No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

On appeal from the United States District Court
for the Central District of California
The Honorable Stephen V. Wilson
C. D. Cal. Case No. CV 03-5715 SVW (RZx)

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STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. §1331. This Court has jurisdiction pursuant to 28 U.S.C. §1292(a)(1).

This is an appeal from the denial of a request for a preliminary injunction.

STANDARD OF REVIEW

A denial of a preliminary injunction must be reversed if the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *United States v. Peninsula Communications, Inc.,* 287 F.3d 832, 839 (9th Cir. 2002); *Wiener v. County of San Diego,* 22 F.3d 263, 268 (9th Cir. 1994). The issues of law underlying the district court's decision are reviewed *de novo. Idaho Sporting Congress, Inc. v. Alexander,* 222 F.3d 562, 565 (9th Cir. 2000); *Brookfield Communications, Inc. v. West Coast Entertainment Corp.,* 174 F.3d 1036, 1046 (9th Cir. 1999); *Foti v. City of Menlo Park*, 146 F.3d 629, 634-35 (9th Cir. 1998).

INTRODUCTORY STATEMENT

On October 7, 2003, California voters will decide whether to recall Governor Gray Davis, the identity of Davis's successor in the event he is recalled, and the fate of two critical ballot initiatives. The outcome of those elections may well be determined by a purely and unacceptably arbitrary distinction, enforced by

the state, between voters lucky enough to reside in counties where modern voting technologies will be in place come October 7, and voters unlucky enough to reside in counties that have not yet completed the transition from voting technologies that have been decertified by California's Secretary of State as "obsolete, defective, or otherwise unacceptable."

Voters in six counties in California, comprising 44 percent of the state's electorate in the 2000 election, will therefore be compelled to use discredited punchcard voting machines identical to those responsible for the Florida debacle. The overwhelming evidence in the record unambiguously demonstrates that these machines are precisely what the Secretary of State affirmed at the time he proclaimed their decertification: "prone to error," and therefore far less reliable than all other voting systems in use throughout the state. Millions of registered voters in punchcard counties – Los Angeles, Sacramento, San Diego, Santa Clara, Solano, and Mendocino – face a substantially higher risk than voters in other counties that their votes will be discarded and uncounted. In all, tens of thousands of punchcard voters will be systematically – and quite predictably – disenfranchised, creating the very real risk that the "margin of victory . . . [will be] less than the margin of error of the voting system used." *Black v. McGuffage*, 209 F. Supp. 2d 889, 891 (N.D. Ill. 2002).

There can be no doubt – indeed, the Secretary of State does not dispute –

that the dismal disparities generated by these arbitrary geographical distinctions present an equal protection issue of the highest magnitude. As the Supreme Court has repeatedly and powerfully made clear, such disparities violate the Constitution, because, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104 (2000). The core principle on which the *Bush v. Gore* majority rested its ruling – a principle that not one of the nine Justices disputed in that case, which incurred controversy solely over its proper application to the facts presented – is not of recent vintage; to the contrary, this "conception of political equality [stems] from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments." *Gray v. Sanders,* 372 U.S. 368, 381 (1963). "The Court has consistently recognized that all qualified voters have a constitutionally protected right to cast their ballots and have them counted . . . . Every voter's vote is entitled to be counted once. It must be correctly counted and reported." *Id.* at 380 (internal citations and quotations omitted). Precisely because there can be no such thing as a disposable vote in our constitutional democracy, and because "one source of . . . [the] fundamental nature [of the right to vote] lies in the equal weight accorded to each vote and the equal dignity owed to each voter," *Bush,* 531 U.S. at 104, the accident of residency cannot be permitted to dictate a different result.

Compounding these geographical inequities is clear and troubling evidence that punchcard systems discriminate against minority voters in two distinct ways. First, counties that use punchcard systems have nearly 50 percent more citizens of color than counties that use other systems. Errata Re Exhibits to Brady Declaration (hereinafter "Declaration of Henry Brady"), ER 170, ¶ 39. Second, even *within* counties that employ punchcard systems, "minorities have much higher residual vote rates than non-minorities," attributable only to the use of this machinery. *Id.* ER 171, ¶ 39. Where other voting technologies are utilized, disparities in residual errors between white voters and voters of color virtually disappear. *Id.* Together, these disparities ensure that if the recall election is conducted prior to the removal of punchcard machines from the six counties that retain them, minority voters will be systematically and disproportionately disenfranchised.

Such disenfranchisement violates the letter and spirit of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. As the Supreme Court has explained, Section 2 prohibits "*any* . . . practices or procedures which result in the denial or abridgement of the right to vote of any citizen who is a member of a protected class of racial and language minorities." *Thornburg v. Gingles,* 478 U.S. 30, 43 (1986) (emphasis in original). "Section 2 plainly provides that a voting practice or procedure violates the VRA when a plaintiff is able to show, based on the totality

of circumstances, that the challenged voting practice *results in* discrimination on account of race." *Farrakhan v. Washington,* 2003 WL 21715439, at 6 (9th Cir. July 25, 2003) (emphasis added). As much as in any Section 2 case ever considered by this Court, the evidence is dramatic and unequivocal that the punchcard machines decertified by the Secretary will have precisely this effect, causing disproportionate disenfranchisement of voters of color.

Plaintiffs acknowledge that the racial and geographical disparities presented here, and the statutory and constitutional violations that ineluctably follow from them, might well not, in the case of a regularly scheduled election, compel the injunctive relief sought here. That is so, however, only because there is a world of difference between briefly postponing a recall and Proposition election that might (but might not) result in a governor's early exit from office, and postponing a regularly scheduled election to fill offices that otherwise would not be filled. The latter would give rise to a full-fledged constitutional crisis, either by leaving vacancies in critical government offices, or by extending by judicial fiat the terms of government officials beyond the constitutionally prescribed periods for which they were elected. For example, had the November 2002 elections been held hostage to the demands of equal protection, California would have been left with

no delegation to the U.S. House of Representatives,[1] no Governor, Lieutenant Governor, Attorney General, Controller, Treasurer, Secretary of State, or other elected state officials within the Executive Branch,[2] and with a vastly diminished Assembly and State Senate.[3] Here, in sharp contrast, the question is not whether the people will be left without elected officials, or governed by officials they did not elect, but whether an extraordinary election to cut short a specified term of office should be briefly postponed in order not to sacrifice the people's "constitutionally protected right to cast an equally weighted vote," *Lucas v. 44th General Assembly,* 377 U.S. 713, 736 (1964), such that the election results may truly reflect the will of all voters.

Plaintiffs' challenge is, if anything, all the more compelling with respect to Propositions 53 and 54. In defense of the October 7 election date, the defendant, the intervenor, and, ultimately, the district court, placed enormous weight on the state constitutional provision requiring that the recall election be held in most instances within 80 days of its certification. No such constitutional requirement governs the scheduling of the vote on the initiatives and, indeed, the initiatives were never intended to be on the ballot until March 2004. It was only the

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[1] *See* U.S. Const. art. I, sec. 2.

[2] *See* Cal. Const. art. V., secs. 2, 11.

[3] *See* Cal. Const. art. IV, sec. 2.

fortuitous qualification, for the first time in California's history, of a petition to recall the incumbent governor, that served to advance the vote on the initiatives from their originally scheduled date. No prejudice of any kind would result from their postponement to their originally scheduled ballot. On the other side of the ledger, it is particularly problematic to conduct a vote on a racially charged matter such as the so-called Racial Privacy Initiative[4] – a measure that would prevent the state from collecting or retaining racial and ethnic data about health care, hate crimes, racial profiling, public education, and public safety – knowing full well that minority voters will be disproportionately disenfranchised. Thus, although this brief for the most part discusses the October 7, 2003 election as a single occurrence, the district court properly should have given separate treatment to the question whether the vote on the initiatives must be postponed. Because none of the interests that even arguably could be raised to justify conducting the recall election on October 7 applies to the vote on the initiatives – a point not disputed by any party – those matters, at the very least, should be put off until punchcards are a thing of the past, as the Secretary has decreed.

Finally, plaintiffs do not seek to prevent the election scheduled for October 7, nor even necessarily to delay it. If the Secretary of State can arrange for the

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[4] The initiative's full name is "Classification by Race, Ethnicity, Color, or National Origin. Initiative Constitutional Amendment."

replacement of punchcard machines by October 7, then this lawsuit will require no postponement whatsoever. And, of course, if constitutionally adequate machines cannot be ready by October 7, but can be installed before the next scheduled statewide election in March 2004, the election need not be postponed until March. But if postponement is needed, the Supreme Court has been clear that "[a] desire for speed is not a general excuse for ignoring equal protection guarantees." *Bush*, 531 U.S. at 108.

The choice this case presents – whether to conduct an indisputably discriminatory and almost certainly unconstitutional election on October 7, or possibly to postpone the election by no more than a few months to ensure that the votes of all Californians are accorded equal weight and dignity – could hardly be more stark. The district court gave short shrift to the Supreme Court's jurisprudence as to the fundamental right to vote, treating *Bush v. Gore,* in deed if not quite in word, as if its holding (and indeed the equal protection ruling on which seven Justices agreed) were good for that day and that case only, and as if the Court meant other than what it said when it founded a doctrine some four decades ago premised on the principle that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims,* 377 U.S. 533, 555 (1964). No less dismissive than its treatment of the equal protection

issue, the district court's decision eviscerates the congressional intent behind Section 2 of the Voting Rights Act, and turns the Court's doctrine upside down so as to make an unambiguous showing that punchcard machines "result in unequal access to the electoral process," *Gingles,* 478 U.S. at 46, insufficient as a matter of law.

The "substantial questions" thereby raised by this case, questions "that could well affect the outcome of the recall election" and of the critical initiatives that will share the ballot, "should be resolved before the election, rather than after the election in the event the recall is successful." *Burton v. Shelley,* S117845 (Cal. Aug. 7, 2003) (George, C.J., dissenting). Indeed, it is in the nature of the failure of punchcard machines that, though a Florida redux is surely predictable in the event of a close election, lost votes can never be recovered, and soothing assurances about post-election relief can only come to naught. The compelling constitutional and statutory claims raised here must be resolved now, or not at all.

STATEMENT OF THE CASE

Shortly after the Lieutenant Governor of California, in accord with the state Constitution, set the recall election for October 7, 2003, plaintiff civil rights organizations – 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 – filed this action. Plaintiffs moved for a temporary restraining order and a preliminary injunction against the use of punchcard voting machines in the election now scheduled for October 7, 2003.

On August 20, 2003, the United States District Court for the Central District of California issued an order and opinion denying the request for a preliminary injunction. *See* Order Denying Plaintiffs' Ex Parte Application for Temporary Restraining Order and Motion for Preliminary Injunction, August 20, 2003 (hereafter, "Order"). Pursuant to 28 U.S.C. §1292(a)(1), plaintiffs file this appeal.

STATEMENT OF FACTS

A. Punchcard Systems Are Significantly Less Accurate and Reliable Compared to All Other Systems Used in California

The 2000 presidential election "brought into sharp focus a common, if heretofore unnoticed phenomenon. Nationwide statistics estimate that an estimated 2% of ballots cast do not register a vote for President." *Bush v. Gore,* 531 U.S. at 103. The Court expressly noted that the controversy revolved around punchcard systems, which cause a significant number of votes to not be counted. *Id.* at 104.

There are currently four types of voting systems used in California: pre-scored punch cards (decertified by the Secretary of State effective March 1, 2004),

datavotes, optical scans and touch screens. Pre-scored punchcard systems ("PPC") are markedly inferior compared to the others in the reliability and accuracy in recording the intentions of voters, and produce greater racial disparities in residual votes. The particular characteristics of the recall election compound these problems.

1. Description of operation of systems

In counties using pre-scored punch card machines (VotoMatic or Pollstar machines), a voter entering the polling place is given a paper ballot in the form of a long piece of relatively heavy stock paper. The ballot card is pre-scored with columns of small, perforated rectangles, known as chads. Once inside the voting booth, the voter inserts the card into a slot and opens a booklet that lists the candidates for a given office. The voter then uses a metal stylus to attempt to punch out the rectangle on the card lined up next to the candidate or ballot measure of choice. The voter is required to turn to subsequent pages of the booklet, which list other candidates or ballot measures, for which the voter must punch out the adjacent rectangles in order to vote. If the ballot is not placed in the correct location in the machine, then the candidates' names or ballot measures will not line up properly with the rectangles that must be removed to register a vote. Because the candidates' names and ballot measure identifiers do not appear on the ballot itself, voters may not be able to tell from a visual inspection if their votes

were cast as intended. In addition, pressing the stylus against the pre-scored rectangle sometimes does not cause the chad to be removed completely, which may result in the vote not being counted. Nor is there any protection against the voter "overvoting" by casting more than one vote for a particular office or ballot measure.

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

Optical scan systems (also referred to as "Mark Sense" systems), function in a similar way to standardized tests. The voter is given a ballot that lists the names of the candidates and any ballot measures. Next to each choice is either a small circle or an arrow with a gap. The voter must darken the bubble next to the

preferred candidate or measure, or draw a straight line connecting the two parts of the arrow. The ballot is then placed in a box and, once ballots are collected, counted using an optical scanner. Some versions of the technology permit the voter to scan the ballot at the polling place to make certain that he or she voted as intended.

Touch screen voting machines (also known as direct recording electronic devices or "DRE"s) resemble ATM machines in appearance. Upon entering the booth, the voter touches the name of the candidate or the ballot measure on a screen to register his or her preference. Typically, the voter may review the entire ballot to check the votes cast. It is not possible to vote twice, or "overvote," for the same office or measure. The computer tallies the votes and sends them to a central location.

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

The pre-scored punchcard machines differ markedly in their propensity to record accurately and reliably to record the intentions of voters. The district court's November 7, 2002 Order, p. 8, noted that "statistical evidence advanced [in the *Common Cause*] case suggested that the challenged punch card machines suffered from an error rate nearly double that of other polling technologies, and

risked continuing effectively to disenfranchise thousands of voters as a result."

The Secretary of State's determination to decertify pre-scored punchcard voting systems in California and the court's conclusion are reinforced by the most recent declarations and studies of Henry Brady and Roy Saltman, the pre-eminent experts in the country on voting systems. Dr. Brady concluded that "[t]he punchcard voting technology that will be used in at least six counties (Los Angeles, Mendocino, Sacramento, San Diego, Santa Clara, and Solano) in the October 7, 2003 statewide recall election will significantly increase the rate of residual votes (i.e., invalid ballots) as compared to other technologies." Brady decl., ¶ 9, ER 162. He projected based on past experience that the punchcard machines "will throw away about 40,000 votes," to be "heavily concentrated in minority areas." *Id.*, ¶ 44, ER 172. These counties comprised 44 percent of the 2000 vote in California. *Id.*, ¶ 9, ER 162. Thus, "[f]or those voters using punchcard systems, the residual vote rate was 2.23 percent. No other system had a higher average residual vote rate than 0.89 percent, a difference of 1.34 percentage points, meaning that punchcard systems failed to count 1.34 percentage points more votes than these other systems. *Id.*, ¶ 16, ER 164.[5] Stated differently, the

[5] *See also* Brady decl., ¶¶ 17-24, ER 164-66 (demonstrating that poor performance was the result of using punch-cards and not other characteristics of the punchcard counties).

error rate for punchcard systems was at least two and a half times greater than for any other voting technology used in California. Brady therefore concluded:

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

Id., ¶ 11, ER 163.

Though, as Dr. Brady also observes, "it might be thought that punchcard performance would have improved through a combination of voter awareness and diligence of election officials," in California, it has not. *Id.* ¶¶ 46-47, ER 172-73. Thus, for example, "the eight counties that used punchcards in the 2002 gubernatorial race had a residual vote rate of 4.04 which was *worse* than the 3.72 percent in the counties in the 1992 Gubernatorial race." *Id.*, ¶ 47, ER 173 (emphasis in original). And the four counties that changed from punchcard systems to new systems decreased their residual rate from 3.25 percent to 2.37 percent. *Id.*

Similarly, Saltman concluded that "PPC systems are irreparably deficient in producing a reliable record of voter intent and therefore in assuring public

confidence in the results of elections. The problems with PPC systems include the inherent fragility of PPC ballots, the fact that many voters do not completely punch out 'chads' even with training, the user-friendliness of PPC machines and the fact that voters do not see their errors in PPC systems." Saltman decl., ¶ 4, ER 14-15.[6] As Brady and Saltman point out, similar conclusions and results have also been found for counties in other states and for nationwide data. *See* Brady decl., ¶ 27, ER 167.[7]

3. Disparate impact on racial and ethnic minorities.

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

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[6]The Declaration of Roy Saltman is attached as Appendix B.

[7] The Secretary of State did not deny the validity of plaintiffs' factual evidence concerning the vastly disparate error rates associated with various voting technologies. Instead, the Secretary offered well-intentioned but feeble assurances that increased voter education would offset the documented and irrefutable defects of punch-card voting systems. However, "[t]here is no evidence that voter education remedies the poor performance of punchcards." Supplemental Declaration of Henry E. Brady, ER 188, ¶ 6. "Punchcard systems simply fail to record a statistically and substantively significant percentage of intentional votes that are recorded by other systems . . . . Consequently, the only possible remedy is to not use punchcards." *Id.*

Intervenor Ted Costa did purport to challenge the accuracy of plaintiffs' evidence. Costa's factual submissions were thoroughly and conclusively rebutted by Dr. Henry Brady in a supplemental declaration filed below and attached hereto. The district court declined to resolve this factual dispute, holding that even assuming the accuracy of plaintiffs' evidence, they were not entitled to the relief they sought. Order, ER 211.

punchcard equipment. Overall, people of color (including African-Americans, Asian Americans, Latinos and American Indians) constitute 46 percent of the population of the six counties using pre-scored punchcard equipment, but only 32 percent of the population of counties using other, more reliable types of equipment. Brady decl., ¶ 10, ER 162. Moreover, there is a substantially higher residual vote rate – the failure to count votes – for minority voters than non-minority voters when punchcard machines are used; the difference is as much as 2 percent worse for minority voters. Brady decl., ¶ 39, ER 170; ¶ 37, ER 170.

4. Impact on October 7 election.

Dr. Brady concluded that "[i]n an election that may be close, as the October 7 election is shaping up to be, these impacts are significant enough to make the difference between whether the first recall election is approved and/or who receives the highest number of votes on the second recall question." *Id.* at ¶ 14, ER 163. And the problems of unreliability and inaccuracy will only be exacerbated where the ballot will contain 135 candidates for governor. As Dr. Brady explains:

> Checking overvotes will be especially important in the October 7, 2003 election. As of 4:30 pm on August 10, 2003, the Secretary of State's web page (http://www.ss.ca.gov/elections/recall_cand.htm) indicated that 193 candidates had filed of which 89 had complete

> applications and 104 were still under review . . . . This large number of candidates presents serious problems for a punchcard system. It is worth remembering that the infamous and confusing Florida "Butterfly Ballot" was designed with the intent of reducing the possibility of overvotes on a punchcard system by getting all ten of the presidential candidates in Florida on two facing pages of a punchcard voting device. Duval County, Florida experienced significant numbers of overvotes on a punchcard system when it used multiple pages to list presidential candidates. Punchcard systems can only deal with this many candidates by having a "booklet" with multiple pages listing the candidates with perhaps ten candidates per page. It will be very easy for voters to get confused and to think that they must mark each page or to simply accidentally mark more than one candidate. The result will be the nullification of that person's vote because of an overvote. It will be hard for voters to check whether they have made multiple marks, and there will be no systematic checking as with in-precinct optical scan or DRE systems.

Id., ¶ 41, ER 171(citation omitted). The large number of candidates on the recall ballot also makes a close election – one that is within the substantial margin of

error that exists with pre-scored punchcard machines – much more likely than in a typical two-candidate race. *See* Saltman decl., ¶ 7, ER 15 ("The problems with the PPC systems . . . are especially acute in the California gubernatorial recall election . . . [E]ven a small number of uncounted or erroneously counted votes could be determinative in a close election.").

5. The District Court's ruling

The district court did not dispute or make findings contrary to any of plaintiffs' factual evidence. Instead, the court treated the Secretary of State's decertification of punchcard machines and the evidentiary record regarding their lack of accuracy and reliability as irrelevant to the disposition of the motion for injunctive relief, concluding that "even assuming that Plaintiffs can show a likelihood that punch-card machines will evidence a higher rate of erroneously uncounted ballots – a finding that the Court does not make at this time – Plaintiffs' claims still are not likely to succeed." Order, ER 211.

The district court did note that the Secretary of State's assurances with regard to increased voter education were unlikely to cure the challenged disparities, observing: "Of course, the public was certainly conscious of punch-card machines and their defects following the 2000 presidential election, and yet these machines appear to have experienced a disproportionately high residual vote rate in the 2002 California elections." Order, ER 211. The court thus tacitly

acknowledged that punchcard systems will fail to count significantly more ballots than any other voting system.[8]

B. The Prior Litigation Concerning Punchcard Voting Machines

This lawsuit follows an earlier legal action brought by several of the plaintiffs in this case which resulted in a consent decree requiring California to replace all punchcard machines no later than March 1, 2004. The district court's res judicata discussion was predicated on that earlier litigation.

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

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[8]At the hearing conducted by the district court on August 18, 2003, counsel for the plaintiffs urged the court to hold an evidentiary hearing if factual matters were in dispute. The court expressly rejected this suggestion on the basis of its conclusion that plaintiffs were not entitled to relief even accepting all of their factual allegations. *Id.*, ER 211 n.3.

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

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

On September 18, 2001, defendant Secretary of State issued a proclamation

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

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

As a result of the decertification, on October 12, 2001, the sole remaining issue in the case was "whether it is feasible to replace Votomatic and Pollstar

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

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

No appeal was taken from any of the court's rulings. As a result of the *Common Cause* consent decree, all pre-scored punchcard machines in the State of California must be replaced by March 1, 2004, in sufficient time for the next regularly scheduled statewide elections. The Order thereby ensures that all California voters, including the nearly eight and a half million registered voters who were previously compelled to use obsolete and unreliable equipment, will for the first time be able to cast their votes in a statewide election confident that their votes will actually be counted, to be accorded equal status with all other voters across California.

SUMMARY OF ARGUMENT

There are three questions on this appeal. First, is the plaintiffs' suit barred by res judicata or laches? The district court discussed this question but expressly declined to decide it. Order, ER 208, 209. Neither res judicata nor laches applies here. Res judicata does not apply because plaintiffs are bringing a new and distinct claim that was not part of, and could not have been part of, the earlier suit. The prior judgment required defendant to replace all punchcards by March 2004, and this action in no way disturbs that judgment. Res judicata "prevents a party from litigating in a subsequent action any matter that was a part of the same claim or cause of action adjudicated in a prior action. These rules preclude from litigation any part of the claim that *might* have been litigated." Larry Teply &

Ralph Whitten, Civil Procedure 872 (1994) (emphasis in original); *Western Radio Serve. v. Glickman,* 123 F.3d 1189, 1192 (9th Cir. 1997). Plainly, an equal protection and Voting Rights action predicated on the extraordinary election subsequently scheduled for October 2003 – a point in time at which some but not all parts of California would have been ready to count ballots through methods more accurate by far than the punchcard systems that would then have been replaced in some counties but not yet in others – was not, because it could not possibly have been, part of the earlier litigation. Even if the parties to that litigation are now to be credited with remarkable clairvoyance, no Article III court would have been empowered at that point in time to render an authoritative resolution of a potential future dispute that had not yet ripened into an actual case or controversy. More important still, the unique characteristics of the recall election raise the identified deficiencies of punchcard systems to a qualitatively different level, presenting an altogether new claim under equal protection and the Voting Rights Act.

Second, did the district court err in denying plaintiffs' request for a preliminary injunction? The court correctly acknowledged that plaintiffs will be irreparably injured in the absence of preliminary injunctive relief, because there is no "effective remedy that would be available to Plaintiffs after the votes have been cast." Order, ER 220. However, the court misapprehended the nature of

plaintiffs' constitutional claim, misapplied the Voting Rights Act, and seemingly failed to grasp the supremacy of substantive federal constitutional and statutory dictates over a procedural state rule governing timing. In elevating a state constitutional provision establishing the time periods for holding a recall election after certification of petitions above the core federal demand of equal treatment under the law, the district court plainly abused its discretion.

Third, did the district court err in declining to give separate consideration to plaintiffs' claims with respect to the vote on the ballot initiatives? Whatever the balance of equities may be as to when the recall election should be scheduled, the district court abused its discretion by failing altogether to distinguish an election over whether to remove a sitting governor from an election over two initiatives, previously set for March 2004. The court dismissed in a brief footnote plaintiffs' contention that the case for postponing the vote on the initiatives was even more compelling than for postponing the recall election, without considering, in particular, the racial character of Proposition 54, and the failure of the opposing parties to suggest *any* reason why the vote on the initiatives should not be postponed until the decertified machinery has been replaced. [9]

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[9] Because resolution of this question turns on a sensitive identification and balancing of the competing interests, and the constitutional and Voting Rights Act analyses are identical to those undertaken with respect to the recall election, we address this question in the section of the brief concerned with the public interest

ARGUMENT

I. NEITHER RES JUDICATA NOR LACHES PRECLUDES PLAINTIFFS FROM PURSUING THIS ACTION

A. Res Judicata Does Not Bar This Action

The district court expressly declined to decide whether plaintiffs' claims were barred by res judicata and did not base its denial of injunctive relief on this ground. Order, at 11. This Court, therefore, need not address res judicata, since it was not a basis for the district court's decision. Nonetheless, plaintiffs submit that the district court's analysis of res judicata was flawed.

In order for the doctrine of res judicata to apply, there must be: (1) an identity of claims; (2) a final judgment on the merits; and (3) the same parties or privity between the parties. *Owens v. Kaiser Foundation Health Plans, Inc.,* 244 F.3d 708, 713 (9th Cir. 2001). Res judicata does not apply here because the first element is not satisfied.

"Res judicata . . . bars litigation in a subsequent action of any claims that were raised or could have been raised in a prior action." *Western Radio Serve. v.*

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inquiry. *See* Part III.C, *infra.*

Glickman, 123 F.3d 1189, 1192 (9th Cir. 1997). Plaintiffs' challenge to the use of punchcard voting machines in the October 2003 recall election was not raised, and could not have been raised, in the earlier litigation. That litigation was aimed at, and resulted in, the replacement of defective voting machinery at the earliest feasible date, and it is both counterfactual and illogical to suggest that plaintiffs' consent to the judgment in that case implied further consent to conducting an unscheduled, unforeseeable, and unprecedented statewide election employing the decertified machinery.

The district court discounted the extraordinary circumstances of this election, asserting that "though plaintiffs might not have known that a recall election was probable, they certainly knew one was possible." Order, ER 205. This is a profound oversimplification of the issue. To begin, plaintiffs' constitutional and statutory claims are not predicated solely on the occurrence of the recall election itself, but rather on a series of circumstances that could not by any stretch of the imagination have been predicted: a controversial interpretation of California election law that permitted an unprecedented number of candidates to qualify for the gubernatorial race,[10] thereby exacerbating the inherent disparities

[10] *See Burton v. Shelley,* S117845 (Cal. Aug. 7, 2003) (George, C.J., joined by Moreno, J., dissenting) (disputing Secretary of State's interpretation of election law and arguing for more demanding standard for ballot qualification).

in voting technologies;[11] a resource-driven consolidation of polling places that will disproportionately affect users of antiquated, time-consuming punchcard machinery; and, of course, the first-ever – thus, literally unprecedented – successful recall drive in the state's history. The particular features of this election – the dizzying number of candidates whose names in all likelihood will appear on multiple punchcards, the enhanced likelihood that the documented margin of error will be determinative in a close election, the inclusion of a racially charged ballot initiative in an election that will disproportionately disenfranchise minority voters – are like none other in California's (if not the nation's) history, and give rise to a unique equal protection and Voting Rights Act challenge, one that simply did not exist when the *Common Cause* consent decree was entered. These new and unforseen facts make claim preclusion inapplicable. *See Jones v. Bates,* 127 F.3d 839, 848 (9th Cir. 1997) ("Due process requires at a minimum that the party to be estopped . . . should reasonably have expected to be bound by the prior adjudication") (internal citations and quotations omitted).

This Court has stated that "[t]he central test in determining whether there is an identity of claims between the first and second adjudications is whether the two

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[11] Dr. Brady asserts that the unprecedented number of candidates on the recall ballot greatly magnifies the likelihood of substantial disparities between the residual vote rates for voters using obsolete punchcard technology and other newer, accurate voting machines. Declaration of Henry E. Brady ¶ 41, ER 171.

suits arise out of the same transactional nucleus of facts." *Frank v. United Airlines,* 216 F.3d 845, 851 (9th Cir. 2000). The October 2003 election is an entirely new transaction, with entirely different facts.

When plaintiffs settled the *Common Cause* litigation in the spring of 2002, two things were known: First, it was undisputed that constitutionally adequate voting machines could not be in place in time for the November 2002 election. Plaintiffs never contemplated seeking postponement of that election, recognizing that the balance of equities would not support so drastic remedy – a remedy that would leave the state without a congressional delegation or executive branch, and with a vastly diminished state legislature. Second, there was no reason to believe that any statewide election would occur prior to March 2004.[12]

The constitutional and statutory problems posed by *this* ballot – the entire focus of this lawsuit – were not part of the earlier lawsuit and could not have been raised then. Indeed, even if the district court had ruled against the plaintiffs on the merits in the earlier litigation – finding no equal protection or Voting Rights Act

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[12] Thus, there was no purpose in having the court determine whether it was feasible to replace the machines by, for example, December 31, 2003. Plaintiffs in *Common Cause* agreed to the March 1, 2004 decertification date because it would ensure the elimination of punchcard machines in time for the earliest statewide election by which their replacement was feasible. At the time of the May 9, 2002 consent decree and judgment, it would not have been feasible to force a transition from punchcards to better voting systems in time for the November 2002 elections, without inviting disaster.

violation in general from the use of punchcard machines – plaintiffs would not be barred by res judicata from bringing this new action challenging their use in this extraordinary election. Res judicata does not bar plaintiffs' claims.[13]

B. Laches Does Not Bar This Action

The district court, *sua sponte*,[14] suggested that plaintiffs' action might be barred by the equitable doctrine of laches. As with res judicata, the court expressly declined to decide the question, concluding: "[W]hile the Court need not decide the defense of laches at this point in the litigation, it clearly poses a significant impediment to the prosecution of this suit." Order, ER 209. The court was wrong.

Laches applies only if there is a "lack of diligence by the party against

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[13]In the alternative, the district court should have treated plaintiffs' motion as a motion to modify the earlier judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The state's scheduling of a recall election, never contemplated when the consent decree was entered, is itself a significant change in circumstances warranting a modification of the earlier judgment. Although plaintiffs suggested this in their briefs to the court and at oral argument, the court rejected the request "[b]ecause the motion was improperly made in this case, and not in the separate *Common Cause* suit." Order, ER 206 n.2. But such a technicality should not be the basis for denying a remedy for alleged violations of equal protection and the Voting Rights Act. If the district court's concern was a failure to file a proper motion, the appropriate solution would have been to accord plaintiffs' counsel the chance to do this.

[14]Under Federal Rule of Civil Procedure 8(c), laches is an affirmative defense, not a jurisdictional bar, and thus it is particularly inappropriate for the court to consider the defense absent its invocation by defendant.

whom the defense is asserted." *Costello v. United States,* 363 U.S. 265, 282 (1961). There was no lack of diligence by the plaintiffs in this action. They brought this suit within days of hearing that a recall election would occur on October 7, 2003.

The district court's statement that "Plaintiffs waited almost two years to reassert their claims with full knowledge that, until replacement of the punch-card machines in March of 2004, other elections would take place" distorts the facts. Order, at 11. As explained above, plaintiffs reasonably believed, as did everyone else in California, that there would be no statewide election between November 2002 and March 2004, when punchcard machines would no longer be used. Plaintiffs had no reason to bring a challenge until then.

II. THE DISTRICT COURT ERRED IN DENYING PLAINTIFF'S REQUEST FOR A PRELIMINARY INJUNCTION

This Court recently reiterated the standard for granting a preliminary injunction: "To obtain a preliminary injunction, a party must demonstrate either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor . . . . These two alternatives represent 'extremes of a single continuum,' rather than two separate tests . . . . Thus, the greater the relative hardship to [the party seeking the preliminary injunction,] the

less probability of success must be shown." *Clear Channel Outdoor, Inc. v. City of Los Angeles,* 2003 WL 21947181 (9th Cir. August 15, 2003).

Although the denial of a preliminary injunction is generally reviewed on an abuse of discretion standard, "where the district court is alleged to have relied on erroneous legal premises, review is plenary." *FDIC v. Garner,* 125 F.3d 1272, 1276 (9th Cir. 1997). The law is well-settled in that the issues of law underlying the decision on a preliminary injunction are reviewed *de novo*. *See, e.g., Foti v. City of Menlo Park,* 146 F.3d 629, 634-35 (9th Cir. 1998); *Does 1-5 v. Chandler,* 83 F.3d 1150, 1152 (9th Cir. 1996).

A. Plaintiffs Have Shown a Substantial Likelihood of Prevailing on the Merits

Plaintiffs raise two distinct claims: the denial of equal protection and the violation of section 2 of the Voting Rights Act. Plaintiffs easily satisfy the preliminary injunction standard with respect to both claims.

1. Punchcard systems for the October 2003 election deny equal protection

Plaintiffs' constitutional claim is simple and, following *Bush v. Gore,* irrefutable: the simultaneous use of defective punchcard voting machines in some counties, and far more accurate systems in other counties, denies equal protection

by impermissibly diluting the voting strength of voters in punchcard counties, and by disproportionately disenfranchising tens of thousands of voters compelled to utilize machinery decertified by the Secretary of State as failing to satisfy minimal statutory criteria for accuracy and reliability. As the Court has explained: "'[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush,* 531 U.S. at 105 (*quoting Reynolds,* 377 U.S. at 555). Further, "'[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.'" *Id.* at 107 (*quoting Moore v. Ogilvie,* 394 U.S. 814, 819 (1969)). Indeed, plaintiffs' equal protection showing is far stronger than the showing advanced by then-Governor Bush: plaintiffs have demonstrated with virtual certainty that a statistically substantial – and possibly decisive – disparity exists between the documented error rates of punchcard machines and those of certified voting technologies, and that tens of thousands of votes cast in six California counties will literally be thrown out. The claimed disparities in *Bush v. Gore*, principally involving non-uniform standards for the hand-counting of undervotes, were speculative by comparison, though the undergirding of that decision was, as here, the differential "opportunity to have [one's] vote count." 531 U.S. at 108.

The district court disclaimed the precedential value of *Bush v. Gore,* stating that "there are many reasons to believe that the *Bush* Court's analysis was limited to its unique context." Order, ER 214. But the court did not account for the agreement of seven Justices that equal protection was violated by inequalities inherent in the Florida recount process. Moreover, the equal protection analysis in *Bush v. Gore,* whatever one might think of its application to the facts of that case, is hardly novel: the outcome of this case is fortified by, not dependent upon, *Bush v. Gore.* For the Court there explicitly based its decision on principles of equal protection embodied in earlier cases such as *Harper v. Virginia Bd. of Elections, Reynolds v. Sims*, *Gray v. Sanders,* and *Moore v. Ogilvie.* As the Court explained, these cases establish that "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. at 104-05. In each case, as here, the weight of a citizen's vote impermissibly turned on place of residence. And in none of these cases did the Court's holding turn on a finding of intentional discrimination.

The factual record here indisputably establishes a constitutional violation. The difficult question presented here – as in *Bush v. Gore* – is the question of remedy. The district court fundamentally misapprehended that critical distinction, conflating the constitutional violation with the injunctive remedy sought by

plaintiffs. Further, in erroneously asserting that "the State's choice is between using punchcard machines in several counties *and using nothing at all in those counties*," Order, at ER 216 (emphasis added), the court treated the October 7 election date as intrinsically sacrosanct, in effect assuming its conclusion and impermissibly assigning greater weight to the state constitutional provision governing timing of a recall election than to the far more significant – and, quite literally, supreme[15] – demands of geographical and racial equality. The choice, of course, is not between disenfranchising some as opposed to all voters in the six punchcard counties, but rather between conducting an election in which tens of thousands of votes will not be captured by defective technology, or briefly postponing that election to ensure that constitutional and statutory demands are satisfied.

The district court "ratified this uneven treatment" (*Bush,* 531 U.S. at 107) between citizens of different counties through a series of errors. First, it improperly concluded that only rational basis review was appropriate. This was error – though this error would have been harmless had the court properly applied this level of scrutiny. Even under rational basis review, the district court did not – indeed, could not – explain how discrimination against voters from six counties so

[15] *See* U.S. Const. art. VI, cl. 2.

as to increase substantially the likelihood that votes cast might never be counted, on the basis of nothing more than the serendipity of geography and the accident of timing, could be considered anything other than arbitrary and irrational.

The right to vote is a "fundamental political right" that is "preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement must be carefully and meticulously scrutinized." *Harper v. Virginia State Board of Elections,* 383 U.S. at 667. The district court sidestepped these core precedents, declining to apply strict scrutiny on the ground that "marginal deviations from precise vote equality, and minor burdens on the right to vote, will be subject to rational basis review." Order, ER 213. Yet the "deviations" at issue – which, according to expert projections will deprive some 40,000 voters in six counties of the right to vote, and will disenfranchise voters in punchcard counties at no less than two and a half times the rate of other counties – cannot fairly be dismissed as "marginal," and may in fact prove decisive. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders,* 376 U.S. at 17. The district

court thus abused its discretion a second time in adopting a rational basis standard notwithstanding evidence of a direct abridgement of the fundamental right to vote.[16]

The Secretary of State's insistence on conducting a flawed election on October 7 notwithstanding the certain disenfranchisement of tens of thousands of voters cannot withstand strict scrutiny. Indeed, the arbitrary discrimination against voters in six California counties cannot survive even the most lenient review, as the district court itself acknowledged in denying the Secretary's motion for judgment on the pleadings in the *Common Cause* litigation. The court tied itself in knots, once again, by treating the October 7 date as immovable, and evaluating plaintiffs' challenge against the backdrop of that supposedly fixed fact. Thus, the court opined: "The State clearly has a compelling interest in not

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[16]The district court also asserted that *Bush v. Gore* supported the application of rational basis review. Order, ER 213. But the Court never announced the level of scrutiny it was using, though the four cases cited in support of its ruling all relied on strict scrutiny. 531 U.S. at 105, 107. Even if the district court were correct in its surmise that the Court applied rational basis review, that does not mean that the Court rejected the use of strict scrutiny. Instead, it shows only that the Court thought it unnecessary to apply heightened scrutiny, because Florida's procedure, as here, failed even rational basis review. In other cases, too, the Court has found that laws fail rational basis review and that this obviates the need for deciding whether heightened scrutiny applies. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996) (invaliding Colorado Amendment 2, which repealed laws protecting gays and lesbians from discrimination, as failing rational basis review, without considering whether heightened scrutiny is appropriate for sexual orientation discrimination).

disenfranchising the voters of at least six counties, and the limited use of punch-card voting in this election is a narrowly-tailored means to achieve this end." Order, at 19. But this reasoning is entirely circular: only by taking off the table the question whether the election must be conducted on October 7 – precisely the issue at the heart of this case – can the question be framed as the district court framed it, i.e., whether to disenfranchise some, or all, voters in six counties.

Properly posed, the question is whether it is necessary, or even rational, to conduct a discriminatory election on October 7, when the defective machinery responsible for widespread disenfranchisement will be replaced within a short period of time. In *Black v. McGuffage*, the federal district court for the Northern District of Illinois correctly concluded that a similar allegation that punchcard machines caused some voters to have a "significantly different probabilit[y] of having their votes counted" stated a claim for violation of Equal Protection Clause, regardless of the standard applied. 209 F. Supp. 2d at 897-99.

2. The Use of Punchcard Machines in the October 7, 2003 Election Would Disproportionately Disenfranchise Minority Voters in Violation of Section 2 of the Voting Rights Act

If the election proceeds as scheduled on October 7, 2003, the votes of minority citizens will be denied at a much greater rate than those of white citizens, as a direct result of the obsolete and defective punch card equipment slated for

decertification on March 1, 2004. The causal connection between pre-scored punch card machines and the denial of minority votes is not simply matter of chance or conjecture, as the Secretary would have it. It is a matter of fact, one established beyond any reasonable doubt by the overwhelming evidence that plaintiffs submitted in support of their motion below. This showing more than suffices to establish the "causal connection" required for a Section 2 claim under this Court's recent opinion in *Farrakhan v. Washington*, 2003 WL 21715349 (9th Cir. July 25, 2003). The district court's contrary conclusion is at odds with *Farrakhan*, a decision it does not even acknowledge, let alone distinguish, as well as with the evidence of punchcard machines' dramatic and dual-fisted impact upon the votes of racial minorities.

As this Court held in *Farrakhan*, the gravamen of a Section 2 claim is that a challenged voting practice "*results in* vote denial or vote dilution on account of race." *Id.*, at *4 (emphasis added). Discriminatory intent or animus is not required under this "results test." *Gingles,* 478 U.S. at 35. What *is* required is "evidence of 'a causal connection between the challenged voting practice and a prohibited discriminatory result.'" *Farrakhan,* at *4 (quoting *Smith v. Salt River Project Agricultural Improvement and Power District*., 109 F.3d 586, 595 (9th Cir. 1997). In this case, there is simply no question that the use of punchcard voting machines

has a "causal connection" to the disproportionate denial of minority votes by citizens who must use these machines. *See, e.g., Roberts v. Wamser,* 679 F. Supp. 1513 (E.D. Mo. 1987) (granting injunctive relief on basis of Section 2 violation caused by use of punchcard voting systems), *rev'd on other grounds,* 883 F.2d 617 (8th Cir. 1989).

There are two fatal flaws in the district court's analysis of the Section 2 issue. First, the district court significantly understated, both in degree and in kind, the disparate impact on minority voters arising from the use of punchcard machines. This disparate impact results not only from the fact that minorities disproportionately reside in punchcard counties, but also from the fact that *even within those counties* punchcard machines discard minority votes at a rate much greater – in fact, over three times greater – than those of whites. Second, the district court's ruling conflicts with this Court's holding in *Farrakhan*, which rejects exactly the sort of analysis that the district court applied here – namely, giving talismanic significance to the twelve "factors" contained in the 1982 Senate Report. As we explain, such an approach is especially inappropriate in cases like this one, where there is *direct* evidence of a causal connection between the challenged practice and the denial of minority votes. If the district court's ruling survives, it will have the effect of doing what this Court's recent opinion in

Farrakhan sought to avoid: engrafting an "intent" requirement onto a statute that was designed to eliminate precisely this requirement. *See Farrakhan*, at *8.

a. Plaintiff's Section 2 claim arises from *both* the disproportionate number of minorities in punchcard counties *and* the disparate impact of punchcard machines on minorities within those counties.

The Voting Rights Act of 1965 ("VRA") is "a broad remedial statute, which the Supreme Court has emphasized 'should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination.'" *Black*, 209 F. Supp. 2d at 896 (quoting *Chisom v. Romer*, 501 U.S. 380, 403 (1991)). In 1982, Congress amended Section 2 of the VRA, 42 U.S.C. §1973, to prohibit "*any* . . . practices or procedures which result in the denial or abridgement of the right to vote of any citizen who is a member of a protected class of racial and language minorities." *Gingles,* 478 U.S at 43 (emphasis in original).

Plaintiffs' Section 2 claim differs from their Fourteenth Amendment claim in that it depends upon showing that members of particular racial groups are disproportionately denied the right to have their votes counted as a result of the use of punchcard machines in the forthcoming election. A Section 2 claim, unlike some equal protection claims, does not require proof of discriminatory *intent*; it is sufficient to show that a "practice" or "procedure" has the *effect* of disadvantaging

minority voters.[17] A plaintiff may prevail on a Section 2 claim by showing that the challenged practice "*results in* the denial or abridgement" of minorities' votes. *See*, *e.g., Chisom*, 501 U.S. at 393 (emphasis in original).

In this case, there are two distinct ways in which punchcard voting machines result in the disproportionate denial of minority votes. First, people of color are more likely to reside in the counties that have not yet replaced their punchcard voting machines. People of color constitute 46 percent of punchcard counties, but only 32 percent of counties using other, more reliable voting systems. Brady Dec. ¶ 10, ER 162.[18] And, as set forth in detail above, the uncounted vote rate for punchcard machines is more than twice that of any other

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[17] Section 2(b) provides that a violation of Section 2(a) is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected] class . . . in that its member have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

[18] African Americans, Asian Americans, and Latinos are all more likely to reside in punchcard counties than are whites. The six punchcard counties collectively have 9 percent African Americans, 11 percent Asian Americans, and 27 percent Latinos. Brady Dec. ¶ 39. ER 170. In contrast, the non-punchcard counties have only 5 percent African Americans, 8 percent Asian Americans, and 19 percent Latinos. *Id.*

machine used in the State of California.[19] As Dr. Brady explains, the possibility that these variations occurred by chance, rather than as the result of punchcards, is eliminated by evidence showing that the residual vote rate declines dramatically for those counties that convert from punchcards to other systems. *Id.,* ¶¶ 23, 26, ER 165, 167.[20]

The district court acknowledged the evidence showing that minorities are significantly more likely to live in punchcard counties than are whites. Order, at 21 (noting plaintiffs' contention that "the affected counties have average minority populations that are 15% larger than counties using other voting technologies."). But contrary to the district court's order, that is not the only respect – or even the most significant one – in which punchcards disproportionately deny minority votes.

As Dr. Brady explains, even if one looks only *within* counties using punchcard machines, it is clear that these systems have a disproportionate impact on minority voters. In particular, within punchcard counties, these machines result

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[19]In the 2000 elections, for example, the residual vote rate for voters using punchcard systems was 2.23 percent; no other system had a higher average residual vote rate than 0.89 percent. Brady Dec. ¶ 18, ER 164, & Exh. 1.

[20]Dr. Brady estimates the likelihood of the differential performance of punchcard and optical scan systems occurring by chance as one in 10^{38}, or 1 in 100,000,000,000,000,000,000,000,000,000,000,000,000.

in a residual vote rate for minority voters that is over *three times* that of white voters. In counties that used punchcards in 2000, for example, the residual vote rate for 100 percent minority tracts was approximately 4.0 percent; on the other hand, the residual vote rate for zero percent minority tracts was only about 1.3 percent. Brady Dec. ¶ 11, ER 163. Dr. Brady further found that counties that convert from punchcards to other systems significantly reduce the disparity in uncounted votes between minorities and whites. *Id.,* ¶¶ 24-26, ER 166 (replacing punchcards reduced the disparity by an average of 1.90 percent). Dr. Brady concludes that "minorities have much higher residual vote rates than non-minorities in punchcard counties" (*id.* ¶ 39, ER 171), and that "replacement of punchcards with other systems substantially reduced this relationship between residual votes and minority voters." *Id.* ¶ 35, ER 169. Nowhere does the district court acknowledge or even attempt to deal with this evidence.

The significance of Dr. Brady's uncontroverted findings regarding the effect of punchcard machines on minority voters cannot be overstated. These machines are the functional equivalent of an ATM that charges a $1.30 fee for white users, but a $4.00 fee for minorities. Indeed, the effect is even more egregious, in that it is not simply money but the fundamental right to vote that is denied to minorities at a much higher rate than whites. Nor is there any serious question that the

disparity in uncounted votes results from the use of the machines. By examining the residual vote data alongside data showing the improvements that have occurred when counties convert from punchcards to other systems, Dr. Brady shows that the possibility of these improvements occurring by chance to be microscopic. *Id.,* ¶¶ 24-26, ER 166.[21]

In two distinct ways, then, the use of punchcard machines has a racially disparate impact on minority voters. African Americans, Asian Americans, and Latinos are significantly more likely to reside in those counties that use these defective machines. And even within those counties, punchcard machines "swallow" minority votes at a much higher rate than those of whites. Finally, as Dr. Brady demonstrates, these disparities are significantly reduced by conversion to other systems, in a way that cannot plausibly be explained by any other variable.

b. The district court's analysis conflicts with *Farrakhan*, which establishes that the "causal connection" between the challenged practice and the denial of minority votes – a fact amply demonstrated here – is determinative under Section 2

As explained above, a Section 2 claim does not require proof of discriminatory *intent*; it is sufficient to show that a "practice" or "procedure" has

[21]For example, Dr. Brady demonstrates that the likelihood of Fresno County's reduction in uncounted votes among minority voters occurring by chance is "less than one in a trillion." Brady Dec. ¶ 24, ER 166.

the *effect* of disadvantaging minority voters. 42 U.S.C. § 1973(b). In this case, it is abundantly clear that the use of punchcard machines in six California counties results in the disproportionate denial of African American, Asian American, and Latino votes.

The district court nevertheless concluded that "[t]here is little about the violation alleged here that would suggest it is of the type contemplated by Section 2 of the Voting Rights Act." Order, at 21, ER 218. It reasoned that the Senate Report accompanying the 1982 amendments listed a number of factors that may be used show a violation of Section 2 and that all but one of these factors was absent here. *Id.* ("Indeed, of the approximately dozen relevant factors contained in the Senate Report and Section 2 itself, Plaintiffs cite but one (from the Senate Report): that the State's justification for use of the challenged practice is 'tenuous.'").[22] The district court therefore found that plaintiffs had failed to show a likelihood of prevailing on their Section 2 claim.

The district court's reasoning and conclusion are in direct conflict with this

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[22]As the court noted: "[T]he Senate Report accompanying the 1982 amendments to the Voting Rights Act lists a number of additional factors that may inform the Section 2 analysis. . . . These include: a history of official discrimination in the jurisdiction; racially polarized voting; the lingering effects of prior discrimination; a lack of electoral success among minority candidates; the comparative unresponsiveness of elected officials to the needs of minorities; and whether the policy justification for the alleged practice is 'tenuous.'" Order, ER 217.

Court's opinion in *Farrakhan*. As *Farrakhan* explains, the factors identified in the Senate Report are not elements that *must* be demonstrated to make out a claim, but are instead "'typical factors' that *may be relevant* in analyzing whether Section 2 has been violated." *Farrakhan,* at *3 (emphasis added). This Court simply could not have been more emphatic on this point:

> Congress did not intend this list to be comprehensive or exclusive, nor did it intend 'any particular number of factors to be proved, or that a majority of them point one way or the other.

Id. at *4; *see also Gingles,* 478 U.S. at 50 n. 15 (factors listed in the Senate Report "are supportive of, but *not essential to*, a minority voter's claim") (emphasis in original); *Gomez v. City of Watsonville,* 863 F.2d 1407, 1419 (9th Cir. 1988) (factors not intended as "a mandatory seven-pronged test" but as " a guide to illustrate some of the variables that should be considered by the court").

Congress knew that it could not possibly list all of the types of election practices that might have a racially discriminatory impact. It therefore provided a statute that clearly and unequivocally prohibits election practices resulting in a discriminatory impact, knowing that application of the law would be "inherently fact-based and localized." *Smith v. Salt River Project Agricultural Improvement and Power District,* 109 F.3d 586, 591 (9th Cir. 1997). Contrary to the district court's conclusion, then, it is irrelevant that the legislative history does not

expressly mention voting machines with a racially disparate impact.

The factors set forth in the Senate Report may of course be extremely relevant in cases where it is ambiguous whether a challenged practice is actually *causing* the dilution of minority votes. For example, where plaintiffs claim that redistricting decisions are causally related to the disproportionately small number of minority candidates elected to office, factors such as "racial polarization," the "history of official discrimination," and "political campaigns characterized by overt or subtle racial appeals" may well be important and even determinative. In such a case, these factors are likely to shed light on whether the disparate impact is caused by the challenged practice, or "is better explained by other factors independent of race." *Farrakhan*, at *7 (quoting *Salt River*, 109 F.3d at 591).

There is no need to rely on those factors, however, where the uncontroverted evidence conclusively demonstrates that the challenged practice (i.e., the use of punchcard machines) causes the disproportionate denial of minority votes. Application of the "totality of circumstances" test set forth in *Farrakhan* and its predecessor cases is far more straightforward here than, for example, in a redistricting or at-large election case.[23]

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[23]This is further demonstrated by *Gingles*, in which the Court emphasized that the Senate Report factors "will often be pertinent to *certain types* of § 2 violations, *particularly to vote dilution claims* . . . ." 478 U.S. at 45 (emphasis added). This case, however, is not a vote *dilution* case, but a vote *denial* case. *See*

If allowed to stand, the district court's order would have the effect of superimposing an intent requirement onto Section 2, in direct conflict with *Farrakhan* and Congress's core purpose in amending the VRA. While the district court recites the "results test" embodied in these amendments, its analysis expressly hinges on the absence of discriminatory intent in this case. For example, the district court relies on the fact that Plaintiffs have not "argued that historical discrimination or present animus, together with the lingering effects of prior discrimination" is at work here. Order, ER 218. It further relies on the fact that plaintiffs do not "even allege that punch-card machines are *intended* to limit" minority participation. *Id.* (emphasis added).[24] As in *Farrakhan*, the standard applied by the district court "would effectively read an intent requirement back into the VRA." *Farrakhan,* at *8.

Farrakhan v. Locke, 987 F. Supp. 1304, 1311 (E.D. Wash. 1997) ("The Senate Report factors are mostly limited in relevance to claims for vote dilution . . ."). Where each person has an equal opportunity to vote and have his or her vote counted, consideration of other circumstances may be necessary to show that the voting strength of a particular group has been diminished. Here, however, plaintiffs do not simply claim that their votes have been diluted; they instead claim that minority citizens will be denied their right to vote at a much higher rate if the election proceeds with punchcard machines.

[24]The court also states that plaintiffs do not allege that punchcard machines "have the effect of limiting the ability of minority voters to participate effectively as members of the electorate." Order, ER 218. On this point, the court is simply mistaken. In fact, plaintiffs have not only made such an allegation, FAC ¶¶ 6, 24, 25, 38, 39; they have also proven this allegation through Dr. Brady's findings.

Indeed, the standard applied by the district court in this case is even *more restrictive* than the standard applied by the lower court, and rejected by this Court, in *Farrakhan.* As this Court's opinion notes, the district court in *Farrakhan* had required plaintiffs to show that the challenged practice was "either 'motivated by racial animus, or that is operation *by itself* has a discriminatory effect.'" *Id.*, at *5. Even if this impermissibly high standard were applied to the instant case, it is apparent that it would be satisfied by the evidence that plaintiffs have adduced. Dr. Brady's statistical evidence demonstrates that the use of punchcard machines *by itself* has a discriminatory effect on minority voters. Accordingly, the standard actually applied by the district court in this case is even more stringent – and more clearly at odds with Section 2's purpose – than the one decisively rejected by this Court in *Farrakhan.*

The district court therefore erred as a matter of law in concluding that Plaintiffs have failed to show a Section 2 violation. Had the correct standard been applied, the district court would have been compelled to conclude that plaintiffs were likely to prevail on their Voting Rights Act claim. The evidence of record plainly demonstrates a causal connection between punchcard voting machines and the disproportionate denial of minority votes.

B. Plaintiffs Will Suffer Irreparable Injury Absent a Preliminary Injunction

The "[a]bridgement or dilution of a right so fundamental as the right to vote constitutes irreparable injury." *See, e.g., Cardona v. Oakland Unified School Dist.,* 785 F.Supp. 837, 840 (N.D. Cal. 1982). Those whose votes are not counted by the punchcard machines are irreparably denied their right to vote and to have an equal say in the choices facing the electorate on October 7. There is no post-election remedy for this violation.

Indeed, the district court expressly acknowledged that plaintiffs would be irreparably injured without an injunction. The court stated: "[A]s the Court cannot envision an effective remedy that would be available to Plaintiffs after the votes have been cast, it assumes for purposes of this analysis that the alleged injury would be irreparable." Order, ER 220. Plaintiffs concur.

C. The public interest will be served by an injunction

In deciding whether to grant equitable relief, a court must consider whether the public interest would be served by an injunction. *See, e.g., Cano v. Davis,* 191 F.Supp.2d 1135, 1139 (C.D. Cal. 2001) (three-judge court). There can be no doubt that the district court got it right the first time, during the prior litigation, when it declared it "self-evident that replacing voting systems that deprive individuals of the right to vote is clearly in the public interest." *Common Cause II,*

213 F.Supp.2d at 1113. One measure of this public interest is that, unvindicated, the injury necessarily suffered is irreparable. And it is surely the case that an election known in advance to compel voters in certain counties, disproportionately minorities, to use machines decertified as inaccurate and unreliable, guaranteed to discard tens of thousands of votes, is "not well calculated to sustain the confidence that citizens must have in the outcome of elections." *Bush,* 531 U.S. at 109.[25] The question this case presents, therefore, is whether such a public interest in the integrity of an election to decide the fate of the state's highest official, and of two initiatives to amend the state constitution on matters of great importance, further supports a brief postponement of the votes, if necessary, to prevent arbitrary and racially disproportionate disenfranchisement of tens of thousands of voters, or whether the public interest instead favors the state's interest in conducting those votes on the scheduled date.

The district court's somewhat discursive discussion of the public interest touched on several issues. First, the court seemingly questioned its own authority

[25] *See also Clark,* 500 U.S. at 653-54 ("Voters may be more confused and inclined to avoid the polls when an election is held in conceded violation of federal law."); *United States v. Berks County, Pennsylvania,* 250 F. Supp. 2d 525, 540 (E.D. Pa. 2003) ("[D]enial of equal access to the electoral process discourages future participation by voeters").

to delay an election.[26] Order, ER 220-222. Yet, there is no doubt that a federal court has the power to demand that constitutionally adequate voting machines be used, and to delay an election, if necessary, to achieve that end. The Supreme Court has expressly stated: "If time presses too seriously, the District Court has the power appropriately to extend the time limitations imposed by state law." *Sixty-Seventh Minnesota State Senate v. Beens,* 406 U.S. 187, 201 (1972).

In fact, the Supreme Court repeatedly has approved delaying elections when necessary to ensure compliance with the Voting Rights Act. *See, e.g., Lopez v. Monterey County, California*, 519 U.S. 9, 20, 22 (1996) (reversing failure to enjoin California county election even though "simply enjoining the elections would leave the County without a judicial election system," and holding that "[i]f a voting change subject to § 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change."); *Clark v. Roemer*, 500 U.S. 646, 645-55 (1991), ("[t]he District Court should have enjoined the elections."). Other courts have likewise enjoined elections and election procedures, including, most recently, an order from Judge Jeremy Fogel in the Northern District of California on Friday, August 15, 2003, that "Monterey

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[26] It is not altogether clear how this question bears on the public interest inquiry, but as the district court considered limitations on its own authority in this context, plaintiffs will as well.

County is restrained from mailing absentee ballots to overseas voters registered to vote in Monterey County until Section 5 preclearance has been obtained or until further order of the Court." *Salazar v. Monterey County,* No. C-03-03584 JF (N.D. Cal. Aug. 15, 2003), Order to Show Cause Re Preliminary Injunction, at 4. *See also Haith v. Martin*, 618 F. Supp. 410, 414 (E.D. N.C. 1985) (enjoining election of superior court judges in the absence of preclearance for changed election procedures), *aff'd without opinion*, 477 U.S. 901 (1986); *Garza v. County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990) (noting that "a motions panel entered an order which had the effect of staying the county's election procedure pending our decision").[27]

The district court next suggested that the public interest weighed against an injunction because of the "possibility of corrective relief at a later date." Order, at

[27] The district court rejected this authority, observing that the cases involved Section 5 and not Section 2 of the Voting Rights Act. Order, ER 221. This is a distinction without a difference. Nothing in the Voting Rights Act supports allowing courts to delay elections pursuant to Section 5, but not Section 2. Nor is there any limit on a court's authority to order such a remedy when necessary to prevent a constitutional violation. The district court insisted that Section 5 cases are different because they "present[] a single, clear-cut issue." *Id*., ER 221 n.6. But this case also presents a single, clear-cut issue: whether the use of punchcard voting machines in the October 2003 election violates equal protection or the Voting Rights Act.

25 (citations omitted).[28] The court elaborated: "[T]he allegedly unlawful use of punch-card balloting is being remedied pursuant to the *Common Cause* Consent Decree," and thus a "remedy" will be available even in the absence of injunctive relief. *Id.* at 26. But this assertion only underscores the district court's improper framing of the question presented: the issue in *this* case is not whether punchcards will be replaced at a later date, but whether their use on October 7 will violate the rights of voters to be free from geographical and racial discrimination. As the court previously and correctly apprehended in acknowledging that plaintiffs would be irreparably injured absent an injunction, there is simply no post-election remedy for the violations at issue.

Finally, the court placed enormous weight on the provision of the California Constitution providing for recall elections to take place within 80 days of their certification. In fact, so sacrosanct was that provision in the court's view, that it declined even to contemplate the possibility that the state-law provision regarding dates might yield to the federal demands of equality, insisting instead that "if [the requested] relief were ordered, the State would be in an untenable position: it would be forced either to conduct the election outside the time frame required by the California Constitution, or to cancel the election to avoid that predicament."

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[28] *But see* Order, ER 220 ("[T]he Court cannot envision an effective remedy that would be available to Plaintiffs after the votes have been cast . . .").

Order, ER 223. This was wrong. First, there is nothing "untenable" about requiring a state to amend or disregard one of its laws in order to comply with the Constitution or federal statutes; indeed, this is the very essence of constitutional litigation and the Supremacy Clause. Moreover, the issue in dispute is not, as the court's statement suggests, whether there should be a flawed election or no election at all, but whether a delay in the scheduled election is necessary to achieve the constitutional and statutory demands of equality that a democracy demands to legitimate its electoral process.

California's constitutional provision governing the timing of recall elections is concededly relevant to the public interest inquiry as a reflection of the state's interest in a prompt resolution of the governor's status, but it is in no way dispositive, and it in no way bears on the separate question of whether the two initiatives must be included on the October 7 ballot. Indeed, there is no state constitutional or statutory imperative requiring the scheduling of the ballot initiatives within this time frame.[29] The question for this Court, then, is whether California's interest in a swift recall process should take precedence over

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[29] Both initiatives were originally scheduled for inclusion on the March 2004 ballot, as provided by state law. Only the fortuitous qualification of the recall procedure served to advance the vote on the initiatives to October, and no state constitutional provision would be offended by their postponement to their originally scheduled date.

plaintiffs' interest in equal treatment, and whether there is *any* justification in conducting a vote on the initiatives, particularly in view of the racial character of Proposition 54. Plaintiffs acknowledge that in an ordinary, regularly scheduled election, the state would have additional interests that would likely prove decisive – namely, in having elected officials rather than empty government offices or judicially imposed holdovers. But those interests are absent here, and plaintiffs submit that a brief postponement of this extraordinary election in the interest of equality is squarely within the public interest.

Plaintiffs do not deny that delaying an election is an extraordinary remedy. But it is an essential remedy, which serves the public interest, when the alternative is an election in which it is known in advance that tens of thousands of voters will be systematically and disproportionately disenfranchised.

CONCLUSION

The issue in this appeal is whether an electoral train wreck – one that will make Florida's 2000 election look fair and orderly by comparison – must be avoided. If the recall and Proposition election proceeds on October 7, 2003 as now scheduled, we know for a fact – as, of course, do the citizens themselves – that citizens in the six California counties that still use punchcard machines will have their votes discarded at a rate more than twice that of citizens in other

counties. Worse still, we know – as do they – that citizens of color will be hit with a double deprivation, both because they are more likely to reside in counties with obsolete and defective equipment and because, within counties using that equipment, their votes are discarded at a much higher rate than those of whites. Given the unique and unprecedented features of this election, it is highly likely that these differences will be determinative.

This Court should reverse the district court and enjoin the Secretary from conducting the recall and Proposition election until punchcard machines have been replaced.

DATED: August __, 2003 Respectfully submitted,

By: _____
Mark D. Rosenbaum

DATED: August __, 2003 Respectfully submitted,

By: _____
Ben Wizner

DATED: August __, 2003 Respectfully submitted,

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Laurence Tribe