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September 17, 2003

Clerk of the Court
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119

Re: SVREP v. Shelley, No. 03-56498

Dear Ms. Catterson:

I hereby request this court's permission to submit this letter as an amicus curiae opposing en banc review in the above-referenced case.

I am a professor of law specializing in election law at Loyola Law School in Los Angeles (I list my affiliation for identification purposes only). I have written a forthcoming book examining the Supreme Court's political equality cases from *Baker v. Carr* to *Bush v. Gore*, I am co-author of a leading casebook on election law, co-editor of the peer-reviewed *Election Law Journal*, and the author of at least 25 election law-related articles in the last decade.

I also filed an amicus brief in this Court supporting the position of the appellants in this case. That brief (along with my c.v., attached as an appendix to my motion to file) is docketed in this case and also is available on the Ninth Circuit's website at:
[http://www.ca9.uscourts.gov/ca9/Documents.nsf/54dbe3fb372dcb6c88256ce50065fcb8/722cc6b3cfe8d22788256da3007681e0/\\$FILE/hasen-acluamicus-9th.pdf](http://www.ca9.uscourts.gov/ca9/Documents.nsf/54dbe3fb372dcb6c88256ce50065fcb8/722cc6b3cfe8d22788256da3007681e0/$FILE/hasen-acluamicus-9th.pdf).

En banc review is not warranted in this case. As this court knows, the meaning of *Bush v. Gore* was central to the three-judge panel's resolution of the issues in this case. I have spent considerable time studying and writing about that decision, and believe that the panel applied *Bush v. Gore* in a straightforward and correct manner. Indeed, in a 2001 law review article discussing the opinion, I used the hypothetical situation of punch cards being used in some jurisdictions but not others in a statewide election as an *easy* case for application of *Bush v. Gore*. See Richard L. Hasen, *Bush v. Gore* and the Future of Equal Protection Law in Elections, 29 FLA. ST. U. L. REV. 377, 393-96 (2001), available at:
<http://www.law.fsu.edu/journals/lawreview/downloads/292/Hasen.pdf>. If *Bush v. Gore* has any precedential value, it must apply to the punch card case.

Clerk of the Court
September 17, 2003
Page 2

This court must take seriously the *Bush* Court's admonition not to allow the state to value one person's vote over that of another through the use of non-uniform standards, particularly where, as here, the state itself has conceded that the non-uniform standards are unacceptable, is planning to ameliorate the imbalance in the near future, and has no significant, let alone compelling, reason for not taking the necessary steps to ensure that this particular election will conform to the constitutional standards that the state already has agreed to implement in all future elections. The state's argument that the selective disenfranchisement of voters on the basis of their county of residence can be justified by a compelling need to hold a hasty election in October is belied by the State's own Constitution, Article II, Section 15(b), which allows for a recall election to be scheduled for as many as 180 days after certification of the petitions, so that it may be consolidated with the next scheduled general election.

Following *Bush v. Gore*, the panel's decision in this case is hardly remarkable. The bottom line is this: had the election gone forward as scheduled, with the selective use of punch cards creating *systematic geographical disparities*, the chances of someone in Los Angeles county (and other counties using punch card ballots) being able to cast a vote that actually counts would have been much lower than the chances facing someone voting in a county using more reliable voting equipment, especially in counties using superior technology and not consolidating their precincts.

Finally, I note that press reports are incorrect in stating that if the panel's decision stands the election is delayed until March. The panel only enjoined the election from going forward on October 7 with selective use of punch card machines in certain counties but not others. The Secretary may hold the election sooner, without violating the preliminary injunction, so long as he does so using voting technology throughout the state that insures minimum due process and equal protection concerns are met. For example, the election could conceivably be held later this month, should the state choose to use technology such as paper ballots in those jurisdictions that had used punch cards.

I wrote this letter on my own initiative because of the importance of the issues involved. I have asked counsel for the appellants to assist me with filing this letter brief because I cannot make alternative arrangements given the press of time.

Very Truly Yours,

Richard L. Hasen