THE COMMITTEE TO RECALL ROBERT MENENDEZ FROM THE OFFICE OF U.S. SENATOR, Appellant, v. NINA MITCHELL WELLS, ESQ., SECRETARY OF STATE, and ROBERT F. GILES, DIRECTOR OF THE DIVISION OF ELECTIONS, Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-2254-09 T1 **Civil Action** **On Appeal From The Final Determination of The Department of State and Division Of Elections Dated January 11, 2010**

APPELLANT'S BRIEF

IN FURTHER SUPPORT OF APPEAL, EMERGENT MOTION FOR INJUNCTION, AND ACCELERATED DISPOSITION

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Preliminary Statement

Appellant, the Committee To Recall Robert Menendez from The Office of United States Senator (the "Committee") submits this brief in further support of its Appeal, and in further support of its emergent relief motion.

In opposition, Respondents rely principally upon two arguments. First, Respondents assert that the constitutional issue concerning a State's ability to issue a judicially enforceable recall order is ripe, notwithstanding that no such order has been requested, and no such order has been issued. Indeed, one may not ever issue in our lifetimes.

Second, the respondents suggest that the Committee cannot freely exercise its rights to engage in "core political speech" under the UREL without violating the "qualifications" and "term of office" clauses of the 17th Amendment (formerly Art. I, §3). Specifically, respondents argue that the People of New Jersey may only speak about, assemble, petition, and vote upon political issues approved by the Federal Government.

The respondents are incorrect in both respects. As demonstrated below, and as admitted by Respondents, there has never been any federal court decision holding that the States do not have the power to recall their Senators.

But more importantly, even if that was the established 17th Amendment precedent, the Committee is still entitled to exercise its rights of "core political speech" guaranteed to them under U.S. Const. 1st Amend; N.J. Const. Art. 1, ¶18; N.J.

Const., Art. 1, § 2a; N.J. Const. Art. 1, ¶2b; and the UREL. And, it can do so without harm to the 17th Amendment.

Yet respondents insist upon improperly tangling the Committee's unassailable right to "core political speech" with the more complicated, and indeed, disputed issue concerning the State's power to issue a judicially enforceable recall order of a U.S. Senator. Respondents motives are clear; they are intent on denying the Committee its right to make a collective, State-endorsed, political statement, as granted to it under the U.S. and New Jersey Constitutions and the UREL, simply because Respondents do not approve of the content of the message. That is clearly impermissible.

The Secretary and Director must be ordered to approve the Committee's Notice of Intention to Recall, so that the Committee may immediately begin collecting campaign funds and signatures on its petition. The dispute concerning the enforceability of a State's recall order will be decided if and when such an order is ever issued.

LEGAL ARGUMENT

POINT I

PLAINTIFF HAS THE RIGHT TO A CERTIFIED RECALL PETITION AS "CORE POLITICAL SPEECH"

Election laws "are designed to deter fraud, safeguard the secrecy of the ballot, and prevent disenfranchisement of qualified voters." In re Contest of November 8, 2005 General Election, 192 N.J. 546 (2007). As a general proposition,

election laws are designed to instill public confidence in the accuracy of the outcome of the vote.

Unlike an election to fill a vacancy, a recall effort has two very unique, and very distinct, characteristics. First, it is a unique form of political speech; an independently verified collective statement of political dissatisfaction directed at a specified incumbent elected official, which must comply with a uniform, statutory framework. This characteristic permeates the entire recall effort, and can influence policy, regardless of whether the recall effort is ultimately successful. It is truly "core political speech." See Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)("[A]n election campaign is an effective platform for the expression of views on the issues of the day"); Illinois Bd. of Election v. Socialist Workers Party, 440 U.S. 172, 186 (1979)("[A]n election campaign is a means of disseminating ideas").

Second, only if successful, the recall effort results in a legally binding, judicially enforceable certification removing the targeted elected official from office. Under the UREL, that characteristic is codified in paragraph a. of N.J.S.A. 19:27A-16:

> **Election results; further petitions**
>
> a. If a majority of votes cast on the question of the recall of an elected official are in the affirmative, the term of office of the elected official shall terminate upon the certification of the election results. Where nominees to succeed the recalled official are voted on at the same election, the successor receiving the greatest number of votes shall

> succeed to the office of the recalled official upon certification of the election results and shall serve for the remainder of the unexpired term.
>
> b. If a majority of votes cast on the question of recall of an elected official are in the negative, the official shall continue in office as if no recall election had been held and the vote for the successor of such officer shall be void.
>
> c. An elected official sought to be recalled who is not recalled as the result of a recall election shall not again be subject to recall until after having served one year of a term calculated from the date of the recall election.
>
> [N.J.S.A. 19:27A-16.]

New Jersey has long recognized the dual nature of the recall process, distinguishing between its "core political speech" and "legal effect" characteristics:

> [T]he right of the electorate to petition its government is constitutionally protected by the First Amendment to the United States Constitution. If the electorate chooses, it can circulate petitions with respect to any issue the very day an official takes office. While this general type of petition cannot have the effect of law absent statutory authorization, it is an effective tool for the electorate to use to affect public policy. The constitutional right to petition is to be distinguished from the right to petition for recall, a statutory right granted by the Legislature. In Re Petition of Smith, 114 N.J.Super 421, 435 (App. Div.), certif. den. 59 N.J. 263 (1971). The statutory right to petition for recall is subject to legislative discretion and this court is bound by the intention of the Legislature as reflected in the statute.

[Baker v. Deane, 196 N.J.Super. 416 (Law Div. 1983)[1].]

This duality still exists under the current New Jersey law.

A. The UREL Created A State-Endorsed Process For Collective "Core Political Speech"

Prior to the adoption of Art. 1 ¶2b, our citizens had only the general right to petition their Senators and Congressman, in an informal way, without independent verification of a State official, without any statutory framework, and without any enforcement authority. However, this type of petition can be disregarded by the targeted official, the Senate, the media, and the public, simply because it lacks the controls and assurances of credibility.

This changed with the adoption of Art. 1 ¶2b in 1993. New Jersey citizens guaranteed to themselves the right to collectively and formally express their dissatisfaction with their Senators and Congressman. New Jersey's citizens chose to adopt a State-sanctioned recall process that could potentially result in a judicially enforceable recall order, issued upon satisfaction of uniform and specific legal requirements.

There can be no dispute: The UREL provides a recall effort with a level of credibility and effectiveness that did not exist prior to its passage in 1995. The formalities of the UREL,

[1] `The Baker case pre-dates the 1993 amendment to Art. 1, ¶2b of the New Jersey Constitution, and the 1995 adoption of the UREL, and concerns a recall under the Falkner Act.

like all election laws, are designed to produce accurate counts and instill confidence in the targeted official, in the public at large, and throughout government generally, that the strength of the people's political statement is neither over nor understated.

The UREL achieves this by requiring an independent third party, (now the Secretary of State, but formerly, the Attorney General) to confirm: (1) that the petition itself meets certain legal requirements; (2) that the number of signers is counted accurately; and, (3) that the signatures are genuine. It adds further credibility to the political expression by requiring the State government, upon receipt of statutorily mandated number of signatures, (4) to put the issue to a formal vote with the State's election apparatus, and (5) have the Secretary and Director certify the results of the election.

Independent verification of the petition's form and number of signatures and verification of the election results by the State, makes the recall process a far more forceful political statement than an unverified petition. Uniform requirements and State certification means credibility, and with credibility, the political message is more effective in influencing policy. There is simply no alternative to the UREL available to the Committee.

Notably, the overwhelming majority of the legal references cited by respondents pre-date the November 2, 1993 general election adopting Art. 1, ¶2b, the Attorney General's certification of that election, and the Legislature's 1995 passage of the UREL. The Citizens, the Attorney General, and the Legislature must be presumed to have had knowledge of the legal

references cited by respondents, and opted to move forward with full knowledge thereof.

Thus, to the extent that Respondents are correct on the constitutional recall issue (which they are not), the Citizens, the Attorney General, and the Legislature surely must have adopted Art. 1, ¶2b and the UREL to create a State-sanctioned recall process to express their collective dissatisfaction with their Senators and Congressman, rather than to create a process whose sole purpose and intention was to effect a judicially enforceable recall of those same Senators and Congressmen.

B. The UREL Created A Legal Mechanism For An Enforceable Recall

At the same time, a successful recall election under the UREL is intended to produce a binding and judicially enforceable order of recall. N.J.S.A. 19:27A-16(a). Respondents claim this portion of the UREL is unconstitutional, though concede there is no case on point supporting their position.

However, even if this provision were to be deemed unconstitutional, it need not be "stricken". To the contrary, such a ruling would merely deprive the recall order of its intended legal effect with respect to Federal Senators and Congressmen, i.e., it would not be binding on or enforceable against the United States Senate or Senator Menendez. Its value as "core political speech", however, would remain in tact.

But even if N.J.S.A. 19:27A-16(a) were to be stricken, the remainder of the UREL would continue in full force an effect. When faced with a constitutional challenge, New Jersey courts are

careful to invalidate only those provisions found to be unconstitutional, leaving the remainder of the statutory framework intact. See, American Civil Liberties Union of New Jersey v. New Jersey Election Law Enforcement Commission, 509 F.Supp. 1123 (D.N.J. 1981).

C. Content-Based Restrictions On Access To The UREL's Processes Are Unconstitutional

In this case, Respondents' primary concern and objection focuses upon the content of the Committee's speech.

Respondents concede that our citizens must be permitted to freely exercise their rights of "core political speech" (see, Senator's Brief, p. 8 stating "the citizens of New Jersey are unquestionably free to assemble, speak their minds, and petition their government"). Yet, Respondents inconsistently argue that our citizens may not do so under the UREL if they are assembling, speaking, and petitioning about the Senator's recall. According to Respondents, the citizens may freely exercise their rights with respect to a State official, but may not do so with respect to Senator Menendez. The Respondents clearly overreach.

Unable to dispute the Committee's right to free exercise of core political speech, Respondents' briefs are silent on the single question before the Court:

> Can the State, after amending its Constitution and passing legislation to guarantee its citizens access to a formal, State-endorsed mechanism to foster collective "core political speech", deny its citizens access to that mechanism because of the content of their political message?

The answer is no. Neither the State nor Federal Constitutions prohibit the citizens of New Jersey from adopting a formal, State-endorsed mechanism to foster collective "core political speech". To the contrary, both Constitutions prohibit the State and Federal Governments from enforcing content-based restrictions on access to those mechanisms once put in place.

New Jersey citizens have the constitutionally guaranteed right to select the subject matter of an election. Just as they are free to speak on any political matter, and to assemble for any political matter, and petition on any political matter, the citizens of New Jersey have the right to roll out the voting apparatus of the State to vote upon any political matter they choose, irrespective of whether the vote results in a legally enforceable certification. The election apparatus is the property of the People of New Jersey, and nobody (including Senator Menendez, the United States Senate, or the State or Federal governments) may restrict access to that apparatus based upon the content of the message.

Regardless of whether it would be judicially enforceable against the United States Senate or Senator Menendez, certification of a successful recall election, and all efforts to obtain it, remain "core political speech" and are entitled to the Court's most strident protection.

Clearly, the State has no compelling interest in its content-based regulation of access to the State's election apparatus, particularly here, where the New Jersey Constitution has been amended and a statutory scheme adopted for the specific

purpose of providing New Jersey citizens with an irreplaceable form of State-endorsed, collective, core political speech. The unregulated, informal process of gathering signatures suggested by the Respondents is a poor substitute for the formal procedures set forth in the UREL.

D. There Is No Substantial Burden or Expense To The State

Respondents suggest that the Committee is seeking an order that would result in "a substantial burden and expense to the State." Respondents are incorrect. The Committee is merely seeking an order directing the Secretary to apply her stamp to the Notice of Intent to Recall, marking it "Approved" as per the UREL. Presently, no more is asked of the State. The entire burden of gathering the signatures of 25% of the registered voters across the State rests solely upon the Committee. If the Committee is unable to collect the required signatures within the statutory time period, the issue ends there.

But should the Committee collect the required number of signatures, it will be entitled to a recall election. The citizens of New Jersey have collectively determined to permit the expenditure of public funds for a recall election, upon presentation of a petition signed by 25% of the registered voters. See, Art. 1, ¶2b and the UREL.

Importantly, the citizens could have, but did not require recall committees to demonstrate a "likelihood of success" in order to trigger a recall election. Instead, our citizens agreed that a recall committee must gather signatures of

only 25% of the registered voters. In fixing the mark at 25% (rather than 51% or more), the people and their legislature clearly contemplated the possibility that a recall election might not result in the official's recall.

Notwithstanding Respondents' opinion that an unsuccessful recall effort would be a waste of money and "impose a substantial burden and expense" on the State, the citizens of New Jersey disagree, and have a different point of view. Collectively, the citizens of New Jersey and their legislators have decided that a recall election, even if unsuccessful, is an important exercise of core political speech, and well worth the investment. Liberty is not free.

POINT II

THOUGH THE ISSUE IS NOT RIPE, THE STATES RETAIN THE RIGHT TO RECALL FEDERAL SENATORS AND CONGRESSMEN

Respondents contend that the State does not have the power to issue a binding, judicially enforceable recall order under N.J.S.A. 19:27A-16(a), and go to great lengths to demonstrate that point. But, the Attorney General concedes that "there are no federal decisions squarely on point ..." which would compel this Court to accept the respondents' position. Brief, p.12.

Once again, the Committee is not presently seeking judicial enforcement of a certification following a successful recall election under N.J.S.A. 19:27A-16(a). The constitutional issue raised by respondents is not ripe. Hooper v. Hart, 56 FRD

476 (W.D. Mich. 1972)(dismissing action for declaratory judgment as to whether U.S. Senator from Michigan was subject to recall under Michigan law). Indeed, this appeal can be disposed of without ever reaching that issue. O'Keefe v. Passaic Valley Water Com'n., 132 N.J. 234, 240 (1993)(stating "courts should not reach constitutional questions unless necessary to the disposition of the litigation.").

Senator Menendez's reliance on Urrutia v City of Elizabeth is also misplaced. While it is true that this Court cannot enforce an unconstitutional provision, Urrutia is distinguishable. Prior to Urrutia, a Court had already found the offending ordinance unconstitutional. Id. at *1. But here, as the State concedes, there is no binding legal authority stating a U.S. Senator cannot be recalled. Thus, the case is inapplicable.

Respondents' reliance upon Abbott Laboratories v. Gardner, 387 U. S. 136 (1967), in support of their assertion that the Constitutional recall question is ripe as a purely legal question, is unavailing. If anything, Abbott supports the Committee's position. In Abbott, the legal question focused on whether a statute was properly construed. Here, the issue before the Court is whether the Secretary and Director properly executed their duty under the UREL, and whether their failure to do so, violated the rights of the Committee.

Should the constitutional recall question ever ripen, the Committee is confident that a court of competent jurisdiction will find that States, in fact, do have the right to recall their Senators. Indeed, so says five of New Jersey's sitting

Congressmen. Congressmen Frelinghuysen, Garrett, Lance, LoBiondo, and Pascrell, each as members of the New Jersey General Assembly, cast their vote on March 29, 1993 in favor of Assembly Concurrent Resolution No. 19 (which placed the then-proposed amendment to Art. 1, ¶2b on the ballot). Addendum to the Assembly Minutes of 1992, March 29, 1993, p. 151.

Notwithstanding the Attorney General's current position, the Attorney General formerly agreed that the State had the power to recall their U.S. Senators, as evidenced by the fact that the Attorney General certified the outcome of the election of November 3, 1993, and thereby allowed Art. 1, ¶2b to become law.[2]

The Congressmen and the Attorney General were correct. The right of recall predates the United States Constitution. Article V of the Articles of Confederation provided, "a power reserved to each state, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the Year." This provision was effective during the Constitutional Convention, and remained in full force and effect until ratification of our U.S. Constitution. Thus, the suggestion that the 10th Amendment did not reserve to the States the power of recall is, at best, an open debate, if not flat out wrong.

[2] As of April 1, 2008 The Division of Elections was transferred from the Office of the Attorney General to the Department of State, making the Secretary New Jersey's chief election official. See, P.L. 2007, c.254 passed by the 212th Legislature and signed into law by Governor Corzine.

Respondents rely heavily upon such cases as U.S. Term Limits v. Thornton, and adopt in its entirety the majority's position, and extend it to suggest that, based upon the Court's analysis of the debates at the Constitutional Convention, the states were not granted the right to recall. They also rely heavily upon Thorton's rejection of the 10th Amendment argument.

Respondents assert that the historic record of the Constitutional Convention shows that our Founders were concerned that State Legislatures would exercise too much control over Federal Senators. They argue that the Founders were concerned with the speed and ease with which a fickle State Legislature could vote to recall a Senator who opted to vote against his/her own State's interests. As a result, as Respondents now argue, the Founders concluded that the State Legislatures should not have the power to recall. The Committee disagrees with the Respondents' analysis and conclusion.

Nevertheless, history has shown that State Legislatures in fact had far more power, and effectively exercised that power, to frustrate the operations of the U.S. Senate (creating vacancies by refusing to appoint Senators because of political disputes, etc). As a result, the U.S. Constitution was amended.

The 17th Amendment takes away from State Legislatures the right to select their Senators, and grants to the people of the several states the right to select their Senators through direct election. Notably, the 17th Amendment comports with New Jersey's current Constitution of 1947, which states "[a]ll

political power is inherent in the people." N.J. Const., Art. 1, § 2a.

Unlike a power of recall vested in a State Legislature (an issue debated by our Founders), there is nothing "fast" nor "easy" about a recall through a direct popular election. For example, unlike a Legislative recall, the UREL does not permit a recall until one year has passed since the targeted official took office. Then, the petitioners must collect signatures within 320 days. While I would not go so far as to suggest the debates of our Founders at the Constitutional Convention are irrelevant, (that would be blasphemy), our Founder's debates at the Convention did not concern the issue at hand.

A Senator is elected for a term of six years, a term longer than any other elected official in the Federal Government. In light of the length of a Senator's term, and the adoption the 17th amendment providing for their direct popular election, the question is whether the Founders would have denied the people the right of recall. The Committee argues that it would not. As shown, many of the arguments offered at the Constitutional Convention against granting a State Legislature the right to recall, simply do not apply to direct popular recall elections.

The question of whether the 17th Amendment undermines the Respondent's position has never been raised to any Court, nor has any Court ever spoken to it. Importantly, not one of the references relied upon by the respondents, including U.S. Term Limits v. Thornton, addresses this question. Indeed, this issue was never presented to nor debated by the Founders at the

Constitutional Convention, as their debates focused solely upon Senators to be appointed by State Legislatures.

But again, that issue is not ripe, and its resolution must wait until someone seeks enforcement of a recall certification under N.J.S.A. 19:27A-16(a) before a court of competent jurisdiction.

POINT III

THE RESPONDENTS' FINAL DETERMINATION MUST BE REVERSED, AS THE RESPONDENTS HAVE NO AUTHORITY TO UNILATERALLY DETERMINE WHICH PROVISIONS OF THE NEW JERSEY CONSTITUTION ARE VALID.

The Secretary of State claims the authority to pass upon the constitutionality of any law, and the New Jersey Constitution itself, notwithstanding the Separation of Powers.

The Secretary makes much of the argument that she has a sworn duty "to uphold the United States Constitution, and is thus obliged to abide by the Supremacy clause", citing N.J.S.A. 41:1-1. But, that same statute also requires the Secretary to uphold the New Jersey Constitution. Clearly, under the New Jersey Constitution, the citizens reserved to themselves the power of recall. To deny them that power, as an initial position, especially when the State concedes there is no direct Federal authority on the issue, is to abdicate the State's duty to protect its citizens' rights.

The Secretary's position is incorrect. In a similar case in Wisconsin, the Secretary was presented with a Notice of

Intention to Recall a U.S. Senator. In interpreting state recall statutes, Wisconsin's Attorney General noted in an opinion on May 3, 1979, its state election board, upon presentation of a valid petition to recall a Member of Congress under the Wisconsin Constitution, had no authority, in itself, to adjudicate and reject such petition without a ruling from a court. 68 Opinions of the Attorney General 140, 146, 148 (Wisconsin 1979):

> In the foregoing discussion I have attempted neither a resolution nor a comprehensive analysis of the constitutional issue. Enough has been said, however, to show that the question of constitutionality is one that is arguable and open to debate. The Wisconsin Supreme Court has provided guidance to administrative bodies called upon to perform their ministerial duties under circumstances raising doubts as to the constitutional validity of the result. ...
>
> Accordingly, in the event petitions for the recall of a United States senator are presented to the Elections Board, you should proceed to carry put your responsibilities ... unless and until directed otherwise by a court of law.

Here, the UREL directs the Secretary and Director to review the petition for completeness. N.J.S.A. 19:27A-7. They are not permitted to seek out and rely upon a disputed, unsettled Federal Constitutional issue to avoid that duty.

The Secretary of State and Director of elections violated their statutory mandate, and as a result, denied the Committee, and the people who want to sign the petition, their right of free speech. Their final determination must be reversed.

POINT IV

THE COMMITTEE IS ENTITLED TO AN INJUNCTION ORDERING RESPONDENTS TO APPROVE THEIR NOTICE OF INTENT TO RECALL

The State, asserting only that it has no power to issue a judicially enforceable order to recall a U.S. Senator, argues the Committee has failed to demonstrate a likelihood of success on the merits. However, the State focuses on the wrong issue.

This issue before this Court concerns the State's content-based restriction on the Committee's right to freely exercise core political speech, not the dispute over whether a recall order issued by the Secretary of State is judicially enforceable as against Senator Menendez or the United States Senate.

The Committee has clearly shown a likelihood of its ultimate success on the sole ripe Constitutional issue before the Court, i.e., the right to freely engage in core political speech.

CONCLUSION

For the foregoing reasons, the Appellant, the Committee To Recall Robert Menendez from The Office of United States Senator, respectfully request reversal of the "final determination" dated January 11, 2010, and an order directing the approval of the Committee's Notice, so that the Committee may begin to collect signatures.

DATED: February 4, 2010

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