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November 1, 2023

Bob Page  
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Sonia Carvalho  
City Attorney  
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Mayor Valerie Amezcua and Members of the City Council  
Care of city clerk jhall@santa-ana.org

*Re: Recall Election of November 14, 2023*

Dear Mr. Page, Ms. Carvalho, Mayor Amezcua and Members of the City Council:

The undersigned attorneys represent the proponents of the recall election scheduled for November 14, 2023, and the Santa Ana Police Officers Association, one of the supporters of the recall. In light of the recent questioning of the election, we wish to provide our views.

To begin with, we cannot emphasize enough how improper it would be to cancel an election fourteen days before the scheduled election date. Ballots have gone out; campaigns have been in full swing; polling places have been up and running; and money has been spent. We call your attention to the case of *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, where a lawsuit was filed 14 days before an election to try to stop it. The court took note of the stage of the process: “Nevertheless, appellants did not commence the action seeking an injunction of the election until February 17, 1987—three months after first learning of and just two weeks before the scheduled election. [¶] The prejudice resulting from the delay in bringing the action is likewise amply demonstrated. The sworn declaration of Ms. Hennessy, Assistant Town Clerk, sets forth that by the time appellants' lawsuit was filed, the Town had taken all the necessary steps to hold the special election: the notice of election had been published; the sample ballot including the analysis and arguments for and against the measure had been prepared and printed; and the absentee ballots had been mailed and the absentee voting had commenced. Her declaration established further that the Town had incurred expenses of \$5,845 in connection with election preparations. Moreover, postponement of the election would have constituted a breach of the stipulated agreements with its attendant monetary consequences.” The court not only

denied the effort to stop the election, but found the effort to be frivolous and awarded sanctions, which were upheld on appeal.

The United States Supreme Court has also repeatedly held that elections should not be cancelled, or the rules changed, when the election is imminent. See *Purcell v. Gonzalez* (2006) 549 U.S. 1.

This warning applies to this election as well – it should not be halted so close to the date of the election. If anybody tries to stop the election, we will immediately respond and will seek attorneys fees and sanctions, as well as any damage our clients may have suffered.

Superficial legal assertions and wild nonlegal accusations have been made without the necessary deep research and contemplation required to take the drastic step of stopping the election. The obvious illustration is the Registrar of Voters' letter of October 26, 2023, which cites Elections Code §21606 – a statute that applies to general law cities, not to charter cities. We understand how such a mistake could have been made because of the haste in which the letter was sent. But that mistake illustrates why the election should be held and the votes should be counted, and then any alleged flaws can be examined after the election when there is more time to consider all of the legal arguments.

Beyond this, there are two important reasons why the election is being properly held and should continue. First, at this stage the city and the Registrar are estopped from contending the wrong lines were used. Second, the Registrar and the city clerk were in fact legally correct to use the new lines.

First, at all times the proponents and the city relied on information provided by the Registrar, and there were numerous opportunities before now to challenge the lines that were being used. When the proponents first filed the notice of intent and prepared the recall petition, the Registrar gave them the number of signatures they needed to qualify the recall for the ballot. That number was calculated on the new lines. In reliance on that number and those instructions, the proponents circulated the petition and obtained signatures. Had the Registrar given different instructions, the proponents would have sought the signatures in the lines prescribed by the Registrar. The opponents also relied on those lines in seeking to invalidate signatures.

At this point it is too late to change the lines. The Elections Code sets forth time limits to challenge aspects of the recall. At the beginning, there was a ten day period to challenge the petitions for any reason, under Elections Code §11042.5. Then, when the petitions were submitted, there was a 30 day period to examine the petitions and ascertain whether or not the petitions were signed by the requisite number of voters, under Elections Code §11224. That was the statutory opportunity by the Registrar to challenge any signatures. That was the best and final opportunity for the Registrar to question any signatures. The Elections Code does not allow for the Registrar to extend that time or to change his mind.

In this particular recall, there was a question of whether the Santa Ana City Council had timely issued an order to call the election under Elections Code §11240. The undersigned actually filed a lawsuit in the Orange County Superior Court against the Registrar and the Santa Ana city clerk to require the election to be called. That case was *Gomez v. Page*, Case No 30-2023-01341303-CU-WM-WJC. In addition, there was a lawsuit filed by the opponents of the recall, asserting various grounds to stop the recall, but said nothing about the lines. That case was *Castillo v. City Council of the City of Santa Ana*, Case No. 30-2023-01339759-CU-WM-CJC. These court actions put this entire election under a microscope. They both presented an opportunity for anybody to challenge the propriety of the election, but nobody raised the issue of the lines.

Given all this, it is too late in the day for the Registrar to now try to cancel the election. See *Preserve Shorecliff Homeowners v. City of San Clemente* (2008) 158 Cal.App.4<sup>th</sup> 1427, applying the doctrine of estoppel to an election. The Registrar's own actions and lack of action prevent the Registrar and the city from taking the drastic step of cancelling the election.

Second, the Registrar and the city clerk were in fact correct in using the new lines. As the Registrar's October 26, 2023, letter concedes, the Elections Code provisions he relies upon do not apply when a city charter provides differently. The charter of the City of Santa Ana indeed provides differently by calling for the use of new lines for all elections once those lines have been adopted. This is shown by Resolution 2022-022, adopted by the City Council on April 5, 2022, on a 7-0 vote and signed by then-mayor Sarmiento. Section 2 of the resolution says in part: "Pursuant to Elections Code §21621 and Santa Ana Charter §101.2, the Santa Ana City Council hereby adopts the ward boundaries set forth in the Recommended Map. . . for use in the City's General Municipal Election on November 8, 2022 and subsequent elections thereafter until a further redistricting is required. . .".

Significantly, this language does not make any exception for special elections or recall elections. It applies to all elections. In contrast, the otherwise applicable state statute, Elections Code §21626(b), refers to using the newly adopted boundaries "excluding a special election to fill a vacancy or a recall election". This language is not in the city charter or in Resolution 2022-022.

Charter provisions also provide that the new boundaries, once adopted, become applicable to incumbents for electoral purposes. For example, Charter section 401 provides an exemption to residency requirements for incumbent councilmembers who are residents of a different ward based on a change in boundaries. That section could have provided that new ward boundaries become applicable at the end of an incumbent's term, but instead specifically applies new boundaries to incumbents and exempts the incumbents from residency requirements.

If there is a conflict between the state Elections Code and the city charter, then the city charter prevails. Numerous cases have held that municipal elections are not a matter of statewide concern but are instead a municipal affair, and therefore a city charter prevails over state statutes that conflict with the charter. See *Johnson v. Bradley* (1992) 4 Cal.4<sup>th</sup> 389 (public financing of

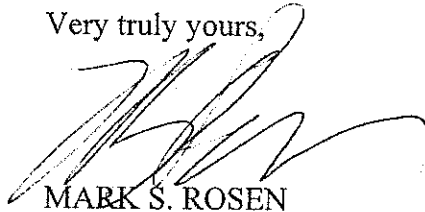
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campaigns); *Cawdrey v. City of Redondo Beach* (1993) 15 Cal.App.4<sup>th</sup> 1212 (council term limits). Therefore the Registrar and the city clerk acted properly in using the new lines for a recall in 2023.

Finally, it is a myth that anybody was disenfranchised. Most of the voters who were in Ward 3 in 2020 and who now are not, were put into Ward 6. Those voters got to vote for their councilmember in 2022 and are currently represented by the Ward 6 councilmember now. If they were allowed to vote in a Ward 3 election, they would end up with two council representatives. They would be overenfranchised, not disenfranchised.

These are significant legal issues that are worthy of detailed study. They should not be decided by snap decisions. The election should proceed and then, if the recall is successful, there will be post-election opportunities provided for in state law for the courts to give detailed consideration of all of these matters.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Mark S. Rosen', written over a horizontal line.

MARK S. ROSEN

NICHOLAS L. SANDERS