

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

RECALL GRAY DAVIS COMMITTEE and
its Chairman HOWARD KALOOGIAN; and
RUSSELL W. WRIGHT,

Petitioners,

v.

KEVIN SHELLEY, as Secretary of State
of California; ERNEST R. HAWKINS, as
Registrar of Voters of Sacramento County;
WARREN SLOCUM, as Assessor-County
Clerk-Recorder of San Mateo County;
JOSEPH E. HOLLAND, as County Clerk-
Recorder-Assessor of Santa Barbara County;
LAURA WINSLOW, as Registrar of Voters
of Solano County; MARY ALICE GEORGE,
as County Clerk-Recorder of Tehama County;
and DOES 1-53,

Respondents;

GOVERNOR GRAY DAVIS,

Real Party in Interest.

No.

Original Proceeding

**VERIFIED PETITION
FOR ALTERNATIVE
WRIT OF MANDATE**

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**PETITION FOR ALTERNATIVE
WRIT OF MANDATE**

Petitioners Recall Gray Davis Committee, its chairman Howard Kaloogian, and Russell W. Wright (Recall Proponents) petition this Court for a writ of mandate (1) directing Respondent Secretary of State to act consistently with his nondiscretionary legal duty to maintain a “continuous count” of the verified signatures submitted in support of the recall of Governor Gray Davis and to make such count available to the public upon request; and (2) directing all Respondents to act consistently with the nondiscretionary legal duty of elections officials to examine and verify every signature submitted in support of such recall no later than *five business days* before any periodic reports they submit to the Secretary of State. The Recall Proponents allege as follows:

1. Petitioner Recall Gray Davis Committee is an unincorporated association that is spearheading efforts to collect signatures in support of the pending recall of Governor Gray Davis. Petitioner Howard Kaloogian is the Committee’s chairman.

2. Petitioner Russell W. Wright is one of the persons who signed the original Notice of Intention that initiated the recall of Governor Davis on March 25, 2003.

3. Respondent Kevin Shelley is Secretary of State of California. In that capacity, he shares responsibility for administering the state’s election laws, including the laws pertaining to recall elections, and he provides advice

and direction to county elections officials, including the other Respondents named herein.

4. Respondent Ernest R. Hawkins is Registrar of Voters of Sacramento County. In that capacity, he shares responsibility for administering the state's election laws within that county, including the laws pertaining to recall elections.

5. Respondent Warren Slocum is Assessor-County Clerk-Recorder of San Mateo County. In that capacity, he shares responsibility for administering the state's election laws within that county, including the laws pertaining to recall elections.

6. Respondent Joseph E. Holland is County Clerk-Recorder-Assessor of Santa Barbara County. In that capacity, he shares responsibility for administering the state's election laws within that county, including the laws pertaining to recall elections.

7. Respondent Laura Winslow is Registrar of Voters of Solano County. In that capacity, she shares responsibility for administering the state's election laws within that county, including the laws pertaining to recall elections.

8. Respondent Mary Alice George is County Clerk-Recorder of Tehama County. In that capacity, she shares responsibility for administering the state's election laws within that county, including the laws pertaining to recall elections.

9. Under Article II, § 14(c) of the state constitution, the Secretary of State has the nondiscretionary legal duty to “maintain a continuous count of the [recall petition] signatures certified to [his] office,” that is, to maintain a continuous count of the signatures verified by county elections officials.

10. Under that provision and under Government Code § 6253, the Secretary of State has the concomitant nondiscretionary legal duty to make that continuously maintained count available to the public upon request.

11. Contrary to his legal duties, the Secretary of State is not maintaining a continuous count of the signatures verified by county elections officials; alternatively, in the event he is maintaining such a count, he is refusing to make the count available to the Recall Proponents. *See Exhibit G, at 15-16; Exhibit H, at 17-22.*¹

12. Under Elections Code § 11104(a), Respondent county elections officials have the nondiscretionary legal duty to submit periodic reports to the Secretary of State regarding signatures received by them in support of the recall of Governor Davis. Respondents do not dispute this duty.

13. Under Elections Code § 11104(a), Respondent county elections officials have the additional and concomitant nondiscretionary legal duty to examine and verify every signature received by them in support of the recall

¹ Consistent with Rule of Court 56(d), the exhibits attached hereto are both tabbed by letter and consecutively paginated in the upper right-hand corner. Exhibits will be cited by both methods, as in the text accompanying this note.

no later than *five business days* before each periodic report submitted to the Secretary of State.

14. Respondents dispute this additional duty. The Secretary of State has directed county elections officials that, with respect to the periodic report due July 23, 2003, they need verify only signatures received through *June 16, 2003*, more than *five weeks* prior to the reporting date. *See* Exhibit D, at 7; *see also* Exhibit C, at 6 (adhering to this directive).

15. Agents of Respondent county elections officials have stated to agents of the Recall Proponents that the officials will follow the Secretary of State's directives in this regard; that for the periodic reports to be submitted to the Secretary on July 23, 2003, the officials will verify only signatures received through June 16, 2003; that the officials will not verify signatures received through July 16, 2003 until sometime in August; and that the officials will report those later verified signatures no earlier than the periodic reports to be submitted to the Secretary on August 22, 2003. When provided a formal opportunity to repudiate those statements, Respondent elections officials declined to do so. *See* Exhibits I through M, at 23-32 (demand letters from the Recall Proponents' attorney to Respondent elections officials); Exhibit E, at 9-10 (attorney's declaration that he received no responses to such letters).

16. The Secretary of State's refusal to act consistently with the non-discretionary legal duties imposed by Article II, § 14(c) and by Government Code § 6253, and all Respondents' refusal to act consistently with the non-

discretionary legal duty imposed by Elections Code § 11104(a), are causing irreparable injury to the Recall Proponents. To prevent that injury, the Recall Proponents have no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition.

17. While this petition could lawfully have been made to the superior court in the first instance, the Recall Proponents believe it is proper that the writ should issue originally from this Court because of the great importance of the issues and the necessity that such issues be resolved promptly.

18. Governor Gray Davis, whose recall this proceeding concerns, is the real party in interest. Mr. Davis has accordingly been named as such and has been served with a copy of this petition and all supporting documents.

WHEREFORE, Petitioners pray:

(a) that the Court issue an alternative writ commanding Respondents either (1) to act consistently with Secretary of State's nondiscretionary legal duty to maintain a "continuous count" of the verified signatures submitted in support of the recall of Governor Gray Davis and to make such count available to the public upon request, and further to act consistently with the nondiscretionary legal duty of elections officials to examine and verify every signature submitted in support of such recall no later than *five business days* before any periodic reports they submit to the Secretary; or (2) to show cause before this Court why Respondents have not conformed their conduct to law and why a peremptory writ should not then issue.

(b) that after such hearing, the Court issue a peremptory writ (1) directing Respondent Secretary of State to act consistently with his nondiscretionary legal duty to maintain a “continuous count” of the verified signatures submitted in support of the recall of Governor Gray Davis and to make such count available to the public upon request; and (2) directing all Respondents to act consistently with the nondiscretionary legal duty of elections officials to examine and verify all signatures submitted in support of the recall no later than *five business days* prior to any periodic reports they submit to the Secretary of State.

(c) for costs of suit and attorney’s fees incurred herein; and

(d) for such other and further relief as the Court may deem proper.

DATED: July 10, 2003.

Respectfully submitted,

James F. Sweeney
Eric Grant
SWEENEY & GRANT LLP

By _____
Eric Grant

Attorneys for Petitioners
RECALL GRAY DAVIS COMMITTEE,
HOWARD KALOGIAN, and
RUSSELL W. WRIGHT

VERIFICATION

I, Russell W. Wright, declare as follows:

I am a Petitioner in this proceeding. I have read the foregoing petition for writ of mandate and know its contents. All of the facts alleged therein and not otherwise supported by exhibits are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: July 10, 2003.

Russell W. Wright

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF PETITION
FOR ALTERNATIVE WRIT OF MANDATE**

This petition for writ of mandate seeks relief against the Secretary of State and various county elections officials with respect to their erroneous interpretations of the laws governing the conduct of the ongoing effort to recall Governor Gray Davis. Specifically, Petitioners Recall Gray Davis Committee, its chairman Howard Kaloogian, and Russell W. Wright (Recall Proponents) seek an order from this Court (1) directing the Secretary of State to act consistently with his nondiscretionary legal duty to maintain a continuous count of the verified signatures submitted in support of the recall and to make such count available to the public upon request; and (2) directing all Respondents to act consistently with the nondiscretionary legal duty of elections officials to examine and verify all signatures submitted in support of the recall no later than *five business days* prior to periodic reports they submit to the Secretary.

**LEGAL, FACTUAL, AND
PROCEDURAL BACKGROUND**

On March 25, 2003, Petitioner Wright and others initiated the recall of Governor Gray Davis pursuant to Article II, § 14 of the state constitution. *See* Exhibit F, at 11-12.² As set out below, that event triggered a 160-day period

² Consistent with Rule of Court 56(d), the exhibits attached hereto are both tabbed by letter and consecutively paginated in the upper right-hand corner. Exhibits will be cited by both methods, as in the text accompanying this note.

for proponents of the recall to gather nearly one million signatures in support thereof. Petitioners Recall Gray Davis Committee and its chairman Howard Kaloogian have been spearheading that effort. *See* Verified Petition for Alternative Writ of Mandate ¶ 1, at 1. On an ongoing basis, these signatures are being submitted to elections officials in the signatories' respective counties. Those officials have various duties, considered in detail below, in relation to the signatures, including counting and "verifying" them and reporting the resulting information to the Secretary of State on a periodic basis. The Secretary, in turn, has the duty to receive and maintain that information and, with particular relevance here, to maintain a "continuous count" of the number of verified signatures. On the basis of that count, he is to certify whether or not the recall proponents have collected sufficient signatures, which determines whether or not a recall election is to be held. The Recall Proponents contend that the Respondents herein, the Secretary and various of the county elections officials, are not discharging their duties in accordance with law. The Recall Proponents seek a writ of mandate to rectify that malfeasance.

A. The Constitutional and Statutory Framework.

Recall elections are governed principally by Article II (§ 13, *et seq.*) of the Constitution and Division 11 (§ 11000, *et seq.*) of the Elections Code. A recall of a state officer "is initiated by delivering to the Secretary of State a petition alleging reason for recall." Cal. Const. art. II, § 14(a). Thereafter, proponents of a recall "have 160 days to file signed petitions," *id.*, containing

the signatures of “electors equal in number to 12 percent of the last vote for the office,” *id.*, § 14(b). For the recall of Governor Gray Davis, the initiating petition was filed on March 25, 2003, as noted above. Thus, according to the Secretary of State, the Recall Proponents have until September 2, 2003 to file in the various counties petitions containing a total of 897,158 signatures. *See* Exhibit F, at 12-13.

Elections officials are responsible for having the signatures “certified,” Cal. Const. art. II, § 14(c), or what is the same thing, “verified,” Elec. Code §§ 11104(a)(3), (b), 11105, 11106.³ Under § 11104(b), “[s]ignatures shall be verified in the same manner set forth in subdivisions (b), (c), (d), (e), (f), and (g) of Section 9030, and in Section 9031.” As prescribed in § 9030(d), and as confirmed by § 11105, verification is effected by a “random sampling technique” if more than 500 signatures are submitted to a given elections official.⁴

One dispute between the parties concerns the frequency or timeliness of the required verifications. As noted above, the Recall Proponents have 160 days in which to submit signatures in support of the recall petition. Elections

³ All undesignated statutory references herein are to the Elections Code.

⁴ There appears to be a conflict with respect to the number of signatures that must be examined in the random sampling. Section 9030(d), as incorporated by § 11104(b), provides that “[t]he random sampling shall include an examination of at least 500 or 3 percent of the signatures, *whichever is greater*” (emphasis added). Section 11105, by contrast, provides that “the elections official may verify, using a random sampling technique, either 3 percent of the signatures submitted, or 500, *whichever is less*” (emphasis added). This apparent conflict does not bear on the issues raised by the instant petition.

officials may not, however, wait until the end of that period to discharge their duties. Rather, § 11104(a) imposes on those officials a duty to report certain information to the Secretary of State on an interim basis. In particular, that provision imposes a duty to report “30 days after a recall has been initiated and every 30 days thereafter, or more frequently at the discretion of the elections official.”⁵ As prescribed in § 11104(a), elections officials must include the following information in those periodic reports:

(1) The number of signatures submitted on the recall petition sections for the period ending five days previously, excluding Saturdays, Sundays, and holidays.

(2) The cumulative total of all signatures received since the time the recall was initiated and through the period ending five days previously, excluding Saturdays, Sundays, and holidays.

(3) The number of valid signatures, verified pursuant to subdivision (b), submitted during the previous reporting period, and [the number] of valid signatures verified during the current reporting period.

(4) The cumulative total of all valid signatures received since the time the recall was initiated and ending five days previously, excluding Saturdays, Sundays, and holidays.

The other dispute between the parties concerns what the Secretary of State is to do with information contained in the reports that he receives from the elections officials. In this respect, Article II, § 14(c) of the Constitution

⁵ Consistent with this provision, the Secretary of State has determined that the reporting dates for officials who report no more frequently than necessary to be as follows: April 24, 2003; May 27, 2003; June 23, 2003; July 23, 2003; and August 22, 2003. *See* Exhibit F, at 13.

provides that the Secretary “shall maintain a continuous count of the signatures certified” by those officials. Cal. Const. art. II, § 14(c). If and when the Secretary “determines that the proponents have collected sufficient signatures, he or she shall certify that fact to the [Lieutenant] Governor.” § 11109. On receiving such certification, the Lieutenant Governor “shall make or cause to be made publication of notice for the holding of the election.” § 11110.⁶

B. The Factual Basis of the Dispute.

The parties have two disputes concerning the interpretation and application of the aforementioned constitutional and statutory provisions.

First, it cannot be disputed that various county elections officials have “certified” counts of verified signatures to the Secretary of State. *See* Exhibit H, at 18-22 (copies provided *by* the Secretary to the Recall Proponents). Nonetheless, despite repeated requests by the Recall Proponents through their attorneys over the course of a nearly a week, the Secretary refused to provide the *continuous* count of the verified signatures that he is constitutionally required to maintain. *See* Exhibit G, at 15-16 (demand letter recounting previous requests and making a final demand); Exhibit H, at 17 (responding with “verified signature count reports” but no up-to-date cumulative count of verified signatures). The only reasonable inference from this refusal is that the

⁶ Strictly speaking, it is the Governor who is specified in §§ 11109 and 11110. Article II, § 17 of the Constitution provides, however: “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.”

Secretary is failing to maintain a “continuous count” of verified signatures or, if he is maintaining such a count, that he is refusing to make the count available to the public. The Recall Proponents contend that the Secretary’s failure to maintain the count or to make the count available is contrary to law.

Second, the next reporting date for elections officials who report no more frequently than necessary is July 23, 2003, less than two weeks away. *See* note 5, *supra*. On June 30, 2003, the Secretary of State issued a memorandum providing directives to elections officials regarding the contents of the required July 23rd report. *See* Exhibit D, at 7. That memorandum takes the position that the officials have discretion whether or not to verify signatures received after *June* 16th, more than five weeks before the report is due. In statements to agents of the Recall Proponents, agents of Respondent elections officials have indicated their adherence to this position and their intention not to verify any of the signatures they receive after June 16th. Instead, they will verify those signatures sometime after July 23rd and not report them before the next report due on August 22nd. When provided a formal opportunity to repudiate that position, Respondent elections officials declined to do so. *See* Exhibits I through M, at 23-32 (demand letter to each official); Exhibit E, at 9-10 (attorney’s declaration that he received no responses to the letters). The Recall Proponents contend that the position espoused by the Secretary’s memorandum and adhered to by the other Respondents is contrary to law.

C. The Procedural Posture of this Case.

This is an original proceeding. Although this petition could lawfully have been made to the superior court in the first instance, the Recall Proponents believe it is proper that the writ should issue originally from this Court. *Cf.* Rule 56(a)(1). As this Court has held: “In election cases, where, as here, the issues are of great public importance and must be resolved promptly, we will exercise our original jurisdiction in mandamus proceedings.” *Bjornestad v. Hulse*, 229 Cal. App. 3d 1568, 1580 (1991) (quoting *Burrey v. Embarcadero Municipal Improvement District*, 5 Cal. 3d 671, 675 (1971)); *accord Andal v. Miller*, 28 Cal. App. 4th 358, 360-61 (1994) (granting mandamus in original proceeding involving elections matter). Involving the proper administration of a statewide recall of the governor, the instant proceeding raises issues of great public importance. Moreover, these issues must be resolved quickly, as they involve duties that the Secretary must discharge immediately and duties that all Respondents must discharge beginning July 16, 2003, less than one week away.

The officers named as Respondents are elections officials, including the Secretary of State. Pursuant to Rule 56(a)(2), the Recall Proponents disclose that Governor Gray Davis, whose recall this proceeding concerns, is the real party in interest. Mr. Davis has accordingly been named as such and has been served with a copy of this petition and all supporting documents.

As indicated by the various demand letters from their attorneys to all Respondents, the Recall Proponents attempted to resolve this issue without litigation but were unsuccessful. *See* Exhibit B, at 3-5; Exhibit G, at 15-16; Exhibits I through M, at 23-32.

ARGUMENT

The Recall Proponents seek mandamus against the Secretary of State and various county elections officials. It is well established that “[m]andamus is clearly the proper remedy for compelling an officer to conduct an election according to law.” *Wenke v. Hitchcock*, 6 Cal. 3d 746, 751 (1972) (quoting *Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 570 n.2 (1971)). Therefore, if the Court accepts the following arguments that Respondents are acting contrary to law in their conduct of the gubernatorial recall election, the Court should grant the requested writ.

I. THE SECRETARY OF STATE IS VIOLATING HIS NONDISCRETIONARY LEGAL DUTY TO MAINTAIN A “CONTINUOUS COUNT” OF VERIFIED SIGNATURES AND TO MAKE THAT COUNT AVAILABLE TO THE PUBLIC UPON REQUEST.

It is not disputed that county elections officials have a duty to “verify” signatures submitted them in support of a recall, that is, to determine whether the signatures are “valid.” By virtue of § 11104(b), the signatures are to be verified in the manner set forth in §§ 9030(b)-(g) and 9031. Under § 9030(e),

the official, upon completion of the verification process for a given set of signatures, shall prepare “a properly dated certificate, showing the result of the examination” and shall “transmit . . . the certificate to the Secretary of State.” Once that transmission is accomplished, the verified signatures are properly said to be “certified to” the Secretary of State. Cal. Const. art. II, § 14(c). It is these certified signatures of which the Secretary has a constitutional duty to “maintain a *continuous* count” (emphasis added). *Id.* Practically speaking, this means that the Secretary has a constitutional duty to *continuously* determine the progress of the recall proponents toward their goal of “collect[ing] sufficient signatures” to trigger the calling of a recall election. § 11109.

How often must the Secretary tally the submissions from the various elections officials for his count fairly to be *said* to be continuous? Although the constitution does not specify the frequency, a strong argument could be advanced that the count must be updated every time the Secretary receives a submission from an elections official. At the very least, given the triviality of the task—adding numbers to an existing sum—the count should be updated daily in order to qualify as a *continuous* count. But whatever the frequency, it is clear that *never* updating the count does not satisfy the duty imposed by Article II, § 14(c). Yet as noted above, *see supra* at pp. 5-6, *never* updating the count of verified signatures is precisely what the Secretary is now doing (or to be more accurate, *not* doing).

It is theoretically possible, we suppose, that the Secretary *is* maintaining the constitutionally required continuous count, but refusing to share that count with the public upon request. If so, this would be no less a dereliction of duty on the Secretary's part. The very existence of a comprehensive reporting scheme requiring frequent and detailed reports from local officials to a central authority, *see* § 11104, capped off by a requirement that the central authority maintain a "continuous" tally of the reported information, *see* Cal. Const. art. II, § 14(c), by itself belies the notion that the Secretary may rightfully keep the count to himself. Is it conceivable that the framers of the recall provisions of the California Constitution intended for the Secretary to maintain a continuous *but altogether secret* count of verified signatures? No, it is surely not.

Moreover, if the constitutional and statutory provisions specific to recall elections are not sufficient to resolve this issue, there is also the Public Records Act, Gov't Code §§ 6250, *et seq.* Under Gov't Code § 6252(e), any count of verified signatures maintained by the Secretary of State qualifies as a "public record." Therefore, it is "open to inspection at all times during the office hours of the [Secretary of State] and every person has a right to inspect [it]." Gov't Code § 6253(a). Because there is no conceivable basis for claiming that the signature count would be exempt from disclosure under the Act,⁷

⁷ Although some matters relating to recall election petitions are exempt, *see* Gov't Code § 6253.5, the count of verified signatures is not among them.

the Secretary has the duty is to “make [it] promptly available to any person.” Gov’t Code § 6253(b). Assuming that the Secretary is even maintaining the required count, he is shirking his mandatory duties under these provisions.

In short, one way or another, the Secretary of State is violating his non-discretionary legal duties regarding the maintenance of a *continuous* count of verified signatures as mandated by the state constitution. Either the Secretary is illegally failing to maintain the count, or he illegally refusing to disclose the count to the public upon request. Both alternatives warrant intervention by this Court.

II. WITH THE SECRETARY OF STATE’S ENCOURAGEMENT, RESPONDENT ELECTIONS OFFICIALS ARE VIOLATING THEIR NONDISCRETIONARY LEGAL DUTY TO EXAMINE AND VERIFY EVERY SIGNATURE SUBMITTED NO LATER THAN *FIVE BUSINESS DAYS* BEFORE A PERIODIC REPORT.

In his June 30, 2003 memorandum, the Secretary of State directs elections officials to include (among other things) in their July 23rd report:

the number of verified signatures submitted from May 20, 2003 through June 16, 2003; [and] the number of signatures, *if any*, that you *have chosen* to verify during the current reporting period [i.e., June 17, 2003 through July 16, 2003].

Exhibit D, at 7 (emphasis added). The unmistakable import of this directive is that elections officials have unfettered discretion regarding whether to verify the signatures submitted to them in the period from June 17th to July 16th. That is certainly how Respondent elections officials have interpreted the Sec-

retary’s directive. *See supra* at p. 6 (recounting the positions taken by these officials with respect to the timing and reporting of verifications).

The Secretary of State’s directive—and Respondent election officials’ implementation of that directive—is contrary to law. The argument is simple: paragraphs (3) and (4) of § 11104(a) impose a nondiscretionary legal duty on elections officials to “verif[y]” signatures—that is, determine whether they are “valid”—on an ongoing and timely basis. In particular, with respect to a given periodic report, elections officials have a duty to verify as many as reasonably possible of the “signatures received since the time the recall was initiated and ending *five [business] days previously*.” § 11104(a)(4) (emphasis added). To say the same thing, the officials have a duty to verify as many as reasonably possible of the signatures received “during the *current* reporting period.” § 11104(a)(3) (emphasis added).⁸ Given these explicit provisions, there is no legal warrant for excusing elections officials from verifying all signatures submitted no later than five business days prior to the submission of the report. Thus, as to the periodic report that is due no later than July 23rd, elections officials must verify as many as reasonably possible of the signatures received for the period ending five business days previously, or July 16th.

⁸ In the context of § 11104(a), the term “current reporting period” can reasonably be interpreted only to represent the period beginning at the close of the previous reporting period and “ending five days previous[], excluding Saturdays, Sundays, and holidays,” to the date that the current report is submitted to the Secretary of State.

As explained below, this interpretation of § 11104(a) is eminently reasonable and feasible, and it accords with sound public policy relating to recall elections. By contrast, the contrary interpretation proffered by the Secretary of State and accepted by Respondent elections officials is logically untenable and contrary to public policy.

A. This Interpretation of § 11104(a) Is Eminently Reasonable and Feasible.

Section 11104(a) mandates that elections officials “shall report” certain information to the Secretary of State. That mandate necessarily implies a duty on the part of those officials to take all steps necessary to obtain the required information. With respect to the raw signatures referred to in paragraphs (1) and (2) of § 11104(a), elections officials obviously must *count* the signatures, even though § 11104 does not actually contain that verb. With respect to the valid signatures referred to in paragraphs (3) and (4), the officials obviously must determine whether the signatures are in fact valid; that is, the officials must *verify* the signatures. The Secretary apparently does not dispute that the Elections Code imposes a mandatory duty on elections officials both to count and to verify every signature submitted to them. *See* Exhibit D, at 7 (memorandum directing elections officials to “maintain a raw count” of signatures and to “determine how many valid signatures were received” by them).

The question is when that counting and verification must take place. It is reasonable to construe the Elections Code to mean what it says. *See, e.g.,*

Robert L. v. Superior Court, 30 Cal. 4th 894, 901 (2003) (noting that in cases of statutory construction, courts “turn first to the language of the statute, giving the words their ordinary meaning”). With respect to counting, elections officials must report “[t]he cumulative total of all signatures received since the time the recall was initiated and through the period ending five [business] days previously.” § 11104(a)(2). How can that reporting duty be discharged except by actually counting all signatures received “through the period ending five [business] days” before the report is submitted? Similarly, with respect to verification, elections officials must report “[t]he cumulative total of all valid signatures received since the time the recall was initiated and through the period ending five [business] days previously.” § 11104(a)(4). Again, how can that reporting duty be discharged except by actually verifying all signatures received “through the period ending five [business] days” before the report is submitted? It cannot, which is why the language of § 11104, given its ordinary meaning, requires officials to verify as many as reasonably possible of the signatures received no later than *five business days* prior to a required report.

This makes eminent sense. By limiting the subject of a periodic report to signatures that were received no later than “five [business] days” before the report is to be submitted to the Secretary of State, the Legislature has granted elections officials no less than *one entire week* to count and verify signatures. Given modern computer technology—and the fact that *at most* only 3 percent of signatures must actually be examined as part of the verification process, *see*

§ 9030(e); *see also supra* note 4—this time period is feasible. If, in the face of extraordinary and unforeseen circumstances, an elections official cannot possibly verify all of the signatures, the official must *at least* verify as many as reasonably possible. Thus, in a particular case, an elections official might conceivably be able to verify only those signatures received, say, *eight* business days prior to the report rather than five. But that slippage of a *few days* is a far cry from the Respondents’ proposal that elections officials verify only those signatures received no later than June 16th, more than *five weeks* prior to the July 23rd report.

B. This Interpretation of § 11104(a) Accords with the Public Policy Relating to Recall Elections.

The foregoing interpretation of the Elections Code will result in a more expeditious determination of the validity of the signatures submitted in support of a recall. This is self-evidently true even if the proponents of a recall utilize the entire 160-day period for gathering signatures: verifying signatures received five *weeks* ago will take longer than verifying signatures received five business *days* ago. What may not be immediately evident, however, is that the more timely verification of signatures sought by this petition can result in an early termination of the 160-day signature-gathering period. Under § 9030(g), as incorporated into recall elections by § 11104(b), a recall petition “shall be deemed to qualify”—requiring an election to be conducted—“as of the date of receipt by the Secretary of State of certificates showing” that the

petition has been signed by “more than 110 percent of the number of qualified voters needed to find the petition sufficient.” Accordingly, more timely verification of signatures can result in a more timely qualification of the petition, that is, a more timely determination that a recall election must be held.

This result accords with public policy: “The courts are ever mindful of the desirability of having recall petitions presented to the people through election *without delay . . .*” *Wilcox v. Enstad*, 122 Cal. App. 3d 641, 651 (1981) (emphasis added) (quoting *Moore v. City Council*, 244 Cal. App. 2d 892, 901 (1966) (quoting *Reites v. Wilkerson*, 99 Cal. App. 2d 500, 502 (1950))). On the proponents’ side, delay frustrates the long-recognized constitutional right of the people “to remove elective officers whenever the people, in their judgment, deem such action necessary.” *Laam v. McLaren*, 28 Cal. App. 632, 638 (1915). The longer a recall election is put off, the longer the people must put up with an officer whom (by definition) a substantial portion of the electorate has determined is unworthy to continue in office.

But a timely verification of signatures also benefits the targeted officeholder. From his perspective, delay frustrates the day when he either will be altogether rid of the cloud of recall (because the proponents failed to secure sufficient signatures) or will have the controversy definitively resolved by a decisive up-or-down vote of the electorate. For all sides, then, the more timely verification of signatures that would occur under the Recall Proponents’ interpretation of § 11104 is good public policy.

C. Respondents' Contrary Interpretation of § 11104(a) Is Logically Untenable and Contrary to Public Policy.

It remains to examine Respondents' contrary interpretation of § 11104. Under the interpretation encapsulated in the Secretary of State's June 30, 2003 memorandum, elections officials may "choose" to verify signatures received during the current reporting period, or they may choose instead *not* to verify those signatures; the officials have discretion. *See* Exhibit D, at 7. Yet at the same time, the officials *must* verify the signatures received during the previous reporting period; they have *no* discretion in this regard. *See id.*

This interpretation is logically untenable. The only conceivable basis for reading paragraphs (3) and (4) of § 11104(a) as *not* imposing a mandatory duty to verify all signatures received within current reporting period (or five business days prior to the report) is to read those provisions as requiring elections officials to report only "the number of signatures that you have bothered to verify" in that period. But if one is to so cavalierly dismiss any mandatory duty to verify all signatures received within the *current* reporting period, why shouldn't one dismiss the mandatory duty to verify *any* signatures, including signatures received during the *previous* reporting period? Of course, the Secretary of State is not willing to go that far, but there is nothing in logic or the text of § 11104(a)(3) that permits such a fundamental distinction between the two reporting periods.

Furthermore, given the parallelism between paragraphs (2) and (4) of § 11104(a), the logic of the Secretary's position is such that elections officials have no mandatory duty even to *count* raw signatures. If paragraph (4) is to be interpreted to require a report merely of "the cumulative total of all valid signatures that you chose to verify in your discretion," why shouldn't paragraph (2) be interpreted to require a report merely of "the cumulative total of all valid signatures that you chose to count in your discretion." Again, there is no logical reason, under the Secretary's interpretation, not to reach this absurd conclusion. But the absurdity of the conclusion is sufficient reason to reject that interpretation. *See, e.g., In re Michelle D.*, 29 Cal. 4th 600, 606 (2002) ("[T]he language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend.").

Finally, the Secretary's interpretation would consonance the delay that courts are "ever mindful" of preventing in recall context. *Wilcox v. Enstad*, 122 Cal. App. 3d at 651. Rather than having signatures that are received by July 16th verified and reported by July 23rd, the Secretary would allow—and Respondent elections officials would take advantage of—a significant delay until August 22nd. Such a gratuitous postponement of the resolution of the recall controversy is bad public policy, disadvantaging both the electorate and Governor Davis.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of mandate to compel Respondents to conduct the pending recall election of Governor Gray Davis according to law. Specifically, the writ should (1) direct the Secretary of State to act consistently with his nondiscretionary legal duty to maintain a continuous count of the verified signatures submitted in support of the recall and to make such count available to the public upon request; and (2) direct all Respondents to act consistently with the nondiscretionary legal duty of elections officials to examine and verify all signatures submitted in support of the recall no later than *five business days* prior to periodic reports they submit to the Secretary of State.

DATED: July 10, 2003.

Respectfully submitted,

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