



## MEMORANDUM

DATE: April 24, 2019

TO: Organize Sacramento & The Move the Vote Coalition  
1714 Broadway  
Sacramento, CA 95818

FROM: Andres Ramos

RE: Election of Countywide Officers in Presidential Election Years

This memo examines how the election of countywide elected officials in Sacramento County (i.e., Assessor, District Attorney, and Sheriff) can be moved to presidential election years (e.g., 2012, 2016, 2020).

### EXECUTIVE SUMMARY

Sacramento County is a charter county that provides that its countywide elected officers of Assessor, District Attorney, and Sheriff are elected at the time specified by state law. As a result, those countywide officers are elected during gubernatorial election years. Moving their election to presidential years would result in substantially more voter empowerment and participation, of approximately 13.54% in the primary election and 15.78% in the general election, compared to gubernatorial election years. (See tables 1 & 2.)

Moving the election of those countywide officers to the presidential election cycle can be done one of two ways—either by amending the county charter, or by changing state law. Amending the county charter requires placing a proposed charter amendment on the ballot and getting majority voter approval. Changing state law requires the enactment of either special or general legislation. This memo has identified the following alternatives:

- Alternative 1: Move to presidential election years by amending the Sacramento County Charter, by:
  - Placing a proposed charter amendment on the ballot by action of the Board of Supervisors.
  - Placing a proposed charter amendment on the ballot by gathering 51,471 signatures of registered voters.
- Alternative 2: Move to presidential election years by changing state law, by:
  - Seeking special legislation that would move the election year of countywide officers for Sacramento County only.

- Seeking generally-applicable legislation that would require general law counties elections in presidential years, or instead empower counties to opt-in to moving the election of their countywide officers to presidential election years by Board of Supervisors’ action (no public vote).

Additionally, proponents of moving the election year would need to identify how to transition to presidential election years. There are three options: 1) by electing officers for a 2-year short term in 2022 to transition to the 2024 presidential cycle, 2) by extending the current term of countywide officers by 2 years (for a total 6-year term) until 2024, or 3) by reducing the current term of county officers by 2 years and transitioning to the 2020 presidential cycle. The first option (2-year short term) is the most feasible, and the last (shortening the current term) is the most legally vulnerable.

**WHY MOVE THE ELECTION YEAR?**

The primary benefit of moving the election of countywide officers to presidential election years is that there is a significantly greater amount of voter participation during presidential election cycles.

**Voter Turnout is Significantly Higher During Presidential Election Years**

An analysis of voter participation rates in Sacramento County over the past twenty years (equivalent to ten election years) demonstrates that, on average, voter turnout is 13.58% higher during a primary election held during a presidential election year compared to a primary election held during a gubernatorial election year. Similarly, voter turnout is, on average, 15.78% higher during a general election held during a presidential election year compared to a general election held during a gubernatorial election year. *See* Tables 1 and 2.

According to the most recent report of registration, the total number of registered voters in Sacramento County is approximately 784,086.<sup>1</sup> That then suggests that, in raw voter numbers, there are on average 106,478 more voters voting in a presidential primary election, and on average 123,728 more voters voting in a presidential general election.

Table 1. Voter Turnout in Sacramento County, 2000–2018.

<b>ELECTION CYCLE</b>	<b>VOTER TURNOUT</b>
2018 General	68.23%
2018 Primary	41.94%
<b>2016 General</b>	<b>74.49%</b>
<b>2016 Primary</b>	<b>47.54%</b>
2014 General	48.39%
2014 Primary	29.61%
<b>2012 General</b>	<b>74.70%</b>
<b>2012 Primary</b>	<b>35.62%</b>
2010 General	63.12%

<sup>1</sup> See “Voter Registration by SOS District,” Last Updated 4/23/19, Sacramento County Registrar of Voters.

<sup>2</sup> There were two primaries in 2008, a special February presidential primary (“2008 Pres. Primary”), and a

2010 Primary	37.45%
<b>2008 General</b>	<b>79.85%</b>
<b>2008 Primary</b>	<b>29.88%</b>
<b>2008 Pres. Primary<sup>2</sup></b>	<b>58.39%</b>
2006 General	58.96%
2006 Primary	34.59%
<b>2004 General</b>	<b>74.08%</b>
<b>2004 Primary</b>	<b>49.64%</b>
2002 General	57.36%
2002 Primary	38.66%
<b>2000 General</b>	<b>71.83%</b>
<b>2000 Primary</b>	<b>58.75%</b>

Table 2. Average Voter Turnout by Election Cycle, 2000–2018.

ELECTION CYCLE	AVERAGE TURNOUT	DIFFERENCE
<b>Presidential General</b>	<b>74.99%</b>	<b>+15.78%</b>
Gubernatorial General	59.21%	
<b>Presidential Primary</b>	<b>49.99%<sup>3</sup></b>	<b>+13.54%</b>
Gubernatorial Primary	36.45%	

### More Voter Participation Ensures a More Representative Outcome

A voter turnout difference of roughly 14% or 16% between gubernatorial and presidential election years can change the outcome of a close election. That can cast doubt on whether closely decided election contest held during a low-turnout election is truly representative of the electorate’s preferences. In the last two contested races for Sacramento County Sheriff, the election was decided by less than 1.5% of the vote.

In June 2018, Sheriff Scott Jones was re-elected with 51.30% of the vote, a mere 3,705 votes above the majority threshold he needed to avoid a runoff election in November.<sup>4</sup> Had that election been held in June 2016, there would have been approximately 6% greater voter turnout, or roughly 44,000 more voters voting, which would have been more representative and could have resulted in a different election outcome.

Likewise, in November 2010, then-candidate Scott Jones defeated his opponent with 50.36% of the vote—a margin of 3,660 votes more than his opponent, and only 1,283 votes above the majority threshold. Had that election been held during either the 2008 or 2012 general elections, there would have been from 10% to 15% more voter turnout, or

<sup>2</sup> There were two primaries in 2008, a special February presidential primary (“2008 Pres. Primary”), and a regular June direct primary (“2008 Primary”) at which all other contests were held.

<sup>3</sup> The February 2008 presidential primary is used instead of the June 2008 direct primary in calculating the average voter turnout for presidential primaries because voter turnout during the June 2008 direct primary is unrepresentative of a presidential primary since it did not include the presidential primary contest.

<sup>4</sup> Voter turnout in November 2018 was 26.29% higher than in June 2018. That alone raises questions about whether the results in June 2018 were truly representative, without even considering the greater voter turnout differential had the election been during a presidential election year. However, the issue of whether contests held during a primary election are sufficiently representative is beyond the scope of this memo.

between 75,000 to 110,000 more voters participating, which likewise could have produced a different, and potentially more representative, outcome.

### **Sacramento County’s District Attorney Could be a Candidate for Attorney General**

Moving the election of countywide officers to presidential election years would make it easier for the Sacramento County District Attorney to be contender for California Attorney General. Because the district attorney must run for re-election during gubernatorial election years when the office of California Attorney General is also on the ballot, a district attorney would have to decline to run for re-election in order to run for higher office.

Notably, the last time the office of California Attorney General was up for election without an incumbent, the two main contenders and major party nominees,<sup>5</sup> were the district attorneys of San Francisco and Los Angeles counties. In other words, the main contenders were the only two district attorneys in California that were *not* elected in gubernatorial election years, and could therefore run for California Attorney General without losing their office of district attorney.

### **BACKGROUND**

#### **California Constitution Requires Every County to Elect an Assessor, District Attorney, and Sheriff, but is Silent as to When They Must be Elected**

The California Constitution requires that, at a minimum, the following three county officers be elected in every county: Assessor, District Attorney, and Sheriff.<sup>6</sup> But, the state constitution is silent as to when countywide officers are elected and how long their term lasts. That gap is filled by state law, which specifies that countywide officers are elected in gubernatorial election years (e.g., 2014, 2018, 2022).<sup>7</sup>

#### **Timing of When Countywide Officers are Elected is Determined Either by State Law or by the County Charter**

California counties are either general law counties or charter counties. General law counties operate under the default rules for the governance of counties provided for in the California Government Code.<sup>8</sup> Charter counties are governed by their county charter, which operates as a sort of ‘county constitution,’ and which can deviate from the default governance rules for counties specified in the Government Code. Currently, 14 of California’s 58 counties, including Sacramento County, are charter counties.<sup>9</sup>

Since state law provides that countywide officers are elected in gubernatorial election years, general law counties cannot deviate from that election timeline. The California Constitution requires charter counties to specify when their countywide officers will be

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<sup>5</sup> This election occurred in 2010, the last election prior to the implementation of the top-two primary.

<sup>6</sup> Cal. Const., Art. XI, §1(a).

<sup>7</sup> Cal. Gov. Code §24200.

<sup>8</sup> Cal. Gov. Code §23000 et seq.

<sup>9</sup> California’s charter counties are: Alameda, Butte, El Dorado, Fresno, Los Angeles, Orange, Placer, Sacramento, San Bernardino, San Diego, San Francisco, San Mateo, Santa Clara, and Tehama.

elected.<sup>10</sup> Accordingly, charter counties can provide for a different time for electing their countywide officers in their county charter. Still, almost all charter counties elect their countywide officers during gubernatorial election years. The only two that do not do so are Los Angeles and San Francisco counties.<sup>11</sup>

## **OPTIONS FOR SACRAMENTO COUNTY**

### **Sacramento County Charter Provides that Countywide Officers are Elected at the Time Provided for by State Law**

Though Sacramento County is a charter county, the charter does not specify when countywide officers are elected. Rather, the county charter incorporates state law by stating that “elective county [...] officers shall be nominated and elected at the time and in the manner and for the terms now or hereafter provided by general law, for the nomination and election of such officers.”<sup>12</sup> As a result, Sacramento County’s Assessor, District Attorney, and Sheriff are elected in gubernatorial election years because that is the default provided for in the Government Code.<sup>13</sup>

### **Sacramento County has Two Options for Making the Change: By Amending the County Charter, or By Changing State Law**

As a result of incorporating state law into its county charter on the issue of determining when countywide officers are elected, Sacramento County has two ways to change when they are elected. The first is by amending the county charter. The second is by changing state law.

## **BY AMENDING THE COUNTY CHARTER**

The Sacramento County Charter can be amended to provide that countywide officers are elected in presidential election years, just as Los Angeles County has done for its district attorney. The California Constitution explicitly allows and requires that charter counties provide for when their countywide officers are elected in their county charter.<sup>14</sup>

### **County Charter Amendment May be Placed on Ballot by Board of Supervisors or Initiative Petition, and Requires Majority Vote Approval**

A county charter amendment requires a majority vote approval by voters at a countywide election.<sup>15</sup> There are two means by which a charter amendment can be placed on the ballot: by ordinance or by initiative petition. The Sacramento County Board of

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<sup>10</sup> Cal. Const., Art. XI, §4(c).

<sup>11</sup> The only two charter counties that elect any countywide officers during a non-gubernatorial election year are Los Angeles and San Francisco counties. Los Angeles County elects its district attorney in presidential election years (but not the Assessor or Sheriff), and San Francisco elects five of its seven countywide officers in the odd-numbered years that follow gubernatorial election years. Both counties specify the election years of their countywide officers in their county charter. *See* Los Angeles County Charter, Art. IV, §13, San Francisco City and County Charter, Art. 13, §13.101.

<sup>12</sup> Sacramento County Charter, Art. XVII, §72.

<sup>13</sup> Cal. Gov. Code §24200.

<sup>14</sup> Cal. Const., Art. XI, §4(c).

<sup>15</sup> Cal. Elec. Code § 9102, Cal. Gov. Code § 23723.

Supervisors can place a county charter amendment on the ballot by ordinance.<sup>16</sup> Alternatively, voters can place a county charter amendment on the ballot by initiative petition.<sup>17</sup> Doing so requires gathering signatures equal to 10% of the total number of votes cast for all candidates for Governor at the last gubernatorial election.<sup>18</sup> In other words, 51,471 signatures would be required.<sup>19</sup>

Amending the county charter presents several potential challenges. For starters, qualifying an initiative charter amendment would likely require a substantial amount of financial resources to collect signatures. More significantly, whether placed on the ballot by initiative petition or Board of Supervisors' action, contesting a countywide ballot measure would require significant financial resources, and there is the possibility that voters may reject the measure. The uncertainties that accompany pursuing a charter amendment suggest that changing state law might be more preferable, though that route presents its own unique challenges.

### **BY CHANGING STATE LAW**

Since the Sacramento County Charter states that countywide officers are elected at the time "provided by general law," it follows that state law can be changed to either mandate or allow the timing of countywide officer elections to be moved.

There are two ways to make the change by state law. First, the state could enact special legislation that specifically provides that Sacramento County's countywide officers are to be elected in presidential election years. However, this raises the issue of the constitutional prohibition on special legislation and the issue of how to interpret the Sacramento County Charter's incorporation of state law. No such special legislation exists for any other county. Or second, the state could enact legislation of general application (applicable to general law counties, and therefore also charter counties that incorporate general law), such as moving all general law counties to presidential election years or empowering a county's board of supervisors to move the election date of their countywide officers by ordinance without voter approval.

### **Incorporation of State Law into a County Charter**

California courts have been clear that the incorporation of state law into a county charter is permissible. The courts have recognized that when a county charter incorporates state law, the county's voters have determined that the Legislature will determine their county's rules for governance.<sup>20</sup> Accordingly, when Sacramento County voters adopted §72 of the county charter, which provides that countywide officers are elected at the time provided by general law, they did so with the knowledge that the Legislature could at any time change the timing of the election of countywide officers.

### **Special Legislation**

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<sup>16</sup> Cal. Gov. Code § 23720.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> A total of 514,706 votes were cast for all candidates for Governor in Sacramento County in the November 2018 general election. See "Statement of the Vote, November 6, 2018," November 2018, Sacramento County Registrar of Voters.

<sup>20</sup> *People ex rel. Kerr v. County of Orange*, 106 Cal.App.4th 914, 919 (2003).

The simplest way to make the move by state law would be for the Legislature to enact special legislation specifying that Sacramento County’s countywide officers will henceforth be elected in presidential election years. This raises two issues—whether it would be constitutional to do so, and whether the county charter by its own terms allows special legislation on this subject.

The California Constitution prohibits the Legislature from enacting a special statute “in any case if a general statute can be made applicable.”<sup>21</sup> It could be argued that legislation specifically providing that Sacramento County’s countywide officers are elected in presidential election years would be unconstitutional special legislation. However, the California courts have established that creating legislation that is specific to a particular county or city does not constitute special legislation prohibited by the constitution.<sup>22</sup>

The county charter states that countywide officers are elected at the time “provided by general law.” An initial reading suggests that those words refer broadly to state law applicable to counties in the Government Code, and would include any special legislation included there. However, a more strict reading could suggest that the county charter is referring only to state law of general application (i.e., state law applicable to all counties), which would exclude special legislation laws that are not of general application. It is unclear how a court would interpret the county charter’s words and whether special legislation would be upheld.

### **Generally Applicable Legislation**

The issues raised by enacting special legislation can be avoided if the Legislature were to enact legislation applicable to all general law counties (and implicitly also charter counties that incorporate the general law on matters relating to the election of their countywide officers). The Legislature could simply change the default timing of election for countywide officers in the Government Code by mandating that general law counties must elect their countywide officers during presidential election years. But broadening the scope of application beyond Sacramento County would likely also broaden the opposition by including counties that have no interest in changing when their countywide officers are elected.

To avoid a one-size-fits-all solution, the Legislature could enact generally-applicable legislation that would empower a general law county’s Board of Supervisors to opt-in to moving the election of their countywide officers to presidential election years by ordinance without voter approval. Again, this would likewise empower charter counties like Sacramento County that incorporate the general law to opt-in to making the change by ordinance. This approach would likely provoke less opposition and have more political appeal because it favors local control.

### **IMPLEMENTATION/TRANSITION**

Whether by charter amendment or state law, a proposal to move the election of countywide officers needs to address when and how the transition would be made.

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<sup>21</sup> Cal. Const., art. IV, §16.

<sup>22</sup> *White v. State of California*, 88 Cal.App.4th 298 (2001), *City of Malibu v. California Coastal Commission*, 121 Cal.App.4th 989 (2004).

There are three potential ways in which it can be implemented: 1) by transitioning with a two-year short term, 2) by extending the term of the incumbents by two years until the presidential election cycle after their four-year term would otherwise end, or 3) by shortening the term of incumbents elected in 2018 by two-years and conducting elections on the presidential election cycle beginning in 2020. *See* Table 3.

Table 3. Alternatives for Transitioning to Presidential Election Cycle.

ALTERNATIVES	EFFECT ON INCUMBENTS
Transition with 2-Year Short Term	<ul style="list-style-type: none"> <li>• Incumbents complete current 4-year term in 2022.</li> <li>• Officeholders elected in 2022 serve 2-year short term until 2024.</li> <li>• Transition complete in 2024.</li> </ul>
Extend Existing Terms by 2 Years	<ul style="list-style-type: none"> <li>• Incumbents serve 2 more years in addition to their current 4-year term (total term of 6 years) until 2024.</li> <li>• Transition complete in 2024.</li> </ul>
Shorten Existing Terms by 2 Years	<ul style="list-style-type: none"> <li>• Incumbents do not complete current 4-year term; instead term ends in 2020 (total term of 2 years).</li> <li>• Transition complete in 2020.</li> </ul>

It is unclear whether it would be possible to cut short the term of office of any current countywide officer who was elected in 2018 (i.e., ending their term of office in 2020 and requiring they be up for election in 2020, rather than in 2022). This path would likely face legal challenges.

**Whether the Current Term of Incumbent Officeholders can be Shortened**

It is a long established constitutional principle that the authority that created an office can at any time abolish or discontinue the office, as well as extend or cut short the term of incumbent officeholders. The U.S. Supreme Court has recognized that a state legislature may create or abolish any state-created political entity, or extend or reduce a term of office of an incumbent officeholder, only bound by the limits of the state’s own constitution.<sup>23</sup> The California Supreme Court has likewise recognized the Legislature’s power to shorten the term of office for any office it created, and that the legislative power to extend or reduce the term of any office is only limited by the state constitution.<sup>24</sup> The California Supreme Court has recognized that the Legislature can similarly extend an officer’s term except as prohibited by the state constitution.<sup>25</sup> In the case of Sacramento County, the state constitution empowers the county’s voters to adopt a county charter providing for the county’s governance, including determining the term of office for countywide officers and when they are elected. Since the state constitution empowers county voters to decide what term their countywide officers serve, and county voters have

<sup>23</sup> *Higginbotham v. City of Baton Rouge*, 306 U.S. 535, 538 (1939)

<sup>24</sup> *In re Bulger*, 45 Cal. 553 (1873), *People ex rel. Bledsoe v. Campbell*, 138 Cal. 11 (1902).

<sup>25</sup> *Christy v. Board of Supervisors*, 39 Cal. 3 (1870).



incorporated state law into the county charter, it follows that the term of office may be modified either by county voters amending the county charter or by the Legislature.

Case law suggests that the term of an incumbent countywide officeholder could theoretically be shortened. However, this approach presents a slew of challenges. First of all, it would be politically challenging to deny an elected officeholder the right to finish the term of office for which they were elected. Secondly, it would be near impossible to implement such a change in time for 2020. Approval by charter amendment would require voter approval at the next countywide election in either March or November 2020, which is when the election of countywide officers would need to occur. If the move were made by state law the statute could not take effect until January 2020, a month after the close of filing to run for office in March 2020.<sup>26</sup> Lastly, given that much of the California case law relating to whether a term of an office can be cut short was decided over a century ago, it is unclear whether a modern court would follow or divert from that precedent in a contemporary case.

## **CONCLUSION**

There are clear benefits to moving the election of Sacramento County's countywide elected officers to presidential election years, primarily an increase voter participation which would mean a more representative electorate electing the Assessor, District Attorney, and Sheriff. A move to presidential election years can be effected either by amending the county charter or by state legislation. Each has its benefits and its drawbacks. In either case, it would be critical to win the support of the Board of Supervisors. A charter amendment can be submitted by initiative petition, but that path is far more costly than getting a measure placed on the ballot by Board of Supervisors' action. Additionally, getting the political support needed for legislation to be carried would likely also require strong support from the Board of Supervisors. If the move were to be pursued by changing state law, it would be preferable to seek generally-applicable legislation that would empower a county's Board of Supervisors to move the election of countywide officers to presidential years by ordinance without voter approval. This would likely be the path of least legal or political resistance. Lastly, the most feasible plan for implementing a move to presidential election years would be to allow the countywide incumbents to finish the term to which they were elected in 2018, elect a two-year transition term in 2022, and begin regularly electing countywide officers in presidential election years in 2024. This would likewise be the most legally and politically feasible manner of implementing this change.

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<sup>26</sup> Legislation can take effect sooner than January 1 if enacted as an urgency state, requiring a two-thirds vote in both houses. However, this could only happen if there is very little or no opposition.