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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

AARON PERSKY,
Petitioner,

v.

SHANNON BUSHEY, Santa Clara County,
Registrar of Voters,

Respondent.

11- _____

MICHELE DAUBER, MAGDALENA G. CARRASCO, GRACE H. MAH, ROBERT LIVENGOOD, RAUL PERALEZ, RICHARD TRAN, GARY KREMEN, PATRICK J. BURT, AMADO M. PADILLA, SHANTA FRANCO-CLAUSEN, YAN ZAO, JENNIFER BRISCOE, SUZANNE E. DOTY, ALLAN SEID, M. VEIRA C. WHYE, KAVITA TANKHA, SOPHIA YEN, GABRIEL MANJARREZ, STEVE KO, PAULETTE ALTMAIER,

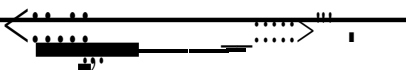
Real Parties in Interest

No. 17-CV-31431

ORDER RE: PETITION FOR WRIT OF MANDATE

This matter came on for hearing on August 28, 2017 before the Honorable Kay Tsenin, Judge of the Superior Court. The Court, for good cause shown, and having considered all papers filed in support and opposition as well as any responses, objections and oral arguments, hereby:

///



2 (1) Adopts its tentative ruling rendered verbally on August 28, 2017 (attached hereto);
3 (2) Denies with prejudice Petitioner's Petition for Writ of Mandate;
4 (3) Finds that the Registrar of Voters is the proper official to review and approve recall
5 petition forms for recalls directed at Superior Court Judges and to perform the duties required of the
6 "elections official" under the Elections Code;

7 (4) Finds that the review and approval by the Registrar of Voters of Santa Clara County
8 of the recall petition form at issue was appropriate and authorized under the Elections Code;

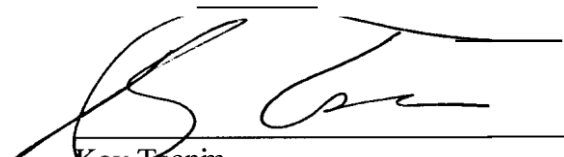
9 (5) Finds that the recall petition form filed by proponents of Petitioner's recall was
10 neither misleading nor inaccurate;

11 (6) Rules that proponents of Petitioner's recall shall have 159 days from August 28, 2017
12 to file their recall petition with the Registrar of Voters of Santa Clara County; and

13 (7) Holds that parties to this action shall each pay their attorneys' fees and costs and shall
14 not be responsible for paying the attorneys' fees or costs of any other party.

15 IT IS SO ORDERED.

16 Dated: 8/31/2017

17 
18 Kay Tsenim
19 Judge of the Superior Court

Decision on Writ of Mandate.

Issue: Are trial court judges, for the purpose of recall, considered local or statewide officers?

It is a longstanding rule that "If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. [Citations.] The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers." (*Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828, 142 P.2d 297.) cited by People v. Mendoza (2017) 10 Cal.App.5th 327, 354 [216 Cal.Rptr.3d 361, 385], as modified on denial of reh'g (Apr. 20, 2017)

Looking to the wording of the California Constitution Article II Section 14, Petitioner claims that this section requires trial court judges to be treated as statewide officers rather than local officials for the purpose of recall. Section 14 subdivision (a) states in relevant part that "recall of a state officer is initiated by delivering to the Secretary of State a petition." This section does not define who or what position is a state officer.

Subdivision (b) governs the number of voter signatures required to qualify a recall petition for the ballot. The first sentence sets forth the requirement for "statewide officers." The second sentence sets the threshold for various other officers (including trial-court judges). Each of the officers mentioned in the second sentence is elected by voters in a particular district or subdivision within the state, not voters statewide. All of those officers listed in the second sentence of Subdivision (b) except superior court judges are elected in districts that can encompass multiple counties or in one case several districts within one county. However, trial court judges are unique in that they are elected by one county.

The proposition that Section 14(b) designates two different classes of statewide officers or "state officers" is incorrect. Subdivision (b) does not say that.

Petitioner would like this court to rewrite this second sentence of paragraph (b)



and insert either a comma or a "however", or in some other way of joining the two ideas designating the second series of officers as "statewide."¹¹

As all sides have pointed out, there have been several amendments to the constitution including sections involving the recall of judges. There was ample opportunity to modify Article II Section 14(b) and its predecessors since it has been a longstanding procedure to treat the trial court judges as local officers for the purpose of recall.

Modification could have simply been done by a comma and or with the word "however" or a comma or in some other way designating trial court judges as statewide officers for the purpose of recall. None of these modifications have been presented to the people for adoption in any constitutional revisions of these sections involving recall. In fact, historically the ballot measures have assured the voters that no substantive changes were being made. Interestingly, these amendments all preceded unification of the courts which occurred in 1996-1997. At the time, section b's predecessor had virtually the same language referring to "trial courts." Clearly municipal courts, which were trial courts could not be statewide courts, yet language similar to that which exists today was in the Constitution. Thus, petitioner finds no help in the historical analysis of Section 14 (b).

In *5 Pub. Employee Rep. for California*, 12033, 1981 WL 676535 the California Supreme Court 29 Cal3d 168, Justices Bird, Tobriner, Mask, Newman, Richardson and Clark stated,

"...we start from several fundamental principles of constitutional adjudication. "Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. [Citations.] Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers *which are not expressly, or by necessary implication denied to it by the Constitution*. [Citations.] . . . Secondly, all intendment favor the exercise of the Legislature's plenary authority: 'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action.'"



Issue 2: Is there a conflict within the Elections Code and with the California Constitution.

Petitioner contends that Elections Code section 11221 subdivision (c)((l) in its reference to a state officer by stating "including judges" supports their position that trial court judges are "statewide officers." However, the legislature also expressly defines judges to be local officers in at least four separate sections that expressly apply to the entire recall division. Section 11001: "For the purposes of this division, judges of courts of appeal shall be considered state officers, and judges of trial courts shall be considered county officers."

Courts are required to harmonize the various parts of a statutory enactment by considering particular sections in their context. Any undue reliance or emphasis on section 11221 subdivision (c)((l) would render the Elections Code internally inconsistent. Thus, it appears that Section 11221 does not purport to define the term statewide to include judges for all purposes but rather to apply it only for the purpose of voter signature requirements this seems particularly true also in that it refers back to Article II Section 14 (b).

Olson v Cory (1980) 26 Cal 3 672, the pension case is also of little help to the petitioner. Olson did not concern the election laws. Public official and employees are often treated as state officials for some purposes and local officials for others. Judges are elected by county, Sheriffs are sometimes "state officers" but at other times are within the general category of county officers for electoral purposes as are District Attorneys. See Venegas v. County of LA (2004) 32 Cal 4th 820, Pitts v County of Kern (1998) 17 Cal 4th 340.

Article II section 19 gives the authority to the Legislature to provide for recall of local officers. The Legislature has designated trial court judges for the purpose of recall as local officers. Although there have been several amendments to the constitution with ample opportunity to change the existing longstanding recall procedures treating trial court Judges as local officers, this has not been done.

Finally, it is well-settled law that, "In evaluating claims such as this the court must be guided by certain established principles of statutory construction. First, that all presumptions are in favor of the validity of a statute; that mere doubt is not a



sufficient basis for finding it constitutionally defective; and that the invalidity of a statute must be clear and unquestionable. "*Dittus v. Cranston*, 53 Cal.2d 284, 286, 1Cal.Rptr. 327, 347 P.2d 671; *Jones-Hamilton Co. v. Franchise Tax Bd.*, 268 Cal.App.2d 343, 349, 73 Ca l.Rptr. 896.) *People v. Medina* (1972) 27 Cal.App.3d 473, 479 (103 Cal.Rptr. 721,724]

Thus, the court finds that the recall petition was properly filed with the Registrar of voters.

ISSUE: Is the statement in the petition for recall indicating that should the recall be successful, Judge Perskey's position will be filled by election correct or is that statement erroneous and therefore misleading?

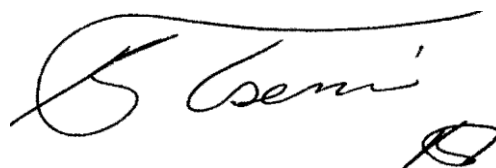
The petition states, "We demand an election of a successor to the office." Petitioner claims that any successful recall would create a vacancy which would then be filled by appointment by the governor and stating otherwise on the petition is misleading.

California Constitution, Article VI Section 15 and 16 are controlling here. Section 15 provides that recalled officials typically are replaced by an election, but expressly exempt the Supreme Court and Court of Appeal recalls. This court cannot add the superior court to that exemption.

Furthermore, a recall does not create a "vacancy" to be filled by appointment. Section 15 states, that "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 Elections Code is clear that an election for successor is submitted to the voters at the same time as the question of recall. Therefore, the recall procedure does not result in a vacancy, but rather concurrent election of a successor.

The Supreme Court in *Frankel v. Shelly* addressed this issue precisely and recognized that recall does not result in a vacancy because the recalled officer is immediately replaced by an elected candidate.

Based on the foregoing the Petitioners Writ of Mandate is denied, each side to bear own costs.

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

AARON PERSKY,

Petitioner,

v.

SHANNON BUSHEY, Santa Clara County,
Registrar of Voters,

Respondent.

No. 17-CV-314311

**ORDER DISSOLVING TEMPORARY
RESTRAINING ORDER**

MICHELE DAUBER, MAGDALENA G.
CARRASCO, GRACE H. MAH, ROBERT
LIVENGOOD, RAUL PERALEZ, RICHARD
TRAN, GARY KREMEN, PATRICK J. BURT,
AMADO M. PADILLA, SHANTA FRANCO-
CLAUSEN, YAN ZAO, JENNIFER BRISCOE,
SUZANNE E. DOTY, ALLAN SEID, M.
VEIRA C. WHYE, KAVITA TANKHA,
SOPHIA YEN, GABRIEL MANJARREZ,
STEVE KO, PAULETTE ALTMAIER,

Real Parties in Interest

This matter came on for hearing on August 28, 2017 before the Honorable Kay Tsenin, Judge of the Superior Court. The Court, for good cause shown, and having considered all papers filed in support and opposition as well as any responses, objections, and oral arguments, ordered as follows:


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2 (1) The Temporary Restraining Order in this matter issued by Judge Carter on August 11,
3 2017 enjoining Real Parties in Interest from circulating the recall petition is dissolved effective
4 August 28, 2017; and

5 (2) Proponents of the recall at issue in this matter shall have 159 days from August 28,
6 2017 to file their recall petition with the Registrar of Voters of Santa Clara County.

7 IT IS SO ORDERED.

8 Dated: 8/31/2017

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10 Kay Tenin
11 Judge of the Superior Court

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