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September 17, 2003

VIA ELECTRONIC TRANSMISSION AND  
OVERNIGHT MAIL

Ms. Cathy A. Catterson  
Office of the Clerk  
United States Court of Appeals for the Ninth Circuit  
95 Seventh Street  
San Francisco, California 94103-1526

RE: Request for Rehearing En Banc  
Southwest Voter Registration v. Kevin Shelley et al.

Dear Ms. Catterson:

In its order dated September 16, 2003, this Court ordered the parties to "file simultaneous briefs ... setting forth their views on whether or not this case should be reheard en banc." This Court further indicated that the briefs could be filed in letter format. In accord with that order, appellee Kevin Shelley, in his capacity as California Secretary of State, hereby submits his letter brief and respectfully submits that because the panel decision in this case was an untenable departure from settled precedent, this case presents one of those "rare circumstances" when en banc consideration is necessary to secure or maintain uniformity of decisions. Moreover, en banc reconsideration is appropriate given the exceptional importance of the question presented: whether the district court abused its discretion by declining to issue a preliminary injunction that would halt, without a trial on the merits, an ongoing state election in which hundreds of thousands of absentee ballots have already been cast. Fed. R. App. P. 35(a).

Secretary of State Shelley has acknowledged throughout this litigation that punchcard voting systems are obsolete. Indeed, he has been a leader in urging conversion to more modern voting technology. Federal case law, however,

uniformly prohibits federal courts from intervening in an ongoing state election except in the most extraordinary of circumstances -- that is, where alleged errors in the election process involve intentional wrongdoing and where existing state remedies are inadequate. Nonetheless, in a complete departure from this unbroken line of federal authority, and in direct conflict with sister circuits, the three-judge panel in this case issued an unprecedented order, with no trial on the merits, enjoining a statewide election after 375,000 voters had already cast absentee ballots. Under the circumstances, this Court should rehear this case en banc, vacate the panel opinion and dismiss this appeal without further proceedings.

### **Background**

A full recitation of the facts and procedural history of this case was set forth in the published decision of the district court (*see Southwest Voter Registration Edu. Proj. et al. v. Kevin Shelley*, 2003 WL 22001185 (C.D. Cal. Aug. 20, 2003)) (hereafter "Order"), but the facts and history can be summarized briefly as follows. On July 23, 2003, the Secretary of State certified that the proponents of a petition to recall Governor Gray Davis had collected a sufficient number of valid signatures to qualify the recall for the ballot. The following day, pursuant to the dictates of the California Constitution, Lieutenant Governor Cruz Bustamante scheduled a special statewide election for Tuesday, October 7, 2003. Once this election date was set, California law required the Secretary of State to place two statewide ballot measures on the October 7<sup>th</sup> ballot.<sup>1/</sup>

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<sup>1</sup> See *Takash v. Superior Court (Shelley)* (en banc) (September 3, 2003, S118630) (concluding that article II, section 8(c) of the California Constitution was "not intended to vest the Secretary of State with authority to submit a qualified initiative measure to the voters either at the next general election held at least 131 days after the initiative qualifies or at any special statewide election held prior to that general election, at the Secretary of State's discretion, but rather was intended to require the Secretary of State to submit the initiative measure at an earlier timely special statewide election.") See <<http://www.courtinfo.ca.gov/courts/supreme/>>; see also *Sands v. Morongo Unified School Dist.*, 53 Cal.3d 863, 902-903 (1991) (conc. opn. of Lucas, C.J.) (the California Supreme Court is the "final arbiter[] of

The instant action was filed on August 7, 2003, alleging that the use of punch-card voting systems in the recall election would violate the United States Constitution and the Voting Rights Act. But this was not the first time that such allegations had been asserted. On April 17, 2001, in *Common Cause, et al. v. Bill Jones*, No. 01-03470 SVW (C.D. Cal. 2001) (hereafter "*Common Cause*"), an action for declaratory and injunctive relief was filed alleging violations of the right to vote based on the use of pre-scored punch-card voting systems in nine California counties. That case resulted in a consent decree and a judgment. The consent decree provided that punch-card voting systems would be decertified effective March 1, 2004.

Since that time, and as contemplated by the consent decree, primary and general elections were held in 2002, and various local elections have been held in the six counties that use the punch-card systems. In addition, a well-publicized recall election took place in January 2002 in the City of South Gate, County of Los Angeles.

Nonetheless, on August 12, 2003, appellants filed an ex parte application for temporary restraining order in the instant action pending a hearing on a preliminary injunction. Judge Wilson of the United States District Court, Central District, who had presided over the *Common Cause* litigation, consolidated the ex parte application for temporary restraining order with the motion for preliminary injunction and denied the requested relief. *See* Order. Judge Wilson held that under well-established law, the public interest in not delaying a constitutionally-mandated statewide recall election by way of preliminary injunction outweighed appellants' claims about the injury that would be caused by use of the punch-card voting systems. Judge Wilson also held that appellants failed to demonstrate a likelihood of success on the merits.

In considering the equities of issuing an order postponing the October 7, 2003 election, Judge Wilson stated:

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the meaning of state constitutional provisions").

Plaintiffs ask the Court to postpone the recall and ballot initiative votes until alternative voting mechanisms are in place. Yet if such relief were ordered, the State would be in an untenable position: it would be forced either to conduct the election outside the time frame required by the California Constitution, or to cancel the election to avoid that predicament. Clearly, the public interests in avoiding wholesale disenfranchisement, and/or not plunging the State into a constitutional crisis, weigh heavily against enjoining the election.

Moreover, even if the election could somehow be conducted at a later date, it is relevant in the public interest analysis to consider whether such a delayed election would not itself work strongly against the voting rights of all Californians. Because an election reflects a unique moment in time, the Court is skeptical that an election held months after its scheduled date can in any sense be said to be the same election. In ordering the contemplated remedy, the Court would prevent all registered voters from participating in an election scheduled in accordance with the California Constitution. Arguably, then, the Court by granting the relief sought could engender a far greater abridgement of the right to vote than it would by denying that relief.

\* \* \*

Implicit in a recall election, and explicit in the time frame provided by the California Constitution, is a strong public interest in promptly determining whether a particular elected official should remain in office.

In this circuit, “a district court’s order regarding injunctive relief is subject to limited review.” *El Pollo Loco v. Hashim*, 316 F.3d 1032, 1038 (9th Cir. 2003). Accordingly, the denial of a preliminary injunction will only be reversed where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Sammartano v. First Judicial District Court*, 303 F.3d 959, 964 (9th Cir. 2002). Moreover, a reviewing court may not reverse a district court’s order simply because it would have reached a different result. “The [reviewing] court is not empowered to substitute its judgment for that of the [district court.]” *Sardi’s Restaurant Corporation v. Sardie*, 755 F.2d 719, 723 (9th Cir. 1985.)

Despite these standards requiring deference to the district court’s preliminary determinations -- especially in the context of a request for preliminary injunction that would enjoin a statewide election already in progress without a trial on the merits – the assigned three-judge panel of the Ninth Circuit reversed Judge Wilson’s order and issued an unprecedented decision on September 15, 2003, enjoining the October 7th election. For the reasons that follow, a rehearing en banc is necessary to secure uniformity of decisions, and such a rehearing is appropriate given the exceptional importance of the question presented.

## Argument

### **A. This Court Should Grant Rehearing En Banc Due to the Exceptional Importance of the Question Presented.**

A Court of Appeals may order rehearing en banc where “the proceeding involves a question of exceptional importance.” Fed. R. App. P. 35(a); *see, e.g., California Medical Association v. Federal Election Commission*, 641 F.2d 619, 632 (9<sup>th</sup> Cir. 1980) (importance of case addressing constitutionality of limits on contributions to political action committees warranted en banc determination). Here, even appellants must concede that this case presents a question of exceptional importance: whether the district court abused its discretion by declining to issue a preliminary injunction that would halt, without a trial on the merits, an ongoing state election in which absentee ballots have already been cast.

The panel's incorrect decision has thrown the election into uncertainty, and threatens to negate the votes of 375,000 voters who have already cast absentee ballots.

**B. This Court Should Also Grant Rehearing En Banc To Secure Uniformity Of Decisions, Because The Panel's Decision Departs From Settled Precedent.**

The Constitution protects the right of all qualified citizens to vote in state and federal elections, *Reynolds v. Sims*, 377 U.S. 533, 554 (1964), and provides the right to have votes counted without dilution as compared to the votes of others. *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 52, 90 (1970). But not every "election irregularity ... will give rise to a constitutional claim and an action under section 1983." *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir.1975). "Although federal courts closely scrutinize state laws whose very design infringes on the rights of voters, federal courts will not intervene to examine the validity of individual ballots or supervise the administrative details of a local election." *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986). For this reason, federal courts have uniformly held that section 1983 is implicated only when there is "willful conduct" that undermines the organic processes by which candidates are elected," *Hennings*, 523 F.2d at 864, and where the plaintiffs have "lacked an adequate remedy in the state courts." *Curry v. Baker*, 802 F.2d at 1316, citing *Griffin v. Burns*, 570 F.2d 1065 (1st Cir.1978); *see also Powell v. Power*, 436 F.2d 84, 86-87 (2d Cir.1970); *Roe v. Mobile County Appointment Bd.*, 676 So.2d 1206, 1253 (Ala.1995) (summarizing federal decisions), *overruled on other grounds by Williamson v. Indianapolis Life Ins. Co.*, 741 So.2d 1057, 1059 (Ala. 1999); *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion).

The courts of appeal for virtually every circuit in this nation have consistently followed and applied this fundamental rule of deference for more than 30 years. *See Gold v. Feinberg*, 101 F.3d 796, 801 (2d Cir.1996); *Hutchinson v. Miller*, 797 F.2d 1279, 1280 (4th Cir.1986); *Curry v. Baker*, 802 F.2d at 1316 (allegedly inadequate state response to illegal cross-over voting does not give rise

to constitutional violation); *Hendon v. North Carolina State Board of Elections*, 710 F.2d 177, 182 (4th Cir.1983); *Gamza v. Aguirre*, 619 F.2d 449, 452 (5th Cir.1980); *Griffin v. Burns*, 570 F.2d at 1076; *Hennings v. Grafton*, 523 F.2d 861, 864-865 (7th Cir.1975); *Pettengill v. Putnam County R-1 School Dist.*, 472 F.2d 121, 122 (8th Cir.1973); *cf. Bennett v. Yoshina*, 140 F.3d 1218, 1226-1227 (9th Cir. 1998).

Nonetheless, in a radical departure from this unbroken line of cases, and in direct conflict with sister circuits, the three-judge panel in this case decided that it could preliminarily enjoin California's ongoing special statewide election, without a trial on the merits, and in the absence of any claim of intentional discrimination. *See Curry v. Baker*, 802 F.2d at 1316. The court took this unwarranted course without regard to existing law or the drastic and prejudicial effect it will have on the citizens of California who have already cast their votes. And that being so, the panel's opinion stands directly at odds with *Hennings* and *Curry*, as well as the reasoning of the Ninth Circuit in *Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1184 (9th Cir.1988), which relied on the rule of deference when it rejected an untimely post-election challenge in large part due to the "the extremely disruptive effect of election invalidation and the havoc it wreaks upon local political continuity." *Soules*, 849 F.2d at 1180; *accord, Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1058 (9th Cir.2000); *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir.1998). For these reasons, the panel erred when it reversed the district court's denial of a preliminary injunction.

### **C. The Panel's Decision Is Flawed In Additional Ways.**

As a matter of settled law, the panel was required to grant deference to the district court, reversing its determinations only if they represented an abuse of discretion. *See El Pollo Loco v. Hashim*, 316 F.3d 1032, 1038 (9th Cir. 2003); *Sammartano v. First Judicial District Court*, 303 F.3d 959, 964 (9th Cir. 2002). Here, the panel failed to afford the district court any deference, choosing instead to substitute its own judgment for the judgment of the district court on each element of the preliminary injunction analysis. *See Sardi's Restaurant Corporation v. Sardie*, 755 F.2d 719, 723 (9th Cir. 1985). This error infected the panel's entire

decision, and compels reversal.

Applying these principles, courts generally do not grant requests to preliminarily enjoin scheduled elections. *See Cardona v. Oakland Unified School Dist. of Calif.*, 785 F. Supp. 837, 842 (N.D. Cal. 1992) (“The strong public interest in having elections go forward ... weighs heavily against an injunction that would delay an upcoming election.”); *Cano v. Davis*, 191 F. Supp. 1135, 1137 (“enjoining an election is an extraordinary remedy involving a far-reaching power, which is almost never exercised by federal courts prior to a determination on the merits”).

As the United States Supreme Court has said, “where an impending election is imminent and a State’s election machinery is already in process, equitable consideration might justify a court in withholding the granting of immediately effective relief ....” *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). In other words, “[i]n 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 ....” *Id.*

Notably, the three-judge panel in this case failed to give proper weight to the imminence of the October 7, 2003, election. Absentee balloting has been underway since September 8, 2003. *See* Cal. Elec. Code § 3001. More than 2 million absentee ballots have been mailed to California voters, and more than 375,000 California voters have already cast their ballots. Counties have mailed 15 million sample ballots to voters, and the Secretary of State has mailed 13 million state ballot pamphlets to California voters. Polling places have been established, and poll workers have been hired. The state and local governments have already incurred approximately \$30 to \$50 million in costs in conducting the election. As the *Cano* and *Cardona* courts recognized, enjoining an election at this time – prior to any determination on the merits of appellants’ claims – is directly contrary to the public interest.

Moreover, the panel cannot downplay the injury to the public interest the order would inflict by saying they are just “postponing the election for a few

months.” Op. p. 63. With the election called on July 24, 2003, to take place on October 7, 2003, a postponement of five months to March 2004 would triple the time designated in the California Constitution for holding the election. Cal. Const., art. II, § 15, subd. (b) (a recall election of a state official shall be held “not less than 60 days nor more than 80 days from the date of certification of sufficient signatures”).

The panel further erred in its evaluation of the balance of hardships. “[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined.” *Coalition for Economic Equity v. Wilson*, 122 F.3d 718 (9th Cir. 1997) (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 54 L. Ed. 2d 439, 98 S. Ct. 359 (1977) (Rehnquist, J., in chambers) (“It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury”) and *Campbell v. Wood*, 20 F.3d 1050, 1051 (9th Cir. 1994). The state’s inability to fulfill its mandated duty to hold the required, already ongoing election would thus alone be an irreparable injury. But the panel’s suggestion that the state’s interest here is the mere “abstract interest in strict compliance with the letter of state law” (Op., p. 52) vastly understates the state’s interest at stake. The starting point for the state’s interest is the compelling *public interest* in objective, consistent application of the election schedule requirements. The irreparable harm to the state from the panel’s injunction includes not only the inability to fulfill its mandated duty to proceed with the ongoing election, but also the destruction of the state’s interest in neutral, general application of the election schedule requirements.

In addition, the panel’s analysis of the potential harm to appellants is flawed. First, California’s recount and election provisions provide appellants with a remedy if in fact it turns out that they are dissatisfied with the results of the October 7th election. See Cal. Elec. Code §§ 15600 et seq; Cal. Elec. Code §§ 16000 et seq; *Canales v. City of Alviso*, 3 Cal.3d 118, 130-31 (constitutional claim of vote denial or dilution recognized as ground for election contest). There is thus no potential irreparable harm to plaintiffs that would ostensibly support halting the election. Moreover, the panel’s suggestion (Op. p. 47) that parties should not be

able to complain of hardship that is of their own creation actually supports the Secretary of State, not appellants. Appellants originally sued in *Common Cause* to decertify the punch-card voting systems by March 2002, but they ultimately settled for March 2004. Appellants agreed that a change in California's election mechanics was not required until March 2004. Since that time, California has had two statewide elections without objection from appellants. Appellants also knew that there was a possibility of other elections using punch-card voting systems. California's recall provisions have been part of the State Constitution since 1911.

In addition, the Secretary of State is actively working to mitigate the risks associated with punch-card voting systems. For example, the Secretary of State is producing the following, at a minimum, to assist voters in using the various voting machines: (1) Public Service Announcements for the electronic media; (2) articles for printed media, especially for community newspapers and other publications; (3) items for radio and television; (4) State Ballot Pamphlets distributed to all voter households that include instructions on how to contact local elections officials for information regarding the methods of voting; (5) op-ed articles regarding the voting process, to be placed and distributed by the Secretary of State's Office and local elections officials. All of these materials will be produced or prepared in multiple languages and distributed to minority language media and community-based organizations. Moreover, the Secretary of State's website provides specific information on how to use voting systems in each of California's 58 counties, including those counties that will be using punch-card voting systems. Clearly, this efforts cannot guarantee that problems will not arise. Nonetheless, engaging in these efforts is clearly preferable to issuing injunctive relief to postpone the constitutionally-mandated election. Accordingly, the panel's balancing of injuries is fundamentally flawed.

The panel further erred in its evaluation of appellants' likelihood of success on the merits. "In order to bar a later suit under the doctrine of res judicata, an adjudication must (1) involve the same 'claim' as the earlier suit, (2) have reached a final judgment on the merits, and (3) involve the same parties or their privies." *Nordhorn v. Ladish Co.*, 9 F.3d 1402, 1404 (9th Cir. 1993). Appellants did not dispute the satisfaction here of the last two elements, but only whether the present

claim is the same as the prior claim in *Common Cause* for the purpose of res judicata. Appellants announced explicitly, however, in the very first paragraph of their complaint that this suit “challenges ‘the same punch card voting machines challenged before this Court in *Common Cause, et al. v. Jones . . .* which resulted in a consent decree decertifying these machines effective March 1, 2004 . . . .’” Supplemental Excerpts of Record, at p. 3. Indeed, appellants conceded in their ex parte application for temporary restraining order below that their prior case “raised precisely the same legal claims as are at issue in this case.” Supplemental Excerpts of Record, at p. 4.

The panel acknowledges that the evidence in the two actions would be “substantially the same” (Op. 34), but inexplicably finds that the second action is “to enjoin an election” and thus would contemplate “very different” evidence (Op. p. 35). Leaving aside the verbatim allegations common to both actions (district court order, p. 7), appellants emphatically argue that this action is *not* to enjoin an election, but only to prevent use of the punch-cards at the election, i.e., to decertify the punch-cards additionally for this election, which of course is just one aspect of what was sought in the prior *Common Cause* action. *See* Ex Parte Reply, p. 1, 16-17. The district court properly recognized that appellants were “seeking to establish the same constitutional violations alleged in *Common Cause*, but to secure an additional remedy.” Order p. 9; *see McClain v. Apodaca*, 793 F.2d 1031, 1032-34 (9th Cir. 1986).

The District Court correctly concluded that the public interest in going forward with the scheduled election and the balance of hardships strongly favored denying injunctive relief. At the same time, appellants failed to demonstrate that they are likely to prevail on the merits. Because appellants fell far short of their burden, the panel’s decision was in error.

### **Conclusion**

For the foregoing reasons, the Secretary of State requests that the Court grant rehearing of this matter en banc and issue a new decision upholding the district court’s denial of the preliminary injunction requested by appellants. Due to the severe time constraints involved in the election schedule, the Secretary of State

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respectfully requests that this Court decide no later than Friday, September 19, 2003, to hear this matter en banc, and that this Court expedite its consideration en banc in an effort to quickly bring certainty to this election. If this Court should decide not to grant rehearing en banc, the Secretary of State further requests that this Court maintain the stay so that the Secretary of State may consider his options.

Sincerely,

DOUGLAS WOODS  
Deputy Attorney General

For BILL LOCKYER  
Attorney General