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## **STATEMENT OF THE MATTER INVOLVED**

Plaintiff-Respondent Committee to Recall Robert Menendez (“Committee”) has not sought an Order from the Secretary of State, or from any court, to decertify or remove Robert Menendez as a U.S. Senator from New Jersey, or an Order of Instruction for the Senator’s recall. Rather, the Committee has asked in this litigation only for an injunction mandating that the Secretary of State comply with the New Jersey Constitution and the duly enacted Uniform Recall Election Law by approving the Notice of Intention to Recall filed by Appellant, allowing it to immediately begin the collection of signatures on a petition to recall Senator Menendez. The only question presented by this litigation is whether the law provides for such an approval. The Appellate Division below rightly concluded that it did.

The issue of whether the provisions of New Jersey law providing for the recall of Senator Menendez are valid under the U.S. Constitution would not be raised until the Committee had gathered the signatures of over a million citizens and voters of the state of New Jersey asking for such a recall, a majority of voters in a recall election voted for such a recall, and the Committee then asked the Court for an order mandating the removal of Senator Menendez. That constitutional question may never arise because the Appellant may not succeed in obtaining the required signatures, or a majority of New Jersey voters may not vote to recall Senator Menendez. Or if Appellant does obtain over a million signatures from the citizens and voters of New Jersey asking for such a recall, and a majority of New Jersey voters do vote to recall Senator Menendez, the Senator may choose to resign in the face of such a powerful and dramatic political statement, or the Senate may choose to expel him in that event in accordance with the expressed will of the

people. A long line of controlling New Jersey and U.S. Supreme Court precedents holds that courts should not address Constitutional questions until they have to do so. To address these issues now, those cases would have to be overruled.

Senator Menendez bemoans that even to begin this process would be a costly burden to the state. But the cost and burden of collecting the more than 1 million signatures necessary for a recall election would be borne by the Committee, not by the state. Senator Menendez claims that even checking the signatures and validating the petition is too much of a burden for the state. But an overwhelming majority of the people of New Jersey, and of the state legislature, have already committed the state to that *de minimis* cost in adopting the provisions of the New Jersey Constitution and the Uniform Recall Election Law expressly providing for the recall of Congressional representatives as well as state officials. If the Committee is lost in a quixotic frolic of its own, then it will never get the 1.3 million signatures required for the recall process to continue, and the Committee will never be heard from again. But if the Committee does gain the backing of well over a million New Jersey citizens and voters then the minor costs will be well justified.

Nothing about the collection of signatures by the citizens of New Jersey on such petitions would violate the U.S. Constitution. Quite to the contrary, such petitioning is political activity protected by the U.S. Constitution, as a public expression of their views under the First Amendment, and as an exercise of their right to petition their government for redress of grievances under that same Amendment. That is all that this case presents to this court now.

Senator Menendez now asks this Court to rush to shut down this constitutionally protected political activity solely to protect him from the political burden of having to address the concerns of the people. But a broad majority of the people of New Jersey, from Progressives and unionists, to fiscal conservatives and tax protestors, wisely provided for the recall provisions of New Jersey state law precisely so they could demand this attention from their representatives. Senator Menendez asks this Court to now rip out these provisions of the New Jersey Constitution and Uniform Recall Election Law expressly providing for such a recall, duly adopted by the people of New Jersey, and the legislature of this state, on the basis effectively of an imagined, constitutionally protected, freedom from criticism he believes he should enjoy. But the Constitution protects just the opposite.

If over a million citizens of New Jersey join with the Committee to duly ask for a recall election, and a majority of the citizens of New Jersey join with the Committee to vote for such a recall, and the Senator chooses to ignore the expressed will of the people, and the United States Senate does so as well, then the issue of whether the Senator may consequently be removed from office under the U.S. Constitution may be presented. We may then explore the implications of the Tenth and Seventeenth Amendments, and the silence of the Constitution on the issue otherwise, and the longstanding practice of the states providing for the procedures governing elections to federal offices, and the absence of any federal election law, and the practice of recall going back to colonial times.

But for now, the Senator is asking this Court to shut down political expression and participation that is actually protected by both the New Jersey state constitution and the federal Constitution.

## STATEMENT OF THE CASE

The New Jersey Constitution expressly states,

All political power is inherent in the people. . . . The people reserve unto themselves the power to recall, after at least one year of service, any elected official in this state or representing this state in the United States Congress. The Legislature shall enact laws to provide for such recall elections.

N.J. Const. Art. 1, Para. 2. This provision was added to the Constitution by public ballot on November 2, 1993. The Interpretive Statement on the ballot explaining the provision stated,

This Amendment to the Constitution permits the voters to remove elected officials, after at least one year of service, through the process of a recall election. . . . This applies to any elected official in this State and to the United States Senators and Congressmen elected from New Jersey. . . . The amendment also provides that the reasons for a recall election shall be a political question, so that the courts cannot set aside a recall on the grounds that the reasons for it are in some way inadequate.

At present, statutory provisions make certain elected municipal and county officials subject to removal by a recall election. However, constitutional rather than statutory provisions are necessary to provide for the recall election of the Governor, members of the legislature, U.S. Senators, and Congressmen. . . .

Petitioner Appendix at 19a. This statement made clear to voters that they were voting on whether recall should be extended to all elected officials in the state, including expressly United States Senators, such as Senator Menendez. The vote was overwhelmingly in favor, 76.2% to 23.8%, with over 1.3 million New Jersey citizens voting for the provision. Id. at 20a.

Pursuant to this Constitutional mandate, the Legislature enacted the Uniform Recall Election Law (UREL), N.J.S.A. 19:27A-1 et seq., on May 17, 1995. The UREL specifically provides,

Pursuant to Article I, paragraph 2b. of the New Jersey Constitution, the people of this state shall have the power to recall, after at least one year of service. . . . , any

United States Senator or Representative elected from this state or any State or local elected official in the manner provided herein.

N.J.S.A. 19:27A-2. The statute specifies the procedure for all recalls, including the recall of Senator Menendez. A Recall Committee must first prepare a Notice of Intention to Recall including specific required information about the proposed recall effort, and file it with the Secretary of State. The Secretary is then to review the filed Notice to determine if it includes the required information specified by the statute. If it does include that information, the statute then requires the Secretary to approve the Notice. N.J.S.A. 19:27A-7.

After such approval, the circulation of petitions is to begin, and the clock on such circulation begins to run. The New Jersey Constitution itself specifies that to obtain a recall election, the petition must collect the signatures “of at least 25% of the registered voters in the electoral district of the official sought to be recalled.” N.J. Const. Art. 1, Para. 2b.1. Since the electoral district for Senator Menendez is the entire state of New Jersey, that means the recall petition must collect the signatures of 1.3 million registered voters in the state. Moreover, the statute specifies that must be done within 320 days for an election to recall a U.S. Senator. N.J.S.A. 19:27A-1 et seq.

There is no doubt that the Committee qualified for a certified recall petition under these provisions of law. The Committee filed the requisite Notice complete with all required information on September 25, 2009. Pa1-2. The Secretary’s belated response, which did not come until January 11, 2010, did not dispute that the Committee’s Notice included all of the required information. Rather, the response purported to rule that the recall provisions of the New Jersey Constitution, and the New Jersey Uniform Recall Election Law, are unconstitutional under the U.S. Constitution. Pa11.

Consequently, whether the Committee qualified for a certified recall petition under the UREL was not at issue in this case. The Secretary of State did not even dispute that it so qualified, and on the record the Secretary clearly could not do so. Indeed, the court below ruled, “There is no substantive factual dispute.” Petitioner’s Appendix 15a.

On January 13, 2010, the Committee filed suit seeking injunctive relief to mandate certification of its petition under the UREL. On March 16, 2010, the Appellate Division ruled for the Committee, concluding,

[A]bsent clear precedent that compels such a declaration, we are loath to strike down a component of our State’s charter that fortifies the democratic role of our citizens. In short, our State Constitution, and the democratic process that produced it, deserves our utmost respect unless federal law clearly and definitively trumps it.

Petitioner’s Appendix 41a. Petitioner filed his Notice of Petition for Certification with this Court on April 5, 2010. This Court issued has now granted that Certification request.

## **ARGUMENT**

### **I. The Issue of Whether Recall of a U.S. Senator is Unconstitutional Is Not Currently Presented by this Litigation.**

Petitioner Senator Menendez argues that not just the Court below but the people of New Jersey and the New Jersey state legislature erred when they overwhelmingly adopted the provisions of the New Jersey Constitution and the UREL providing for recall of U.S. Senators, as these provisions are unconstitutional under the U.S. Constitution.

But that issue is not currently presented by this case. In bringing suit before the Court below, the Committee did not request an injunction mandating that the Secretary of State issue an order decertifying or removing Robert Menendez as a U.S. Senator from New Jersey. Rather, the Committee requested an injunction mandating that the Secretary of State comply with the New Jersey Constitution and the state’s duly enacted Uniform

Recall Election Law by approving the Notice of Intention filed by the Committee, as required by those provisions of law, which would allow the Committee to immediately begin the collection of petition signatures. The only question that has been presented by this litigation is whether state law provides for such an approval, which it indisputably does.

Nothing about the collection of signatures on such a petition by the citizens and voters of New Jersey would violate the U.S. Constitution. Quite to the contrary, such collection of signatures is political activity protected by the U.S. Constitution. The process of asking for signatures on a petition to recall Senator Menendez, and signing such a petition, is political expression by the citizens and voters of New Jersey. That expression is core political speech fully protected by the First Amendment.

Moreover, the process of publicly requesting such signatures, and signing such a public petition, is an exercise by the citizens and voters of New Jersey of their right to petition their government for redress of grievances, also fully protected under the First Amendment.

The constitutional issues Petitioner seeks to raise on appeal to this Court would not be presented by this case until the Committee had gathered the signatures of 1.3 million citizens and voters of New Jersey asking for a recall of Senator Menendez, a majority of New Jersey voters voted for such a recall in a recall election, and the Committee then sought a court order mandating the removal of Senator Menendez. Those constitutional issues may never arise because the Committee may not succeed in obtaining the required signatures, or a majority of New Jersey voters may not vote to recall Senator Menendez. Or if the Committee does obtain 1.3 million signatures from

the citizens and voters of New Jersey supporting such a recall election, and a majority of New Jersey voters do vote to recall Senator Menendez, the Senator may choose to resign in the face of such a powerful and dramatic political statement. Or if he does not resign, the Senate may choose to expel him, out of respect for the will of the people.

The law is well settled that the courts will not address constitutional questions unless necessary to resolve a particular case. United States v. Scurry, 193 N.J. 492, 500 n. 4 (2008)(courts “do not address constitutional questions when a narrower, non-constitutional result is available.”); Randolph Town Ctr., L.P. v. County of Morris, 186 N.J. 78, 80 (2006)(“[c]ourts should not reach a constitutional question unless its resolution is imperative to the disposition of litigation.”); O’Keefe v. Passaic Valley Water Com’n., 132 N.J. 234, 240 (1993)(“Courts should not reach constitutional questions unless necessary to the disposition of the litigation.”); Crescent Park Tenants Ass’n v. Realty Equities Corp., 58 N.J. 98 (1971); New Jersey Tpk. Auth. v. Parsons, 3 N.J. 235, 240 (1949)(courts do not render “recommendations” but rather “decide only concrete contested issues conclusively affecting adversary parties in interest.”); Donadio v. Cunningham, 58 N.J. 309 (1971); State v. Zucconi, 50 N.J. 361 ((1967); State v. Salerno, 27 N.J. 289 (1958); State v. Fair Lawn Serv. Ctr., 20 N.J. 468 (1956); Grobart v. Gobart, 5 N.J. 161 (1950); Independent Realty Co. v. Township of North Bergen, 376 N.J. Super. 295, 301 (App. Div. 2005)(“It is well settled that we will not render advisory opinions or function in the abstract.”).

In Hamdan v. Rumsfeld, 548 U.S. 557, 720 (2006), the U.S. Supreme Court was sowing in an already well plowed field when it wrote that courts will not decide claims that are “contingent [upon] future events that may not occur as anticipated, or indeed may

not occur at all.” (quoting Texas v. United States, 523 U.S. 296 (1998)). In another recent case, Scott v. Harris, 550 U.S. 372, 388 (2007), Justice Breyer in concurrence noted:

older, wiser judicial counsel ‘not to pass on questions of constitutionality... unless such adjudication is unavoidable.’ Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 89 L. Ed. 101 (1944); see Ashwander v. TVA, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936)(Brandeis, J., concurring)(“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).

*Accord* Burton v. United States, 196 U.S. 283 (1905)(United States Supreme Court will not decide constitutional issue unless absolutely necessary to disposition of case). See also, Renne v. Geary, 501 U.S. 312 (1991); Califano v. Saunders, 430 U.S. 99 (1977); John Paul Stevens, The Bill of Rights: A Century of Progress, 59 *U. Chi. L. Rev.* 13, 37 (1992)(doctrine of judicial restraint obliges federal judges to avoid “unduly expansive constitutional adjudication”); Ronald D. Rotunda & John Nowak, *Treatise on Constitutional Law*, 2.13(g) at 240 (2d. ed.1992)(citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

Ruling now upon the constitutional issues Petitioner raises would require this Court to overrule all of the above New Jersey precedents and authorities, and ignore the rest, because this case does not yet even present those constitutional issues, and can be resolved for now merely by certifying the Committee’s petition and waiting to see if those issues ever do indeed arise.

Senator Menendez claims that the constitutional issues he raises must be addressed now because the relief the Committee sought in this case and won from the court below threatens “real harm to the state, Senator Menendez, and the citizens of New

Jersey.” Petitioners Certification Brief at 2. But that relief simply involves the Secretary of State applying her official stamp on the Committee’s Notice of Intention, to “imprint on the face of that notice a statement of the official’s approval thereof,” as required by law. N.J.S.A 19:27A-7. The Committee would then bear the entire expense of attempting to collect the signatures of 1.3 million citizens and voters of New Jersey on its petitions. If the Committee fails to do so within the statutory time period, the state would bear no further expense.

But if the Committee succeeds, it would then have the company of 1.3 million citizens and voters of New Jersey requesting such an election. In such a case, the people of New Jersey, and its elected officials, have already determined that the expenditure of public funds for such an election would be appropriate when they duly adopted the provisions of the New Jersey Constitution and the Uniform Recall Election Law specifically providing for such a recall election. Those elected officials included 5 of New Jersey’s current Congressmen, who voted as members of the New Jersey state Assembly on March 29, 1993 in favor of the recall provisions of the New Jersey Constitution.<sup>1</sup> The people of New Jersey then overwhelmingly approved those recall provisions in a public vote in 1995, as discussed above.

What Senator Menendez really objects to is not the cost of the process. He is asking the Court to rush to shut down the constitutionally protected political expression involved in circulating and signing the petitions because it has the effect “[t]o force a Senator to defend himself,” as he himself puts it. Petitioner’s Certification Brief at 8. But enforcing such democratic accountability and responsiveness from their Congressional

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<sup>1</sup> The five Congressmen include Frelinghuysen, Garrett, Lance, LoBiondo, and Pascrell. Addendum to the Assembly Minutes of 1992, March 29, 1993.

representatives is precisely why such a broad majority of the citizens of New Jersey, from Progressives and unionists to fiscal conservatives and tax protestors, wisely provided for the recall provisions of New Jersey state law. Senator Menendez asks this Court to now rip out these provisions of the New Jersey Constitution and Uniform Recall Election Law expressly providing for such a recall, on the basis effectively of an imagined constitutionally protected freedom from criticism he believes he should enjoy. But the Constitution actually protects just the opposite.

Indeed, just 3 months ago, in Citizens United v. Federal Elections Commission, No. 08-205 (slip opinion, January 21, 2010), the U.S. Supreme Court struck down as unconstitutional a provision of law that effectively embodied Senator Menendez's claimed freedom from criticism. The McCain Feingold campaign finance law prohibited corporations and unions from using their funds to make independent expenditures for communications criticizing a candidate within 30 days of a primary election and 60 days of a general election. The Court struck down that provision, saying, "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." (Slip Op. at 23).

When the people of New Jersey duly adopted the provisions of the New Jersey Constitution expressly providing for the recall of U.S. Senators and Congressmen, and when the legislature of New Jersey duly adopted the provisions of the Uniform Recall Election Law expressly providing for such recall as well, they created a means for the citizens and voters of New Jersey to join together to make a political statement regarding the service of any particular Senator or Congressman. Anderson v. Celebreeze, 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.”).

In this litigation, the Committee has asked only for enforcement of its right to attempt to make such a political statement, which can by itself have powerful and compelling effects. It may be that the recall process created by the New Jersey Constitution and implementing statute may also have a powerful legal effect in mandating the removal of a recalled Senator or Congressman. The Court can decide that question when it has before it a case that presents that question. But even apart from that possible legal effect, what the people of New Jersey have done in their Constitution and implementing statute is create the opportunity for a powerful and compelling political statement, and the Committee has sought only enforcement of its right to pursue that duly enacted opportunity. This Court recognized the importance of such public participation in N.J. Democratic Party, Inc. v. Samson, 175 N.J. 178, 190 (2002) in holding that election laws “will be interpreted to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow the voters a choice on Election Day.” (citing Catania v. Haberle, 123 N.J. 438 (1990) allowing replacement on the ballot of Senator Torricelli 34 days before an election after the statutory time limit for such replacement had passed). This Court should similarly interpret the recall provisions of the New Jersey Constitution and UREL. *See also* Herbst Gaming, Inc. v. Heller, 141 P. 3d 1224 (Nev. 2006)(recognizing the benefit of allowing the people to vote on initiative even if later found unconstitutional, precluding pre-election review of the substantive provisions of the initiative); Hooper v. Hart, 56 F.R.D. 476 (W.D. Mich. 1972)(court

would not hear suit seeking declaratory judgment that U.S. Senators from Michigan were subject to recall under state law because the suit did not present a justiciable case or actual controversy).

Indeed, once a state creates by law a process for the political activity and expression of circulating and signing petitions for recall of an elected official, then the constitutional protections for such political activity and expression attach, and courts cannot intervene to shut down that political activity and expression. As the Supreme Court said just 3 months ago, “The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.” Citizens United, *supra* (Slip Op. at 24). The courts may later determine the full legal effect of that recall process. But only the people and the legislature can undo what they have done in providing for the process.

If a state wants to adopt a recall election process effectively providing the right and opportunity for citizens to make a political statement regarding their elected federal representatives, there is nothing in the U.S. Constitution that prevents it from doing so. A state is not limited to holding elections only on subjects approved by the federal government. Indeed, prior to ratification of the Seventeenth Amendment, the Progressive movement led enactment of state laws providing for state advisory elections to choose U.S. Senators, even though the Constitution at the time provided for selection of U.S. Senators by state legislatures. The state legislatures routinely abided by these advisory elections. In fact, when the Seventeenth Amendment was ratified, most U.S. Senators were already chosen by this advisory election process. Vikram David Amar, “The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures

in the Article V Constitutional Amendment Process?” 41 Wm. and Mary L. Rev. 1037, 1070 (2000).

Such a state policy on recall would wisely maintain democratic accountability continuously throughout the term of their elected federal officials. Experience may have shown the citizens and voters of a state that they have a compelling need to maintain such continuous democratic accountability.

**II. The Court Below Adopted the Proper Standard for Dealing with the Constitutional Issues Petitioner Seeks to Raise on Appeal at this Stage of the Litigation.**

The court below did not ignore the constitutional issues Petitioner seeks to raise on this appeal. The unanimous court adopted the proper standard for considering those issues at this point in the litigation, given the relief the Committee has sought, saying,

The critical question before us, therefore, is whether our State’s constitutional and statutory recall measures, as applied to a United States Senator, are so manifestly invalid under the Federal Constitution that we must depart from the norms of judicial restraint and compel that the Committee’s process in circulating a recall petition be halted.

Petitioner’s Certification Appendix at 32a. The court rightly concluded, “the recall measures approved by the citizens of New Jersey are not so clearly invalid under federal law as to require such a drastic, pre-emptive judicial declaration thwarting the will of the voters.” *Id.*

The court correctly noted, “the United States Constitution has no express provision precluding the recall of United States Senators or Representatives.” *Id.* at 34a. It also recognized, “we can find no case or precedent which addressed the issue before us or precludes recall under the Seventeenth Amendment.” *Id.* at 37a. The court also recognized the critical distinction between this case and U.S. Term Limits v. Thornton,

514 U.S. 779 (1995). The term limits at issue in that case infringed upon “the right of the people to vote for whom they wish.” 514 U.S. at 820. The case upheld the principle that “the people should choose whom they please to govern them.” Id. at 819. Justice Kennedy with the concurring fifth vote emphasized this reasoning, Id. at 844, but it was the basis of the four Justice plurality as well. Id. at 819, 820.

But recall results in just the opposite. It does not restrict “the right of the people to vote for whom they wish,” but, rather reinforces the principle in Term Limits that “the people should choose whom they please to govern them.” As the court below recognized in distinguishing Term Limits, “[The present] case deals with neither the qualifications clause nor with handicapping the electorate or its choice; even a recalled Senator could run for reelection.” Petitioner’s Certification Appendix at 38a.

This was the same principle upheld by this Court in Samson, *supra*. (The legislature intended that election laws “will be interpreted ‘to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow the voters a choice on Election Day.’” 175 N.J. at 190). The same principle was upheld as well in Powell v. McCormack, 395 U.S. 486 (1969), where the U.S. Supreme Court again proclaimed, “A fundamental principle of our representative democracy is, in Hamilton’s words, ‘that the people should choose whom they please to govern them.’” Id. at 547. This principle again upholds recall, as recall simply extends the power of the people to choose whom they please to govern them.

The court below also recognized, “we must also consider the fundamental significance of our State’s own constitutional charter, and the overwhelming majority of

voters who approved the recall measure in 1993.” Petitioner’s Certification Appendix at 39a-40a. The court below therefore concluded,

[A]bsent clear precedent that compels such a declaration, we are loathe to strike down a component of our state’s charter that fortifies the democratic role of our citizens. In short, our state Constitution, and the democratic process that produced it, deserves our utmost respect unless federal law clearly and definitively trumps it.

Id. at 40a-41a. Finally, the unanimous court below summarized its thorough and correct analysis in saying,

[W]e neither declare the recall provision in our State Constitution as applied to a United States Senator definitively valid or invalid. There is, and there will be, no necessity for our courts to resolve this difficult constitutional issue if the Committee’s petition drive fails to collect the necessary, approximately, 1,300,000 signatures. Pending that possible eventuality, we see no urgent reason to now decide the question of invalidity or validity with finality. All we need to decide, as we have done, is whether there is a sufficient basis for the Committee to proceed with its initiative and for the Secretary of State to perform the ministerial function. To go beyond that limited holding and ‘embrace unnecessary constitutional questions’ would depart from the ‘older, wiser counsel’ of judicial restraint.

Id. at 43a-44a. *See also*, Timothy Zick, The Consent of the Governed: Recall of United States Senators, 103 Dick. L. Rev. 567, 589 (1999)(“As the Constitution does not bar the people of the states the power to recall their federal legislators, they should be free to exercise that power.”).

Other states have recognized the validity of recall for members of Congress. Wisconsin, a birthplace of the Progressive movement that historically promoted recall, added a recall provision applying to congressional representatives to its state Constitution in 1926. That provision states,

**Recall of elective officers. Section 12.** The qualified electors of the state, of *any congressional*, judicial or legislative district or of any county may petition for the recall of any incumbent elective officer after the first year of the term for which the incumbent was elected, by filing a petition with the filing officer with whom

the nomination the nomination petition to the office in the primary is filed, demanding the recall of the incumbent.

Wisconsin Const., Art. XIII, Sec. 12 (emphasis added). The Attorney General of Wisconsin issued an opinion in 1979 upholding the constitutionality of this recall provision in regard to U.S. Senators. 68 Op. Atty. Gen. Wis. 140, 1979 Wisc. AG LEXIS 61. Relying on this provision, citizens initiated recalls against the two sitting U.S. Senators in 1997 with no legal denial or challenge claiming it was unconstitutional, but they failed to collect the required signatures from 25% of registered voters. Wisconsin GOP Congressman Backs Drive to Recall Senators, Washington Post A04 (Apr. 22, 1997). Overall, at least eleven states today maintain state recall provisions that apply to congressional representatives. Besides New Jersey and Wisconsin, these include Arizona, Colorado, Louisiana, Michigan, Montana, Nevada, North Dakota, Oregon and Washington.<sup>2</sup> <http://www.recallcongressnow.org> (viewed 5/7/10).

Support for recall of congressional representatives goes all the way back to colonial times. John Armor, *Is a State-Based Recall of a U.S. Senator Constitutional?*, American Thinker, [www.americanthinker.com](http://www.americanthinker.com), April 1, 2010 (“Recall was available for the voters of a colony to remove an official with whom they had become dissatisfied. It first appeared in New England in 1639.”). The concept of popular sovereignty, that the people hold the ultimate power, provides the basis for recall, with elected representatives subject to removal by the will of the people as they please. Such popular sovereignty first appeared on American shores in the Mayflower Compact of 1610, with the free

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<sup>2</sup> Petitioner Senator Menendez cites an unpublished case from Idaho as ruling that recall of a U.S. Senator is unconstitutional under the U.S. Constitution. Rankin v. Canarrusa, Civ. No. 39700 (D.C. Idaho, Sept. 28, 1967). But Idaho state law provided for recall only of state officials, not Congressional representatives, as that court found. Petitioner’s Certification Appendix 49a-50a.

citizens of the *Mayflower* agreeing that they would “enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient....” Id. The most famous and bold statement of such popular sovereignty appeared in our Declaration of Independence,

That to secure these [God-given] rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive to these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

Id. If the people hold the right to alter or abolish their entire government, and institute a new one, then surely they would have the power to remove and replace a discredited representative or official.

The first President of the United States, George Washington, recognized recall as well, writing in a letter dated Nov. 10, 1787, just after the Constitutional Convention over which he presided,

The power under the Constitution will always be in the People. It is entrusted for certain defined purposes...and whenever it is executed contrary to their Interest, or not agreeable to their wishes, ***their Servants can, and undoubtedly will be, recalled.***

Letter from George Washington to Bushrod Washington, Nov. 10, 1787, *The Writings of George Washington from the Original Manuscript Sources 1745-1799*, Section 29:311 (Ed. by John C. Fitzpatrick)(emphasis added).

The Tenth Amendment to the Constitution provides, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Since recall of elected officials was among the powers of the colonies and the states before the Tenth Amendment was adopted, and this

power was not delegated to the United States by the Constitution, nor prohibited by it to the States, the power of recall is reserved by the Tenth Amendment to the states, and to the people.

In addition, both the text of the Constitution itself, and the Seventeenth Amendment, leave to the states the details of election law, rather than providing for a federal election law. The states consequently define who can vote and how elections are conducted. That is why the states today have the constitutional authority to require photo IDs in order to vote, as well as the authority to bar convicted felons from voting. It is also why states can require a candidate to face the voters multiple times to be elected to the Senate, depending on how primaries are conducted, and whether run-offs are required. States providing for Congressional recall would merely involve another exercise of these powers.

For all of these reasons, it is clear that under the standard properly adopted by the court below concerning the constitutional issues for this point in the litigation, this Court should not address and rule on the constitutional issues raised by Petitioner at this time. The recall provisions of the New Jersey Constitution and UREL expressly applying to Congressional representatives are not so manifestly invalid under the federal constitution that the political expression of the Committee and the citizens of New Jersey involved in circulating and signing recall petitions must be halted now, when the constitutional issues are not even presented yet and may never be.

**CONCLUSION**

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should affirm the ruling of the Appellate Division below.

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