

1 BENBROOK LAW GROUP, PC
2 BRADLEY A. BENBROOK (SBN 177786)
3 STEPHEN M. DUVERNAY (SBN 250957)
4 400 Capitol Mall, Suite 2530
5 Sacramento, CA 95814
6 Telephone: (916) 447-4900
7 Facsimile: (916) 447-4904

8 Attorneys for Proposed Intervenors
9 Caitlyn Jenner and
10 Caitlyn Jenner for Governor 2021, Inc.

11 SUPERIOR COURT OF CALIFORNIA
12 COUNTY OF SACRAMENTO

13 GAVIN NEWSOM,

14 Petitioner,

15 v.

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

19 Respondent.

Case No.: 34-2021- 80003666

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
CAITLYN JENNER AND CAITLYN
JENNER FOR GOVERNOR 2021, INC.'S
EX PARTE APPLICATION TO
INTERVENE**

**STATEWIDE ELECTION MATTER
IMMEDIATE ACTION REQUIRED**

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

Petition Filed: June 28, 2021

1 I. INTRODUCTION

2 Caitlyn Jenner (“Jenner”) and Caitlyn Jenner for Governor 2021, Inc. (the “Committee”)
3 should be permitted to intervene in this action as real parties in interest to oppose the claims of
4 Petitioner Gavin Newsom. Jenner has declared her candidacy for Governor in the 2021
5 Gubernatorial Recall Election, and Caitlyn Jenner for Governor 2021, Inc. is the controlled
6 committee supporting her candidacy. This application is brought pursuant to Code of Civil
7 Procedure section 387 on the grounds that proposed intervenors have a direct and substantial
8 interest in this action. Specifically, Jenner’s and the Committee’s intervention is appropriate to
9 ensure that the laws governing the recall election are enforced and uniformly applied. There is a
10 substantial likelihood that the Secretary of State will not mount a robust, good-faith defense
11 against Governor Newsom’s claims.

12 As a replacement candidate in the recall election, Jenner has a direct interest in this
13 litigation, where Gov. Newsom is seeking to modify the content of the recall ballot in violation of
14 California election law. This interest qualifies her for intervention as of right. Indeed, the
15 circumstances here are indistinguishable from litigation over a candidate’s ballot designation –
16 which confirms Jenner’s status as a real party in interest. Candidates routinely join litigation with
17 the Secretary of State over opposing candidates’ ballot designations.

18 Alternatively, Jenner and the Committee satisfy the requirements for permissive
19 intervention. Governor Newsom is seeking to evade compliance with a law governing recall
20 procedure that he signed into law by suing the Secretary of State that he recently appointed. The
21 absence of any non-governmental party in this litigation confirms that Jenner’s interest – and the
22 interests of all candidates – will not be adequately represented, and raises the question whether the
23 important legal issues in this case will be fully litigated. Jenner’s intervention is appropriate to
24 protect her unique interests and sharpen the presentation of the issues to the Court. Jenner’s
25 participation will not enlarge the issues in the case, and the reason for intervention – to ensure that
26 California’s election laws are fully enforced and uniformly applied – far outweighs any opposition
27 that Governor Newsom or the Secretary of State could muster.

28 The intervention application should be granted.

1 **II. JENNER HAS ESTABLISHED HERSELF AS A CANDIDATE**

2 On June 10, 2020, the Secretary of State’s office approved petitions for circulation for
3 the recall of Governor Gavin Newsom. On July 1, 2021, Respondent Secretary of State Weber
4 certified the petition to recall Governor Newsom, and Lieutenant Governor Kounalakis issued a
5 proclamation ordering that the 2021 California Gubernatorial Recall Election will be held on
6 September 14, 2021.

7 Jenner is a qualified candidate for the recall election. She is registered to vote in Los
8 Angeles County, California. Cal. Const., art. V; Elec. Code § 201. Caitlyn Jenner for Governor
9 2021, Inc. is the controlled committee supporting Jenner’s candidacy in the recall election. Jenner
10 and the Committee have taken the steps available to establish her candidacy for governor in the
11 recall election. On April 23, 2021, Jenner filed a Candidate Intention Statement (Form 501) with
12 the Secretary of State, declaring her intent to run for governor. Bauer Decl., ISO Intervention, Ex.
13 1. On April 26, 2021, the Committee filed a Statement of Organization (Form 410) with the
14 Secretary of State. *Id.* Ex. 2.

15 Nominating papers for replacement candidates are not available until July 9, the date of the
16 hearing on the writ.

17 **III. ARGUMENT**

18 **A. Legal Standard.**

19 “An intervention takes place when a nonparty, deemed an intervenor, becomes a party to an
20 action or proceeding between other persons by doing any of the following: [¶] (1) Joining a
21 plaintiff in claiming what is sought by the complaint. [¶] (2) Uniting with a defendant in resisting
22 the claims of a plaintiff. [¶] (3) Demanding anything adverse to both a plaintiff and a defendant.”
23 Code Civ. Proc. § 387 (b). “By allowing nonparties to participate in litigation, section 387
24 ‘protects the interests of others affected by the judgment, obviating delay and multiplicity.’”
25 *Carlsbad Police Officers Ass’n v. City of Carlsbad*, 49 Cal.App.5th 135, 147 (2020) (quoting
26 *People v. Super. Ct. (Good)*, 17 Cal.3d 732, 736 (1976)).

27 Section 387 recognizes two forms of intervention. The first is compulsory. Under
28 subdivision (d)(1)(B), a trial court “shall, upon timely application, permit a nonparty to intervene

1 in the action or proceeding” if that person “claims an interest relating to the property or transaction
2 that is the subject of the action and that person is so situated that the disposition of the action may
3 impair or impede that person’s ability to protect that interest, unless that person’s interest is
4 adequately represented by one of the existing parties.” In other words, to establish a right to
5 mandatory intervention, the nonparty must: (1) show a protectable interest in the subject of the
6 action, (2) demonstrate that the disposition of the action may impair or impede its ability to protect
7 that interest; and (3) demonstrate that its interests are not adequately represented by the existing
8 parties. *Edwards v. Heartland Payment Sys., Inc.*, 29 Cal.App.5th 725, 732 (2018).

9 Permissive intervention is governed by section 387, subdivision (d)(2), which states, “Upon
10 timely application, any person, who has an interest in the matter in litigation, or in the success of
11 either of the parties, or an interest against both, may intervene in the action or proceeding.” Under
12 this provision, “the trial court has discretion to permit a nonparty to intervene where the following
13 factors are met: (1) the proper procedures have been followed; (2) the nonparty has a direct and
14 immediate interest in the action; (3) the intervention will not enlarge the issues in the litigation;
15 and (4) the reasons for the intervention outweigh any opposition by the parties presently in the
16 action.” *Siena Ct. Homeowners Ass’n v. Green Valley Corp.*, 164 Cal.App.4th 1416, 1428 (2008)
17 (citation omitted); *see also City of Malibu v. Cal. Coastal Comm’n.*, 128 Cal.App.4th 897, 902
18 (2005).

19 The threshold question under section 387(d)(2) is whether the party seeking discretionary
20 intervention has a direct and immediate interest in the action. *Siena Ct. Homeowners Ass’n*, 164
21 Cal.App.4th at 1428. “The requirement of a direct and immediate interest means that the interest
22 must be of such a direct and immediate nature that the moving party ‘will either gain or lose by the
23 direct legal operation and effect of the judgment.’” *City and Cty. of San Francisco v. State of Cal.*,
24 128 Cal.App.4th 1030, 1037 (2005) (citations omitted). “Conversely, ‘[a]n interest is
25 consequential and thus insufficient for intervention when the action in which intervention is sought
26 does not directly affect it although the results of the action may indirectly benefit or harm its
27 owner.’” *Id.* (citations omitted). At bottom, “[t]he purpose of allowing intervention is to promote
28 fairness by involving all parties potentially affected by a judgment.” *Simpson Redwood Co. v.*

1 *State of Cal.*, 196 Cal.App.3d 1192, 1199 (1987). And “[s]ection 387 should be liberally
2 construed in favor of intervention.” *Lindelli v. Town of San Anselmo*, 139 Cal.App.4th 1499, 1505
3 (2006).

4 **B. Jenner And The Committee Have Satisfied The Criteria For Intervention.**

5 **1. As A Candidate In The Recall Election, Jenner Has A Distinct Interest That**
6 **Supports Her Intervention As A Matter Of Right.**

7 Jenner is a real party in interest since she is a replacement candidate in the recall election.
8 Because the petition seeks to modify the content of the recall ballot, Jenner has a direct interest in
9 the subject matter of this litigation, and she qualifies for intervention of right. *See* Code Civ. Proc.
10 § 387(d)(1)(B). If Gov. Newsom is allowed to bend the rules because he thinks it benefits him, the
11 replacement candidates have a corresponding interest in enforcing the rules. The writ itself
12 demonstrates that Gov. Newsom views the recall as a contest between himself and the other
13 candidates: He argues, for example, that the deadline applicable to him should not be enforced
14 since the other candidates have until July 16 to file their nominating papers. *See* Writ, ¶ 11. He
15 goes so far as to argue it would violate the equal protection clause for him to not have “Democrat”
16 next to his name (despite failing to request this on his own paperwork, and despite the fact that the
17 State banned recall targets from using a party identification until he signed the law in 2019
18 allowing it), since the other candidates have the opportunity to have their party preference listed.
19 Brief at 12:16–24.

20 In that light, the essence of this case is indistinguishable from litigation over a candidate’s
21 ballot designation – which confirms Jenner’s status as a real party in interest. Just as in a ballot
22 designation dispute where a candidate sues to force the Secretary of State to identify the candidate
23 on the ballot with his or her preferred three-word description, Gov. Newsom claims here that the
24 Secretary must identify him with his Democrat party designation. In ballot designation cases, the
25 other candidates in the race routinely enter the litigation as real parties in interest, sometimes
26
27
28

1 without even filing a motion to intervene. *Cf. Eastman v. Bowen*, Sacramento Super. Ct. Case No.
2 34-2010-80000486 (candidate Steve Cooley intervening in writ filed by opponent).¹

3 Jenner's interests are not adequately represented by the Secretary of State. While the
4 Secretary of State is charged with enforcement of the state's election laws, her actions so far
5 suggest that she may fail to provide a thorough and complete defense against Gov. Newsom's
6 claims. *See infra*, § 3. Jenner's intervention is necessary to protect her interests in ensuring the
7 laws governing the recall election are fully enforced and uniformly applied.

8 Jenner satisfies the criteria for intervention of right.

9 **2. Jenner Should Be Permitted To Intervene.**

10 Alternatively, Jenner and the Committee satisfy the requirements for permissive
11 intervention.

12 *The Application Is Timely.* Gov. Newsom filed this lawsuit just over a week ago, and the
13 matter is set for hearing on this Friday. Jenner has submitted this application and the proposed
14 opposition before the Secretary of State's opposition deadline and before any proceedings have
15 been held in this case.

16 *Jenner and the Committee Have a Direct and Immediate Interest in the Action.* As both a
17 registered voter and a candidate, Jenner has an interest in ensuring the uniform application of the
18 State's election laws, particularly as they are enforced in the recall election. Jenner's important
19 and unique interests will be directly impacted in a substantial manner by the outcome of this case:
20 Gov. Newsom is seeking to evade compliance with a law governing recall procedure that he signed
21 into law by suing the Secretary of State that he recently appointed. The absence of any non-

22 _____
23 ¹ Moreover, several federal courts have recognized that candidates have distinct interests in
24 election law disputes sufficient to permit mandatory intervention and that the presence of a
25 governmental defendant (such as the Secretary of State here) does not ensure that a candidate's
26 interests are adequately protected. *See, e.g., Craig v. Simon*, 493 F. Supp. 3d 773, 781 (D. Minn.
27 2020) (granting intervention of right to candidate in dispute over state election law and recognizing
28 that the candidate's interests "may be separate and distinct from the interests of Minnesota's
Secretary of State"); *Blankenship v. Blackwell*, 341 F. Supp. 2d 911, 918 (S.D. Ohio 2004)
(holding that electors were entitled to intervene of right in ballot-access litigation, and
acknowledging that the intervenors' "interest is not necessarily adequately represented by [the
secretary of state], since [the secretary] acts in the capacity of a governmental agency"); *Hoblock
v. Albany Cty. Bd. of Elections*, 233 F.R.D. 95, 99–100 (N.D.N.Y. 2005) (permitting candidates to
intervene of right in dispute over election procedure).

1 governmental party in this litigation confirms that Jenner’s interest – and the interests of all
2 candidates – will not be adequately represented and raises the question whether the important legal
3 issues in this case will be fully litigated.

4 *Intervention Will Not Enlarge The Issues In The Case.* Jenner and the Committee seek to
5 both protect their unique interests and sharpen the presentation of the issues to the Court. They do
6 not seek to expand the litigation or to delay this Court’s resolution of the case. Rather, they seek
7 to intervene to oppose Gov. Newsom’s writ petition. As set forth more fully in the concurrently
8 filed proposed opposition, the petition seeks relief that has been rejected by California courts for
9 over a century.

10 *Jenner’s Interest In The Uniform Application Of California Law Outweighs Any*
11 *Conceivable Opposition.* Finally, Jenner’s reason for intervention – to ensure that California’s
12 election laws are fully enforced and uniformly applied – far outweighs any opposition that Gov.
13 Newsom or the Secretary of State could muster. Jenner’s intervention is necessary to hold the
14 Governor and Secretary of State to account and ensure the legal issues in this case are fully
15 litigated.

16 In sum, Jenner and the Committee satisfy the criteria for permissive intervention.

17 **3. The Secretary of State’s Likely Neutrality Underscores The Importance Of**
18 **Allowing Jenner’s Intervention.**

19 Permitting Jenner to intervene is essential if, as expected, the Secretary of State fails to
20 provide a thorough and complete defense against Gov. Newsom’s claims. The Secretary’s actions
21 so far suggest that she may not do so. For one thing, the Secretary of State’s public statements
22 about this case do not indicate that she will fully oppose the petition. *See* Kevin Yamamura,
23 *Newsom sues elections chief to call himself a Democrat on recall ballot*, Politico (June 29, 2021)
24 (“The Secretary of State’s office has a ministerial duty to accept timely filed documents,” and
25 “[a]cceptance of filings beyond a deadline requires judicial resolution”); Hope Miller, *Gov.*
26 *Newsom files lawsuit against his secretary of state over recall filing ‘mistake’*, KRCA Channel 3
27 (June 30, 2021) (same). And when Jenner’s counsel attempted to confer with the Secretary of
28 State’s counsel to determine whether intervention was necessary, counsel for the Secretary of State

1 refused to disclose the Secretary’s position – and in fact refused to commit to whether the
2 Secretary of State would be opposing the petition at all. Benbrook Decl., ¶ 2.

3 Accordingly, there is a substantial possibility that the Secretary of State will not offer a
4 full-throated defense of the State’s election laws. This factor weighs significantly in favor of
5 permitting Jenner’s intervention. Courts recognize that intervention is appropriate to prevent
6 injustice, particularly if there is potential collusion, bad faith, or other circumstances that result in
7 key legal positions not being fully asserted in the litigation. *Cont’l Vinyl Prod. Corp. v. Mead*
8 *Corp.*, 27 Cal.App.3d 543, 551 (1972); *see also Kobernick v. Shaw*, 70 Cal.App.3d 914, 918
9 (1977) (“Where a party to a lawsuit fails to exercise good faith in defending the action, then a
10 party whose interest at the outset may be only consequential becomes a party with a direct interest
11 and may therefore intervene.”).

12 The Secretary of State’s office has already demonstrated in the recall that it will take
13 inconsistent positions to benefit Gov. Newsom. As the Court is well aware, the Secretary took
14 starkly different positions when it came to litigation over whether the Governor’s shutdowns
15 burdened First Amendment activities: when two initiative campaigns sought extensions to
16 signature-gathering for an initiative, the Secretary’s predecessor (now-United States Senator Alex
17 Padilla) was happy to stipulate to whatever the proponent wanted, *Macarro v. Padilla*, Case No.
18 34-2020-80003404 (July 1, 2020 Stipulation for Order Granting Writ of Mandate), and
19 *Sangiaco v. Padilla*, Case No. 34-2020-80003413 (July 1, 2020 Stipulation for Order Granting
20 Writ of Mandate). When the recall proponents sought exactly the same relief, Secretary Padilla
21 vigorously opposed the request for an extension. *Heatlie v. Padilla*, Case No. 34-2020-80003499
22 (Oct. 28, 2020 Opposition to Petition for Writ of Mandate).

23 Indeed, if the Secretary of State had permitted Gov. Newsom to add his party designation
24 nearly a year-and-half after the deadline, then Jenner would have standing to bring an independent
25 claim under Section 13314 precisely because it would constitute a “neglect of [her] duty” under
26 the Elections Code. Gov. Newsom only appointed Respondent Weber six months ago. There is
27 no reason to believe she will stand up for the State’s elections law in the face of the Governor’s
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


demand. Intervention is necessary to protect her interests and to ensure that the laws governing the recall election are fully enforced and uniformly applied.

* * *

For the foregoing reasons, the application to intervene should be granted.

Dated: July 6, 2021

BENBROOK LAW GROUP, PC

By 
BRADLEY A. BENBROOK
Attorneys for Proposed Intervenors
Caitlyn Jenner and
Caitlyn Jenner for Governor 2021, Inc.