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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF GREATER LOS ANGELES; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, CALIFORNIA STATE CONFERENCE OF BRANCHES, Plaintiffs, **v.** **KEVIN SHELLEY, in his official capacity as Secretary of State,** Defendant.	EDCV 03-5715 SVW (RZx) **OPPOSITION TO EXPARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT ISSUE** **Judge: Stephen V. Wilson** **Date:** **August 18, 2003** **Time:** **1:30 p.m.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

Other Authorities

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INTRODUCTION

The Secretary of State concurs with plaintiffs that punch-card voting systems are antiquated. Indeed, he has been a leader in advocating for more state-of-the-art

voting systems. Pursuant to an order entered last year by this Court, and agreed to by plaintiffs, defendant is exercising his oversight responsibility for the statewide transition from punch cards to other systems. In fact, funding for that transition is provided by a bond issue authored by the Secretary. But, as explained in more detail below, this Court never ruled that punchcard systems are unconstitutional. Instead, the parties adopted a transition schedule approved by this Court that is proceeding as ordered. Under the circumstances, the Secretary disagrees that the suspension of a statewide special election is an appropriate means of addressing plaintiffs' concerns with punch card voting.

Just over one year ago, plaintiffs alleged, as they do here, that the use of punchcard voting systems in some California counties violated the United States Constitution. *Common Cause v. Jones* (2002) WL 1766410 (C.D. Cal.). The Secretary of State and plaintiffs entered into a consent decree after then-Secretary Bill Jones issued a proclamation decertifying these systems effective in 2005. Pursuant to the consent decree, on May 9, 2002, this Court entered judgment in *Common Cause*, and in doing so advanced the effective date of Secretary Jones' earlier decertification of these systems to March 2004.

In entering into this stipulation, the parties recognized certain facts:

· Punchcard systems were based on antiquated technology.

· New and improved voting systems were becoming available.

· It was not feasible for counties to convert immediately from punchcard to more modern voting systems.

· The California Constitution and Elections Code would require the counties to conduct elections between May 9, 2002, when the Court entered judgment in *Common Cause*, and the effective decertification date of March 2004.

· Imperfect as punchcard voting systems were, some counties would use these systems for elections occurring during this interim period, both elections that

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were certain to occur - such as the November 2002 General Election - as well as other elections compelled to be called by the California Constitution and Elections Code.

On July 23, 2003, the Secretary of State certified that proponents of a petition to recall Governor Gray Davis had submitted sufficient signatures to place the recall on the ballot. Under the strict timelines imposed by the California Constitution for conducting recall elections, the Lieutenant Governor called the special recall election for October 7, 2003. The calling of the special election, however, did not change the underlying premises of the May 2002 consent decree. The reality remains that the time for counties to convert to punchcard systems has not expired, and some counties have not yet converted to more modern systems. And nothing in the consent decree or judgment contemplates postponement of constitutionally-imposed elections – such as the October 7, 2003 recall election – occurring before March 2004.

Six months after the judgment in *Common Cause*, California voters elected Kevin Shelley as Secretary of State. Secretary Shelley had made his commitment to the modernization of voting systems one of the central features of his election campaign. This commitment was evidenced by his co-sponsorship of the Voting Modernization Bond Act of 2002 (Shelley-Hertzberg Act), approved by voters in March 2002, that authorized the sale of $200 million in bonds to pay for voting system improvements.

Recall election dates imposed by the California Constitution cannot be changed, but as the state's chief elections officer, Secretary Shelley will make unprecedented efforts to educate voters in punchcard counties of the potential problems with these systems, with the aim of assisting voters to cast their ballots properly and have their votes counted.

The measures the Secretary will take as part of a broader voter outreach and education program include:

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· Having election outreach officers visit each punchcard county in California to publicize the steps voters should take to ensure that their votes are counted.

· Taping of public service announcements in all counties to run throughout the weeks leading up to the election.

· Working with community-based organizations such as plaintiffs to educate voters in all counties, including punchcard counties.

· Writing op-ed articles for publication in local newspapers informing voters of how to avoid errors in using punchcard systems.

Engaging in these efforts – rather than postponing the constitutionally-mandated election – is the appropriate way of addressing the concerns raised in plaintiffs' complaint.

STATEMENT OF FACTS

A. The *Common Cause* Litigation

On April 17, 2001, in *Common Cause, et al. v. Bill Jones*, No. 01-03470 SVW (*Common Cause*), a number of individuals and entities, including the Southwest Voter Registration Education Project (SVREP) and the Southern Christian Leadership Conference of Greater Los Angeles (SCLC), filed suit for declaratory and injunctive relief, alleging violations of the right to vote based on the use of prescored punch-card (PPC) voting systems in six California counties. (Plaintiffs' Memorandum of Points and Authorities in Support of Ex Parte Application for Temporary Restraining Order [Pl. Mem.], 2:28.) In that case, plaintiffs alleged that "three groups of citizens -- African-Americans, Asian-Americans, and Latinos -- are disproportionately denied the right to have their votes counted because they are more likely to reside in the counties that use PPC machines." (Pl. Ex. 4, at 29:24-26: Order signed February 19, 2002.) Plaintiffs sought an injunction requiring the California Secretary of State to decertify the PPC machines (Pollstar and VotoMatic machines) by the time of the March 2002 Primary Election. (Pl. Ex. 1, at 21:9-11.)

On February 19, 2002, the Honorable Stephen V. Wilson signed an order requiring the parties to lodge a form of consent decree within seven days of the order. (Pl. Ex. 4, at 6:3-4.)

On May 6, 2002, the parties executed a Consent Decree that was signed by Judge Wilson on May 8. Judgment was filed on May 9, 2002. (Pl. Ex. 5, at 37.) The consent decree provided that the PPC machines would be decertified effective March 1, 2004. (Pl. Ex. 5, at 39:7-8.)

Since that time, and as contemplated by the consent decree, the primary and general elections were held in 2002, and various local elections have been held in the six counties that use the PPC machines. In addition a well-publicized recall election took place in the City of South Gate in January 2003, without objection regarding the use of the PPC machines.

B. The Recall Election And The Current Litigation

On July 23, 2003, Secretary of State Kevin Shelley certified the sufficiency of the signatures collected on a petition to recall Governor Gray Davis. The following day, Cruz Bustamante, the Lieutenant Governor,[1/] set the election for Tuesday, October 7, 2003.[2/]

On August 7, 2003, plaintiffs SVREP and SCLC filed the instant action seeking to postpone the election until after the effective date of the decertification of the PPC voting machines. On or about August 10, the First Amended Complaint was filed in this action, adding the National Association for the Advancement of Colored People (NAACP) as a plaintiff.

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[1] Pursuant to law, when a recall of the Governor is initiated, the recall duties of that office are to be performed by the Lieutenant Governor. (Cal.Const., art. II, § 17.) Moreover, the election must be held "not less than 60 days nor more than 80 days from the date of certification of sufficient signatures." (Cal.Const., art. II, § 15, subd. (a).)

[2] According to statute, [n]o election shall be held on any day other than a Tuesday, nor shall any election by held on the day before, the day of, or the day after, a state holiday." (Cal. Elec. Code § 1100.)

On August 11, 2003, plaintiffs filed an Ex Parte Application for a Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue, seeking to restrain and enjoin the Secretary of State from conducting the recall election until after March 1, 2004, the effective date of decertification of the PPC voting machines. (App. 3:2-10.) The stated ground for requesting this relief is that "there is an imminent risk of harm to Plaintiffs and voters throughout the State of California if the TRO does not issue." (App. 3:14-16.) The "imminent risk" is not identified, except to note that there may be more than 100 candidates for Governor on the ballot and "given the extremely fast track that the recall election is on, and the fact that the recall campaign has already begun in earnest, prompt issuance of a TRO is essential to bring order to the process." (*Id.* 3:21-23.) Plaintiffs then assert that, due to the accelerated schedule for the recall, "it is vital to candidates, election officials, and the California electorate that any appellate proceedings be resolved no later than August 31, 2003." (*Id*. 3:24-25.)

ARGUMENT

A. Plaintiffs Cannot Satisfy Requirements For Issuance Of A Preliminary Injunction

In the Ninth Circuit, a preliminary injunction may issue if the court finds that

> (1) the [moving party] will suffer irreparable injury if injunctive relief is not granted, (2) the [moving party] will probably prevail on the merits, (3) in balancing the equities, the [non-moving party] will not be harmed more than [the moving party] is helped by the injunction, and (4) granting the injunction is in the pubic interest.
>
> Alternatively, a court may issue a preliminary injunction if the moving party demonstrates *either* that a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor. Under this last part of the alternative test, even if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an irreducible minimum that there is a fair chance of success on the merits.

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(*Stanley v. University of Southern California,* 13 F.3d 1313, 1319 (9th Cir. 1994).) (Emphasis in the original.)

Because a preliminary injunction is a provisional remedy issued prior to the final disposition of a case on the merits, its function is to preserve the status quo and to prevent irreparable loss of rights prior to judgment. (*Sierra On-Line, Inc. v. Phoenix Software, Inc.,* 739 F.2d 1415, 1422 (9th Cir. 1984).) This is especially true where full relief could not be undone even if the defendant p.evailed at trial. (*Forest City Daly Housing, Inc. v. Town of North Hempstead,* 175 F.3d 144, 150 (2d Cir. 1999).)

Plaintiffs' TRO application fails to demonstrate that it meets any of the criteria for issuance of a preliminary injunction.

1. Issuance Of A Preliminary Injunction Would Not Preserve The Status Quo

In their First Amended Complaint, plaintiffs seek injunctive relief requiring the Secretary of State to postpone the recall election, as well as the vote on two propositions that also qualify for the ballot, until a date on or after March 1, 2004, the effective date for decertification of the PPC voting machines.[3/] Far from maintaining the status quo, issuance of a provisional remedy restraining and enjoining the Secretary of State from conducting the recall election and the vote on the propositions would give plaintiffs all the relief they would be entitled to if they were to prevail on the merits of their lawsuit. The hearing on a request for a preliminary injunction "is not to be transformed into a trial of the merits of the action upon affidavits, and it is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial. This is particularly true where the relief

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[3] A recall election may, under certain conditions, be consolidated with the next regularly scheduled election *if* that election is within 180 days from the date of certification of sufficient signatures. (Calif. Const., art. II, § 15, subd. (b).) The next regularly scheduled statewide election is the Primary Election scheduled for March 4, 2004, a date beyond 180 days from the date the recall election was certified.

afforded, rather than preserving the status quo, completely changes it." (*Larry P. v Riles*, 502 F.2d 963, 965 (9th Cir. 1974).) Because a preliminary injunction would greatly upset the status quo between the parties, the court should deny plaintiffs' request.

2. Plaintiffs Cannot Demonstrate A Likelihood Of Success On The Merits

The First Amended Complaint is simply an attempt to collaterally attack the consent decree entered into between plaintiffs and the Secretary of State in 2002. (Pl. Ex. 5.) On February 19, 2002, when Judge Wilson signed the order requiring the parties to lodge a consent decree within seven days of that date,[4] plaintiffs were well aware of the fact that the PPC machines would be used in statewide elections occurring before March 2004. They were also aware that, prior to March 1, 2004, there would likely be a number of local elections in the counties that used the PPC machines. Plaintiffs chose not protest the use of the punchcard systems for those local elections, nor did they protest when the machines were used for the recall of three city council members and the city treasurer in the City of South Gate, a predominantly Latino community in Los Angeles County, in early 2002. Yet, now they seek to interfere with the People's reserved right of the recall that is expressly provided for in the California Constitution,[5] in disregard of the fact that the consent decree was reduced to a *judgment*, which plaintiffs did not appeal, and which they are now precluded from attacking by principles of *res judicata*. (*Rafferty v. City of Youngstown*, 54 F.3d 278, 282 (6th Cir. 1995).)

It appears that plaintiffs filed an amended complaint to add the NAACP as a party plaintiff to avoid the application of *res judicata* principles by adding as a plaintiff an

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[4] Execution of the consent decree was delayed until May 6, 2002 while defendant Jones pursued a Motion for Reconsideration, which was denied on April 26, 2002. (FAC, & 30.)

[5] Cal. Const, art. II, §13.

entity that was not a party to the consent decree, on the theory that one who was not a party to a judgment in a prior action is not bound by it. However, that theory does not apply when the absent party's interests were adequately represented in the prior action. This was the holding in *Rafferty, supra,* in which white police officers were held to be bound by a consent decree entered into in a case in which their collective bargaining representative had been granted leave to intervene as a party-defendant. The officers' efforts to attack the consent decree in a separate action was denied on the ground that they had been adequately represented in the earlier action and therefore did not have standing to raise a collateral attack on the consent decree. (*Ibid*.)

In the present case, the NAACP is identified as the nation's oldest and largest civil rights organization with a mission to secure and protect the civil rights of people of color, including the voting rights of African Americans. (FAC, & 12.) The *Common Cause* complaint identified plaintiffs Common Cause, SCLC and the American Federation of Labor and Congress of Industrial Organizations (AAFL-CIO) as organizations whose members include African Americans. Common Cause states its goals are to promote fair and honest elections. (Pl. Ex. 1, & 8.) The SCLC stated that it has always worked to promote the full equality of African Americans in all aspects of American life, including voting, elections and political participation. (Pl. Ex. 1, & 9.) The AFL-CIO alleged that one of its objectives is to encourage workers to register and vote. (Pl. Ex. 1, & 12.)

All three entities alleged that their members are adversely affected by use of PPC voting machines. In addition, two of the named individual plaintiffs in *Common Cause* were identified as being African Americans. (Pl. Ex. 1, && 13, 16.) It cannot be disputed, therefore, that the interests of African American voters were adequately represented in the *Common Cause* action. Thus, the addition of the NAACP as a plaintiff in the instant action does not preclude application of the principle of *res judicata* to that plaintiff, as well as to the others, to prevent them now from attacking the provisions of the consent decree. Moreover, as this Court has already observed,

"[s]tipulations voluntarily entered by the parties are binding." (*Common Cause, et al. v. Jones*, 213 F.Supp.2d 1110, 1112 (C.D. Calif. 2002.)

Although plaintiffs are not so bold as to suggest that the effective date of the decertification of the PPC voting machines now be moved up to October 1, 2003, they nonetheless seek the same result by asking the court to issue a preliminary injunction that would be the functional equivalent: move the election to a date after March 1, 2004. The Court should reject this attempt to avoid the terms of the consent decree. As was said by a three-judge court convened to hear a challenge by a number of Latino voters to the legality of the 2000 redistricting plan in California, "enjoining an election is an 'extraordinary remedy' involving a far-reaching power [citation] which is almost never exercised by federal courts prior to a determination on the merits, other than in cases involving a violation of the preclearance requirement of ' 5 of the Voting Rights Act." (*Cano v. Davis*, 191 F.Supp.2d 1135, 1137 (C.D. Cal. 2001).) The court denied plaintiffs' application for a temporary restraining order. (*Id*. at 1139.) In fact, defendant is not aware of any cases that have allowed an election to be delayed in the face of mandatory statutory and constitutional provisions specifying the time frame for the election. To allow that to happen here, in the face of a consent decree, which plaintiffs stipulated to and are bound by, would violate basic principles of equity.

Finally, the fact that plaintiffs seek to move the election to a date after March 1, 2004, can only be construed as a request for a mandatory injunction. As stated by the court in the *Stanley* case, where a party seeks mandatory preliminary relief that goes "well beyond maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing a preliminary injunction." (*Stanley, supra*, 13 F.3d at 1319.) Plaintiff Stanley, the women's basketball coach at U.S.C., sought an injunction requiring the university to renew her expired contract and pay her more than she had made under the contract. (*Stanley, supra*, 13 F3d. at 1320.) As the court noted, such injunctions are "particularly disfavored. [Citation.] When a mandatory

preliminary injunction is requested, the district court should deny such relief, 'unless the facts and law clearly favor the moving party.'" (*Ibid*.) Given the preclusive effect of the consent decree, neither the facts nor the law clearly favor the plaintiffs. Because a showing of probable success on the merits is an element of each one of the various tests for the issuance of a TRO or preliminary injunction, and because plaintiffs cannot make that showing, the Court should deny the requested relief.

B. The Secretary Of State Is Taking Actions Aimed At Addressing The Concerns Raised By This Lawsuit.

The Secretary of State understands the concerns raised by plaintiffs in this action. The Office of the Secretary of State is preparing to engage in an aggressive effort to educate voters with respect to the methods of voting using all voting systems, with particular emphasis on PPC voting systems. (Declaration of John Mott-Smith, Exhibit A, ¶¶ 5-15.)

For example, the Secretary of State's Office plans, at a minimum, to produce or prepare: (1) Public Service Announcements for the electronic media; (2) articles for printed media, especially for community newspapers and other publications; (3) items for radio and television; (4) State Ballot Pamphlets distributed to all voter households that include instructions on how to contact local elections officials for information regarding the methods of voting; (5) op-ed articles regarding the voting process, to be placed and distributed by the Secretary of State's Office and local elections officials. All these materials will be produced or prepared in multiple languages and distributed to minority language media and community-based organizations. In addition, the Secretary of State's website provides specific information on how to use voting systems in each of California's 58 counties, including those counties that will be using PPC voting systems. (Declaration of John Mott-Smith, ¶¶ 6, 7, 8.)

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The Secretary of State's Office will also work with local elections officials and community-based organizations to educate voters with respect to methods of voting, with particular emphasis on those voters who will cast ballots using PPC voting systems. This effort will, where appropriate, include ensuring that sample ballots sent to registered voters by local elections officials contain specific information for using PPC voting systems with particular emphasis on preventing problems. (Declaration of John Mott-Smith, ¶ 9.)

The Secretary of State's Office will also undertake additional voter outreach and education activities, as outlined in the Declaration of John Mott Smith. Conducting this proactive, aggressive voter outreach and education activity – rather than postponing the election – is the proper response to the concerns raised by plaintiffs' complaint.

CONCLUSION

For all the foregoing reasons, the Court should deny the preliminary injunctive relief sought by plaintiffs.

Dated: August 15, 2003

Respectfully submitted,

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