No. 21-55930

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A. W. CLARK,

Plaintiff-Appellant,

v.

SHIRLEY WEBER, as California Secretary of State,

Defendant-Appellee.

On Appeal From The United States District Court
For The Central District of California, Los Angeles
Case No. 2:21-cv-06558-MWF-KS
The Honorable Michael W. Fitzgerald

BRIEF OF AMICUS CURIAE CARLA ENDOW, LISA LONG, AND MARLLUS GANDRUD IN SUPPORT OF APPELLEE'S ANSWER TO THE EMERGENCY PETITION AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION

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INTRODUCTION

The District Court correctly rejected Appellant's unfounded, last-minute attempt to cancel the duly scheduled September 14, 2021, California recall election ("Recall Election"). The California Constitution's recall provisions have protected the will of California voters for over a century. Amici Curiae Carla Endow, Lisa Long, and Marllus Gandrud ("Amici Curiae") are three individual registered voters who have already cast ballots in the Recall Election, just like over five million other registered voters across California as of the time of this filing. Endow and Long further exercised their First Amendment rights to freedom of association and speech, and their rights under the California Constitution, in their substantial efforts to initiate the Recall Election. Carla Endow volunteered approximately 1,200 hours towards the effort while Lisa Long volunteered over 100 hours (Decl. of Endow and Long, Dist. Court ECF 24-4 and 24-5).

Amici Curiae's vested interest in the recall's success is not shared by Appellee, who has publicly stated both her opposition to the recall and her support for legal arguments made by Appellant. To make sure their unique interests were zealously and adequately represented, Amici

Curiae moved to intervene in the lower court. The District Court's order noted an intent to deny that request, but to date the District Court has not acted. Amici Curiae request leave of the Court to file this brief pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29(a) as Appellee did not object to the filing of this brief but Appellant's counsel has not responded to counsel's request.[1]

The District Court rightly declined to upend the last century of California law, not to mention numerous rights protected by the United States Constitution, in the dramatic, unprecedented – and belated manner demanded by Appellant. *Republican Nat'l Committee v. Democratic Nat'l Committee*, 140 S.Ct. 1205, 1207 (2020) (per curiam) (admonishing lower courts to refrain from "alter[ing] the election rules on the eve of an election."). California's recall provisions create a straightforward way to permit California voters to remove an elected official, and on the same ballot, replace the recalled official with another

[1] No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than Amicus Curiae or their counsel contributed money that was intended to fund preparing or submitting this brief.

qualified candidate. Amici Curiae availed themselves of these provisions, seeking representative changes in the executive branch.

Appellant waited until the eleventh hour to file his challenge, an action which, if he is successful, would prejudice Amici Curiae and other similarly situated Californians. To make matters worse, Appellant wastes this Court's time by raising new arguments this Court may not consider for the first time on appeal, and also lacks standing as the proffered claims are wholly speculative. This Court should rebuff Appellant's ill-conceived attack on democracy and belated attempt to disenfranchise millions of Californians, by denying Appellant's petition and affirming the District Court refusal to enjoin the pending recall election.

ARGUMENT

I. The Remedy Sought by Appellant Would Violate Amici Curiae's First Amendment Rights

Amici Curiae have cast votes in support the recall election, and two have worked with others to advocate for Governor Newsom's recall. With this lawsuit, Appellant is attempting to judicially eliminate the recall provisions of the California Constitution and cancel the recall election that is underway as of the time of this filing, even though over five million

Californians have already voted. Appellant's position would violate "two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)). Both the freedom of association and the right to effectively cast votes "of course, rank among our most precious freedoms." *Rhodes*, 393 U.S., at 30. The Supreme Court has repeatedly held that the freedom of association is protected by the First Amendment and "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Id.* at 30–31. Here, Amici Curiae worked with others to advocate a point of view—to remove Governor Newsom from office using long-established means under the Constitution—

advocacy that was "undeniably enhanced" by their association. *Perry v. Schwarzenegger*, 591 F.3d 1126, 1139 (9th Cir. 2009) (quoting *NAACP v. Alabama,* 357 U.S. 449, 460 (1958)).

For Amici Curiae and others with whom they associated, Governor Newsom's conduct in office warrants his immediate removal from power using the citizens' solemn recall power under the state constitution. "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 843 (1995) (Kennedy, J., concurring) (quoting *United States v. Cruikshank,* 92 U.S. 542, 552, 23 L.Ed. 588 (1876)). This right to petition to redress grievances is at the core of First Amendment protections, and it includes the right to present initiatives. *City of Cuyahoga Falls Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196 (2003); *see also Meyer v. Grant*, 486 U.S. 414, 421–22 (1988) (explaining that the circulation of ballot petitions is "core political speech"). Amici Curiae Endow and Long, along with many other Californians assembled and, through the recall petition process, are seeking to have their grievances redressed. Appellant's frivolous but strategic suit thus seeks

to stop, discourage, or burden the protected First Amendment activity and interests of Amici Curiae and other Californians.

II. Appellant Has Waived Any Argument That the Recall Provisions Violate Proposition 14

"[A]rguments raised for the first time in a reply brief are waived." *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 672 F.3d 1160, 1166 n. 8 (9th Cir. 2012) (internal quotation marks omitted). In addition, "[l]egal arguments normally may not be raised for the first time on appeal," the only exception being consideration at discretion of the court when deciding an issue would not require the parties to develop any new facts. *Whittaker Corp. v. Execuair Corp.*, 736 F.2d 1341, 1346 (9th Cir. 1984); *see Cook Inlet Native Assoc. v. Bowen*, 810 F.2d 1471, 1476 (9th Cir. 1987). "A party's unexplained failure to raise an argument that was indisputably available below is perhaps the least 'exceptional' circumstance warranting" revivification of a waived issue. *G & G Prods. LLC v. Rusic*, 902 F.3d 940, 950 (9th Cir. 2018).

The Appellant waived any argument that California's recall provisions violate California's Top Two Candidates Open Primary Act ("Proposition 14") by raising the matter for the first time in his Reply Brief. *Clark*, 2021 WL 3868772, at *5. This case is not appropriate for the

Court to grant discretionary review, as its consideration would require the parties to develop new facts, including facts regarding Proposition 14, its purpose and history, and its application to this situation. No exceptional circumstances exist that justify consideration of Appellant's waived argument. This Court is under no obligation to entertain Appellant's waived claims, and their consideration would not be appropriate under these circumstances.

III. The Recall Provisions Do Not Violate Proposition 14 Even If That Argument Were Not Waived

Even if Appellant had not waived his argument regarding Proposition 14, which he has, the argument fails because Proposition 14 governs primary and general elections, not recalls. Nothing in Proposition 14 voids California's recall provisions or renders them unconstitutional.

Proposition 14 amended the California Constitution to create a top two primary system whereby "[t]he candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office shall, regardless of party preference, compete in the ensuing general election." Cal. Const. art II., § 5(a). The amended provisions solely relate to California's primary and general elections and

do not mention, much less abolish, California's recall system, the provisions of which appear in a separate section of the Constitution. It is axiomatic that an addition of a new section into the Constitution, does not automatically change the terms of a separate, existing constitutional section without express language suggesting it should be so construed. There is no suggestion that Proposition 14's changes to Section 5 and Section 6 of Article II, expressly applying to primary and general elections, also changed the rules for recall elections found in Sections 13 through 16.

Appellant errs in his suggestion that recall elections somehow violate a constitutional requirement that allows voters to vote for a candidate of their choice. Appellant contrives this rule from the "Proposed Law" portion of Proposition 14 which provides that "[a]ll registered voters otherwise qualified to vote shall be guaranteed the unrestricted right to vote for the candidate of their choice in all state and congressional elections." Appellant's Br. at 1. This portion of Proposition 14 is, tellingly, not found in California's Constitution – but further, recall elections do not violate this principal.

All voters may vote for the qualified candidate of their choice by allowing them one vote on whether to recall the Governor, and a second vote on a replacement candidate if the Governor is recalled. The requirement that a recalled candidate not appear on the second question of the recall ballot is akin to any other neutral restriction placed on prospective elected officials. The California Constitution requires Governors to have been a resident of the state for five years. Cal. Const. art. V, § 2. The government code requires that they be over the age of eighteen. Gov. Code, § 1020, subd. (b). The requirement that all candidates to appear on the second question of a recall ballot not have simultaneously had the majority of voters call for their ousting from office on the first question is no more or less onerous. Even if Appellant had not waived his Proposition 14 arguments, they are without merit.

IV. California May Hold Two Elections on One Ballot

California has exercised its broad authority to administer elections by creating a reasonable and straightforward recall structure using a two-question format. Appellant's twisted logic and mischaracterizations of the law should not induce this Court to disturb that structure. The recall is effectively two separate elections on the same ballot. *See Clark*,

2021 WL 3868772, at *4; *Partnoy v. Shelley*, 277 F.Supp.2d 1064, 1074 (S.D. Cal. 2003) (finding that a California "recall election presents two separate and distinct questions to be voted on."). Each voter is permitted one vote on each question. No votes are diluted or diminished under this system, which gives *every* voter an equal opportunity to vote on each question.

California has chosen its recall structure, which is logical and politically neutral, and the Court should not second-guess that choice. "[S]tates retain broad authority to structure and regulate elections." *Short v. Brown,* 893 F.3d 671, 678 (9th Cir. 2018) (citing *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)). "Governments necessarily must play an active role in structuring elections," *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016) (en banc). And "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes," *Storer v. Brown*, 415 U.S. 724, 730 (1974).

This Court has made clear that "respect for governmental choices in running elections has particular force where, as here, the challenge is

to an electoral system." *Dudum v. Arntz*, 640 F.3d 1098, 1114 (9th Cir. 2011). Indeed, California "cannot select a system that best serves all the multiplicity of interests implicated in an election, as no such system exists." *Id.* Courts also "cannot as a practical matter assess the likely effects of eliminating one election system without considering what system would replace it, and what new burdens that replacement choice would likely impose." *Id.* at 1115. And "the voiding of a state election is a 'drastic if not staggering' remedy." *Soules v. Kauaians for Nukolii Campaign Committee*, 849 F. 2d 1176, 1180 (9th Cir. 1988) (citing *Bell v. Southwell*, 376 F. 2d 659, 662 (5th Cir. 1967)).

Appellant never explains how holding an election with two separate issues, in which all voters may vote on both ballot issues, violates the Equal Protection or Due Process Clauses of the Constitution. Appellant's Br. at 11. Every single voter in California is entitled to vote to recall the Governor or not, and to vote for a replacement if the Governor is recalled. And every voter understands that the targeted official cannot be a candidate to replace him or herself when voting, since a majority of voters have already voted that he should no longer be a holder of public office. Finally, as referenced above, disqualification of particular individuals

from appearing on a ballot is common and constitutional. *See* U.S. Const., art. 1, § 3.

Even if – and it is a big if – Appellant is correct that the newly elected governor will assume office on a plurality rather than a majority vote, it does not create a constitutional crisis and would not serve to disenfranchise voters. For most states, garnering a majority of votes is not necessary to gain elected office. "Plurality voting is widely used in the United States for single-office elections, including races for mayors and governors." *Dudum*, 640 F.3d at 1114. There is nothing unconstitutional about such elections. And Appellant cites no case holding that packaging two separate elections on one ballot to provide a mechanism to replace a sitting state official is somehow illegal or unconstitutional.

V. California's Recall Provisions Are Constitutional

With great umbrage, Appellant repeatedly alleges that California's recall structure violates his right to vote under the Fourteenth Amendment's Due Process and Equal Protection Clauses, *see* Appellant's Br. at 11-16. To the contrary, adopting Appellant's argument would

result in the trampling of the rights of millions of California voters, including Amici Curiae – not Appellant's disenfranchisement.

Amici Curiae Carla Endow and Lisa Long both dedicated significant time and resources to ensure that there was a Recall Election. They worked in reliance that the recall provisions that have served Californians ably for the last century would continue to be faithfully followed. With the election certified and voting currently taking place, all of Amici Curiae's votes, along with millions of other California voters, would be disregarded. Instead of the mythical disenfranchisement of which Appellant complains, the *actual* votes of millions of Californians would be thrown out in violation of their constitutional rights if the Court were to adopt Appellant's theories. Appellant's request that the Court provide him a heckler's veto to stop this election, based on the mere possibility that a plurality candidate wins on the second question, should be roundly rejected.

The *Anderson-Burdick* balancing test requires "[a] court considering a challenge to a state election law [to] weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the Appellant seeks to vindicate'

against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the Appellant's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

California's recall provisions are subject to rational basis review because they provide reasonable, non-discriminatory restrictions designed to effectuate the State's important interest in permitting its citizens to recall elected officials. The provisions are generally applicable in that *all* registered California voters may vote to recall the elected official on the ballot, and *all* Californians may also vote for a replacement candidate. These provisions are even-handed and politically neutral as they apply to all recalled elected officials. And they serve the state's additional critical interest in maintaining the orderly administration of elections and ensuring that voters are not confused by seeing a potentially removed official as a candidate to replace him or herself. *See Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 225–26 (1989) (noting that "protecting voters from confusion" is a "compelling governmental interest").

Importantly, even if California recall law's alleged restrictions on the right to vote *were* extreme, which they are not, they survive strict scrutiny because they provide a straightforward, narrowly tailored mechanism to remove elected officials, and then replace them. California's recall structure serves the compelling government interests of permitting voters to remove and replace elected officials, maintaining the orderly administration of elections, and not confusing voters. And California's two-question approach, first permitting all voters to vote on whether to recall the officials, and next permitting those same voters to select a replacement for the removed official, is narrowly tailored to achieve these ends.

California has the right to manage its democratic process. *De La Fuente v. Padilla*, 930 F.3d 1101, 1106 (9th Cir. 2019). It has done so by creating a sound and constitutional recall system rationally related to its stated goals.

VI. Appellant Cannot Meet the High Bar Required for a Preliminary Injunction

Appellant's request for a preliminary injunction should be denied because he cannot carry the heavy burden to show that Appellant is "likely to succeed on the merits," "likely to suffer irreparable harm in the

absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. In light of Amici Curiae's First Amendment rights, Appellant is not likely to succeed on the merits for the reasons discussed in the District Court's thorough review of Appellant's claims under the *Winter* test. *Clark*, 2021 WL 3868772, at *3–4.

VII. The Doctrine of Laches, the *Purcell* Principle, and Standing Defects Compel Denial of the Petition

A. Laches Prohibits Appellant's Claims

The Court should deny the petition under the equitable doctrine of laches. Appellant has failed to diligently pursue the asserted constitutional claims. "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961) (citations omitted); *see also Soules*, 849 F.2d at 1180 n. 7. Here, Appellant could have brought the challenge to the constitutionality of California's recall provisions at any time. Appellant's claim that he would only have standing when his ballot was mailed and delivered to him is spurious – he could and should have brought his claim when the recall was certified. *See* Appellant's Br. at 19. Appellant has slept on his rights until tens of

millions of ballots were printed and voting began, and a more prejudicial result from a court order involving an election is difficult to imagine.

B. The *Purcell* Principle Requires Denial of the Petition

This Court should refuse to change or terminate California's ongoing recall, because the U.S. Supreme Court has repeatedly emphasized that federal courts should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); *see also Merrill v. People First of Ala.*, 141 S.Ct. 25 (2020); *Republican National Committee v. Democratic National Committee*, 140 S.Ct. 1205 (2020) (per curiam). The California recall has already begun. Because running a statewide election is a complicated endeavor, courts should not change carefully considered and democratically-enacted state election rules when an election is imminent or ongoing. *See Purcell*, 549 U.S., at 4–5. The *Purcell* principle dictates that this Court should refuse to abolish or change California's recall procedures at this late hour.

C. Appellant Lacks Standing to Bring These Claims Because the Alleged Injury Is Speculative, Has Not Occurred, And May Never Occur

The Court should deny the petition because Appellant lacks standing to challenge California's recall provisions. At this preliminary injunction stage, Appellant "must make a clear showing of each element of standing," proving (1) an injury in fact that is "concrete and particularized" and "actual or imminent"; (2) "a causal connection between the injury and the conduct complained of"; and that (3) "the injury will likely be redressed by a favorable decision." *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013). Appellant speculates that if Newsom is recalled, his right to vote may be infringed because he will not be able to vote for Newsom on the second recall question. This is purely conjectural, because if Newsom is not recalled, Appellant's right to vote will not be violated. Allegations of harm that are merely hypothetical do not confer standing. *See Yazzie v. Hobbs*, 977 F.3d 964, 966-67 (9th Cir. 2020). As a result, Appellant lacks standing to challenge California's recall provisions.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that the Court deny Appellant's petition.

Respectfully submitted,

September 3, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/S/HARMEET K. DHILLON
HARMEET K. DHILLON

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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