Mark D. Rosenbaum, SBN 59940
Peter J. Eliasberg, SBN 189110
Ben Wizner, SBN 215724
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Blvd.
Los Angeles, CA 90026
Tel: (213) 977-9500, ext. 224
Fax: (213) 250-3919

Daniel P. Tokaji, SBN 182114
Ohio State University Moritz College of Law*
55 W. 11th Ave.
Columbus, OH 43210
Tel: (614) 292-6566
Fax: (614) 688-8422
Attorneys for Plaintiffs
Additional Co-Counsel on Next Page

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF GREATER LOS ANGELES; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, CALIFORNIA STATE CONFERENCE OF BRANCHES,

Plaintiffs,

vs.

KEVIN SHELLEY, in his official capacity as California Secretary of State,

Defendant.

Case No. EDCV 03-903 RT SGLx

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER

Date:
Time:
Ctrm:

* Institutional affiliation given for the purpose of identification only; counsel acting in individual capacity.

Erwin Chemerinsky, of counsel
University of Southern California Law School
600 Exposition Boulevard
Los Angeles, CA 90089-0071
Tel: (213) 740-2539

Alan L. Schlosser, SBN 49957
Margaret C. Crosby, SBN 56812
ACLU Foundation of Northern California
1664 Mission Street, Suite 460
San Francisco, CA 94103
Tel: (415) 621-2493
Fax: (415) 255-8437

Jordan Budd (SBN 144288)
ACLU of San Diego & Imperial Counties
P.O. Box 87131
San Diego, CA 92138
Tel: (619) 232-2121
Fax: (619) 232-0036

INTRODUCTION

1. Our voting systems are the infrastructure of our democracy. The pre-scored punch-card ("PPC") voting systems in six California counties, including Los Angeles County, utilized by 44 percent of the registered voters voting in the 2000 presidential election, have been decertified by the State's highest election official as "defective, obsolete, or otherwise unacceptable" and are known to produce uncounted votes at between double and quadruple the rates in remaining counties, all of which use certified voting systems. These PPC systems, essentially identical to those responsible for the 2000 Florida debacle that cast a cloud over the presidential election, are on their way out: by the time of our next regularly scheduled statewide election, they will be history.

2. Yet despite this demonstrated inaccuracy and unreliability, their decertification by the California Secretary of State, and the assured result that they will disenfranchise not less than tens of thousands of California voters in six counties, punch-card machines are set to be used in the special recall election on October 7, 2003. Use of these obsolete punch-card machines will disproportionately disadvantage African-American, Latino and Asian-American voters, who primarily reside in the six counties that use the machines. Those voters, and other voters subject to the punch-card machines, will be asked to choose their governor, and to decide whether controversial Propositions 53 and 54 should be enacted, without any assurance that their votes will be counted. The critical value of every vote for elected officials is especially at stake in an election to choose the state Governor. Moreover, Proposition 53 would devote critical funds toward parks and other public works, and Proposition 54 – the so-called "Racial Privacy Initiative" – would prohibit the state's collection and use of racial and ethnic data. No election could embody more strongly the core value of the vote than this upcoming election, but without the requested TRO the election could be nothing more than a sham, given the universal recognition that punch-card machines are failed voting mechanisms.

3. We know from *Bush v. Gore*, 531 U.S. 98 (2000) and from the decisions of this Court in *Common Cause v. Jones*, 213 F. Supp. 2d 1106, 1107 (C.D. Cal. 2001), that the fundamental right to vote is unconstitutionally degraded when the votes of all citizens are not accorded equal weight and equal dignity. And we know without any doubt that unless the special recall election is postponed to the next regularly scheduled March 2004 election date, nearly half of our state's citizens – those who are compelled to vote on PPC voting systems until that time – confront a near certainty that their votes will be rejected as much as four times more often than those of their co-citizens in counties using other types of voting machines. However exceptional the delay of an election, it would be more exceptional – and unconstitutional – to sanction knowingly the malfunctioning of the enabling machinery for our democratic process. Even were the recall and Propositions 53 and 54 races not projected as close calls – perhaps turning on the residual votes resulting from the treacherous arbitrariness of the PPC machinery – we have never before permitted an election to go forward by unconstitutional methods that could feasibly be replaced. No less than in *Bush v. Gore*, and in fact much more so given the incontrovertible statistical evidence of disparities, the use of systems that treat voters differently for no good reason must be enjoined.

BACKGROUND

A. The *Common Cause, Southern Christian Leadership Conference of Greater Los Angeles, et al. v. Jones* Litigation

4. Plaintiffs in this case, Southwest Voter Registration Education Project and Southern Christian Leadership Conference of Greater Los Angeles, and the National Association for the Advancement of Colored People, California State Conference of Branches, along with other organizations and registered voters residing in California counties that use Votomatic and Pollstar pre-scored punch-card ("PPC") voting systems in election contests, filed an action in this Court for declaratory and injunctive relief on April 17, 2001, alleging ongoing violations of the fundamental right to vote, arising out of the use of these voting systems in nine California counties. *Common*

Cause, et al. v. Jones (01-CV-03470) SVW (RZx).[1] As summarized by the Court in denying defendant's motion for judgment on the pleadings, the First Amended Complaint "allege[d] that, because punch-card voting systems are less reliable than the other voting systems permitted by the Secretary of State, those individuals living in counties where the punch-card system is used are substantially less likely to have their votes counted." *Common Cause v. Jones*, 213 F. Supp. 2d 1106, 1107 (C.D. Cal. 2001).

> This, plaintiffs allege, amounts to vote denial and a violation of the fundamental right to vote protected by the Fourteenth Amendment. Moreover, plaintiffs allege that the counties which choose the punch card system have high racial minority populations in comparison with counties using other voting systems. Therefore, plaintiffs allege that there is denial of the right to vote on the basis of race in violation of the Voting Rights Act, 42 U.S.C. §1983.

Id. at 1107-08.

5. On August 24, 2001, the Court denied the defendant's motion for judgment on the pleadings, finding that plaintiffs had alleged facts sufficient to support both their constitutional and their statutory claims. *Id.* The Court noted that "[t]he United States Supreme Court has clearly stated that the right to vote is a fundamental right protected by the Fourteenth Amendment." *Id.* at 1108 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)). It rejected the motion as to the equal protection cause of action "regardless of the standard of review used," explaining that "[e]ven if the more lenient standard is ultimately applied. . . Plaintiff has alleged facts indicating that the Secretary of State's permission to counties to adopt either punch-card voting procedures or more reliable voting procedures is unreasonable and discriminatory." *Id.* at 1109.

[1] A copy of the First Amended Complaint is attached separately to these papers as Exhibit 1.

6. On September 18, 2001, defendant Secretary of State issued a proclamation decertifying Votomatic and Pollstar pre-scored punch-card systems for use in California pursuant to Cal. Gov't. Code §12172.5 and Cal. Elections Code §19222, thereby reflecting the statutorily-mandated determination that such systems were "defective, obsolete, or otherwise unacceptable."[2] Decertification was made effective January 1, 2006. The Secretary's decertification of these voting systems further reflected the legally-required conclusion that they "fail[] to meet the standards set forth in California election law." California Voting Systems Certification Procedures §1201 (stating the standard for decertification). The nine counties identified as still using these systems were: Alameda, Los Angeles, Mendocino, Sacramento, San Bernardino, San Diego, Santa Clara, Shasta and Solano. On December 17, 2001, the Secretary of State announced that decertification would be advanced to July 1, 2005.

7 On the same day that the Secretary issued the proclamation, he released a public statement in which he said: "We cannot wait for a Florida-style election debacle to occur in California before we replace archaic voting systems."[3] The statement continued: "As was seen in the Florida presidential election, these systems are prone to user error that can result in ambiguous votes clouded by hanging, dimpled and pregnant chads."

[2] A copy of this proclamation is attached separately to these papers as Exhibit 2.

[3] A copy of the News Release is attached separately to these papers as Exhibit 3.

8 As a result of the decertification, on October 12, 2001, the sole remaining issue in the case was "whether it is feasible to replace Votomatic and Pollstar punch-card voting equipment in the [PPC counties] in advance of either the 2004 primary election or the 2004 general election." *See Common Cause v. Jones* ("Common Cause II") 213 F. Supp. 2d 1110, 1111-1112 (C.D. Cal. 2002). On February 19, 2002, the Court found that it was "plainly feasible for the PPC counties to convert to 'other certified voting' by March 2004." (Order, ¶14, p. 3)[4] The Court noted that PPC counties "comprise 8.4 million registered voters." *Id.* at ¶ 11, p. 3. It subsequently denied defendant's motion for reconsideration, after first permitting the Secretary "once again... the opportunity to point out any facts that he felt the Court should have considered in making its ruling." *Common Cause II*, 213 F. Supp. 2d at 1115. The Court found "it self-evident that replacing voting systems that deprive individuals of the right to vote is clearly in the public interest." *Id.* at 1113.

9 On May 6, 2002, pursuant to a consent decree accordingly entered by the Court, the effective date of the decertification of PPC voting systems throughout California was advanced to March 1, 2004. 2002 WL 1766410. The Court approved a consent decree on May 9, 2002, specifically emphasizing that "statistical evidence advanced in [the] case suggested that the challenged punch-card machines suffered from an error rate nearly double that of other polling technologies, and risked continuing effectively to disenfranchise thousands of voters as a result."[5]

10 No appeal was taken from any of the Court's rulings.

11 As a result of the *Common Cause* consent decree, all PPC machines in the State of California must be replaced by March 1, 2004, in sufficient time for the next regularly scheduled statewide elections. The Order thereby ensures that all California voters, including the nearly eight and one half million registered voters who were

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[4] A copy of the February 19, 2002 Order is attached separately to these papers as Exhibit 4.

[5] A copy of the May 9, 2002 Order is attached separately to these papers as Exhibit 5.

previously compelled to use obsolete and unreliable equipment, will for the first time be able to cast their votes in a statewide election confident that their votes will actually be counted, to be accorded equal status with all other voters across California.

B. Pre-Scored Punch-Card Voting Systems [6]

12 There are currently four types of voting systems used in California: pre-scored punch cards (decertified by the Secretary of State effective March 1, 2004), datavotes, optical scans and touch screens. PPC systems are markedly inferior compared to the other systems in the reliability and accuracy in recording the intentions of voters, and produce greater racial disparities in residual votes. The particular characteristics of the recall election compound these problems.

1. Description of operation of systems.

13 In counties using pre-scored punch card machines (VotoMatic or Pollstar machines), a voter entering the polling place is given a paper ballot in the form of a long piece of relatively heavy stock paper. The ballot card is pre-scored with columns of small, perforated rectangles, known as chads. Once inside the voting booth, the voter inserts the card into a slot and opens a booklet that lists the candidates for a given office. The voter then uses a metal stylus to attempt to punch out the rectangle on the card lined up next to the candidate or ballot measure of choice. The voter is required to turn to subsequent pages of the booklet, which list other candidates or ballot measures, for which the voter must punch out the adjacent rectangles in order to vote.

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[6] Unless otherwise indicated, the facts in this section derive from the declarations of Henry E. Brady and Roy G. Saltman. Henry Brady is currently Robson Professor of Political Science and Public Policy at the University of California, Berkeley, where he regularly teaches courses at the graduate level in elections and voting behavior, and advanced statistical methods. He is also Director of the University's Survey Research Center and of UCDATA, where he regularly designs studies of voting and political participation. Dr. Brady has authored numerous books and articles regarding political participation and voting systems. He is past president of the Political Methodology Group (PMG) of the American Political Science Group. (See Brady decl., ¶¶ 4-6, pp. 1-2.)
Roy Saltman has worked in the field of election policy and technology since 1974. He has conducted studies in this area, including a study of computerized voting systems involving PPC systems in California as a result of a grant from the U.S. General Accounting Office. (See Saltman decl., ¶ 2, p. 1.)

If the ballot is not placed in the correct location in the machine, then the candidates' names or ballot measures will not line up properly with the rectangles that must be removed to register a vote. Because the candidates' names and ballot measure identifiers do not appear on the ballot itself, voters may not be able to tell from a visual inspection if their votes were cast as intended. In addition, pressing the stylus against the pre-scored rectangle sometimes does not cause the chad to be removed completely, which may result in the vote not being counted. Nor is there any protection against the voter "overvoting" by casting more than one vote for a particular office or ballot measure.

14 Datavote machines use a stapler-like tool that creates a hole in ballots. In contrast to pre-scored punch card machines like VotoMatic and Pollstar, no pre-scoring of the ballot is necessary. In order for the tool to be used, the ballot is placed in a holder which positions the row to be punched under the hole-punching part of the tool. The tool is mounted on the holder so that it can move up and down the row to the desired column. The names and parties of the candidates are printed directly on the Datavote ballot, which allows voters to ascertain after completing their ballot whether they voted as intended. Because Datavote machines do not rely on pre-scored punch cards, this system does not have the problem that exists with VotoMatic and Pollstar machines caused by chads that are not completely dislodged.

15 Optical scan systems (also referred to as "Mark Sense" systems), function in a similar way to standardized tests. The voter is given a ballot that lists the names of the candidates and any ballot measures. Next to each choice is either a small circle or an arrow with a gap. The voter must darken the bubble next to the preferred candidate or measure, or draw a straight line connecting the two parts of the arrow. The ballot is then placed in a box and, once ballots are collected, counted using an optical scanner. Some versions of the technology permit the voter to scan the ballot at the polling place to make certain that he or she voted as intended.

16 Touch screen voting machines (also known as direct recording electronic devices or "DRE"s) resemble ATM machines in appearance. Upon entering the booth,

the voter touches the name of the candidate or the ballot measure on a screen to register his or her preference. Typically, the voter may review the entire ballot to check the votes cast. It is not possible to vote twice, or "overvote," for the same office or measure. The computer tallies the votes and sends them to a central location.

2. Disparity in accuracy and reliability among voting systems as to recording intentions of voters.

17 The decertified PPC machines differ markedly in their propensity to record accurately and reliably to record the intentions of voters. This Court's November 7, 2002 Order, p. 8, noted that "statistical evidence advanced [in the *Common Cause*] case suggested that the challenged punch card machines suffered from an error rate nearly double that of other polling technologies, and risked continuing effectively to disenfranchise thousands of voters as a result."

18 The Secretary of State's determination to decertify PPC voting systems in California and the court's conclusion are reinforced by the most recent declarations and studies of Henry Brady and Roy Saltman, the pre-eminent experts in the country on voting systems. Dr. Brady concluded that "[t]he punchcard voting technology that will be used in at least six counties (Los Angeles, Mendocino, Sacramento, San Diego, Santa Clara, and Solano) in the October 7, 2003 statewide recall election will significantly increase the rate of residual votes (i.e., invalid ballots) as compared to other technologies." (Brady decl., ¶ 8, p. 2.) He projected based on past experience that the punch-card machines "will throw away about 40,000 votes," to be "heavily concentrated in minority areas." (*Id.*, ¶ 44, p. 13) These counties comprised 44 percent of the 2000 vote in California (*id.*, ¶ 9, p. 3). Thus, "[f]or those voters using punchcard systems, the residual vote rate was 2.23 percent. No other system had a higher average residual vote rate than 0.89 percent, a difference of 1.34 percentage points, meaning that punchcard systems failed to count 1.34 percentage points more votes than these other systems. *Id.*, ¶ 16, p. 4.[7] Brady therefore stated:

[7] *See also* Brady decl., ¶¶ 17-24, pp. 4-7 (demonstrating that poor performance was the result of using punch-cards and not other characteristics of the punchcard counties.)

> These data and data from other studies support the conclusion that moving away from punchcards will reduce overall residual voting by one to three percentage points with a best estimate of about 1.5 percentage points, and it will reduce the especially high residual vote rates among minorities compared to non-minorities by one to two percentage points.

(Id., ¶ 11, p. 3.)

19 Though, as Dr. Brady also points out, "it might be thought that punchcard performance would have improved through a combination of voter awareness and diligence of election officials," in California, it has not. (*Id.* ¶¶ 46-47, pp. 13-14.) Thus, for example, the eight counties that used punchcards in the 2002 gubernatorial race had a residual vote rate of 4.04 which was *worse* than the 3.72 percent in the counties in the 1992 Gubernatorial race." (*Id.*, ¶ 47, p. 14, emphasis in original.) And the four counties that changed from punchcard systems to new systems decreased their residual rate from 3.25 percent to 2.37 percent. *Id.*

20 Similarly, Saltman concluded that "PPC systems are irreparably deficient in producing a reliable record of voter intent and therefore in assuring public confidence in the results of elections. The problems with PPC systems include the inherent fragility of PPC ballots, the fact that many voters do not completely punch out 'chads' even with training, the user-friendliness of PPC machines and the fact that voters do not see their errors in PPC systems." (Saltman decl., ¶ 4, pp. 1-2.)

21 As Brady and Saltman point out, similar conclusions and results have also been found for counties in other states and for nationwide data. *See* Brady decl., ¶ 27, p. 8.[8]

3. Disparity in impact on racial and ethnic minorities.

22 In California, a significantly higher percentage of African-American, Latino and Asian-American voters than white voters reside in counties using pre-

[8]Dr. Brady cites at paragraph 27 of his declaration: Justin Buchler, Matthew Jarvis, and John McNulty, "Punch Card Technology and the Racial Gap in Residual Votes," unpublished paper, University of California, Berkeley; Henry E. Brady, Justin Buchler, Matt Jarvis, and John McNulty, *Counting All the Votes*, September 2001, Survey Research Center and Institute for Governmental Relations; Michael Tomz and Robert P. Van Houweling, 2003, "How Does Voting Equipment Affect the Racial Gap in Voided Ballots?" *American Journal of Political Science*, 47: 46-60.

scored punch-card equipment. Overall, people of color (including African-Americans, Asian Americans, Latinos and American Indians) constitute 46 percent of the population of the six counties using pre-scored punch-card equipment, but only 32 percent of the population of counties using other, more reliable types of equipment. (Brady decl., ¶ 10, p. 3.) More specifically, these six counties have nine percent African Americans, 11 percent Asian Americans, and 27 percent Latinos compared to non-punchcard counties that have only five percent African Americans, eight percent Asian Americans, and 1 nine percent Latinos. (*Id.*, ¶ 39, pp. 11-12.)[9]

4. Impact on October 7 election.

23 Dr. Brady concluded that "[i]n an election that may be close, as the October 7 election is shaping up to be, these impacts are significant enough to make the difference between whether the first recall election is approved and/or who receives the highest number of votes on the second recall question." (Decl., ¶ 14, p. 4.) And the problems of unreliability and inaccuracy are likely to be exacerbated where the ballot will contain somewhere between perhaps 100 and 200 candidates for governor:

> One of the reasons punchcards perform so poorly is that the "computer card" on which votes are recorded only has pre-scored punches and numbers - no names of candidates are visible on the punchcard. As a result, voters cannot easily check their work as on an optical scan ballot which puts names of candidates next to the marks that are made or in electronic systems in which names are nest to "buttons." Furthermore, whereas optical scan systems with in-precinct counting and direct record election systems can actually check ballots for overvotes and undervotes before they are submitted by the voter, punchcard systems used in California do not allow for this.
>
> Checking overvotes will be especially important in the October 7, 2003 election. As of 3:15 p.m. on August 10, 2003, the Secretary of State's web page indicated that 184 candidates had filed of which 84 had complete applications and 100 were still under review. Thus, there is every indication that there will be numerous candidates on the ballot, perhaps as many as one hundred. Punchcard systems can only deal with this many candidates by having a "booklet" with multiple pages listing the candidates with perhaps ten candidates per page. It will be very easy for voters to get confused and to think that they must mark each page or to simply accidentally mark more than one candidate. The result will be the nullification of that person's vote because of an overvote. It will be hard for voters to check whether they have made

[9] Moreover, Dr. Brady found that "[w]hen punchcard systems are used, minorities have a much higher residual votes rates than non-minorities, but when other voting systems replace punchcards, minorities have residual rates much closer to other groups. (Decl., ¶¶ 10-11, pp. 3-4.) *See generally, id.*, ¶¶ 21-29, pp. 6-9; ¶¶ 32-45, pp. 10-13.

> multiple marks, and there will be no systematic checking as with in-precinct optical scan or DRE systems.

(*Id.*, ¶¶ 40-41, pp. 11-12 citation omitted.) The large number of candidates on the recall ballot also makes a close election – one that is within the substantial margin of error that exists with PPC machines – much more likely than in a typical two-candidate race. *See* Saltman decl., ¶ 7, p. 2. ("The problems with the PPC systems... are especially acute in the California gubernatorial recall election,... [E]ven a small number of uncounted or erroneously counted votes could be determinative in a close election.").

ARGUMENT

I. PLAINTIFFS SATISFY THE TEST FOR A TEMPORARY RESTRAINING ORDER

24 Plaintiffs are entitled to the issuance of a temporary restraining order by this Court under the standards applied in this Circuit.

> The moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F. 2d 1197, 1201 (9th Cir. 1980). "These are not separate tests, but the outer reaches 'of a single continuum.'" *L.A. Coliseum*, 634 F. 2d at 1201 (quoting *Benda* [*v. Grand Lodge of the International Associates of Machinists and Aerospace Workers*, 584 F. 2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979)].

Chalk v. U.S. District Court Central District of California, 840 F. 2d 701, 704 (9th Cir. 1988).

25 As explained below, plaintiffs satisfy both ends of this continuum. There is the strongest possibility that they will succeed on the merits in this case under the Equal Protection Clause of the United States Constitution. Existing case law, including decisions of this Court and a district court in Illinois raising identical constitutional and statutory questions, and construing *Bush v. Gore*, 531 U.S. 98 (2000) and other voting rights cases from the United States Supreme Court, have held in plaintiffs' favor. And as *Bush v. Gore* underscores, the injury from utilization of a voting system that arbitrarily, as a result of varying accuracy rates, "value[s] one

person's vote over that of another," 531 U.S. at 104-05, is severe and irreparable. *See also Reynolds v. Sims*, 337 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a full and democratic society.") The harm in this case could scarcely be more grave, as the elections at issue involve for California voters the decisions over whether to recall the sitting governor, and, if so, who will be his successor, and statewide initiatives seeking to prohibit the collection of racial and ethnic data by governmental entities and [discuss Prop. 53]. This Court has already determined that it is "self-evident that replacing voting systems that deprive individuals of the right to vote is clearly in the public interest." *Common Cause v. Jones*, 213 F. Supp. 1110, 1113 (C.D. Cal. 2002).

II. USE OF PRE-SCORED PUNCH-CARD VOTING SYSTEMS VIOLATES THE FUNDAMENTAL RIGHT TO VOTE ON EQUAL TERMS WITH ALL CITIZENS.

A. Under *Bush v. Gore, Common Cause* and *Black v. McGuffage*, Equal Protection Requires That Equal Weight Must Be Accorded to Every Citizen's Vote

26 The United States Supreme Court held in *Bush v. Gore*, 531 U.S. 98 (2000), that a state violates equal protection when it fails to apply uniform standards for recounting of votes during statewide election. Undergirding its decision was the recognition that "the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Id* at 104. As the Court stated:

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. *See e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[O]nce the election franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment"). It must be remembered that "The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Id. at 104-05.[10]

27 It consequently characterized "[t]he question before us. . . [as] whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate." *Id.* at 105. The Court, of course, answered that inquiry in the negative, concluding that the recount mechanism adopted by the Florida Supreme Court could "not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right "under the Equal Protection Clause." *Id.* Among the rationales provided for the ruling was the fact that recounts already undertaken had included a manual recount of all votes in certain counties, yet the new recounts directed by the Florida courts included only undervotes.

> As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent.

Id. at 108. The Court added: "Furthermore, the citizen who marks two candidates, only one of which is discernable by the machine, will have his vote counted even thought it should have been read as an invalid ballot." *Id.*

28 A second ground relied upon by the Court derived from the differing standards among and within Florida counties for adjudging how to determine the"intent of the voter" as to any particular ballot. *Id.* at 106-07. The consequence was a lack of uniformity as to measuring votes cast by different citizens with identical intent, but, because of the disparity in systems used, registering inconsistent results. *Id.*

29 In the face of these infirmities, the Court enjoined the Florida recount in progress as unconstitutional: "[t]hat date [of December 12] is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards." *Id.* at 110.

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[10] *See also Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (holding that voting is fundamental for purposes of the Equal Protection Clause) (citing *Wesberry v. Sanders*, 376 U.S. 1, 6-7 (1964)).

30 Applying these principles, this Court denied the Secretary of State's motion for judgment on the pleadings in *Common Cause v. Jones*, irrespective of the standard of review applied to the Equal Protection Clause analysis. *Common Cause v. Jones*, 213 F. Supp. 2d 1106, 1109 (C.D. Cal. 2001) ("Even if the more lenient standard is ultimately applied by the Court, Plaintiff has alleged facts indicating that the Secretary of State's permission to counties to adopt either punch-card voting procedures or more reliable procedures is unreasonable and discriminatory.")[11] It subsequently found "it self-evident that replacing voting systems that deprive individuals of the right to vote is clearly in the public interest." *Common Cause v. Jones*, 213 F. Supp. 2d 1110, 1113 (C.D. Cal 2002).

31 Similar to the *Common Cause* case, the court in *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002), denied defendants' motion to dismiss equal protection and Voting Rights Act claims brought by African-American and Latino voters who sought to enjoin the use of punch-card ballot systems in Illinois that resulted in substantial and disproportionate numbers of undervotes. Noting that "[n]either the federal courts, nor likely anyone, can guarantee to every eligible voter in this country a perfect election with 100% accuracy," it stated that, nevertheless, "[t]he courts can, however, by enforcing the Fourteenth Amendment to the U.S. Constitution and the Voting Rights Act of 1965, guarantee the equal treatment of voters who attempt to have their votes counted, their votes heard." *Id.* at 891. In Illinois, as in California, [s]election of the voting system. . . is left to each of the. . . local election authorities. . ., subject to certification and approval by [state officials]." *Id.* at 892.

[11] Accordingly, the Court discussed, but did not reach the question of which level of review to apply. It examined five Supreme Court opinions "discuss[ing] the standard to be applied in fundamental right to vote cases: *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia Bd. of Elections, et al.*, 383 U.S. 663 (1966); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992); and *Bush v. Gore*, 531 U.S. 98 (2000). *Common Cause Southern Christian*, 213 F. Supp. 2d at 1108-09. It noted that "it appears that perhaps the Court [in *Bush v. Gore*] was using a heightened standard of scrutiny but was also finding the Florida recounts to be arbitrary and discriminatory. *Id.* at 1109.

32 Reviewing allegations closely similar in nature to the record in this case, the court concluded that "[p]unch card voting systems are especially prone to ballot error." *Id.*[12] It found that the residual [error] rate varied substantially among Illinois jurisdictions, depending upon whether the jurisdiction used a punch-card voting system or an optical scan system. *Id.* at 893.

> As a result, 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. Similarly situated persons are treated differently in an arbitrary manner.

Id. at 899.

33 The court thus held that "the heart of the problem" is "[t]hat 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. . . ." *Id.* "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. *Id.* As such, "[t]he 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 v. Gore*, 531 U.S. at 104-05, even if it does not know the faces of those people whose votes get valued less. The system does not afford the 'equal dignity owed to each voter.' *Id.* at 104." *Id.* (full citations omitted, second bracket in original.)

> Any voting system that arbitrarily and unnecessarily values some votes over others cannot be constitutional. Even without a suspect classification or invidious discrimination, "[t]he right of suffrage can be denied by debasement or dilution fo the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 55.

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[12] The Court elaborated:

> A residual vote occurs when a voting system determines that a ballot does not contain a permissible vote in a particular race, notwithstanding the voter's actual intent.... Such failures are caused by machine defects and the predictable and normal interaction between voters and the machines. These included the buildup of chad in the machines, improper placement of the ballot into the recording device, and improper use of the stylus. These problems can result in ballots that cannot be read by the vote counting machines.

McGuffage, 209 F. Supp. 2d at 892.

Id. (full citation omitted).

B. PPC Voting Systems Unconstitutionally Debase the Right to Vote in Six California Counties Comprising 44 percent of the State's Registered Voters Who Voted in the 2000 Presidential Election.

34 The PPC voting systems at issue in this case have already been decertified by the Secretary of State as having satisfied the statutory standard that they are "defective, obsolete or otherwise unacceptable" for use in future California elections. *See* California Elections Code §19222.[13] The Secretary, therefore, was surely correct to have stated that "[w]e cannot wait for a Florida-style election debacle to occur in California before we replace archaic voting systems."

35 The case for holding these systems as unconstitutional is, if anything, more compelling than at the judgment on the pleadings stage in the predecessor *Common Cause* case. For not only have all the allegations been proven on the record submitted, but the decertification also establishes that the State has disclaimed the accuracy and reliability of the PPC balloting. As a matter now of California law, these systems are unacceptable because of the arbitrary and discriminatory results they produce.

36 Indeed, the disparities created are gaping and growing. The error rates in the November 2000 presidential election in the seven counties using PPC systems in the 2000 election averaged 2.23 percent, more than twice that of counties with the next highest average residual rate. The error rate in Los Angeles County, where more than 4 million voters reside, was four and one half times the error rate in Riverside County (2.7 percent compared to .85percent). As we have pointed out, the six counties that will rely upon PPC systems, if the election proceeds on October 7, comprise 44percent of the 2000 vote in California and 67 percent of the State's registered voters.

37 The disparities just cited most likely understate the actual differences as of 2003. Analysis of 2002 data show, as Dr. Brady demonstrates, that "rather than having evidence that punchcards have improved since 2000, there is evidence that they are

[13] Section 19222, "Periodic review of voting systems," states in pertinent part: "The Secretary of State shall review voting systems periodically to determine if they are defective, obsolete, or otherwise unacceptable. The Secretary of State has the right to withdraw his or her approval."

performing worse in California, and there is additional evidence that other systems perform much better." (Brady decl., ¶¶ 46-47. pp. 13-14.)

III. THE USE OF PRE-SCORED PUNCH-CARD VOTING SYSTEMS IN THE FORTHCOMING ELECTION WOULD VIOLATE THE VOTING RIGHTS ACT OF 1965.

A. Disproportionate Impact is the Correct Legal Standard.

38 In *Common Cause v. Jones*, this Court rejected defendants' argument that "Plaintiff must satisfy the three part test in *Thornburg v. Gingles*, 478 U.S. 30, 48-51 (1986)" in order to sustain the Voting Rights Act Claim. *Common Cause*, 213 F. Supp. 2d at 1110. It properly characterized "[t]he voting mechanism challenge. . . [as] far more similar to a voting qualification challenge than it is to redrawing the lines of voting districts." *Id.* The Court thereby upheld on the pleadings "[t]he argument. . . that racial minorities are disproportionately denied the right to vote because their votes are uncounted in disproportionate numbers as a result of the voting mechanism that they are supplied." *Id.*

39 Similarly, in *Black v. McGuffage*, the court stated that "[w]hen the allegedly arbitrary system. . . 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. Holding that "Plaintiffs' complaint satisfies the necessary elements under Section 2 [of the Voting Rights Act]," the court found that alleged "disparate rates of undervotes indicates that... voters residing in predominantly Latino and African American precincts where punch card machines are utilized bear a greater risk that their votes will not be counted than do other voters." *Id.* at 896-97. "As such, Plaintiff's participation in the political process could be significantly diminished." *Id.* at 897.

B. PPC Voting Systems Disproportionately Discriminate Against People of Color.

40 As Dr. Brady found, because "[t]he use of punchcards in the [] six counties in the October 7, 2003 elections will mean that there will be a high residual rate in

them," African Americans. Latinos and Asian Americans "will be discriminated against because of where they live." (Decl., ¶ 39, pp. 11-12.) Thus, "[e]ven if punchcards affected all groups equally, minorities would be disadvantaged by being disproportionately concentrated in punchcard counties with high residual rates compared to non-punchcard counties." *Id.*

41 In denying the Secretary of State's motion for judgment on the pleadings in the *Common Cause* case, the Court found a violation of the Voting Rights Act to have been pled on allegations essentially identical to those established here. Diminution of the ability of voters of color to participate on equal terms would be especially unfair in this case given the obvious importance of the issues on the ballot: the retention of the sitting governor or the selection of his successor, and the fate of the so-called "Racial Privacy Initiative" (Proposition 54), determinative of whether racial and ethnic data will continue to be collected by governmental entities like law enforcement, educational facilities and health care institutions.[14]

IV. BECAUSE IRREPARABLE INJURY TO FUNDAMENTAL VOTING RIGHTS IS AT STAKE, THE BALANCE OF HARDSHIPS AND THE PUBIC INTEREST TIP DECISIVELY IN PLAINTIFFS' FAVOR

42 As set forth above, the recall election set for less than two months away is a disaster in the making. Conducting the election on October 7, 2003, as currently planned, would violate the voting rights of numerous California voters in the six counties that will still be using PPC voting machines. It also places state and local election officials in the unprecedented position of having to plan, administer, and conduct a uniquely complicated election is a highly compacted time frame. Plaintiffs do not of course seek to stop the recall election and vote on Propositions 53 and 54 from taking place altogether, but only to postpone the election until PPC systems will be replaced. Under the consent decrees in *Common Cause v. Jones*, these systems will be decertified and cannot be used in California elections as of March 1, 2004. The

[14] *See, e.g., Clark v. Roemer,* 500 U.S. 646 (1991) (district court erred in not enjoining election when serious questions as to § 5 of the Voting Rights Act have been raised, notwithstanding short period of time before election day).

irreparable injury to Plaintiffs and other voters throughout the state can therefore be avoided entirely if the election is enjoined until on or after this date.

43 Irreparable injury may established by "showing violations of [plaintiffs'] constitutional rights which, if proven at trial, could not be compensated adequately by money damages." *Zepeda v. United States Immigration and Naturalization Svs.*, 753 F.2d 719, 727 (9th Cir. 1983); *see also Elrod v. Burns*, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). In this case, there would be no conceivable way of redressing the loss of voting rights, if PPC machines are used in the recall election. The irreparable injury to Plaintiffs is all the more pronounced given that, in our constitutional scheme, the right to vote is fundamental. *See Reynolds v. Sims*, 377 U.S. 533, 562, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964) (the right to vote is "a fundamental political right, because [it] is preservative of all rights"); *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966)(denial of voting rights is irreparable harm). Under the Ninth Circuit's formulation of the test for issuance of a preliminary injunction, the probability of success on the merits of their claims and the possibility of irreparable injury is sufficient to warrant such relief. *See, e.g., Chalk*, 840 F. 2d at 704.

44 Issuance of an injunction is also appropriate under the Ninth Circuit's test, because there are serious questions on the merits with the balance of hardships weighing strongly in Plaintiffs' favor. In light of the evidence presented with this application, this Court's rulings in *Common Cause v. Jones* and the Secretary of State's own admission that PPC machines are defective, there can be no doubt that there are at the very least "serious questions" on the merits.

45 Although Plaintiffs do not dispute that postponement of an election is a serious step that ought not be ordered lightly, it is abundantly clear in this case that the relief sought is necessary both to avoid major voting rights violations and to prevent what is certain to be an election administration nightmare. Postponement of the election would of course avoid the constitutional and statutory violation of which

Plaintiffs complain. This would not only benefit Plaintiffs and their constituents, but also election officials currently working on an extremely compressed time frame to conduct an election that is sure to have more names on the ballot than any in recent memory. The orderly administration of elections therefore provides further support for the injunctive relief that Plaintiffs seek.

46 Finally, the public interest strongly supports issuance of injunctive relief. This is not a regularly scheduled election that election officials and the public have known about for months. It is instead an election that was declared, and for which the date was set, just days ago. As the Chief Justice of the California Supreme Court remarked in dissenting from that court's denial of review of state law claims, "chaos, confusion and [a] circus-like atmosphere" have thus far attended the recall proceedings. *Burton v. Shelley*, S117834, slip op. at p. 1 (Aug. 7, 2003)(dissenting from denial of review). If the recall election proceeds as planned, on the very punch card machines that the Secretary of State has characterized as "defective" and "obsolete," this chaos can only increase over the coming weeks. The abbreviated time between now and the election will not only create serious problems for elective officials, but will make it more difficult for the electorate to become educated on the grave issues to be voted upon, including not just the recall but also the two ballot propositions. Under these circumstances, the public interest strongly supports a brief postponement of the election.

47 In short, the irreparable injury to voters, the balance of hardships, and the public interest all support issuance of immediate injunctive relief. There will be no cognizable no harm to state and county officials from issuance of a preliminary injunction. In fact, an injunction would actually help these officials, by giving them much needed time to accomplish the exceptionally difficult task that lies ahead.

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DATED: August __, 2003

Respectfully submitted,

By: _____
Mark D. Rosenbaum

DATED: August __, 2003

Respectfully submitted,

By: _____
Daniel P. Tokaji