No. S117921

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

GOVERNOR GRAY DAVIS, CONGRESSMAN XAVIER BECERRA, CONGRESSMAN TOM LANTOS, COUNCILMAN BEN WONG, DANNY J. BAKEWELL, SR., and JORGE CORRALEJO,

Petitioners,

vs.

KEVIN SHELLEY, in his official capacity as Secretary of State of the State of California and CONNY McCORMACK, in her official capacity as Registrar-Recorder-County Clerk of the County of Los Angeles,

Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION

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INTRODUCTION

California's chief election officer argues that enlarging the franchise and providing registrars adequate time to run a free and fair election will thwart the will of the voters. Like so many other "firsts" caused by this election, this must surely be the first time that California's Secretary of State has publicly taken a position in favor of limiting voter participation.

The Secretary of State does not contest the evidence of electoral disarray that petitioners have put before the Court. He does not deny that some of the State's largest counties will use punchcard voting systems that will be illegal in California after March 1, 2004. He does not deny that Los Angeles and other counties will make drastic reductions in the number of polling places, nor does he deny that the impact of those reductions will fall harder on voters in poor and minority neighborhoods, due to lack of transportation and the time constraints that affect those who must work long hours for a living. Finally, he does not deny that many registrars will face "formidable" difficulties training pollworkers, securing polling places, preparing sample ballots and ballots and otherwise educating voters. (Shelley Opp. at 1, 6.) But, he says, the evidence is not enough to justify postponing the election: "There is simply no basis for the Secretary of State to ignore the California Constitution's deadline out of an abundance of caution." (*Id*. at 6.)

The need to act stems from far more than "an abundance of caution." The need to act is grounded in uncontested evidence that voters' rights will be severely impaired and the legitimacy of the election compromised by the fact that registrars simply cannot put on a free and fair election by October 7th. Rather than joining petitioners to avert an

electoral travesty, the State's chief election officer insists that election deadlines must prevail over the right to vote, without ever offering any reason why that should be so.

The Secretary of State's position on petitioners' right to vote for the Governor in the replacement election is equally baffling. Voicing concern for the "outrage" of the voters who signed petitions to place the recall on the ballot, the Secretary of State neglects entirely the outrage of those who voted for the Governor at the last general election and who want the opportunity to vote for him as a replacement candidate if the recall succeeds. That these voters, who will almost certainly represent the single largest voting bloc in this crowded field of candidates, must cede the election to a candidate favored by a much smaller plurality is an equal protection violation of the first order. Yet rather than urge the Court to treat the Governor's supporters like those of every other candidate, the Secretary of State would deny them that right out of concern for the "outrage" of other voters.

This is not the way our system works. The voters never intended for election deadlines to trump the right to a free and fair election. The fact that they specifically enlarged those deadlines to 180 days to encourage greater voter participation and to save public funds demonstrates that the Secretary of State has misplaced his priorities. Nor could the voters have anticipated, when they approved the recall provisions in 1911, that a statewide recall could occur nearly 100 years later at the instigation of less than 6 percent of the electorate, one in which literally hundreds of candidates would run and the winner could be elected with a single-digit plurality. To prohibit the Governor's supporters from adding his name to

the ballot under these circumstances would make a mockery of our claim to live under a republican form of government.

The alternative writ should issue, and the election should be postponed until March 2, 2004 to protect petitioners' right to vote and to afford the Court sufficient time to consider the issues raised in each of the petitions currently pending before the Court.

ARGUMENT

I.

THIS COURT CAN AND SHOULD POSTPONE THE ELECTION

The Secretary of State argues that "[t]he constitutional requirement to hold the recall election within 80 days of certification is clear and unconditional" and that "speculative concern about the effects of practices that, while arguably unfortunate, are not themselves unconstitutional [and] cannot justify moving the election date in contravention of the constitution." (Shelley Opp. at 2.) Mr. Costa goes so far as to argue that the Court lacks equitable power to postpone the election. (Costa Opp. at 25-26.)

As demonstrated below, the "arguably unfortunate" problems with this election do in fact render it unconstitutional, and this Court undeniably has the equitable power to postpone the election. This Court should not wait, therefore, for a constitutional violation to occur. It can and should do what it has done in the past: take action to avert such problems.

A. This Court Has Taken Far-Reaching Steps in the Past to Protect the Right to Vote

The Secretary of State insists that the requirement in article II, section 15(a) that the election be set "not less than 60 days nor more than 80 days from the date of certification" is somehow sacrosanct. He makes

no attempt to explain why that should be, nor can he. As demonstrated in petitioners' opening brief, had the recall proponents taken even a little more of the time allotted to them to circulate petitions, the recall would certainly have qualified after September 4, 2003, and the Lieutenant Governor could have set the election for March 2, 2004. That they did not do that, and instead rushed to qualify their initiative with paid signature-gatherers from out of state, does not entitle them to an election schedule that imposes severe and disparate impacts on the voters of this State.

Respondents complain that petitioners have cited no case in which this Court changed the date for an election. (Shelley Opp. at 2; Costa Opp. at 27.) They ignore the fact that this Court has taken far more drastic steps than that to protect the right to vote. For example, article XXI, section 1 of the California Constitution provides that after each decennial census, "the Legislature shall adjust the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts . . ." Despite this clear constitutional commitment of the redistricting power to the Legislature, this Court, albeit with great reluctance, has twice undertaken the task of redistricting over the strenuous objection of the Legislature. (*See Wilson v. Eu* (1991) 54 Cal.3d 471; *Legislature v. Reinecke* (1973) 10 Cal.3d 396.) That the Court's action stepped over the line that traditionally separates the judicial from the legislative power cannot be denied. That it did so to protect the fundamental principle of one person, one vote is equally undeniable.

This Court has also reversed the results of an election, once again very reluctantly and once again to protect the fundamental right to vote. In *Gooch v. Hendrix* (1993) 5 Cal.4th 266, this Court annulled the results of a school board election because of "pervasive illegalities that

permeated the election process . . ." (5 Cal.4th at 282.) In doing so, this Court held that the lower court "fail[ed] to heed the fundamental premise that a court must not 'sacrifice the integrity of the [elective] process on the altar of electoral finality.'" (*Id.,* quoting *Hardeman v. Thomas* (1989) 208 Cal.App.3d 153, 167.) In this case, it is important that the right to vote and the right to have one's vote counted not be sacrificed on an altar of electoral scheduling that would not even have applied had proponents used the full time allotted for signature gathering.

Finally, this Court has ordered the use of legislative districts that would otherwise have been stayed by a duly-qualified referendum, because it was necessary to do so in order to protect the right to vote. In *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 674, *cert. denied*, 456 U.S. 941, this Court wrote:

> It is with great reluctance that this court enters a dispute more properly resolved in the political environs of the state Legislature and at the ballot box. However, this court has been given no choice in the matter. The court must act to protect the right of the citizens of this state to vote in an orderly and constitutional fashion.
>
> (30 Cal.3d at 674.)

B. Other Courts Have Postponed Elections to Protect the Right to Vote

There can be no doubt that this Court has the power to stay the election to protect the right to vote, as other courts have done in the past. For example, in *Lopez v. Monterey County* (1996) 519 U.S. 9, the United States Supreme Court stayed Monterey County's judicial elections pending federal approval under section 5 of the Voting Rights Act, despite the fact that in doing so, it was "leav[ing] the County without a judicial

election system." (519 U.S. at 10.) Even individual justices have enjoined or postponed elections when it was necessary to protect the right to vote. In *Lucas v. Townsend* (1988) 486 U.S. 1301, Justice Kennedy granted an application to enjoin a bond referendum election in order to ensure compliance with the Voting Rights Act, because "[o]n balance . . . the equities favor the applicants," and post election relief would be insufficient. (486 U.S. at 1305.) Similarly, in *Holt v. City of Richmond* (1972) 406 U.S. 903, three justices granted an application to enjoin city council elections in the City of Richmond, again to ensure compliance with the Voting Rights Act.

In *Alabama v. United States* (5th Cir. 1962) 304 F.2d 583, affd. (1962) 371 U.S. 37, the court affirmed an affirmative injunction mandating the registration of specified voters as a proper exercise of the district court's equitable powers. In so doing, the court emphasized the "full and elastic resources of the traditional court of equity" that permit it "to adapt judicial power to the needs of the situation." (*Id.* at 590-591.) The court further explained:

> Thus relief in matters of public, rather than private, interests may be quite different from that ordinarily granted. Though language frequently employed might be thought to place this result on the nature of the litigant – the sovereign or an agency of Government – it is really a manifestation of the principle that the nature of the relief is to be molded by the necessities. [Citations.]
>
> (*Id.* at 591.)

In *Otey v. Common Council of the City of Milwaukee* (E.D. Wis. 1968) 281 F.Supp. 264, the Court enjoined any election on a referendum against a fair housing ordinance based in large part on

testimony that "the mere holding of a referendum probably would be dangerous, disruptive and destructive to the community." (*Id.* at 278.) There, as here, it was argued that judicial intervention was premature. The court answered:

> The defendants raise the objection that the instant action is premature, that is, that judicial action should properly be abated at least until after the electorate has pro forma expressed itself. But in the total absence of any valid reasons against judicial activity in an equitable proceeding such as here, this objection is answered in our judgment by the language of the Tolbert court, *supra*, 67 S.E. at 827: "Certainly the remedy to enjoin the holding of the election would be more direct, and better calculated to avoid complications, than to remain passive until the law has been declared before beginning a proceeding to test its constitutionality."
>
> (*Id.* at 279, quoting *Tolbert v. Long*, 67 S.E. at 827.)

Thus, an order by this Court consolidating the recall election with the March primary election is an exercise of the same equitable power that permits pre-election review of initiative measures. Both are quite properly directed at avoiding disruption, voter confusion, electoral cynicism and undue expense. (*See Senate v. Jones* (1999) 21 Cal.4th 1142, 1154; *see also Miller v. Greiner* (1964) 60 Cal.2d 827, 833 ["The issue ultimately turns upon a determination of whether the policy against limiting the right of the electorate to express itself by the ballot outweighs the expenses and inconvenience of an off-year special election."].)

C. Cases Denying Pre-Election Review Are Inapposite

The Secretary of State and amicus Ted Costa argue that there must be a clear showing of unconstitutionality before the Court may stay an election. (*See* Shelley Opp. at 6; Costa Opp. at 11-14.) As we discuss below, petitioners have demonstrated a clear violation of federal law. More importantly, the cases upon which the Secretary of State and Mr. Costa rely do not speak to this situation; none of the cases in which this Court denied preelection review involved issues relating to the validity of the election procedures themselves. Doubt as to the validity of the election procedures erodes any interest in permitting the election to go forward, because the reliability of the election results are themselves in doubt. (*See Gooch v. Hendrix*, 5 Cal.4th 266.) In these circumstances, the court properly evaluates the balance of hardships which here so clearly favor a stay. (*See Holt v. City of Richmond*, 406 U.S. 903; *Lucas v. Townsend*, 486 U.S. 1301.)

Mr. Costa cites *Pederson v. Moser* (Wash. 1983) 662 P.2d 866, 869 for the proposition that interference with the right of recall requires "strong justification." Yet the Washington Supreme Court in that case expressly affirmed its authority to enjoin an election, under the proper circumstances:

> Initially, it should be noted that we have the power to enjoin a recall election if proper procedures are not followed. [Citation.] In addition, we may stay an election until some appropriate future date. [Citation.] Thus, we have the power to provide the relief requested by Pederson had we found his claims meritorious.

(*Id.* at 868.)

Mr. Costa cites yet another case from the State of Washington for the proposition that the "interest of the people in an expeditious recall procedure is fundamental." (*Janovich v. Herron* (Wash. 1979) 592 P.2d 1096, 1102.) He neglects to mention that the Washington Supreme Court there *postponed* the recall election until an indefinite time in the future:

> [T]he constitutional rights of appellant would be irreparably harmed unless the date of the recall election is set after the conclusion of the trial presently under way in United States District Court in San Francisco, California in which appellant here is a defendant. ¶ Therefore, it is ordered that the recall election may proceed but that the date set for the election, if it is necessary to hold it, shall be no earlier than 45 days from the conclusion of the trial in San Francisco.
>
> (*Id.* at 1103 [separate order signed by Chief Justice Utter].)

D. Relief is Necessary Now in Order to Avoid Unprecedented Disruption After the Election

This Court is at a crossroads in California history. Petitioners have proven that critical irregularities will permeate the election if it is held on October 7, 2003. The Secretary of State does *not* deny that these irregularities will occur and he does *not* identify any harm that will occur if the election is moved to March 2004 and the irregularities eliminated. Nevertheless, the Secretary of State suggests that the extent of the problems is "speculative" and he proposes to forge ahead.

The Court has a choice: act now and eliminate the electoral deficiencies or defer now and adjudicate these issues later. If the Court does not protect the rights of California citizens now, those citizens – frustrated, alienated, and angry – will bring lawsuits to set aside the

illegitimate election. In that post-election litigation, the California courts will be forced to decide between the awful choices of validating an election riddled with unconstitutional activity or requiring the state to hold another election.

Since the choice between an election fiasco or providing in advance for a fair and orderly election seems clear, the reasonable question to ask is: What is the cost of delay? The answer is not found in the Secretary of State's or Mr. Costa's papers because they identify no legitimate interest that is trammeled by delay. Under these circumstances, where so much is at stake, the wise and just result for this Court and California is to put this rare and uniquely important election over until March of 2004.

II.

THE COURT SHOULD POSTPONE THE ELECTION UNTIL MARCH TO AVOID CONSTITUTIONAL VIOLATIONS

Respondent Secretary of State acknowledges that six counties intend to use punchcard voting systems, that Los Angeles County intends to reduce the number of precincts by two-thirds, and that the counties face "serious challenges . . . in conducting the special election in a way that ensures that every voter has a reasonable opportunity to cast his or her vote and have that vote properly counted." (Shelley Opp. at 2.) The Secretary of State characterizes this state of facts as "arguably unfortunate" and dismisses petitioners' concerns as speculative. (*Id*.) There is nothing speculative, however, about the fact that voters who live in counties with punchcard systems are less likely to have their votes counted (Brady Decl., ¶ 13), and that minorities within these counties are twice as likely to have their vote invalidated as non-minority voters. (*Id*., ¶ 14.) Nor is there

anything speculative about the fact that voters who live in Los Angeles County will be disproportionately burdened by having to find their new polling places, travel farther to get there, and wait longer in line to vote, than voters who live in other counties. (Brady Decl., ¶¶ 24-25, 28-29, 30-31, 33-34; Sragow Decl., ¶¶ 8-9; and Westall Decl., ¶ 8; Declaration of David Ely ("Ely Decl., ¶¶ 8-9, 15-19.) Furthermore, as the declarations submitted by petitioners demonstrate, minorities, the elderly, the poor and the disabled are even more disproportionately affected by these burdens. (*Id*.) These problems are not simply "unfortunate." They are unconstitutional.

A. Petitioners Meet the Standard Set Forth in *Bush v. Gore*

The Secretary of State concedes that petitioners have raised "legitimate subjects of electoral consideration: selection of voting equipment, composition of voting precincts, and time and resources necessary to accomplish pollworker training, secure polling places, prepare sample ballots and ballots, and otherwise educate voters." (Shelley Opp. at 6.) He argues, however, that "discomfort to elections officials and staff and even voter inconvenience" does not impose a severe restriction on the right to vote. (*Id*.) Petitioners submitted ample evidence that voters will be disenfranchised, not merely inconvenienced. As a result of the use of punchcard voting systems and the consolidation of precincts, voters in certain counties, and in particular, minority communities within those counties, will be less likely to have their votes counted than voters in other counties.

Under *Bush v. Gore* (2000) 531 U.S. 98 and *Black v. McGuffage* (N.D. Ill. 2002) 209 F.Supp.2d 889, the disparate treatment of similarly situated voters resulting from the use of punchcard voting systems

and the consolidation of precincts in certain counties constitutes a violation of the equal protection clause. Contrary to the Oppositions' claims, the equal protection analysis in *Bush v. Gore* is not dependent upon any showing of racial impact or discrimination. The Court found an equal protection violation without any showing that the state court's recount procedures disproportionately affected any racial group or that the state court acted with an intent to discriminate. Rather, "[e]ven without a suspect classification or invidious discrimination, '[t]he right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" (*Black*, 209 F.Supp.2d at 899, quoting *Reynolds v. Sims* (1964) 377 U.S. 533, 555.) Thus, when the right to vote is at issue, the equal protection clause is violated when "similarly situated persons are treated differently in an arbitrary manner." (*Black,* 209 F.Supp.2d at 899.)

In *Black v. McGuffage,* the court held that plaintiffs stated an equal protection claim based on allegations that counties within the State of Illinois used different voting machines, with substantially different accuracy rates, in statewide elections:

> That people in different counties have significantly different probabilities of having their votes counted, solely because of the nature of the system used in their jurisdiction is the heart of the problem. *Whether the counter is a human being looking for hanging chads in a recount, or a machine trying to read ballots in a first count, the lack of a uniform standard of voting results in voters being treated arbitrarily in the likelihood of their votes being counted.* The State, through the selection and allowance of voting systems with greatly varying accuracy rates "value[s] one person's vote over that of another," *Bush,* 531 U.S. at 104-105, 121

> S.Ct. 525, even if it does not know the faces of those people whose votes get valued less. This system does not afford the "equal dignity owed to each voter." *Id.* at 104, 121 S.Ct. 525. When the allegedly arbitrary system also results in a greater negative impact on groups defined by traditionally suspect criteria, there is cause for serious concern.
>
> (209 F.Supp.2d at 899, emphasis added.)[1]

The same is true here. The use of punchcard machines and the consolidation of precincts in certain counties will "result[ ] in voters being treated arbitrarily in the likelihood of their votes being counted." (*Black v. McGuffage*, 209 F.Supp.2d at 899.) Put simply, voters in "some counties are statistically less likely to have their votes counted than voters in other counties in the same state in the same election for the same office." (*Id.* at 899.) That is a violation of the voters' equal protection rights.

Both the Secretary of State and Mr. Costa are quick to argue that *Bush v. Gore* cannot be read to require states to conduct an election using "identical voting machines" or the "best available voting system."[2] (Shelley Opp. at 8; Costa Opp. at 14.) Petitioners do not argue, however, that Los Angeles must use the same system as San Mateo. Rather, the counties must use systems that do not result in significant and arbitrary disparities in the number of votes counted. Here, as in *Bush v. Gore*, different standards will be used in different counties. Voters in some

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[1] Mr. Costa argues that there is no risk of a standardless election because the Secretary of State has issued uniform guidelines that govern the use of punchcard machines. (Costa Opp. at 19.) It is the machines themselves, however, that result in a lack of a uniform standard in the counting of votes.

counties will have the luxury of using up-to-date voting machines in their normal precinct. Others, like those who live in Los Angeles, will not, and as a result, they are less likely to have their votes counted. As the court in *Black v. McGuffage* noted, "[a]ny voting system that arbitrarily and unnecessarily values some votes over others cannot be constitutional." (209 F.Supp.2d at 899.)

B. Use of Punchcard Voting Machines Will Disproportionately Disenfranchise Voters in Some Counties

Petitioners have offered ample evidence that voters will be disparately affected by the different voting machines provided in their counties. Voters in San Mateo County, for example, will find an optical scanning voting system, similar to the standardized tests given in schools, when they go to the polls on October 7. (Secretary of State, Voting Systems Used by Counties for November 5, 2002 General Election, RJN, Exh. M.) Likewise, voters in Alameda County will find a user-friendly touch screen system, as will voters in Shasta and Riverside Counties. (*Id*.)

Voters in Los Angeles, San Diego, Sacramento, Santa Clara, Solano, and Mendocino Counties, by contrast, will face a different situation. Rather than the new, more reliable systems which the counties plan to introduce in time for the March 2, 2004 primary election, voters will cast their votes on punchcard systems that, according to the Secretary of State, "'fail[ ] to meet the standards set forth in California election law.'" (*Common Cause v. Jones* (C.D. Cal. 2002) 2002 WL 1766436, *1, citation omitted [RJN, Exh. T].) These systems are more likely to result in invalid

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(. . . continued)

[2] Shelley Opp. at 7; Costa Opp. at 24-25.

ballots, and minority voters are twice as likely as non-minority voters to have their votes invalidated. (Brady Decl., ¶¶ 13, 14.)

Respondents reply that the punchcard machines at issue here will not be decertified until March 2004. (Shelley Opp. at 9; McCormack Opp. at 2.)[3] Petitioners do not argue, however, that the counties should somehow be forced to convert to new systems by October 7th. Rather, the answer is to postpone the election to permit the counties to complete their conversion before the election. A March election solves all of these problems.[4]

The Los Angeles County Registrar also argues that using the Votomatic machines is "the most efficient and prudent means of conducting the election scheduled for October 7, 2003," because Los Angeles County is not yet prepared to use the InkaVote optical scanning voting system. (McCormack Opp. at 4 and 8 [McCormack Decl., ¶ 6].) The issue, however, is not whether respondent McCormack made the best judgment about the appropriate voting system. Indeed, the fact that the county cannot complete its conversion to the InkaVote system is the impetus for this petition. The problem is that the county's punchcard voting system is not good enough. As respondent McCormack admits, incomplete punches

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[3] Mr. Costa argues that the use of punchcard voting machines cannot be unconstitutional because they were used in 2002. (Costa Opp. at 17.) The fact that no one challenged the use of the machines in 2002, of course, has no bearing on whether the use of the machines results in an election system that values one person's vote more than another person's vote.

[4] This is not a case, therefore, in which the adoption of uniform standards is not practicable. (*See Bush v. Gore*, 531 U.S. at 106.)

(hanging chads), undervotes, and overvotes are weaknesses of the punchcard voting systems.[5]

Both respondents and Mr. Costa argue that petitioners have not submitted sufficient evidence that punchcard voting systems produce disparities. (Shelley Opp. at 10, fn. 3; McCormack Opp. at 5; Costa Opp. at 17-20.)[6] The findings, however, are clear. Punchcard systems are more likely to result in invalid ballots than newer, more reliable touch screen and optical scanning systems. (Brady Decl., ¶ 18.) In counties with a high percentage of minority voters, the disparity is even greater. (Supp. Brady Decl., ¶ 8.)[7]

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[5] County of Los Angeles Registrar-Recorder/County Clerk, "Voting System Comparisons," January 1, 2001, available at http://www.lavote.net/general/vs_and_chad/vs_and_chad.htm.

[6] Respondent McCormack simply states that she disagrees with the conclusions of petitioners' experts. (McCormack Decl., ¶ 10.) With the exception of Mr. Westall, however, she offers no explanation for her position. (*Id*., ¶¶ 7, 10.) She disputes petitioners' reliance on the Westall Declaration, because she contends his calculations are inaccurate. (McCormack Decl., ¶ 7.) As Mr. Westall's supplemental declaration makes clear, however, he relied on Elections Code section 12222, which prohibits elections officials from establishing a precinct that crosses the boundary of any incorporated city, even when counties consolidate precincts pursuant to Elections Code section 12241. (Supp. Westall Decl., ¶ 3.) Based on section 12222 and respondent McCormack's list of precincts, he calculated the average number of registered voters per precinct. (*Id*.) Based on her declaration, it appears that respondent McCormack has established precincts that cross city boundaries. (*Id*., ¶ 4.) As Mr. Westall observes, establishing polling places outside of a voter's city of residence will make it even more difficult for voters to reach their polling places on October 7. (*Id*., ¶ 5.)

[7] The Secretary of State complains that the data is not statistically significant. In fact, the probability of these results occurring by chance is less than one in a billion. (Supp. Brady Decl., ¶ 2-4, 11-5.)

Respondent Shelley and Mr. Costa suggest that the data from Fresno County "says nothing" about the error rates in Los Angeles and the other punchcard counties. (Costa Opp. at 18; Shelley Opp. at 10, fn. 3.) As Professor Brady's supplemental declaration demonstrates, however, data from Marin and San Francisco Counties, both of which moved from punchcard systems to precinct optical scan systems, produce similar results. (Supp. Brady Decl., ¶¶ 4, 16.) Both counties experienced a reduction in invalid ballots or residual votes. (*Id*..) Indeed, comparing punchcard counties versus non-punchcard counties in California demonstrates that there is a greater residual vote rate for punchcard counties and that there is a significantly higher residual rate for minorities in punchcard counties. (*Id*., ¶¶ 8, 24-30.) The data from Fresno County are also consistent with data from Los Angeles County, which show an even greater disparity between percent residual vote and percent minority than in Fresno. (*Id*., ¶ 25.) In short, punchcard machines result in more problems and have a disparate impact on minority voters.[8]

Mr. Costa relies on the declaration of the registrar of voters of Sacramento County, who concludes, without any explanation that she does not find any support for Professor Brady's conclusion that the use of punchcard machines has a disparate impact on minority voters. (Costa Opp. at 31 [Declaration of Jill LaVine, ¶ 10].) In fact, data from Sacramento County demonstrate that there is a substantial relationship between residual votes and percent minority when punchcards are used.

[8] Contrary to Mr. Costa's suggestion (Costa Opp. at 18), these data are also consistent with the findings of Professors Tomz and Van Houwelling, who concluded that there are racial disparities in residual votes and that better voting technologies can reduce the disparities. (Supp. Brady Decl., ¶ 5.)

(Supp. Brady Decl., ¶¶ 23-24, Figure 3.) The percent residual vote in Sacramento County may be lower than in Fresno County, however, because Fresno has a larger minority population. (*Id*. at ¶ 23.)

C. The Consolidation of Precincts in Los Angeles Will Disproportionately Burden Voters in that County

Respondents argue that the consolidation of precincts is authorized by the Elections Code, and therefore presents no constitutional issues. (Shelley Opp. at 10; McCormack Opp. at 1.) This special election, however, is unique, and is likely to result in a significantly higher voter turnout than past special elections. (Sragow Decl., ¶ 7.)[9]

More importantly for equal protection analysis, some counties, such as San Mateo, Marin and Napa, expect to open the normal number of precincts while other counties, like Los Angeles and Santa Clara, plan to reduce the number of precincts dramatically. (*San Francisco Chronicle*, "Fewer polling sites for recall/Critics predict chaos, confusion among voters" (August 1, 2003) 2003 WL 3759433; August 6, 2003 letter to the Court from County Counsel of Santa Clara County.) The result is that voters in Los Angeles will have to find their new polling places, travel farther to get there, and face bigger crowds once they arrive. As demonstrated by the declarations submitted by petitioners, the consolidation of precincts will depress turnout and disproportionately burden voters in Los Angeles County.

[9] Mr. Costa admits that at the March election "larger numbers of Davis supporters can be anticipated to vote." (Costa Opp. at 28.) This is a byproduct of the fact that in March, more voters will vote, period.

Mr. Costa challenges petitioners' proof that the consolidation of precincts will unfairly burden Los Angeles County voters and reduce turnout. The declarations of Henry Brady and Darry Sragow established, however, that an increase in distance from voters' home to the polling stations affects turnout. The declaration of David Ely reinforces that conclusion. Mr. Ely compared the historical experience of two communities in Los Angeles County: La Canada, a predominantly white suburb, and South Los Angeles, an urban neighborhood comprised largely of minorities. (Ely Decl., ¶¶ 6, 9.) Based on precinct records from the November 2002 election, he determined that for La Canada there is a 7 percent drop in the polling place vote for voters who have to travel more than a quarter of a mile to the polls. In South Los Angeles, 22 percent fewer voters went to the polls when they had to travel more than a quarter mile. (*Id*., ¶ 8.)

Mr. Ely then determined the effect of precinct consolidation. Only 8 percent of voters in La Canada are moved from inside a quarter mile to a greater distance as a result of consolidation. (Ely Decl., ¶ 14.) In South Los Angeles, by contrast, 37.9 percent of the voters are moved from inside a quarter mile to a greater distance. (*Id*., ¶ 15.) Based upon the impact on voter turnout among voters who have to travel more than a quarter of a mile to the polls, Mr. Ely estimates that precinct consolidation will result in a 22 percent reduction in voter turnout among these South Los Angeles voters. (*Id*., ¶ 16.) The impact on La Canada would be much smaller, on the order of one-third or less of the impact on South Los Angeles. (*Id*.)

This disparate impact is not limited to travel distance. In La Canada, 50.6 percent of the voters will be assigned to a new polling

place. (Ely Decl., ¶ 18.) The figure for South Los Angeles is 72.7 percent of voters. (*Id*., ¶ 18.)

Thus, Mr. Ely's analysis confirms that precinct consolidation will depress turnout in Los Angeles County, and it will have a disparate impact on low income minority neighborhoods. (Ely Decl., ¶ 19.)

Respondent McCormack also suggests that the sample ballot, which identifies the precinct, the availability of absentee voting, and the fact that voters can access precinct information by calling her office or checking www.lavote.net, cures any problems arising from precinct consolidation. (McCormack Opp. at 4, 5.) As the county has admitted, however, "voters are creatures of habit and often assume that their voting locations are unchanged."[10] In March 2002, for example, the county moved some polling places to accommodate redrawn districts. As a result, "thousands appeared at poll sites that were no longer where they had been in past elections," notwithstanding the availability of the same information. (*Id.*) "Election day confusion was compounded by a large number of voters who called our office, your offices [Board of Supervisors] and City Clerks to complain that their polling place was 'not open' when, in fact, the voters went to a location where they had previously voted but was not assigned as a polling place for the March 5th election." (*Id.*) To require voters to locate and proceed to yet another polling place for the recall election will result in even greater disruption and confusion.

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[10] County of Los Angeles Registrar-Recorder/County Clerk, *March 5, 2002 Primary Election: Problems, Solutions and Resources Needed for Improvement*, April 9, 2002, available at http://www.lavote.net/general/3-5-02PSR.

Respondent McCormack also dismisses petitioners' evidence of voter confusion concerning the recall ballot. She states that the ballot will be "simple," with a maximum of four selections to make. (McCormack Decl., ¶ 9.) Many voters, however, are confused about the very nature of the recall, including whether or not they have to vote to remove the Governor in order to vote for a successor. (Sragow Decl., ¶ 19.) Furthermore, as the Secretary of State concedes, 234 candidates have taken out candidacy papers to run as replacement candidates. (Shelley Opp. at 5.) As of August 6, 2003, however, the list has grown to 356, with an additional 155 individuals who are considered unofficial, for a total of 511. (*See* Secretary of State, Candidate Status Report, available at http://www.ss.ca.gov/elections/recall_cand.htm.) Because the names will appear in random order (Elec. Code, § 13112(c)), voters will have to search a long list of names for the candidate of their choice. Under ordinary circumstances, elections officials would have ample time to engage in voter education and outreach. In the case of the recall, however, the calendar affords no time for such efforts.

D. County Elections Officials Do Not Have Sufficient Time to Conduct a Minimally Adequate Election

Respondents also dismiss the evidence submitted by petitioners regarding the obstacles to a fair election. They do not dispute any of the facts cited by petitioner, however. Instead, they argue that elections officials will work diligently to meet these challenges. (McCormack Opp. at 5.)

Petitioners do not dispute that elections officials will do their best to conduct a fair election. Unfortunately, diligence is not enough. There is simply not enough time to hire and train 100,000 poll workers,

reserve 25,000 polling places, print and mail 15 million sample ballots, process absentee voter applications, and educate the voters, all while preparing for November elections in 43 counties. No matter how well elections officials perform, the task is simply too great, and in an election as close as this one may be, the risk of errors is too high.

III.

CALIFORNIA'S PROCEDURES VIOLATE THE EQUAL PROTECTION RIGHTS OF VOTERS WHO SUPPORT THE GOVERNOR

Respondent Kevin Shelley argues that "allowing an incumbent to immediately run for the office from which he or she was just voted out would run the risk of making the entire recall process a moot and meaningless expense, engendering tremendous voter anger." (Shelley Opp. at 24.) Respondent's argument ignores the "tremendous voter anger" of those who voted for the Governor last November, expecting him to be able to serve a full four-year term undistracted by a recall election instigated by a mere 6% of the California electorate. It also ignores the tremendous voter anger of what will almost certainly be the largest single bloc of voters voting on the replacement question – those who support the Governor – if they are denied the right to vote for the candidate of their choice. And it ignores the tremendous anger that will follow if Governor Davis, who was elected by the votes of 3,533,490 Californians in November, 2002, is replaced by a candidate who has received a fraction of that vote, who has not had to win the nomination of his or her party, and who has not been subjected to the rigors of a normal campaign.

Respondent Shelley argues that article II, section 15(c) of the California Constitution "is only a limited burden on voters' rights," because

voters can vote for the Governor by voting against the recall. Therefore, he argues, "the voters are only denied the opportunity to vote for the incumbent *twice*," something they would not otherwise be entitled to do. (Shelley Opp. at 16.) Mr. Costa, on the other hand argues that this is two elections and the Governor therefore can be excluded from the second just as if this were term limits.

Both ignore the reality of what the people are being asked to decide – who should be Governor. As the federal district court held in related recall litigation only last week, "it must be underscored that voters are not merely voting on who will be replacing a recalled officer, they are voting on who will be their Governor – that is, who will govern the people of California." (*Partnoy v. Shelley*, No. 03CV1460 BTM, Memorandum Decision and Order, at p. 13, RJN, Exh. S.) On that question, one set of voters and their candidate must reach the 50 percent mark; all others need only a plurality.

Thus, a vote cast in favor of Gray Davis is quite simply counted as less than a vote cast for anyone else. This the Constitution forbids: "The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates," is the fundamental premise of equal protection. (*Gray v. Sanders* (1963) 372 U.S. 368, 380.)

A. <u>This Case Differs From the Term Limits Cases</u>

Contrary to respondent Shelley's claims, this case cannot be equated with the term limit cases. Both the interests of the voters and the alleged state interests are far different in a recall from those at stake in a term limits case.

1. The interests of the voters

The burden imposed on the voters by article II, section 15(c) is far greater than the one that this Court upheld in *Legislature v. Eu* (1991) 54 Cal.3d 492, cert. den. (1992) 503 U.S. 919. There, the Court held that the burden on voters' rights was offset by, among other things, the candidates' "entitlement to a significant period of service in office before the term limitations apply . . ." (54 Cal.3d at 519.) Here, of course, the opposite is true. The voters elected Gray Davis as their Governor only ten months ago, expecting him to serve a full four-year term. Instead, they face the prospect that he will be prevented from completing that term and replaced by someone who will have been elected by a mere fraction of those who voted for him last fall. All this will have occurred at an election marred by procedural and practical infirmities and one in which the Governor's supporters will have been prevented from exercising their right to vote for the candidate of their choice.

There is another feature that distinguishes term limits from the prohibition at issue here: Term limits are content-neutral and uniformly applicable. As this Court wrote in *Legislature v. Eu*:

> Moreover, respondents observe that neither voter choice nor candidate eligibility is restricted based on the content of protected expression, political affiliation, or inherently arbitrary factors such as race, religion or sex. The only criterion used is incumbency. Voters retain the ability to vote for any qualified candidate holding the beliefs or possessing the attributes they may desire in a public officeholder. Under these circumstances, First Amendment protection of political expression

> and promotion of the marketplace for ideas continue unabated.
>
> (54 Cal.3d at 519.)

The Ninth Circuit made much the same point when it reviewed California's term limits in *Bates v. Jones* (9th Cir. 1997) 131 F.3d 843, cert. den. (1998) 523 U.S. 1021:

> Most important, the lifetime term limits do not constitute a discriminatory restriction. Proposition 140 makes no distinction on the basis of the content of protected expression, party affiliation, or inherently arbitrary factors such a race, religion, or gender. Nor does the Proposition "limit [ ] political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status."
>
> (131 F.3d at 847, citation omitted.)

The same certainly cannot be said here. Article II, section 15(c) singles out only one individual – the "targeted official" – for exclusion. As a result, it clearly "limit[s] political participation by an identifiable political group" whose members share both an associational preference and a particular viewpoint. They want to associate to support the Governor as a candidate in a plurality election in which voters will be asked to choose from a field crowded by the serious and the frivolous alike. The denial of these voters' associational rights is clear.

2. <u>The alleged state interests</u>

The state interests at issue in this case cannot be equated with those that support term limits. To begin, this Court itself recognized the difference between the interests served by term limits and those at issue here:

> *De Bottari,* using strict scrutiny, reviewed the interests that assertedly supported a temporary ban on candidacy by *recalled* candidates and found them insufficient to sustain the restriction. The court had no occasion to review the "different" interests served by general limitations on incumbency, as outlined by *Maloney, supra.*
>
> (*Legislature v. Eu*, 54 Cal.3d at 522, original emphasis.)[11]

Undeterred, respondent argues that "this Court held that the state had legitimate and compelling interests in limiting incumbency, in protecting against an entrenched, dynastic bureaucracy, and in thereby encouraging new candidates to seek public office." (Shelley Opp. at 21.) These interests, respondent insists, "apply with even greater force when the incumbent is facing a recall election." (*Id*.)

Before making the leap from term limits to recalls, it is important to know just what the Court was discussing in *Legislature v. Eu*.

[11] Respondent's attempt to distinguish *De Bottari* on the ground that it turned on the length of the ban against running for office must fail. (Shelley Opp. at 18-19.) The Court's analysis of the voter and state interests at stake in *De Bottari* applies even more strongly to the simultaneous recall/replacement election for the state's highest office at issue here. In *De Bottari,* the court held that "[t]he most substantial argument in favor of [the ban on running as a replacement candidate] is that it promotes stability in city government . . ." (*De Bottari v. Melendez* (1975) 44 Cal.App.3d 910, 921.) Here, of course, the opposite is true. The outcome of a plurality election in which the Governor is prohibited from running can never have the kind of legitimacy that is necessary to govern a state of this size and complexity. Instead, as the *De Bottari* court recognized, the result may very well be another recall, with all the instability that entails.

The issue in that case involved legislative[12] term limits that applied neutrally and across the board to every member of the Legislature. As noted earlier, the recall election at issue here targets just one official, and infringes on the rights of only one group – the Governor's supporters.

In analyzing the state's interests in term limits, this Court turned to the purposes identified in the initiative, which were "to restore 'free, fair, and competitive elections,' to 'encourage qualified candidates to seek public office,' and to eliminate 'unfair incumbent advantages' that have resulted in an 'extremely high number of incumbents' and created 'a class of career politicians' instead of the 'citizen representatives envisioned by the Founding Fathers." (*Id*. at 519.)

The prohibition against a recall target running as a replacement candidate certainly does not serve these same interests; in fact, it defeats them. By definition, a recall election is designed to overturn the last "free, fair, and competitive election," in this case one that occurred only ten months ago. Barring the targeted official from running as a replacement candidate when his successor can be elected by a tiny plurality can hardly be said to further "free, fair, and competitive elections" either. There is nothing free or fair about electing a Governor by singling out for elimination the choice of a large – probably the largest – bloc of voters casting ballots on the question of who should hold the office.

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[12] Respondent's paraphrase of the Court's words is, therefore, inaccurate. The state interest at stake was in "protecting against an entrenched, dynastic *legislative* bureaucracy," something that the Court held could only be accomplished by applying term limits to each of the 120 members of the State Legislature. (*Legislature v. Eu*, 54 Cal.3d at 520, emphasis added.)

Similarly, no one can seriously argue that the prohibition encourages qualified candidates to seek public office, either as a general matter or with respect to this election itself. Qualified candidates considering a potential run for governor in the future will hardly be encouraged to do so if they know that they can be subjected to a recall election demanded by a tiny percentage of the electorate and then barred from running as a replacement candidate even though their supporters constitute the single largest bloc voting in the election. As for this election, no one can argue that there is any dearth of candidates, qualified and unqualified alike. The Secretary of State's web site reports that more than 500 individuals have taken out papers to run in this election.

Finally, the purpose of eliminating "unfair incumbent advantages" simply has no place in a recall election, which by definition means that the incumbent lacks such an advantage. As the Court of Appeal wrote in *De Bottari v. Melendez* (1975) 44 Cal.App.3d 910, 920, "[o]rdinarily, of course, an official who has been removed by recall will stand little chance of winning an election held a few months later . . . ." This is even more true, one might argue, when that official appears as a candidate on the same ballot as the recall question itself. If, however, that official is able to garner the highest plurality as a replacement candidate, what possible argument can be made that he does not represent the wishes of the largest number of voters voting on the question? And what possible state interest can be served by preventing those voters from expressing their preference that he be elected?

Thus, the fact that a larger plurality of voters may prefer the Governor than any other candidate can hardly be called unfair; it is a

concept that lies at the heart of majoritarian democracy. As the Court of Appeal put it in *De Bottari*:

> If an official is recalled by a narrow vote and barred from the subsequent general election, the quickest way to obtain a new electoral contest would be to support a recall of his successor. If the recalled official is allowed to run in the general election following his recall, on the other hand, the results are more likely to be accepted by both sides and the chances of recall during the subsequent term will be reduced.
>
> (*De Bottari,* 44 Cal.App.3d at 922.)

B. Respondent's Other State Interests Are Unpersuasive

Conscious that the comparison with term limits is imperfect, respondent also posits other state interests supposedly served by article II, section 15(c): that the "recalled officer should not be able to thwart the will of the voters by running to succeed him or herself," that the prohibition on running is necessary to avoid voter confusion, and that it is necessary to avoid "voter outrage." (Shelley Opp. at 32.)[13]

It is ironic indeed that the Secretary of State should characterize enlarging the franchise as thwarting the will of the voters. If the purpose of this election is, in the federal district court's words, to

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[13] Respondent also argues that "[o]n four separate occasions over a period of 83 years, California voters have amended the Constitution to include a provision for recall that prohibits State officers from running as replacement candidates for themselves in a recall election." (Shelley Opp. at 31.) That statement is misleading, at best. The ban on running as a replacement candidate has been in the Constitution since passage of the recall provisions in 1911. It has never been the specific subject of any subsequent amendments, and the voters have never been asked to focus on the issue itself.

determine "who will govern the people of California,"[14] then everyone who has an interest in this election should be allowed to vote for the candidate of his or her choice. The Secretary of State's solicitude for "the will of those voters who signed recall petitions" and his concern over "voter outrage" ignore the fact that, in the District Court's words, "[t]he selection of a governor is not an interest special only to those favoring recall. Rather, it is of paramount interest to all of California's voters." (*Partnoy v. Shelley*, *supra*, at pp. 10-11, RJN, Exh. S.)

Nor will permitting the Governor to run as a replacement candidate cause voter confusion, as respondent contends. To the contrary, it will prevent it. As the declaration of Darry Sragow demonstrates, many voters believe that they must vote yes on the recall in order for their vote for a replacement candidate to count. (Sragow Decl., ¶ 19.) Allowing the Governor to appear on the ballot will ensure that these voters, together with the voters whose rights to abstain on the recall issue were upheld in *Partnoy*, are not disenfranchised.

C. This Court's *Edelstein* Decision Offers Respondent No Support

Respondent is equally mistaken in relying on this Court's analysis in *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164. The voters' interest at issue there was the right to vote for a write-in candidate in the runoff portion of the San Francisco mayoral election. The Court held that the impairment of the voters' rights was not severe, "because there was a single *election*, although there were two rounds of voting." (29 Cal.4th at 174, emphasis in original.) Contrary to

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[14] *Partnoy v. Shelley*, *supra*, at p. 13, RJN, Exh. S.

respondent's claims, the Court's emphasis on the "winnowing" process of the runoff election does not support the prohibition at issue here; it undermines it. As the Court pointed out, the purpose behind a runoff election is "to ensure that the winning candidate receive a majority of the votes." (*Id*. at 182.) This, the Court held, is a valid purpose "given the centrality of the concept of majority rule in the founding documents of American democracy . . ." (*Id*. at 183.)

It is this same "centrality of the concept of majority rule" that makes it so important that petitioners' votes – and those of all the voters who support the Governor – be recorded and counted on the second question. Without the inclusion of those votes, the legitimacy of the election will always be in doubt, and if Californians are to have a new Governor, they can have no confidence that he or she was elected in a free and fair election.

D. Other State Cases Provide No Support for Respondent

The Secretary of State cites four cases from other states in which certain aspects of the recall process were challenged. Those cases are not informative here, and need not distract this Court for long.

Two of the cases involve no constitutional challenge to the recall procedures at issue. In *Recall Bennett Com. v. Bennett* (Or. 1952) 249 P.2d 479, the Oregon Supreme Court was asked to construe the recall provisions of a city charter as applied to a city commissioner. The court determined that those provisions, like the identical provisions of the state constitution, barred the recalled commissioner from running for the vacated seat for the duration of that term. It was not asked, and did not address, whether such a construction raised any constitutional concerns, or whether its conclusion might differ were the recall of the state's governor at issue.

Similarly, in *Bernzen v. City of Boulder* (Colo. 1974) 525 P.2d 416, the issues raised before the court were statutory construction, not constitutional validity. The Colorado Supreme Court, relying in part on the *Bennett* case, construed a city charter and the state constitution as barring recalled councilmen from running as candidates to succeed themselves. Again, no constitutional claims were raised as to that construction. Moreover, the Secretary of State is simply wrong in stating that Colorado's constitutional provisions are identical to California's. Indeed, the state court took pains to note that Colorado, with its requirement that 25 percent of the relevant electorate sign a recall petition, had "assured that a recall election will not be held in response to the wishes of a small and unrepresentative minority." (525 P.2d at 419.)

The Secretary of State, moreover, does not balance his citation of those two cases against other state cases that construe their constitutions or charter provisions to allow recalled candidates to succeed themselves. (*See, e.g., Hurt v. Naples* (Fla. 1974) 299 So.2d 17, 20 [construing city charter to allow recalled councilmen to be candidates in simultaneous election to fill the vacated term]; *Grubb v. Wyckoff* (N.J. 1968) 247 A.2d 481.)[15]

The two cases that discuss constitutional issues do so in such a perfunctory manner as to provide no assistance to this Court in its deliberations. *Stone v. Wyckoff* (N.J. Super. 1968) 245 A.2d 215, decided prior to the New Jersey Supreme Court's decision in *Grubb v. Wyckoff*, has

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[15] *Grubb v. Wyckoff* is discussed at length in our opening memorandum at pp. 34-35.

no analysis whatsoever, but simply a one-sentence denial of a constitutional claim that had not even been raised in the lower court. (*Id.* at 220.)

Mink v. Pua (Haw. 1985) 711 P.2d 723, concerned the recall of two city councilmen under the Honolulu Charter. The charter provision barring recalled officers from running in any city election for two years had already been enjoined by the U.S. Court of Appeals for the 9th Circuit as unconstitutional. (*Matsumoto v. Pua* (9th Cir. 1985) 775 F.2d 1393.)[16] The state court thus was construing a general charter provision regarding election of a successor to fill a vacancy in a city office. That provision applied not only to recalled officials, but also those who had resigned or been impeached. (*Mink v. Pua*, 711 P.2d at 726.) It was in this context that the court decided the ban on election of the recalled official as his own successor, in a subsequent special election, was not unconstitutional. In so doing, the court had no occasion to apply the *Anderson v. Celebrezze* balancing test in the context of the recall of an elected statewide officer. Notably, Hawaii has no constitutional or statutory provision of which we are aware allowing recall of its statewide officers.

Mr. Costa cites *Citizens Com. to Recall Rizzo v. Board of Elections* (Pa. 1976) 367 A.2d 232, 274-275, as authority for the proposition that "the people may reserve the power to change their

[16] The Ninth Circuit in *Pua* expressed no view as to the constitutionality of a ban on recalled officials running to fill the vacancies created by their recall. (775 F.2d at 1398.) Nonetheless, it is instructive that the appellate court enjoined the city from keeping the recalled officials off the ballot for the special election to fill the vacancy. Moreover, the Ninth Circuit found that prohibiting the recalled officials from running for city office "imposes a severe burden on the rights of recalled city officials and their supporters" and "burdens the first amendment rights of elected officials . . . ." (*Id.* at 1397.)

representatives at will." (Costa Opp. at 3.) He neglects to mention, however, that the quote comes from the dissent. The majority struck down Philadelphia's recall law because the state constitution in fact did not allow the people to "change their representatives at will," but instead allowed civil officers to be removed by the Governor for "reasonable cause, after full hearing, on the address of two-thirds of the Senate." Pennsylvania is one of the states that does not provide a method for recalling its Governor. The majority also threw out the recall petitions in the case before it as insufficient because, for example, they were circulated by persons who falsely attested they were registered electors of the city. (*Id.* at 239-240.)

Finally, Mr. Costa suggests he finds support for the "paradoxical" nature of allowing a recalled official to stand for reelection in the case of *Abbey v. Green* (Az. 1925) 235 P. 150, 156. But there, the state avoided such a "paradox" by having the target of the recall stand for election with the potential replacement candidates in a single election. No separate vote was taken on the question of the recall; instead, the official was recalled only if he or she did not receive the highest number of votes at the special election. (*Id*. at 60.)

E. California's Recall Procedures Violate the Principle of One Person, One Vote

In arguing that the one person, one vote rule does not apply here, the Secretary of State relies on *Gordon v. Lance* (1971) 403 U.S. 1, and *Lockport v. Citizens for Community Action* (1977) 430 U.S. 259. (Shelley Opp. at 28-31.)

In *Gordon v. Lance*, the Supreme Court upheld a requirement that 60 percent of the voters in a referendum election approve bonded indebtedness or tax increases. (403 U.S. at 3.) The Court based its ruling

on several factors. First, unlike the situation in *Hunter v. Erickson* (1969) 393 U.S. 385, where "fair housing legislation alone was subject to an automatic referendum requirement," the three-fifths requirement "applied equally to all bond issues for any purpose." (*Gordon v. Lance*, 403 U.S. at 5.) Second, because there is no discernible class of citizens "that favors bonded indebtedness over other forms of financing," no sector of the population was being treated differently. (*Id.*) Finally, the Court held, it was legitimate for the State to make "it more difficult for some kinds of governmental actions to be taken." (*Id.* at 5-6.)[17]

None of these factors is present here.

First, this case is very like *Hunter v. Erickson*: Gray Davis is the only one among all those seeking to be Governor for whom a 50 percent vote requirement applies. Like the fair housing legislation in *Hunter*, the Governor alone has been targeted because of what he stands for and the viewpoint he represents.

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[17] The Court also noted the unique character of bonds: "It must be remembered that in voting to issue bonds voters are committing, in part, the credit of infants and of generations yet unborn, and some restriction on such commitment is not an unreasonable demand. (*Id.* at 6.)

Additionally, courts have distinguished between popular votes on bonds versus voting for representatives where, "[t]o insure equal representation, the vote of each person in every constituency must be of equal weight . . . . Since the consequences of electing a representative differ significantly from those of a bond referendum, what is necessary to guarantee fairness in one should not be applied automatically to the other. " (*Brenner v. School Dist. of Kansas City* (W.D. Miss. 1970) 315 F.Supp. 627, 635; *Phoenix v. Kolodziejski* (1970) 399 U.S. 204, 215, Stewart, J., dissenting ["If this case really involved an 'election,' that is, a choice by popular vote of candidates for public office under a system of representative democracy, then our frame of reference would necessarily have to be *Reynolds v. Sims,* 377 U.S. 533. . . ."].)

Second, in contrast to the situation in *Gordon*, here there is a readily identifiable class of citizens who favor retention of sitting officials, such as the Governor, who were elected in a duly held general election just months ago. There is also a readily identifiable class of citizens who support the Governor and the policies under attack in this recall.

Finally, this is not a case of the State rationally making some categories of governmental action more difficult to take, as the Court found in *Gordon*. The governmental action here is choosing a governor; within that single governmental action the State has placed a heavier burden on some voters based entirely upon their political beliefs and associations. Even if one treats the removal action as distinct from replacement, there is no logic or rationale for making it easier to remove a sitting Governor than to select a replacement. This is particularly true when, as here, nothing distinguishes the contestants except their political positions and policies.

In *Lockport v. Citizens for Community Action*, the Court upheld a unit vote on charter changes with the city votes and the unincorporated votes counted separately on the grounds that there was a "genuine difference in the relevant interests" between these two distinct groups of voters in regard to amendments to the city charter. (430 U.S at 268.) Otherwise, "[p]resumptively, when all citizens are affected in important ways by a governmental decision . . ., the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise." (*Phoenix v. Kolodziejski,* 399 U.S. at 209, 212 [differences must be "sufficiently substantial to justify" the restriction on the franchise; "somewhat different" interests between land owners and others did not justify differential treatment in referendum vote.].)

The *Phoenix* case involved a state law restricting the vote in certain bond elections to real property taxpayers. (399 U.S. at 206.) Justice Stewart, dissenting, criticized application of one person, one vote principles in *Phoenix*, because he questioned whether the case "really involved an 'election,' that is, a choice by popular vote of candidates for public office under a system of representative democracy. . . ." (*Id.* at 215, dis. opn. Stewart, J.) He acknowledged that a candidate election would clearly be governed by one person, one vote requirements:

> [R]ightly or wrongly, the Court has said that in cases where public officials with legislative or other governmental power are to be elected by the people, the Constitution requires that the electoral franchise must generally reflect a regime of political suffrage based upon 'one man, one vote.'"

(*Id.*)

It is thus one thing to say that a vote differential is permissible in a "limited purpose election"[18] such as the bond vote in *Gordon v. Lance* or the charter amendment in *Lockport*. It is quite another to say that citizens' votes for governor will be counted differently depending upon whom they support for office. This would be the equivalent of the court in *Edelstein* saying that write-in candidates required a higher percentage of the vote to prevail.

Mr. Costa argues that because the state is not required to hold an election for a successor, it can structure the election any way it likes." (Costa Opp. at 11.) The United States Supreme Court disagrees: "The

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[18] *Cipriano v. City of Houma* (1969) 395 U.S. 701, 704.

need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment." (*Kramer v. Union Free School Dist.* (1969) 395 U.S. 621, 628-629; *see also Rodriguez v. Popular Democratic Party* (1982) 457 U.S. 1, 10, citing cases ["To be sure, when a state or the Commonwealth of Puerto Rico has provided that its representatives be elected, 'a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.'"].)

Finally, respondent argues that "[t]he Governor, as the subject of the recall, is not similarly situated with the potential replacement candidates because the Governor will keep his position . . . even if one of the candidates who seeks to replace him gets 80 percent of the vote." (Shelley Opp. at 30.) But, equal protection, particularly when the right to vote is involved, deals in practical impacts and real differences, not theoretical or fictional distinctions. (*See, e.g., Anderson v. Celebrezze* (1989) 460 U.S. 780, 799 [court assesses burdens and benefits of election requirements based upon practicalities]; *Phoenix v. Kolodziejski*, 399 U.S. at 209, 212 [differences among voters must be "substantial" to justify differential treatment]; *Hunter v. Erickson*, 393 U.S. at 391 [looking to real impact on black voters]; *Knoll v. Davison* (1974) 12 Cal.3d 335, 347, fn. 5 ["realities of the electoral process"].)

From the voters' perspective, there is no doubt that Gray Davis is in a contest with the other candidates for the office of governor. The state having established an electoral contest cannot, consistent with equal protection, impose more onerous vote requirements on those who want Gray Davis to be governor.

IV.

UNLESS THIS COURT ACTS, THE ELECTION WILL VIOLATE THE GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT

Respondent Kevin Shelley too easily dismisses the Guarantee Clause argument as nonjusticiable, and in the process, misses its import. It is true that the Guarantee Clause of the federal Constitution is rarely invoked in the courts, but this case is like no other. California's recall election is spiraling rapidly out of control. Respondent cannot assure Californians that there will be a fair and orderly election. Just as importantly, respondent cannot assure Californians that the outcome of this election will be a *representative government*. Instead, this recall election – instituted by 6 percent of the voters, funded in large part by one wealthy individual, and now the butt of jokes throughout the nation – has finally become a textbook example of the rare circumstance under which the Guarantee Clause properly is invoked.

Thus while the Court in *Gregory v. Ashcroft* (1991) 501 U.S. 452, stressed the power of the states "'to prescribe the qualifications of their own officers . . . free from external interference'" (501 U.S. at 460, citation omitted), the assumption was that those officials would be part of "'a Republican Form of Government.'" (*Id.* at 463, quoting U.S. Const., art. IV, § 4.)

The recall provisions as they threaten to unfold here do not comport with that constitutional guarantee.[19] The flaw is in the ease with which everyone but Gray Davis can be elected governor under its provisions, together with the lack of time to educate the electorate, implement ameliorative measures, and address the logistical nightmare. In the ballot access cases, the United States Supreme Court has recognized the dangers inherent in an unregulated election.

> Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."
>
> (*Burdick v. Takushi* (1992) 504 U.S. 428, 433, quoting *Storer v. Brown* (1974) 415 U.S. 724, 730.)

This gubernatorial recall election has descended into chaos. One reason is the lack of any real filter for appearing on the ballot. As of 5:00 p.m. on Wednesday, August 6, a staggering 511 candidates had completed the initial steps to run as replacement candidates for governor.[20]

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[19] *Bonner v. Belsterling* (Tex. 1911) 138 S.W. 571 and *Roberts v. Brown* (Tenn. App. 1957) 310 S.W.2d 197, cited by Mr. Costa, stand for the unremarkable proposition that, if properly constructed and applied, the recall is not inherently inconsistent with the republican form of government.

[20] The exact number of candidates on the ballot will not be known until the counties verify each individual's nominating signatures and report to the Secretary of State, who will issue a certified list of candidates on August 13. (*See* RJN, Exh. L.)

It may be that not all of them will ultimately complete the process. But all of them could; the laxity of state regulation for the recall allows, if not encourages, a multitude of frivolous and fraudulent candidacies, in direct contravention of respondent's duties as the State's chief elections officer.[21]

> [A] state has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.
>
> (*Bullock v. Carter* (1972) 405 U.S. 134, 145, citing *Jenness v. Fortson* (1971) 403 U.S. 431, 442.)

Much has been written in the popular press[22] about the lax requirements for running as a candidate in the recall election – 65 signatures and a $3,500 filing fee, which can even be paid for by credit

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[21] There is no need to worry here about an unduly broad definition of a "frivolous" or "fraudulent" candidacy. The 511 candidates who have filed to date include self-identified "frivolous" and "fraudulent" candidates. (*See, e.g.,* www.run-for-governor.org , a website set up to encourage people to file as candidates and asking the public to seek out "anyone named Bill Simon, Darrell Issa, Michael Huffington, Richard Riordan, or even Arnold Schwarzenegger, convince and help them to run for office (or at least file for candidacy).) Even if you only know someone with one of these candidates' last names, convince them to run. The more confusing the ballot, the more likely we are to affect the election." (*See also* www.99only.com (press release announcing advertising campaign in which 99 Cents Only Stores will pay the filing fee for any 99-year-old individual who is willing to run for governor).)

[22] *See, e.g.,* R. Sanchez, "'Survivor' Meets Sitcom in Calif.: New Plots, Characters Emerge in Recall Election," *Washington Post*, p. A-1 (Aug. 6, 2003), 2003 WL 56510835; *see also* J. Mathews & P. Hong, "California's Crazy Quilt of Politics Frays," *Los Angeles Times,* p. 1 (Aug. 7, 2003), 2003 WL _____ [quoting State Librarian and historian Kenneth Starr: "This is a society melting down into deliberate self-parody."].

card.[23] This method of electing a governor ignores all the safeguards contained in the state's election laws. Ordinarily, a candidate obtains a place on the general election ballot in one of two ways: through receiving the nomination of a major political party, or by completing the requirements for an independent candidacy. Neither of those is applicable here. There is not even time for an exploratory campaign, in which candidates can test the waters and ascertain the level of likely voter support.

The Secretary of State notes that 15 candidates appeared on the ballot for the office of Governor in the November 2002 general election. However, six of those candidates were the nominees of their qualified political parties. They thus had gone through two levels of filtering: first, their parties had demonstrated sufficient support among the electorate to become a "qualified political party" under state law; second, the individual had gone through the party nomination process and thus had demonstrated a level of support among the members of his or her party.

The remaining individuals qualified as write-in candidates by submitting 65 to 100 nominating signatures, the same number required of candidates in this special recall election. However, the write-in candidates did *not* have their names listed on the ballot. Instead, below the six political party nominees was a designation for "write-in." A voter could check that designation and then hand-write in the name of an individual.

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[23] Fresno, San Joaquin and Santa Barbara counties are accepting credit cards for payment of the $3,500 candidate filing fee.

Such a vote would count only if the individual was a "qualified" write-in candidate.

Thus, the election that is scheduled to take place in October bears no resemblance to the last general gubernatorial election. There is nothing in place here to winnow the list of candidates who will appear on the ballot. And there is no time in the pressure cooker election schedule to evaluate or implement winnowing mechanisms. Instead, on a scale far beyond any ever seen, serious candidates must compete with publicity hounds, persons whose stated purpose is to disrupt the election, and others who admittedly have no interest in serious pursuit of the governorship. All will be listed together on a ballot in randomized alphabet order, adding to the confusion.[24]

The Secretary of State and the counties have done their best to cobble together a set of rules borrowed from various parts of the Elections Code or past practice. The result, however, is an irrational system that either provides too stringent a filter (by blocking Governor Davis as a candidate), or none at all (for all other candidates). It cannot elect a governor who represents the interests of more than a fractured minority of California voters.

[24] In light of this, it is ludicrous for the Secretary to suggest that adding Governor Davis' name to the randomized list of 511 candidates is what will cause "voter confusion."

CONCLUSION

The alternative writ should issue, and the election should be postponed until March 2, 2004.

Dated: August 7, 2003

Respectfully submitted,

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