

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
Docket No.: A-2254-09T1

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COMMITTEE TO RECALL ROBERT MENENDEZ,  Plaintiff/Appellant	) CIVIL ACTION ) ) ON APPEAL FROM: Final Agency ) Action by the Secretary of State, ) Department of State, ) State of New Jersey
v.	)
NINA WELLS, SECRETARY OF STATE, ET AL.  Defendants/Respondent.	) SAT BELOW: Hon. Nina Mitchell Wells, ) Esq. and Robert F. Giles, Director ) Division of Elections, Director of the ) Division of Purchase and Property ) )

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BRIEF OF *AMICUS CURIAE*  
THE AMERICAN CIVIL RIGHTS UNION  
IN SUPPORT OF APPELLANT  
COMMITTEE TO RECALL ROBERT MENENDEZ

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**TABLE OF CONTENTS**

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

INTEREST OF THE AMICUS CURAIE.....1

PRELIMINARY STATEMENT.....2

LEGAL ARGUMENT.....4

**POINT I**

**NEW JERSEY STATE LAW EXPRESSLY PROVIDES FOR  
THE RIGHT TO A CERTIFIED RECALL PETITION AND  
APPELLANT HAS CLEARLY QUALIFIED FOR THAT RIGHT.....4**

**POINT II**

**THE SECRETARY OF STATE HAS NO DISCRETION  
UNDER LAW REGARDING APPROVAL OF APPELLANT’S  
NOTICE OF INTENT TO RECALL, NOR ANY AUTHORITY  
TO RULE ON THE CONSTITUTIONALITY OF THE NEW  
JERSEY CONSTITUTION OR STATUTES.....6**

**POINT III**

**THE ISSUE OF WHETHER THE RECALL PROVISIONS OF THE  
NEW JERSEY CONSTITUTION AND STATUTES ARE  
CONSTITUTIONAL IS NOT PRESENTLY BEFORE THIS COURT....8**

**POINT IV**

**APPELLANT IS ENTITLED TO THE REQUESTED INJUNCTION....14**

CONCLUSION.....15

**TABLE OF AUTHORITIES**

**CASES**

Anderson v. Celebreeze, 460 U.S. 780, 788 (1983).....10

Boos v. Barry, 485 U.S. 312 (1988).....13

Borough of Glassboro v. Byrne, 141 N.J. Super 19 (App. Div.),  
certif. denied, 71 N.J. 518 (1976).....7

Buckley v. Valeo, 424 U.S. 1 (1976).....13

Chamber of Commerce v. State of New Jersey, 89 N.J. 131 (1982).....7

Citizens United v. Federal Elections Commission,  
No. 08-205 (slip opinion, January 21, 2010).....11,12,13

Civil Serv. Comm’n v. Senate of N.J., 165 N.J. Super. 144 (1970)  
certif. denied, 81 N.J. 266 (1979).....7

Crescent Park Tenants Ass’n v. Realty Equities Corp., 58 N.J. 98 (1971).....10

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986).....13

FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985).....13

FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007).....13

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).....13

Hooper v. Hart, 56 FRD 476 (W.D. Mich. 1972).....10

Illinois Bd. of Election v. Socialist Workers Party, 440 U.S. 172, 186 (1979).....10

Independent Realty Co. v. Township of North Bergen,  
376 N.J. Super. 295, 301 (App. Div. 2005).....10

In re Advisory Committee on Professional Ethics Opinion 705,  
192 N.J. 46 (2007).....8

Massett Bldg. Co. v. Bennett, 4 N.J. 53 (1950).....8

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995).....13

New Jersey Mortgage Fin. Agency v. McCrane, 56 N.J. 414 (1970).....7

<u>New Jersey Tpk. Auth. v. Parsons</u> , 3 N.J. 235, 240 (1949).....	10
<u>O’Keefe v. Passaic Valley Water Com’n.</u> , 132 N.J. 234, 240 (1993).....	9
<u>State v. De Stasio</u> , 49 N.J. 247 (1967).....	8
<u>Vreeland v. Byrne</u> , 72 N.J. 292 (1977).....	7
<u>Williams v. Rhodes</u> , 393 U.S. 23 (1968).....	13
 <u>OTHER AUTHORITIES</u>	
N.J. Const. Art. 1, Para. 2b.1.....	5
N.J.S.A. 19:27A-7.....	5,7,12
Uniform Recall Election Law, N.J.S.A. 19:27A-1 et seq.....	5,6
68 <u>Opinions of the Attorney General</u> 140, 146, 148 (Wisconsin 1979).....	7

## **INTEREST OF THE AMICUS CURIAE**

The American Civil Rights Union (ACRU) is a non-partisan, non-profit 501(c)(3), legal/educational policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; Pepperdine Law School Dean, Kenneth W. Starr; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management, J. Clayburn LaForce.

This case is of interest to the ACRU because we seek to ensure that the legal and constitutional rights of the citizens of New Jersey to freedom of political expression, participatory democracy, and democratic accountability are fully recognized and protected, regardless of political correctness.

## **PRELIMINARY STATEMENT**

The issue of whether the provisions of New Jersey state law providing for the recall of Senator Robert Menendez are constitutional under the U.S. Constitution is not presently before this Court. The Appellant is not seeking an Order from the Secretary of State 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 Appellant asks the Court 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 now before this Court is whether the law provides for such an approval.

Nothing about the collection of signatures by the citizens of New Jersey on such a petition would violate the U.S. Constitution. Quite to the contrary, such collection of signatures is political activity protected by the U.S. Constitution, as a public expression of their views regarding the service of Senator Menendez under the First Amendment, and as an exercise of their right to petition their government for redress of grievances under that same Amendment.

The issue of whether the provisions of New Jersey state law providing for the recall of Senator Menendez are valid under the U.S. Constitution would not be raised until the Appellant 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 Appellant 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.

There is no question in this case that the Appellant is entitled to the requested approval of its Notice of Intention under New Jersey state law, as it has clearly met all the requirements of the law for such an approval. The Secretary of State, who is sworn to uphold the New Jersey state Constitution expressly providing for such recall, has no discretion under the law to deny such an approval.

Nevertheless, the Respondents ask this Court to rip out the provisions of the New Jersey state Constitution expressly providing for such a recall, duly adopted by the people of New Jersey, and the provisions of the Uniform Recall Election Law expressly providing for such a recall, duly adopted by the legislature of New Jersey. They consequently ask this Court to deny the citizens of New Jersey the opportunity to make the powerful and dramatic political statement Appellant seeks. They effectively claim that Senator Menendez somehow enjoys a constitutionally protected freedom from criticism regarding his service as expressed by such a political statement. But to the contrary, it is the people of New Jersey who enjoy the constitutional protections under both the U.S. Constitution and the New Jersey state Constitution to make such a political statement.

The idea for such a statement is not solely the enterprise of Appellant. The people of New Jersey expressly reserved the right to make such a statement in the state Constitution, and the legislature expressly provided a procedure for them to do so. It is not the province of this Court to now deny the people the duly enacted right and opportunity to make that statement. If over a million citizens of New Jersey join with Appellant to duly ask for a recall election, and a majority of the citizens of New Jersey join with Appellant to vote for such a recall, and the Senator chooses to ignore the expressed will of the people, and the United States Senate does 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.

But until that time arrives, this Court should not deny the citizens of this state the right to express the will of the people, and make the political statement they choose, for which they have duly provided under law. Exactly contrary to the claim of Respondents, the U.S. Constitution protects rather than prohibits their freedom to do so.

## **LEGAL ARGUMENT**

### **POINT I**

#### **NEW JERSEY STATE LAW EXPRESSLY PROVIDES FOR THE RIGHT TO A CERTIFIED RECALL PETITION AND APPELLANT HAS CLEARLY QUALIFIED FOR THAT RIGHT**

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The New Jersey Constitution expressly states,

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. 2b.1

Pursuant to this Constitutional mandate, the Legislature has enacted the Uniform Recall Election Law, N.J.S.A. 19:27A-1 et seq. This statute specifies the procedure for any recall, 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. The statute states,

Upon receiving a notice of intention, the recall election official shall review it for compliance with the provisions of Section 6 of this act. If the notice of intention is found to be in compliance, the recall election official shall imprint on the face of that notice a statement of the official's approval thereof....If the notice of intention is found not to be in compliance, the recall election official shall, within the period of three business days, return the notice, together with a written statement indicating the reasons for that finding, to the recall committee, which shall have the opportunity to file a corrected notice of intention.

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 Appellant has qualified for a certified recall petition under these provisions of law. Appellant filed the requisite Notice complete with all required information on September 25, 2009. PA001-002. The Secretary's belated response, which did not come until January 11, 2010, did not dispute that the Appellant'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. PA011.

Consequently, whether Appellant has qualified for a certified recall petition under the provisions of law discussed above is not at issue in this case. The Respondent Secretary of State has not even disputed that it is so qualified, and on the record it clearly cannot do so. Under law, therefore, the Appellant is clearly entitled to the requested relief of an "injunction compelling the Respondents to approve the Committee's Notice of Intention (to allow them to immediately begin collection of signatures....)." PA013.

## **POINT II**

### **THE SECRETARY OF STATE HAS NO DISCRETION UNDER LAW REGARDING APPROVAL OF APPELLANT'S NOTICE OF INTENT TO RECALL, NOR ANY AUTHORITY TO RULE ON THE CONSTITUTIONALITY OF THE NEW JERSEY CONSTITUTION OR STATUTES**

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The New Jersey Uniform Recall Election Law specifically states that upon receiving a Notice of Intention, the Secretary of State "*shall* review it for compliance with Section 6 of this act," and "If the notice of intention is found to be in compliance, the recall election official *shall* imprint on the face of that notice a statement of the

official's approval thereof," and "*shall*, within three business days of receiving the notice, return a certified copy of the approved notice to the recall committee..." N.J.S.A.

19:27A-7. (emphasis added).

The Secretary of State consequently has no discretion regarding approval of Appellant's Notice of Intention. If the Notice includes the information the law requires, the law commands the Secretary to approve the notice, and return a certified copy of that approval "within three business days." The only alternative is "If the notice is found not to be in compliance" then the Secretary "*shall*, within the period of three business days, return the notice, together with a written statement indicating the reasons for that finding, to the recall committee, which shall have the opportunity to file a corrected notice of intention." N.J.S.A. 19:27A-7. (emphasis added). The Secretary's responsibility is purely clerical: to determine if the Notice includes the information required under law. That is why the Secretary is commanded to respond within 3 days.

The Secretary of State also has no authority to rule on the constitutionality of any provision of the New Jersey Constitution, or duly enacted state statutes. That is a power reserved to the Judicial Branch. Vreeland v. Byrne, 72 N.J. 292 (1977); Chamber of Commerce v. State of New Jersey, 89 N.J. 131 (1982); New Jersey Mortgage Fin. Agency v. McCrane, 56 N.J. 414 (1970); Civil Serv. Comm'n v. Senate of N.J., 165 N.J. Super. 144 (1970) certif. denied, 81 N.J. 266 (1979); Borough of Glassboro v. Byrne, 141 N.J. Super 19 (App. Div.), certif. denied, 71 N.J. 518 (1976). See also 68 Opinions of the Attorney General 140, 146, 148 (Wisconsin 1979). The Secretary's purported ruling on the constitutionality of the recall provisions of the New Jersey Constitution, which the Secretary is sworn to uphold, and of the Uniform Recall Election Law, is a

violation of the Separation of Powers, and has no force or effect. In re Advisory Committee on Professional Ethics Opinion 705, 192 N.J. 46 (2007); State v. De Stasio, 49 N.J. 247 (1967); Masset Bldg. Co. v. Bennett, 4 N.J. 53 (1950).

### POINT III

#### **THE ISSUE OF WHETHER THE RECALL PROVISIONS OF THE NEW JERSEY CONSTITUTION AND STATUTES ARE CONSTITUTIONAL IS NOT PRESENTLY BEFORE THIS COURT**

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The Respondents argue that the provisions of the New Jersey Constitution and of the state's Uniform Recall Election Law granting the voters of New Jersey the right to recall Senator Menendez are unconstitutional under the U.S. Constitution. But that issue is not presently before this Court.

Appellant is not requesting an injunction from this Court mandating that the Secretary of State issue an order decertifying or removing Robert Menendez as a U.S. Senator from New Jersey. Rather, Appellant is requesting 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 Appellant, as required by those provisions of law, which would allow Appellant to immediately begin the collection of petition signatures. The only question now before this Court is whether those provisions of law require such an approval, which they indisputably do as discussed above, entitling Appellant to its requested relief.

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 a public expression by the citizens and voters of New Jersey of their views regarding the service of Senator Menendez. That public 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 Respondents raise would not be before the Court until the Appellant 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 Appellant then asked the Court for an Order mandating the removal of Senator Menendez. Those constitutional issues 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 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. 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.”); See also 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.”); 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.”); Hooper v. Hart, 56 FRD 476 (W.D. Mich. 1972). Since the constitutional issues raised by Respondents are not even before the Court in the present case, given the relief sought by Appellant, they cannot be necessary to resolve the case, and, therefore, cannot now be addressed.

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.”).

Appellant is now before this Court asking only that it enforce 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 Appellant is before the Court now asking only that the Court enforce its right to pursue that duly enacted opportunity.

Respondents ask this Court to rip out those duly adopted provisions of the New Jersey Constitution and the New Jersey Uniform Recall Election Law, and deny the citizens and voters of New Jersey the duly enacted right to make such a political statement. Effectively, they argue that Senator Menendez somehow enjoys a constitutionally protected freedom from criticism regarding his service that would be expressed by such a political statement. But to the contrary, it is the people of New Jersey who enjoy the constitutional protections under both the U.S. Constitution and the New Jersey state Constitution to make such a political statement.

Indeed, just last month, 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).

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. Such a state policy 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. Again, the U.S. Constitution would protect, rather than prohibit, the right and opportunity to make such political statements if a state chooses to provide for them. As the Supreme Court said just last month, “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).

Senator Menendez complains that what Appellant requests would impose “a substantial burden and expense to the state” which he doesn’t think is worthwhile. Brief of Senator Menendez at 8. But the relief the Appellant is requesting today before this Court would simply involve the Secretary of State applying her official stamp on the Appellant’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. Appellant 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 Appellant fails to do so within the statutory time period, the state would bear no further expense.

But if Appellant 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 approved those recall provisions in a public vote in 1995.

What Senator Menendez objects to is not really the cost, but the content of the message the voters of New Jersey might send in such a recall election. But a content based denial of such core political speech is the most condemned of all First Amendment violations. *E.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995); Boos v. Barry, 485 U.S. 312 (1988); FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007); FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985); Williams v. Rhodes, 393 U.S. 23 (1968); Citizens United, *supra*, (Slip Op. at 24) (“Premised on mistrust of government power, the First Amendment stands against attempts to disfavor certain subjects of viewpoints.”).

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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.

## POINT IV

### APPELLANT IS ENTITLED TO THE REQUESTED INJUNCTION

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As discussed above, Appellant is clearly entitled to approval of the Notice of Intention it submitted to the Secretary of State. That Notice satisfies all the legal requirements, and the Secretary has no discretion but to approve it under the law. Therefore, the Court should grant the preliminary injunction it has requested mandating that the Secretary provide such approval.

Respondents confuse the issue regarding the probability of success on the merits Appellant is required to show to obtain the injunction. That is not the probability of success in showing that the provisions of the New Jersey Constitution and Uniform Recall Election Law providing for recall of federal representatives are constitutional under the U.S. Constitution, an issue that is not even before the Court as discussed above. The issue is the probability of success in later obtaining a permanent injunction providing for what is requested in the preliminary injunction, a court order that the Secretary of State approve Appellant's Notice of Intention as required by applicable state law.

Appellant has not only shown sufficient probability of success on the merits in obtaining that permanent injunction. Appellant has made a sufficient showing to obtain that permanent injunction now. Consequently, *Amicus Curiae* American Civil Rights Union respectfully submits that the Court can and should grant that permanent injunction now.

## CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should grant Appellant's requested injunction mandating that the Secretary of State approve the Notice of Intention it has filed.

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