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September 17, 2003

Hon. Mary M. Schroeder, Chief Judge
and Circuit Judges
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Amicus curiae letter – Southwest Voter Education Project et al. v. Shelley, et al. No. 093-56498/D.C. No. CV-03-05715-SVW
- In Response to Court's Invitation for Comments on En Banc Review

To the Honorable Chief Judge and Circuit Judges:

This letter is submitted pursuant to the advisory notes for Rule 29 of the Federal Rules of Appellate Procedure for the 9th Circuit. The undersigned respectfully submits this letter as *amicus curiae* in support of the Intervenor-Appellee's motion to vacate the 9th Circuit Court of Appeal panel's decision and allow the October 7th California statewide election to go forward as scheduled. The court's September 16, 2003 Order regarding this case invited responses and comments concerning *en banc* review.

Amicus is the former California Secretary of State. This letter seeks to correct certain erroneous statements in the panel opinion from which the panel appears to draw erroneous inferences with respect to its decision and order setting aside the October 7, 2003 special recall and statewide election.

These erroneous statements occur in the published opinion of the panel concerning my reasons, as then- Secretary of State, for decertifying pre-scored punchcard voting systems in 2001. The panel opinion begins with two incorrect factual statements contained in its lead topic sentence at page 1 of the panel opinion: that "the [punchcard] voting system is so flawed that the Secretary of State has officially deemed it 'unacceptable' and banned its use in all future elections."

This statement is incorrect in two ways: (1) as Secretary of State, I never concluded, nor was it – or is it – my view, that pre-scored punchcard voting systems are

flawed; and (2) I did not "ban the use of punchcard voting machines in all future elections." The incorrect implication of the first statement is that punchcard voting systems were and are defective, a view I never held and do not hold now. During my tenure as Secretary of State, dozens of elections involving national and local contests were successfully conducted using pre-scored punch card voting systems. There was never a challenge in California to the result of any election because the election had been conducted using pre-scored punch card voting systems.

The incorrect implication of the latter statement above is that punchcard voting systems would not be used in any elections between my decertification order and the date of its implementation. Moreover, the latter statement implies -- incorrectly -- that my action in 2002 somehow anticipated the recall and validates the panel's decision.

In the official decertification proclamation dated September 18, 2001, as Secretary of State, I expressly made no finding that punch-card systems were either defective or error-prone under California Elections Code section 19222, or could not be used for elections while newer systems were being implemented. Instead, the proclamation found them "obsolete" as of 2006. While the panel decision quotes from my statement at page 9 of the decision, the language of its decision misrepresents what I said. I stated:

> As I order this proclamation, I want to be very clear on two points. First, Votomatic and Pollstar voting systems are old technology and their use today can be seen as analogous to the use of typewriters—they worked well for many years but now are obsolete in the world of the personal computer. ... Voters are entitled to have the infrastructure of democracy upgraded to reflect technological improvements to the voting process. Second, it is critically important that the transition to any new technologies be orderly and well thought out. A poorly planned rush to implement a new voting technology without providing adequate time for counties to purchase these systems, and to train their staff, pollworkers, and voters on the proper use of new equipment could easily result in great harm to the most fundamental right of the people, the right to vote.

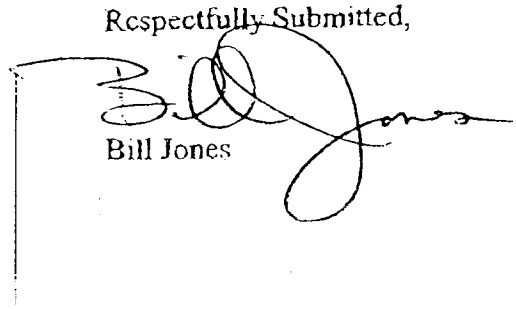
The panel decision at page 10 cites a portion of a press statement quoting me that "[w]e cannot wait for a Florida-style election debacle to occur in California before we replace archaic voting systems." Nothing in this statement

should be construed to reflect the panel's erroneous statement at page 1 that punchcard systems were "flawed" or error-prone. The statement is a reflection of my official proclamation that it is essential to replace older, though still serviceable voting systems, with available newer technology in an expedited but orderly manner. I was then, and am now, of the view -- stated in the press release accompanying the proclamation -- that aggressive voter education efforts such as those conducted in the aftermath of the Florida election here in California during my tenure as Secretary of State, and continued by the current Secretary of State, Kevin Shelley, adequately assist voters in effectively using these voting systems.

I urge the court immediately to vacate the panel's decision and to allow the October 7, 2003 election, in which hundreds of thousands of absentee ballots have already been cast, to proceed. The decision introduced great chaos and uncertainty to the voting process, and in this circumstance did a grave disservice to the people's fundamental right to vote – interfering with, rather than protecting, its exercise.

Based upon my experience for eight years as Secretary of State, I know that county election officials in all fifty-eight California counties work diligently to ensure that the electorate is well informed about the voting process and procedures, including the use of voting systems. I know that in the case of special and recall elections, election officials undertake extensive additional measures to educate and assist the electorate about every aspect of the voting process. Pre-scored punchcard systems are giving way to newer technologies, but like them, this election should not be sacrificed upon the basis of speculation and particularly on the basis of the erroneous statements of the panel, which this letter respectfully seeks to correct.

Respectfully Submitted,



Bill Jones

cc: Cathy Catterson, Clerk of Court

DECLARATION OF SERVICE

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

I am employed at Bell, McAndrews, Hiltachk & Davidian, LLP. I am over the age of 18 and not a party to this action; my business address is 455 Capitol Mall, Suite 801, Sacramento, CA 95814.

On September 17, 2003, I served the following document as follows:

Letter of Amicus Curiae Bill Jones

ELECTRONIC MAIL TRANSMISSION:

Pursuant to Federal Rules of Civil Procedure Rule 5(b)(2)(D) and by stipulation of the parties and upon Order of the Court, on the date above I served via electronic mail the document referenced above to the following e-mail addresses originating from Bell, McAndrews, Hiltachk & Davidian, LLP electronic mail address Stephanie@bmhlaw.com

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MAILING:

On the date above, I served the document referenced above by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at Bell, McAndrews, Hiltachk & Davidian, LLP in Sacramento, CA 95814.

See attached Service List

I declare under penalty of perjury under the laws of the State of California and the laws of the United States that the foregoing is true and correct. Dated this September 17, 2003, in Sacramento, California.

Stephanie Alison

Stephanie Alison

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