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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

GAVIN NEWSOM,

Petitioner,

v.

DR. SHIRLEY N. WEBER, in her official capacity as Secretary of State of the State of California,

Respondent.

Case No.: 34-2021- 80003666

PROPOSED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF MANDATE

STATEWIDE ELECTION MATTER IMMEDIATE ACTION REQUIRED

Hearing Date: July 9, 2021
Time: 9:30 a.m.
Department: 17

Petition Filed: June 28, 2021

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I. INTRODUCTION AND SUMMARY

This litigation shows once again that Gavin Newsom believes the rules – even the rules that he signs into law – do not apply to him. None of Gov. Newsom's excuses provide a basis for ignoring the very same statute that he signed into law just a few months before he signed and filed the answer in which he failed to identify a party preference for the recall election.

Gov. Newsom signed Senate Bill 151 into law in October 2019. This law significantly changed the rules governing recall elections. In prior recall elections, the targeted official could not identify his or her party preference on the ballot, but that changed with Gov. Newsom's signature: Under new Elections Code § 11320, an elected officer targeted for recall could now "elect to have the officer's party preference identified on the ballot." To do so, however, "[t]he officer ***shall*** 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***" to the recall.

Gov. Newsom signed and filed that answer on February 28, 2020, just four months after signing the new law that made such an election possible, but he didn't state a party preference in the answer. The law he signed contemplated this scenario too: "If the officer elects not to have the officer's political party preference identified on the ballot, ***or 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 . . . , ***the statement of party preference shall not appear on the ballot***." Gov. Newsom does not want this law to apply to him, so he filed this writ.

Gov. Newsom argues mainly that the missed deadline should be overlooked under the "substantial compliance" doctrine. Putting aside the fact that filing 16 months after the deadline is not substantial compliance in any normal sense of the term, Gov. Newsom cannot point to a single case where a court applied this doctrine to a missed election deadline. His failure to cite any such case stems from the rule, confirmed in *Barnes v. Wong*, 33 Cal.App.4th 390, 396 (1995), that the substantial compliance doctrine simply does not apply to mandatory election deadlines. As *Barnes* noted, courts insist on strict compliance with such deadlines. *Id*. Were it otherwise, the various participants in the election process – candidates, initiative proponents and opponents, etc. – who miss deadlines would routinely go to court and argue, just as Gov. Newsom does here, that the

policy served by the deadline must yield to some other policy that is supposedly weightier. This would enmesh the courts in elections even more than they already are, which must be avoided.

Nor is there a constitutional argument for excusing the application of Section 11320 here. Gov. Newsom makes half-hearted arguments that he and his supporters might suffer a violation of their rights to equal protection and political association, but he cites no case where a simple deadline could give rise to such a theory. Indeed, multiple cases in California and throughout the Nation confirm that states have wide latitude in establishing the rules governing the party-identification of candidates on the ballot.

The writ portrays the filing as a simple "mistake." Gov. Newsom's loyal counsel has thrown himself under the bus and claims it was all his fault, but the facts don't match the story being sold here: The answer at issue here – conspicuously missing from the writ filings – was a short, one-page political narrative that only Gavin Newsom signed. Gov. Newsom had a simple opportunity to put into action the law he had just signed. If, as he now argues, it is so important for him to identify himself as a Democrat in the recall, why didn't he do so when he had the chance? If a "mistake" was made, it was surely not the lawyer's mistake "alone," and it is simply wrong to assert that "Governor Newsom was not in any way at fault."

Mistake or not, there is nothing remotely unfair about having Gov. Newsom abide by a law that he signed into effect. To the contrary, it is urgent that the law apply here. This recall election may not be taking place if Gov. Newsom had not flouted the very rules he imposed on the masses by attending an indoor dinner party at the French Laundry. This case provides an opportunity for one branch of the California government to affirm that the rules really do apply equally to all Californians. Gov. Newsom is not above the law.

II. BACKGROUND FACTS OMITTED AND MISDESCRIBED IN THE WRIT

Gov. Newsom's legal team has filed a writ petition with exhibits, a request for judicial notice with exhibits, a declaration with exhibits, and a brief. Conspicuously missing from the many pages in these filings is the actual document giving rise to this case – the answer that Gov. Newsom filed in February 2020 that did not include the election to have his Democrat party preference on the recall ballot.

Gov. Newsom's lawyer falls on his sword by claiming he prepared the answer and "erred in not including with the answer a notice of election of party preference. The mistake was mine alone, and it was unintentional. Governor Newsom was not in any way at fault." Willis Decl., ¶ 5. This creates the image of a lawyerly form that Gov. Newsom surely must not have even seen before it was filed.

The truth is quite different than the image Gov. Newsom's team is trying to create. Here is the answer:

GOVERNOR GAVIN NEWSOM'S ANSWER TO RECALL STATEMENT
(Pursuant to Elections Code § 11023)

WARNING: THIS UNWARRANTED RECALL EFFORT WILL COST CALIFORNIA TAXPAYERS 81 MILLION DOLLARS! IT IS BEING PUSHED BY POLITICAL EXTREMISTS SUPPORTING PRESIDENT TRUMP'S HATEFUL ATTACKS ON CALIFORNIA.

In 2018 California voters elected Governor Gavin Newsom by historic margins.

As Governor, Newsom is working to 1) increase funding for public education, 2) protect and secure Californians' health and health care, 3) improve water, roads, and bridges, 4) address the challenges of housing affordability and homelessness, and 5) prepare for the threats of wildfires.

Our budget is balanced. Our fiscal reserves are unprecedented. Our economy and employment are historically strong.

Yet a handful of partisan activists supporting President Trump and his dangerous agenda to divide America are trying to overturn the definitive will of California voters and bring Washington's broken government to California with this recall effort.

The last thing California needs is another wasteful special election, supported by those who demonize California's people and attack California's values.

Do not be fooled – California's police officers, firefighters, first responders, public school teachers, health providers, and business leaders all STRONGLY OPPOSE this costly recall.

DO NOT HAND OVER YOUR SIGNATURE, YOUR SUPPORT OR YOUR PERSONAL, PRIVATE INFORMATION TO THIS DESTRUCTIVE RECALL SCHEME.

Governor Gavin Newsom
State Capitol Building, 1st Floor
Sacramento, California 95814

Benbrook Decl., Ex. A.

It is a simple, one-page political document that Gov. Newsom – and *only* Gov. Newsom – signed at the bottom. This document was written to appear on the petition that was circulated to voters. *See* Benbrook Decl., Ex. B (Stipulation and Order dated January 8, 2021, in *Heatlie v.*

Padilla, Exhibit 1 of which is the petition containing text of Gov. Newsom's answer). Just four months earlier, Gov. Newsom had signed into law a significant change that finally allowed *him* to state that he was a Democrat in response to the succession of recall attempts. *See* Willis Decl., ¶ 4. Yet the Court is asked to believe that Gov. Newsom was totally unaware of the absence of this election. The only way for this to be true, however, is if Gov. Newsom did not read the document he signed; if he had read it, he would have seen that there was no election.

In addition, Newsom's lawyer states that "[b]y the time the Heatlie notice of intent was filed in early 2020, Governor Newsom had been subject to three other recall efforts in 2019, and we filed the same answer to the Heatlie recall that we had to the previous recall efforts in 2019" – before Gov. Newsom signed SB 151 into effect so that targets of recall like himself could state their party identification. Willis Decl., ¶ 4. But a comparison of the January 2020 answer to the file-stamped answer Gov. Newsom signed in August 2019 (as available online) reveals that they were different; the 2020 version was updated in three places to reflect changed circumstances. *See* Benbrook Decl. Ex. C (August 2019 answer). Someone actually paid attention to this filing.

III. ARGUMENT

A. Elections Code § 13314 Does Not Give Courts Authority To Grant Relief When A Candidate Fails To Comply With The Elections Code.

The writ petition here asserts that Gov. Newsom is entitled to relief under Elections Code § 13314 on the grounds that "an error or omission has occurred, or is about to occur, in the placing of a name on, or in the printing of, a ballot, . . . or that any neglect of duty has occurred, or is about to occur." Elec. Code § 13314(a). The brief appears to back off of this theory, but it's worth remembering just how backwards this lawsuit is: Elections Code section 13314 does not authorize the Court to issue a writ of mandate to correct a *candidate's* error or neglect. Rather, it permits the Court to correct errors made by the elections official (in this case, the Secretary of State). But the Secretary has committed no error or neglect (yet).

A century ago, the California Supreme Court held that courts lack authority to grant relief to a candidate that fails to comply with mandatory requirements of the election law. *Sinclair v. Jordan*, 183 Cal. 486 (1920). In *Sinclair*, a congressional candidate sought a writ of mandate

directing the Secretary of State to accept his late-filed nomination papers. *Id.* at 487. The candidate relied on a law that permitted relief upon showing "an error or omission has occurred or is about to occur in the placing of any name on an official primary election ballot, that any error has been or is about to be committed in printing such ballot, or that any wrongful act has been or is about to be done by [any] person charged with any duty concerning the primary election, or that any neglect of duty has occurred or is about to occur . . . ." Direct Primary Law § 27, Stats. 1913, ch. 690, p. 1408, § 27. The California Supreme Court held that "the courts have no power to grant relief" under this provision if a candidate "fail[s] to . . . conform" with "mandatory requirement[s]" of the election law. The provision was

> reasonably susceptible of no other construction than that it is inapplicable to any failure of the candidate or those proposing him as a candidate for nomination to comply with mandatory requirements of the law essential to his candidacy. It has to do solely with errors or omissions of others charged under the law with duties relative to the matter of the primary election, and the relief expressly provided for therein is an order requiring 'the officer or person charged with such error, wrong or neglect to forthwith correct the error, desist from the wrongful act or perform the duty.'

Id. at 487–88.

The same result is required here. Section 13314 is materially indistinguishable from the statute in *Sinclair*:

Direct Primary Law, § 27	**Elections Code § 13314(a)(1)**
Whenever it shall be made to appear by affidavit to the supreme court or district courts of appeal or superior court of the proper county that **an error or omission has occurred or is about to occur in the placing of any name on** an official primary election ballot, that any error has been or is about to be committed **in printing such ballot**, **or that any wrongful act has been or is about to be done** by any judge or clerk of a primary election, county clerk, registrar of voters in any city and county, canvassing board or any member thereof, or other person charged with any duty concerning the primary election, **or that any neglect of duty has occurred or is about to occur**, such court shall order the officer or person charged with such error, wrong or neglect to forthwith correct the error, desist from the wrongful act or perform	An elector may seek a writ of mandate alleging that **an error or omission has occurred, or is about to occur, in the placing of a name on,** **or in the printing of, a ballot,** county voter information guide, state voter information guide, or other official matter, **or that any neglect of duty has occurred, or is about to occur.**

the duty, or forthwith show cause why he should not do so. Any person who shall fail to obey the order of such court shall be cited forthwith to show cause why he shall not be adjudged in contempt of court.	

Gov. Newsom, like all candidates, cannot rely on Elections Code section 13314 to correct his failure to conform with the mandatory requirements of the Elections Code by asking to have his party preference added 16 months after the deadline. The California Supreme Court ruled in *Sinclair* that "courts have no power to grant relief" in this circumstance. The petition should be denied on this basis alone.

B. There Is No "Substantial Compliance" With Mandatory Elections Deadlines.

Gov. Newsom argues that he "substantially complied" with Section 11320(c)'s February 2020 filing deadline by filing his party-preference notice in June 2021 – sixteen months late. This is not a close question.

In *Barnes v. Wong*, 33 Cal.App.4th 390 (1995), a voter argued that he substantially complied with filing deadlines when he filed an opposition argument to a local proposition just five hours after the deadline. The court specifically held that "[t]he doctrine of substantial compliance does not apply." *Id*. at 396. Rather, "[c]ases specifically dealing with statutory deadlines for election filings that are couched in language requiring documents to be filed 'not less' than or 'not later' than a given number of days before a designated time have insisted on strict compliance with the deadlines." *Id.* (citing *Steele v. Bartlett*, 18 Cal.2d 573, 574 (1941) (candidates left off ballot who filed nomination papers 30 days before the election (which fell on a Monday) when they were required to be filed no later than the 31 days before), and *Griffin v. Dingley*, 114 Cal. 481, 482–483 (1896) (candidate could not file nomination papers 28 days before election because statute required filing not less than 30 days before)).

Section 11320's requirements are mandatory on both the targeted official and the Secretary of State. If an official targeted for recall elects to have their party preference identified on the ballot, "[t]he officer *shall* 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 pursuant to Section 11023." Elec. Code § 11320(c) (emphasis added).[1] And "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*." *Id.* at (c)(3) (emphasis added).

Gov. Newsom's brief inexplicably claims that *Barnes*' rejection of the substantial compliance argument was "apparent dicta." Brief at 14:16. *Barnes* specifically stated that the petitioner had argued substantial compliance in the court below, and that the trial court had agreed with the very same sort of policy arguments that Gov. Newsom is making here; namely, that the interest in "ensuring that the public receive information . . . [outweighs the] legislative body's [interest in] promoting evenhanded administration of election laws by establishing firm filing deadlines." 33 Cal. App. 4th at 396. The *Barnes* court correctly rejected this approach: "The lower court's reason for granting the petition is no more than a substitution of the court's view of the most important public policy." *Id*. The Court should likewise reject Gov. Newsom's policy-based arguments for ignoring the statute.

But those arguments are wrong in any event. Gov. Newsom argues, for instance, that the Legislature's deadline in § 11320 has nothing to do with the efficient administration of elections. Brief. at 11, 14-15. But this is obviously wrong: It is always easier for an election official to deal with one deadline rather than a system where deadlines are treated as optional and administrators have to review arguments that late filings should be accepted since the deadlines aren't very important. Gov. Newsom undermines his theory by acknowledging that "the Legislature apparently concluded that it would be more convenient to provide a single filing deadline for the official subject to a recall rather than creating a second filing deadline." Brief at 12:1-3. His self-centered theory that this was done solely for the candidate's convenience (e.g., *id*. at 11:18-19), cannot be taken seriously, as it invites arguments in future cases that deadlines are essentially

[1] Section 11023 provides that any answer be filed "[w]ithin seven days after the filing of the notice of intention" to seek a recall.

waivable by candidates. Of course a single filing deadline is more convenient for *both* the candidate and the election official, and that is enough to end the case.

Likewise, Gov. Newsom argues that enforcing this deadline has nothing to do with treating people "fairly and equally." Brief at 15. This argument is remarkable and ignores that *Barnes* emphasized the simple point that, in elections, selectively enforcing any deadlines necessarily favors some candidates over others, so the only tenable system is enforcing all deadlines applicable to all candidates. The court in *Barnes* thus agreed with the local election official's approach:

> [She] adhered to a strict and consistent policy of enforcing the various deadlines imposed on candidates and others for filing documents in her office. In virtually every election she was asked to make exceptions to the deadlines and in each instance the person presented what he or she considered a good faith reason why the exception should be allowed. However, in her view, the only way to treat everyone fairly and equally is to consistently apply the rules, which means relying upon and enforcing deadlines.

33 Cal.App.4th at 393–94; *id* at 396 ("hard and fast enforcement of filing deadlines avoids uneven and inconsistent administration of preelection procedures and is the most reliable way to ensure that everyone is treated fairly and equally").

Not that it matters for the result here, but of course there are other policy reasons for enforcing the deadline here, including the avoidance of gamesmanship. In the heat of a recall election, a candidate may make a strategic decision not to have their party preference included on the ballot, only to later change their mind when the political winds change, or based on the other candidates who have entered the race. Under Gov. Newsom's approach, a recall target could disregard the statutory directive and wait until the eve of the nomination deadline to decide which approach gives them the best chance to beat the recall, and the Superior Court would have to give relief, since, in his view, the earlier deadline doesn't serve sufficiently important purposes.

Gov. Newsom relies primarily on *Costa v. Superior Court*, 37 Cal.4th 986 (2006), for the proposition that courts must look deeper into the purposes behind the rule that a petitioner supposedly complied with "substantially." *Costa* is no help here for several reasons.

First, neither *Costa* nor any of the cases it cited involved deadlines, so it cannot be relied on for the proposition that courts must conduct a searching inquiry into the policy reasons for deadlines. *Costa* never cited *Barnes*, let alone called it into question.

Second, *Costa* and the cases on which it relied arose in the initiative and referenda setting. *See* 37 Cal.4th at 1013–21 and 1019 n.26 (collecting substantial compliance cases). That setting is distinguishable from what voters face in a recall. As *Costa* highlighted, the "substantial compliance" rule compliments the rule of liberal construction in favor of the people's initiative power. *Id.* at 1013. In that context, "relatively minor" "defects" or "departures" from statutory commands are tolerated so long as they "d[o] not undermine or frustrate the basic purposes served by the statutory requirements in ensuring the integrity of the initiative or referendum process." *Id.* at 1019; *see also id.* at 1013. (Gov. Newsom's "substantial compliance" argument might make more sense had he made a mistake in the manner in which he indicated a party preference, such as by indicating his party preference as "(D)" in the answer rather than "Democrat" or "Democratic Party.") This makes good sense: The initiative process is complex and often involves preparing lengthy or detailed materials for presentation to would-be petition signers and the voters. The substantial compliance doctrine thus ensures that the "fundamental right" to propose initiatives is not comprised, by permitting a measure of flexibility so long as it does not undermine the integrity of the election process. The same cannot be said here, where the Court is considering whether a statutorily mandated deadline was met – this is a yes-or-no issue.

Third, the common theme running through *Costa* and all of the cases it discussed is wholly absent here; the consequence of requiring strict compliance with the various provisions at issue in those initiative and referendum cases was extreme: striking the measures from the ballot entirely. *See, e.g.*, *Assembly of State of Cal. v. Deukmejian*, 30 Cal.3d 638, 645–46, 652–54 (1982) (seeking a writ of mandate to omit referendum from the ballot); *Cal. Teachers' Ass'n v. Collins*, 1 Cal.2d 202, 203 (1934) (petitioners sought to place initiative on ballot after registrar refused). Indeed, the *Costa* court emphasized that such a "harsh" result was inappropriate in light of the "minor" wording differences between the two versions of petition. 37 Cal.4th at 1026–27.

To a similar end, in *California Teachers Association v. Collins*, the Court held that relatively minor deficiencies in the form of a petition did not warrant the exclusion of an initiative from the ballot. 1 Cal.2d 202. Specifically, the petitions used the wrong typeface (12-point type, instead of 18-point required by statute) and exceeded the statutory word limit on the short title (24 words instead of the maximum 20). *Id.* at 203–04. The Court permitted these minor deviations because they did not detract from the overall statutory purpose – to prevent voter deception – and striking the initiative from the ballot would be an unduly harsh result. *See id*. at 205 (noting that the petition had been "circulated in good faith" and collected "many thousands of signatures," and observing that "the time [was] short" to circulate a new petition).

The "substantial compliance" doctrine does not apply here.

C. Section 11320's Operation Violates No Constitutional Rights.

Gov. Newsom is also wrong to suggest that judicial intervention is necessary to vindicate his, and his prospective voters', constitutional rights to equal protection and political association. He cites the *Costa* court's discussion about the "fundamental constitutional interests of the" citizens who signed the initiative petition to vaguely suggest similar interests are at stake here. Brief. at 13 (citing *Costa*, 37 Cal.4th at 1027–28). Once again, however, this discussion in *Costa* arose in the context of the concededly fundamental state constitutional interest held by the *initiative signers* in getting initiatives qualified for the ballot, *see Costa*, 37 Cal.4th at 1013 (discussing the "fundamental nature of the people's constitutionally enshrined initiative power"), Cal. Const., art. 4, § 1, not Gov. Newsom's asserted interest of the public's "right to know information" about a candidate.

Gov. Newsom relies on a Sixth Circuit case for the proposition that "[v]oters have [basic associational rights' protected by the First and Fourteenth Amendments that are implicated by regulations that limit ballot information about the political party affiliation of the candidates they support." Brief at 14:6-8 (citing *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992)). In *Rosen*, however, Ohio allowed Democrat and Republic candidates to be identified by party on the ballot but *prohibited* independent candidates who qualified for the election to designate themselves as "Independent" on the ballot. Obviously, no such prohibition is at issue here. And *Rosen* affirmed

there is no constitutional "right to know" a candidate's party preference such that party information *must* appear on a ballot. *Id*. at 175 ("With respect to political designations of the candidates on nomination papers or on the ballot, a State could wash its hands of such business and leave it to the educational effort of the candidates themselves . . . during the campaigns."). Indeed, as Gov. Newsom recognizes, California law had long *prohibited* the official proposed to be recalled from identifying his or her party preference on the ballot.

In any event, the constitutional theories hinted at in the brief are surely foreclosed by *Libertarian Party v. Eu*, 28 Cal.3d 535 (1980). In that case, a Libertarian Party candidate who qualified for an election challenged the Elections Code provision that then required members of nonqualified parties to be listed as "Independent" on the ballot, whereas the candidates nominated through qualified-party nominating procedures had their party affiliation listed on the ballot. The candidate and the Libertarian Party argued that this violated the candidate's equal protection rights and the rights of the candidate, the party, and Libertarian voters to associate for political activity. *Id.* at 540-42. The California Supreme Court flatly rejected these arguments, observing that the identification requirement – what plaintiffs there rightfully considered a *mis*-identification requirement – was an "insubstantial burden." *Id*. at 542. And there, as here, the State has a strong interest in maintaining the "integrity and stability of the election process." *Id*. The strong interest in order and integrity include avoiding disputes about whether deadlines really are worth adhering to.

The First District Court of Appeal applied *Libertarian Party* to reject a similar challenge after passage of the open primary system in *Field v. Bowen*, 199 Cal. App. 4th 346 (2011), where candidates alleged they were unconstitutionally barred from being identified as associating with the unqualified "Socialist Action" and "Reform" parties. *Id.* at 357–60; *see also id*. at 356 (stressing State's "broad power" to regulate elections, including "'significant authority to regulate . . . the identification of candidates on the ballot,' and those contesting such regulations 'bear[] a heavy constitutional burden'") (quoting *Schrader v. Blackwell*, 241 F.3d 783, 790–91 (6th Cir. 2001)); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) ("That a

particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights.").

In the end, Gov. Newsom's claims about the urgency of communicating party information to voters proves too much: If the Legislature thought the official's party preference were so urgent to communicate to voters, it could have *required* that the official's preference from his or her voter registration be automatically added to the ballot. Instead, it made the decision to provide this information *optional*, subject only to a simple deadline. And if the party identification on a ballot were so vitally important, why didn't the Governor bother to mention it when he filed his answer? That such an urgent matter would slip the mind of the State's top elected official is difficult to fathom.

D. This Case Is Not So "Unique" As To Justify Special Treatment.

Gov. Newsom's fallback argument is that this case is "unique" such that his failure to comply with Section 11320 should be excused. This argument focuses on the California Supreme Court's decision in *Assembly v. Deukmejian*, where the court permitted a referendum to appear on the ballot despite not complying with statutory requirements based on what it termed "unusual and unique circumstances." 30 Cal.3d at 652. This argument does not withstand serious scrutiny.

First, and foremost, the Court permitted the deviation in significant part based on its "judicial policy to apply a liberal construction" to the initiative and referendum power "in order that the right be not improperly annulled." *Id.* at 652; *see also id*. at 678 ("Since its inception, the right of the people to express their collective will through the power of the referendum has been vigilantly protected by the courts."). This concern points in the opposite direction here. The recall, just as much as the initiative and referendum, is "'one of the most precious rights of our democratic process.'" *Associated Home Builders etc., Inc. v. City of Livermore*, 18 Cal.3d 582, 591 (1976) (citation omitted). And because it is the "duty of the courts to jealously guard the right of the people," *id.*, courts construe the people's direct democracy powers liberally "to promote the democratic process." *Brosnahan v. Brown*, 32 Cal.3d 236, 241 (1982). Gov. Newsom seeks to evade compliance with a recall procedure; the duty to jealously guard the people's recall power requires the Court to strictly enforce the procedural requirements in the people's favor. *See, e.g.*,

Laam v. McLaren, 28 Cal.App. 632, 638 (1915) (the recall "power is given [to the people] by the constitution and statutes enacted in aid of this power should be liberally construed").

Gov. Newsom seeks to align himself with *Assembly v. Deukmejian* by conjuring up a factual similarity: He argues that the answer "follow[ed] a custom and practice" that had previously been accepted by the Secretary of State. Brief at 16:14–18. But unlike in *Assembly v. Deukmejian*, where the Secretary of State had published a handbook that had an error in it, 30 Cal.3d at 651, Gov. Newsom seeks refuge in a recall guide that had been superseded by a law *that he signed himself*. Although Gov. Newsom has been the target of prior recall attempts, it is beyond a stretch to claim he has a "custom and practice" of responding that "had been accepted by [the Secretary of State]."[2] And unlike in *Assembly v. Deukmejian*, where state and county-level election officials accepted defective petitions for years without objection, the Secretary of State had no previous opportunity to enforce Section 11320: This was the first recall answer Gov. Newsom filed since the new law took effect.

Finally, it is not correct that the answer "was filed in a format identical to his previous answers" as Gov. Newsom claims. Brief at 16:15; *see* Willis Decl., ¶ 4 ("we filed the same answer to the Heatlie recall that we had to the previous recall efforts in 2019"). As noted above, it appears that three paragraphs were updated to correspond with the latest recall effort. Answer, ¶¶ 2, 3 & 4.

There is nothing "unique" about this case permitting Gov. Newsom to include his party preference on the recall ballot.

IV. CONCLUSION

This case has important implications for the State. The law must apply equally to all Californians. Say, for example, a mere citizen files her California tax return a day late next April; will she now be able to point to Gov. Newsom's argument here and avoid the consequence of her late filing by arguing that she "substantially complied" with the deadline? For the reasons set forth above, the petition for a writ of mandate should be denied.

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[2] In fact, the Secretary of State updated its recall guide in January 2020, which included information on Section 11320 under the heading "Recallee's Political Party Preference" immediately below the section on "Answer of Recallee" Cal. Sec'y of State, *Procedures for Recalling State and Local Officials* (Rev. Jan. 2020).

Dated: July 6, 2021

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