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12 **UNITED STATES DISTRICT COURT**
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
14 **WESTERN DIVISION**

15 SOUTHWEST VOTER)
REGISTRATION EDUCATION)
16 PROJECT; SOUTHERN)
CHRISTIAN LEADERSHIP)
17 CONFERENCE OF GREATER LOS)
ANGELES; and NATIONAL)
18 ASSOCIATION FOR THE)
ADVANCEMENT OF COLORED)
19 PEOPLE, CALIFORNIA STATE)
CONFERENCE OF BRANCHES,)

20 Plaintiffs,

21 vs.

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

24 Defendant.

Case No. CV 03-5715 SVW RZx

PLAINTIFFS' REPLY BRIEF

Date: August 18, 2003

Time: 1:30 p.m.

Ctrm: 6

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1 **I. INTRODUCTORY STATEMENT**

2 “A desire for speed is not a general excuse for ignoring equal protection
3 guarantees.” *Bush v. Gore*, 531 U.S. 98, 108 (2000). The defendant (“Secretary”)
4 and *amicus curiae* (“Costa”) seek to prevent having an election that complies with
5 equal protection on the important issue of whether the Governor of California
6 should be recalled and on two significant ballot initiatives. The Secretary and
7 Costa repeatedly mischaracterize plaintiffs’ suit as seeking to “prevent” the recall
8 election. Memorandum of Points and Authorities of Amicus Curiae Ted Costa In
9 Opposition To Application for Temporary Restraining Order (“Costa Br.”) 1-3.
10 Quite the contrary, plaintiffs seek only to ensure that the election occur in a manner
11 that meets the requirements of the Fourteenth Amendment’s equal protection
12 clause.¹

13 The Secretary, and especially Costa, seek to denigrate the Supreme Court’s
14 decision in *Bush v. Gore*, relegating its consideration to a footnote and dismissing it
15 as of no precedential value. But *Bush v. Gore* powerfully demonstrates that the
16 judiciary must be involved in the election process, even when it means that a court
17 essentially will decide a presidential election, to ensure that the requirements of
18

19
20
21 ¹Plaintiffs’ complaint requested that the election be postponed until March
22 2004 because that is when new voting machines are scheduled to be in place.
23 However, if the Secretary can arrange for these machines by October 7, then this
24 lawsuit will not require any postponement of the election. If constitutionally
25 adequate machines cannot be ready by October 7 but can be installed before
26 March, the election need not be postponed until March. Plaintiffs seek only that the
27 election be held in a constitutionally adequate manner and not that the election be
28 postponed for even a day beyond when that can occur. Plaintiffs are submitting a
revised proposed order to make clear that they do not seek an order to delay the
election to any particular date, only to ensure that no voters be forced to use
punch-card ballots.

1 equal protection are met.² The Costa *amicus* brief ignores that seven Justices in
2 *Bush v. Gore* found that inequalities within Florida in how votes would be counted
3 violated equal protection. The Court explained that it was unconstitutional to have
4 a significant variation as to whether a ballot would be counted depending on the
5 accident of where a person lived. That is exactly the type of constitutional claim
6 raised by plaintiffs here.

7 Plaintiffs' constitutional claim is based entirely on the principle of equal
8 protection embodied in cases such as *Harper v. Virginia Bd. of Elections*, 383
9 U.S. 663, 665 (1966), *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Bush v. Gore*.
10 As the Court explained in *Bush v. Gore*, “[h]aving once granted the right to vote on
11 equal terms, the State may not, by later arbitrary and disparate treatment, value one
12 person’s vote over that of another.” 531 U.S. at 104-05. The much higher rate of
13 errors with punch-card machines in reading ballots – the reason that the state
14 decertified them – ensures that some residents in counties using those machines will
15 not have their voted counted at all. This violates equal protection by denying their
16 right to vote and also by arbitrarily treating them differently than voters who are
17 fortunate enough to vote with machines that do not have such an error rate.

18 The choice this case presents – whether to conduct an indisputably
19 discriminatory and almost certainly unconstitutional election on October 7, or to
20 postpone the election by no more than a few months to ensure that the votes of all
21 Californians are accorded equal weight and dignity – could hardly be more stark.

23
24 ²In fact, on Friday, August 15, 2003, a federal district court enjoined the state
25 of California from sending absentee ballots for the upcoming recall election and
26 announced that the court may delay the election because of the state’s failure to
27 comply with Section 5 of the Voting Rights Act, 42 U.S.C. §1973. *See* Maura
28 Dolan, “U.S. Judge May Put Recall Vote on Hold,” *Los Angeles Times*, August
16, 2003, A-1. This belies Costa’s suggestion that delaying the election is
unthinkable and its claim that the lawsuits concerning the recall are without merit.

1 The “substantial questions” raised by this case, questions “that could well affect
2 the outcome of the recall election” and of the critical Propositions that will share the
3 ballot, “should be resolved before the election, rather than after the election in the
4 event the recall is successful.” *Burton v. Shelley*, S117845 (Cal. Aug. 7, 2003)
5 (George, C.J., dissenting).

6 The Secretary does not – because he cannot – deny the validity of plaintiffs’
7 factual evidence concerning the vastly disparate error rates associated with various
8 voting technologies.³ Nor does he deny that these dismal disparities present an
9 equal protection issue of the highest magnitude. Instead, the Secretary offers well-
10 intentioned but feeble assurances that increased voter education will offset the
11 documented and irrefutable defects of punch-card voting systems. Def. Br. 11-12.
12 These promises should carry little weight, as there is positively no evidence that
13 voter error – as opposed to machine error – is a principal factor in punch-card
14 systems’ high error rates. If, as Dr. Brady explains, punch-card machines were an
15 adequate solution to the problems with punch-card machines, the Secretary surely
16 would have undertaken voter outreach and educational efforts long ago, rather than
17 acceding to the extraordinary and far more burdensome task of decertifying – and
18 replacing – all of the defective machines.

19 The Secretary asserts that the temporary restraining order sought by plaintiffs
20 – rather than the fatally flawed recall election scheduled for October 7 – would
21 disrupt the status quo. The opposite is true. Plaintiffs seek to maintain the status
22 quo by keeping everything as it is until constitutionally adequate voting machines
23 are in place. It is the Secretary who would irreparably damage the status quo by
24 conducting an extraordinary recall election whose outcome might well be

25
26 ³Costa does purport to challenge the accuracy of plaintiffs’ evidence. Mr.
27 Costa’s factual submissions are thoroughly and conclusively rebutted by Dr. Henry
28 Brady in a supplemental declaration filed herewith. *See* Supplemental Declaration
of Henry Brady (“Brady Supp. Decl.”).

1 determined by the discriminatory disenfranchisement of minority voters. After the
2 election is completed, nothing can be done to restore the right to vote to those
3 whose ballots have not been counted; nor is there any remedy a court can provide
4 if the inequalities in voting machines determine the outcome of the election.

5 The arguments in favor of postponing the votes on Propositions 53 and 54
6 are even more compelling, especially in light of the obvious implications to minority
7 voters of Proposition 54, the so-called Racial Privacy Initiative. Neither the
8 Secretary nor Costa offers *any* reason why voter consideration of those matters
9 should not be briefly delayed.

10 Costa's suggestion that "this Court can always intervene after the election,"
11 Costa Br. 2, in the event that predictable errors mar the result is an invitation to a
12 post-election judicial nightmare. When the Secretary's predecessor announced his
13 intent to decertify pre-scored punch-card voting mechanisms, he rightly proclaimed
14 that we must not "wait for a Florida-style election debacle to occur in California
15 before we replace archaic voting systems."⁴ That statement resonates all the more
16 powerfully on the eve of what may turn out to be an election fiasco of historic
17 proportions. This court should ensure that the Secretary's dire warning does not
18 become our imminent reality by ordering the postponement of the October 7
19 election until March 1, 2004 or such earlier time as the Secretary has replaced the
20 defective voting machines with technology that will not systematically and
21 disproportionately disenfranchise tens of thousands of California voters.

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24 **II. ARGUMENT**

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27 ⁴A copy of the news release in which the statement appears was attached to
28 Plaintiffs' Memorandum of Points and Authorities in Support of Ex Parte
Application for TRO as Exhibit 3.

1 **A. Plaintiffs’ Claims Are Not Precluded by *Res Judicata***

2 The principle of *res judicata* does not prohibit plaintiffs from challenging the
3 upcoming October 2003 election as violative of equal protection and the Voting
4 Rights Act. The fundamental flaw of similar arguments made by the Secretary and
5 Costa is in their contention that plaintiffs “conceded the constitutionality of punch-
6 card voting through February 2004” by agreeing to the consent decree entered by
7 this Court in *Common Cause v. Jones*. 213 F. Supp.2d 1110 (C.D. Cal. 2002).
8 *Contra* Costa Br. 9; Secretary of State Shelley’s Memorandum in Opposition To
9 Ex Parte Application For Temporary Restraining Order (“Def. Br.”) 8-9. Plaintiffs
10 no more conceded the constitutionality of denying citizens of some counties access
11 to reliable, non-punch-card voting machine technology in the November 2002
12 election than the U.S. Supreme Court deemed the continued operation of
13 segregated schools constitutional when it ordered in *Brown v. Board of Education*
14 *II*, 349 U.S. 294, 301 (1955), that schools must be desegregated with “all deliberate
15 speed” as opposed to immediately.

16 Plaintiffs never ceased asserting that the use of punch-card machines in some
17 California counties alongside the use in other counties of far superior voting
18 technology violated the Constitution. The Secretary himself conceded the
19 discriminatory nature of forcing voters in some counties to use punch card
20 machines when he agreed to decertify those machines.

21 Moreover, *res judicata* does not apply here because plaintiffs are bringing a
22 new and distinct claim that was not part of, and could not have been part of, the
23 earlier suit – the use of existing punch-card machines in the October 2003 election
24 will violate equal protection and the Voting Rights Act. *Res judicata* “prevents a
25 party from litigating in a subsequent action any matter that was a part of the same
26 claim or cause of action adjudicated in a prior action. These rules preclude from
27 litigation any part of the claim that *might* have been litigated.” Larry Teply & Ralph
28 Whitten, *Civil Procedure* 872 (1994) (emphasis in original). Obviously, the

1 challenge to the planned October 2003 election was not part of the earlier litigation.

2 *Res judicata* precludes relitigation of claims arising from the “same operative
3 nucleus of fact.” *See, e.g., Olmstead v. Citibank, NA*, 725 F.2d 627, 629 (11th
4 Cir. 1984); *Bank of India v. Trendi Sportswear*, 239 F.3d 428 (2d Cir. 2000). *Res*
5 *judicata* does not apply if there are facts which give rise to a new claim. *See, e.g.,*
6 *Curtis v. Citibank, NA*, 226 F.3d 133 (2d Cir. 2000); *Baker Group v. Burlington*
7 *N. & S.F. Ry.*, 228 F.3d 883 (8th Cir. 2000). This case is based entirely on new
8 facts – an unexpected election, with an unprecedented ballot – giving rise to this
9 new claim. No one could reasonably have foreseen the recall election. Indeed, this
10 is the first gubernatorial recall effort in history that has qualified for the California
11 ballot. Nor could anyone have foreseen the possibility of the Proposition 53 and
12 54's being on the ballot in October 2003. Under ordinary circumstances, those
13 initiatives would have been on the March 2004 ballot, the date of the next regularly
14 scheduled statewide election. Nor could anyone have anticipated the unique
15 circumstances posed by having voters choose among 135 candidates on a ballot
16 that will likely contain numerous separate punch-cards, as opposed to the single
17 punchcard used in almost every other election. Nor could anyone have foreseen
18 the consolidation of districts consolidated. The number of candidates on the recall
19 ballot is orders of magnitude different from those present in any race in 2002, or
20 likely to present in 2004. Dr. Brady makes clear that the unprecedented number of
21 candidates on the recall ballot greatly magnifies the likelihood of substantial
22 disparities between the residual vote rates for voters using obsolete punch-card
23 technology and other newer, accurate voting machines. Declaration of Henry E.
24 Brady ¶ 41. These new and unforeseen facts make claim preclusion inapplicable.
25 The constitutional and statutory problems posed by *this* ballot – the entire focus of
26 this lawsuit – were not part of the earlier lawsuit and could not have been raised

1 then.⁵

2 The inapplicability of *res judicata* here can be illustrated by a hypothetical in
3 which plaintiffs had entered into a consent decree with a school district in which the
4 district had agreed to integrate its school system by a within two years. Plaintiffs or
5 their privies would be barred from filing a second suit against the same defendants
6 to force them to integrate their schools within a year. Preclusion would not apply if,
7 a year after the decree was entered, the district opened a new school that no one
8 expected it to open and then allowed only white students to attend that school and
9 Plaintiffs challenged the operation of the new school on a segregated basis.

10 The Secretary and Costa attempt to use the fact that some of the plaintiffs
11 agreed to the consent decree with a March 2004 date for new machines as barring
12 this action. This is legally and factually incorrect. What plaintiffs recognized in
13 entering into the consent decree was that an appropriate remedy to the
14 constitutional violation was to decertify the punch-card machines and replace them
15 as soon as was feasible, thereby limiting their use to as few upcoming regularly
16 scheduled elections as possible. Plaintiffs chose the March 2004 date for obvious
17 reasons. First, plaintiffs believed that constitutionally adequate voting machines
18 could not be in place in time for the November 2002 election and that delaying that
19 election would have run afoul of the federal constitution's requirement that a
20 Congressional delegation be elected every two years. *See* U.S. CONST., Art. I, § 2
21 (“The House of Representatives shall be composed of Members chosen every
22 second Year by the People of the several States”). With respect to the state

23
24 ⁵In fact, even if this court found that *res judicata* applied, the unprecedented
25 ballot is a significant factual change warranting the setting aside of the earlier
26 judgment pursuant to Federal Rule of Civil Procedure 60(b). Indeed, the holding of
27 an additional election is itself a significant change in the facts warranting a
28 modification of the earlier judgment, if the court were to deem *res judicata*
applicable.

1 elections scheduled for November 2002, an injunction would have required the
2 Court to leave in place for almost two years state constitutional officers whose
3 terms had expired. Plaintiffs recognized that the balance of equities would not
4 support such a drastic remedy. Second, the March 2004 date would limit the use
5 of unconstitutional technology to only one more regularly scheduled statewide
6 election, since the next regularly scheduled statewide election after November 2002
7 was in March 2004.⁶

8 Indeed, this is the key flaw in the argument by the Secretary and Costa that
9 plaintiffs are barred from raising constitutional and statutory challenges to the
10 voting machines for the October 2003 election because plaintiffs were willing to
11 allow these machines to be used in November 2002.⁷ There is a world of
12

13 ⁶ Thus, there was no purpose in having the Court determine whether it was
14 feasible to replace the machines by, for example, December 31, 2003. Since there
15 was no foreseeable possibility of a statewide election after November 2002 and
16 before March 2004, any earlier date would simply have made the job of local
17 registrars more difficult without reducing the constitutional injury suffered by voters
18 forced to use obsolete technology.

19 ⁷ The Secretary's observation that plaintiffs failed to object to the January
20 2003 recall election in the City of South Gate reflects a core misapprehension of
21 plaintiffs' constitutional claim. Def. Br. 5. The disparities arising from a statewide
22 election in which some voters use modern technologies and others use more error-
23 prone technologies are absent in a local election in which all voters employ identical
24 machinery. For the same reason, Costa's insinuation that plaintiffs' failure to
25 oppose the local elections to be held in November 2003 demonstrates the
26 underlying partisan nature of plaintiffs' interest is baseless. Costa Br. 8.
27 Moreover, there was not even a reasonable possibility that the results of the South
28 Gate recall election would have been within the margin of error attributable to
punch-card voting machines because voters supported recall of each of the four
officials by a margin of about 8-1. Richard Marosi and Li Fellers, *Treasurer, 3
Council Allies Recalled, Voters in all 15 South Gate Precincts Overwhelmingly
Choose to End Tenure of Four Elected Officials*, Jan. 29, 2003.

1 difference between briefly postponing a recall election that might (but might not)
2 result in a governor’s early exit from office, and postponing a regularly scheduled
3 election to fill offices that otherwise would not be filled. The latter would give rise
4 to a full-fledged constitutional crisis, either by leaving vacancies in critical
5 government offices, or by extending the terms of government officials beyond the
6 constitutionally prescribed periods for which they were elected. Accordingly, the
7 Secretary and Costa are off the mark in observing that plaintiffs did not contest the
8 statewide elections of November 2002. Had those elections not gone forward,
9 California would have no delegation to the U.S. House of Representatives,⁸ and no
10 Governor, Lieutenant Governor, Attorney General, Controller, Treasurer, or
11 Secretary of State,⁹ as well as a vastly diminished Assembly and State Senate.¹⁰
12 Here, in sharp contrast, the question is not whether the people will be left without
13 elected officials, or governed by officials they did not elect, but whether an
14 extraordinary election to cut short a specified term of office should be briefly
15 postponed in order to ensure that the people’s “constitutionally protected right to
16 cast an equally weighted vote” is not violated. *Lucas v. 44th General Assembly*,
17 377 U.S. 713, 736 (1964).

18 **B. It Is Beyond Dispute That Plaintiffs Have Raised Claims of**
19 **Constitutional Magnitude**

20 The Secretary wisely declines to challenge the underlying validity of
21 plaintiffs’ constitutional concerns. The Secretary does not deny that using punch-
22 card machines in some counties denies citizens in those places of equal protection

23
24 ⁸Article I, Section 2 of the United States Constitution provides that “The
25 House of Representatives shall be composed of Members chosen every second
26 Year by the People of the several States.”

27 ⁹See Cal. Const. Art. V., §§ 2, 11.

28 ¹⁰See Cal. Const. Art. IV, § 2.

1 by ensuring that their votes have less chance of being counted than in places where
2 better voting machine technology is used. That, of course, is exactly why the
3 Secretary decertified punch-card machines. Thus, between the parties there is no
4 dispute that using punch-card voting machines presents serious constitutional
5 problems.

6 But *amicus* Costa has nothing but scorn for an equal protection challenge
7 grounded in election practices that result in a state’s “valu[ing] one person’s vote
8 over that of another” on the basis of nothing more than the accident of residency.
9 *Bush v. Gore*, 531 U.S. at 104 (citing *Harper v. Virginia Bd. of Elections*, 383
10 U.S. 663, 665 (1966)). Indeed, Costa’s brief reads as if the Supreme Court had
11 never decided *Bush v. Gore*, or that the opinion has no application to the inequities
12 caused by punch-card machines, and as if this Court had not previously
13 acknowledged the constitutional dimensions of the claims at issue. *Common*
14 *Cause v. Jones*, 213 F. Supp.2d 1110. His denigration of the fundamental premise
15 of plaintiffs’ complaint as “simple-minded,” Costa Br. at 12, ignores the fact that
16 seven U.S. Supreme Court Justices concluded that inequalities within a state
17 relating to the likelihood that votes will be counted violates equal protection.¹¹

18
19 ¹¹ Costa is equally off the mark in insisting that a heightened standard of
20 review should attach to this court’s consideration of whether to grant the TRO and
21 preliminary injunction. Costa cites to a Second Circuit case, *NAACP v. Town of*
22 *East Haven*, 70 F.3d 219, 223 (2d Cir. 1995), for the proposition that a plaintiff’s
23 burden of proof is higher when seeking to enjoin state government action. Costa
24 Br. 4. Despite passage of over twenty-five years since the Second Circuit
25 announced this rule, *see Medical Society of New York v. Toia*, 560 F.2d 535, 538
26 (2d Cir. 1977), not a single other circuit has adopted it. The Ninth Circuit has
27 consistently, frequently, and recently held that, regardless of the defendant’s
28 identity, when the balance of hardships tips in plaintiffs’ favor, they need show only
that serious questions are raised. *See, e.g., Brown v. California Dept. of*
Transportation, 321 F.3d 1217, 1221 (9th Cir. 2003) (challenge to policy of state
Department of Transportation); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d

1 Costa ignores the fact that *Bush v. Gore* is based on a long series of cases
2 proclaiming a fundamental right to equality in voting.

3 Plaintiffs’ constitutional claim is that the use of punch-card voting machines
4 in some counties, and far more accurate systems in other places, denies equal
5 protection in the recall election because those voting with punch-card systems have
6 a far greater chance that their votes will not be counted. As the Supreme Court
7 noted in *Harper v. Virginia Bd. of Elections*, 383 U.S. at 665: “[O]nce the
8 franchise is granted to the electorate, lines may not be drawn which are inconsistent
9 with the Equal Protection Clause of the Fourteenth Amendment.”

10 In many cases, the Supreme Court has recognized that equal protection is
11 violated by treating voters differently depending on where in a state they are
12 located. In *Gray v. Sanders*, 372 U.S. 368 (1963), the Court found that equal
13 protection was violated when a state accorded arbitrary and disparate treatment to
14 voters in different counties within a state. In *Bush v. Gore*, the Supreme Court
15 found that equal protection would be violated if uncounted votes in Florida were
16 counted without preset standards. The Court’s concern was that similarly situated
17 voters would be treated differently. Yet, that is exactly the effect of using the
18 current voting machines: two voters, in every other way identical, have very
19 different chances of having their votes counted if one lives in a county using punch-
20 card machines and the other uses a more reliable voting system.

21 Costa’s effort to diminish the significance of *Common Cause v. Jones* and
22 *Black v. McGuffage* to this case is unsuccessful. As this court is well aware, in
23 denying the Secretary’s motion for judgment on the pleadings in the *Common*
24 *Cause* litigation, the Court made clear that plaintiffs had stated viable equal
25 protection claims under *any* standard of review. *Common Cause v. Jones*, 213 F.
26 Supp. 2d 1106, 1109 (C.D. Cal. 2001) (“Even if the more lenient standard is

27 _____
28 1094, 1115 (9th Cir. 2002) (challenge to United States Forest Service rule).

1 ultimately applied by the Court, Plaintiff has alleged facts indicating that the
2 Secretary of State’s permission to counties to adopt either punch-card voting
3 procedures or more reliable procedures is unreasonable and discriminatory”).
4 *Contra* Costa Br. at 11.

5 Indeed, the implication of the very next statement in the Court’s opinion was
6 that the primary issue at summary judgment would not be the legal validity of
7 Plaintiffs’ claims, but whether record evidence supported the factual assertions
8 undergirding those claims. *See Common Cause*, 213 F.Supp. at 1109 (“The
9 parties may test their arguments regarding the evidentiary support for [the claim of
10 unreasonable and discriminatory treatment] on summary judgment).¹² Plaintiffs in
11 this case have submitted substantial evidence that punch-card voting machines have
12 much higher error rates than voting technology used in most counties in California.
13 *See* Brady Decl. The Secretary makes no effort to rebut that evidence. Dr. Henry
14 Brady, plaintiffs’ expert, convincingly rebuts the evidence submitted by Costa
15 purporting to show that punch-card machines work as well as other voting
16 machines. *See* Brady Supp. Decl.

17 In *Black v. McGuffage*, the district court also concluded that an allegation
18 that punch-card machines caused some voters to have a “significantly different
19 probabilit[y] of having their votes counted” compared with voters using other
20 technology stated a claim for violation of Equal Protection Clause, regardless of
21 whether strict scrutiny or rational basis applied. 209 F.Supp. at 897-99. In so
22 holding, the court rejected an argument, also made here by Costa, Costa Br. 12,
23

24 ¹² Defendants are correct that neither this Court in *Common Cause* nor the
25 judge in *Black* enjoined an election. That does not undercut the significance of the
26 court’s conclusion in both cases that if the plaintiffs supported the factual
27 allegations in their complaints, they had made out a violation of the Equal
28 Protection Clause. Moreover, Plaintiffs demonstrate, *see* Part II.D, *infra*, that
courts frequently enjoin elections where the circumstances warrant it.

1 n.4, that *Bush v. Gore* is a narrow holding that has no application to a claim
2 concerning the discriminatory effects of forcing some voters to use punch-card
3 machines while other voters use more accurate technology. *Black v. McGuffage*,
4 209 F.Supp. at 899 (“The Court is certainly mindful of the limited holding of *Bush*.
5 However, we believe that the situation presented by this case is sufficiently related
6 to the situation presented in *Bush* that the holding should be the same”).

7 Although plaintiffs in *Black* alleged that punch-card machines caused greater
8 disparities than Dr. Brady has demonstrated in California, *Black* is still apposite,
9 contrary to Costa’s assertion. *Contra Costa Br.* at 13-14. Nothing in the court’s
10 opinion suggested that there was some threshold of disparity necessary to prove an
11 Equal Protection violation. *Black*, 209 F.Supp.2d at 899 (noting that “voters in
12 some counties are less likely to have their votes counted than voters in other
13 counties in the same state in the same election for the same office. Similarly
14 situated persons are treated differently in an arbitrary manner”). *Black* certainly
15 never states that where one type of machine has an error rate that is twice as large
16 as all other types of voting machine, as Dr. Brady has demonstrated with respect to
17 punch-card machines in California, Brady Decl. ¶ 18, the unequal treatment is
18 insufficient to violate the Equal Protection Clause.

19 **C. Plaintiffs Are Likely to Prevail on the Merits of Their Claim**
20 **Under the Voting Rights Act**

21 Amicus Costa misconstrues and confuses the law applicable to Section 2
22 cases, contending that the use of a voting practice that disparately impacts minority
23 voters cannot establish a violation of Section 2 of the Voting Rights Act. *Costa Br.*
24 23. This is plainly untrue and flies in the face of relevant Section 2 precedent. In
25 addition, both Costa and the Secretary ignore the only federal lawsuit other than
26 *Common Cause v. Jones* in which punch card systems were alleged to violate
27 Section 2. *Black v. McGuffage*, 209 F. Supp.2d 890, 897 (N.D. Ill. 2002). In
28 *Black*, the district court ruled, above objections like those made by Costa and the

1 Secretary herein, that plaintiffs had made out a claim for a Section 2 violation based
2 on allegations that punch-card voting resulted in disenfranchisement of voters of
3 color. *Id.*

4 To prove that a voting practice or procedure violates Section 2 of the Voting
5 Rights Act, 42 U.S.C. § 1973, a plaintiff need show only that, based on the
6 “totality of the circumstances,” the challenged voting practice results in
7 discrimination on account of race. *Farrakhan v. Washington*, __ F.3d __, 2003
8 WL 21715349 (9th Cir. July 25, 2003). The challenged practice need not *by itself*
9 cause the discriminatory result; it may interact with social and historical conditions
10 to cause racial inequalities in voting opportunities. *Id.* at *7; *Thornburg v. Gingles*,
11 478 U.S. 30, 47 (1986). Courts interpret the Act in a manner that provides the
12 “broadest possible scope” in combating racial discrimination. *Chisom v. Roemer*,
13 501 U.S. 380, 403 (1991).

14 While a showing of a discriminatory result alone is not adequate to prove a
15 Section 2 violation, it is well-settled that a showing that the challenged practice
16 causes the discriminatory result is sufficient. *Farrakhan*, 2003 WL 21715349, *7;
17 *Smith v. Salt River Project Agricultural Improvement And Power District*, 109
18 F.3d 586, 595 (9th Cir. 1997). *Costa* argues that plaintiffs’ statistical evidence,
19 which shows close, repeated and numerically significant correlation between the use
20 of punch cards and resulting disenfranchisement of voters of color, does not prove
21 causation. This argument is specious and blind to the weight of plaintiffs’
22 evidence. *See Brady Supp. Decl.* ¶ 15.

23 Plaintiffs have provided far more than a “bare statistical showing” here.
24 *Costa Br. 24*. Plaintiffs have shown that, using a variety of proven and reliable
25 research methods, and accounting for other potential variables, punch-card voting
26 disproportionately decreases the chances that voters of color in California will have
27 their votes counted in the upcoming election. *See Brady Decl.* In addition, the
28 upcoming recall election, with consolidated precincts, drastically reduced and

1 newly changed polling places, and a ballot unprecedented in its potential to confuse
2 as a result of the sheer number of gubernatorial candidates, promises conditions
3 that will greatly exacerbate the problems already posed by punch-card systems. *Id.*
4 ¶ 41.

5 In addition, plaintiffs have shown that the Secretary's policy in using punch-
6 cards for the upcoming election despite having decertified the same machines only
7 seven months from now, is an unreasonable policy in light of the potential
8 disenfranchisement of a significant portion of California's electorate. Among the
9 factors typically considered in a "totality of the circumstances" analysis is whether
10 the policy underlying the state's use of the challenged practice or procedure is
11 "tenuous." *Farrakhan v. Washington*, 2003 WL 21715349, *4 (9th Cir. 2003). In
12 this case, using punch-card systems that cause racially disparate results is *at best*
13 tenuous.

14 Costa's attempt to make the Section 2 standard seem more onerous than it is
15 fails. First, as Costa concedes, in Section 2 cases, a showing of discriminatory
16 intent is entirely unnecessary. *Costa Br. 22; Thornburg v. Gingles*, 478 U.S. at 43
17 (Congress repudiated an intent test in adopting Section 2). Second, the cases cited
18 by Costa merely confirm that a causal link between the challenged practice and the
19 discriminatory result must be shown, which, as explained above, plaintiffs have
20 amply satisfied. *Costa Br. 23, citing Smith v. Salt River Agricultural*
21 *Improvement & Power District*, 109 F.3d 586, 595 (9th Cir. 1997); *Wesley v.*
22 *Collins*, 791 F.2d 1255 (6th Cir. 1986); *Ortiz v. City of Philadelphia*, 28 F.3d 306,
23 315 (3d Cir. 1994

24 Third, Costa's implication that the "totality of the circumstances" analysis in
25 this vote denial case requires plaintiffs to satisfy a three-part test applied to vote
26 dilution cases is contrary to law. *Costa Br. 24; see Thornburgh v. Gingles*, 478
27 U.S. at 48-51 (three-part test); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 550 (9th
28 Cir. 1998) (three-part test applies to vote dilution claims). As this court has already

1 held, although both vote-denial and vote-dilution cases are analyzed using a “totality
2 of the circumstances” analysis, a vote dilution case entails a three-part test, relating
3 to a minority group’s size and cohesiveness, that does not apply to vote denial
4 cases. *Common Cause v. Jones*, 213 F. Supp.2d at 1110. Recent Ninth Circuit
5 decisions have not changed this rule. *Farrakhan*, 2003 WL 21715349, *4, n.11.

6 In this case, plaintiffs challenge the state’s practice of using punch-card
7 systems in counties with predominantly voters of color, when those systems are
8 notoriously unreliable and cause disproportionately higher residual votes by voters
9 of color. By direct and sound statistical evidence on punch-cards, applied to the
10 “totality of the circumstances” surrounding the unusual impending election,
11 plaintiffs have made out a Section 2 violation.

12 **D. Amicus Costa’s Purported Factual Showing Does Not**
13 **Undermine the Basic Truth That Punchcard Machines Suffer**
14 **Unacceptably High Error Rates That Disproportionately Affect**
Voters of Color

15 Although the Secretary correctly does not challenge plaintiffs’ evidence
16 showing stark – and unconstitutional – disparities in error rates associated with pre-
17 scored punch-card machines in contrast to other voting technologies, Costa
18 attempts to defend the validity of use of pre-scored punch-card machines. Costa
19 Br. at 3, 15-18. Costa claims both that punch-card systems in California “record
20 voter preferences as accurately as other approved devices” and that postponing the
21 election until punch-card systems are no longer used may well diminish” the
22 accuracy of the count. Costa Br. at 3 (emphasis in original). Costa is wrong.¹³

23
24 ¹³It bears noting also that Mr. Costa’s thrice-repeated charge that voters of
25 color “tend” deliberately to undervote when “a member of their group” is not
26 among the candidates, Costa Br. at 3, 17, 21, is not supported even by the research
27 Costa purports to cite for the proposition. Brady Supp. Decl. ¶¶ 7-9. The
28 allegation that voters of color somehow seek to spoil elections by not participating
in them is a telling indicator of Costa’s dismissive view of the fundamental right to
vote shared by all and of Costa’s failure to appreciate the constitutional significance

1 Using multiple methods to test and bolster his conclusions, plaintiffs’ expert Dr.
2 Brady demonstrates devastating disparities between rates of residual votes from
3 punchcard machines and rates from other voting technologies. Brady Supp. Decl.
4 at ¶¶ 12-14, 21; Brady Decl. at ¶¶ 2, 16, 23, 44. In addition, after examining data
5 from the 2000 elections, when electronic voting systems were well-established, Dr.
6 Brady concludes that “optical scan and DREs appear to dominate all other systems
7 in terms of overall performance across all counties and especially in large counties.”
8 Brady Supp. Decl. at ¶ 22. Electronic voting systems are demonstrably preferable
9 to the “defective, obsolete or otherwise unacceptable”¹⁴ punch-card machines that
10 at least six counties would be forced to use if an election is held on October 7,
11 2003. Dr. Brady – whose professional credentials as the Class of 1941 Morton
12 Deutsch Professor of Political Science and Public Policy at the University of
13 California, Berkeley, and Director of the University’s Survey Research Center and
14 of UC DATA are unimpeachable – is so certain of the integrity of his conclusions
15 that “[b]ased on my twenty years of analyzing political science data, I am willing to
16 stake my reputation on the results reported in my declaration.” Brady Supp. Decl.
17 at ¶¶ 5, 28.

18 **E. Plaintiffs Are Entitled to Injunctive Relief**

19 The Secretary and Costa repeatedly mischaracterize the nature of the relief
20 sought by plaintiffs, insisting that plaintiffs aim to “halt” or “prevent” the recall
21

22 of holding an election that disenfranchise tens of thousands of voters, particularly
23 voters of color, each of whose vote comprises democracy. *Cf. Thornburgh v.*
24 *Gingles*, 478 U.S. 30, 62 (1986) (“the reasons black and white voters vote
25 differently have no relevance to the central inquiry” in cases relating to violations of
26 Section 2 of the Voting Rights Act).

27 ¹⁴A copy of the Secretary of State’s 2001 proclamation was attached as
28 Exhibit 2 to the opening papers in support of the application for the temporary
restraining order.

1 election. Costa Br. at 2, 6. Plaintiffs seek nothing of the sort, but rather to ensure
2 that the vote on the recall and Proposition measures be conducted employing
3 election machinery that complies with the demands of equal protection. At most,
4 plaintiffs seek briefly to delay the election until it can be conducted constitutionally,
5 though no legal barrier would prevent the Secretary from devoting additional
6 resources to speeding the transition from defective technology and conducting the
7 election prior March, 2004 – indeed, even on the scheduled date of October 7,
8 2003.¹⁵

9 Costa cites a line of authority in support of his contention that virtually any
10 delay of a regularly scheduled election constitutes unwarranted judicial interference,
11 but those cases merely underscore the exceptional and extraordinary nature of this
12 case. In the case of a regularly scheduled election, any judicially ordered delay
13 requires the court either to extend the expired terms of previously elected officials,
14 to leave elective offices vacant, or to appoint temporary successors. *See, e.g.,*
15 *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1362-63 (M.D. Ala. 1986);
16 *Banks v. Board of Education of the City of Peoria, School District No. 150*, 659
17 F. Supp. 394, 403 (C.D. Ill. 1987); *Chisom v. Roemer*, 853 F.2d 1186, 1190 (5th
18 Cir. 1988). Courts have understandably sought to avoid the risks of confusion and
19 chaos resulting from the cancellation of regular elections. *See, e.g., Ely v. Klarh*,
20 403 U.S. 108, 113 (1971) (affirming lower court’s denial of injunction); *Cardona v.*
21 *Oakland Unified School District*, 785 F. Supp. 837, 840 (N.D. Cal. 1992). Faced
22 with the unwelcome conflict between a constitutionally flawed regular election, and
23 no election whatsoever in the foreseeable future, most courts correctly permit

24
25 ¹⁵ In order to avoid any confusion, Plaintiffs are submitting an amended
26 proposed order that seeks to have the recall and initiative election held under
27 constitutional standards, rather than on any particular date. If the Secretary is able
28 to hold an election earlier than March 2004 in which punch-card machines will not
be used, plaintiffs would have no objection.

1 elections to proceed in order to ensure that critical government offices are filled and
2 the fundamental structure of democracy is preserved.

3 That conflict is not present here. *At most*, the recall election will be delayed
4 by a few months. No one will be denied the right to vote. No legally prescribed
5 term of office will expire. Most critically, voters in punch-card counties will not see
6 their votes unconstitutionally diluted, and minority voters will not be
7 disproportionately disenfranchised.

8 Although there are cases where courts have refused to enjoin elections,
9 Costa states the presumption exactly wrong by asserting that supposedly
10 “traditional ‘equitable principles’ . . . justify allowing a scheduled election to
11 proceed despite claims of illegality.” Costa Br. at 5 & n.2. In fact, courts must
12 enjoin – and repeatedly have enjoined – elections from proceeding when Section 5
13 of the Voting Rights Act has been violated: “If a voting change subject to § 5 has
14 not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting
15 implementation of the change.” *Lopez v. Monterey County, California*, 519 U.S.
16 9, 20, 22 (1996) (reversing failure to enjoin a California county election even though
17 “simply enjoining the elections would leave the County without a judicial election
18 system”). Far from relying on “traditional” equitable principles to override illegal
19 voting procedures by allowing elections to proceed, as amicus claims, in *Clark v.*
20 *Roemer*, 500 U.S. 646, 645-55 (1991), the Supreme Court stated the presumption
21 the other way but noted that “[a]n extreme circumstance might be present” if failure
22 to preclear election changes “is not drawn to the attention of the State until the eve
23 of the election and there are equitable principles that justify allowing the election to
24 proceed.” Because “[n]o such exigency exists here,” the *Clark* Court held that
25 “[t]he District Court should have enjoined the elections.” *Id.*

26 Other courts have likewise enjoined elections and election procedures,
27 including most recently an order from Judge Jeremy Fogel in the Northern District
28 of California on Friday, August 15, 2003, that “Monterey County is restrained from

1 mailing absentee ballots to overseas voters registered to vote in Monterey County
2 until Section 5 preclearance has been obtained or until further order of the Court.”
3 Order at 4. *See also, Haith v. Martin*, 618 F. Supp. 410, 414 (E.D. N.C. 1985)
4 (enjoining election of superior court judges in the absence of preclearance for
5 changed election procedures), *aff'd without opinion*, 477 U.S. 901 (1986); *Garza*
6 *v. County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990) (noting that “a motion
7 panel entered an order which had the effect of staying the county’s election
8 procedure pending our decision”).

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1 **CONCLUSION**

2 For the foregoing reasons, plaintiffs respectfully request that the Court grant
3 the relief sought by plaintiffs.

4 Dated: August 16, 2003

5 Respectfully Submitted,

6
7 By: Mark D. Rosenbaum

8
9 By: Peter J. Eliasberg

10
11 By: Catherine E. Lhamon

12
13 By: Ben Wizner

14
15 By: Erwin Chemerinsky