

1 CHARLES P. DIAMOND (S.B. #56881)  
2 ROBERT M. SCHWARTZ (S.B. #117166)  
3 ROBERT C. WELSH (S.B. #130782)  
4 VICTOR H. JIH (S.B. #186515)  
5 1999 Avenue of the Stars, Seventh Floor  
6 Los Angeles, California 90067-6035  
7 Telephone: (310) 553-6700  
8 Facsimile: (310) 246-6779

9 CHARLES H. BELL, JR. (S.B. NO. 60553)  
10 THOMAS W. HILTACHK (S.B. NO. 131215)  
11 BELL, MCANDREWS, HILTACHK &  
12 DAVIDIAN LLP  
13 455 Capitol Mall, Suite 801  
14 Sacramento, California 95814  
15 Telephone: (916) 442-7757  
16 Facsimile: (916) 442-7759

17 Attorneys for *Amicus Curiae* Ted Costa

18 **UNITED STATES DISTRICT COURT**  
19 **CENTRAL DISTRICT OF CALIFORNIA**

20 SOUTHWEST VOTER  
21 REGISTRATION EDUCATION  
22 PROJECT, *et al.*,

23 Plaintiffs,

24 v.

25 KEVIN SHELLEY, *et al.*,

26 Defendants.

Case No. CV 03-5715 SVW (RZx)

**MEMORANDUM OF POINTS AND  
AUTHORITIES OF AMICUS  
CURIAE TED COSTA IN  
OPPOSITION TO APPLICATION  
FOR TEMPORARY RESTRAINING  
ORDER / PRELIMINARY  
INJUNCTION;**

**DECLARATIONS OF ERNEST R.  
HAWKINS, MARSHA WHARFF,  
JONATHAN M. KATZ, AND  
MICHAEL HERRON IN SUPPORT  
THEREOF**

**[SUPPORTING EXHIBITS FILED  
SEPARATELY]**

Hearing: August 18, 2003  
Time: 1:30 p.m.  
Location: Courtroom 6

1 **I. INTRODUCTION**

2 California is in crisis. The State’s treasury is hemorrhaging badly. The  
3 workers’ compensation system is headed toward failure. Employment rolls  
4 continue to shrink, as beleaguered companies shed jobs, export them across state  
5 lines and abroad, or leave California altogether. Meanwhile, State legislative  
6 leaders have stalemated one another and, with a complicit Governor, have put off to  
7 another day the unpleasant task of tackling the State’s grave problems.

8 It is no wonder that millions of Californians have lost faith in their chief  
9 executive, who has squandered the second chance voters gave him last year to get  
10 the State’s difficulties in hand. Exercising a century-old right written into the  
11 Constitution for just such crises, Californians have lined up by the hundreds of  
12 thousands to demand a referendum on their governor and to select his replacement.

13 Having reviewed the 1.6 million signatures gathered in favor of a recall  
14 election, defendant Secretary of State Shelly certified the election on July 23, 2003.  
15 As required by Article 2, Section 15(c) of the Constitution, the Lieutenant Governor  
16 scheduled the recall vote for October 7, 2003, within the compressed sixty- to  
17 eighty-day window the Constitution wisely requires to secure a quick resolution  
18 when the State’s leadership is in doubt.

19 The right of the people to control who governs them, pursuant to procedures  
20 they have established for that purpose, is fundamental. This right is not unique to  
21 Californians; eighteen states afford a right of recall “founded upon the most  
22 fundamental principle of our constitutional system”—that “the people may reserve  
23 the power to change their representatives at will,” *Citizens Comm. to Recall Rizzo v.*  
24 *Bd. of Elections*, 367 A.2d 232, 274-75 (Pa. 1976), and may claim the power to  
25 remove those “whom the electors do not want to remain in office,” *Groditsky v.*  
26 *Pinckney*, 661 P.2d 279, 283 (Colo. 1983). Because recall is an important  
27 expression of “the people’s most basic right of self-governance,” any interference  
28 with that right requires “strong justification.” *Pederson v. Moser*, 662 P.2d 866,

1 869 (Wash. 1983). When, as here, a crisis of confidence regarding the State’s  
2 highest elected official has arisen, the “interest of the people in an expeditious  
3 recall procedure is fundamental.” *Janovich v. Herron*, 592 P.2d 1096, 1102 (Wash.  
4 1979) (emphasis added); *see also Gage v. Jordan*, 23 Cal.2d 794, 799 (1944).

5 With a substantial majority of voters opposed to him, Governor Davis and his  
6 supporters have labored in courthouses around the State to stop the recall election  
7 (or to shuffle the rules of succession to give Governor Davis another chance). This  
8 is the eleventh such lawsuit. None have succeeded. Just last week, the California  
9 Supreme Court denied five separate mandate petitions, including one filed by the  
10 Governor alleging the supposed unconstitutionality of punch-card voting. That  
11 Court, which has as much of a responsibility to enforce the United States  
12 Constitution as this one, turned away the challenge on a vote of seven to zero.<sup>1</sup>

13 This Court must do the same. In the first place, these plaintiffs have no right  
14 to be in court. Three years ago they filed this very lawsuit, which they then settled  
15 by agreeing that the State could conduct punch-card elections through March 4,  
16 2004. Now they sue to prevent what they agreed the State could do.

17 Even if the Court considers this suit, it has before it a showing that is utterly  
18 wanting of the extraordinarily compelling justification required before a federal  
19 court may halt a state election. Decision after decision stands for the proposition  
20 that federal courts should not remedy conduct that only risks disenfranchising a few  
21 by depriving the rest of the electorate of their right to vote. Restraint is particularly  
22 appropriate here, where plaintiffs can only speculate that the vote will be so close as  
23 to fall within what they contend is the margin of error of punch-card systems. It  
24 probably will not, but even if it is, the Court can always intervene after the election.  
25 The alternative—forcing on millions of Californians a Governor who they do not  
26 want for six more months while the State deteriorates further—is not acceptable.

27  
28 <sup>1</sup> *See Davis v. Shelley*, S117921, Aug. 7, 2003 Order Denying Petition for Writ of Mandamus.

1 Plaintiffs also fail on the merits. Their evidence does not establish any  
2 constitutional or statutory violation arising from punch-card voting, let alone the  
3 compelling showing required for an injunction. Punch-card voting systems are not  
4 the pariah that plaintiffs make them out to be. We are not in Florida. California  
5 election administrators—none of whom has lent support to plaintiffs’ delaying  
6 tactic—have successfully and reliably deployed punch-card systems for over forty  
7 years. Despite plaintiffs’ statistical lightshow—remarkable only for its skillful  
8 demonstration of how numbers can be manipulated—punch-card systems, properly  
9 maintained and deployed, as they are in California, record voter preferences as  
10 accurately as other approved devices. More significantly, postponing the recall  
11 vote until next March will not improve the accuracy of the count; it may well  
12 diminish it. That is because to comply with the *Common Cause* consent decree,  
13 Los Angeles County will be forced to roll out an untested, never-before-used,  
14 barebones optical scan system that will lack all the attributes that plaintiffs’ experts  
15 say make optical scanning so desirable. The situation will be worse in other, less  
16 populous counties that are committed to deploying systems next March that use  
17 ballots which do not have space for 135 candidates who seek the same office.

18 Plaintiffs’ Voting Rights Act claim is equally specious. As studies have  
19 shown, punch-card voting does not have a disparate error impact on minority  
20 voters, who tend to undervote (and, less frequently, overvote) deliberately when a  
21 member of their group is not among the candidates. But even ignoring this,  
22 plaintiffs offer only a bare statistical showing of disproportionate impact on  
23 minority-group voters, which courts have repeatedly rejected as a basis for a  
24 violation, absent proof that it uniquely disadvantages them as a group and on  
25 account of their race, which plaintiffs do not allege and cannot prove.

26 Sad though it may be, Californians in unprecedented numbers have lost faith  
27 in their Governor. Over 1.6 million have set in motion a constitutional process to  
28 replace him that, itself, is part of the right of self-governance that the United States

1 Constitution protects. The role of this Court should be to protect the People’s right,  
2 not to thwart it. The recall election should proceed.

3 **II. PLAINTIFFS HAVE FAILED TO ESTABLISH A RIGHT TO ENJOIN**  
4 **THE RECALL ELECTION AND DEFEAT THE RIGHT OF**  
5 **CALIFORNIA VOTERS TO REMOVE THEIR GOVERNOR**

6 Californians have the constitutional right to recall elected state officials. Cal.  
7 Const., Art. 2 § 13. Although every California governor since Ronald Reagan in  
8 1967 has been subject to a recall effort, never before has a gubernatorial recall  
9 effort acquired the number of signatures necessary to require an election.

10 Plaintiffs ask this Court to prevent the October 7 recall election from taking  
11 place, and to protect the incumbent Governor from the will of the voters for at least  
12 six months. That is not an ordinary request, nor do the normal rules of preliminary  
13 injunctive relief apply. (*Contra* Pl. Mem. at 11-12.)

14 Because plaintiffs seek to enjoin a constitutionally mandated election, they  
15 must demonstrate a clear likelihood of success. *See NAACP v. Town of East*  
16 *Haven*, 70 F.3d 219, 223 (2d Cir. 1995) (plaintiffs’ burden of proof is greater when  
17 they seek a federal court injunction to stay state governmental action). Because  
18 even temporarily enjoining election officials will, as a practical matter, derail the  
19 October 7 election, plaintiffs’ showing must not only be “clear and unequivocal,”  
20 but “compelling.” *See Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001)  
21 (greater burden when temporary injunction will “provide the movant substantially  
22 all the relief he may recover after a full trial”). And because disrupting the election  
23 affects the public, an injunction may not issue unless the Court concludes that  
24 Californians would be best served by keeping them from voting for the next six  
25 months. *See United States v. Oakland Cannabis Buyers’ Coop.*, 190 F.3d 1109,  
26 1114 (9th Cir. 1999) (failure to separately consider the public interest results in  
27 abuse of discretion); *Sammartano v First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th  
28 Cir. 2002). That is not the case here.

1           **A. Federal Courts Do Not Enjoin Even Routine Elections, Much Less**  
2           **Such Momentous Ones, And Plaintiffs Have Not Demonstrated**  
3           **Any Reason For This Court To Act Otherwise**

4           Intervention “by the federal courts in state elections has always been a  
5           serious business,” *Oden v. Brittain*, 396 U.S. 1210 (1969), and is “fraught with  
6           difficulties,” *Chisom v. Roemer*, 853 F.2d 1186, 1189-90 (5th Cir. 1988). The  
7           “strong public interest in having elections go forward weighs heavily against an[y]  
8           injunction that would delay an upcoming election.” *Cardona v. Oakland Unified*  
9           *School Dist.*, 785 F. Supp. 837, 842 (N.D. Cal. 1992).

10           The “well-established” rule is that courts will not block a scheduled election  
11           even if plaintiffs are likely to prevail. *Banks v. Bd. of Educ.*, 659 F. Supp. 394, 402  
12           (C.D. Ill. 1987).<sup>2</sup> Thus, courts have refused to disenfranchise the electorate by  
13           canceling an election, even when plaintiffs have demonstrated a violation of the  
14           Constitution. *See Whitcomb v. Chavis*, 396 U.S. 1055 (1970) (refusing to delay  
15           election under a scheme that was found to be unconstitutional); *Chisom*, 853 F.2d at  
16           1190 (explaining the Supreme Court’s action in *Chavis*); *Ely v. Klahr*, 403 U.S.  
17           108, 113 (1971) (permitting elections to proceed under an unconstitutional plan  
18           because the court “could not itself devise a new plan” quickly enough “without  
19           delaying primary elections”); *Kilgarin v. Hill*, 386 U.S. 120, 121 (1967).

20           Courts have similarly refused to enjoin scheduled elections for violations of  
21           the Voting Rights Act. *See Oden v. Brittain*, 396 U.S. 1210 (1969) (refusing to  
22           enjoin election alleged to violate the Act); *Chisom*, 853 F.2d at 1189-90 (no  
23           injunction even assuming the election system to be illegal); *Dillard v. Crenshaw*  
24           *County*, 640 F. Supp. 1347, 1362-63 (M.D. Ala. 1986) (no injunction despite strong  
25           likelihood of Voting Rights Act violation); *Banks*, 659 F. Supp. at 400 (no

26           \_\_\_\_\_

27           <sup>2</sup> *Clark v. Roemer*, 500 U.S. 646 (1991), does not hold otherwise. The Court enjoined an election  
28           not scheduled until after the Attorney General had refused to preclear it under the Voting Rights  
                  Act. *Clark* did not address, nor purport to upset, the traditional “equitable principles” that justify  
                  allowing a scheduled election to proceed despite claims of illegality. *Id.* at 655-56.

1 injunction); *In re Pennsylvania Congressional Dists. Reapp. Cases*, 535 F. Supp.  
2 191, 194 (M.D. Pa. 1982); *Cardona*, 785 F. Supp. at 842.

3 These cases all recognize that “the interests of the voters mandate holding  
4 elections on time.” *Watkins v. Mabus*, 771 F. Supp. 789, 802-04 (S.D. Miss. 1991).

5 **B. The Balance Tips Decidedly Against an Injunction**

6 There are several compelling reasons why this Court should not enjoin the  
7 October 7 recall election, notwithstanding plaintiffs’ claims:

8 First, even if plaintiffs are correct and “tens of thousands of California  
9 voters” may not have their votes correctly counted because of the imperfections of  
10 the voting system (Pl. Mem. at 1), preventing millions of California voters from  
11 voting to recall Governor Davis on October 7 would be worse. As the court  
12 explained in *Banks*, enjoining a scheduled election has “the effect of preventing all  
13 of the voters ...from exercising their right to vote and elect new” officials. 659 F.  
14 Supp. at 402. The likelihood of some disenfranchisement, while “unacceptable”  
15 (Pl. Mem. at 1), is far less unacceptable than the certainty of total  
16 disenfranchisement while the right to vote is suspended for six months.

17 Second, by postponing the recall election until March 2004, this Court would  
18 be forcing California voters to be ruled by a governor who has so lost the faith of  
19 the governed that—for the first time in state history—is the subject of a recall  
20 election. In this context, six months more is too long, which is why the California  
21 Constitution requires that recall elections occur promptly. Cal. Const., Art. 2 §  
22 15(a). It is neither proper nor fair to the voters for a court to “freez[e] current  
23 legislators in office.” *Watkins*, 771 F. Supp. at 802-04; *see also Dillard*, 640 F.  
24 Supp. at 1363 (refusing to enjoin election because “extend[ing] the terms of  
25 incumbents” would “effectively deny the entire electorate the right to vote and thus  
26 seem to offend basic principles of representative government”); *Banks*, 659 F.  
27 Supp. at 402 (“if the Court were to enjoin the [] election, the Court would  
28 necessarily have to extend the terms of the present office holders until after a trial is

1 held”). Plaintiffs’ proposed six-month delay cannot be entertained because the  
2 Court should not enter an order where “the electorate [will] have no say whatever  
3 as to the person to serve during that period.” *Chisom*, 853 F.2d at 1192.

4 Third, there is no guarantee that under plaintiffs’ remedy the right to vote  
5 will be suspended for only six months. They demand such a high standard of  
6 perfection in elections that there is no assurance the standards will be met even in  
7 March 2004. It is improper, however, to postpone elections until some abstract  
8 standard is attained, because “[n]umerous unforeseen events could delay the  
9 implementation of alternative plans, ranging from disagreement ...to failure to get  
10 approval from the Department of Justice.” *Dillard*, 640 F. Supp. at 1362. And  
11 nothing prevents plaintiffs or the Governor from demanding another lengthy delay  
12 so the new systems can be tested, poll workers can be trained, etc. This is why, as  
13 shown below, the Constitution does not require perfect voting systems before the  
14 right to vote can be exercised. It requires use of only the best system practicable as  
15 of scheduled election date, which plaintiffs concede is the case here.

16 Fourth, the Court should not protect the incumbent governor from having to  
17 face the voters when his election was itself the product of what plaintiffs claim is a  
18 “malfunctioning” election system. As the court noted in *Banks* in refusing to enjoin  
19 an election, “the black voters of Peoria would be no better off because they would  
20 still be represented by the public officials currently in office, elected under the  
21 system they claim is illegal.” 659 F. Supp. at 402. If plaintiffs are truly concerned  
22 about the illegitimacy of the voting system (and are not motivated by the political  
23 goal of preserving an incumbent they happen to support), then keeping an  
24 incumbent in office who was elected by that same system serves no valid purpose.

25 Fifth, upsetting a scheduled election invites political mischief. Reasons can  
26 always be crafted to justify giving voters and election officials more time. The  
27 timing of an election will always favor one candidate over another. For that reason,  
28 the Court should be hesitant to interfere with normal election scheduling and,



1 unwittingly, tip a balance that only the voters should be able to influence. This  
2 Court should be particularly wary of granting plaintiffs' requested relief because it  
3 serves political ends. Plaintiffs do not seek to undo the election of Governor Davis  
4 in 2002, nor do plaintiffs seek to enjoin the elections scheduled in November 2003,  
5 even though the same challenged voting system was and will be in place. They  
6 seek to enjoin only the October 7, 2003 election because of their fears of how the  
7 vote will come out on the recall issue and the two propositions. (Pl. Mem. at 1, 18.)

8 Sixth, the availability of post-election remedies mitigates the need to cancel  
9 an election. Plaintiffs argue that this Court may not "sanction knowingly the  
10 malfunctioning of the enabling machinery for our democratic process." (Pl. Mem.  
11 at 2.) As the *Banks* court notes, however, it is inappropriate for plaintiffs to claim  
12 to "know" anything. Without final findings of fact, the most plaintiffs can claim is  
13 a "likelihood" of success. 659 F. Supp. at 401. And before the election occurs, it is  
14 impossible to predict whether the election will be sufficiently close to make the  
15 residual vote rate of punch-card systems material to the election's outcome. Given  
16 the uncertainty inherent in any ruling on a motion for preliminary injunctive relief,  
17 and the conjectural nature of plaintiffs' harms, "it is a better practice to go ahead  
18 with the election procedures already in place." *Id.* at 402. "If, after a trial on the  
19 merits, the Court decides that the election system" is invalid, "the Court can decide  
20 how to deal with the people who have been elected to these offices at that time."  
21 *Id.*; see also *Oden*, 396 U.S. 1210 (no basis for injunction when the "applicants  
22 could later bring suit to have [the election] set aside").

23 The right to vote is of conceded importance. It makes no sense, however, to  
24 eliminate that right in the name of protecting it. In plaintiffs' "eagerness to make  
25 sure that one group's voting rights are not being violated," they may not seek to  
26 "upset the established election process." *Banks*, 659 F. Supp. at 403. As the  
27 Supreme Court explained in *Reynolds v. Sims*, 377 U.S. 533 (1964), courts must  
28 "consider the proximity of a forthcoming election" and exercise "proper judicial

1 restraint.” *Id.* at 585-86. In the choice between lesser and greater evils, “the  
2 priority of holding elections on a timely basis warrants a temporary departure from  
3 the one-person, one-vote principle.” *Watkins*, 771 F. Supp. at 803-04.

4 **III. BECAUSE PLAINTIFFS CONCEDED THE CONSTITUTIONALITY**  
5 **OF PUNCH-CARD VOTING THROUGH FEBRUARY 2004, RES**  
6 **JUDICATA PRECLUDES THEM FROM REOPENING THE ISSUE**

7 This Court should also refuse to entertain plaintiffs’ requested injunction  
8 because these subjects have already been litigated and addressed in an existing  
9 consent decree. Under the doctrine of *res judicata* this Court’s Consent Decree and  
10 Final Judgment in *Common Cause v. Jones* precludes plaintiffs from relitigating  
11 here the same claims they asserted there. *Res judicata* bars a later suit where the  
12 first adjudication: (1) involved the same claim as the later suit; (2) reached a final  
13 judgment on the merits; and, (3) involved the same parties or their privies. *See*  
14 *Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 323-24 (1971).

15 All three requirements are satisfied here:

16 First, plaintiffs concede that this case and *Common Cause* asserted the  
17 identical claims: whether use of punchcard voting systems in certain California  
18 counties is unconstitutional under the Fourteenth Amendment of the U.S.  
19 Constitution and violates the Voting Rights Act, 42 U.S.C. § 1973. *See* First  
20 Amended Complaint at ¶¶ 1, 24. (Pl. Mem. at 18.)

21 Second, the “entry of a consent decree constitutes a final judgment on the  
22 merits for *res judicata* purposes.” *Ho By Ho v. San Francisco Unified Sch. Dist.*,  
23 965 F. Supp. 1316, 1321 (N.D. Cal. 1997); *S.E.C. v. Randolph*, 736 F.2d 525, 528  
24 (9th Cir. 1984) (“A consent decree is a judgment [and] has the force of *res*  
25 *judicata*”); *Bechtel Petroleum, Inc. v. Webster*, 636 F. Supp. 486, 497 (N.D. Cal.  
26 1984) (consent decree is final, conclusive, and binding for *res judicata*).  
27  
28

1 Third, this case involves the same parties or their privies. Plaintiff Southwest  
2 Voter Registration Education Project, plaintiff Southern Christian Leadership  
3 Conference, and defendant Secretary of State were parties in *Common Cause*.<sup>3</sup>

4 Plaintiffs are therefore bound by the final judgment in that case, which  
5 permitted California to use punchcard voting systems through March 1, 2004.  
6 Plaintiffs, though, now want more from this Court, and seek to prevent elections  
7 occurring before March 1, 2004 because they use punchcard voting systems.

8 Under Federal Rule of Civil Procedure 60(b), the Court should not disrupt  
9 the remedial scheme set forth in a final consent decree unless there is “a significant  
10 change in circumstances warrant[ing] revision of the decree.” *Rufo v. Inmates of*  
11 *the Suffolk County Jail*, 502 U.S. 367, 383 (1992). Here, there is no basis to alter  
12 the remedial scheme set forth in *Common Cause* because the final decree clearly  
13 contemplated that there would be important elections using the punchcard voting  
14 systems before March 1, 2004, including the November 2002 election in which the  
15 Governor, Lieutenant Governor, Attorney General, and entire California

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16 <sup>3</sup> The addition this week of the NAACP as a plaintiff is irrelevant. Under the doctrine of “virtual  
17 representation,” *res judicata* binds one not a party to the first suit if another party to it was “so  
18 closely aligned with his interest as to be his virtual representative.” *Aerojet General Corp. v.*  
19 *Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied* 423 U.S. 908 (1975). Such preclusion arises  
20 where there is a common identity of interests, *Mann v. City of Albany, Ga.*, 883 F.2d 999, 1003  
21 (11th Cir. 1989), where the first party had a strong incentive to protect the interests of the second,  
22 *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 761 (1st Cir. 1994), and when the issue raised is a  
23 public law matter. *NAACP v. Los Angeles Unified Sch. Dist.*, 750 F.2d 731, 741 (9th Cir. 1984)  
24 (if new parties were allowed to litigate matters already decided, public law claims “would assume  
25 immortality”), *cert. denied*, 474 U.S. 919 (1985). These factors compel preclusion here:  
26 (1) although not a plaintiff in the *Common Cause* case, the NAACP appears to have been  
27 involved. See Plaintiffs’ Memorandum at 2-3, ¶ 4 (NAACP “along with other organizations ...  
28 filed an action in this Court ... alleging ongoing violations of the fundamental right to vote”); (2)  
The interests of the NAACP and the *Common Cause* plaintiffs were identical; (3) the NAACP is  
represented by the same counsel that represented the *Common Cause* plaintiffs and the other  
plaintiffs here; (4) given the unanimity of interest and representation, plaintiffs were capable of  
and motivated to protect the interests of the NAACP; (5) this case involves a public law matter—  
voting rights—where the number of potential plaintiffs is limitless. Courts have applied virtual  
representation preclusion in such cases. See *Tyus v. Schoemehl*, 93 F.3d 449, 455-56 (8th Cir.  
1996) (candidate barred from bringing Voting Rights Act challenge to redistricting based on  
dismissal of similar challenge brought by other candidates); *Robertson v. Bartels*, 148 F.Supp.2d  
443, 452 (D.N.J. 2001) (incumbent candidates and voters barred from challenging  
reapportionment plan as their interests were adequately represented in earlier lawsuit filed by  
minorities and state legislators).

1 Congressional delegation would be voted upon. *Id.* at 384 (modification ordinarily  
2 should not be granted where events “were anticipated”).

3 **IV. PLAINTIFFS FAIL TO ESTABLISH ANY PROBABILITY OF**  
4 **PREVAILING ON CONSTITUTIONAL OR STATUTORY CLAIMS**

5 Turning to the merits, plaintiffs claim that an October 7 recall election would  
6 violate the equal protection clause guarantee of “one person, one vote” and would  
7 violate the Voting Rights Act by disproportionately impacting minority voters.  
8 Neither claim has merit, and neither justifies the cancellation of the election.

9 **A. Use of Votomatic Voting Devices Does Not Infringe Anyone’s**  
10 **Right to “One Person, One Vote”**

11 1. The Constitution Does Not Require Perfection in Elections.

12 Plaintiffs argue that the election should be postponed because conducting it  
13 in October, as constitutionally required, will supposedly violate the “right to vote  
14 on equal terms with all citizens.” (Pl. Mem. at 12.) In attempting to fashion this  
15 claim, however, plaintiffs seek to require a level of voting perfection that the  
16 Constitution never has. Contrary to what plaintiffs suggest, courts do not rigidly  
17 apply the philosophical principles of equal protection in a vacuum. Rather, the  
18 Constitution aspires to reach electoral equality with real-world practicalities in  
19 mind. Thus, there is no constitutional right to an error-free voting system or to a  
20 particular voting system—or even to the best available voting system. *See Hadley*  
21 *v. Junior College Dist. of Metro. Kansas*, 397 U.S. 50, 52 (1970).

22 The Constitution also recognizes that what works in one election location  
23 may not be optimal in another. The Supreme Court has consistently recognized the  
24 importance of allowing county officials a degree of flexibility in determining how  
25 best to serve their local needs in conducting their respective elections. Thus, states  
26 may “employ diverse methods of voting, and the methods by which a voter casts  
27 his vote may vary throughout the state.” *Hendon v. Bd. of Elections*, 710 F.2d 177,  
28

1 181 (4th Cir. 1983).<sup>4</sup> Given the need for flexibility, “[m]athematical exactness or  
2 precision is hardly a workable constitutional requirement.” *Id.*, 377 U.S. at 577; *see*  
3 *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931) (“the machinery of  
4 government would not work if it were not allowed a little play in its joints”).

5 Given these practical realities, plaintiffs simple-minded argument that any  
6 deviation from the principle of equality, and any variation in how votes are counted,  
7 must violate the Constitution misapprehends what the Constitution requires. While  
8 the Fourteenth Amendment speaks in terms of “one person, one vote,” it requires  
9 only an “honest and good faith effort” by election officials to achieve “substantial  
10 equality,” so that “as nearly as is practicable one man’s vote ... is to be worth as  
11 much as another’s.” *Reynolds v. Sims*, 377 U.S. 533, 558-59 (emphasis added).

12 Plaintiffs have presented no evidence that even remotely suggests that  
13 California election officials are not making a good faith effort to ensure that every  
14 vote in the recall election is afforded equal weight. Nor do plaintiffs contend there  
15 is an alternative that is both practicable and more accurate that can be used for the  
16 October 7 election, but that election officials simply refuse to consider it. Indeed,  
17 plaintiffs base their argument for postponing the election on the grounds that it is  
18 not feasible to replace the punch-card systems until March 2004. Although  
19 plaintiffs complain that punch-card systems can potentially register 1% to 2% more  
20 residual votes (Pl. Mem. at 8-9), plaintiffs never establish why such a variance is  
21 *per se* too much or would result in an unconstitutional election (nor would they

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22 <sup>4</sup> *Bush v. Gore*, 531 U.S. 98 (2000), did not alter this constitutional understanding. All of the  
23 justices, both majority and minority, recognized the right of localities to use different voting  
24 mechanisms, even though differing systems inevitably invite differing error rates. Chief Justice  
25 Rehnquist, in the majority opinion, limited *Bush* to the unique circumstances of that case, and did  
26 not question “whether local entities, in the exercise of their expertise, may develop different  
27 systems for implementing elections.” *Id.* at 109. Justice Stevens, in dissent, recognized the  
28 established practice, if not the right, of “state legislatures to delegate to local authorities certain  
decisions with respect to voting systems and ballot design.” *Id.* at 126. Similarly, Justice Souter,  
in his dissent, agreed that “the Equal Protection Clause does not forbid the use of a variety of  
voting mechanisms within a jurisdiction, even though different mechanisms will have different  
levels of effectiveness in recording voters’ intentions; local variety can be justified by concerns  
about cost, the potential value of innovation, and so on.” *Id.* at 134.

1 want to, since Governor Davis was elected using the same systems). There is  
2 nothing in the record to support any conclusion that the current electoral system in  
3 place for the October 2003 election does not achieve “substantial equality” “as  
4 nearly as is practicable” under the circumstances. *Sims*, 377 U.S. at 558-59.

5 Ultimately, plaintiffs contend that California should not be permitted to hold  
6 any elections at all if, by waiting half a year, it can make the vote-counting system  
7 more accurate. The setting of an election, however, has always been committed to  
8 the discretion of state election officials and not the federal courts. Here, election  
9 officials did not have the option of waiting for the retirement of punch-card systems  
10 in March 2004 because the state constitution prohibits waiting another six months  
11 to resolve the recall question. Nothing in the Fourteenth Amendment compels the  
12 state to disregard that mandate. *See Sims*, 377 U.S. at 585. It is perverse to argue  
13 that the Fourteenth Amendment could prohibit voting altogether simply because  
14 voting systems can be improved, since it is always possible to improve with more  
15 time, more money, and new technology.

16 Neither *Common Cause v. Jones*, 213 F. Supp. 2d 1110 (C.D. Cal. 2001), or  
17 *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002), hold otherwise.  
18 *Common Cause v. Jones* was resolved by stipulation and consent decree, pursuant  
19 to which the Secretary of State agreed to decertify the use of punchcard voting  
20 systems in California, subject to the District Court’s determination as to when  
21 decertification would be effective. 213 F. Supp. 2d at 1111-12. The Secretary of  
22 State’s September 18, 2001 Proclamation makes clear that the decertification was  
23 borne out of a desire to upgrade “the infrastructure of democracy ... to reflect  
24 technological improvements to the voting process.” This Court determined in  
25 *Common Cause* that the earliest feasible date for that upgrade would be March  
26 2004. Nothing in that case suggests that elections cannot be held while this  
27 upgrade occurs, or that the use of “Votomatic and Pollstar systems” in the interim is  
28 unconstitutional. *Id.* at 1112-13. Indeed, both the decertification and the consent

1 decree contemplate that elections between 2001 and March 2004 would continue to  
2 take place. Thus, eight counties were still using punchcard voting systems during  
3 the November 2002 election in which Governor Davis was reelected.

4 *Black v. McGuffage* is also inapposite. In that case plaintiffs claimed an  
5 equal protection violation because the election system in Illinois was an “allegedly  
6 arbitrary system” that “unnecessarily values some votes over others.” 209 F. Supp.  
7 2d at 899. Plaintiffs alleged that in the 2000 presidential election, the residual vote  
8 rate ranged from 0.32% in some Illinois counties to over 36.73% in other counties.  
9 *Id.* at 893.<sup>5</sup> Denying a motion to dismiss, the *McGuffage* court simply held that,  
10 viewing all factual allegations in the light most favorable to the plaintiffs, plaintiffs  
11 could proceed with a claim demanding that Illinois improve its voting systems to  
12 address this disparity. *Id.* at 894. In so deciding, the *McGuffage* court merely  
13 followed the Supreme Court’s mandate that states should improve their voting  
14 systems to achieve the greatest degree of equality practicable. Given the procedural  
15 posture of the case, *McGuffage* never determined whether the Illinois voting system  
16 was unconstitutional, or whether the 36.73% residual vote rate was “arbitrary” and  
17 “unnecessary” under the circumstances. More importantly, *McGuffage* only  
18 considered whether states can be constitutionally compelled to improve their voting  
19 systems prospectively. Nothing in *McGuffage* supports plaintiffs’ position that  
20 elections cannot be held while those improvements take place.

21 2. Punch-Card Voting Is Time-Tested and Reliable, and Plaintiffs’  
22 Attempt to Show Otherwise Is Unpersuasive and Riddled With  
23 Error.

24 Plaintiffs’ factual premise—that punch-card voting is a failure—is also  
25 wrong. Four California Registrars of Voters, with over sixty years of combined  
26 experience conducting hundreds of punch-card elections, have submitted affidavit  
27 testimony that Votomatics are a sound, reliable way of recording and tabulating

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28 <sup>5</sup> Here, in contrast, plaintiffs complain that punch-card voting results in a residual vote rate of only 2.23% in the six counties that still use such systems. (Pl. Mem. at 8.)

1 voter choices.<sup>6</sup> Their opinions are backed up by facts: in elections subject to  
2 recounts, manual counts of Votomatic ballots invariably agree with machine counts.  
3 Indeed, as established by Ernie Hawkins—former Sacramento County Registrar  
4 and a leader in the field of election administration—there has not in modern history  
5 been “a single California election ...in which an appreciable number of  
6 undecipherable punch-card ballots remained after a recount such as to call into  
7 question even the closest of elections.” Hawkins Decl. ¶12; *see* Wharff Decl. ¶ 3.  
8 This is not Florida, where in 2000 human error was shifted to a mechanical device,  
9 leading to what the Los Angeles Registrar has called “a hysterical overreaction”  
10 against punch-card systems. *Id.* n.2 & Exh. C. Unlike Florida, punch-card voting  
11 devices in California are assiduously maintained, utilized by voting officials and an  
12 electorate well aware of how they need to be handled and, in close cases, subject to  
13 manual counts that are governed by forty pages of uniform standards that set clear  
14 and objective criteria on how voter intent is to be discerned. Hawkins Decl. ¶7, 12;  
15 Wharff Decl. ¶ 3-4.<sup>7</sup>

16 Although punch-cards elected Governor Davis, plaintiffs claim that punch-  
17 card voting is too inaccurate to pass constitutional muster. Yet they simultaneously  
18 ignore the shortcomings of their preferred technologies: optical scanning systems

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19  
20 <sup>6</sup> The are: Ernest R. Hawkins – Sacramento (declaration attached); Conny McCormack – Los Angeles (Exhibit D); Marsha Wharff – Mendocino (declaration attached); Jill LaVine – Sacramento (Exhibit E).

21 <sup>7</sup> After the 2000 Florida election dispute, Congress studied various voting systems. In the 2002  
22 Help America Vote Act, Congress determined that there was no reason to compel all election  
23 precincts “to change to a different kind of voting system” as long as the federal standards could  
24 be met. H. Rpt. 107-730, conf. rpt. on H.R. 3295, “Help America Vote Act of 2002” (Oct. 8,  
25 2002), p. 74. Congress further concluded that states may continue to use punch card voting  
26 systems as long as there is “a voter education program specific to that voting system that notifies  
27 each voter of the effect of casting multiple votes,” and there are “instructions on how to correct  
28 the ballot before it is cast and counted.” 42 U.S.C. § 15481(a)(1)(B). In authorizing punch card  
voting for federal elections, Congress reaffirmed the importance of “flexibility, so that local  
authorities can tailor their procedures to meet the demands of disparate and unique communities.”  
H. Rpt. 107-329, pt. 1 on H.R. 3295, “Help America Vote Act of 2001” (Dec. 10, 2001), p. 32.  
The Help America Vote Act refutes plaintiffs’ claim that there is “universal recognition that  
punch-card machines are failed voting mechanisms.” (Pl. Mem. at 1.) Indeed, this Court could  
not invalidate California’s election system without simultaneously invalidating the federal one.



1 and touch screens (DREs). According to former Registrar Hawkins, who has  
2 consulted with countless state, federal, and private groups on voting technology,  
3 those devices are not the solution for every locality. For example, optical scan  
4 systems can misread ballots even more frequently than Votomatics. Stray marks  
5 can be mistaken for votes, and off-center markings can be mistaken for background  
6 noise, depending on the card-reader sensitivity settings the voting official selects.  
7 As Registrar Wharff explains, punch-cards are more objective: “either there is or  
8 hole or there’s not.” Wharff Decl. ¶ 8. There is a place for punch-card systems, as  
9 the National Commission on Election Reform determined when it pointed to Los  
10 Angeles as an example of a large, ethnically diverse city “where punch cards make  
11 much more sense than optical scanners.” Hawkins Decl. 18 & n 15.

12 DRE’s, too, offer a mixed bag of benefits and shortcomings. While they may  
13 be easy to use, they rank poorly on plaintiffs’ test for accuracy—*i.e.*, the number of  
14 residual ballots they generate (*see* Hawkins Decl. ¶16); they produce no voter-  
15 verified paper audit trail to permit a post-election recount; and they are more readily  
16 compromised and prone to failure. *Id.* ¶17. The point here is not that one  
17 technology is better than another, but rather, as Registrar Hawkins puts it, “The  
18 choice of the type of voting device to be used is thus a delicate balance of many  
19 competing factors. There is no ‘one size fits all,’ nor is there any reason to banish  
20 any of the venerable technologies, including punch-cards.” *Id.* ¶ 18.<sup>8</sup> Neither  
21 plaintiffs nor any of the litigants in the related cases have been able to produce  
22 testimony from a single election administrator who feels differently.

23 Instead of opinions borne of first-hand experience conducting punch-card  
24 elections, plaintiffs serve up a dizzying array of numbers, all designed to show that  
25 punch-card systems generate “uncounted votes at between double and quadruple

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26 <sup>8</sup> The Election Center, an organization of election-administration professionals, agrees: “With no  
27 voting system possessing, or likely to acquire, a clear claim to the title “Best,” it is better to  
28 maintain diversity and competition as a means of promoting innovation and continued  
improvement in voting system technology.” Exh. L at 45.

1 the rates” of competing technologies. (Pl. Mem. at 1.)<sup>9</sup> But even to the untutored,  
2 plaintiffs’ statistical assault on punch-cards does not withstand scrutiny. As  
3 Professors Katz and Herron explain in their affidavits:

4 • Plaintiffs’ statistics do not measure the accuracy of punch cards in  
5 recording voter intent. The percentage of residual ballots—those in which the voter  
6 has not voted for the race at the top of the ballot (undervote) or has voted for too  
7 many candidates (overvote)—is not a measure of error at all. Many voters simply  
8 choose to abstain from voting in particular contests, and others register vote  
9 protests by casting votes for competing candidates or positions. This is apparent  
10 from looking at the residual rates in contests on the same ballot, as Caltech’s  
11 Professor Katz does in the table in his declaration (at ¶ 12). On seven ballot  
12 measures on the L.A. County ballot in 2002, for example, the residual rate ranged  
13 from 8.4% at the low end to almost twice that at the high end. Moreover,  
14 investigators have documented intentional over- and undervoting. Professor Herron  
15 conducted research in Cook County establishing that deliberate abstentions are  
16 particularly prevalent among members of minority groups, who tend not to cast a  
17 vote for office that a member of the group is not seeking. (Herron Decl. ¶ 21, Katz  
18 Decl. ¶ 14.)

19 • Even if residual ballots are an indication of a machine’s failure to properly  
20 record voter intent, plaintiffs’ use of the statistics does not prove the unreliability of  
21 punch-card systems. Plaintiffs try to build a statistical case for unreliability in two  
22 ways. First, they compare the residual vote rates found when punch-cards were  
23 used with the residual vote rates found when precinct-count optical scan voting  
24 systems and touch screens were used in the same election. Not surprisingly, punch-

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25 <sup>9</sup> They also falsely insinuate that California decertified punch-card voting machines finding that  
26 they were “defective, obsolete and otherwise unacceptable.” Secretary of State Jones made no  
27 such finding when, under pressure following the adverse publicity from Florida, he agreed to  
28 decertify punch-card machines in 2007. But he was careful to say it was not on account of their  
unreliability. Rather, he explained that like typewriters “in the world of personal computers,” it  
was time for them to go. Hawkins Decl. n. 19.

1 cards do worse. But as Professor Herron explains, that is not necessarily because  
2 punch-cards fail to accurately register voter intent. Rather, optical scanning  
3 systems and DREs are biased against overvotes and undervotes; they are designed  
4 to generate warnings that effectively force voters to cast a vote in each contest and  
5 not more than one, even if that is how the voter would otherwise prefer to vote.

6 Herron Decl. ¶¶ 11-12.<sup>10</sup>

7 • The second part of plaintiffs’ statistical case is evidence showing that  
8 counties that migrate from punch-cards to other technologies experience a drop in  
9 their residual rate. But this too is explained by the strong discouragement that  
10 DREs and optical scan systems provide against deliberate over- and undervoting.  
11 Moreover, as Professor Katz explains, while this analysis controls for differences in  
12 the characteristics of the populations being compared (they are the same), it does  
13 not control for differences in the election. The nature of the election may account  
14 for different residual rates. Indeed, there is good reason to think that differences in  
15 the nature of the electoral contest did play a role in the one example plaintiffs  
16 provide. The 1996 and 2000 presidential races were very different: In 1996, we  
17 saw a presidential race with a sitting Democratic incumbent whereas 2000 was an  
18 open election expected to be very close nationwide. Katz Decl. ¶24.<sup>11</sup>

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22 <sup>10</sup>See also Hawkins Decl. ¶ 13. The other flaw in plaintiffs’ showing is that it does not take into  
23 account the possible existence of confounding factors common to both the use of punch-card  
24 systems and higher residual rates. As Professor Katz explains, “the counties using punch-card  
25 systems typically have larger minority population, who may be undervoting intentionally more  
often, making the residual rates appear larger than they are for these systems. It is also the case  
that punch-card counties are typically bigger and this may independently be related to residual  
rates in elections.” Katz Decl. ¶ 20.

26 <sup>11</sup> For similar reasons, one must dismiss plaintiffs’ evidence that the publicity generated in Florida  
27 had no effect on the reliability of punch-card systems, namely that residual rates increased  
28 between the 1998 Gubernatorial contest and the one that took place in 2002. As Registrar  
Hawkins explains, those races were worlds apart. The California 1998 gubernatorial race was  
hotly contested while 2002 pitted an incumbent against a weak challenger. Not surprisingly,  
many more voters chose to abstain in 2002 than did in 1998. Hawkins Decl. ¶¶ 8-9.

1                   3.     Given the Untested Equipment Former Punch-card Counties  
2                             Intend to Roll Out to Satisfy the Consent Decree, the Vote Tally  
3                             Would Likely be Less Reliable If Postponed Until Next March

4                   Even if a case could be made against punch-card voting, accuracy in this  
5 critical recall election would not be served by postponing the election until next  
6 March. That is because counties, in an attempt to comply with the consent decree  
7 that will then take effect, are rolling out stop-gap solutions that are not measurably  
8 better than punch-card systems and conceivably worse. Los Angeles County  
9 intends to introduce an optical scan system using retooled Votomatic machines that  
10 deposit ink marks on a card instead of punches. The system shares many common  
11 attributes with Votomatics that plaintiffs experts say contribute to its unreliability  
12 (e.g., potential misalignment of the ballot card, voter's inability to check his work,  
13 etc.). Hawkins Decl. ¶ 23. Los Angeles' new system has never been tested, other  
14 than for its mechanical integrity, and no performance data (including residual rates)  
15 exists because it has never been deployed in an election anywhere. *Id.*

16                   Moreover, the card reader that Los Angeles intends to use, as well as those to  
17 be introduced in Sacramento when it, too, switches over from punch-cards, are  
18 stripped down versions that dispense with the feature that supposedly makes optical  
19 scanning more accurate.<sup>12</sup> Plaintiffs' experts say that optical scanning systems  
20 contribute to an accurate tally because when ballots are scanned at the precinct level  
21 in the presence of the voter, under- and over-votes are caught allowing the voter a  
22 "second chance" to fix his or her "mistake." But neither Los Angeles nor  
23 Sacramento will have precinct level scanning next March; ballots will be read at a  
24 central location. Hawkins Decl. ¶ 24. Hence, in Los Angeles and Sacramento,  
25 none of the reported benefits will be realized. Under these circumstances, a delay  
26

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27 <sup>12</sup> The three counties that intend to switch next March from punch-cards to DRE systems can also  
28 expect no improved residual rate. As measured by residual ballots, there is evidence that DREs  
do worse than punch-cards. Hawkins Decl. ¶ 27.

1 to March might diminish the accuracy of the count. Herron Decl. ¶¶ 13-17, 24.  
2 One study found that optical scanning done primarily at a central location where  
3 voters were not afforded a “second chance” resulted in higher error rates than  
4 punch-cards, not lower rates. Hawkins Decl. ¶ 24.

5 The uniqueness of the recall election also augers against postponing it to  
6 March. The evidence suggests that punch-card systems may actually be preferred  
7 when there are an unusually large number of candidates. For this recall, the  
8 Secretary of State has qualified 135 candidates. Punch-card systems can  
9 accommodate up to 312 separate choices. But optical scan devices utilize paper  
10 ballots, and even the longest one can accommodate only 100 names. This means  
11 that optical scan systems, in order to accommodate 135 candidates, must give  
12 voters several pages. Problems arise, though, because the card readers are not able  
13 to associate multiple pages as a single ballot. Hawkins Decl. ¶ 25. Thus, a manual  
14 process, itself an invitation to error, must be devised to ensure that voters do not  
15 accidentally vote multiple times—a candidate on each page—simply because there  
16 are multiple pages. Without the ability to use their punch-card systems, registrars  
17 in the large counties could be facing a nightmare. *Id.* ¶ 26. Certainly, postponing  
18 the election until March, under these circumstances, will not be striking a blow for  
19 accuracy.

20 When the facts are considered—not just the hype and rhetoric—punch-card  
21 voting systems work and, in the unique setting of this recall election, may work  
22 better than the alternatives. There is therefore no factual basis under the equal  
23 protection voting cases for upsetting the scheduled recall election.

24 **B. The Supposedly “Disparate Impact” Is Contrived and Irrelevant.**  
25

26 Plaintiffs have no likelihood of success on their disparate impact claims  
27 either. Neither the facts nor the law supports plaintiffs’ request for injunction, nor  
28 are minorities are being unlawfully disadvantaged.

1                   1.     There Is No Credible Evidence that Higher Levels of Over- and  
2                                   Undervotes Among Minority Voters Is Attributable to the Use  
3                                   of Punch-card Voting in Populous Counties

4                   Plaintiffs’ evidence that punch-card voting disproportionately disenfranchises  
5                   minority voters is an exercise of playing games with the numbers. They argue that  
6                   punch-cards are more error-prone than competing technologies. Since punch-cards  
7                   are more prevalent in large counties like Los Angeles with large minority  
8                   populations, they then conclude that their use will disproportionately effect  
9                   minority ballots. But as shown earlier, there is no persuasive evidence that punch-  
10                   cards produce errors more frequently than other voting systems. Thus, there is no  
11                   basis for concluding that punch-card errors disproportionately impact minorities.

12                   Beyond this, plaintiffs offer Dr. Brady’s statistical comparison of residual  
13                   rates in communities having different levels of minority population. Observing  
14                   higher residual rates in largely minority communities, and a more pronounced  
15                   increase for punch-card residuals as one moves from primarily Anglo precincts to  
16                   primarily minority ones, Dr. Brady concludes—erroneously—that the cause must  
17                   be punch-cards.

18                   This is nonsense. For one thing, controlled studies have determined that  
19                   minority groups more frequently under- and overvote than non-minority voters. As  
20                   noted above, this is particularly pronounced in races where a minority group  
21                   member is not running. Herron Decl. ¶ 21; Katz Decl. ¶¶ 14, 28. One would thus  
22                   expect to see higher residual rates in areas of greater minority concentration,  
23                   independent of the use of punch-cards.

24                   Second, there is a simple answer as to why punch-card residual rates  
25                   correlate more strongly with minority concentration than is the case with optical  
26                   scan or DRE residual rates. We know that minority voters overvote and undervote  
27                   with greater frequency than non-minorities. Punch-card technology is neutral as to  
28                   this. But as noted earlier, optical scan systems and DREs effectively discourage

1 voters from casting residual votes by warning them of the “error,” making it  
2 difficult to proceed without addressing it, and prompting them to “fix” it. Hawkins  
3 Decl. ¶ 13. No wonder that the residual rates optical scan and touchscreen systems  
4 are less effected by the percent of minority votes. They have a built-in bias against  
5 residuals generally.<sup>13</sup>

6 2. Even if Use of Votomatics Disproportionately Impacted  
7 Minorities, No Claim Would Arise Under Either the  
8 Constitution or the Voting Rights Act

9 Even were the race-neutrality of punch-cards ignored, and a contrary view  
10 adopted, plaintiffs have no likelihood of prevailing on their disparate impact claim.  
11 Plaintiffs do not make a race-based constitutional claim because such a violation  
12 requires proof of intentional discrimination, which they do not (and cannot) claim is  
13 occurring. *See Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (“a showing of  
14 discriminatory intent has long been required in *all* types of equal protection cases  
15 charging racial discrimination”).

16 Plaintiffs instead invoke Section 2 of the Voting Rights Act of 1965, which  
17 prohibits a state or political subdivision from adopting any voting “standard,  
18 practice, or procedure ...which results in a denial or abridgement of the right ...to  
19 vote on account of race or color.” 42 U.S.C. § 1973(a). Although Section 2 does  
20 not require proof of discriminatory purpose, it does require proof of a prohibited  
21 discriminatory result. *Chisom v. Roemer*, 501 U.S. 380, 395 (1991). Plaintiffs  
22 must prove that minority groups are being discriminated against “on account of  
23 race” as opposed to “other factors independent of race.” *Farrakhan v. Washington*,  
24 \_\_ F.3d \_\_, 2003 WL 21715349 \*6 (9th Cir. 2003); *see Johnson v. Bush*, 214 F.

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26 <sup>13</sup> Professor Katz notes another flaw in Dr. Brady’s analysis: aggregation bias. There may be  
27 hidden factors in largely minority communities that contribute to the higher residual rate, such as  
28 the disproportionate presence of disaffected non-minority voters who see their franchise as an  
opportunity to register a protest by voting for multiple candidates or not at all in particular races.  
Katz Decl. ¶¶ 29-30. Dr. Brady has not attempted to filter this out. *Id.* at ¶ 31.

1 Supp. 2d 1333, 1341 (S.D. Fla. 2002) (“no Section 2 violation occurs when factors  
2 other than race caused election results with a disparate impact on minorities”).

3 Electoral devices such as punch-card voting “may not be considered *per se*  
4 violative” of Section 2. *Thornburg v. Gingles*, 478 U.S. 49 (1986). A court must  
5 make an “intensely fact-based and localized” determination—after examining the  
6 “totality of the circumstances” and “a searching practical evaluation of the past and  
7 present reality”—that the electoral device unfairly disadvantages minority groups’  
8 access to the political process. *Smith v. Salt River Project Agr. Imp.*, 109 F.3d 586,  
9 591 (9th Cir. 1997). As the Supreme Court held in *Thornburg*, this requires an  
10 examination of, among other things, the history of voting discrimination; the extent  
11 to which voting is “racially polarized,” the “use of overt or subtle racial appeals in  
12 political campaigns,” and whether “members of the minority group have been  
13 elected to public office in the jurisdiction.” 478 U.S. at 44-45 (elaborating on the  
14 proof necessary to establish a violation).

15 Under *Thornburg*, the fact that a voting practice or system has a disparate  
16 impact on minorities statistically cannot, by itself, establish racial discrimination  
17 under the Voting Rights Act. *See Smith*, 109 F.3d at 595 (“a bare statistical  
18 showing of disproportionate impact on a racial minority does not satisfy the  
19 [Section] 2 ‘results’ inquiry”). Thus, courts have held that a requirement that one  
20 must own land in order to vote does not violate the Voting Rights Act, even if non-  
21 landowners “may disproportionately be African-Americans.” *Smith*, 109 F.3d at  
22 595; a rule disenfranchising non-felons does not necessarily violate the Voting  
23 Rights Act, even if such a rule “disproportionately impacts” blacks, *Wesley v.*  
24 *Collins*, 791 F.2d 1255 (6th Cir. 1986); and a rule purging inactive voters from the  
25 registration lists does not necessarily violate the Act, even though minority voters  
26 are removed at disparate rates, *Ortiz v. City of Philadelphia*, 28 F.3d 306, 315 (3d  
27 Cir. 1994). *See Wesley*, 791 F.2d at 1260-61 (it is “well-settled” that a “showing of  
28 disproportionate racial impact alone does not establish a *per se* violation of the”



1 Voting Rights Act); *Ortiz*, 824 F. Supp. 514, 525 (E.D. Pa. 1993) (plaintiffs must  
2 demonstrate that the voting practice “interacted with sociological, historical and  
3 economic factors to deny minority voters equal access to the political process”).

4 Plaintiffs admit that their Voting Rights Act claim is based on nothing more  
5 than a statistical showing of disproportionate impact. (Pl. Mem. at 17.) Plaintiffs  
6 rely on this Court’s decision in *Common Cause v. Jones*, 213 F. Supp. 2d 1106  
7 (C.D. Cal. 2001), to argue that such an impact should be considered enough to  
8 establish a violation when plaintiffs assert vote-denial claims, as opposed to vote-  
9 dilution claims. *Id.* at 1110. Because plaintiffs once managed to convince the  
10 Court in *Common Cause* to limit the *Thornburg* requirements to vote-dilution cases,  
11 *id.*, plaintiffs bank on the Court to simply do the same in this case. Plaintiffs’  
12 distinction between vote-denial and vote-dilution claims, however, is not the law.  
13 As the Ninth Circuit reconfirmed last month, the “totality of the circumstances  
14 approach applies to both vote dilution and vote denial claims.” *Farrakhan*, 2003  
15 WL 21715349 \*4 n.11. For both types of claims, “a bare statistical showing of  
16 disproportionate impact” is not enough. *Smith*, 109 F.3d at 595, 596 n. 8 (rejecting  
17 argument that *Thornburg* applies only to “vote dilution” claims). Because plaintiffs  
18 admit that is all they have, they cannot prevail on their Voting Rights Act claim.  
19

## 20 **V. CONCLUSION**

21 We have reached a political watershed: Californians in such large numbers  
22 have lost confidence in their Governor that, for the first time in the State’s history,  
23 they have initiated a constitutional process to decide whether he should be retained.  
24 The Court should not derail a political contest that nearly two million California  
25 voters have petitioned for unless the recall election is unequivocally in violation of  
26  
27  
28

1 federal law. Because plaintiffs don't come close to carrying this burden, the Court  
2 should deny plaintiffs' request to enjoin the October 7, 2003 gubernatorial recall  
3 election and let the People decide.

4  
5 Dated: August 15, 2003.

6 Respectfully submitted,

7 CHARLES P. DIAMOND  
8 ROBERT M. SCHWARTZ  
9 ROBERT C. WELSH  
10 VICTOR H. JIH

11 CHARLES H. BELL, JR.  
12 THOMAS W. HILTACHK  
13 BELL, MCANDREWS, HILTACHK  
14 & DAVIDIAN LLP

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By: \_\_\_\_\_  
Robert M. Schwartz  
Attorneys for *Amicus Curiae* Ted Costa

1 **DECLARATION OF ERNEST R. HAWKINS**

2 I, Earnest R. Hawkins, declare as follows:

3 1. I am the former Registrar of Voters of Sacramento, California, a  
4 position I held from 1980 until my recent retirement at the end of last week.  
5 Having spent my a nearly quarter-century presiding over elections, actively  
6 participating in professional election official groups and contributing to state and  
7 federal panels, committees and commissions, I consider myself expert in voting  
8 device technology and voting procedures. I submit this declaration in support of  
9 the opposition of Intervenor Ted Costa to the application for a temporary  
10 restraining order and preliminary injunction.

11 **Professional Credentials**

12 2. I hold undergraduate and graduate degrees in business administration  
13 and have been in county government since going to work for Sacramento County in  
14 1965. I began doing election work in 1976 and became Registrar in 1980. As  
15 registrar, I was responsible for the administration of all elections, federal, state, city,  
16 school and special districts, and for registering and maintaining the registrar of  
17 voters, and for administering campaign disclosure laws for all residents of  
18 Sacramento County. In this capacity, I conducted literally dozens of elections using  
19 Votomatic and Pollstar pre-scored punch-card voting systems. Part of my  
20 responsibilities as Registrar was to evaluate new voting devices and technologies as  
21 they became available, and I am familiar with almost every device on the market  
22 today and many that remain in development. I am currently on contract to  
23 Sacramento as it phases in optical scan technology.

24 3. In addition to running elections in Sacramento County, I am a leader in  
25 my profession. I am a long-standing member of CACEO (California Association  
26 of Clerks and Election Officials), on whose Board I sat for three years, and I have  
27 served as its Election Legislation Committee Chair or Co-Chair for the past twenty-  
28 three years. I have been a member of the Federal Election Commission's Voting

1 Systems Standards Panel and currently serve on its Advisory Panel. I am also  
2 active in the Election Center, which serves voter-registration and elections-  
3 administration professionals by keeping them current on legislative and technical  
4 developments and by hosting conferences designed to improve voting methods and  
5 operations. Among other roles, I chair its Board of Directors, I am its conference  
6 chair (I write this declaration from its annual conference in Bal Harbour Florida),  
7 and I served on its Election Reform Taskforce following the 2000 Presidential  
8 election. I am also a leader in the National Association Of County Recorders,  
9 Election Officials And Clerks (“NACRC”), and I have been an advisor to the  
10 Federal Voting Assistance Program, the California Voter Foundation, and the  
11 International Foundation For Election Systems.

12 4. As a senior member of the election-official community, I have also  
13 served on a variety of government advisory boards. At the national level, I  
14 participated on or with several committees and commissions which were convened  
15 following the adverse publicity that was attached to the Florida presidential  
16 election. I have served on a number of voting task forces organized by the  
17 California Secretary of State, including advisory boards that inspected devices  
18 proposed to replace Votomatics following the Secretary’s decision to decertify that  
19 technology effective March 2004.

20 5. I hold two certifications in election administration, one from Election  
21 Center/Auburn University and the second from the NACRC. In 1990, I was named  
22 Election Official of the Year by the National Association of Recorders, Clerks and  
23 Election Officials, an affiliate of the National Association of Counties (“NACo”).  
24 Three years ago, I was inducted into the Election Center’s Hall of Fame, and last  
25 year I received the NACRC’s Linda F. Carter Excellence in Government award.  
26  
27  
28

The Votomatic System Is a Time-Tested  
and Reliable Method of Conducting Elections

6. When I started my career a quarter-century ago, Sacramento County was using the Votomatic election system. I have continually looked for a superior system, but all things considered haven't found one. In my experience, punch-cards systems in general, and Votomatics in particular, using proper procedures reliably record and allow to be counted voter intent with respect to election preferences. Like other approved systems, they are designed to achieve a mechanical failure rate of less than one in a million.<sup>1</sup> I have presided over dozens of Votomatic elections in which manual counts were taken following a machine count. In each, the two accounts agreed.

7. This is no accident. A comparison between California and Florida is not reasonable. Election laws and policies are very different in the two states. California counties using punch-card technology take pains to insure that their machines are well maintained and properly functioning. Prior to every election, officials remove accumulated chads (apparently not done consistently in Florida with unfortunate results) and otherwise inspect the devices to make sure they are working correctly. In Sacramento, we scour the devices before every election and repair or replace those parts that are beginning to show signs of wear. Nothing is left to chance. We send staff representatives to our ballot card manufacturer in Addison, Texas to insure that our ballots meet weight and strength characteristics before they are shipped.

8. I agree with the Los Angeles Registrar, Conny McCormack who advised her Board of Supervisors in 2000 that Florida's unfortunate experience four years ago has resulted in enhanced reliability of punch-card voting.<sup>2</sup> Voters are

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<sup>1</sup> Caltech/MIT Joint Voting Project, Residual Votes Attributable to Technology, ver. 2 (March 30, 2001), at 17 (hereafter "Caltech/MIT Residual Votes Study") [Exh. A.]

<sup>2</sup> Letter of Connie McCormack to Los Angeles County Supervisors, at 3 (Jan. 17, 2000) [Exh. B]. The New York Times last Sunday reported Ms. McCormack as also saying: "Nine counties in California lost their voting system for no reason except hysteria, an hysterical overreaction .... [Moreover,] Mr. Davis

1 now keenly aware of the need to inspect their punch-card ballots (and to remove  
2 any still-partially attached chads) before depositing them in the ballot box. San  
3 Diego Registrar, Sally McPherson, was recently quoted as saying: “The last  
4 election was the cleanest election we've ever had because voters and poll workers  
5 are totally aware of chads,”<sup>3</sup> Indeed, in our polling places, one regularly sees voters  
6 holding their ballots to the light for just this reason.

7         9. As a (former) California voting official, I am deeply skeptical of  
8 Professor Brady’s evidence that we have not learned from the Florida fiasco. He  
9 contrasts the “residual” rates for the 1998 and 2002 gubernatorial races and shows a  
10 higher “residual” rate after the Florida balloting than before. In my opinion that  
11 comparison is apples and oranges: the California 1998 gubernatorial race was hotly  
12 contested while the 2002 pitted an incumbent against an apparently weak  
13 challenger. Not surprisingly, many more voters chose to abstain in that contest than  
14 did in 1998.

15         10. More significantly, I, and many other election officials,<sup>4</sup> question  
16 whether “residuals” are “errors.” I believe, based on discussions with hundreds of  
17 voters, that most over- or undervotes result from a voter’s *knowing* decision to vote  
18 for multiple candidates (or none) or his absentminded but *intentional* act of doing  
19 so. Overvotes and undervotes are not the result of a failure of the device to  
20 properly record the voter’s choice(s). If they were, within the same precinct during  
21 a single election, residual rates would be expected to remain fairly constant, but, in  
22

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23 was elected by voters using punch cards and he never complained about that.” N.Y. Times, Sunday August  
24 10, 2004, available on the Internet at [http://www.nytimes.com/2003/08/10/  
national/nationalspecial3/10BALL.html](http://www.nytimes.com/2003/08/10/national/nationalspecial3/10BALL.html). [Exh. C.] Ms. McCormack’s declaration to the California  
Supreme Court is attached as Exh. D.

25 <sup>3</sup> Id. Current Sacramento Registrar agrees. In her declaration to the California Supreme Court last week,  
26 she wrote “I believe that the use of the Pollstar [punch-card] system will result in an accurate tabulation of  
27 the results. . . . My confidence in punchcard voting systems is based on Sacramento County’s long history  
using the voting systems and studies analyzing the ‘residual’ votes in Sacramento County. [Exh. E]

28 <sup>4</sup>See LaVine Decl. at ¶ 8 [Exh. E]. Many outside our profession who have looked at reliability measures  
have raised the same question. *See, e.g.*, Caltech/MIT Joint Study at 6 (“The residual vote is not a pure  
measure of voter error or of machine failure, as it reflects to some extent no preference.”).

1 fact, they vary greatly from office-to-office, and race-to-race. The highly regarded  
2 Caltech/MIT Joint Study concluded that “[t]he residual vote is not a pure measure  
3 of voter error or of machine failure, as it reflects to some extent no preference.”<sup>5</sup> In  
4 what is a warning about drawing conclusions from comparative residual rates:

5 Many other factors may explain under and over voting beside machine  
6 types. Other prominent offices on the ballot, such as senator or  
7 governor, might attract people to the polls who have no intention to  
8 vote for president. A large turnout might make it difficult for election  
9 administrators to tend to voter education at the polls. Demographic  
10 characteristics of the county’s electorate might explain the incidence of  
11 people prone to make mistakes. The wealth of the county might  
12 account for expenditures on election administration. New machinery  
13 might produce elevated levels of voter confusion, simply because  
14 people make mistakes more with unfamiliar tasks.

11 11. Moreover, these residual votes are not “lost votes” as some academics  
12 suggest (*see* Brady ¶ 44). These academics lose sight of the fact that residual votes  
13 are not discarded and that in close elections, recounts can be conducted to capture  
14 any of the small number of votes that may have been missed during a machine  
15 count.

16 12. Contrary to what Mr. Saltman says, over the forty odd years that  
17 punch-cards systems have been used, the election administration profession has  
18 developed a series of sensible and objective criteria to gauge voter intent in  
19 recounts. In California, these standards, the Secretary of State has promulgated 44  
20 pages or standards for uniform use around the State.<sup>7</sup> They work: I can’t recall a  
21 single California election in the almost forty-years I have been with County  
22 government in which an appreciable number of undecipherable punch-card ballots  
23 remained after a recount such as to call into question even the closest of elections.

24 13. The evidence of the unreliability of punch-card systems that academics  
25 such as Brady and Saltman typically cite is the comparatively lower residual rate  
26 generally recorded by optical scan and direct recording electronic (“DRE”) voting

27 \_\_\_\_\_  
28 <sup>5</sup> Caltech/MIT Residual Votes Study, at 6.

<sup>6</sup> *Id.* at 8.

<sup>7</sup> See Exhibit A to the LaVine Decl. [Exh. E].

1 devices. They say that the comparison controls for deviations attributable to the  
2 particular election since one can compare the residual rate of different technologies  
3 used in the same race. But even if one accepts that residuals are “errors,” there is  
4 another, more benign explanation for this difference. Most optical scan and DRE  
5 systems alert the voter to an over- or undervote, either by delivering an error  
6 message on a screen or by alerting voting officials during the precinct scan of the  
7 ballot who then tells the voter. (Indeed, this is their principal selling point.) This  
8 creates an enormous bias against residuals, as voters are actively encouraged by  
9 these “second chance” systems to “fix” what the systems consider a mistake. Not  
10 surprisingly they do, with the result that punch-card residual rates invariably are  
11 higher than rates for the newer “second chance” technologies.

12 14. As an election administrator, I also question the reliability of studies  
13 that compare residual rates in successive elections when the jurisdiction migrates to  
14 a new voting technology. Every election is unique. Comparisons of elections  
15 conducted in different places and/or at different times, and the conclusions one can  
16 draw from them, are of extremely limited value and, in my opinion, fraught with  
17 error.

18 15. As discussed more fully below in connection with postponing the  
19 Recall Election, the alternatives to punch-card systems have their own limitations.  
20 Optical scan systems depend on voters neatly filling in circles or bubbles or  
21 connecting arrows with a pen. Stray marks can be mistaken by optical scanners for  
22 votes, just as off-centered markings intended as a vote can be mistaken by the  
23 machine as irrelevant background noise. Some number of voters invariably will fail  
24 to heed directions, and instead of filling in circles, they circle or underline the  
25 candidates name. Thus, as in punch-card voting, in close optical-scan elections,  
26 recounts and judgments about voter intent cannot be avoided

27 16. The soundness and reliability of DRE technology is the subject of even  
28 greater controversy. The highly regarded Caltech/MIT Joint Study found that DRE



1 machines resulted in higher “residual” levels than did punch-cards,<sup>8</sup> and it  
2 concluded that overall DREs do not do well.<sup>9</sup> Moreover, any perceived advantages  
3 of DRE systems is counterbalanced by other potential shortcomings. Most notably,  
4 DREs generally do not produce an voter-verified paper audit trail, an issue which  
5 has become extremely controversial.<sup>10</sup>

6 17. Moreover, concerns exist over the potential for manipulation and  
7 fraud. For example, researchers at Johns Hopkins's Information Security Institute  
8 raised questions, whether correct or not, regarding a system offered by Diebold  
9 Elections Systems, which uses smart-card technology. The claim is that the system  
10 could be compromised by a hacker using counterfeit cards to cast numerous ballots  
11 at a time or by poll workers reprogramming the machine to count ballots cast for  
12 one candidate toward another's tally.<sup>11</sup> And they are reportedly prone to failure.  
13 Florida introduced DREs during its 2002 off-year election, and because it took  
14 technicians hours to get them working properly, many voters were turned away and  
15 polls were forced to stay open two hours late.<sup>12</sup> As the Caltech/MIT Joint Study  
16 group observed, “in terms of one very basic requirement – minimizing the number  
17 of lost votes – electronic voting does not have a very good track record.”<sup>13</sup>

18 18. The choice of the type of voting device to be used is thus a delicate  
19 balance of many competing factors. There is no “one size fits all,” nor is there any  
20 reason to banish any of the venerable technologies, including punch-cards. As the  
21

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22 <sup>8</sup> Caltech/MIT Residual Vote Study at 10, Table 2.

23 <sup>9</sup> “Considering some of the glowing reports about electronics following the 2000 election, we expected the  
DREs to do well. They did not . . . .” *Id.* at 16.

24 <sup>10</sup> The Caltech/MIT team commented: “DREs do not provide a separate record of the voter’s intent apart  
25 form that capture by the machines. Election officials can only recount what the machine record, so it is  
impossible to conduct a thorough audit of the election.” Voting: What Is, What Could Be, at 19 (July  
2001) (hereafter “Voting”) [Exh. F].

26 <sup>11</sup> Washington Post, Editorial: A Soft Touch for Voter Fraud, August 3, 2003, p. B06 [available at  
<http://www.washingtonpost.com/wp-dyn/articles/A15485-2003Aug2.html?referrer=email>] Exh. G.

27 <sup>12</sup> See CNN/Inside Politics, Sept. 10, 2002 (available at  
<http://edition.cnn.com/2002/ALLPOLITICS/09/10/florida.election.woes/>) [Exh. H].

28 <sup>13</sup> Voting, at 23 [Exh. F].

1 National Commission on Election Reform observed, “[p]unch-card systems  
2 sometimes serve particular local needs,” and it pointed to Los Angeles as an  
3 example of a large, ethnically diverse city “where punch cards make much more  
4 sense than optical scanners” because of the county’s large population, ballot size  
5 and language requirements (ballots must be in ten different languages).<sup>14</sup> Congress  
6 in the Help America Vote Act also recognized the continued viability of punch-card  
7 technology when, after exhaustive consideration of the issue, it offered to subsidize  
8 the migration to newer technologies but blessed the continued use of punch-cards  
9 so long as localities adopted uniform rules for determining voter intent.

10 Punch-Card Counties Will Not Be Migrating By  
11 March 2004 to Demonstrably Better Voting Systems

12 19. The thesis of plaintiffs, as I understand it, is that the October 7, 2003  
13 election should be postponed until March 2004 because, due to the terms of a  
14 consent decree, by then all California counties will have migrated away from  
15 punch-cards to more reliable systems. I disagree, and for reasons I will discuss in  
16 this section, I believe that the stop-gap solutions many counties will have adopted  
17 by March 2004, would not produce demonstrably more reliable results than if the  
18 election were conducted today, particularly given the unique circumstances they  
19 they will face in this unprecedented Recall Election; indeed, the results of a ballot  
20 today might well be more accurate.

21 20. I have canvassed the Registrars for all of the California nine counties  
22 that currently use punch-cards to determine what voting systems they will employ  
23 for the October 7, 2003 and March 2004 elections and what they envision as their  
24 permanent system for use beginning in the Fall 2004 (putting aside the required use  
25 of at least one DRE for disabled voting). The following table reflects my findings.  
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27

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28 <sup>14</sup> National Commission on Election Reform, *To Assure Pride and Confidence in the Electoral Process* 52  
(Aug. 2001). [Exh. I.]

County	October 2003		March 2004		Permanent	
	Precinct	Absentee	Precinct	Absentee	Precinct	Absentee
Alameda	DRE	OS-CC	DRE	OS-CC	DRE	OS-CC
Los Angeles	PC	OS-CC	InkaVote	InkaVote	Undecided	Undecided
Mendocino	PC	PC	OS-PC	OS-CC	OS-PC	OS-CC
San Diego	PC	PC	DRE	OS-CC	DRE	OS-CC
Shasta	DRE	OS-CC	DRE	OS-CC	DRE	OS-CC
Solano	PC	PC	DRE	OS-CC	DRE	OS-CC
Sacramento	PC*	PC*	OS-CC	OS-CC	Undecided	Undecided
San Bernardino	OS-CC	OS-CC	DRE	OS-CC	DRE	OS-CC
Santa Clara	PC*	PC*	DRE	OS-CC	DRE	OS-CC

*Legend:*

PC = Votomatic punch-card

DRE = touchscreen

OS-PC = optical scan – precinct count

PC\* = Pollstar punch-card

OS-CC = optical scan – central count

21. The most populous of the nine counties, Los Angeles, intends to deploy an “InkaVote” system for the 2004 elections and perhaps beyond, and then retire the \$4 million system using it solely for absentee votes. As described in the evaluation performed by the Secretary of State as part of the State’s certification process, InkaVote is similar to the County’s existing Votomatic punch-card system that permits the use of ink-marked IBM-type cards which will be centrally scanned.<sup>15</sup> The device that voters will use, patterned after the Votomatic device and using many similar parts, utilizes a 312-position computer card instead of a 312 prescored punch-card. Like the prescored punch-card, the ballot card slides into the device and is positioned by two red pegs. Like the Votomatic card, the ballot bears no identifying information (other than a series of numbers) allowing for easy verification by the voter that he has voted as he intended. Instead of a Votomatic

<sup>15</sup>Secretary of State Elections Division, InkaVote Optical Scan Voting System: Administrative Review and Analysis (October 25, 2002), at 6 [Exh. J].

1 stylus that actuates a punch mechanism, voters will use a marking pen with quick  
2 drying ink. The marker is inserted into a hole in the plastic voting template that  
3 correspond to the position of a particular candidate or ballot issue. This affixes a  
4 ink mark to the card on the appropriate location. The cards are then packaged and  
5 transported to a central facility for scanning by optical card readers.

6 22. In my opinion, there is no reason to believe the InkaVote system will  
7 be any more accurate in recording voting choices than the existing Votomatic  
8 system, and it might be less accurate. To begin with, the system has not be tested in  
9 an election. Although certified by the Secretary of State (I was on his advisory  
10 panel), certification is largely confined to the mechanical aspects of the device. No  
11 one has evaluated the ease or difficulty actual voters will have using the InkaVote  
12 in real-world situations, and no performance data (including residual rates) exist  
13 because it has *never been deployed* in an actual election anywhere.

14 23. Moreover, given the similarities in construction and layout to the  
15 Votomatic, the InkAVote is susceptible to many of the same criticisms leveled at  
16 the Votomatic. For example, there is no greater guarantee that a voter will seat his  
17 card properly in the housing unit so as to ensure proper alignment of the ballot and  
18 the template, one of Mr. Saltman’s complaints about the Votomatic. Further,  
19 because the InkaVote card bears no usable candidate identifying information, a  
20 voter would need to “check his work” in the same way as a Votomatic, which Dr.  
21 Brady’s complaints is not feasible.<sup>16</sup>

22 24. Dr. Brady says that InkaVote devices will perform better because the  
23 ballot is optically scanned. However, Los Angeles, as the other soon-to-be former  
24 punch-card counties, will be adopting a defeatured form of optical scanning that  
25 eliminates most of its benefits. Study-after-study has found that optical scan

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26 <sup>16</sup> Dr. Brady writes, “[Punch-card] voters cannot easily check their work as on an Data vote and optical  
27 scan ballots which put names of candidates next to the marks that are made on the ballot or in electronic  
28 systems in which names are next to ‘buttons.’” Brady Decl. ¶ 40. Just like a Votomatic, a voter could  
ensure he cast his vote accurately by comparing the numbers adjacent to darkened marks with the  
corresponding number of the candidate or issue in the sample ballot or Votomatic assembly.

1 systems (and DREs) reduce residual rates when scanning takes place in the voting  
2 precinct in the presence of the voter, who is then given a “second chance” to fix his  
3 “error” – be it an undervote or an overvote.<sup>17</sup> However, none of the nine counties  
4 will have precinct-level scanning available next March; each will perform their  
5 count centrally at election headquarters. Accordingly, voters will not learn of their  
6 “errors” before they cast their ballot and thus not have an opportunity to correct  
7 them. Dr. Brady’s optimistic predictions of significantly reduced residual rates in  
8 March are thus not likely to be realized. Indeed, one study he cites suggests that  
9 reliability may suffer in March: it found that “the optical scan systems (of which 10  
10 of 13 were central count systems) averaged 5.6 percent invalid votes and punch  
11 cards averaged 5.3 percent.” Brady Decl. ¶ 30.<sup>18</sup>

12 25. The Recall Election is unlike any that we have conducted, and it poses  
13 another, major problem for the proposed optical scan systems that will be rolled out  
14 by March. According to press reports, 135 candidates have qualified to run for  
15 Governor. Conventional optical scan ballots (*i.e.*, paper ballots instead of the IBM-  
16 like card ballots like those used in Los Angeles and Sacramento) vary in the  
17 number of choices per page that they can accommodate, but none exceeds 100.  
18 That means that voters will have to be given multiple pages, even though the  
19 systems are unable to associate more than a single page with a single ballot. Unless  
20 some failsafe is implemented, the optical scanners will count as valid any vote that  
21 is the only one on a page, even if the voter has also made a selection from a  
22 different page.

23 26. The only solution to this problem is for election clerks to manually  
24 check a voter’s multiple-page ballot to ensure that only one vote has been cast

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26 <sup>17</sup> Caltech/MIT Joint Study, Voting, at 22 (“Precinct scanning has lower residual vote rates. Precinct scanning allows voters to fix their mistakes.”). [Exh. F.]

27 <sup>18</sup> There is also a risk that the scanners won’t work, particularly since many are being rolled out in a real  
28 election setting for the first time. As the Caltech/MIT Study found, “Improper installation or wear and tear on machines may lead to high rates of undervoting. In Hawaii in 1998, 7 of the 361 optical scanners failed to operate properly.” Exh. A at 7.

1 before feeding the pages through the scanner. However, every human step  
2 introduces the possibility of human error, making the reliability of the election  
3 results even more problematic than if they were tallied electronically by Votomatic  
4 card readers. Moreover, once multiple ballot pages are detached and scanned, there  
5 will be no easy, error-free way to preserve them as a single ballot, making a recount  
6 impossible.

7 27. I also disagree with Dr. Brady when he contend that a delay that  
8 allows some counties to bring on DRE technology will enhance the reliability of the  
9 count. Accuracy is not likely to improve in those counties that will be moving to  
10 DREs by March 2004. Indeed, the data suggest just the opposite – that it will prove  
11 less reliable. As noted earlier, when looking at the average for all U.S. counties for  
12 the 1988-2000 presidential elections, DREs fared no better than punch-card  
13 systems; when adjusted to weigh by total ballots in a county, DRE's performed  
14 substantially worse than punch-card systems, 2.7% for DRE's compared to 2.5%  
15 for Votomatics and 2.0 for DataVotes.

16 28. Moreover, many new systems will be rolled out for the March 2004  
17 election. As former Secretary of State Bill Jones recognized when he reluctantly  
18 decertified Votomatics in September 2001, change in of itself risks harming the  
19 right to vote because of the learning curve that election workers and voters need  
20 before they are comfortable with a new system.<sup>19</sup> If the Recall Election is held in  
21 March with entirely new equipment, as opposed to now with devices that are  
22 known and tested, some degree of additional error could reasonably be expected.

### 23 24 Conclusion

25 29. Notwithstanding Dr. Brady's facile use of the data, I do not believe

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27 <sup>19</sup> Secretary of State Proclamation, Decertification of Votomatic and Pollsar Voting Systems in California  
28 (Sept. 18, 2001) [Exh. K]. Secretary Jones was careful to state that he was not decertifying these devices  
because they were unreliable but, because, like typewriters "in the world of personal computers," it was  
time for them to go. He explained that "voters are entitled to have the infrastructure of democracy  
upgraded to reflect technological improvements to the voting process."

1 that reliability of the Recall Election count will be sacrificed by conducting the vote  
2 in October 2003 as opposed to March 2004. As the Election Center's Task Force  
3 on Election Reform concluded, "there is currently no absolutely definitive  
4 information available for the evaluation of voting systems used in the U.S." The  
5 data that does exist does not necessarily indicate that punch-card systems under-  
6 perform when compared with competing technologies. And given the untested,  
7 defeated systems that the nine punch-card counties are being forced to roll out  
8 next Spring, there is no reason to believe that a count made this October will be any  
9 less accurate than one made next March.

10 I declare under penalty of perjury under the laws of the United States  
11 that the foregoing is true and correct.

12 Executed this 14th day of August, 2003, at Bal Harbour, Florida

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15 Ernest R. Hawkins  
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**DECLARATION OF MARSHA WHARFF**

I, Marsha Wharff, declare as follows:

1. I am Assessor-County Clerk-Recorder and, by law, Registrar of Voters of Mendocino County, a position I have held since 1983. From 1975 to 1983, I worked in various positions in the Elections Division of the office of the County Clerk-Recorder. I submit this declaration in support of the opposition of Amicus Curaie Ted Costa to the application for a temporary restraining order and preliminary injunction.

2. When I started my career in elections in 1975, Mendocino County was using the Cubic optical scanning voting system. The Cubic system operated by scanning and counting circles that voters had stamped on voting squares on an election ballot. In my experience, the Cubic system was very slow and not extremely accurate. If a voter did not stamp a circle dark enough or if more than half of the stamp was outside the voting square, the Cubic system would not count the stamp. Consequently, when recounts were performed of ballots read by the Cubic system, there often was a considerable discrepancy between the machine count and the hand count.

3. In 1979, Mendocino County began using the Votomatic punchcard voting system in place of the Cubic System. In my experience, the Votomatic systems have been very well-liked by voters, who find them easy to use. They also have been extremely accurate in counting ballots. For instance, in 1992 we had a County Supervisor election in which the certified results were only one vote apart. A machine recount-count yielded the same results as the initial machine-count. Subsequently, a hand count was taken, but only a couple votes changed, not the result. A court contest then led to a judicially supervised eyeball examination of every undervote. Using the standards for discerning voter intent promulgated by the Secretary of State, this recount confirmed the initial result.

4. It is no accident that the Votomatic systems have been extremely



1 accurate in Mendocino County. Mendocino County officials take great pains to  
2 insure that our machines are well maintained and properly functioning. This is all  
3 done in accordance with California Election Code regulations that require strict  
4 testing and maintenance of punchcard voting systems. Likewise, California has  
5 comprehensive guidelines that govern recounts of punchcard ballots. These  
6 guidelines starkly contrast the arbitrary recount procedures that applied in Florida  
7 during the last presidential election.

8         5. In my experience, the “residual” rate for punchcard systems is  
9 comparable to or better than the other voting systems that are available for use  
10 in California. Hand and machine counts on our punch-card system invariably  
11 agree. The same cannot be said for optical scan systems.

12         6. Moreover, like many other California election officials, I question  
13 whether “residuals” are “errors.” People in Mendocino chose the races in which  
14 they wish to cast a vote. Undervotes are deliberate. Some voters show up at the  
15 polls not to register votes but out of the mistaken belief that they need to cast a  
16 ballot in a primary election to participate in the general. In presidential elections,  
17 some seriously undecided voters have told me they intended to vote for no  
18 candidate and others for all of them.

19         7. Comparing residual rates of punch-card systems like the Votomatic  
20 and of DRE or precinct count optical scan systems is an exercise of apples and  
21 oranges. Many DRE systems make it difficult, time consuming and unpleasant  
22 for a voter not to cast a vote in each race. Failure to do so generates an warning  
23 message that the voter must then figure out how to bypass before he or she can  
24 proceed to the next contest. As a result, I would expect that Votomatics would  
25 have higher residual rates than DRE and optical scan systems, and it has nothing  
26 to do with the punch-card system’s ability to accurately record voter intent.

27         8. In my experience, the alternatives to punchcard systems have their  
28 own limitations. Optical scan systems depend on voters neatly filling in circles or

1 bubbles or connecting arrows with a pen. Whether the system picks up a mark  
2 and counts it as a vote can depend on the sensitivity setting the election  
3 administrator makes on the card reader. With punch-cards, it's more objective:  
4 either there is a hole or there's not.

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6 I declare under penalty of perjury under the laws of the United States  
7 that the foregoing is true and correct.

8 Executed this 14th day of August, 2003, at Ukiah, California.

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Marsha Wharff

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1 states of Arizona, California, Illinois, Maryland, Michigan, Missouri,  
2 New Mexico, Oklahoma and Texas.

### 3 Summary of Opinions

4 7. A summary of my basic findings is as follows: First: The analysis of  
5 the relative performance of pre-scored punch-card systems versus other voting  
6 systems by Dr. Brady is methodologically flawed and, therefore, not persuasive.  
7 Specifically, “residuals” are not a fair benchmark to judge reliability of a system  
8 because they can be and are produced by voters intentionally and therefore do not  
9 represent errors.

10 8. Second: Dr. Brady’s analysis of the potential racial impact of use of  
11 pre-scored punch-card systems in the recall election is also seriously flawed and,  
12 therefore, not persuasive.

### 13 Measuring the Performance of Different Voting Systems

14 9. A central issue in this case is how to evaluate the performance of  
15 competing voting systems. Unfortunately, this is not as straightforward as it might  
16 seem or as suggested in the declarations of plaintiffs’ experts. There are two key  
17 problems in evaluating voting systems: a) measuring voting errors; and b) the  
18 issue of non-random assignment. I will consider each in turn.

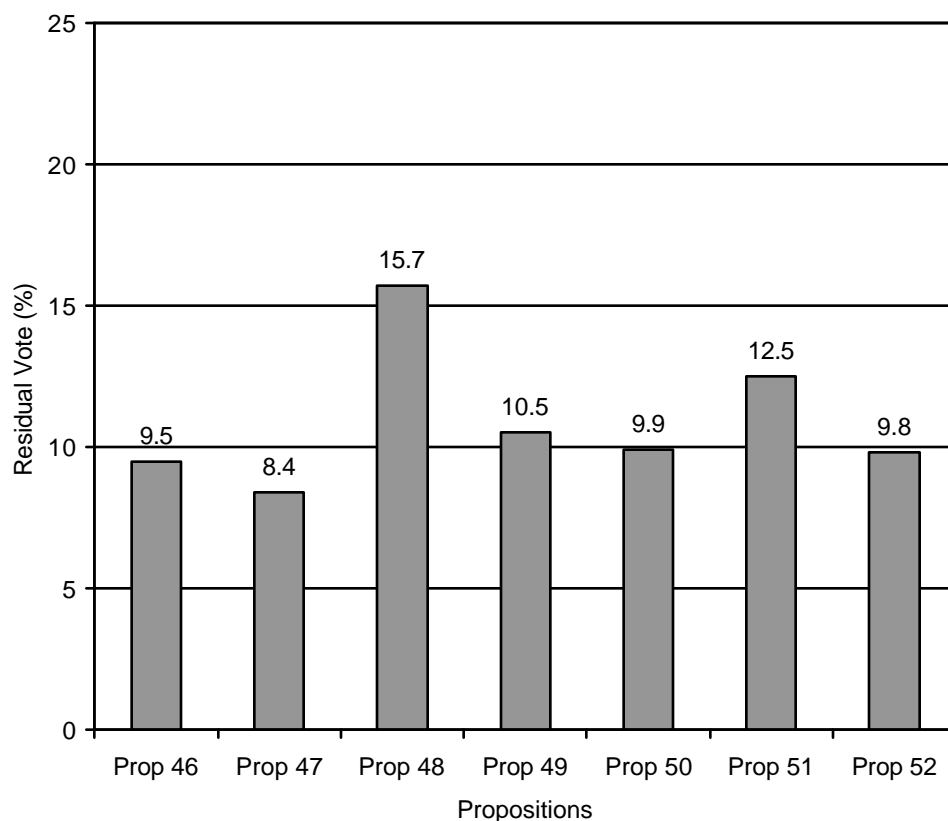
#### 19 A. Measuring Voting Errors -- Residuals

20 10. Because this case implicates the performance of competing voting  
21 systems, we need a measure of voting “errors” in actual elections with which to  
22 compare systems. This is not a straightforward task because voting in the United  
23 States is done by secret ballot, and we have no way of knowing whether a  
24 particular system did or did not properly capture the voter’s intent. The standard  
25 that Dr. Brady used in his declaration is “residual” vote, defined as the difference  
26 between the number of valid votes cast for any of the candidates in the race (as  
27 Dr. Brady defines “valid”) and total number of voters who received a ballot. In  
28 other words, any ballot that does not contain a “valid” vote for a candidate is

1 deemed an “error.” Invalid votes, in Dr. Brady’s lexicon, come in two flavors:  
2 under-votes, where the ballot does not have a vote for a candidate in the race, and  
3 over-votes, where the ballot contains votes for too many candidates.

4 11. The flaw in Dr. Brady’s measure is that many under-votes (and some  
5 over-votes) are made intentionally by voters and are, therefore, not errors. As to  
6 under-votes, voters often choose not to vote for any candidate for a given office  
7 because they do not like any of the choices or do not know enough about the  
8 candidates to cast an informed vote.<sup>1</sup> It is difficult to get an exact estimate on the  
9 number of voters who purposefully choose to under-vote, but survey data suggests  
10 that at least some do.

11 12. Here is some evidence: the figure below graphs out the residual vote  
12 rates in Los Angeles county for the seven statewide proposition on the ballot in  
13 the 2002 General election. Across all of these ballot propositions, the type of



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<sup>1</sup> See , for example, Timothy J. Feddersen and Wolfgang Pesendorfer. 1999. “Abstention in Elections with Asymmetric Information and Diverse Preferences.” *American Political Science Review* 93:381—398 for a theoretical argument for selective abstention.

1 machine and the number of choices (the voter could vote yes or no only) were  
2 constant, yet the residual vote rate varied dramatically.<sup>2</sup> It was a high of 15.7%  
3 on proposition 48, a measure to consolidate the court system, to a low of 8.4%, a  
4 bond measure for schools and universities. This is a difference of residual vote  
5 rates of 7.4 percentage points that cannot have been caused by the voting system  
6 because all voters used the same voting system: pre-scored punch-cards.

7 13. We know that some over-votes may also be intentionally cast by  
8 voters. For example, examination of ballot image data from the 2000 presidential  
9 election in Florida for Broward and Miami-Dade counties found that 412 ballots  
10 included votes for all 10 choices for president. It is hard to imagine that these  
11 were mistakes, but more likely they were some sort of protest vote.<sup>3</sup>

12 14. Furthermore, this variation in residual vote is systematic and,  
13 therefore, likely to confound any attempts to measure the impact of competing  
14 voting systems on residual vote rates. For example, in Michael Herron and Jasjeet  
15 Sekhon's study of Cook County Illinois voting data, they found African-  
16 American voters' residual vote rates vary with the racial makeup of the candidates  
17 on the ballot.<sup>4</sup> When there were no African-American candidates on the ballot,  
18 the residual vote rate doubled for African-American voters. Similarly, one finds  
19 higher rates of undervotes among for Anglo voters when an African-American  
20 candidate is in the race and is likely to win. These systematic patterns, holding  
21 constant the use of punch-card ballots, suggest intentional undervoting.

22 15. Consider what this finding implies for the comparison made in  
23 Figure 1 of the declaration of Dr. Brady. The figure compares the residual vote  
24 rates in the 2000 General election in counties that use punch-card systems to those

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25 <sup>2</sup> Data for the figure comes from the official Statement of Vote: 2002 General Election, November 5, 2002.

26 <sup>3</sup> Data is from Table 1 of Michael C. Herron and Jasjeet S. Sekhon. 2003. "Overvoting and  
27 Representation: An examination of over-voted presidential ballots in Broward and Miami-Dade counties."  
*Electoral Studies* 22:21-47.

28 <sup>4</sup> Michael C. Herron and Jasjeet S. Sekhon. 2003. "Black Candidates and Black Voters: Assessing the  
Impact of Candidate Race on Uncounted Vote Rates." Unpublished manuscript, Northwestern University.

1 that do not.<sup>5</sup> However, as noted by Dr. Brady in paragraph 10 of his declaration,  
2 the punch-card counties have a much larger minority populations. Thus, it is  
3 possible that the higher residual vote rates observed was caused not by the  
4 difference in machine type (i.e., punch-card vs. non-punch-card), but by minority  
5 voters choosing to abstain on an Anglo vs. Anglo presidential race.

6 B. Non-Random Assignment Of Voting Systems

7 16. Even if there were no problems in measuring the error rate of voting  
8 systems, we still need to determine how to compare the various types of voting  
9 equipment. There are two standard approaches, cross-sectional and panel (or  
10 dynamic) comparisons. Dr. Brady uses both and there are problems with each.

11 Dr. Brady's Cross-Sectional Analysis

12 17. Cross-sectional studies compare electoral units (e.g., counties) in a  
13 given election that use different voting equipment. An example of such an  
14 analysis is presented in Figure 1 of Dr. Brady's declaration. This type of study is  
15 supposed to be like measuring the effectiveness of a drug in a controlled medical  
16 study. In such a study, participants are randomly assigned to receive the drug or a  
17 placebo. At the end of the study period, the physicians compares the average  
18 outcome, say survival, between those taking the drug and those taking the  
19 placebo. Any difference in outcome is then attributed to the drug. In the case of  
20 voting systems, the differences in residual vote between counties that use punch-  
21 card systems (i.e., the group taking the drug) and those that do not (i.e., the  
22 placebo or control group) are assumed to be caused by the punch-card system.

23 18. The key to making valid inferences in the medical study was the  
24 random assignment of participants to the drug and control groups. This random  
25 assignment assures that the drug was the cause of any systematic difference in  
26 outcomes between the groups. But suppose instead of random assignment, the

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27 <sup>5</sup> Dr. Brady is not clear about the data in the figure. I assume his measure of residual vote rate is the rate  
28 on the election for the office at the top of the ticket in a given year. In 2000, this was the race for U.S.  
president. As mentioned above, the residual vote rate can vary dramatically between races on the ballot.

1 doctor assigned the sickest patients to get the drug. We then observe that the  
2 survival outcomes are no better for those taking the drug as those taking the  
3 placebo. In this case, we cannot draw any conclusive inferences about the  
4 effectiveness of the drug. The drug might be very effective, but given the  
5 (average) poor initial health of the group taking the drug their survival rate is not  
6 better than the control group at the end of the study.

7 19. In the case of cross-sectional studies of voting technology, the  
8 assignment of machine type is clearly not random: counties in California choose  
9 which system to use. In a larger study of voting equipment use in U.S. counties,  
10 Phillip Garner and Enrico Spolaore find that use voting technology varies by  
11 median income, population, percent of population over sixty-five, and percent  
12 college educated in the county.<sup>6</sup>

13 20. This systematic variation in adoption of voting equipment means that  
14 there are likely confounding factors (like the initial health of group take the drug)  
15 that make simple comparisons, such as presented in the declaration of Dr. Brady,  
16 inconclusive. For example, as was discussed above, the counties using punch-  
17 card systems typically have larger minority population, who may be undervoting  
18 intentionally more often, making the residual rates appear larger than they are for  
19 these systems. It is also the case that punch-card counties are typically bigger and  
20 this may independently be related to residual rates in elections.

21 21. The bottom line is that Dr. Brady assumes that observed differences  
22 in residual rates between different voting systems *is the result* of the system. As  
23 we have shown, that is not necessarily a valid assumption. The conclusion he  
24 draws—that punch-card systems are inferior—is not justified by the data.

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28 <sup>6</sup> Philip Garner and Enrico Spolaore. 2002. “Why Chads?: Determinants of Voting Equipment Use in the United States.” Mimeo Brown University.



1 *Dr. Brady's Panel Analysis*

2 22. An alternative to the cross-sectional study is a panel study. In a  
3 panel study of voting systems, some set of counties (or other electoral units) is  
4 compared before and after a change in electoral system. An example of such a  
5 panel study is Dr. Brady's examination of residual vote rates in Fresno county  
6 between the 1996 general election, when the county used punch-cards, and the  
7 2000 general election, when it used a precinct count-optical scan. Again, any  
8 difference in residual rates between the two elections is ascribed to the move  
9 away from a punch-card system.

10 23. The advantage of the panel study is that the same county is observed  
11 before and after the change in voting system. Since the underlying characteristics  
12 of county, such as its demographic make-up, are not likely to have changed much  
13 in a short enough period of time, one potential source of confounding effects is  
14 eliminated. However, panel studies are not perfect. Instead of having to worry  
15 about differences between the counties that use a given voting system as in the  
16 cross-sectional study, we now have to worry that the two elections used to  
17 compare the same county do not systematically vary. If there is systematic  
18 variation between the elections that used a punch-card system and those that use  
19 an optical scan, for example, then once again inference on the effect of voting  
20 system on residual vote will be suspect.

21 24. In the case of the 1996 and 2000 general elections in Fresno county,  
22 a central part of Dr. Brady's analysis, there were significant differences between  
23 the two elections that common sense tells us would have an effect on whether a  
24 voter would cast a vote for the race on the top of the ballot: In 1996, we saw a  
25 presidential race with a sitting Democratic incumbent whereas 2000 was an open  
26 election expected to be very close nationwide. As we saw in Figure 1, differences  
27 in races will lead to differences in residual rate even holding voting system  
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1 constant. That may well explain the observed difference between 1996 and 2000  
2 in Fresno; Dr. Brady cannot prove it is not the case

3 25. There were also differences in turnout in Fresno County. In 2000,  
4 67.58% of registered Fresno voters went to the polls whereas in 1996 64.98%  
5 voted. Therefore, it is likely that the specific demographic and political  
6 preferences of the electorate in these two elections also varied. We have already  
7 seen that these demographic and political preferences can systematically affect  
8 intentional undervoting rates. These differences alone could lead to differences in  
9 observed residual rates make any claims about the impact off voting system  
10 suspect.

11 26. A similar problem exists in Dr. Brady's analysis of the Gubernatorial  
12 elections in 1998 and 2002, which he argues shows that punchcard performance  
13 has not improved after the 2000 Presidential election problems in Florida.  
14 However, once again we must me concerned about potential differences between  
15 the elections leading to differential intentional undervoting rates confounding his  
16 findings. For example, in 1998, Davis won easily over Lungren. However, voters  
17 in the 2002 race faced a choice of a relatively unpopular incumbent Governor and  
18 a very conservative opponent in Simon. That some more voters in Los Angeles  
19 county, for example, decided to abstain on the 2002 race is hardly surprising.

#### 20 Measuring The Racial Impact Of Voting Systems

21 27. In addition to measuring the impact of voting system on residual vote  
22 rates, Dr. Brady claims that the continued use of punch-card system discriminates  
23 against minority voters. Here again, Dr. Brady's analysis is seriously flawed.

24 28. Dr. Brady makes two arguments in favor of the discriminatory effect  
25 of punch-card systems. First, he argues that since the remaining six counties that  
26 will still use punch-card ballots in the recall election have larger minority  
27 population and these systems inherently produce higher residual vote rates,  
28 minorities would have a higher residual rate than non-minorities. However, as I

1 have shown above, Dr. Brady's evidence tying higher residual rates to punch-  
2 cards is, at best, conjectural. Further, given the work of Drs. Herron and Sekhon,  
3 higher residual vote rates among minority voters may be the result of intentional  
4 choice and therefore not discriminatory in nature.

5       29. The second argument made by Dr. Brady is based on a correlation  
6 between residual vote rates and a percentage of minority voters in a precinct. He  
7 finds that this correlation is larger in precincts using punchcard voting. He infers  
8 that under non-punch-card systems, minority voters would have a lower residual  
9 vote. Unfortunately, this analysis is a type that statisticians call ecological  
10 inference: inferring individual level behavior from aggregate data. In this case,  
11 we are interested in knowing the probability that a minority voter casts an invalid  
12 vote, but all we observe are the total number of invalid votes and the fraction of  
13 the precinct that are non-white.

14       30. As has been known since the 1950s from the work of Robinson,  
15 such ecological inference suffers from aggregation bias.<sup>7</sup> Aggregation bias can be  
16 thought of as another form of a confounding factor in recovering the rate at which  
17 minority voters cast valid votes. For example, suppose that white voters in  
18 predominately non-white communities (precincts) cast invalid votes at higher  
19 rates – perhaps because they feel politically disenfranchised or have lower  
20 average education levels – than whites in predominately white communities  
21 (precincts) and that the non-white voters' rate of casting invalid votes is lower  
22 than both groups of white voters. Now in this case, the aggregate data, as used by  
23 Dr. Brady in his analysis, would show a positive correlation between the fraction  
24 of minorities in the precinct and residual vote rate, implying that minorities have  
25 higher residual voter rates, even though they actually do not.

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27 <sup>7</sup> William Robinson. 1950. "Ecological Correlation and the Behavior of Individuals." *American*  
28 *Sociological Review* 15:47-56 . For a more recent discussion, as well, as some proposed solutions, see  
Gary King. 1997. *A Solution to the Ecological Inference Problem*. (Princeton, NJ: Princeton University  
Press). Cite Robinson piece and King as well.





1           6.     One of my ongoing research projects, conducted with Jasjeet S.  
2 Sekhon of Harvard University, attempts to determine the extent to which voters  
3 deliberately cast their votes in a manner that results in an intentional undervote (i.e.,  
4 no vote is registered for a particular office) or overvote (i.e., two or more votes are  
5 cast in a particular office). The first paper from this project is currently undergoing  
6 peer review.

7           7.     There are only eight counties in California currently using punchcard  
8 voting systems. It has been asserted that the recall election should be moved to  
9 March 2004 so as to permit these counties to transition to new voting technologies,  
10 which it is claimed will result in reduced residual vote rates. Notable among these  
11 eight counties are Los Angeles County (comprising 28% of the population of  
12 California) and Sacramento County (comprising 3.8% of the California population).  
13 Both of these counties are moving from punchcard voting systems to optical scan  
14 systems.

15           8.     There are five main types of voting systems currently in use in the  
16 United States. As of November 1998, which is to the best of my knowledge the  
17 date of the last country-wide survey of voting technology, punchcard systems were  
18 used by 37% of the population, optical scan systems were used by 27%, direct  
19 record electronic or touchscreen system were used by 8.8%, lever systems were  
20 used by 18%, and paper ballots were used by 1.4%. In addition, counties  
21 comprising 8.8% of the population used mixed voting systems.<sup>1</sup>

22           9.     The use of punchcards and optical scan systems requires a voter to  
23 mark choices on a ballot that is subsequently processed by an electronic vote-  
24 counting machine.

25           10.    Vote-counting machines can be located in one of two places: they can  
26 be located either in the individual voting precincts (precinct counting) or at a  
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28 <sup>1</sup> Stephen Knack and Martha Kropf, "Who Uses Inferior Voting Technology?" PS: Political Science and  
Politics, 35:3 (2002). The percentages do not sum to one hundred due to rounding.

1 separate central location (central counting). When precinct counting is used, voters  
2 are generally present when their ballots are processed. Under central counting,  
3 voters are not present and processing usually takes place after the polls close.

4 11. Where precinct counting is used, vote-counting machines can be  
5 programmed to reject ballots with undervotes (where no vote is registered for a  
6 particular race) or overvotes (where too many votes are registered for a particular  
7 race). A voter whose ballot is rejected can then choose either to address problems  
8 identified in his or her ballot -- by casting a missing vote or deleting any extra votes  
9 cast -- or by overriding the counting machine and hence producing residual votes.  
10 The opportunity to review a ballot is called "second chance voting."

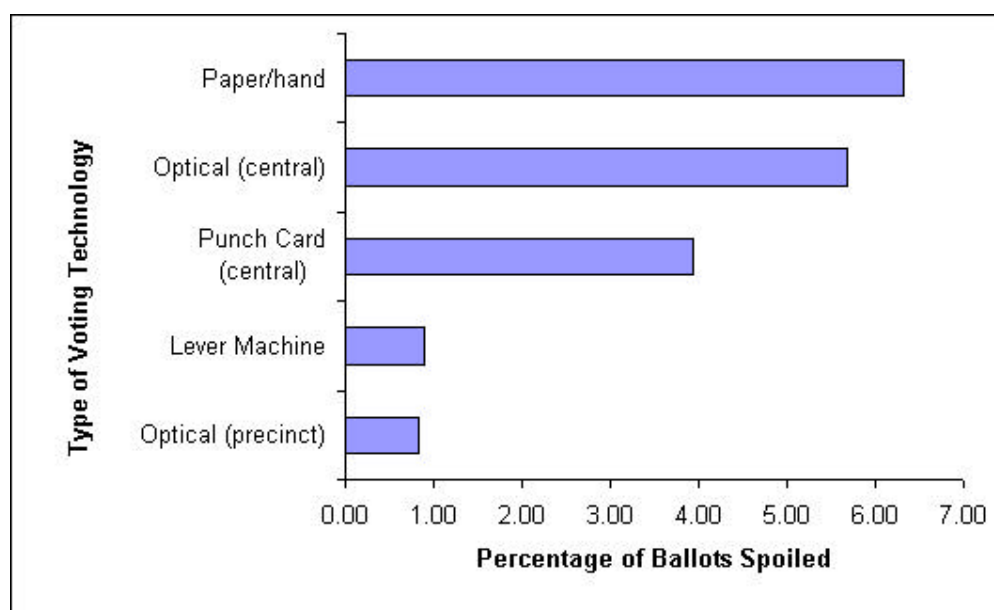
11 12. Second chance voting can be utilized in connection with punchcard or  
12 optical scan systems. However, the issue of second chance voting is not germane  
13 for electronic or touchscreen voting because touchscreen machines are usually  
14 programmed to automatically prohibit overvotes and to alert voters to any  
15 undervotes. Lever voting technology and paper ballots do not allow for second  
16 chance voting.

17 13. By March 2004, Los Angeles and Sacramento counties will transition  
18 from punchcard voting to optical scan voting. Los Angeles will use a new voting  
19 technology that has never been deployed before, called InkaVote. As implemented,  
20 the InkaVote system will use central counting. Sacramento County's optical scan  
21 system will also use central counting.

22 14. The optical scan systems chosen by Los Angeles and Sacramento  
23 counties are not the type of systems known to reduce residual vote rates. Neither of  
24 the systems selected by county officials permit second chance voting. Thus,  
25 delaying the recall election from October 2003 to March 2004 will not appreciably  
26 reduce residual vote rates or otherwise benefit the voters in these counties.

27 15. In a report on the 2000 presidential election in Florida commissioned  
28 by the United States Civil Rights Commission, researchers compared residual vote

1 rates generated from different voting technologies. As indicated in Figure 1 below,  
2 the punchcard voting systems utilizing central count – which is the system currently  
3 used in Los Angeles and Sacramento counties – produced *lower* residual vote rates  
4 than central count optical scanning systems. Hence, it is far from clear that the  
5 transition from the existing punchcard systems to central count optical scan  
6 technology will produce measurably lower residual vote rates. Indeed, experience  
7 may show that the existing punchcard voting technology is actually superior to  
8 central count optical scan.



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20 16. Similarly, a recently published study of voting technology and racial  
21 discrimination in South Carolina concluded that residual vote rates obtained using  
22 central count optical scan systems were not significantly different from the rates  
23 obtained using central count punchcard systems.<sup>2</sup> Most of South Carolina’s optical  
24 scan systems in 2000 were central count, and these systems were virtually  
25 indistinguishable from punchcard systems insofar as having essentially identical  
26 effects on white voter and African American voter residual vote rates

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28 <sup>2</sup> Michael Tomz and Robert P. van Houweling, “How Does Voting Equipment Affect the Racial Gap in Voided Ballots?” *American Journal of Political Science* 47:1 (2003).



1           17.    These data support the conclusion that in Los Angeles and Sacramento  
2 Counties residual vote rates will not significantly decrease, and may in fact  
3 increase, following the transition from the existing punchcard to central count  
4 optical scan systems.

5           18.    By contrast, where a transition is made from the existing punchcard  
6 technology to a precinct count optical scan or touchscreen systems, residual votes  
7 rates do decline significantly. Professor Brady, whose research is relied on by the  
8 Plaintiffs, acknowledges this point in his declaration: “There is evidence that  
9 precinct-count optical scan systems do better than central-count optical scan  
10 systems . . . .” Brady Decl. ¶ 30. This conclusion is also supported by the studies  
11 referenced above.

12           19.    Because of the significant differences between precinct count and  
13 central count optical scan systems in reducing residual vote rates, any general  
14 comparisons between optical scan and punchcard systems can be misleading. For  
15 example, a 2001 study conducted by Professor Brady and others, entitled “Counting  
16 All the Votes: The Performance of Voting Technology in the United States,”  
17 attempts to measure the relative performance of punchcard and optical scan  
18 systems. However, contrary to the evidence cited above, this study assumes that  
19 the impact of central count and precinct count optical scan systems on residual vote  
20 rates is equivalent. Because this study does not separately measure the performance  
21 of central count optical scan systems, it cannot be used to inform a judgment as to  
22 whether Los Angeles County and Sacramento County will have lower residual vote  
23 rates following the transition to new voting systems in March 2004.

24           20.    Likewise the case study of Fresno County, California reported in the  
25 Brady et al. report does not offer a reliable picture of what will occur in Los  
26 Angeles and Sacramento counties. Between the 1996 and 2000 general elections,  
27 Fresno County transitioned from a traditional punchcard system to precinct count  
28 optical scan technology. Professor Brady et al. found that residual vote rates were

1 much lower in the latter election. However, as indicated by the evidence referenced  
2 above, the markedly lower residual votes were the result not simply of switching to  
3 an optical scan system, but specifically to switching to a *precinct count* optical scan  
4 system. As noted above, this is not going to occur in Los Angeles and Sacramento  
5 counties in March 2004.

6 21. Along with my colleague Jasjeet S. Sekhon, I recently conducted  
7 research which indicates that residual vote rates among African American voters  
8 vary depending on whether African American candidates appear on the ballot.  
9 Specifically, our research has shown that African American residual vote rates are  
10 lower where African American candidates are running for office.<sup>3</sup>

11 22. In all states but Nevada, it is not possible to distinguish between  
12 intentional abstentions (i.e., where voters decide not to vote for any candidate in a  
13 particular race) and residual votes caused by technology problems. Nevada,  
14 however, permits general election voters to choose “None of these Candidates”  
15 when voting in a presidential race. Selecting this choice is equivalent to an  
16 intentional abstention. The intentional abstention rates from recent Nevada  
17 presidential elections are set forth in Figure 2.

Year	Abstention Rate
1988	0.55%
1992	1.2%
1996	0.49%
2000	2.0%

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26 23. As Figure 2 demonstrates, the intentional presidential abstention rate  
27 among Nevada voters varies significantly over time. Assuming California voters

28 <sup>3</sup> Michael C. Herron and Jasjeet S. Sekhon, “Black Candidates and Black Voters: Assessing the Impact of Candidate Race on Uncounted Vote Rates,” unpublished manuscript, Northwestern University.

1 share similar characteristics with Nevada voters, it would appear that a significant  
2 component in the overall residual vote rate are not errors but voters' deliberate  
3 choices not to vote in particular races or to cast too many votes

4 24. Given the multitude of factors producing undervotes or overvotes,  
5 coupled with the absence of a second chance voting system, it is simply impossible  
6 to predict with any degree of certainty that a transition from the existing punchcard  
7 system to a central count optical scan system will have any significant impact on  
8 reducing residual vote rates. As pointed out previously, data exists that supports  
9 the conclusion that residual vote rates may increase following the transition from  
10 punchcard systems to central count optical scanners.

11 I declare under penalty of perjury under the laws of the United States that the  
12 foregoing is true and correct.

13 Executed in \_\_\_\_\_ on the \_\_\_\_ day of August, 2003.

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Michael C. Herron