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July 26, 2013

REPORT TO THE HONORABLE CITY COUNCIL

PROPOSED REPEAL OF UNCONSTITUTIONAL VOTING REQUIREMENT IN  
RECALL DIVISION OF THE SAN DIEGO MUNICIPAL CODE

**INTRODUCTION**

The City Attorney's Office has been asked to review a section of the San Diego Municipal Code to determine whether it should be repealed so that the City's recall provisions can be clarified and avoid an unnecessary legal challenge. Section 27.2726 of the Municipal Code prohibits the counting of certain votes in recall elections, stating that, "No vote cast for a candidate shall be counted *unless the voter also voted on the recall question.*" (Emphasis added.) Section 27.2726 was added to the Municipal Code in 1968 and never amended.

In 2003, a federal district court struck down a virtually identical law in the California Elections Code. Although the federal court decision expressly does not apply to San Diego's election code, it is clear San Diego's similar provision would not survive legal challenge. Thus, our office recommends that the offending section be repealed, to avoid any such future challenge and to clarify San Diego's recall election procedures.

**QUESTION PRESENTED**

Can the City legally prohibit counting certain votes in a recall election if the voter did not vote on both parts of the recall ballot – first, by voting for whether a public official should be recalled, and second, by voting for a successor candidate?

**SHORT ANSWER**

No. The requirement that a voter must vote on both parts of a recall ballot to have his or her vote counted has been held by a federal court to effect "a severe restriction on one's Constitutional right to vote" and to violate voters' First Amendment rights of free expression. Thus, the offending section of San Diego's Municipal Code should be repealed.

## ANALYSIS

### **I. THE CALIFORNIA CONSTITUTION GRANTS BROAD AUTHORITY TO CHARTER CITIES LIKE SAN DIEGO TO PROVIDE THEIR OWN ELECTION PROCEDURES, INCLUDING THE MANNER IN WHICH MUNICIPAL OFFICERS ARE REMOVED FROM OFFICE.**

The California Constitution grants broad authority to charter cities like San Diego to establish procedures for their own elections, including recall procedures. Article XI, section 5(a) of the California Constitution provides that a charter city may “make and enforce all ordinances and regulations in respect to municipal affairs,” and that “[c]ity charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.” California Constitution, Article XI, section 5(b) also grants plenary authority to charter cities to provide for the manner in which “municipal officers and employees whose compensation is paid by the city shall be elected or appointed, *and for their removal.*” (Emphasis added.)

The San Diego Charter thus governs City elections and requires the City to adopt an election code ordinance, “providing an adequate and complete procedure to govern municipal elections.” San Diego Charter § 8. The Charter states, “All elections provided for by this charter, whether for choice of officers or submission of questions to the voters, shall be conducted in the manner prescribed by said election code ordinance.” *Id.*

San Diego Charter section 23 requires the Council to include in the election code ordinance an “expeditious and complete procedure for the exercise by the people of . . . recall.” San Diego Charter § 23. The City thus adopted Municipal Code sections 27.2701 through 27.2732 to set forth the City’s recall procedures. Additionally, the Municipal Code states that the purpose and intent of the City’s election code is:

. . . to provide an expeditious and complete procedure for the people’s right to exercise the vote. If there is any ambiguity or contradiction between the provisions of general law and the provisions of this article, *the provisions of this article shall govern. The divisions relating to initiative, referendum and recall (including the initiative provisions relating to Charter amendments) are exclusive as required by the Charter.* (Emphasis added.)

SDMC § 27.0101. Thus, San Diego’s election laws regarding recall, as stated in its Charter and Municipal Code, exclusively constitute its governing law.

### **II. SAN DIEGO’S RECALL PROCEDURES INCLUDE A VOTING REQUIREMENT FOUND UNCONSTITUTIONAL AT THE STATE LEVEL.**

Recall elections are conducted on one ballot, separated from others, in which a voter is first asked whether a public official should be recalled, and then asked to vote from a slate of candidates for his or her successor. This practice, of including the recall question and selection of a successor on the same ballot, is set forth in Municipal Code section 27.2722 and mirrors a state law that remains constitutionally valid.

Historically, however, votes in a recall election were not counted unless a voter cast a ballot for both questions – first choosing whether to recall the official, and then choosing his or her replacement. In 1968, San Diego adopted a provision that stated this, virtually identical to the language of then-California Elections Code section 11382<sup>1</sup>:

**§27.2726      Validity of Votes Cast**

No vote cast for a candidate shall be counted  
unless the voter also voted on the recall question.

In *Partnoy v. Shelley*, 277 F. Supp. 2d 1064 (S.D. Cal. 2003), the district court heard a challenge to California's similar provision and struck it down as unconstitutional. The challenge was filed by a group of voters from San Diego and Los Angeles during the recall campaign against then-California Governor Gray Davis. The voters contended their First Amendment rights were violated because they were being forced to speak on the recall decision despite their wish not to do so, while they fully desired to vote for a candidate to become the next governor. *Id.* at 1071. The voters argued that casting a vote for recall should not be a condition precedent to having their vote counted for a successor candidate.

The District Court held the requirement that a voter must vote on both parts of the recall ballot to have his or her vote counted “effects a severe restriction on their Constitutional right to vote” (*Id.* at 1075) and violates voters’ First Amendment rights of free expression. *Id.* at 1078. The Court found no evidence of any compelling interest by the state sufficient to justify such a burdensome requirement. The court stated, “Implicit in the right to vote is the right to have that vote counted.” *Id.* at 1073. The court said “. . . what is at stake is the right of a voter to decide who shall succeed the Governor, if recalled. Every voter, whether they voted for or against that recall has a paramount interest in choosing the person who will govern them.” *Id.* at 1078.

As set forth above, the *Partnoy* decision applied only to Section 11382 of the California Elections Code and not to the elections codes of charter cities like San Diego. The court stated in the opinion, “Section 11382 applies to all recall elections in California except those provided for under city or county charters. . . Since Section 11382 does not apply to recall elections provided for by a city or county charter, or ordinance adopted pursuant to such a charter, the Court's decision does not affect those recall elections.” *Id.* at 1088.

The constitutional arguments against the provision, however, would apply to San Diego's Section 27.2726 with equal force and effect. If Municipal Code section 27.2726 were challenged, this Office could not defend its constitutionality as it is virtually identical to the former state law. Thus, San Diego's offending law should be promptly repealed, and should not be enforced pending its repeal, to avoid a similar and potentially expensive legal challenge.<sup>2</sup>

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<sup>1</sup> Former section 11382 of the California Elections Code derived from language that had appeared in a 1911 amendment to the California Constitution. This part of the California Constitution was removed and the language was moved into the state's elections code. See *Partnoy v. Shelley*, 277 F. Supp. 2d 1064, 1071 (S.D. Cal. 2003).

<sup>2</sup> The court also held that the offensive provision was severable from the remainder of the state's recall laws. *Id.* at 1081-1087. Similar to the state law, the Municipal Code provision is severable from the rest of the City's recall laws.

**CONCLUSION**

San Diego's law preventing certain recall votes from being counted would be found unconstitutional if challenged in court, with the *Partnoy* opinion confirming it could not be enforced. The law is virtually identical to the one struck down at the state level for effecting "a severe restriction on voters' constitutional right to vote" and violating voters' First Amendment rights of free expression. Our Office recommends that the section not be enforced and promptly be repealed to avoid an unnecessary legal challenge and to ensure the City's recall laws are constitutional.

Respectfully submitted,

By /s/ Sharon B. Spivak

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SBS:jdf  
RC-2013-12  
Doc. No. 604708