restrictions.' *Burdick*, 504 U.S. at 434[,]" Opp. at 7:26-28 (emphasis added), misstated what the Ninth Circuit said of *Burdick* in *Pub. Integrity All, Inc.*: "Under *Burdick*'s balancing and means-end fit framework, strict scrutiny is appropriate when First ***or*** Fourteenth

Amendment rights "are subjected to 'severe' restrictions restrictions." *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992))." *Pub. Integrity All, Inc.*, 836 F.3d at 1024.

Defendant changed the word "***or***" to the word "***and***" and thereby completely changed the holding, to require strict scrutiny only when ***both*** First ***and*** Fourteenth Amendment rights were asserted. Here, this is important because plaintiff asserts *only* Fourteenth Amendment, and not First Amendment, rights. Section 15(c) is unconstitutional under strict scrutiny.

Additionally, strict scrutiny applies because it is incorrect that § 15(c) "minimally burdens the right to vote." Opp. at 8:15-16. Hardly, does preventing a voter from voting for the candidate of the voter's choice and permitting some voters to have two votes on the same ballot "minimally" burden the right to vote: it eradicates it, because it dilutes the voter's vote by one-half, while multiplying the other voters' votes by a factor of two. It violates the "one person, one vote" constitutional requirement.

Plaintiff should prevail on the first injunction test, prevailing on the merits.

Plaintiff would suffer irreparable harm were his right to vote diminished and/or diluted, as it would be were the recall election to be held and completed. And, it would be were plaintiff not permitted to vote for Gov. Newsom on issue two.

Defendant's contention that plaintiff "delay[ed] in bringing this motion" and that that "'implies a lack of urgency and irreparable harm,'" is

rebutted by plaintiff's declaration. Plaintiff had no standing to bring his action previously, *see* A.W. Clark Declaration, ER-47, and his claim previously was premature and was not ripe. Had plaintiff not been notified that his recall ballot was on the way, and had plaintiff not received that ballot, plaintiff would not have had standing to sue. Thus, this "implication" spoken of in *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985), fails. All that this case stands for is that it found there was no irreparable harm such as to support granting an injunction. Indeed, the reason the denial of a preliminary injunction was denied was that "plaintiff seems to admit, this involves purely monetary harm measurable in damages." *Id.* at 1376 (the page just before the page cited by defense counsel). Everything else in this case is dictum. Again, it is not the recall statute in simple that plaintiff challenges, and plaintiff challenges its application to plaintiff, which he had no standing to challenge until it would be applied to plaintiff.

The balance of equities is treated elsewhere, and it tips against defendant and in plaintiff's favor. Defendant cited misleadingly a case, *Rupp v. Becerra*, Opp. at 13:13-16, whose holding actually is that "[t]he Court concludes that the legislature has articulated a legitimate government objective for the AWCA . . . ." This supports plaintiff's contention that the legislature and the people who voted for Prop. 14, because it was enacted to further the legitimate government purpose "to protect and preserve the right of every Californian to vote for the candidate of his or her choice[,]" Prop. 14(a), and that "all registered voters otherwise qualified to vote shall

be guaranteed the unrestricted right to vote for the candidate of their choice in all state and congressional elections." Prop. 14(b). Moreover, the government interest is that "[a]ll candidates for a given state or congressional office shall be listed on a single primary ballot[,]" *ibid.*, thus showing that plaintiff's contention that there is but one ballot is correct. Prop. 14 overrides and supersedes the ancient and out-moded government interests claimed by defendant.

Another case, *Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (en banc) (per curiam), was improperly cited by defendant. First, defendant did not indicate that the case was decided en banc, and second, defense counsel did not indicate the decision was a per curiam one. In its disposition, the en banc court relied on one of plaintiff's counsel's important cases 26 years ago, *People Who Want an Education v. Wilson (Gregorio T. v. Wilson)*, 59 F.3d 1002 (9th Cir. 1995), in which Gov. Wilson's Prop. 187 (voter initiative), which sought to deny public education to undocumented children in California schools, and in which an injunction was granted and upheld by the Ninth Circuit, for the proposition that "we do not review the underlying merits of the case." *Id.* at 1004. Thus, the court never opined on the merits in *Educ. Project*, and simply restated non-case-specific, general principles, which defendant quoted, as if they were new law. They are not.

In that case, mere election procedures -- use of punch cards -- was in issue, and there were not significant, one person, one vote, matters in issue, and hence the court held that it was "speculative" whether or not the use of punch cards would cause harm. Here, there is a certainty that going forward

with the recall will, in fact, violate plaintiff's constitutional right to suffrage, a right declared and defined by Prop. 14.

Defendant candidly admitted, but with some language of trivialization, that "does not mean . . . California's recall procedures are necessarily perfect[,]" Opp. at 14:22-23, but wants the court to defer to the "legislative process." *Id.* at 15:3. The "legislative process" already has occurred, and it was approved by the voters in Prop. 14, whose statement of state policy made nugatory the manner in which the recall ballot is structured.

Plaintiff has more than met the "heightened standard" for a mandatory preliminary injunction, although that is not required, since plaintiff seeks not a mandatory injunction, but rather a prohibitory injunction.

Contrary to defendant's assertion otherwise, plaintiff *does seek* to maintain the status quo, so that what is sought is a prohibitory injunction, and that is warranted. Contrary to defendant's contention, plaintiff does not seek an injunction that "prohibit[s] enforcement of a new law or policy," Opp. at 15:17-18, the policy set forth in Prop. 14 is 10 years old, so that the *Ariz. Dream Act Coal.* case cited by defendant is inapposite, because it opines on something that is not sought by plaintiff. The recall procedure is not "a new law or policy;" rather, by comparison, Prop. 14 is the "new law and policy." Again, plaintiff does not seek to "alter the status quo," but seeks to maintain it.

An "abrupt halt," Opp. at 16:1, to the recall is fully warranted, to maintain the status quo that there has not been an election completed, yet.

Halting something that is "in process," *id.* at 2, prevents its completion, before it has done any harm, and that is entirely appropriate. If the election is put off for a short period of time, to permit defendant to print and send out new, proper ballots, that is far less onerous than permitting the election to go forward, in violation of federal Equal Protection and Due Process. A postponement of the election date is better than the debacle of a faulty, federally-unconstitutional election.

The law and the established and uncontested facts *clearly favor* plaintiff's position. The last case cited by defendant, Opp. at 16:13-15, is *Garcia v. Google*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc). It is inapposite because it deals with "a weak copyright claim [that] cannot justify censorship in the guise of authorship." *Id.* at 736. Plaintiff's claim hardly is "weak," and has nothing to do with censorship. It reaffirmed the *Winter* factor: "The first factor under *Winter* is the most important—likely success on the merits. *Aamer v. Obama,* 742 F.3d 1023, 1038 (D.C.Cir.2014) ("We begin with the first and most important factor: whether petitioners have established a likelihood of success on the merits."). Plaintiff has established a likelihood of success on the merits, under both *Winter* and *Garcia*, and that "the law and facts *clearly favor* [plaintiff's] position . . . ." *Id.* at 740. But the court so held based on the premise, not applicable here: "Why? . . . [because the] requested injunction required Google to take affirmative action—to remove (and to keep removing) *Innocence of Muslims* from You Tube and other sites under its auspices, whenever and by whomever the film was uploaded. This relief is treated as a mandatory injunction, because it

'orders a responsible party to 'take action.'" *Ibid.* Here, plaintiff requests an injunction that requires defendant to take ***no action***, to ***stop acting***, to refrain from acting, and to cease administering the recall election. Here, the opposite of "affirmative action" is sought; plaintiff simply requests that defendant keep her hands in her pockets, by doing nothing further. And, the last sentence of *Garcia* appears to limit it to copyright cases: "the district court did not abuse its discretion when it denied Garcia's motion for a preliminary injunction *under the copyright laws*." *Id.* at 747. (Emphasis added.)

Because the district court did not rule on this issue and because it is a pure issue of law, this court should rule on it.

G. MANDAMUS IS WARRANTED.

If the court determines not to treat this matter as an appeal, then it is requested that it treat the matter as a mandamus petition.

The writ of mandamus, "we command," has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)). It is appropriate in extraordinary circumstances. *Kerr v. United States Dist. Court*, 426 U.S. 394, 402 (1976). Here, it is sought to obtain a decision on important federal constitutional issues, before it is too late to do so, as to the fast-approaching,

Sept. 14, 2021 California recall election. This truly is extraordinary, as is the district court's refusing to rule on plaintiff's most important contention.

In re City of New York, 607 F.3d 923, 932-33 (2d Cir. 2010), the court held as follows:

> The All Writs Act empowers this Court—as well as "all courts established by Act of Congress"—to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). One such writ is the writ of mandamus, an "extraordinary remedy" that has been used "both at common law and in the federal courts ... to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction." *Cheney,* 542 U.S. at 380, 124 S.Ct. 2576 (brackets and internal quotation marks omitted). Although we do not, in this context, employ "an arbitrary and technical definition of 'jurisdiction,' " we nevertheless issue a writ of mandamus only in "exceptional circumstances amounting to a judicial 'usurpation of power' or a 'clear abuse of discretion.' " *Id.* (citations and some internal quotation marks omitted); *see also Sims v. Blot,* 534 F.3d 117, 132 (2d Cir.2008) ("A district court has abused its discretion if it [has] based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence or [has] rendered a decision that cannot be located within the range of permissible decisions." (brackets, citations, and internal quotation marks omitted)).
>
> There are three conditions that must be established before a writ of mandamus may issue (we list these conditions in the order in which we discuss them below): (1) "the party seeking issuance of the writ must have no other adequate means to attain the relief [it] desires"; (2) "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances"; and (3) the petitioner must demonstrate that the "right to issuance of the writ is clear and indisputable." *Cheney,* 542 U.S. at 380–81, 124 S.Ct. 2576 (brackets, citations, and internal quotation marks omitted); *accord*

Kerr v. U.S. Dist. Court for N. Dist. of Cal., 426 U.S. 394, 403, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976).

Here, all three conditions precedent to issuance of the writ are met and compel it being issued.

(1) "The party seeking issuance of the writ must have no other adequate means to attain the relief [it] desires."

Plaintiff has no other means to attain the relief he desires because his motion for a preliminary injunction was denied, and unless this matter is heard the recall election will go forward on Sept. 14, 2021. Petitioner's only relief is by way an expedited/emergency appeal or writ of mandamus.

(2) "[T]he issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances."

When a district court issues a clearly erroneous order that implicates federal, constitutional rights, this court should be satisfied, when also there is no other remedy, that it should exercise its discretion to issue a writ of mandamus. Also, it is important for this court to exercise its power to issue didactic mandamus. *See infra.*

(3) "[T]he petitioner must demonstrate that the 'right to issuance of the writ is clear and indisputable.'"

There can be no question but that the denial of plaintiff's motion for a preliminary injunction was erroneous, as a matter of law.

The court "ha[s] authority to issue writs of mandamus under the All Writs Act, 28 U.S.C. § 1651 . . . ." *Ellis v. United States Dist. Ct. for the*

Western Dist. of Washington, 356 F.3d 1198, 1210 (9th Cir. 2004). "[M]andamus . . . may be obtained . . . to compel [an inferior court] to exercise its authority when it is its duty to do so. *Cordoza v. Pac. States Steel Corp.*, 320 F.3d 989, 998 (9th Cir. 2003); *see also Bauman v. United States Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977) (seminal Ninth Circuit case on mandamus, identifying five factors for exercise of discretion to grant mandamus)." *Ibid.* Here, respondent court refused to issue a preliminary injunction, and should be ordered to do so.

In *Bauman*, 557 F.2d at 654-57, this court canvassed all of the then-relevant cases dealing with writs of mandamus and set forth the five factors to be evaluated when a writ of mandamus is sought in this Circuit. *See also, Armster v. United States Dist. Court for the Cent. Dist. of California,* 792 F.2d 1423 (9th Cir. 1986), 806 F.2d 1347 (9th Cir. 1985) (same); *DeGeorge v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 219 F.3d 930, 934 (9th Cir. 2000) (same, quoting *Bauman).*

In the instant matter, all of the five *Bauman* conditions have been met, so as to warrant the granting of mandamus, but, as set forth in *Special Investments, Inc. v. Aero Air Inc.,* 360 F.3d 989, 993-94 (9th Cir. 2004), *Bauman* requires that only three of its five factors be satisfied. (The Second Circuit lists only three, and not five, mandamus factors be met. *See supra.*)

In *Special Investments Inc.*, the court held that a court "need not find that a petition [for mandamus] satisfies all five [*Bauman*] factors at once. *Executive Software [North America, Inc. v. United States District Court*], 24 F.3d [1545] at 1551 [9th Cir. 1994]. In fact, 'rarely if ever will a case arise

where all the guidelines point in the same direction or even where each guideline is relevant or applicable.' *Bauman*, 557 F.2d at 655." *Id.* at 994. When "[t]hree of the five *Bauman* factors – lack of alternative adequate means of redress, prejudice uncorrectable on appeal, and a clearly erroneous district court order – are present here, and weigh heavily in favor of granting the petition [mandamus will issue] . . . ." *Ellis*, 356 F.3d at 1210 (citing *Cordoza*, 320 F.3d at 998).

Thus, *Bauman* requires fulfillment of *some*, but *not all*, of the following conditions precedent to the issuance of mandamus: (1) other adequate means of relief are not available; (2) there will be harm in a way not correctable on appeal; (3) that a district court's order was erroneous as a matter of law; (4) that a district court's order manifests an oft-repeated error; and, (5) that a district court order raises new or important problems or issues of first impression. Here, four, if not all, of the five factors are met. Indeed, "satisfaction of indicia 1, 2, and 5 is more than sufficient to justify issuance of a writ . . . . As to indicium 4, [this court] ha[s] previously noted that it is most unlikely that that indicium 4 and indicium 5 could both be satisfied in a single case . . . . Where one of the two [factors 4 or 5] is present, the absence of the other is of little or no significance." *Armster*, 806 F.2d at 1352 (citing *United States v. Harper*, 729 F.2d 1216, 1222 (9th Cir. 1984)). Additionally, the Ninth Circuit has "acknowledged that the application of these factors is 'by no means precise,'" *United States v. Amlani*, 169 F.3d 1189, 1194 (9th Cir. 1999), and that the "factors should be weighed together

based on the facts of the individual case." In the instant case, the writ is fully warranted.

So-called "didactic" mandamus often is appropriate, as it is here. "[A]dvisory mandamus . . . may issue to clarify novel[4] and important questions of law . . . [and] is authorized where the decision will serve to clarify a question that is likely to confront a number of lower court judges in a number of suits before appellate review is possible." *Nat'l Right to Work v. Richey*, 510 F.2d 1239, 1243 (D.C. Cir.), *cert. denied*, 422 U.S. 1008 (1975). "[T]he writ [of mandamus] review serves 'a vital corrective and didactic function.'" *Armster*, 806 F.2d at 1353 (quoting *Will*, 389 U.S. at 107).

Either an expedited appeal or mandamus should be the appropriate vehicle for deciding the important issues raised.

H. CONCLUSION AND RELIEF REQUESTED

The district court should be directed to issue the preliminary injunction that is sought.

//

[4] There has been only one, remotely similar case decided by this court, in which the State's refusal to place then-sitting Governor Gray Davis' name on part two of the Oct. 7, 2003 recall ballot was challenged. One of plaintiff's counsel herein brought that action and appeal. *Abcarian v. Shelley*, 77 Fed.Appx. 410 (9th Cir. 2003) (Judges Pregerson, Thomas, and Paez).

Respectfully submitted,

YAGMAN + REICHMANN, LLC

By: _____/s/ Joseph Reichmann_

JOSEPH REICHMANN

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ADDENDUM 1

(California Constitution, Article II)

Article II, California Constitution

Article II of the California Constitution is labeled **Voting, Initiative and Referendum, and Recall**. It has 20 sections.

California Constitution

CALIFORNIA REPUBLIC

Preamble

Articles

I • II • III • IV • V • VI
VII • VIII • IX • X • XA
XB • XI • XII • XIII • XIII A
XIII B • XIII C • XIII D • XIV • XV • XVI • XVIII • XIX • XIX A • XIX B • XIX C
XX • XXI • XXII
XXXIV • XXXV

Section 1

Text of Section 1:
All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.[1]

Amendments

Approved:

- Proposition 4 (1911)

Section 2

Text of Section 2:
(a) A United States citizen 18 years of age and resident in this State may vote.

(b) An elector disqualified from voting while serving a state or federal prison term, as described in Section 4, shall have their right to vote restored upon the completion of their prison term.[1]

Amendments

- Amended by Proposition 17 on November 3, 2020.

Section 2.5

Text of Section 2.5:
A voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted.[1]

- Section 2.5 was added to the constitution via Proposition 43 (March 2002).

Section 3

Text of Section 3:
The Legislature shall define residence and provide for registration and free elections.[1]

Section 4

Text of Section 4:
The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or serving a state or federal prison term for the conviction of a felony.[1]

Amendments

- Amended by Proposition 17 on November 3, 2020.

Section 5

Text of Section 5:
(a) A voter-nomination primary election shall be conducted to select the candidates for congressional and state elective offices in California. All voters may vote at a voter-nominated primary election for any candidate for congressional and state elective office without regard to the political party preference disclosed by the candidate or the voter, provided that the voter is otherwise qualified to vote for candidates for the office in question. The candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office shall, regardless of party preference, compete in the ensuing general election.

(b) Except as otherwise provided by Section 6, a candidate for a congressional or state elective office may have his or her political party preference, or lack of political party preference, indicated upon the ballot for the office in the manner provided by statute. A political party or party central committee shall not nominate a candidate for any congressional or state elective office at the voter-nominated primary. This subdivision shall not be interpreted to prohibit a political party or party central committee from endorsing, supporting, or opposing any candidate for a congressional or state elective office. A political party or party central committee shall not have the right to have its preferred candidate participate in the general election for a voter-nominated office other than a candidate who is one of the two highest vote-getters at the primary election, as provided in subdivision (a).

(c) The Legislature shall provide for partisan elections for presidential candidates, and political party and party central committees, including an open presidential primary whereby the candidates on the ballot are those found by the Secretary of State to be recognized candidates throughout the nation or throughout California for the office of President of the United States, and those whose names are placed on the ballot by petition, but excluding any candidate who has withdrawn by filing an affidavit of noncandidacy.

(d) A political party that participated in a primary election for a partisan office pursuant to subdivision (c) has the right to participate in the general election for that office and shall not be denied the ability to place on the general election ballot the candidate who received, at the primary election, the highest vote among that party's candidates.[1]

Amendments

Approved:

- Proposition 60, Political Party Election Rights Act (2004)
- Proposition 14, Top Two Primaries Act (2010)

Defeated:

- Proposition 62, the "Modified Blanket" Primaries Act (2004)

Section 6

Text of Section 6:
(a) All judicial, school, county, and city offices, including the Superintendent of Public Instruction, shall be nonpartisan.

(b) A political party or party central committee shall not nominate a candidate for nonpartisan office, and the candidate's party preference shall not be included on the ballot for the nonpartisan office.[1]

Amendments

- Proposition 49 (1986)
- Proposition 14, Top Two Primaries Act (2010)

Section 7

Text of Section 7:
Voting shall be secret.[1]

Section 8

Text of Section 8:
(a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.

(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.

(c) The Secretary of State shall then submit the measure at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election. The Governor may call a special statewide election for the measure.

(d) An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.

(e) An initiative measure shall not include or exclude any political subdivision of the State from the application or effect of its provisions based upon approval or disapproval of the initiative measure, or based upon the casting of a specified percentage of votes in favor of the measure, by the electors of that political subdivision.

(f) An initiative measure shall not contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure.[1]

Amendments

Approved:

- Proposition 219 (1998)

Defeated:

- Proposition 131 (1990)

Section 9

Text of Section 9:

(a) The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State.

(b) A referendum measure may be proposed by presenting to the Secretary of State, within 90 days after the enactment date of the statute, a petition certified to have been signed by electors equal in number to 5 percent of the votes for all candidates for Governor at the last gubernatorial election, asking that the statute or part of it be submitted to the electors. In the case of a statute enacted by a bill passed by the Legislature on or before the date the Legislature adjourns for a joint recess to reconvene in the second calendar year of the biennium of the legislative session, and in the possession of the Governor after that date, the petition may not be presented on or after January 1 next following the enactment date unless a copy of the petition is submitted to the Attorney General pursuant to subdivision (d) of Section 10 of Article II before January 1.

(c) The Secretary of State shall then submit the measure at the next general election held at least 31 days after it qualifies or at a special statewide election held prior to that general election. The Governor may call a special statewide election for the measure.[1]

Amendments

- Proposition 109 (1990)

Section 10

Text of Section 10:
(a) An initiative statute or referendum approved by a majority of votes cast thereon takes effect on the fifth day after the Secretary of State files the statement of the vote for the election at which the measure is voted on, but the measure may provide that it becomes operative after its effective date. If a referendum petition is filed against a part of a statute the remainder of the statute shall not be delayed from going into effect.

(b) If provisions of two or more measures approved at the same election conflict, the provisions of the measure receiving the highest number of affirmative votes shall prevail.

(c) The Legislature may amend or repeal a referendum statute. The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval.

(d) Before circulation of an initiative or referendum petition for signatures, a copy shall be submitted to the Attorney General who shall prepare a title and summary of the measure as provided by law.

(e) The Legislature shall provide for the manner in which a petition shall be circulated, presented, and certified, and the manner in which a measure shall be submitted to the electors.[1]

Amendments

- Proposition 71 (June 2018)
- Proposition 109 (1990)
- Amended with the approval of California Proposition 71, Effective Date of Ballot Measures Amendment (June 2018) on June 5, 2018.

Section 11

Text of Section 11:
(a) Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. Except as provided in subdivisions (b) and (c), this section does not affect a city having a charter.

(b) A city or county initiative measure shall not include or exclude any part of the city or county from the application or effect of its provisions based upon approval or disapproval of the initiative measure, or based upon the casting of a specified percentage of votes in favor of the measure, by the electors of the city or county or any part thereof.

(c) A city or county initiative measure shall not contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure.[1]

Amendments

Approved:

- Proposition 219 (1998)

Section 12

Text of Section 12:
No amendment to the Constitution, and no statute proposed to the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect.[1]

Section 13

Text of Section 13:
Recall is the power of the electors to remove an elective officer.[1]

Section 14

Text of Section 14:
(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. Signatures to recall Senators, members of the Assembly, members of the Board of Equalization, and judges of courts of appeal and trial courts must equal in number 20 percent of the last vote for the office.

(c) The Secretary of State shall maintain a continuous count of the signatures certified to that office.[1]

Section 15

Text of Section 15:
(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.

(b) A recall election may be conducted within 180 days from the date of certification of sufficient signatures in order that the election may be consolidated with the next regularly scheduled election occurring wholly or partially within the same jurisdiction in which the recall election is held, if the number of voters eligible to vote at that next regularly scheduled election equal at least 50 percent of all the voters eligible to vote at the recall election.

(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.[1]

Amendments

Approved:

- Proposition 183 (1994)

Section 16

Text of Section 16:
The Legislature shall provide for circulation, filing, and certification of petitions, nomination of candidates, and the recall election.[1]

Section 17

Text of Section 17:
If recall of the Governor or Secretary of State is initiated, the recall duties of that office shall be performed by the Lieutenant Governor or Controller, respectively.[1]

Section 18

Text of Section 18:
A state officer who is not recalled shall be reimbursed by the State for the officer's recall election expenses legally and personally incurred. Another recall may not be initiated against the officer until six months after the election.[1]

Section 19

Text of Section 19:
The Legislature shall provide for recall of local officers. This section does not affect counties and cities whose charters provide for recall.[1]

Section 20

Text of Section 20:
Terms of elective offices provided for by this Constitution, other than Members of the Legislature, commence on the Monday after January 1 following election. The election shall be held in the last even-numbered year before the term expires.[1]

Amendments

Approved

- Proposition 4 (1911)
- Proposition 49 (1986)
- Proposition 109 (1990)
- Proposition 219 (1998)
- Proposition 43 (2002)
- Proposition 60 (2004)

California Ballot Propositions

- Proposition 14 (2010)

Defeated

- Proposition 131 (1990)
- Proposition 137 (1990)
- Proposition 45 (2002)
- Proposition 62 (2004)

See also

- State constitution
- Constitutional article
- Constitutional amendment
- Constitutional revision
- Constitutional convention
- Amendments
  - Initiated constitutional amendment
  - Legislatively-referred constitutional amendment
  - Publication requirements for proposed state constitutional amendments
  - Rules about constitutional conventions in state constitutions
  - State constitutional articles governing state legislatures

- **List of ballot measures**
- **Number of measures per decade**
- **Laws governing the initiative process**
- **Signature requirements**
- **History of initiative and referendum**
- **Contributions by year**
- **Petition signature costs**

External links

- California Constitution
- *California Secretary of State*, "1849 California Constitution from the California State Archives"
- *California Secretary of State*, "1878–1879 Constitutional Convention Working Papers"
- The California Constitution Wiki, a wiki project to re-design the state's constitution

Additional reading

- Joseph R. Grodin, Calvin R. Massey, and Richard B. Cunningham (1993), *The California State Constitution: A Reference Guide*, Westport, Connecticut: Greenwood Press.
- Treadwell, Edward (1902). *The Constitution of the State of California*, San Francisco, California: Bancroft-Whitney.

Footnotes

1. *California State Legislature*, "California Constitution," accessed March 26, 2014

ADDENDUM 2

California Proposition 14

HISTORICAL NOTES

- The 1976 amendment renumbered the section without changing the text.
- Amendment of this section by A.C.A. No. 7 (1986) was approved by the voters at the primary election held June 3, 1986.
- The 1986 amendment designated the section as subd. (a); rewrote subd. (a); and added subd. (b).
- . . .
- **Effective: January 1, 2011**
  - Stats.2009, Res. c. 2 (S.C.A.4) (Prop. 14), provides in pertinent part:
  - "*Resolved by the Senate, the Assembly concurring,* That the Legislature of the State of California at its 2009-10 Regular Session commencing on the first day of December 2008, two-thirds of the membership of each house concurring, hereby proposes to the people of the State of California that the Constitution of the State be amended as follows:

. . .

- "Second-- The People of the State of California hereby find and declare all of the following:
- "(a) Purpose. The Top Two Candidates Open Primary Act is hereby adopted by the People of California to protect and preserve the right of every Californian to vote for the candidate of his or her choice. This act, along with legislation already enacted by the Legislature to implement this act, are intended to implement an open primary system in California as set forth below.
-
- "(b) Top Two Candidate Open Primary.

All registered voters otherwise qualified to vote shall be guaranteed the unrestricte d right to vote for the candidate of their choice in all state and congressional electio ns. All candidates for a given state or congressional office shall be listed on a single primary ballot. The top two candidates, as determined by the voters in an open primary, shall advance to a general election in which the winner shall be the candidate receiving the greatest number of votes cast in an open general election."

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STATEMENT OF RELATED CASES

Abcarian v. Shelley, 77 Fed.Appx. 410 (9th Cir. 2003) (Judges Pregerson, Thomas, and Paez), is related to this appeal.

/s/ Joseph Reichmann
JOSEPH REICHMANN

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BRIEF FORMAT CERTIFICATION

The foregoing Opening Brief/Petition for Write of Mandamus font is Times New Roman, size 14 font, and the word-counting facility indicates that it contains 7,639 words, and thus all brief format requirements are met.

/s/ Joseph Reichmann
JOSEPH REICHMANN

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CERTIFICATE OF SERVICE

The foregoing Opening Brief/Petition for Write of Mandamus will be served electronically by the court's electronic filing system as it is electronically filed on August 29, 2021, as opposing counsel is a subscriber to the court CM/ECF system .

/s/ Joseph Reichmann
JOSEPH REICHMANN