SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME	**AUGUST 4, 2021, 1:30 p.m.**	**DEPT. NO**	**23**
JUDGE	**HON. LAURIE M. EARL**	**CLERK**	**E. BERNARDO**
ORRIN E. HEATLIE, et al., **Petitioners,** **v.** **DR. SHIRLEY N. WEBER, in her official capacity as Secretary of State of California,** **Respondent,** **BRIAN JAMISON, in his official capacity as Acting State Printer for the State of California, et al.,** **Real Parties in Interest.**		**Case No.: 34-2021-80003690**	
Nature of Proceedings:	**PETITION FOR WRIT OF MANDATE**		

Following is the Court's tentative ruling DENYING the petition for writ of mandate.

BACKGROUND

This is a challenge to a 500-word argument against the recall of Governor Gavin Newsom that will appear in the Official Voter Information Guide for the September 14, 2021, gubernatorial recall election. Petitioners are the lead proponent of the recall, one of its main proponents, and a political action committee formed for the purpose of recalling the Governor. (Pet., ¶¶ 5-7.) They allege the Governor's argument contains false and misleading statements, and they seek a writ of mandate ordering that those statements be either removed or revised. For the reasons stated below, the petition is denied.

FACTUAL AND LEGAL BACKGROUND

The Elections Code provides the Secretary of State ("the Secretary") shall prepare a voter information guide ("the Guide") for statewide elections that is mailed to all registered voters.

(Elec. Code §§ 9081, 9094.)[1] The Elections Code lists certain things that must be included in the Guide – and arguments for and against a recall are not on that list. (See § 9084.) The Elections Code also provides, however, that the Guide may contain "materials that the Secretary determines will make the state voter information guide easier to understand or more useful for the average voter." (§ 9084, subd. (e).) Pursuant to this authority, and having determined it would make the Guide more useful to the average voter, the Secretary gave Petitioner Orrin Heatlie (the lead proponent of the recall) and Governor Newsom the opportunity to submit arguments for inclusion in the Guide.[2] The Secretary instructed both sides that their arguments were limited to 500 words, and that they "shall not contain any demonstrably false, slanderous, or libelous statements nor any obscene or profane language, statements, or insinuations." (Pet., RJN, Ex. 1; Resp. RJN, Ex. 2.)

Petitioners contend the argument submitted by Newsom (1) contains false and misleading statements, and (2) references his party affiliation in violation of Elections Code section 13307, subdivision (a)(1). They thus seek a writ of mandate pursuant to Elections Code section 9092 ordering that portions of the argument be either deleted in their entirety or revised.

Section 9092 provides that any elector may seek a writ of mandate requiring that portions of the Guide be amended or deleted. It also provides: "A peremptory writ of mandate shall issue *only upon clear and convincing proof that the copy in question is false, misleading, or inconsistent with the requirements of this code*..., and that issuance of the writ will not substantially interfere with the printing and distribution of the [Guide] as required by law."[3] (Emphasis added.) As one court has explained:

> Official voters' pamphlets are limited public forums provided by the government, so the government can constitutionally impose what would be an otherwise unlawful prior restraint of speech by way of precluding false or misleading statements. [Citations.]
>
> However, because freedom of speech is still implicated, any restrictions must be narrowly drawn. [Citation.] The statute at

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[1] Undesignated statutory references are to the Elections Code.

[2] Similar arguments were included in the Guide for the 2003 Gubernatorial Recall Election. (Southard Decl., Ex. C.)

[3] All parties appear to agree that the Guide must be finalized and submitted to the State Printer by 5 p.m. on August 6, 2021, in order to meet mailing and distribution deadlines, and that the petition thus must be decided before that time.

> issue here, for example, expressly requires clear and convincing evidence before the trial court may interfere with a ballot argument, and the Legislature went out of its way to emphasize the narrowness of the scope of any proper challenges by appending the word "only" in front of the heightened evidentiary standard.

(*Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417, 1428.) The court further explained:

> In determining whether statements are false or misleading, courts look to whether the challenged statement is subject to verifiability, as distinct from typical hyperbole and opinionated comments common to political debate. An outright falsehood or a statement that is objectively untrue may be stricken. We need only add that context may show that a statement that, in one sense, can be said to be literally true can still be materially misleading; hence, the Legislature did not indulge in redundancy when it used both words. On the other hand, the standard, as defined by the Legislature, is necessarily a high one: Courts may intervene only if clear and convincing evidence shows the statement to be false or misleading.

(*Id.* at 1432, internal quotes and cites omitted.) In the words of another court, judicial intervention is justified only in "that rare instance [when the court is presented] with facts which are conclusively and objectively untrue," or when "uncontested, objectively verifiable evidence of untruth is presented to the court." (*San Francisco Forty-Niners v. Nishioka* (1999) 75 Cal.App.4th 637, 649.) And again: "We note we are speaking of outright falsehoods in an official election document and not the typical hyperbole and opinionated comments common to political debate." (*Id.*) Thus, in order to prevail on their petition, it is Petitioners' burden to demonstrate by clear and convincing evidence that the arguments they challenge fall on the "outright falsehood" rather than the "typical hyperbole" side of the line, or that they are otherwise inconsistent with the Elections Code.

ANALYSIS

Petitioners make two separate arguments. First, they argue that Newsom's recall argument violates Elections Code section 13307 because it contains numerous references to his party affiliation. Second, they argue that portions of the recall argument are false and misleading.

1. Elections Code section 13307/References to Party Affiliation

Petitioners contend Newsom's recall argument violates Elections Code section 13307 because it contains numerous references to his party affiliation (i.e., Democrat). Section 13307 is not applicable to the recall argument.

Elections Code section 11327 provides that an officer whose recall is being sought "may file a [candidate's] statement . . . in accordance with Section 13307, to be sent to each voter, together with the voter information guide." Elections Code section 13307, in turn, provides, "The statement may include the name, age, and occupation of the candidate and a brief description, of no more than 200 words, of the candidate's education and qualifications expressed by the candidate himself or herself. ... The statement shall not include the party affiliation of the candidate, nor membership or activity in partisan political organizations." (EC 13307, subd. (a)(1).) The recall argument at issue in this case, however, is not a candidate's statement, and is thus not governed by section 13307. Instead, the recall argument is exactly what it sounds like – an *argument* against the recall that the Secretary allowed pursuant to Elections Code section 9084 in order to make the Guide more useful to voters. In their reply, even Petitioners concede this point and state they withdraw their objections based on Elections Code sections 11307 and 11327. (Reply at 2, fn. 1.)

Petitioners also briefly suggest that Newsom's inclusion of his party affiliation in the recall argument "arguably skirts Judge James P. Arguelles's July 12, 2021 Order preventing Newsom from including his Party Affiliation in the recall election ballots." (Pet., p. 8, fn.6.) Judge Arguelles's July 12 order, however, is neither binding nor precedential. Moreover, and *more importantly*, is irrelevant to this case because it had nothing to do with the contents of a recall argument included in the Guide. Instead, that case involved an interpretation of Elections Code section 11320, and the issue was whether Newsom's party preference could be identified on the ballot in light of the fact that he failed to inform the Secretary of State that he elected to do so by the relevant statutory deadline.[4]

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[4] Section 13320, subdivision (c)(3) provides, "if the officer fails to inform the Secretary of State whether the officer elects to have a party preference identified on the ballot by the deadline for the officer to file an answer with the Secretary of State, the statement of party preference shall not appear on the ballot." Judge Arguelles held Newsom's party preference could *not* appear on the ballot because he failed to act by the relevant deadline.

2. Allegedly False and Misleading Statements

Newsom's recall argument contains 17 sentences or lines. Petitioners challenge the following 10 of them (bracketed numbers added to facilitate discussion):

> [1] The recall is an attempt by national Republicans and Trump supporters to force an election and grab power in California.
>
> [2] VOTE NO on the recall of Democratic Governor Gavin Newsom to stop the Republican takeover of our state.
>
> [3] The recall's leading supporters are the same national Republicans who fought to overturn the presidential election and launched efforts to undermine the right to vote across the country.
>
> [4] Here in California, they are abusing our recall laws in order to gain power and advance their partisan agenda.
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> [5] The leaders of the Republican recall seek to repeal California's clean air protections, roll back gun safety laws and take away health care access for those who need it.
>
> [6] And as California makes important progress against COVID-19, handing power to Republicans and supporters of President Trump could set our state back in our fight against the pandemic.
>
> [7] But all of our residents' sacrifice and our state's progress could be put at risk if this partisan, Republican recall succeeds.
>
> [8] VOTE NO on the recall to the stop this Republican power grab.
>
> [9] Stop the Republican Recall of Governor Newsom
>
> [10] stoptherepublicanrecall.com[5]

Petitioners' primary argument is that all references to the recall being "Republican" are false and misleading because the recall is supported by a veritable rainbow coalition that includes people of all political persuasions. This particular argument applies to lines 1, 2, 3, 5, 6, 7, 8, and 9. Again, Petitioners have the burden of proving by clear and convincing evidence that references to a "Republican" recall are outright falsehoods or objectively untrue rather than "typical hyperbole and opinioned comments common to political debate." (*Huntington Beach City*

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[5] This line merely lists the address of the website of Real Party in Interest Stop the Republican Recall. The address is 100 percent accurate, is thus neither false nor misleading. The Court thus declines Petitioners request to delete it and does not discuss it further.

Council, supra, 94 Cal.App.4th at 1432; *San Francisco Forty-Niners* (1999) 75 Cal.App.4th 637, 649.) They fail to meet their burden.

Petitioners attempt to meet their burden by citing three pieces or types of evidence. First, they cite the fact that, of the 46 candidates running against Newsom, only 24 are Republicans (10 have no party preference, nine are Democrats, one is Libertarian, and two are Greens). That slightly more than half of the candidates running against Newsom are Republicans, however, does not prove that the recall is *not* a Republican-backed effort. Moreover, many of the disputed arguments reference the people behind the recall, and not the candidates running to replace Newsom. For example, statement 3 references the "recall's leading supporters," and statement 5 references the "leaders of the Republican recall." Similarly, statement 1 references the "attempt by national Republicans...to force an election." The fact that some of the candidates running to replace Newsom are not Republican does not demonstrate that these statements are false or misleading in any way, much less that they are outright falsehoods or objectively untrue.

Second, Petitioners cite five declarations from people who signed the petition to recall the Governor and/or who support the recall effort. (See Declarations of Andrea Hedstrom, Craig Gordon, Honor Robson, Bianca Von Krieg, and Daniel MacKinnon.) All five state they are not Republicans. More precisely, one is a Democrat, one is a Libertarian, and three are not registered with any political party. (Khan Decl., ¶ 7.) In order to qualify the recall for the ballot, the proponents needed to collect approximately ***1.5 million*** signatures from registered voters. The fact that one Democrat, one Libertarian, and three voters without a party preference support the recall is not clear and convincing evidence that it is an outright falsehood to use the term Republican when referring to the recall.

Finally, Petitioners cite a declaration from Paul Olson who states he verified signatures on the recall petition and compared the information with voter registration records. (Olson Decl., ¶¶ 3-4.) According to Olson, a "significant percentage" of signatures were from "non-Republican voters, including many Democrats." (*Id.*, ¶ 5.) Olson does not state how "significant" that percentage was, or provide any information on the breakdown between "non-Republicans" and "Democrats." He also states that in "certain areas of California, we found that the percentage of signatures on petitions obtained from people registered as Democrats exceeded 20%." (*Id.*, ¶ 6.) These areas are not identified. Olson's vague and unspecific statements fail to

clearly and convincingly demonstrate that calling this a Republican recall is an outright falsehood.

The Court has no doubt that not all recall supporters are Republicans. But the challenged arguments do not state or imply that they are. Instead, they refer to the recall as a "Republican recall" and they refer to the recall's "leaders" or "leading supporters" as Republicans. As persuasively demonstrated by Governor Newsom, the recall effort was clearly spearheaded by Republicans. Petitioners Heatlie and Netter – who describe themselves as the "Lead Proponent" and "one of the Main Proponents" of the recall effort – are both registered Republicans. (Pet., ¶¶ 5-6; Khan Decl., ¶ 10.) The recall effort began with the collection of 25 signatures on a "notice of intent to circulate a recall petition." (Elec. Code § 11006.) Of the 116 signatories who provided legible, complete and accurate information, 106, or 91.4 percent, were registered Republicans; 6 declined to state a party preference; 2 were registered Democrats; and 2 were registered Libertarians. (Khan Decl., ¶ 6.) The Court suspects that even Petitioners would acknowledge a large majority of those who signed the recall petition and who support the recall are Republicans. A recent poll by the University of California's Institute of Government Studies (IGS) found that while 95 percent of registered Republicans intend to vote yes on the recall, just 6 percent of registered Democrats plan to do so.[6] (Marais Decl., Ex. 2.) The recall is also clearly being supported by the California Republican Party. The first words on the home page of the California Republican Party's website are "September 14, 2021, Recall Governor Newsom," and a 'pop-up' immediately asks for donations under the tagline "Californians will recall Gavin Newsom." (https://cagop.org.) Moreover, the California Republican Party has created a separate website, www.kingnewsome.com, where it asks voters to "commit to vote to recall Governor Gavin Newsom."[7] Finally, many of the recall effort's biggest donors and most prominent supporters are Republicans, including national figures like Newt Gingrich, Devin Nunes, and Mike Huckabee.[8] (See Opp. at 7-9 and articles cited therein.) Given all this evidence, the Court finds it is not too hyperbolic to refer to the recall as a Republican recall.

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[6] 91 percent of Democrats intend to vote no, and 3 percent are undecided.

[7] The bottom of the home page clearly states it is "Paid for by the California Republican Party."

[8] Governor Newsom supports much of this argument by citing newspaper and other media articles. Although these articles are technically hearsay, (see, e.g., *Christian Research Inst. v. Alnor* (2007) 148 Cal.App.4th 71, 83), Petitioners do not object on this ground, and they cite numerous articles in their own brief. (See *Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 726

Again, the burden of proof in this case is high, and "we are speaking of *outright falsehoods* in an official election document and not the *typical hyperbole* and opinionated comments common to political debate." (*San Francisco Forty-Niners, supra,* 75 Cal.App.4th at 649, emphasis added.) Hyperbole means "obvious and intentional exaggeration," and "an extravagant statement or figure of speech not intended to be taken literally." (www.dictionary.com.) Is referring to this election as a "Republic recall" exaggerated? Maybe. But the Court finds it is also the type of exaggeration that is common to political debate and that is thus permissible. Calling this a "Republican recall" falls on the "typical hyperbole" side of the line rather than the "outright falsehood" side of the line. This is particularly true where, as here, the evidence submitted by Petitioners is both limited and weak. This is thus decidedly *not* a case where "the record demonstrates that uncontested, objectively verifiable evidence of untruth is presented to the court, and the opposition consists of halfhearted sounds of silence without evidentiary support[.]" (*San Francisco Forty-Niners, supra,* 75 Cal.App.4th at 649.) Instead, the record demonstrates that all or almost of the recall's leaders and a large majority of its supporters are Republicans. Petitioners have failed to clearly and convincingly demonstrate that the recall argument's description of the recall as "Republican" is an outright falsehood.

Petitioners also challenge the argument that "[t]he recall's leading supporters are the same national Republicans who fought to overturn the presidential election and launched efforts to undermine the right to vote across the country." (Pet., ¶ 27(c).) Petitioners claim this argument is "at best misleading, at worst flat-out false, and in all events a hyperbolic outrage." (*Id.*) They cite *no* evidence demonstrating this particular argument is either misleading or false, and, as noted above, hyperbole is permissible. Similarly, Petitioners also challenge two references in the recall argument to Trump supporters: (1) that "[t]he recall is an attempt by national Republicans and Trump supporters to force an election and grab power in California," and (2) that "handing power to Republicans and supporters of President Trump could set our state back in our fight against the pandemic." Petitioners contend these statements are tantamount to asserting that *all* recall supporters are also Trump supporters who fought to overturn the results of the presidential election. The Court disagrees, and, like the references to Republicans discussed above, finds them instead to be permissible hyperbole. Moreover,

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[hearsay objection waived if not timely raised].) Although the Court considered some of these articles, they were not determinative.

Petitioners Heatlie and Netter are two of the recall's effort's leading supporters (indeed, they describe themselves as its "Lead" and one of its "Main" proponents), and they are Republicans who have spoken publicly of their support for President Trump. (Opp. at 7, fn.10, and 9 fn. 21.) Petitioner Heatlie has also been reported as stating he is "skeptical that President Joe Biden rightfully won the election." (Opp. at 5, fn.2; see also Evid. Code § 1220 [statements of party not made inadmissible by hearsay rule].) There is thus nothing false or misleading about describing the recall effort's leaders as Trump supporters.

Finally, Petitioners complain that the recall argument describes the recall as "an attempt...to *force an election and grab power* in California," and as a "Republican *takeover* of our state," and encourages voters to "stop this Republican *power grab*." They also complain that the argument states proponents "are *abusing our recall laws* in order to gain power and advance their partisan agenda." (Italics added.) According to Petitioners, the recall cannot be described as "forcing an election," a "power grab," a "takeover," or an "abuse" of law, because those phrases all imply "there is something improper or wrong about the recall election," but the recall process is expressly authorized by the California Constitution. To the extent Petitioners argue a recall can never be described as a power grab or an abuse of law because recalls are constitutionally authorized, the Court rejects that argument. Clearly, recalls are authorized by both the California Constitution and the Elections Code. That does not mean that it is necessarily false or misleading to refer to a recall as a power grab or an abuse of the law. The recall does *force an election*, and if it is successful, will in all likelihood result in an opposing party *taking over* control of the Governor's seat. Both of which are exactly the intent of the proponents. Specific to this particular issue, the IGS poll revealed the following:

> The survey ... asked voters whether they agreed or disagreed with a number of statements made about the recall election. In most cases those intending to vote Yes to recall Newsom hold very different views than those intending to vote No to retain the Governor. However, there was one statement in which majorities of both Yes and No voters do agree – *"The recall election offers the Republican Party its best chance to win back the governorship."* Likely voters statewide agree with this statement nearly two-to-one (54% to 29%) and this includes majorities of both Yes voters (57%) and those intending to vote No in the recall election (52%).

(Marais Decl., Ex. 2.) Lastly, the recall is being held less than three years after a sizeable majority of California voters elected Newsom Governor. Out of over 12.4 million votes cast in

the 2018 gubernatorial election, approximately 7.7 million (or 62 percent) voted for Newsom, while approximately 4.7 million (or just 38 percent) voted for Republican challenger John Cox. Cox is one of the candidates running to replace Newsom, and if the recall is successful, he (or any other candidate) could become Governor with far less than a majority of the vote. Moreover, the winner would serve out Newsom's term, which ends on January 2, 2023, and would thus be governor for only 15 and a half months before having to stand for re-election. Regardless of the results of the recall, there will be another gubernatorial election a little more than one year after the recall election, at which time Newsom (or any other candidate) can run for re-election. The recall is costing the taxpayers an estimated $275 million. The lead proponent (i.e., Petitioner Heatlie) supports the recall by arguing that homelessness, crime, failing schools and the cost of living have all gotten worse since Newsom took office, which is the type of argument heard in most gubernatorial elections. (See Heatlie recall argument.) It would be difficult to argue that the past three years have been easy ones, on Californians or on Newsom. Given this, reasonable minds could disagree about whether this recall is an abuse of a legally sanctioned process, or whether the proponents should simply wait one year and then try their luck at unseating Newsom at the regular gubernatorial election. At a minimum, the Court finds that presenting an *argument* to the voters that this recall is an abuse of the law is the type of "hyperbole and opinionated comment[] common to political debate" that section 9092 is not meant to police. (*San Francisco Forty-Niners, supra*, 75 Cal.App.4th at 649.)

CONCLUSION

On September 14, 2021, California voters will be asked whether to recall Governor Newsom. Before the election, they will be provided with a Guide that contains arguments both for and against the recall. For all the reasons stated above, Petitioners fail to clearly and convincingly demonstrate that Governor Newsom's argument against the recall contains outright falsehoods or statements that are objectively untrue. The petition is thus denied.

* * *

This tentative ruling shall become the court's final ruling and statement of decision unless a party wishing to be heard so advises the clerk of this department ***no later than 11:30 a.m. on August 4, 2021***, and further advises the clerk that such party has notified the other side of its request for hearing.

The Court continues to remain closed to the public and therefore the hearing will he held remotely on Zoom and streamed to the public on YouTube. The parties may join the Zoom session by audio and/or video through the following link/telephone number:

https://saccourt.zoom.us/my/dept23a	**(888) 475-4499 ID: 835 479 9928**

In the event that a hearing is requested, oral argument shall be limited to no more than thirty (30) minutes per side.

If a hearing is requested, any party desiring an official record of the proceeding shall make arrangement for reporting services with the clerk of the department not later than 4:30 p.m. on the day before the hearing. The fee is $30.00 for civil proceedings lasting under one hour, and $239.00 per half day of proceedings lasting more than one hour. (Local Rule 9.06(B) and Gov't. Code § 68086.) Payment is due at the time of the hearing.