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PERSPECTIVE

California's recall is lawful, but it needs reform

By David Belcher
and Michael Belcher

A federal court recently rejected Dean Erwin Chemerinsky and Professor Aaron S. Edlin's argument that California's impending gubernatorial recall election violates the federal constitution's equal protection clause. ("Op-Ed: It's not too late to stop California's recall election," LA Times (Aug. 20, 2021).) This should surprise no one. The recall procedure has been in California's constitution for over a century. That instrument's plain language, the lawsuit's 11th-hour nature, and the California Supreme Court's previous rejection of similar claims all but ensured the district court's ruling. But the professors make valid points about problems with plurality elections like California's recall replacement procedure, where the candidate with the most votes wins regardless of whether that candidate receives a majority. California's Legislature should reform the recall process to make future contests more democratic by instituting either a runoff or ranked choice voting for the replacements.

On Sept. 14, California voters will consider two questions: Should Governor Gavin Newsom be removed from office, and, if so, who should replace him? If a majority of voters answers "no" to the first question, Newsom remains governor. But if a majority of voters decide to recall Newsom, then the candidate with the most votes on the second question becomes governor — no majority required.

It's unique, but that procedure has no constitutional defects. As other scholars have noted, during the 2003 recall Gov. Gray Davis asked the California Supreme Court to rule that the 14th Amendment permitted him to be a candidate on the second ballot. The court summarily denied that petition, which should have put the kibosh on the notion that this recall procedure violates equal protection. The California Supreme Court has quashed some other unconstitutional direct democracy acts, but the recall is not one of them.

For example, in *Planning & Conservation League v. Padilla*, Califor-

nia's high court removed from the ballot a proposition that would have divided California into three states. The court noted that although pre-election review of constitutionality is disfavored, it will bar direct democratic measures where "a substantial question has been raised" regarding their validity. This shows how little credence the equal protection argument merited: If Gov. Davis had raised a "substantial question" of constitutionality, the court would have reviewed that issue. We draw two conclusions here: The California Supreme Court will block unlawful measures when necessary to protect ballot integrity, and the recall procedure raises no substantial equal protection issues.

Moving from the merits to Chemerinsky and Edlin's proposed solutions, those raise more questions than they answer — and likely run afoul of California law. Those scholars suggested that a court order Gov. Newsom be listed as his own replacement, just as Gray Davis argued in his 2003 petition. But California constitution article II, section 15(c) and Elections Code section 11381(c) forbid a recalled official from being listed as a replacement candidate in their own recall. And that relief requires a court to assume that a certain election result occurs (Gov. Newsom loses question one) and rule on that hypothetical. Neither California nor federal courts issue advisory opinions; yet that's what such a ruling would be.

Nor could a court anoint Lt. Gov. Eleni Kounalakis as the state's chief executive (regardless of how qualified she is) if a majority voted to remove Gov. Newsom because courts avoid such political questions. And unlike a vice president, California's lieutenant governor is an independently elected constitutional executive officer, so in a recall the ordinary constitutional succession order does not apply. Again, during the 2003 recall the California Supreme Court rejected a nearly identical argument about lieutenant governor succession, ruling that no vacancy occurs when a governor is recalled and so the state constitution's succession provision does not apply.

The clear judicial reluctance to block direct democratic processes,

even for constitutional questions, means that the solution here is to reform the recall to make it more democratic, not filing desperate lawsuits on the eve of an election. California Constitution article II, section 16 permits the Legislature to define recall election procedures. Thus, many of the recall's rules are statutory and the Legislature can implement major reforms. For example, the Legislature could require a runoff if no replacement candidate receives a majority of votes cast on the second question. Voters are already familiar with runoffs and California election officials are well-versed in how to run them.

Ranked choice voting on the second ballot is another meritorious reform. Voters would rank their top three replacement candidates in order of preference. The candidate with the lowest vote total is eliminated in successive rounds, and their votes transfer to other candidates until one candidate has a majority. This would address concerns about the recall's "undemocratic" features by guaranteeing the winner receives a majority of votes. And a ranked-choice ballot could be more efficient than a runoff, which requires multiple voting rounds. Ranked-choice is especially well-suited for recall elections where support is divided between dozens of candidates (some more serious than others). Such stat-

utory reforms are both preferable to and more realistic than invalidating the recall itself.

California's recall procedure is not perfect, but there can be no serious dispute that it is constitutional. The California Supreme Court has repeatedly rejected contrary arguments, and this federal court ruling is only the latest example of courts declining to intervene in the democratic process. While the recall could be improved, casting doubt on an election's validity with long-shot lawsuits filed at the two-yard line is at least pointless and at worst harms voter confidence on all sides. For example, Gov. Newsom's voters could be discouraged from casting seemingly pointless ballots. And if the recall succeeds, groundless claims of illegitimacy will stain the replacement governor.

In his 1911 inaugural address, Gov. Hiram Johnson said that California's direct democracy measures "give to the electorate the power of action when desired." Courts will not prevent the voters from exercising their power on Sept. 14 — and afterwards the Legislature should examine reforming the recall's procedures to resolve the its many mysteries. That will discourage similarly fruitless legal maneuvering in the next gubernatorial recall election, and benefit the process with additional clarity. ■

David Belcher is an attorney in private practice, and his twin brother **Michael Belcher** is an attorney in public service. Both are senior research fellows at the California Constitution Center.

