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11 **UNITED STATES DISTRICT COURT**
12 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
13 **EASTERN DIVISION**

14 SOUTHWEST VOTER
15 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.

**FIRST AMENDED COMPLAINT
FOR INJUNCTIVE AND
DECLARATORY RELIEF**

[Fourteenth Amendment to the United
States Constitution; 42 U.S.C. § 1983;
Section 2 of the Voting Rights Act, 42
U.S.C. §1973]

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1 **INTRODUCTORY STATEMENT**

2 3. The right to vote is fundamental to our constitutional democracy. At the
3 heart of the right to vote is the principle that equal weight must be accorded to each
4 vote and equal dignity to each voter. A voting system that disproportionately denies
5 some citizens the right to have their votes counted, or that dilutes the collective
6 political power of certain groups, is anathema to the one-person, one-vote principle
7 that lies at the heart of our democracy.

8 4. If the gubernatorial recall election and vote on Proposition 53 and
9 Proposition 54 proceed on October 7, 2003, as presently scheduled, voters in at least
10 six California counties will disproportionately be denied their right to have their votes
11 counted, as the result of the use of antiquated and unreliable pre-scored punch card
12 (“PPC”) voting machines in those counties. Counties in the State of California use a
13 variety of voting mechanisms with widely disparate levels of effectiveness in accurately
14 recording voters' intentions. The result of this hodgepodge of voting systems is that a
15 disproportionate number of votes in some counties are not counted at all, and that a
16 grossly disproportionate number of African-American, Latino, and Asian-American
17 voters in the State do not have their votes counted at all. Moreover, according to
18 many publicly reported polls of registered voters in California, these elections are
19 projected as close races, the outcome of which could be decided by narrow margins.

20 5. In 2000 and 2002, the most recent statewide elections, millions of
21 California registered voters used pre-scored punch card voting machines that result in
22 disproportionately high rates of spoiled, uncounted, and unmarked ballots compared
23 to other systems used in the state. In the November 2000 election, 53.4% of voters
24 statewide used pre-scored punch card machines. Yet ballots cast using pre-scored
25 punch card machines accounted for 74.8% of all ballots that did not register a vote for
26 the President of the United States. On information and belief, over 8.4 million people
27 in counties using pre-scored punch card machines were registered to vote at the time
28 of the November 2000 general election, over 5.9 million people actually voted, and

1 there were over 132,000 uncounted votes on these machines. Pre-scored punch card
2 machines resulted in an average combined overvote (the machine reading more than
3 one vote and thus disqualifying that vote) and undervote (the failure of the machine
4 reading the punch card to read any vote) rate of 2.23%. The combined overvote and
5 undervote, herein referred to as the "error rate," for these machines is more than
6 double the error rate of any other type of machine or system used in California. The
7 error rate in Los Angeles County, which presently uses VotoMatic pre-scored punch
8 card machines (identical to the voting machines used in several counties in Florida
9 during the November 2000 election), and where 4,075,037 registered voters reside, was
10 more than 4½ times the error rate in Riverside County (2.7% error rate, compared to
11 .59%).

12 6. The use of pre-scored punch card machines has a disproportionate
13 adverse impact upon people of color, including African-American, Asian-American,
14 and Latino voters. That is because people of color in California are more likely to live
15 in counties that continue to use PPC systems and because, within those counties, PPC
16 systems lead to high rates of undervotes and overvotes for people of color and those
17 with lower levels of education.

18 7. A gubernatorial recall election has been set for October 7, 2003. At that
19 election, California citizens will vote on whether to recall Governor Gray Davis and, if
20 so, on whom will replace him. If the scheduled election proceeds on October 7, 2003,
21 at least six counties -- including Los Angeles County, the state and country's most
22 populous electoral jurisdiction -- will use PPC voting machines. This will result in the
23 disproportionate disenfranchisement of those counties' voters, and will have an
24 especially severe impact on people of color.

25 8. In addition to the gubernatorial recall, the October 7, 2003 ballot is
26 presently scheduled to include Proposition 53, which would ask voters if they want to
27 expand significantly the funding for State and local physical infrastructure projects,
28 earmarking up to \$850 million in 2006-7 for highways, parks and water projects, and

1 machines if the election proceeds on October 7, 2003. These voters will vote in the
2 gubernatorial and Propositions 53 and 54 elections. SVREP's members will be
3 directly and adversely affected by the use of PPC voting machines, if the election
4 proceeds as scheduled on October 7, 2003.

5 11. Plaintiff SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF
6 GREATER LOS ANGELES (“SCLC”) is a non-profit, non-sectarian, inter-faith,
7 advocacy organization committed to non-violent action to achieve social, economic,
8 and political justice. SCLC was established by the Reverend Martin Luther King, Jr.
9 and other religious leaders in 1957. Since then, it has worked to promote the full
10 equality of African Americans and other minority groups in all aspects of American
11 life, including voting, elections, and political participation. SCLC has approximately
12 20,000 members in the greater Los Angeles area, where VotoMatic pre-scored punch
13 card machines are used. SCLC's membership includes registered African-American
14 voters who reside in Los Angeles County and who will vote in the gubernatorial and
15 Propositions 53 and 54 elections. SCLC's members will be directly and adversely
16 affected by the use of PPC voting machines, if the election proceeds as scheduled on
17 October 7, 2003.

18 12. Plaintiff NATIONAL ASSOCIATION FOR THE ADVANCEMENT
19 OF COLORED PEOPLE, CALIFORNIA STATE CONFERENCE OF BRANCHES
20 (“NAACP”) is a non-profit voluntary membership organization incorporated under the
21 laws of the State of New York. Founded in 1909, the NAACP is the nation’s oldest
22 and largest civil rights organization with a mission to secure and protect the civil rights
23 of people of color, including protecting the voting rights of African Americans. The
24 NAACP has a half-million adult and youth members throughout the United States.
25 The California State Conference of Branches of the NAACP has 136 local units and
26 13, 466 members across the state of California, including registered voters who will
27 vote in the gubernatorial and Propositions 53 and 54 elections, who reside in counties
28 that will use PPC voting machines if the election proceeds on October 7, 2003.

1 NAACP's members will be directly and adversely affected by the use of PPC voting
2 machines, if the election proceeds as scheduled on October 7, 2003.

3 13. Defendant KEVIN SHELLEY is the Secretary of State of California. He
4 is sued in his official capacity in connection with actions taken under color of state
5 law. As Secretary of State, Defendant SHELLEY is the chief election officer of the
6 State of California and has responsibility for general supervision and administration of
7 the election laws, including the preparation of ballot materials, instructing county
8 election officials, distributing information to voters, tabulating vote totals, and
9 declaring the results of elections. The Secretary of State also has the responsibility to
10 obtain and maintain uniformity in the application and administration of the election
11 laws, and to provide technical assistance to local supervisors of elections on voting
12 systems. Absent relief from this Court, Defendant SHELLEY will on October 7, 2003
13 conduct a statewide election that will include both a gubernatorial recall and
14 Propositions 53 and 54, in violation of Plaintiffs' rights under the Fourteenth
15 Amendment and Section 2 of the Voting Rights Act.

16 **FACTUAL ALLEGATIONS**

17 Pre-Scored Punch Card Voting Systems

18 14. There are four types of voting systems used in California: pre-scored
19 punch cards, Datavotes, optical scans, and touch screens.

20 15. In counties using pre-scored punch card machines (VotoMatic or
21 Pollstar machines), a voter entering the polling place is given a paper ballot in the form
22 of a long piece of relatively heavy stock paper. The ballot card is pre-scored with
23 columns of small, perforated rectangles, known as chads. Once inside the voting
24 booth, the voter inserts the card into a slot and opens a booklet that lists the
25 candidates for a given office. The voter then uses a metal stylus to attempt to punch
26 out the rectangle on the card lined up next to the candidate or ballot measure of
27 choice. The voter is required to turn to subsequent pages of the booklet, which list
28 other candidates or ballot measures, for which the voter must punch out the adjacent

1 rectangles in order to vote. If the ballot is not placed in the correct location in the
2 machine, then the candidates' names or ballot measures will not line up properly with
3 the rectangles that must be removed to register a vote. Because the candidates' names
4 and ballot measure identifiers do not appear on the ballot itself, voters may not be able
5 to tell from a visual inspection if their votes were cast as intended. In addition,
6 pressing the stylus against the pre-scored rectangle sometimes does not cause the chad
7 to be removed completely, which may result in the vote not being counted.

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

18 17. Optical scan systems (also referred to as “Mark Sense” systems), function
19 in a similar way as standardized tests. The voter is given a ballot that lists the names of
20 the candidates and any ballot measures. Next to each choice is either a small circle or
21 an arrow with a gap. The voter must darken the bubble next to the preferred candidate
22 or measure, or draw a straight line connecting the two parts of the arrow. The ballot is
23 then placed in a box and, once ballots are collected, counted using an optical scanner.
24 Some versions of the technology permit the voter to scan the ballot at the polling place
25 to make certain that he or she voted as intended.

26 18. Touch screen voting machines (also known as direct recording electronic
27 devices or DREs) resemble ATM machines in appearance. Upon entering the booth,
28 the voter touches the name of the candidate or the ballot measure on a screen to

1 register his or her preference. Typically, the voter may review the entire ballot to
2 check the votes cast. It is not possible to vote twice, or “overvote,” for the same
3 office or measure. The computer tallies the votes and sends them to a central location.

4 19. The voting systems used in California differ markedly in their propensity
5 accurately and reliably to record the intentions of voters. In the November 2000
6 presidential election, pre-scored punch card machines resulted in average combined
7 overvotes and undervotes of 2.23% or 223 overvotes and undervotes per 10,000
8 votes. This is at least double the average error rate of any other type of voting system
9 used in California and nearly 3¾ times the error rate of the touch-screen voting
10 machines used in Riverside County (2.23% error rate, compared to .59%). The error
11 rate in Los Angeles County, which uses VotoMatic pre-scored punch card machines
12 and where 4,075,037 registered voters reside, was more than 4½ times the error rate in
13 Riverside County (2.7% error rate, compared to .59%). The overall error rate for the
14 optical scan voting system in the last election was .85%. The error rate for pre-
15 scored punch card machines was therefore more than 2½ times greater than that of the
16 optical scan voting systems.

17 20. The following tables identify the counties using pre-scored punch card
18 machines and the number of registered voters in each county in the November 2000
19 election:

20 **PRE-SCORED PUNCH CARD COUNTIES**

21 VotoMatic

22 County	Registered Voters
23 Alameda	669,918
24 Los Angeles	4,075,037
25 Mendocino	49,145
26 San Diego	1,411,672
27 Shasta	86,924
28 Solano	194,415

1 **PRE-SCORED PUNCH CARD COUNTIES**

2 **Total** **6,487,111**

3
4
5
6 Pollstar

7 **County** **Registered Voters**

8 Sacramento 611,014

9 San Bernardino 691,548

10 Santa Clara 789,332

11 **Total** **2,091,894**

12 21. The VotoMatic pre-scored punch card machines used in the six listed
13 counties in California are identical to machines used in several counties in Florida
14 during the November 2000 election.

15 22. Among the approximately 2.7 million people in the County of Los Angeles
16 who voted or attempted to vote in the November 2000 election, there were over 72,000
17 overvotes and undervotes. The number of overvotes and undervotes in the County of
18 Los Angeles alone is greater than the number of registered voters in 27 California
19 counties.

20 23. The use of pre-scored punch card machines in some counties results in
21 the systematic failure to count disproportionately large numbers of votes, in
22 comparison with counties using other machines. The continued use of this equipment
23 in some counties would deny equal treatment to voters in those counties and equal
24 dignity to their votes. The use of different machines with widely disparate error rates
25 dilutes the collective votes of people in counties that use pre-scored punch card
26 machines. No compelling, substantial, or legitimate state interest is served by the
27 differential treatment accorded to voters in those counties as the result of the continued
28 approval of these machines by Defendant and his failure to establish standards that
would ensure equal treatment to all voters statewide. The use of pre-scored punch

1 card machines, and the resulting denial of the vote to some individuals, bears no
2 relationship to any legitimate prerequisite for granting or denying the right to vote.

3
4 24. In the State of California, a significantly higher percentage of African-
5 American, Asian-American, and Latino voters than white voters reside in counties that
6 use pre-scored punch card machines. Overall, people of color (including African
7 Americans, Asian Americans, Latinos, and American Indians) constitute 45.5% of the
8 population of counties using pre-scored punch card equipment, but only 30.9% of the
9 population of counties using other, more reliable types of equipment. According to
10 one recent study, based on data from the 1996 election, only 58.3% of white voters in
11 California resided in counties using pre-scored punch card machines, compared to
12 80.8% of African-American voters and 66.6% of Latino voters.

13 25. The use of pre-scored punch card machines disproportionately impairs the
14 right of African-American, Asian-American, and Latino voters to have their votes
15 counted. Pre-scored punch card machines result in disproportionately high error rates
16 for African-American, Asian-American, and Latino voters, as compared to white
17 voters. The use of pre-scored punch card equipment discriminates against and
18 causes the disproportionate denial of the voting rights of African-American, Asian-
19 American, and Latino voters.

20 The Common Cause v. Jones Litigation and Consent Decree

21 26. In April 2001, Plaintiffs SCLC and SVREP and other individuals and
22 groups brought the *Common Cause, et. al, v. Jones*, case. This federal voting rights
23 case challenging the use in nine California counties of the same outdated and defective
24 punch-card voting technologies that gave rise to the Florida election debacle and the
25 United States Supreme Court's opinion in *Bush v. Gore*, 531 U.S. 98 (2000).

26 27. The plaintiffs filed this suit in the United States District Court for the Central
27 District of California on April 17, 2001, alleging violations of their right to vote under
28 the Fourteenth Amendment resulting from the use of pre-scored punch card ("PPC")

1 voting systems. Plaintiffs in *Common Cause v. Jones* alleged the same disparities
2 described above. Specifically, plaintiffs asserted that citizens residing in counties that
3 use pre-scored punch cards were substantially less likely than citizens in other counties
4 to have their votes counted. On April 24, 2001, Plaintiffs amended their complaint to
5 add a claim under Section 2 of the Voting Rights Act. In support of this claim, the
6 First Amended Complaint in *Common Cause v. Jones* alleged that African-American,
7 Asian-American, and Latino citizens were disproportionately denied the right to have
8 their votes counted because they were more likely to reside in the counties that use
9 PPC voting systems.

10 28. On August 24, 2001, the district court (Judge Stephen V. Wilson) denied
11 defendant Secretary of State Bill Jones' request for judgment on the pleadings,
12 concluding that the First Amended Complaint in *Common Cause v. Jones* stated
13 claims under both the Fourteenth Amendment and Section 2 of the Voting Rights Act.
14 *Common Cause v Jones*, 213 F. Supp. 2d 1106 (C.D. Cal. 2001).

15 29. On September 18, 2001, after the denial of his motion for judgment on the
16 pleadings, Bill Jones, at that time California's Secretary of State, announced that he
17 would decertify PPC voting systems for use in California pursuant to Cal. Govt. Code
18 § 12172.5 and Cal. Elections Code § 19222. The decertification reflected the
19 Secretary of State's determination that those systems were "defective, obsolete, or
20 otherwise unacceptable," and that California's "[v]oters are entitled to have the
21 infrastructure of democracy upgraded." The Secretary of State initially made
22 decertification effective no later than January 1, 2006, and later advanced the
23 decertification date to July 1, 2005.

24 30. Pursuant to a stipulation entered into by plaintiffs and defendants in
25 *Common Cause v. Jones*, the district court on February 19, 2002 determined that it
26 was feasible for the nine counties to convert to "other certified voting equipment" by
27 March 2004 (2001 WL 1916729). The district court thereafter denied the Secretary of
28 State's Motion for Reconsideration on April 26, 2002, finding it "self-evident that

1 replacing voting systems that deprive individuals of the right to vote is clearly in the
2 public interest.” *Common Cause v Jones*, 213 F. Supp. 2d 1110, 1113 (C.D. Cal.
3 2001) (emphasis added).

4 31. On May 6, 2002, pursuant to a consent decree entered by the district court
5 in *Common Cause v. Jones*, the effective date of the decertification of PPC voting
6 systems in California was advanced to March 1, 2004 (2002 WL 1766410). The Court
7 approved a consent decree on May 9, 2002, and awarded plaintiffs attorneys’ fees on
8 November 7, 2002, emphasizing that “statistical evidence advanced in [the] case
9 suggested that the challenged punch card machines suffered from an error rate nearly
10 double that of other polling technologies, and risked continuing effectively to
11 disenfranchise thousands of voters as a result.” The Secretary of State did not appeal
12 the order requiring decertification of PPC machines effective March 1, 2004 or the
13 order granting attorney’s fees.

14 32. As a result of the *Common Cause v. Jones* consent decree, all PPC
15 machines in the State of California must be replaced by March 1, 2004, in time for the
16 next regularly scheduled statewide elections. This order will ensure that all California
17 voters, including those voters who were previously compelled to use obsolete and
18 unreliable PPC equipment, will be able to cast votes with assurance that their votes will
19 actually be counted.

20 The Scheduled Recall Election

21 33. On July 23, 2003, Defendant SHELLEY certified the recall of Governor
22 Gray Davis for the ballot, after determining that proponents had submitted more than
23 110% of the requisite signatures.

24 34. On July 24, 2003, Lt. Governor Cruz Bustamente set October 7, 2003 as
25 the date for the recall election. The recall ballot is to include two parts, the first of
26 which will ask voters to indicate whether the Governor shall be recalled, and the
27 second of which will ask voters to indicate their choice for his replacement.

28

1 35. If the recall proceeds on October 7, 2003, then Proposition 54, the so-
2 called "Racial Privacy Initiative," and Proposition 53, will also appear on the ballot.
3 Proposition 54, sponsored by Mr. Ward Connerly, an outspoken opponent of race-
4 conscious policies, would prohibit all state and local governmental entities in California
5 from inquiring into or collecting information regarding race or ethnicity. If the recall
6 election does not take place on October 7, 2003, then the vote on Proposition 54 will
7 instead take place at the time of the next regularly scheduled statewide election,
8 currently set for March 2, 2004. As the name suggests, the Racial Privacy Initiative
9 has racial overtones, and, if enacted, will have an especially pronounced impact on
10 people of color within the State of California.

11 36. If the recall election and the Propositions 53 and 54 vote take place on
12 October 7, 2003, at least six counties (Los Angeles, San Diego, Sacramento, Santa
13 Clara, Solano, and Mendocino) within the State of California are certain to use pre-
14 scored punch card machines that are significantly less reliable than other machines, in
15 terms of their ability accurately to record votes. A seventh county (San Bernardino)
16 has not yet made a definitive determination as to whether it will use the PPC system in
17 that election, or will attempt to use a more reliable voting system. Two counties
18 (Alameda and Shasta) will have converted to non-PPC systems by October 7, 2003.

19 37. The use of pre-scored punch card machines in at least six counties during
20 the scheduled election on October 7, 2003 would accord disparate and arbitrary
21 treatment to people residing in those counties.

22 38. The use of pre-scored punch card machines in at least six counties during
23 the scheduled election on October 7, 2003 would have a disparate and adverse impact
24 upon African-American, Asian-American, and Latino voters.

25 39. The use of pre-scored punch card equipment, combined with the lack of
26 adequate standards and procedures for manual recounts, would cause the denial the
27 voting rights of African-American, Asian-American, and Latino voters, and the dilution
28 of their voting strength. Under the totality of the circumstances, this system would

1 DATED: August __, 2003

Respectfully submitted,

2

By: _____
Mark D. Rosenbaum

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4 DATED: August __, 2003

Respectfully submitted,

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By: _____
Daniel P. Tokaji

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