03-56498

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs and Appellants,

vs.

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

Defendant and Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA, CASE NO. CV 03-5715 SVW (RZX)
STEPHEN V. WILSON, JUDGE

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE; APPENDIX; BRIEF OF AMICUS CURIAE, PROFESSOR RICHARD L. HASEN, IN SUPPORT OF APPELLANTS AND URGING REVERSAL OF THE DISTRICT COURT

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ATTORNEY FOR AMICUS CURIAE
In Pro Per

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Plaintiffs and Appellants,

vs.

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

Defendant and Appellee.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

I, Richard L. Hasen, hereby move for leave to file the attached amicus curiae brief supporting the appellants and urging reversal of the district court decision in this case.

INTEREST OF MOVANT

1. I, Richard L. Hasen, am a member of the bar of this court, a California voter, and Professor of Law and William M. Rains Fellow at Loyola Law School in Los Angeles. (I list my affiliation for identification purposes only.)

2. My area of specialization is election law. As an election law professor, I have a strong interest in the application of fair and efficient election laws in California and in the United States.

3. A central aspect of this case is the application of the precedent of *Bush v. Gore*, 531 U.S. 98 (2000), to the equal protection question raised by appellants. The district court incorrectly suggested in its opinion that either rational basis review applies to an equal protection claim under *Bush v. Gore* or that *Bush v. Gore* has no precedential value. I have spent considerable time assessing these issues as part of my academic writings. As indicated on my C.V., which I have attached as an appendix to this motion, I have written a forthcoming book examining the Supreme Court's political equality cases from *Baker v. Carr* to *Bush v. Gore*, I am co-author of an election law casebook that devotes a chapter and a half to the topic, and I have written four academic articles specifically examining the meaning of *Bush*'s equal protection

holding. More generally, I have written over 25 articles on election law topics in the last ten years.

WHY AN AMICUS BRIEF IS DESIRABLE AND WHY THE MATTERS ASSERTED ARE RELEVANT TO THE DISPOSITION OF THE CASE

1. As someone who has spent considerable time studying these issues, I believe it is desirable for this Court to gain additional assistance in evaluating the equal protection issues raised by the case. Such assistance is especially desirable given the expedited consideration that this court likely will give to this case and given that the Appellants' Opening Brief necessarily had to focus on issues besides the equal protection issue.

2. The focus of my brief on equal protection issues in light of *Bush v. Gore* is central to the resolution of this appeal. This brief explains that the district court made fundamental errors in its application of *Bush v. Gore* to the facts of this case.

3. I have requested consent from the parties to file this brief. The appellants have granted their consent. The appellee takes the position that he neither

consents nor objects to the filing of this brief. The intervenors have not responded to my request to file the brief.

CONCLUSION

For the foregoing reasons, this Court should grant this motion for leave to file the attached *amicus curiae* brief supporting appellants and urging reversal of the district court.

Dated: August 27, 2003

Respectfully submitted,

PROFESSOR RICHARD L. HASEN

By _____
Richard L. Hasen

Amicus Curiae In Pro Per

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BRIEF OF AMICUS CURIAE, PROFESSOR RICHARD L. HASEN, IN SUPPORT OF APPELLANTS AND URGING REVERSAL OF THE DISTRICT COURT

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BRIEF OF AMICUS CURIAE, PROFESSOR RICHARD L. HASEN, IN SUPPORT OF APPELLANTS AND URGING REVERSAL OF THE DISTRICT COURT

INTEREST OF THE AMICUS CURIAE

I, Richard L. Hasen, am a member of the bar of this court, a California voter, and Professor of Law and William M. Rains Fellow at Loyola Law School in Los Angeles. (I list my affiliation for identification purposes only.) My area of specialization is election law. As an election law professor, I have a strong interest in the application of fair and efficient election laws in California and in the United States.

A central aspect of this case is the application of the precedent of *Bush v. Gore*, 531 U.S. 98 (2000), to the equal protection question raised by appellants. The district court incorrectly suggested in its opinion that either rational basis review applies to an equal protection claim under *Bush v. Gore* or that *Bush v. Gore* has no precedential value. I have spent considerable time assessing these issues as part of my academic writings. As indicated on my C.V., which I have attached as an appendix to the accompanying motion to file this brief, I have written a forthcoming book examining the Supreme Court's political equality cases from *Baker v. Carr* to *Bush v. Gore*, I am

co-author of an election law casebook that devotes a chapter and a half to the topic, and I have written four academic articles specifically examining the meaning of *Bush*'s equal protection holding. More generally, I have written over 25 articles on election law topics in the last ten years.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Bush v. Gore*, 531 U.S. 98, 108 (2000), the United States Supreme Court warned that "[t]he press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees." In this case, however, the district court's desire for speed served precisely as its excuse for ignoring equal protection guarantees.

Appellants argued below that the use of punch card ballots in some — but not all — counties in the forthcoming California gubernatorial recall election raised serious equal protection concerns because of the concededly much higher error rates of punch card machines in tabulating votes. The district court should have given this claim serious consideration, especially given a confluence of factors *unique to this election*: the plurality rule for choosing a gubernatorial successor, the high expected

turnout, the substantial consolidation of precincts in some counties due to haste and budgetary concerns, and the large number of candidates to be listed on the ballot in random order.

The facts set forth in Appellants' Opening Brief amply demonstrate that the chances of someone in Los Angeles county (and other counties using punch card ballots) being able to cast a vote that actually counts is going to be much lower than the chances facing someone voting in a county using more reliable voting equipment, especially in counties using superior technology and not consolidating their precincts. At stake is the ability of all California voters, regardless of their counties of residence, to cast a vote and to have it counted. "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*…." *United States v. Classic*, 313 U.S. 299, 315 (1941) (emphasis added).

Rather than give serious consideration to the equal protection problem, the district court elevated a California provision for setting the date of a gubernatorial recall election over equal protection concerns. The court viewed the state's choice as "using punch-card machines in several counties and using nothing at all in those counties." (Order Denying Plaintiffs' Ex Parte Application for Temporary

Restraining Order and Motion for Preliminary Injunction, *Southwest Voter Registration Education Project v. Shelley*, No. CV03-5715 SVW (Rzx), Aug. 20, 2003, at 19 [hereinafter "Order"] *available at* http://news.findlaw.com/hdocs/docs/elections/svrepshlly82003ord.pdf); Cal. Const. art. II, § 15(a) (requiring that date be set within 60 to 80 days after certification of recall).

In treating the California recall dates as sacrosanct, the district court created a false dichotomy. Surely it is better to allow voters in punch card counties to vote using those machines than not to vote at all. But there was a third choice: to delay the election until the state may substitute other, more reliable voting technology. The latest this date would be is March 2004, when the counties, pursuant to an earlier consent decree, must use alternative voting technology in any case.

This result is mandated by the strict scrutiny that *Bush v. Gore* demands when faced with such an equal protection problem. The district court, however, treated *Bush v. Gore* as either lacking in any precedential value or subjecting cases such as this one to rational basis review only. (Order at 16-18.) As explained below, the district court erred on both counts.

The district court judge in this case should have done what the district court did in another suit filed in connection with this recall litigation. That judge faced the

argument that a provision of California's recall law allowing only those who vote in part one of the recall (should the governor be recalled?) to have their votes counted in part two of the recall (choosing a successor candidate) violated the Equal Protection Clause. Rather than view the choice as either an election with the constitutionally offensive provision applying or no election at all, the court simply struck the offensive provision (after holding it unconstitutional) and ordered the recall to go forward under a rule that counts every qualified voter's vote in part two regardless of whether the voter casts a vote on the question in part one. *Partnoy v. Shelley*, No. 03CV1460 (S.D. Cal. July 29, 2003) *available at* http://news.findlaw.com/hdocs/docs/elections/partnoyshlly072903opn.pdf.

Similarly, under the strict scrutiny standard of review applicable to this case, a state provision setting the date of the election cannot stand in the way of remedying an otherwise unconstitutional election. The district court should have issued an order delaying the election until the state could replace the punch card voting machinery. Such a conclusion is hardly remarkable; indeed, the Supremacy Clause of the United States Constitution demands it. *See Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967) (ordering a new election in the face of racial discrimination, and holding that

federal courts "are not so helpless or unresourceful" as to be hamstrung by state law that would seem to prevent ordering a new election).

This brief explains that: (1) strict scrutiny does apply to the punch card issue under *Bush v. Gore* and other controlling authority; (2) plaintiffs are likely to succeed on the merits in proving that the selective use of punch card ballots in the recall election fails strict scrutiny; and (3) plaintiffs will suffer irreparable harm should this court not reverse the district court's denial of a preliminary injunction in this case, a point the district court conceded in its order. (Order at 23 ("[A]s this Court cannot envision an effective remedy that would be available to Plaintiffs after the votes have been cast, it assumes for purposes of this analysis that the alleged injury would be irreparable.").)

The irreparable injury point is worth highlighting to this court. The state has taken the position, in litigation raising similar issues before the California supreme court, that courts might craft some remedy *after the election* for equal protection problems that arise from the use of punch card ballots. The state is wrong. As explained below, there likely can be no *adequate post-election remedy* for the punch card problems identified in this case — overvotes (votes for more than one candidate) cannot be recounted, nor can people deterred from voting because of voting problems

later get a chance to vote. This court is in the unique position to prevent harm from occurring, harm that cannot be remedied later.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT A PRELIMINARY INJUNCTION ENJOINING THE STATE OF CALIFORNIA FROM USING PUNCH CARD BALLOTS IN SOME COUNTIES BUT NOT OTHER COUNTIES IN THE UPCOMING RECALL ELECTION. THE SELECTIVE USE OF PUNCH CARD BALLOTS VIOLATES CONSTITUTIONAL EQUAL PROTECTION GUARANTEES.[1/]

A. Strict scrutiny applies to the selective use of punch card ballots in statewide voting.

Bush v. Gore, 531 U.S. 98 (2000), is without doubt the closest case on point to the facts of the case at bar. *Bush* was the first case considered by the Supreme Court raising an equal protection claim related to the "nuts-and-bolts" of election mechanics. *See* Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 Fla. St. U. L. Rev. 377, 377-78 (2001). This case raises a very

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1/ This brief agrees with and adopts the statement of jurisdiction, standard of review, statement of the issues presented, and statement of facts as set forth in Appellants' Opening Brief.

similar "nuts-and-bolts" question. In *Bush*, the question was the constitutionality of selective manual recounts of punch card votes without uniform recounting standards. Here, the question is the constitutionality of using punch card balloting with its concededly higher error rates than other voting technology non-uniformly throughout the state. Like *Bush*, the operative legal question is whether the system for counting votes will unconstitutionally "value one person's vote over that of another," *Bush*, 531 U.S. at 104-05, in violation of the Equal Protection Clause.

It is no surprise, therefore, that the federal district court in *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002) — the first court to issue a published opinion on the question of the use of punch card balloting non-uniformly in a state-wide election[2/] — held that *Bush* applied as precedent on the question whether the use of punch card voting in some parts but not all of Illinois constituted an equal protection violation.

2/ See Daniel H. Lowenstein & Richard L. Hasen, Election Law — Cases and Materials 9 (2d ed. Supp. 2003) *available at* http://www.lls.edu/academics/faculty/pubs/electionlaw-2003update.pdf ("The Illinois litigation has led to the first district court decision applying *Bush v. Gore*'s equal protection holding to the use of punch card voting machines."); *see also Common Cause v. Jones*, 213 F. Supp. 2d 1106 (C.D. Cal. 2001) (denying judgment on pleadings on issue raised in California litigation).

The district court in the case at bar alternatively suggested that *Bush* has no precedential value, (Order at 17-18), or that rational basis review applies to the equal protection claim raised in this case, (Order at 16-17). The district court was incorrect on both counts.

First, this court should treat *Bush* as a case with precedential value. Though the Supreme Court in *Bush* couched its opinion with limiting language, e.g., *Bush*, 531 U.S. at 109, and this court "certainly [should be] mindful of the limited holding of *Bush*," *McGuffage*, 209 F. Supp. 2d at 899, the "situation presented by this case is sufficiently related to the situation presented in *Bush* that the holding should be the same." *Id*.[3/] Moreover, *Bush* is consistent with earlier pre-*Bush* voting rights cases holding that the right to vote includes the right to have one's vote *counted*. *United States v. Classic*, 313 U.S. at 315; *Reynolds v. Sims*, 377 U.S. 533, 544-45 (1964)

3/ It may well be that the Supreme Court ultimately will treat *Bush* as a case with limited or no precedential value. Hasen, *supra*, at 386-92. But the Supreme Court has not repudiated *Bush*, and until the Court does so, lower courts must ensure that states do not, "by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104-05; *see* Steven J. Mulroy, *Lemonade from Lemons: Can Advocates Convert* Bush v. Gore *into a Vehicle for Reform?*, 9 Geo. J. on Poverty L. & Pol'y 357, 364 (2002) ("[E]ven if the *Bush* opinion's reasoning is crucially flawed....it still represents binding case law which lower courts are bound to follow.").

(same); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("Every voter's vote is entitled to be counted once. It must be correctly counted and reported.")

Strict scrutiny is the correct level of scrutiny to apply in this case. The Supreme Court in *Bush* recognized that the right to vote is a fundamental right. *Bush*, 531 U.S. at 104, and, where government action causes unequal access to a fundamental right, the government's action is subject to strict scrutiny.

Moreover, in support of its holding that the state may not "value one person's vote over that of another," *Bush*, 531 U.S. at 104-05, the Court relied upon *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) and *Reynolds v. Sims*, 377 U.S. 533, "two cases in which the Court established that voting is a fundamental right to which strict scrutiny analysis applies." Daniel H. Lowenstein & Richard L. Hasen, Election Law — Cases and Materials 162 (2d ed. 2001).[4/]

4/ The district court suggested that in evaluating appellants' equal protection claim, it should apply a more "flexible standard," (Order at 15), such as that set forth by the Supreme Court in cases such as *Burdick v. Takushi*, 504 U.S. 428 (1992). Yet "even if courts were to follow *Burdick* and require a 'severe' or 'significant' burden on voting rights as a prerequisite for triggering strict scrutiny, the plaintiffs in the post-*Bush* cases [such as those raising punch card claims] seem to have met this test thus far. These plaintiffs allege that the likelihood that their votes will be discounted is several times greater than that of voters in other counties voting in the same election." Mulroy, *supra*, at 376.

Indeed, strict scrutiny applies to a *Bush* equal protection claim even in the absence of plaintiffs' proof of discriminatory intent, just as plaintiffs succeeded without proving discriminatory intent in *Harper*, where the court struck down a poll tax *absent evidence* of intent to discriminate against certain voters on the basis of race or wealth. *Harper*, 383 U.S. at 668; *see* Hasen, *supra*, at 395.

B. Appellants are likely to succeed on the merits in their punch card claim because the selective use of punch cards violates strict scrutiny.

The use of punch card voting — with its higher errror rates (as described by appellants) — in some counties but not others in a statewide election cannot withstand strict scrutiny under the Equal Protection Clause. The use of different voting systems with different error rates treats voters differently and makes it less likely that voters in punch card districts will cast votes that count. Voters in counties using optical scanning equipment have a much better chance of having their votes counted than those in counties using a punch card ballot system. *See McGuffage*, 209 F. Supp. 2d at 899.

The disparate treatment is all the more disturbing because the use of punch card voting correlates with race, a suspect class under the Equal Protection Clause. *See* Stephen Ansolabehere, *Voting Machines, Race, and Equal Protection*, 1 Election L. J. 61, 69 (2002) ("Across the entire country, I estimate that 44% of nonwhites live in counties that use punch cards, while 36% of whites live in counties that use punch cards. For those voters living in counties using punch cards, there is a significantly higher probability that, if you do vote, your ballot will be incorrectly marked or incorrectly counted. Nonwhites disproportionately reside in such counties."); *McGuffage*, 209 F. Supp. 2d at 899 ("When the allegedly arbitrary system also results in a greater negative impact on groups defined by traditionally suspect criteria, there is cause for serious concern.").

Under strict scrutiny, this disparate treatment in the *counting* of votes appears just as "dilutive" of the right to vote and just as "arbitrary" as the different methods of *recounting* votes struck down in *Bush*. There is no compelling reason for the different treatment; a decision about resource allocation by localities should not be able to trump a "fundamental right."

The equal protection problems here are seriously aggravated by the particular facts of the recall election. The second part of the recall ballot will list 135 candidates

for governor, the winner to be chosen by a plurality vote (meaning that whoever gains the most votes is the new governor — assuming the current governor is recalled in the first part of the balloting — regardless of how low a percentage the highest vote-getter receives). With five or six candidates currently considered "serious" by the media and many others potentially to emerge from the group of 135 candidates, the chances of a close election are much higher than normal, meaning that the higher error rates in punch card balloting could make a real difference to the outcome of the election.

In addition, there will be pressure on voters to cast votes quickly, compounding the chances for error with punch card ballots. No doubt, the time taken to cast a ballot will be higher than normal. It will take voters — particularly those voters with poor eyesight or difficulty reading — some time to wade through the list of the 135 candidates on the ballot, listed, pursuant to state law, randomly on the ballot (rather than alphabetically or in order of perceived chances of success). In a county such as Los Angeles, that is consolidating 5,000 precincts down to 1,800, Katherine Q. Seelye, *A Notorious Ballot Returns in Recall*, N.Y. Times, Aug. 10, 2003, at A23, the time it will take to get one's chance to vote and to actually cast a ballot will be increased further. Turnout is also predicted to be high. Daren Briscoe, *L.A. County*

Braces for a High Voter Turnout, L.A. Times, Aug. 20, 2003; Public Policy Institute of California, *PPIC Statewide Survey*, (August 2003) 25, *available at* http://www.ppic.org/content/pubs/S_803MBS.pdf (77 percent of voters say they will vote in recall election).

For these reasons, we can expect long lines at the polling place. Long lines will put pressure on voters to vote faster, which plausibly will increase the rate of errors in casting these punch card ballots.

The bottom line is this: the chances of someone in Los Angeles county (and other counties using punch card ballots) being able to cast a vote that actually counts is going to be much lower than the chances facing someone voting in a county using more reliable voting equipment, especially in counties using superior technology and not consolidating their precincts. These facts make out an equal protection violation, one that predates *Bush v. Gore*. As the Supreme Court held in *Classic*, 313 U.S. at 315, "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*…." (Emphasis added.)

C. The appellants — and all voters in California — face irreparable injury if this Court does not enjoin the use of punch card ballots.

The district court conceded in its order that plaintiffs would face irreparable injury. (Order at 23 ("[A]s the Court cannot envision an effective remedy that would be available to Plaintiffs after the votes have been cast, it assumes for purposes of this analysis that the alleged injury would be irreparable.").)

The state has taken the position, in litigation raising similar issues before the California supreme court, that courts might craft some remedy *after the election* for equal protection problems that arise from the use of punch card ballots: "of course, if specific problems do occur, appropriately-tailored judicial relief may be available to remedy those specific problems." (Secretary of State Kevin Shelley's Opposition to Petition for Writ of Mandate, *Davis v. Shelley*, August 6, 2003, No. S117921, at

2.)[5/] The state is wrong. There likely can be no *adequate post-election remedy* for the punch card problems identified in this case.

One of the problems that punch card voting causes (particularly with so many candidates on the ballot) is the problem of overvotes. Overvotes cannot be recounted. In contrast, other voting technologies used in some counties reject overvotes by voters and give voters a second chance to cast a ballot that will be counted. There are no second chances with punch cards.

Also, the long lines that are expected at the polling places as a result of the use of punch cards in this election may deter some people from voting. These votes that were never cast necessarily cannot be counted. This court is in the unique position to prevent harm from occurring, harm that cannot be remedied later.

On the other side of the ledger is a delay in voting on the recall election, a right guaranteed to California voters in the state constitution. The delay should be avoided

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5/ The document is available at http://news.findlaw.com/hdocs/docs/elections/davisvshlly80603opp.pdf. The California Supreme Court denied the petition in *Davis v. Shelley* without comment. See the notation at http://appellatecases.courtinfo.ca.gov/search/disposition.cfm?dist=0&doc_id=282744. Because there was no alternative writ or order to show cause and no oral argument, the court's decision should be considered the summary denial of a writ petition that has no precedential or law of the case effect. *See Kowis v. Howard*, 838 P.2d 250, 12 Cal. Rptr. 2d 728 (1992).

if possible, perhaps by the state speeding the transition to more reliable voting technology. But the pressure of time cannot compete with an irreparable denial of the right to cast a vote that actually counts.

This court may be wary of delaying a duly-called recall election by a few months. Yet courts have not hesitated to make much more drastic changes to election procedures when the Equal Protection Clause requires it. The Supreme Court's decision in *Reynolds v. Sims*, for example, required virtually *every state* to redraw all of its electoral boundaries for electing members of state legislatures in compliance with the one person, one vote rule. *Avery v. Midland County*, 390 U.S. 474 (1968) extended that ruling to local bodies. And in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Supreme Court mandated *absolute equality* in complying with the one person, one vote rule for congressional districts, a rule that required nationwide massive redistricting. *See id*. at 7-8 ("[A]s nearly as is practicable[,] one man's vote in a congressional election [must] be worth as much as another's.").

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision and grant the preliminary injunction as prayed by appellants and order any other relief that is appropriate.

Dated: August 27, 2003

Respectfully submitted,

PROFESSOR RICHARD L. HASEN

By _____
Richard L. Hasen

Amicus Curiae In Pro Per