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September 17, 2003

Cathy Catterson, Clerk of the Court  
United States Court of Appeal  
Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103

RE: Southwest Voter Registration Education Project, et al v. Shelley  
Case No. 03-56498

To The Honorable Justices of the Ninth Circuit:

In response to the Order of this Court dated September 16, 2003, Plaintiffs-Appellants are submitting this letter brief setting forth our opposition to the herein matter being reheard en banc.

For the Court's reference, this letter brief is proportionately spaced, has a typeface of 14 points or more and contains 4,848 words.

Sincerely,

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There can be no doubt that the facts underlying this litigation – the imminent prospect that voting on “some of the most important issues facing the State [of California],” Order at 2, would produce significant geographical and racial disenfranchisement of voters in six California counties if the state were permitted to hold the election with concededly defective and unlawful voting machines– are of high public importance. But the test for granting en banc review is not whether a case presents “important facts,” and the criteria for rehearing before the full court are not met here. To the contrary, a confluence of factors weigh decisively in favor of permitting the parties to take the inevitable step of seeking Supreme Court review.

There is no genuine argument that this case presents an intra-circuit conflict of authority, or even an inter-circuit split.<sup>1</sup> Further, the Supreme Court decision most on point – *Bush v. Gore* – strongly supports the panel’s holding. Nor does the case have substantial prospective significance. To the contrary, the three-judge panel’s thorough, plainly correct, but *narrow* legal holding is limited to a specific factual circumstances that we know *as a matter of law* will not recur, such

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<sup>1</sup> The Federal Rules of Appellate Procedure provide that en banc review is “not favored” unless “necessary” to maintain uniformity within the circuit or to address a “question of exceptional importance.” Fed. R. App. Proc. 35(a)(1) & (2). As an “example” of a “question of exceptional importance,” the rules suggest only “conflicts with authoritative decisions of other United States Courts of Appeals.” Fed. R. App. Proc. 35 (b)(1)(B). No such conflict exists.

that it is virtually inconceivable that the panel's order will provide a basis for enjoining any future election. Indeed, so singular are the grounds supporting the panel's issuance of the injunction that there is almost an inverse relationship between the inevitable commotion the panel's order has produced in public from those who believe they could be disadvantaged politically, and the limited precedential value that it will merit in this circuit's jurisprudence.

Further, the delay occasioned by en banc review could do real harm. As the appellees have emphasized, there is little time before the October date for the special election. The Secretary and Intervenor have made clear their intention to seek Supreme Court review; timely and considered review in both courts would be extremely difficult to achieve. Definitive final resolution – either by a decision on the merits at the Supreme Court level or by a denial of certiorari – ought not to be delayed by even a single day, so long as there remains a possibility that the last judicial word on this matter will be that the election must go forward on October 7. Accordingly, en banc review is neither necessary nor appropriate in the circumstances.

The Secretary will presumably contend that en banc review is warranted because of the legal significance of the panel's decision. That argument is unsound, for the panel's opinion is a model of caution. It rests on narrow legal

grounds and discrete factual circumstances that are very unlikely to recur.

*First*, the legal rule adopted by the panel does not endanger later elections.

To the contrary, the panel carefully explained that “the Constitution does not demand the use of the best available technology.” Order at 20. In the words of the panel:

Like the Supreme Court in *Bush*, “[t]he question before [us] is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.” 531 U.S. at 109. Rather, like the Supreme Court in *Bush*, we face a situation in which the United States Constitution requires “some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.” *Id.*

*Id.* at 21. The opinion furthermore made clear that the public interest would almost certainly not permit the enjoinder of a regularly scheduled election. As the panel explained:

There is a strong public interest in holding elections as scheduled. To enjoin the election of candidates for office has the potential of disrupting government. It could well result in unfilled essential government positions. In the case of election to national office, it could result in a state not having representation in Congress. These are serious considerations. In the case of a vote on a recall petition, these concerns are considerably lessened because governmental functions will continue.

Order at 55.<sup>2</sup>

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<sup>2</sup> See also Order at 34-35 (“[T]he decision to enjoin an election depends on more than successfully showing a violation of federal law, since it is well established that the public interest in going forward with the election must be part of the calculus. ‘In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon

*Second*, the opinion is limited to the highly unusual facts in which this case arose. It is rare – and in California, literally unprecedented – for the state itself to concede the defects in its voting machinery, both by legally decertifying that machinery as “obsolete, defective, or otherwise unacceptable,” and by acknowledging in its pleadings that punchcard systems are an “old technology” that is “aggressive[ly] [being] eliminate[d] . . . statewide.”<sup>3</sup> Thus, this case does not concern jurisdictions within a state insisting upon a variety of technologies for arguably legitimate parochial reasons in a context of deliberately decentralized decisionmaking within which separate localities might reasonably make their own distinct tradeoffs between more accurate (and thus more costly) voting equipment and greater investment in public education or other infrastructural endeavors.

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general equitable principles.’ *Reynolds [v. Sims]*, 377 U.S. [533], 585 [1964]. The evidence a court must hear to determine whether or not to enjoin this special election is very different from the evidence a court would hear in deciding whether or not to enjoin regularly scheduled elections.”) Accordingly, there was never any question about attempting to enjoin the November, 2002 election, notwithstanding the Secretary of State’s order decertifying punchcard systems some months earlier. That election could not have been postponed without leaving vacant, or filling by judicial fiat, California’s full contingent of U.S. Representatives, its full coterie of elected executive officials, and a substantial percentage of the state legislature.

<sup>3</sup> Whatever his motivation in filing a letter brief to this Court at this time, former Secretary of State Bill Jones’s belated and halfhearted defense of punchcards is entirely belied by his prior public statement, quoted by the panel, that “[w]e cannot wait for a Florida-style election debacle to occur in California before we replace archaic voting systems.” Order at 10. Indeed, Secretary Jones ordered the decertification of these machines *the day before* the state official responsible for the accuracy and reliability of voting systems was to be deposed in the *Common Cause* litigation, and the state unilaterally canceled that deposition.

Rather, the constitutional violation in this case is the unfortunate consequence of the state's centralized insistence on squeezing this election into the brief window in time before all of California's counties will have made the transition, already begun but not completed, to modern, accurate, and state-certified voting equipment.<sup>4</sup>

Moreover, the panel identified several "unique pragmatic problems," Order at 57, that supported equitable relief in this case but would be absent from a typical election dispute, including the following:

- Polling places will be consolidated: "[A]pproximately a quarter of California's polling places – 5,000 of 20,000 – will not be ready for use and voters will be forced to vote at a different polling place. This has the potential of creating substantial voter confusion on election day." Order at

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<sup>4</sup> As part of the public interest calculus, the panel weighed and rightly rejected the State's arguments that pragmatic concerns – local election officials' reliance on the October 7 election date, the prospect of discarding absentee ballots already received and re-issuing the same, and the administrative difficulties of adding the recall ballot and initiatives to the March 2004 primary election ballot – outweighed the voters' Equal Protection interests. Order at 56 ("The State has an interest in holding a fair election – one trusted by the candidates and the voters to yield an accurate and unbiased result. The high error rate associated with the decertified machines to be used by 44 percent of the voters in October would undermine the public's confidence in the outcome of the election"). Moreover, there is ample reason to believe that with the breadth of certified technologies available, election officials will surely be able to fashion appropriate ballots for the March 2004 election to accommodate four additional questions. In addition, the State is of course free to hold the recall election at any time before March 2004 so long as it assures statewide use of certified and reliable voting technologies. In any event, the Supreme Court has authorized the remedy of delaying elections for constitutional violations even when the wheels of election machinery have already begun to turn. See *Lopez v. Monterey County*, 519 U.S. 9, 20 (1996); *Clark v. Roemer*, 500 U.S. 646, 653 (1991) (chastising the district court's failure to enjoin election even though absentee voting had begun, short time remained before election, and considerable expenses had been incurred in preparation).

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- An unprecedented number of candidates: “[T]he sheer number of gubernatorial candidates – there are currently 135 names on the October 2003 ballot – will make operation of the plastic guide substantially more cumbersome to use, potentially compounding the inherent problems in its use.” *Id.*
- The brief postponement is reasonably tied to the state’s own constitutional recall provision: “The California Constitution already permits up to a six month delay to advance the State’s interest in efficiency and convenience; the requested injunction would result in only a seven and a half month delay to cure a substantial constitutional violation.” Order at 56.
- The financial burden on the state will be substantially lessened: “[T]his is the inverse of the usual election situation. Normally, enjoining an election would require that a special election be held later, at great financial cost. But here, the election Plaintiffs seek to enjoin is itself a special election, and if enjoined, voting would occur at a regularly scheduled election. Thus, the great difference in cost between regularly scheduled and special elections is not as significant a factor as in the usual election case.” Order at 50.
- Men and women serving overseas will be able to participate: “[M]any members of the armed forces and California National Guard members did not fill out absentee ballot requests because they did not expect to be overseas for this length of time and did not anticipate a special election. A short postponement of the recall election will serve the public interest by permitting California men and women who are serving our country overseas and who did not anticipate an October election more time to request and submit absentee ballots, thus allowing them to enjoy one of the fundamental rights for which they put themselves in harm’s way – the right to vote.” Order at 57-58.
- With respect to Propositions 53 and 54, conducting the election on October 7 would require the Secretary of State to violate provisions of the California Election Code, and to disturb settled expectations of the voters: “The Secretary of State provided a copy of the ballot pamphlet to the printer on

37 days prior to the election rather than the required 80 days. The public was permitted to examine the pamphlet on 57 days prior to the election, rather than the required 100 days. If the effect of voter education is as significant as the Secretary of State claims, this delay could have a profound effect on the outcome of the initiative votes.” Order at 62. “Indeed, on July 15, 2002, more than a year ago, then Secretary of State Bill Jones issued and signed a certification placing the initiatives on the March 2, 2004 primary election ballot,” *Id.* at 58.

Even accounting for all of these factors, the panel held, with respect to the recall election, that the balance of hardships only “slightly favor[ed] Plaintiffs.” Order at 51. Thus, any fear that the panel’s decision will unleash a wave of garden-variety challenges to non-uniform voting technologies aimed at enjoining state elections is at best farfetched.

*Third*, apart from all of the unique circumstances arising from this special election that limit the panel’s holding, this case involves a type of electoral disparity that will soon be a thing of the past. Punchcard machines, recognized as problematic by the Supreme Court in *Bush v. Gore*, are on their way to the dustbin not only in California, but nationwide. Litigation challenging inequalities produced by punchcards has been settled along the identical lines of the *Common Cause* decree here in several states;<sup>5</sup> the “Help America Vote Act” has provided

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<sup>5</sup> *See, e.g.*, Fl. Stat. 101.56042 (“Effective September 2, 2002, a voting system that uses an apparatus or device for the piercing of ballots by the voter may not be used in this state.”) (enacted to resolve civil rights litigation); *Andrews, et al. v. Cox*, No. 1:01-CV-0318-ODE (N.D. Georgia) (challenge to use of punchcards in Georgia dismissed by stipulation after State of Georgia contracted to purchase and install touch-screen voting units in all voting precincts);

federal funds to assist states in replacing punchcard systems;<sup>6</sup> and,

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*Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002) (ACLU Foundation of Illinois reports that equal protection and Voting Rights Act challenge to inequalities in voting systems will be settled on September 25, 2003, with decree requiring replacement of all punchcards).

<sup>6</sup> In 2002, Congress passed the Help America Vote Act (“HAVA”), 42 U.S.C. §§ 15301, *et seq.*, the first stated purpose of which is “[t]o establish a program to provide funds to states to replace punch card voting systems . . . .” P.L. 107-252, 116 Stat. 1665, 1666 (107th Cong., 2002). In order to qualify for HAVA funding, states were required to submit State Plans that detailed, *inter alia*, their plans for replacing punch card voting machines with more reliable equipment. See 42 U.S.C. § 15404. In response to this mandate, 52 “states” (including the District of Columbia and Puerto Rico) submitted “Preliminary State Plans” between May and September of this year. According to the State Plans, half the states have already jettisoned punch card voting and the remaining half are working to eliminate them by the HAVA deadline of January 1, 2006. Thus,

**25 states already do not use punch card voting equipment:** See (1) Alabama Preliminary HAVA Plan, at 6 (5/30/2003); (2) Alaska Preliminary HAVA Plan, at 4 (3/26/2003); (3) Connecticut Preliminary HAVA Plan, at 3 (6/17/2003); (4) Delaware Preliminary HAVA Plan, at 5 (5/16/2003); (5) District of Columbia Preliminary HAVA Plan, at 4 (6/26/2003); (6) Florida Preliminary HAVA Plan, at 5 (7/21/03); (7) Georgia Preliminary HAVA Plan, at 6-12 (6/23/03); (8) Hawaii Preliminary HAVA Plan, at 5 (8/14/03); (9) Iowa Preliminary HAVA Plan, at 16 (7/17/03); (10) Kansas Preliminary HAVA Plan, at 7 (8/03); (11) Kentucky Preliminary HAVA Plan, at 15 (7/03); (12) Louisiana Preliminary HAVA Plan, at 3 (6/16/03); (13) Maine Preliminary HAVA Plan, at 4 (6/13/03); (14) Maryland Preliminary HAVA Plan, at 2 (5/14/03); (15) Massachusetts Preliminary HAVA Plan, at 9 (8/1/03); (16) Minnesota Sec’y of State, Voting Systems Used In Minnesota (11/02) (<http://electionresults.sos.state.mn.us/VotingSystemsDescriptions.asp>); (17) Nebraska Preliminary HAVA Plan, at 11, 22 (6/9/03); (18) New Hampshire Preliminary HAVA Plan, at 5 (6/27/03); (19) New Mexico Preliminary HAVA Plan, at 4, 5 & 13 (6/23/03); (20) New York Preliminary HAVA Plan, at 5 (6/23/03); (21) Oklahoma Preliminary HAVA Report, at 2 (7/1/03); (22) Puerto Rico Preliminary HAVA Report, at 20 (7/8/03); (23) Rhode Island Preliminary HAVA Report, at 4, 6 (6/9/03); (24) Vermont Preliminary HAVA Plan, at 1-2 (5/16/03); (25) Wisconsin Preliminary HAVA Plan, at 7 (8/19/03).

**10 states are scheduled to eliminate punch card voting by 2004:** See (1) Arizona Preliminary HAVA Plan, at 16-17 (3/18/2003); Arizona Sec’y of State, Press Release (9/2/03); (2) Arkansas Preliminary HAVA Plan, at 3, 17, 19-20 (7/10/2003); (3) Consent Decree [Re California Punch Card Systems], *Common Cause v. Jones*, CV-01-3470-SVW (May 23, 2002); (4) Colorado Preliminary HAVA Plan, at 38, 44 (7/15/2003); (5) Michigan Preliminary HAVA Plan, at 6-8 (6/17/03); Michigan Sec’y of State Press Release (8/4/03); (6) Montana Preliminary HAVA Plan, at 9, 23 (6/4/03); (7) New Jersey Preliminary HAVA Plan, at 4-5, 39 (8/14/03); (8) North Dakota Preliminary HAVA Plan, at 3, 14 (8/11/03); (9) Ohio Preliminary HAVA Plan, at 10-13, 25-26, 40 (8/11/03); (10) South Dakota Preliminary HAVA Plan § 301(a)(1)(B)(i)

notwithstanding the virtual certainty that punchcard disparities will be deemed an insufficient basis for enjoining regular elections, it will not be long before all states have entirely discarded this discredited technology. And while the gulf between punchcard machines and other technologies used in California is wide indeed, the record in this case demonstrates without dispute that the error rate among the remaining technologies – all certified by the Secretary as accurate and reliable – is minuscule, if it exists at all.

*Fourth*, the panel’s decision is correct. Its conclusion that fundamental fairness would be denied by timing an election so that fully 44 percent of the electorate must use machinery deemed formally “unacceptable” by the state,

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(7/17/03).

***1 state is scheduled to eliminate punch card voting by 2005:*** See Indiana Preliminary HAVA Plan, at 12 (7/18/03).

***12 states are scheduled to eliminate punch card voting by 2006:*** See (1) Illinois Preliminary HAVA Plan, at 27, 33 (8/18/03); (2) Mississippi Preliminary HAVA Plan, at 4, 20 (8/12/03); (3) Nevada Preliminary HAVA Plan, at 4 (6/16/03); (4) North Carolina Preliminary HAVA Plan §§ 1, 10 & 11 (6/23/03); (5) Oregon Preliminary HAVA Plan, at 6, 44 (4/2/03); (6) South Carolina Preliminary HAVA Plan, at 8-12, 41 (6/20/03); (7) Tennessee Preliminary HAVA Plan, at 5-6, 17 (6/16/03); (8) Utah Preliminary HAVA Plan, at 1-3 (6/12/03); (9) Virginia Preliminary HAVA Plan, at 4, 21-22 (6/2/03); (10) Washington Preliminary HAVA Plan, at 20, 30 (5/30/03); (11) West Virginia Preliminary HAVA Plan, at 2, 20 (5/30/03); (12) Wyoming Preliminary HAVA Plan, at 6, 20 (6/03).

Of the remaining four states, three are participating in HAVA's punch card buyout, which provides funding for replacement of punch card systems by 2006, *see* (1) Missouri Preliminary HAVA Plan, Introduction (a.vii.) & § 10 (Section 102 Money) (8/12/03); (2) Pennsylvania Preliminary HAVA Plan, at 11, 42 (7/31/03); (3) Texas Preliminary HAVA Plan, at 15 (7/30/03), and the other has encouraged its county election officials to study the feasibility of implementing a statewide DRE system, which would replace punch cards, by 2006. See Idaho Preliminary HAVA Plan, at 18 (7/24/03).

disenfranchising some 40,000 voters, while the other 56 percent uses modern, certified equipment, was entirely faithful not just to *Bush v. Gore*, but to a decades-old line of equal protection jurisprudence making clear that “the weight of a citizen’s vote cannot be made to depend on where he lives.” *Reynolds*, 377 U.S. at 567. If *Bush v. Gore* is to be clarified further – or if it is to be understood as meaning other than what it says, as the Intervenor has repeatedly argued – it will have to be by the Supreme Court.<sup>7</sup>

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<sup>7</sup> Although it has been suggested that the Supreme Court’s statement that its “consideration [was] limited to the present circumstances,” 531 U.S., at 109, deprives *Bush v. Gore* of precedential force in cases involving factual circumstances not identical to those in the Florida presidential election, the Supreme Court never said any such thing. To the contrary, the Court consciously framed its holding in terms of general applicability, emphasizing 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, and that “[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 105 (quoting *Moore v. Ogilvie*, 394 U.S. 814, 819 (1963)). To be sure, the Court could have grounded its holding on distrust for the manual recount process, reasoning that such a process might be used by partisan county officials to increase the number of votes for their own preferred candidates. But the Court expressly declined to do so. Instead of defining the equal protection problem as predicated on human officials deliberately seeking to influence the *outcome* of votes for one candidate or another, the Court grounded its ruling on voting *strength*, and on the long line of voting rights jurisprudence enforcing the principle – invoked by the panel in this case – that “once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.” Order at 19 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)). Thus, the problem with the Florida scheme was that some counties had more voting power than others because of the different standards that a centralized state entity (the state judiciary) permitted the counties to employ. See, e.g., 531 U.S., at 107 (“Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes”); *id.*, at 107-08 (describing loss in voting strength for overvotes in certain counties). The panel cannot be faulted for reading *Bush v. Gore* in the straightforward way in which it was written – as a decision embedded in Supreme Court precedent that prohibits a state from valuing the votes cast in one county more than those cast in another.

The panel was furthermore entirely justified in taking the Secretary of State at his word and in taking as its baseline what the Secretary himself, through decertification, determined was “obsolete, defective, and otherwise unacceptable.” Indeed, the disparities at issue here are the very paradigm of arbitrary discrimination by the state between the voters of counties that have yet to convert to certified methods of counting, and the voters of those counties that have so converted. And, in contrast to the record before the Court in *Bush v. Gore*, where it was pure speculation whether varying recount standards would produce significant geographical disparities in voting strength, here the disparities are concrete and predictable: 40,000 disposable votes in the six remaining punchcard counties.

There is nothing novel or strange about having the equal protection “standard” determined, at least in part, by the baseline of what the state itself offers to some of its citizens; that is precisely what “equal” protection of the laws means. If the state “protects” those of its people who live in counties comprising 56 percent of state electorate by counting all of *their* votes using methods and machines designed to be highly reliable and accurate, but offers second-class “protection” to those who live in counties comprising the remaining 44 percent by continuing to count their votes using methods and machines the state itself

concedes to be unacceptably inaccurate – not as a reflection of decentralized decisions or home rule but as a corollary of the centralized insistence on conducting a special election prior to the date when its own plans will have eliminated that recognized inequality – then, in the literal sense, the state is denying some of its people “equal protection” of its laws.

Neither the Secretary nor the Intervenor has articulated any competing equal protection “standard,” apart from the Intervenor’s repetition of the mantra that the Constitution permits some “play in the joints.” But while it cannot be denied that the Constitution does not require perfect technology, the panel was exactly right in observing that “[i]f there were *equal* ‘play in the joints,’ this argument would have more force.” Order at 27 (emphasis added). As the Secretary’s decertification reflects, and as “the vast weight of the evidence” confirms, *id.*, voters in the six remaining punchcard counties are consistently and predictably confronted with a significantly greater probability than are voters in the counties that have crossed the line into the new counting regime that their votes will not be counted at all or, worse still, will be counted for the wrong candidate.<sup>8</sup> If the Constitution permits

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<sup>8</sup> The panel’s focus on this outcome as constitutionally problematic was scarcely “a novel concept.” Order at 18. As the panel explained: “[T]he Court observed in *United States v. Classic*, 313 U.S. 299, 315 (1941) that: ‘Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . .’” *Id.* (ellipsis in original).

such a systematic and intrinsically unequal treatment of voters by edict of a state's central organs of governance, no persuasive justification has yet been offered as to why that might be so. Certainly, the suggestion, lately heard from some quarters by way of afterthought, that the state, despite having itself altered the time lines by accelerating the previously announced date of the initiative votes at issue in this case, may have some decisive sovereign interest in – or, even more strangely, that campaigners, candidates, and their supporters may have a vested constitutional right to – the avoidance of any extension in the abbreviated time period that the state's rules set for the electioneering surrounding the recall effort – is altogether fatuous.<sup>9</sup>

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<sup>9</sup> The suggestion that the panel somehow violated the First Amendment is particularly farfetched. The First Amendment does not guarantee an election process free from all change, nor does it guarantee one in which voters can vote for whomever they wish in the manner that they wish. For if it did, as the Supreme Court has pointed out, then all election codes would become unconstitutional. *See Burdick v. Takushi*, 504 U.S. 428, 433, 438 (1992) (“Each provision of a code, whether it governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends,” and “[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently”). Indeed, under this novel reading of the First Amendment, the well settled power of federal courts to enjoin elections on the basis of constitutional and statutory violations would be wholly eviscerated. *See Lopez*, 519 U.S. at 20; *Clark*, 500 U.S. 646; *Chisom v. Romer*, 853 F.2d 1186 (5th Cir. 1988) (“It cannot be gainsaid that federal courts have the power to enjoin state elections.”). Some federal courts have even invalidated entire elections and ordered new ones, a judicial remedy that would raise far greater First Amendment concerns. *See Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); Kenneth W. Starr, “Federal Judicial Invalidation as a Remedy for Irregularities in State Elections,” 49 N.Y.U. L. Rev. 1092, 1125 (1974). And some states have set aside election results for one reason or another, activities that would be barred as well under this view of the First Amendment. *See Akizaki v. Fong*, 51 Haw. 354 (1969) (invalidating election due to commingling of valid and

In sum, the panel’s opinion represents an entirely unexceptional application of the law to an entirely exceptional set of circumstances. The panel broke no new ground in identifying constitutional infirmities in the state’s arbitrary and disparate treatment of voters in different counties, and it carefully distinguished the extraordinary and unprecedented circumstances presented by the October 7 special election from those that would be presented by a typical statewide election. Indeed, the panel did a remarkable job, with remarkable speed, and it got the law right. And the alternative – permitting this flawed special election to go forward in the interests of speed and claimed financial hardship though it is known *beforehand* that 40,000 votes will be discarded by virtue of geography and race – would set an ominous stage “not well calculated to sustain the confidence that all citizens must have in the outcome of elections.” *Bush*, 531 U.S. at 109. There is no basis whatsoever for en banc review.

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invalid absentee ballots); N.Y. Elect. Law 16-102 (1999) (“The court may direct . . . the holding of a new primary election . . . where it finds” in its judgment “that there has been such fraud or irregularity as to render impossible a determination as to who rightfully was nominated or elected”). This First Amendment reading would also make unconstitutional the delays imposed by the Voting Rights preclearance process. *See Clark, supra; Allen v. State Board of Elections*, 393 U.S. 44 (1969) (requiring Virginia to seek preclearance of changes in the way illiterate voters could cast write-in votes). And finally, the theory would declare unconstitutional all judicial decisions that alter the rules about campaigning once campaigning has begun, making it impossible, for example, for the federal courts to examine the constitutionality of the “McCain-Feingold” campaign finance legislation. *See Federal Election Comm’n v. McConnell*, 123 S. Ct. 2268 (2003) (noting probable jurisdiction). The First Amendment interests, which are slight here at best, are dwarfed by the gaping equal protection problem engendered when 40,000 or more people are deprived of their right to vote.