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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

|                                 |   |                               |
|---------------------------------|---|-------------------------------|
| SOUTHWEST VOTER REGISTRATION    | ) |                               |
| EDUCATION PROJECT; SOUTHERN     | ) | Case No. CV 03-5715 SVW (RZx) |
| CHRISTIAN LEADERSHIP CONFERENCE | ) |                               |
| OF GREATER LOS ANGELES; and     | ) | ORDER DENYING PLAINTIFFS' EX  |
| NATIONAL ASSOCIATION FOR THE    | ) | PARTE APPLICATION FOR         |
| ADVANCEMENT OF COLORED PEOPLE,  | ) | TEMPORARY RESTRAINING ORDER   |
| CALIFORNIA STATE CONFERENCE     | ) | AND MOTION FOR PRELIMINARY    |
| BRANCHES,                       | ) | INJUNCTION                    |
|                                 | ) |                               |
| Plaintiffs,                     | ) |                               |
|                                 | ) |                               |
| v.                              | ) |                               |
|                                 | ) |                               |
| KEVIN SHELLEY, in his official  | ) |                               |
| capacity as California          | ) |                               |
| Secretary of State,             | ) |                               |
|                                 | ) |                               |
| Defendant.                      | ) |                               |
|                                 | ) |                               |
| _____                           | ) |                               |

**I. INTRODUCTION**

Plaintiffs 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 Branches ("Plaintiffs") bring this lawsuit alleging that the proposed use of "punch-card" balloting machines in the forthcoming California election will violate the U.S. Constitution and Voting Rights Act. Plaintiffs move this Court for an Order delaying

1 that election, currently scheduled for October 7, 2003, until such  
2 time as it can be conducted without use of punch-card machines.

3 The Court has consolidated Plaintiffs' Ex Parte Application for  
4 Temporary Restraining Order with Plaintiffs' Motion for Preliminary  
5 Injunction. The Motion has been fully briefed by both sides, and the  
6 Court has heard oral argument from all parties, including Intervenor  
7 Ted Costa.

8 Having carefully considered the arguments and record before the  
9 Court, and for the reasons stated herein, the Court HEREBY DENIES  
10 Plaintiffs' Motion for Preliminary Injunction.

11  
12 **II. FACTUAL AND PROCEDURAL BACKGROUND**

13 A. The October 7, 2003 Election

14 On July 23, 2003, California Secretary of State Kevin Shelley  
15 announced that more than 1.3 million signatures of registered  
16 California voters had been received and verified in connection with a  
17 recall petition for incumbent Governor Gray Davis. As that number  
18 exceeded the amount of signatures required to initiate a recall  
19 election, Shelley certified on that date the first recall election of  
20 a Governor in California history.

21 Under the California Constitution, the Lieutenant Governor is  
22 charged with setting the date of a gubernatorial recall. See Cal.  
23 Const. Art II, sec. 17. The Constitution requires that the election  
24 be held not less than 60 days and not more than 80 days from the date  
25 of certification. Cal. Const. Art 2, Sec. 15(a). The only exception  
26 to this time frame applies where a regular election is already  
27 scheduled to be held within 180 days of the date of certification.

1 See Cal. Const. Art 2, Sec. 15(b). In that circumstance, the recall  
2 election may be consolidated with the regularly scheduled election.

3 Id.

4 Because the next regularly scheduled election is to be held in  
5 March of 2004 - more than seven months from the date of certification  
6 - the 60 to 80 day time frame applies. Accordingly, Lt. Governor Cruz  
7 Bustamante signed a proclamation on July 24, 2003 ordering that the  
8 recall election take place on October 7, 2003 (the last Tuesday within  
9 the allotted period).

10 At that time, California voters are scheduled to decide whether  
11 or not Governor Gray Davis should be recalled and, if so, who should  
12 replace him. Also on the ballot will be two statewide initiatives:  
13 Proposition 53, a proposed constitutional amendment sponsored by the  
14 state legislature that would require a portion of the state's budget  
15 be set aside for infrastructure spending; and, Proposition 54, a  
16 measure that would ban government agencies from collecting certain  
17 racial information.

18 B. This Lawsuit

19 Plaintiffs bring this lawsuit to delay the October 7, 2003  
20 election until it can be conducted without use of pre-scored punch-  
21 card balloting machines. Plaintiffs allege that punch-card machines  
22 result in an average combined "residual vote rate" of 2.23%. Residual  
23 votes consist of "overvotes" (ballots disqualified because they are  
24 read by the machine as containing more than one vote on a single  
25 contest or ballot issue) and "undervotes" (ballots read by the machine  
26 as not containing a vote). While residual votes may be caused by  
27 factors other than machine error - including, for instance, a voter's  
28

1 affirmative choice not to vote - Plaintiffs allege that the residual  
2 vote rate of punch-card machines is, on average, twice that  
3 experienced by other voting technologies.

4 Plaintiffs claim, therefore, that voters using punch-card  
5 machines to cast their votes in the October 7 election will have a  
6 comparatively lesser chance of having their votes counted, in  
7 violation of the Equal Protection Clause of the U.S. Constitution's  
8 Fourteenth Amendment. (See First Amended Complaint ("FAC") ¶ 42.)  
9 Further, Plaintiffs allege that the counties employing punch-card  
10 systems have greater minority populations than counties using other  
11 voting systems, thereby disproportionately disenfranchising and/or  
12 diluting the votes of voters on the basis of race, in violation of  
13 Section 2 of the Voting Rights Act (codified at 42 U.S.C. §§ 1973).  
14 (FAC ¶ 46.)

15 C. Common Cause Litigation

16 On April 17, 2001, a number of individuals and entities -  
17 including two of the three Plaintiffs in the instant case - brought  
18 suit in this Court alleging similar constitutional and statutory  
19 violations. See Common Cause, et al. v. Bill Jones, CV 01-03470-SVW  
20 ("Common Cause"). The plaintiffs in the Common Cause litigation  
21 levied their allegations not against the use of punch-card balloting  
22 in a particular election, but based upon the Secretary of State's  
23 certification of punch-card machines for use in all California  
24 elections. They also challenged the adequacy of the State's recount  
25 procedures.

26 During the pendency of the Common Cause litigation, then  
27 California Secretary of State Bill Jones decertified punch-card voting  
28

1 systems for use in California elections on or after January 1, 2006.  
2 Secretary Jones later advanced the decertification date to July 1,  
3 2005. Without conceding the allegations of the Complaint, the  
4 Secretary of State entered into a stipulation whereby he agreed to  
5 decertify the machines, and to submit to the Court the question  
6 whether it was "feasible" for the State to do so by either March or  
7 November 2004.

8 The Court concluded that it was feasible for the nine counties  
9 using punch-card machines to replace those machines with other  
10 certified voting systems in advance of the elections in March of 2004.  
11 See Common Cause v. Jones, 2002 WL 1766436 (C.D. Cal. Feb. 19, 2002).  
12 A Consent Decree reflecting the March 2004 date was signed by the  
13 parties, and a Final Judgment thereupon was entered by the Court on  
14 May 8, 2002.

### 16 **III. PRELIMINARY INJUNCTION STANDARD**

17 A party moving for preliminary injunctive relief bears the burden  
18 of proving either "(1) a combination of probable success on the merits  
19 and the possibility of irreparable harm; or (2) that serious questions  
20 are raised and the balance of hardships tips in its favor."  
21 Sammartano v. First Judicial District Court, 303 F.3d 959, 965 (9th  
22 Cir. 2002) (citations and internal quotations marks omitted); see also  
23 Johnson v. California State Bd. of Accountancy, 72 F.3d 1427, 1430  
24 (9th Cir. 1995); Metro Pub. Ltd. v. San Jose Mercury News, 987 F.2d  
25 637, 639 (9th Cir. 1993); Nordyke v. Santa Clara County, 110 F.3d 707,  
26 710 (9th Cir. 1997). "These two alternatives represent extremes of a  
27 ///

1 single continuum, rather than two separate tests." Sun Microsystems,  
2 Inc. v. Microsoft Corp., 188 F.3d 1115, 1119 (9th Cir. 1999).

3 When the public interest is affected by the proposed injunction  
4 it is also factored into the analysis. See Sammartano, 303 F.3d at  
5 965; Fund for Animals v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992);  
6 Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir.  
7 1988). While the effect on the public interest was, at one time, part  
8 of the "balance of hardships" analysis, the Ninth Circuit has held  
9 that this factor "is better seen as an element that deserves separate  
10 attention in cases where the public interest may be affected."  
11 Sammartano, 303 F.3d at 974 (citing Fund for Animals, 962 F.2d at  
12 1400).

#### 14 **IV. ANALYSIS**

##### 15 **A. Probability of Success on the Merits**

16 To determine the likelihood that Plaintiffs will prevail on the  
17 merits of their lawsuit, it is first necessary to consider the  
18 viability of any defenses to its prosecution.<sup>1</sup> Only then does the  
19 Court consider the substance of Plaintiffs' claims.

##### 20 **1. Res Judicata**

21 A subsequent action may be barred under the doctrine of res  
22 judicata where (1) it involves the same "claim" as an earlier suit,  
23 (2) the earlier suit has reached a final judgment on the merits, and  
24 (3) the earlier suit involves the same parties or their privies.  
25 Nordhorn v. Ladish Co., 9 F.3d 1402, 1404 (9th Cir. 1993). It is

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26  
27 <sup>1</sup> Unlike the other elements of a motion for preliminary  
28 injunction, the burden will ultimately be on Defendant to prove  
any defenses.

1 well-settled that a consent decree constitutes a final judgment on the  
2 merits "and thus bars either party from reopening the dispute by  
3 filing a fresh lawsuit." United States v. Fisher, 864 F.2d 434, 439  
4 (7th Cir. 1988) (collecting authorities). Thus, the Court turns to  
5 the first and third prongs of the res judicata analysis.

6 (1) Identity of Claims

7 Whether or not two "claims" are the same for purposes of res  
8 judicata depends upon:

- 9 1) whether rights or interests established in the prior  
10 judgment would be destroyed or impaired by prosecution  
11 of the second action;
- 12 2) whether substantially the same evidence is presented in  
13 the two actions;
- 14 3) whether the two suits involve infringement of the same  
15 right; and
- 16 4) whether the two suits arise out of the same  
17 transactional nucleus of facts.

18 Nordhorn, 9 F.3d at 1405.

19 All of these conditions are satisfied. First, the facts and  
20 constitutional deprivations alleged by Plaintiffs are nearly identical  
21 to, and at some points verbatim recitations of, those asserted in the  
22 Common Cause case. (Compare, e.g., Compl. ¶¶ 3, 5, Common Cause v.  
23 Jones, with FAC ¶¶ 3, 5.) Indeed, this suit explicitly challenges  
24 "the same punch card voting machines challenged before this Court in  
25 Common Cause, et al. v. Jones . . . which resulted in a consent decree  
26 decertifying these machines effective March 1, 2004 . . . ." (FAC ¶  
27 1.)

1 As that statement reflects, the rights established by Common  
2 Cause would certainly be impaired by permitting this suit to proceed.  
3 The California Secretary of State was party to the Consent Decree in  
4 Common Cause, which set a deadline of March 2004 for the  
5 decertification of pre-scored punch-card machines. That Decree formed  
6 the basis of a Final Judgment entered by this Court on May 8, 2002.  
7 Implicit in the Consent Decree and Judgment is an intervening period  
8 during which punch-card machines would remain certified for use. The  
9 State's right to use such machines until March 2004, and the State's  
10 interest in an orderly replacement of punch-card balloting, would both  
11 be eviscerated if this suit proceeded to a contrary end.

12 Plaintiffs argue, however, that a 2003 recall election was  
13 unknowable at the time of the 2001 Consent Decree, and that their  
14 litigation strategy would have been altered had they known the  
15 election was likely. But the recall provision of the California  
16 Constitution is hardly an arcane constitutional anachronism. In its  
17 ninety-two year history, parties have attempted to invoke it on  
18 numerous prior occasions, and it was the subject of amendment as  
19 recently as 1994. Thus, though plaintiffs might not have known that a  
20 recall election was *probable*, they certainly knew one was *possible*.  
21 They nonetheless chose to seek decertification by March 2004. Now  
22 they demand another remedy for the same violation - in essence, to  
23 advance the date of the required decertification from March 2004 to  
24 October 2003.

25 Plaintiffs analogize to a situation in which a school district,  
26 ordered to desegregate its schools, subsequently opens a new, all-  
27 white school. Such an action would be a direct affront to the spirit  
28



1 of a court order, however, and a subsequent remedy would clearly be  
2 within a federal court's continuing jurisdiction to "vindicate its  
3 authority" and "effectuate its decrees." Kokkonen v. Guardian Life  
4 Ins. Co. of America, 511 U.S. 375, 380, 114 S. Ct. 1673 (1994). The  
5 comparable analogy in this case would be an attempt by the Secretary  
6 of State to advance the March 2004 primary to February 2004, thereby  
7 circumventing the spirit of the Consent Decree. But no such event has  
8 transpired. The State has not moved a scheduled election, nor enacted  
9 a recall provision of which the Common Cause plaintiffs were unaware.  
10 Rather, the people of the State have invoked a state constitutional  
11 provision of which the plaintiffs were, or should have been, well  
12 apprised. Accordingly, Plaintiffs are seeking to establish the same  
13 constitutional violations alleged in Common Cause, but to secure an  
14 additional remedy.<sup>2</sup>

15 b. Identity of Parties

16 This case was originally filed by two organizations that were  
17 also plaintiffs in Common Cause v. Jones: the Southwest Voter  
18 Registration Education Project, and the Southern Christian Leadership  
19 Conference ("SCLC"). The First Amended Complaint added a third  
20 plaintiff, the California NAACP, which was not a party to the Common  
21 Cause litigation.

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24 <sup>2</sup> At oral argument, Plaintiffs' counsel moved in the  
25 alternative for relief from the Consent Decree and Judgment in  
26 Common Cause, pursuant to Fed. R. Civ. P. 60(b). For essentially  
27 the same reasons stated above, the Court would be inclined to  
28 deny such a motion if brought in the Common Cause litigation.  
Because the motion was improperly made in this case, and not in  
the separate Common Cause suit, however, it must be, and hereby  
is, DENIED.

1           The Ninth Circuit has held, however, that "when two parties are  
2 so closely aligned in interest that one is the virtual representative  
3 of the other, a claim by or against one will serve to bar the same  
4 claim by or against the other." Nordhorn, 9 F.3d at 1405. Thus, for  
5 instance, the "EPA could not sue to enforce the Water Pollution  
6 Control Act, where [the] same issue had been litigated in state court  
7 by the Washington Department of Ecology." Id. (summarizing United  
8 States v. Rayonier, Inc., 627 F. 2d 996 (9th Cir. 1980)).

9           Common Cause v. Jones sought, and the current action seeks, to  
10 vindicate the rights of voters in California counties that use punch-  
11 card balloting. (Compl. ¶ 4, Common Cause; FAC ¶ 4.) In essence, the  
12 plaintiffs in both cases were and are acting in a representative  
13 capacity on behalf of not only their members, but all voters in the  
14 affected counties.

15           Moreover, there is little question that the additional Plaintiff  
16 in this case - the California NAACP - is closely aligned with the  
17 interests of the plaintiffs in the prior case. First, it is  
18 noteworthy that all three Plaintiffs here, as in Common Cause, are  
19 represented by the ACLU Foundation of Southern California, and indeed  
20 by the same lead counsel, Mark D. Rosenbaum. Second, the stated  
21 mission of the California NAACP is particularly closely aligned with  
22 that of the Southern Christian Leadership Conference, a party to the  
23 first lawsuit. (Compare FAC ¶ 12 (NAACP mission is "to secure and  
24 protect the civil rights of people of color, including protecting the  
25 voting rights of African Americans") with Compl. ¶ 9, Common Cause v.  
26 Jones (SCLC works "to promote the full equality of African Americans

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1 and other minority groups in all aspects of American life, including  
2 voting, elections, and political participation”).)

3 Finally, Plaintiffs have not disputed that there is an identity  
4 of parties in this case. Accordingly, while the Court need not decide  
5 the res judicata issue at this juncture, there is ample reason to  
6 believe that Plaintiffs will have a difficult time overcoming it.

7 **2. Laches**

8 Under the equitable doctrine of laches, the Court may deny an  
9 injunction to a plaintiff who fails diligently to assert his claim.  
10 “Laches requires proof of (1) lack of diligence by the party against  
11 whom the defense is asserted, and (2) prejudice to the party asserting  
12 the defense.” Costello v. United States, 365 U.S. 265, 282, 81 S. Ct.  
13 534 (1961) (citations omitted); see also Amtrak v. Morgan, 536 U.S.  
14 101, 121-22, 122 S. Ct. 2061 (2002); Soules v. Kauaians for Nukolii  
15 Campaign Committee, 849 F.2d 1176, 1180 n.7 (9th Cir. 1988).

16 Here, Plaintiffs waited almost two years to reassert their claims  
17 with full knowledge that, until replacement of the punch-card machines  
18 in March of 2004, other elections would take place. On the eve of  
19 this election, Plaintiffs have suddenly rediscovered “the  
20 malfunctioning machine of our democracy” that will render this  
21 election “a sham.” (Memo. in Supp. of Ex Parte Application at 1.)  
22 Yet Plaintiffs were apparently content with the malfunctioning machine  
23 when they faced, and presumably participated in, recent elections.  
24 Most significantly, the 2002 primary and general elections came and  
25 went without Plaintiffs at any time asserting these claims or calling  
26 for injunctive relief.

27 ///

1 Plaintiffs argue that they forewent injunctive relief with  
2 respect to the 2002 elections because the public interest in holding  
3 those elections was of a much greater magnitude than that at issue  
4 here given the number of expiring state office terms, and the need to  
5 elect a congressional delegation. The comparative interests in  
6 holding this election are discussed infra. The Court notes, however,  
7 that whatever Plaintiffs' reasons for not challenging the 2002  
8 election, it is still the case that the Common Cause plaintiffs  
9 proposed 2004 - not 2003 - as the year for punch-card phase-out, with  
10 full actual or constructive knowledge that special elections were a  
11 possibility. Indeed, it was only after the recall election had been  
12 certified and a date set that Plaintiffs finally decided to reassert  
13 their claims.

14 The potential prejudice to the State of California is clear. The  
15 State is in the process of updating its voting machinery consistent  
16 with the deadline imposed by the Consent Decree in Common Cause. The  
17 State relied on the Consent Decree and could have attempted to update  
18 the voting machines sooner if made aware of Plaintiffs' continuing  
19 challenge. The date currently set for the recall election is mandated  
20 under the California Constitution, and any injunction against so  
21 proceeding would bear strongly upon the State's interest in complying  
22 with its laws and effecting the will of its people.

23 As with the question of res judicata, while the Court need not  
24 decide the defense of laches at this point in the litigation, it  
25 clearly poses a significant impediment to the prosecution of this  
26 suit. Cf. Knox v. Milwaukee County Board of Elections Commissioners,  
27 581 F. Supp. 399, 402-04 (E.D. Wis. 1984) (refusing to enjoin an  
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1 upcoming election because plaintiff's claim was wholly barred by the  
2 doctrine of laches).

3 **3. Substantive Claims**

4 Even if the Court could reach the substance of Plaintiffs'  
5 constitutional and statutory claims, Plaintiffs have failed to prove  
6 a likelihood of success on the merits with regard to both their equal  
7 protection and Voting Rights Act claims.

8 While the Court assumes that Plaintiffs can show a likelihood  
9 that the punch-card machines will suffer a higher error rate than  
10 other technologies, the Court concludes that Plaintiffs are not likely  
11 to prevail on the merits of their claims.

12 a. Alleged Error Rates

13 It is disputed whether punch-card balloting is guaranteed to  
14 produce a higher "error rate" than other technologies. It is  
15 possible, for instance, to conjure explanations other than machine  
16 error for a residual vote rate, including affirmative decisions by  
17 voters not to vote in particular races or on particular issues.  
18 Indeed, Intervenor Ted Costa argues (with expert support) that the  
19 former is a significant factor in the differential residual vote  
20 rates. Costa argues that some other technologies actually prevent  
21 intentional non-votes, and thus dramatically lower the incidence of  
22 residual votes. In some contrast, the Secretary of State concedes  
23 that punch-card machines are "antiquated" and does not squarely  
24 dispute Plaintiffs' fundamental allegations of higher error rates.  
25 (Def.'s Opp. at 1-2.)

26 The Secretary of State does argue, however, that he will be  
27 undertaking extensive voter education efforts that could have the  
28

1 effect of lowering the residual rate in the forthcoming election.  
2 Thus, he maintains, it would be entirely speculative to conclude that  
3 higher residual vote rates will necessarily afflict punch-card  
4 balloting in the upcoming election. (Of course, the public was  
5 certainly conscious of punch-card machines and their defects following  
6 the 2000 presidential election, and yet these machines appear to have  
7 experienced a disproportionately high residual vote rate in the 2002  
8 California elections.)

9 In any case, even assuming that Plaintiffs can show a likelihood  
10 that punch-card machines will evidence a higher rate of erroneously  
11 uncounted ballots - a finding the Court does not make at this time<sup>3</sup> -  
12 Plaintiffs' claims still are not likely to succeed. This is true  
13 because, even if Plaintiffs can show disparate treatment in this  
14 regard, the Court concludes that such would not amount to illegal or  
15 unconstitutional treatment.

16 b. Equal Protection Claim

17 It is, of course, "beyond cavil that voting is of the most  
18 fundamental significance under our constitutional structure." Burdick  
19 v. Takushi, 504 U.S. 428, 432, 112 S. Ct. 2059 (1992) (citation and  
20 internal quotation marks omitted). And as a general proposition,  
21 governmental infringements of fundamental constitutional rights are  
22 subject to close judicial scrutiny. See, e.g., Dunn v. Blumstein, 405  
23 U.S. 330, 336-39, 92 S. Ct. 995 (1972).

24 However, election laws, even those affecting the "voting process  
25 itself," "will invariably impose some burden upon individual voters."

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26  
27 <sup>3</sup> The Court declines Plaintiffs' invitation to hold an  
28 evidentiary hearing on this issue, as the factual inquiry  
contemplated is mooted by the Court's holding.

1 Burdick, 504 U.S. at 433. Accordingly, a flexible standard has been  
2 applied by the Supreme Court in voting rights cases, under which a  
3 court "must weigh the character and magnitude of the asserted injury  
4 . . . against the precise interests put forward by the State as  
5 justifications for the burden imposed by its rule." Burdick, 504 U.S.  
6 at 434. While strict scrutiny is applied to "severe" restrictions on  
7 the exercise of the franchise, "the State's important regulatory  
8 interests are generally sufficient to justify" "reasonable,  
9 nondiscriminatory restrictions" on the right to vote. Id.; accord  
10 Anderson v. Celebrezze, 460 U.S. 780, 788, 103 S. Ct. 1564 (1983).

11 Indeed, this two-tiered analysis has been a consistent feature of  
12 the Court's voting rights cases. Plaintiffs introduce their First  
13 Amended Complaint with an invocation of the "one-person, one-vote  
14 principle that lies at the heart of our democracy." (FAC ¶13.) This  
15 is a reference to the Supreme Court's landmark apportionment cases,  
16 including Gray v. Sanders, 372 U.S. 368, 381, 83 S. Ct. 801 (1963),  
17 Reynolds v. Sims, 377 U.S. 533, 558, 84 S. Ct. 1362 (1964), and their  
18 progeny. While intentional geographic segregation of voters - which  
19 may work to dilute vote weight on the basis of residence - was  
20 subject in those cases to exacting judicial scrutiny, the Court  
21 realized the limitations of its decisions. Acknowledging that precise  
22 mathematical equality was likely to be elusive, the Reynolds Court  
23 specifically noted that "[s]o long as the divergences from a strict  
24 population standard are based on legitimate considerations incident to  
25 the effectuation of a rational state policy, some deviations from the  
26 equal-population principle are constitutionally permissible . . . ."  
27 377 U.S. at 579.

28

1           Thus, from Reynolds through Burdick, the Supreme Court has  
2 suggested that marginal deviations from precise vote equality, and  
3 minor burdens on the right to vote, will be subject to rational basis  
4 review so long as they reflect "legitimate [governmental]  
5 considerations," Reynolds, 377 U.S. at 579, or are "reasonable  
6 nondiscriminatory restrictions," Burdick, 504 U.S. at 434.

7           Indeed, in Bush v. Gore, 531 U.S. 98, 121 S. Ct. 525 (2002) -  
8 which did not involve allegations of illegitimate motivation or voter  
9 classification - the Supreme Court strongly hinted that rational basis  
10 review might be appropriate to claims of marginally disparate error  
11 rates among varying voting technologies. In that case, which  
12 challenged the standards imposed in connection with a court-ordered  
13 recount of machine-case ballots, the Court eschewed an explicit  
14 standard of review. In striking down the recount procedure as  
15 violative of equal protection, however, the per curiam opinion  
16 repeatedly couched its decision in language evocative of rational  
17 basis review. See, e.g., Bush, 531 U.S. at 104-05 (explaining that,  
18 having once granted the vote on equal terms, a State may not, "by  
19 later arbitrary and disparate treatment, value one person's vote over  
20 that of another"); id. at 105 ("[T]he question before us . . . is  
21 whether the recount procedures the Florida Supreme Court has adopted  
22 are consistent with its obligation to avoid arbitrary and disparate  
23 treatment of the members of the electorate."); id. ("[T]he recount  
24 mechanisms . . . do not satisfy the minimum requirement for  
25 nonarbitrary treatment of voters.").

26           If rational basis review applies, the State might well be able to  
27 adduce sufficient justifications for the use of punch-card balloting  
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1 machines. See, e.g., Bush, 531 U.S. at 134 (Souter, J., dissenting)  
2 (“[E]ven though different mechanisms [within a jurisdiction] will have  
3 different levels of effectiveness in recording voters’ intentions[,]  
4 local variety can be justified by concerns about cost, the potential  
5 value of innovation, and so on.”); Richard L. Hasen, “*Bush v. Gore* and  
6 the Future of Equal Protection Law in Elections,” 29 Fla. St. U. L.  
7 Rev. 377, 395-96 (2001).

8 As this Court noted in Common Cause v. Jones, however, it is  
9 possible to read Bush as implying, or at least employing, an elevated  
10 standard of review. See Common Cause v. Jones, 213 F. Supp. 2d 1106,  
11 1109 (C.D. Cal. 2001). To the extent that the use of such a standard  
12 would be in tension with the Supreme Court’s prior voting rights  
13 jurisprudence, there are many reasons to believe that the Bush Court’s  
14 analysis was limited to its unique context.

15 For instance, the Court concluded that the challenged recount  
16 process was “inconsistent with the minimum procedures necessary to  
17 protect the fundamental right of each voter in the *special instance* of  
18 a statewide recount under the authority of a single state judicial  
19 officer.” 531 U.S. at 109 (emphasis added). Indeed, the Court  
20 continued, “[o]ur consideration is limited to the present  
21 circumstances, for the problem of equal protection in election  
22 processes generally presents many complexities . . . . The question  
23 before the Court is not whether local entities, in the exercise of  
24 their expertise, may develop different systems for implementing  
25 elections.” Id.; see also Spears v. Stewart, 283 F.3d 992, 996 (9th  
26 Cir. 2002) (Reinhardt, J., dissenting) (suggesting majority’s rule is  
27 like that of Bush: “good for this case and this case only”); Sorchini  
28

1 v. City of Covina, 250 F.3d 706, 709 n.1 (9th Cir. 2001) (per curiam,  
2 Kozinski, Tallman, Zapata, JJ.) (citing Bush for proposition that  
3 particular argument is persuasive "only in this case").

4       Regardless, this Court specifically did not decide in Common  
5 Cause what standard of review would apply to a challenge levied  
6 against the certification of punch-card voting machines with  
7 disproportionately high error rates. See Common Cause, 213 F. Supp.  
8 2d at 1109. It need not do so here.

9       Plaintiffs in this case bring a far narrower subset of the  
10 challenge that was brought in Common Cause. The plaintiffs in the  
11 earlier suit challenged the Secretary of State's decision to certify  
12 punch-card machines for use in California. In other words, they  
13 contested the use of punch-card machines *in general*. Had that case  
14 gone to trial, the State would have been required to demonstrate  
15 sufficient justifications for the use of punch card machines *in*  
16 *general*.

17       Since that suit was brought, however, the Secretary of State has  
18 decertified punch-card machines effective March 2004. Plaintiffs in  
19 this case do not - indeed, cannot - challenge the use of punch-card  
20 machines generally, but rather contest their use *in this election*.  
21 Thus, even if the Court were to reach the merits of Plaintiffs' equal  
22 protection claim, the State would not be obligated to justify the use  
23 of punch-card machines as a general means of gauging voter preference.  
24 Rather, the State would merely need to adduce sufficient  
25 justifications for their use *in this election*.

26       That, the State undoubtedly can do. Alternative technologies  
27 will not be available in several of the affected counties in time for  
28

1 the October election. Because the State cannot under its own  
2 constitution conduct the election later than the date currently set,  
3 and short of a court order compelling something different, the State's  
4 choice is between using punch-card machines in several counties and  
5 using nothing at all in those counties. The State clearly has a  
6 compelling interest in not disenfranchising the voters of at least six  
7 counties, and the limited use of punch-card voting in this election is  
8 a narrowly tailored means to achieve that end. Accordingly, whatever  
9 the appropriate standard of review, Plaintiffs are unlikely to succeed  
10 on the merits of their constitutional claim.

11 c. Voting Rights Act

12 Plaintiffs allege that punch-card machines are used in counties  
13 with disproportionately large minority populations, and thus that the  
14 machines' allegedly higher error rate "results in a denial or  
15 abridgement of the right . . . to vote on account of race or color,"  
16 in violation of Section 2(a) of the Voting Rights Act (codified at 42  
17 U.S.C. § 1973(a)).

18 While Plaintiffs accurately state the general rule of Section  
19 2(a), they seem to ignore Section 2(b), which provides an analytical  
20 framework for determining whether that rule has been violated:

21 A violation of subsection (a) is established if, based on the  
22 totality of the circumstances, it is shown that the political  
23 processes leading to nomination or election in the State or  
24 political subdivision are not equally open to participation by  
25 members of a [protected class] in that its members have less  
26 opportunity than other members of the electorate to participate  
27 in the political process and to elect representatives of their  
28

1 choice. The extent to which members of a protected class have  
2 been elected to office in the State or political subdivision is  
3 one circumstance which may be considered . . . .

4 42 U.S.C. § 1973(b); see Gingles, 478 U.S. at 43.

5 As that Section reflects, “[t]he essence of a § 2 claim is that a  
6 certain electoral law, practice, or structure interacts with social  
7 and historical conditions to cause an inequality in the opportunities  
8 enjoyed by black and white voters to elect their preferred  
9 representatives.” Gingles, 478 U.S. at 47; accord Voinovich v.  
10 Quilter, 507 U.S. 146, 153, 113 S. Ct. 1149 (1993). Thus, the express  
11 intent of the Voting Rights Act is to combat electoral structures and  
12 procedures that deprive minority voters of an opportunity to  
13 participate effectively in the political process. See Gingles, 478  
14 U.S. at 44.

15 Indeed, the Senate Report accompanying the 1982 amendments to the  
16 Voting Rights Act lists a number of additional factors that may inform  
17 the Section 2 analysis, and which confirm the Section’s central  
18 purpose. These include: a history of official discrimination in the  
19 jurisdiction; racially polarized voting; the lingering effects of  
20 prior discrimination; a lack of electoral success among minority  
21 candidates; the comparative unresponsiveness of elected officials to  
22 the needs of minorities; and, whether the policy justification for the  
23 challenged practice is “tenuous.” Gingles, 478 U.S. at 37 (citing  
24 Sen. Jud. Comm. Maj. Rep., at 28-29, U.S. Code Cong. & Admin. News  
25 1982, pp 206-207).<sup>4</sup>

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26  
27 <sup>4</sup> While the reasoning from Gingles is apt, as the Court noted  
28 in the Common Cause litigation, the separate three-part test  
provided by that case and referred to by Plaintiffs is not

1           There is little about the violation alleged here that would  
2 suggest it is of the type contemplated by Section 2 of the Voting  
3 Rights Act. Plaintiffs contend that the affected counties have  
4 average minority populations that are 15% larger than counties using  
5 other voting technologies, and that the punch-card machines in the  
6 affected counties have a residual vote rate of 2.23%, as compared to  
7 an average residual vote rate of approximately 1% in other localities.  
8 This is not a situation where, for instance, punch-card machines are  
9 alleged to be used only in minority-majority precincts, or where the  
10 error rate is so high as to consistently disable minority voters from  
11 electing their candidates of choice. Nor have Plaintiffs argued that  
12 historical discrimination or present animus, together with the  
13 lingering effects of prior discrimination, somehow combine to  
14 exacerbate the effect of this particular practice vis-à-vis minority  
15 voters. Nor do Plaintiffs even allege that punch-card machines are  
16 intended to limit, or have the effect of limiting, the ability of  
17 minority voters to participate effectively as members of the  
18 electorate, or have rendered office-holders comparatively less  
19 responsive to minority voters.

20           Indeed, of the approximately dozen relevant factors contained in  
21 the Senate Report and Section 2 itself, Plaintiffs cite but one (from  
22 the Senate Report): that the state's justification for use of the

23 \_\_\_\_\_  
24 applicable here, as it was specifically geared to the context of  
25 legislative apportionment in which Gingles arose. 213 F. Supp.  
26 2d at 1110. However, the fact that Section 2 has been invoked  
27 primarily to challenge certain types of legislative districts  
28 merely reinforces the Court's conclusion that Section 2 is  
targeted principally to electoral procedures and practices that  
have the effect of impairing the participation of minorities in  
the electoral process.

1 challenged practice is "tenuous." Gingles, 478 U.S. at 45 (citing S.  
2 Rep. at 29); (Pls.' Compl. at 18-19; Reply at 13-15). While the  
3 Senate Report notes that this factor "may have probative value,"  
4 Gingles, 478 U.S. at 45 (citing S. Rep. at 29), it is certainly not  
5 dispositive in the absence of *any other evidence or allegations* that  
6 would tend to prove Plaintiffs' Section 2 claim.

7 In sum, Plaintiffs suggest a Voting Rights Act violation based  
8 exclusively upon the alleged error rate of machines that poll  
9 "majority" as well as minority voters, and are used in counties  
10 containing nearly one-half of California's voters. They contend that  
11 some 40,000 votes may be lost as a result of higher error rates (many  
12 if not most of which votes will be cast by non-minority voters) in a  
13 state of nearly eight million voters. Accordingly, there is, at best,  
14 a slim chance that Plaintiffs will be able to prove that punch-card  
15 machines in California "interact[] with social and historical  
16 conditions to cause an inequality in the opportunities enjoyed by  
17 black and white voters to elect their preferred representatives."  
18 Gingles, 478 U.S. at 47; accord Voinovich, 507 U.S. at 153.

19 While Plaintiffs' Section 2 allegations suffice to state a claim  
20 under the liberal federal pleading rules,<sup>5</sup> injunctive relief is  
21 warranted only where Plaintiffs can show a *probability* of success on  
22 the merits, or at least that there are *substantial questions* as to the  
23 merits. In light of the allegations and record before the Court,  
24 Plaintiffs have failed to make such a showing.

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26 <sup>5</sup> See Common Cause, 213 F. Supp. 2d at 1110; Black v.  
27 McGuffrage, 209 F. Supp. 2d 889, 897 (N.D. Ill. 2002) (concluding  
28 that viability of Section 2 claim in similar punch-card balloting  
case "cannot be fully ascertained in this case except through  
discovery and possibly trial").

1           **B. Irreparable Injury**

2           “Abridgement or dilution of a right so fundamental as the right  
3 to vote constitutes irreparable injury.” Cardona v. Oakland Unified  
4 School District, 785 F. Supp. 837, 840 (N.D. Cal. 1992) (citations  
5 omitted). There is some question, however, whether Plaintiffs can  
6 establish that punch-card balloting’s higher residual vote rate  
7 actually reflects a higher error rate, and therefore will injure  
8 Plaintiffs in the way they allege. Nonetheless, as the Court cannot  
9 envision an effective remedy that would be available to Plaintiffs  
10 after the votes have been cast, it assumes for purposes of this  
11 analysis that the alleged injury would be irreparable.

12           **C. Balance of Hardships**

13           Even assuming the above analysis suggests a serious question on  
14 the merits (which it does not), the balance of hardships weighs  
15 heavily in favor of allowing the election to proceed.

16           Here, the Court must balance the potential hardship to Plaintiffs  
17 (namely, the risk of having their votes diluted or denied through use  
18 of punch-card balloting), against the hardship to the State of  
19 California if the injunction is granted (i.e., canceling or postponing  
20 its scheduled election). Because the hardships implicated in this  
21 case are, in essence, both matters of public concern, the Court turns  
22 to the public interest prong of the analysis.

23           **D. Public Interest**

24           The public interest factor is particularly important in a case  
25 such as this, where the plaintiff seeks to enjoin an election. See  
26 Cano v. Davis, 191 F. Supp. 2d 1135, 1139 (C.D. Cal. 2001) (decided by  
27 a three-judge panel, which included Circuit Judge Reinhardt); Cardona,

1 785 F. Supp. at 842. "Because the conduct of elections is so  
2 essential to a state's political self-determination, the strong public  
3 interest in having elections go forward generally weighs heavily  
4 against an injunction that would postpone an upcoming election."  
5 Cano, 191 F. Supp. 2d at 1139 (citations omitted). The Cano court  
6 explained that "enjoining an election is an extraordinary remedy  
7 involving a far-reaching power, [citation], which is almost never  
8 exercised by federal courts prior to a determination on the merits. .  
9 . ." Id. at 1137; see also Diaz v. Silver, 932 F. Supp. 462, 465  
10 (E.D.N.Y. 1996) (decided by three-judge panel, which included Circuit  
11 Judge McLaughlin) ("[A] preliminary injunction enjoining an election is  
12 an extraordinary remedy involving the exercise of a very far-reaching  
13 power.").<sup>6</sup>

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17 <sup>6</sup> To support their proposition that this Court may enjoin the  
18 forthcoming election, Plaintiffs point almost exclusively to  
19 cases involving judicial elections that were enjoined for failure  
20 to comply with the preclearance requirements of Section 5 of the  
21 Voting Rights Act. See, e.g., Clark v. Roemer, 500 U.S. 646, 111  
22 S. Ct. 1096 (1991).

23 That context is distinguishable in material respects.  
24 First, an alleged Section 5 violation presents a single, clear-  
25 cut issue: whether or not a regulated jurisdiction has obtained  
26 preclearance before conducting an election. If such preclearance  
27 has not been sought or granted, a court may easily determine that  
28 the merits are likely to be resolved in a plaintiff's favor.

23 Second, and most significantly, Section 5 provides the  
24 district court with little discretion and does not mandate the  
25 balancing of equitable factors required here. See Lopez v.  
26 Monterey County, 519 U.S. 9, 23, 117 S. Ct. 340 (1996); Haith v.  
27 Martin, 618 F. Supp. 410, 414 (E.D.N.C. 1985).

26 Third, every case cited by Plaintiffs in which a court  
27 enjoined an election arose in the context of a *judicial* election.  
28 The Court notes that the policy factors implicated by enjoining  
the October 7 election (discussed herein) are likely far  
different than those at issue in judicial elections.



1 In Reynolds v. Sims, the Supreme Court explained:

2 [U]nder certain circumstances, such as where  
3 an impending election is imminent and a  
4 State's election machinery is already in  
5 progress, equitable considerations might  
6 justify a court withholding the granting of  
7 immediately effective relief in a legislative  
8 apportionment case, even though the existing  
9 apportionment scheme was found invalid. In  
10 awarding or withholding relief, a court is  
11 entitled to and should consider the proximity  
12 of the forthcoming election and the mechanics  
13 and complexities of state election laws, and  
14 should act and rely upon general equitable  
15 principles.

16 377 U.S. 533, 585, 84 S. Ct. 1362 (1964).

17 Relying in part on this principle, the courts in both Cano and  
18 Cardona refused to issue injunctions despite potentially meritorious  
19 challenges. As in those cases, allowing this election to go forward  
20 in October is "essential to [the] state's political self-  
21 determination." Cano, 191 F. Supp. 2d at 1139. The recall is an  
22 unprecedented event, which directly reflects the will of the people of  
23 California. Delaying the election for half a year beyond the date set  
24 pursuant to the California Constitution undoubtedly works against the  
25 public interest implicit in a recall election.

26 In addition, where "the possibility of corrective relief at a  
27 later date exists, even an established [Voting Rights Act] violation  
28

1 does not in and of itself merit a preliminary injunction.'" Diaz, 932  
2 F. Supp. at 468 (quoting Watkins v. Mabus, 771 F. Supp. 789, 805 n.16  
3 (S.D. Miss. 1991) (citation omitted), aff'd in part and vacated in  
4 part on other grounds, 112 S. Ct. 412 (1991)). Here, the allegedly  
5 unlawful use of punch-card balloting is being remedied pursuant to the  
6 Common Cause Consent Decree. Indeed, the March 2004 decertification  
7 date was proposed by plaintiffs in the prior litigation, and has been  
8 unchallenged since the Consent Decree was signed. Had the Common  
9 Cause plaintiffs preferred the Court reach the merits of their claims  
10 and, if successful, award the necessary remedy or remedies, they could  
11 have sought an adjudication on the merits. If plaintiffs had  
12 prevailed, the Court might well have ordered an earlier phase-out  
13 date, or enjoined certain elections. But "[t]his Court should not  
14 impose the significant costs of delaying an election when Plaintiffs,  
15 with nearly a year in which to seek a hearing on the merits, have done  
16 so only now that the election machinery is in gear." Cardona, 785 F.  
17 Supp. at 843; see also United States v. Upper San Gabriel Valley  
18 Municipal Water District, 2000 U.S. Dist. LEXIS 13353, at \*6-\*10 (C.D.  
19 Cal. Sep. 8, 2000); Banks v. Board of Education, 659 F. Supp. 394, 399  
20 (C.D. Ill. 1987).

21 Further, there is some question whether the remedy contemplated  
22 would even have the effect Plaintiffs seek. Plaintiffs ask the Court  
23 to postpone the recall and ballot initiative votes until alternative  
24 voting mechanisms are in place. Yet if such relief were ordered, the  
25 State would be in an untenable position: it would be forced either to  
26 conduct the election outside the time frame required by the California  
27 Constitution, or to cancel the election to avoid that predicament.

1 Clearly, the public interests in avoiding wholesale  
2 disenfranchisement, and/or not plunging the State into a  
3 constitutional crisis, weigh heavily against enjoining the election.

4 Moreover, even if the election could somehow be conducted at a  
5 later date, it is relevant in the public interest analysis to consider  
6 whether such a delayed election would not itself work strongly against  
7 the voting rights of all Californians. Because an election reflects a  
8 unique moment in time, the Court is skeptical that an election held  
9 months after its scheduled date can in any sense be said to be the  
10 same election. In ordering the contemplated remedy, the Court would  
11 prevent all registered voters from participating in an election  
12 scheduled in accordance with the California Constitution. Arguably,  
13 then, the Court by granting the relief sought could engender a far  
14 greater abridgement of the right to vote than it would by denying that  
15 relief.

16 Furthermore, the recall election in particular is an  
17 extraordinary - and in this case, unprecedented - exercise of public  
18 sentiment. Implicit in a recall election, and explicit in the time  
19 frame provided by the California Constitution, is a strong public  
20 interest in promptly determining whether a particular elected official  
21 should remain in office.<sup>7</sup>

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23 <sup>7</sup> Although Plaintiffs make glancing references to the ballot  
24 initiatives, they have not developed any substantial legal or  
25 evidentiary basis to support a delay in votes on those  
26 initiatives. Rather, their arguments are directed almost wholly  
to the recall election, and Plaintiffs have made little or no  
effort to explain why an injunction would be warranted in one  
case and not the other.

27 Moreover, while some of the Court's analysis pertains  
28 specifically to the recall election, much of it - including that  
regarding the merits of Plaintiffs' constitutional and statutory

1           Accordingly, the public interest in going forward with the  
2 scheduled election, including the gubernatorial recall and ballot  
3 initiatives, strongly favors denial of the preliminary injunction.  
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25 claims, and the public interest against enjoining scheduled  
26 elections - applies with equal force to the currently-scheduled  
27 ballot initiatives. To the extent it is not explicit elsewhere  
28 in this Order, the Court concludes that Plaintiffs have not met  
their burden of showing that an injunction is warranted with  
respect to the ballot initiatives, nor have they convinced the  
Court that the public interest mandates injunctive relief.

1 **V. CONCLUSION**

2 Therefore, because Plaintiffs have failed to meet their burden in  
3 showing that injunctive relief is warranted, Plaintiffs' Motion for  
4 Preliminary Injunction (consolidated with Plaintiffs' Ex Parte  
5 Application for Temporary Restraining Order) must be, and hereby is,  
6 DENIED.

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10 IT IS SO ORDERED.

11  
12 DATED: \_\_\_\_\_

\_\_\_\_\_  
STEPHEN V. WILSON  
UNITED STATES DISTRICT JUDGE