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7
8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
9

10
11 AARON PERSKY,

12 Petitioner,

13 v.

14 SHANNON BUSHEY, Santa Clara County,
Registrar of Voters,

15 Respondent.
16

17 MICHELE DAUBER, MAGDALENA G.
CARRASCO, GRACE H. MAH, ROBERT
18 LIVENGOOD, RAUL PERALEZ, RICHARD
TRAN, GARY KREMEN, PATRICK J. BURT,
19 AMADO M. PADILLA, SHANTA FRANCO-
CLAUSEN, YAN ZAO, JENNIFER BRISCOE,
20 SUZANNE E. DOTY, ALLAN SEID, M.
VEIRA C. WHYE, KAVITA TANKHA,
21 SOPHIA YEN, GABRIEL MANJARREZ,
STEVE KO, PAULETTE ALTMAIER,
22

Real Parties in Interest
23

No. 17-CV-314311

**RESPONSE BY SHANNON BUSHEY,
REGISTRAR OF VOTERS, SANTA CLARA
COUNTY, TO ORDER TO SHOW CASE
WHY PEREMPTORY WRIT OF
MANDATE SHOULD NOT ISSUE**

Date: August 23, 2017
Time: 1:30 p.m.
Dept.: TBD
Judge: Marjorie Laird Carter
Date of First Filing: August 11, 2017
Trial Date: TBD

**IMMEDIATE ACTION REQUIRED
ELECTION LAW MATTER ENTITLED TO
CALENDAR PREFERANCE
(Code Civ. Proc. § 35.)**

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I. INTRODUCTION

Respondent Shannon Bushey, named in the instant matter in her official capacity as the Registrar of Voters of the County of Santa Clara (“Registrar”), submits this response regarding her duties and authority under the California Constitution and the Elections Code.¹ The Registrar also provides information on the potential impact of this Court’s Order on the timing of the recall election at issue here.

The overwhelming weight of constitutional and statutory authority supports the role of the Registrar as the county elections official entrusted with reviewing and approving the form of recall petitions for Superior Court Judges. As discussed in detail below, such an interpretation of the applicable constitutional and statutory provisions is not only consistent with standard norms of interpretation, it is supported by the Secretary of State (“SOS”), California’s chief elections officer. Adopting the contrary interpretation advocated by the Petitioner requires declaring large portions of the Elections Code in conflict with each other and unconstitutional, and upending practices by county elections officials in the state.

The Registrar respectfully asks the Court to affirm her status as the elections official charged with reviewing and approving recall petitions, and to deny the Petitioner’s request for a writ of mandate for the reasons set forth herein.

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II. BACKGROUND

California law treats elections and recalls for Superior Court judges differently than for state officers, such as justices of California Courts of Appeal and of the Supreme Court. Elections for Superior Court judges are essentially local elections, with judges being “elected in their counties,” but justices of Courts of Appeal and the Supreme Court face retention elections in districts that span several counties and the entire state, respectively. (Cal. Const., art. VI, § 16, subds. (a), (b); Elec. Code, § 9083; Confirmation Election., 2 Witkin, Cal. Proc. 5th Courts § 3 (2008).)

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¹ While the Registrar is strictly following the Order issued by the Court on August 11, 2017, this pleading may also be treated as a demurrer in response to the petition for writ of mandate.

1 Similarly, in the recall process, the Constitution defers to the Legislature in establishing rules
2 for the recall of local officers, such as Superior Court judges. (Cal. Const. art II, § 19.) However,
3 for state officers, the Constitution is more prescriptive, mandating that recall “is initiated by
4 delivering to the [SOS] a petition alleging reason for recall.” (Cal. Const. art II, § 14, subd. (a).)

5 This difference also manifests itself in the statutory recall process at issue in this matter:
6 With regard to local officers such as trial court judges, the process falls within the jurisdiction of the
7 County elections officer; with regard to state officers it falls within the jurisdiction of the SOS. In
8 order to initiate a recall, proponents of such an effort must publish a statutorily-compliant “notice of
9 intention to circulate a recall petition” including a statement of the reasons for the recall. (Elec.
10 Code, §§ 11006, 11020.) A copy of the notice must be filed with the county elections official for
11 recalls of trial court judges, but with the SOS for a state officer. (Elec. Code, §§ 11002, 11021.)
12 Any answer by the target of a recall effort must be filed with the county elections official if the
13 person is a local officer; it must be filed with the SOS for state officers. (Elec. Code, §§ 11002,
14 11023, subd. (b).)

15 The proponents of the recall must then file the form of a recall petition with the county
16 elections official for trial court judges, and with the SOS for state officers. (Elec. Code, §§ 11002,
17 11042.) The county elections official or the SOS, as applicable, must review the form recall petition
18 and determine if statutory requirements are met and provide findings within 10 days. (Elec. Code,
19 §§ 11002, 11042, subd. (c).)

20 In the matter before the Court, the proponents of Petitioner’s recall followed this process,
21 filing the notice of intention to circulate a recall petition with the Registrar on June 26, 2017.
22 (Declaration of Virginia J. Bloom, Assistant Registrar of Voters, In Support of the Response by
23 Registrar (“Bloom Decl.”), ¶ 8, Exh. I.) On June 30, 2017, the Petitioner filed an answer with the
24 Registrar. (*Id.* at ¶ 10, Exh. J.) On August 9, 2017, the Registrar approved the recall petition form.
25 (*Id.* at ¶ 20, Exh. R.)

26 Despite having filed an answer with the Registrar, Petitioner now challenges the Registrar’s
27 authority in approving the recall petition.
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III. DISCUSSION

A. The California Constitution And The County Charter Point To The Elections Code For The Recall Process

Article II of the California Constitution is entitled “VOTING, INITIATIVE AND REFERENDUM, AND RECALL.” Within that article, Section 19 states: “The Legislature shall provide for recall of local officers. This section does not affect counties and cities whose charters provide for recall.” (Cal. Const., art II, §19.)

The County of Santa Clara’s charter simply states: “An elective officer may be recalled by the voters of the county after the officer has held office six months in the manner provided by general law.” (Count of Santa Clara Charter, §103.) Petitioner has held office since 2003; therefore, the County Charter, like the California Constitution, points to the Elections Code as the source of law for the recall of local officers.

B. The Elections Code Is Clear That The Registrar Must Review And Approve The Recall Petition Form

The California Elections Code’s Division 11 is devoted in its entirety to recall elections, and “governs the recall of elective officers of the State of California and of all counties, cities, school districts, county boards of education, community college districts, special districts, and judges of courts of appeal and trial courts.” (Elec. Code, § 11000.) Among other things, the division prescribes the duties of the “elections official” and defines the term as meaning one of the following:

(a) A county elections official in the case of the recall of elective officers of a county, school district, county board of education, community college district, or resident voting district, and of judges of trial courts.

(b) A city elections official, including, but not necessarily limited to, a city clerk, in the case of the recall of elective officers of a city.

(c) The secretary of the governing board in the case of the recall of elective officers of a landowner voting district or any district in which, at a regular election, candidate's nomination papers are filed with the secretary of the governing board.

(Elec. Code, § 11002) (emphasis added). Additionally, the Elections Code distinguishes between the classification of state and county officers: “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.” (Elec. Code, § 11001.) The Elections Code also confirms that a “local officer” includes a

1 “judge of a trial court.” (Elec. Code, § 11004.)

2 With regard to the process at issue in this matter—approval of the form of the recall
3 petition—the Elections Code mandates that two blank copies of the recall petition are to be filed
4 with the elections official, who must review it within 10 days. (Elec. Code, § 11042, subd. (b).) The
5 above-quoted definitions equate elections official with the “county elections official” for trial court
6 judges. Therefore, the receiving and reviewing official is the Registrar of Voters in the County of
7 Santa Clara. (Elec. Code, §§ 11002, 320.) The Secretary of State also points to the Registrar of
8 Voters as the relevant elections official. (Bloom Decl., ¶ 5, Exh. C.) In contrast, the process for
9 state officers is different in that jurisdiction over review and approval of the recall petition lies
10 within the purview of the SOS. (Elec. Code, § 11042, subd. (b).)

11 The Elections Code, therefore, clearly supports the Registrar’s position that she is the
12 appropriate official to review and approve recall petition forms for Superior Court judges.

13 Though recalls of judges are rare, the process described above appears to consistently applied
14 in California. (Bloom Decl., ¶ 5, Exh. D, E, F, and G.) For instance, the well-publicized 2015 recall
15 effort directed at Judge M. Marc. Kelly of Orange County lay under the jurisdiction of that County’s
16 Registrar of Voters, who approved the recall petition. (Kelly Puente, *Petition moves forward to
17 recall O.C. Judge M. Marc Kelly over child sexual assault ruling*, O. C. Register (Aug. 5, 2015),
18 (Bloom Decl., ¶ 6, Exh. H).)

19 **C. Constitutional Authority Cited By Petitioners Supports, Rather Than**
20 **Undercuts, The Registrar’s Authority**

21 Petitioner states that the California Constitution’s Article II, Section 14(b) “treats” trial court
22 officers as state officers. (*Petitioner’s Ex Parte Application* at p. 6.) That provision reads in full as
23 follows:

24 A petition to recall a statewide officer must be signed by electors equal in number to 12
25 percent of the last vote for the office, with signatures from each of 5 counties equal in
26 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.

27 (Cal. Const., art. II, § 14, subd. (b).) A common sense reading of Section 14(b), shows that it merely
28 defines the minimum signature threshold for various offices, including trial court judges. Treating

1 this provision as definitional, i.e., using it to define “state officer,” and having this definition include
2 superior court judges, grossly and incorrectly enlarges its scope.

3 Petitioner claims that the “Legislature has erroneously categorized Superior Court judges as
4 ‘local’ officials in Elections Code sections 11001-11004.” (*Petitioner’s Ex Parte Application*, at p.
5 6.) Petitioner would render “unenforceable” these provisions on the ground that they conflict with
6 Article II, Section 14(b). (*Id.*, at p. 7.) But such a conflict does not exist: Article II, Section 14(b)
7 clearly sets thresholds for the number of signatures required for the recall of certain officers. There
8 is no conflict with Elections Code provisions that define Superior Court judges as local officers
9 whose recalls fall within the jurisdiction of the county elections official. (This is particularly the
10 case since the signature thresholds established by Article II, Section 14(b) are unaffected by the
11 identity of the reviewer of the recall petition form.) Courts should not manufacture a conflict where
12 there is none—in fact, Courts are required to operate under the “assumption that the legislative body
13 intended to enact a valid statute.” (*City of Cerritos v. State* (2015) 239 Cal.App.4th 1020, 1035,
14 *review denied* (Nov. 24, 2015).) Courts presume “that the Legislature understands the constitutional
15 limits on its power and intends that legislation respect those limits.” (*Id.* (quoting *Kraus v. Trinity*
16 *Management Services, Inc.* (2000) 23 Cal.4th 116, 129 *superseded by statute on other grounds*).

17 Therefore, Petitioner’s argument regarding the unenforceability of the many Elections Code
18 provisions that treat Superior Court judges as local officers lacks merit.

19 **D. Elections Code Section 11221 Cannot Transform Superior Court Judges Into**
20 **State Officers**

21 Petitioner also claims an inconsistency within the Elections Code—between provisions that
22 define superior court judge as local officers and Elections Code, section 11221, subdivision (c)(1),
23 which reads as follows:

24 **11221. Number of Signatures Required**

25 ...

26 (c)(1) In the case of a state officer, including judges of courts of appeal and trial courts, the
27 number of signatures shall be as provided for in subdivision (b) of Section 14 of Article II of
28 the California Constitution. In the case of a judge of a superior court, which office has never
appeared on the ballot since its creation, or did not appear on the ballot at its last election
pursuant to Section 8203, the number of signatures shall be as provided in subdivision (b) of
Section 14 of Article II of the California Constitution, except that the percentage shall be

1 based on the number of votes cast within the judicial jurisdiction for the countywide office
2 which had the least number of votes in the most recent general election in the county in
3 which the judge holds his or her office.

4 (Elec. Code, § 11221, subd. (c)(1).)

5 As noted above, the California Constitution, Article II, Section 14(b) mandates, among other
6 things, that the minimum number of signatures for a recall of certain state offices and trial court
7 judges is 20 percent of the last vote for the office. Article II, Section 14(b) lumps such officers
8 together, and so does the provision above. However, the Constitutional provision underpinning this
9 statute clearly does not treat trial court judges as state officers (as discussed above). Since the above
10 statutory provision makes a reference to trial court judges as state officers, the only logical inference
11 is that it treats trial court judges as state officers for the limited purpose of establishing minimum
12 signature requirements, and that it groups certain officers together because the requirements are the
13 same. The above provision cannot transform trial court judges into state officers as a general matter,
14 including for the processing of their recall—in conflict with the remainder of Division 11 of the
15 Elections Code and the California Constitution.

16 This narrow reading of Section 11221(c)(1) is supported by the Elections Code. The
17 Elections Code provisions treating trial courts as local officers and requiring county elections
18 officials to process recall petitions are prefaced by the words “For the purposes of this division [i.e.
19 Division 11: RECALL ELECTIONS].” (Elec. Code, §§ 11001, 11002, 11004.) In contrast,
20 Elections Code section 11221, subdivision (c)(1), also a part of Division 11, does not contain such a
21 descriptor, thereby making it relevant only to that section, i.e., for setting signature requirements.

22 Such a construction is required to avoid constitutional and statutory conflicts. If “the terms
23 of a statute are by fair and reasonable interpretation capable of a meaning consistent with the
24 requirements of the Constitution, the statute will be given that meaning, rather than another in
25 conflict with the Constitution.” (*People v. Navarro* (2013) 212 Cal.App.4th 1336, 1351 (internal
26 quotation marks and citations omitted).) Further, statutes are to be interpreted “with reference to the
27 entire scheme of law of which it is part so that the whole may be harmonized and retain
28 effectiveness.” (*State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043, *as*

1 *modified (June 9, 2004) (internal quotations omitted).*

2 Here, the reading that harmonizes all constitutional and statutory provisions is one in which
3 Elections Code section 11221, subdivision (c)(1) is narrowly read as establishing signature limits for
4 trial court judges (among others). To the extent that such a narrow reading is not applied, Elections
5 Code section 11221, subdivision (c)(1)—rather than the rest of Division 11 of the Elections Code—
6 should be deemed partially unenforceable in its reference to trial court judges as state officers.

7 **E. The Treatment Of Superior Court Judges As Local Officers Is Required By The**
8 **Chief Elections Officer Of The State**

9 The interpretation presented by the Registrar is favored by the SOS, who is “the chief
10 elections officer of the state” charged with “administer[ing] the provisions of the Elections Code.”
11 (Gov. Code, § 12172.5, subd. (a).) In a handbook directing recall elections, the SOS places the
12 responsibility for reviewing and approving the form of recall petitions for trial court judges with the
13 ROV. (Procedure for Recalling State and Local Officials, Prepared by the Office of the Secretary of
14 State, rev. June 29, 2017 <<http://elections.cdn.sos.ca.gov/recalls/recall-procedures-guide.pdf>> at pp.
15 1, 7-8, 16, 17, (Bloom Decl., ¶ 3, Exh. A.)) This handbook places the recall process for judges of
16 courts of appeal and other state officers in one chapter (Chapter II: Recall of State Officers (*id.* at pp.
17 7-8)) and the recall of trial court judges in a separate chapter (Chapter III: Recall of Local Officers
18 (*id.* at pp.16-17)). The review of the recall petition form is assigned to the SOS for state officers and
19 to the county elections official for the trial court judges.

20 This Court should defer to the authoritative (and common-sense) requirements of the SOS.
21 “The Secretary of State is the constitutional officer charged with administering California’s election
22 laws ... and his interpretations of those laws are entitled to substantial judicial deference.” (*Burton*
23 *v. Shelley* (Cal., Aug. 7, 2003) 03 Cal. Daily Op. Serv. 7066.)

24 **F. Any Order Should Provide Adequate Time for the Registrar to Process and**
25 **Conduct the Recall Election**

26 Proponents have indicated that they wish to have the recall election conducted on June 5,
27 2018. By then, the following must occur:

- 28 (1) Proponents must complete their signature-gathering effort. Recall proponents had 160
days to circulate the recall petition for signatures after the Registrar approved the recall

1 petition form, 159 of which will remain after the Court issued a Temporary Restraining
2 Order on August 11, 2017. (Elec. Code, §11220, subd. (a)(5); Bloom Decl., at ¶ 22.)

3 (2) After proponents gather the requisite signatures, the Registrar must examine and verify
4 signatures within 30 days excluding Saturdays, Sundays, and holidays. (Elec. Code,
5 §§11224, 11225; Bloom Decl., at ¶ 29.) The process used to examine and verify
6 signatures is time and labor intensive since it requires examining the petition, and, from
7 the records of registration, ascertaining whether or not the petition is signed by the
8 requisite number of voters. (Bloom Decl., at ¶ 30.)

9 (3) The Registrar must submit a certificate of sufficiency to the Board of Supervisors, who
10 must then issue an order of election. (Elec. Code, §§ 11227, 11003; Bloom Decl., ¶ 31.)

11 (4) At least 88 days must pass before the election is held. Under Elections Code section
12 11242, a recall election “[s]hall be held not less than 88, nor more than 125, days after the
13 issuance of the order [of election]” (Bloom Decl., at ¶ 28.)

14 Because of these steps, the Assistant Registrar of Voters has estimated that a final judicial
15 determination allowing resumption of signature-gathering (if the Court reaches such a decision)
16 would need to be made by September 1, 2017 for the recall petition to qualify for the June 5, 2018
17 ballot. (Bloom Decl., ¶ 31.)

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21 **G. The Petition For Writ Of Mandate Is Defective Because Petitioner Has Failed To
Join The SOS**

22 The Petitioner must join any party that, among other criteria, “claims an interest relating to
23 the subject of the action and is so situated that the disposition of the action in his absence may (i) as
24 a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons
25 already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent
26 obligations by reason of his claimed interest.” (Code Civ. Proc., § 389, subd. (a).) Petitioner’s case,
27 if successful, would directly contradict the position of the SOS on the issues in this matter as
28 discussed above, and would place additional heavy responsibilities on the SOS. Petitioner’s failure

1 to join the SOS has the effect of the SOS not being able to protect his interest as the chief elections
2 official in the administration of the Elections Code. (See *Redevelopment Agency v. Comm'n on State*
3 *Mandates* (1996) 43 Cal.App.4th 1188, 1197.) Petitioner's failure renders his petition defective and
4 his request for writ of mandate should be denied on this ground as well.

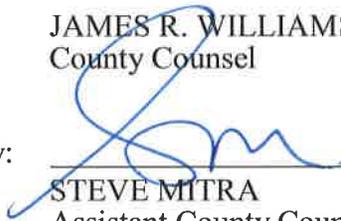
5 **IV. CONCLUSION**

6 For the foregoing reasons, the Registrar respectfully requests that the Court deny Petitioner's
7 request for a writ of mandate.² The Registrar also respectfully requests that if the Court is inclined
8 to allow proponents of the recall to resume signature gathering, a final order be issued no later than
9 September 1, 2017.

10 Dated: August 16, 2017

Respectfully submitted,

11 JAMES R. WILLIAMS
12 County Counsel

13 By:  _____

14 STEVE MITRA
Assistant County Counsel

15 Attorneys for SHANNON BUSHEY,
16 Santa Clara County, Registrar of Voters

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27 ² The Registrar also asserts that her review of the recall petition form was adequate and lawfully
28 conducted. The statement that Petitioner objects to—"We demand an election of a successor to that
office"—is in the Secretary of State's form for petition for recall. (Bloom Decl. Exh. A (Secretary
of State, *Procedure For Recalling State And Local Officials*) at Exhibit D.) The Registrar will take
direction from the Court regarding the propriety of inclusion of this statement.

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

PROOF OF SERVICE

AARON PERSKY v. SHANNON BUSHEY

17-CV-314311

I, Cristina Delgado, say:

I am employed in the County of Santa Clara, State of California. I am over the age of 18, and not a party to the within action. My business address is 70 West Hedding Street, East Wing, 9th Floor, San Jose, California 95110-1770. On the date shown below, I served the foregoing document described as:

RESPONSE BY SHANNON BUSHEY, REGISTRAR OF VOTERS, SANTA CLARA COUNTY, TO ORDER TO SHOW CASE WHY PEREMPTORY WRIT OF MANDATE SHOULD NOT ISSUE

by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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BY MAIL: I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above or on the attachment. I am readily familiar with the County's business practice for collection and processing of correspondence for mailing. Under that practice, said correspondence will be deposited with United States Postal Service on the same day with postage thereon fully prepaid at San Jose, California, in the ordinary course of business; there is delivery service by United States mail at the place so addressed. I am a resident or employed in the county where the mailing occurred.

BY E-MAIL: Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed above or on the attachment.

STATE: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on **August 16, 2016**, at San Jose, California.



Cristina Delgado