



NEWS RELEASE

CALIFORNIA SECRETARY OF STATE **KEVIN SHELLEY**

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U.S. District Court Rules in Favor of Secretary of State Shelley's Security Measures

SACRAMENTO, CA – A federal district court judge has ruled that Secretary of State Kevin Shelley's requirements for enhanced security measures on touchscreen machines are "designed to protect the voting rights of the state's citizens."

Judge Florence-Marie Cooper, of the United States District Court, Central District of California, wrote in her ruling, *Benavidez v. Shelley*, that the Secretary's "decision to decertify touchscreen voting machines and to withhold further certification until he is satisfied that manufacturers and counties have complied with specified conditions is a reasonable one. It is based on studies conducted and information gathered which convinced him [Shelley] that the voting public's right to vote is not adequately protected by the systems currently in place."

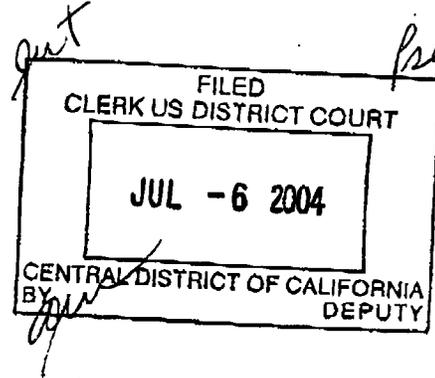
She wrote also that, "If any voting systems are deemed by the Secretary to be defective, obsolete, or otherwise unacceptable...the Secretary is, therefore not only authorized, but expressly directed, to withdraw his approval of any voting system to be defective or unacceptable."

"The Court has found that the actions we have taken to ensure the security and integrity of the November election are appropriate -- that they are, in fact, necessary," said Secretary Shelley. "Now is the time to leave the litigation and the acrimony behind, implement the added security measures we have called for, and run a secure, efficient election in November."

Judge Cooper's decision concerning the plaintiff's requests for a preliminary injunction and temporary restraining order has been added as an attachment.

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Attachment: Judge Cooper Ruling



**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

**AMERICAN ASSOCIATION OF
PEOPLE WITH DISABILITIES,
et al.,**

Plaintiffs,

vs.

KEVIN SHELLEY,

Defendant.

PETER BENAVIDEZ, et al.,

Plaintiffs,

vs.

KEVIN SHELLEY,

Defendant.

Case No. CV 04-01526 FMC (PJWx)

**ORDER DENYING PLAINTIFFS'
APPLICATION FOR
TEMPORARY RESTRAINING
ORDER, OR, IN THE
ALTERNATIVE, PRELIMINARY
INJUNCTION**

This matter is before the Court on the Benavidez Plaintiffs' Application for Temporary Restraining Order, or, in the Alternative, Preliminary Injunction (docket #5, Case No. 04-03318). This matter was heard on July 2, 2004, at which time the parties and amici were in receipt of the Court's tentative Order. For the reasons set forth below, the Court

1 denies the Application for Temporary Restraining Order and the Alternative
2 Motion.

3 4 I. Introduction

5 Plaintiffs seek to enjoin Defendant Secretary of State Kevin Shelley's
6 April 30, 2004, Directives which decertified and withdrew approval of the
7 use of certain direct recording electronic (DRE) voting systems. The Court
8 has read and considered the moving, responding, reply, and supplemental
9 documents submitted by the parties, together with their voluminous
10 exhibits, and the amicus curiae briefs filed by Conny McCormack, Registrar
11 of Los Angeles County, and the Electronic Frontier Foundation, California
12 Voter Foundation, Verified Voting Foundation, and Voters Unite! in
13 opposition to the Motion. The Court concludes that Plaintiffs have not
14 demonstrated a likelihood of success on the merits. Moreover, the
15 possibility of irreparable injury to Plaintiffs is substantially outweighed by
16 the advancement of the public interest.

17 18 II. Background

19 In 1999, the Accu-Vote-TS DRE voting system was approved for use in
20 California.¹ In the ensuing years, other electronic voting systems,
21 manufactured by a number of companies, were also given approval. By 2004,

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23 ¹ "In touchscreen (DRE) systems, a voter whose eligibility has been verified by an
24 election official is given a card that is used to activate a freestanding voting machine. On-
25 screen directions tell the voter how to select candidates or issues by touching the screen
26 over the corresponding choice. The voter may make changes by de-selecting a response
27 already made, and making another selection in its place. The voter is required to review
28 the entire ballot at the end of the process. The voter then touches a yellow 'Cast Vote' cue
on the last screen to record his or her vote." *Weber v. Shelley* 347 F.3d 1101, 1104 (9th Cir.
2003).

1 14 counties in California used some form of DRE touch-screen voting
2 system, and 43% of the state's voters used a DRE machine in the March 2,
3 2004 election. In response to reports of difficulties encountered throughout
4 the state during the March primary, Secretary of State Shelley (Defendant)
5 conducted a review of DREs in use in California. The review identified
6 problems in the areas of testing and certification of software, reliability,
7 accuracy, training, and security.

8 On April 21, 22, and 28, 2004, public hearings were conducted by the
9 Voting System and Procedures Panel, a panel charged with the responsibility
10 of reviewing proposed voting systems and modifications and making
11 recommendations to Defendant regarding certification. At the hearings,
12 testimony and documents were presented by hundreds of interested parties,
13 including persons representing Plaintiffs' views in this case. At the
14 conclusion of the hearings, the panel recommended that Defendant
15 withdraw approval of the use of the Diebold Accu-Vote-TSx voting system
16 (which system had been conditionally approved for use in California in
17 November 2003), and withdraw approval of the use of other voting machine
18 systems unless certain conditions were first satisfied.

19 Thereafter, on April 30, 2004, Defendant issued two Directives:
20 "Decertification and Withdrawal of Approval of Accu-Vote-TSx Voting
21 System As Conditionally Approved November 20, 2003, and Rescission of
22 Conditional Approval" and "Decertification and Withdrawal of Approval of
23 Certain DRE Voting Systems and Conditional Approval of the Use of
24 Certain DRE Voting Systems."

25 These Directives are the subject of this lawsuit and request for
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1 injunction.²

3 III. Plaintiffs' Claims

4 The individual plaintiffs in this action are registered voters in the
5 State of California who have either visual or manual impairments which
6 substantially limit one or more major life activities. They are, therefore,
7 "qualified individuals with disabilities" within the meaning of the
8 Americans With Disabilities Act. The organizational plaintiffs represent and
9 support persons with disabilities.

10 Plaintiffs urge the invalidation of Defendant's Directives, because
11 their effect is to deprive them of the opportunity to vote using touch-screen
12 technology. The importance of DREs to persons with handicaps is well
13 established by the evidence presented by the moving parties. DRE systems
14 contain an audio component which enables visually impaired voters to listen
15 to candidates' names on headphones and to vote using distinctively shaped
16 keys. DRE systems also contain mouth or head sticks, sip-and-puff devices,
17 or other accessible switch technology that enables manually impaired voters
18 to select candidates of their choice. Only with the use of these devices may
19 such disabled voters, for the first time, vote independently and in private.

21 IV. Standard for Issuance of a Preliminary Injunction

22 The Ninth Circuit has stated the legal standard justifying the issuance
23 of a preliminary injunction in a number of ways. *See, e.g., United States v.*
24 *Odessa Union Warehouse Co-op*, 833 F.2d 172, 174 (9th Cir. 1987) (setting

26 ² On May 14, 2004, the Secretary issued a document entitled "Clarification of Conditions
27 for Using Electronic Voting Machines in the November 2004 State-Wide General Election."

1 forth a four-part test that considers 1) likelihood of success on the merits;
2 2) the possibility of irreparable injury in the absence of an injunction; 3) a
3 balancing of the harms; and 4) the public interest); *Regents of Univ. of*
4 *California v. American Broadcasting Co.*, 747 F.2d 511, 515 (9th Cir. 1984)
5 (applying a three-part test that combines the second and third parts of the
6 four-part test into one part); *Topanga Press, Inc. v. City of Los Angeles*, 989
7 F.2d 1524, 1528 (9th Cir. 1993) (applying a two-part test that considers 1)
8 whether a probability of success on the merits and the possibility of
9 irreparable harm have been raised; or 2) whether serious questions have been
10 raised and the balance of hardships tips sharply in the moving parties' favor),
11 *cert. denied* U.S. 1030, 114 S. Ct. 1537 (1994); *see also Oakland Tribune, Inc. v.*
12 *Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985) (suggesting that
13 a high showing of likelihood of success on the merits lessens the degree of
14 irreparable harm required to be shown by the moving party, and vice versa).
15 These tests, although phrased differently, all require the Court to inquire
16 into whether there exists a likelihood of success on the merits, and the
17 possibility of irreparable injury; the Court is also required to balance the
18 hardships. Additionally, because this case involves the accuracy of public
19 elections, the Court finds the Ninth Circuit's four-part test, which requires
20 inquiry into the public interest, to be particularly relevant here.

21 The Court begins by examining the likelihood of success on the merits
22 as to each of Plaintiffs' claims.

23 24 V. Likelihood of Success

25 1. Americans with Disabilities Act ("ADA")

26 The ADA applies to all programs, services, and activities of state and
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1 local governments, including elections. *See, e.g., AAPD v. Smith*, 227 F.
2 Supp. 2d 1276, 1289 (M.D. Fla. 2002). Plaintiffs contend that decertification
3 of touch-screen voting machines will alter the voting system and make the
4 right to vote less accessible to disabled persons, citing 28 C.F.R. §35.151(b).
5 Plaintiffs assert that the Directives in question discriminate by reason of
6 disability, amounting to state action that disproportionately burdens the
7 disabled because of their unique needs.

8 The evidence does not support the conclusion that the elimination of
9 the DREs would have a discriminatory effect on the visually or manually
10 impaired. Although it is not disputed that some disabled persons will be
11 unable to vote independently and in private without the use of DREs, it is
12 clear that they will not be deprived of their fundamental right to vote. Each
13 plaintiff declares that he or she has voted in the past and intends to vote in
14 the future. Title II of the ADA precludes the exclusion of the disabled from
15 the services, programs or activities of any public entity. 42 U.S.C. §12132.
16 Title II requires only that programs be made “readily accessible to and
17 usable by” people with disabilities. 28 C.F.R. §35.150. The evidence
18 establishes that long before the conditional certification of DREs, counties
19 utilized a number of programs to provide handicapped persons with ready
20 access to voting equipment. As provided in the controlling regulations, a
21 public entity may employ such means as “assignment of aides to
22 beneficiaries . . . or any other methods that result in making its services,
23 programs, or activities readily accessible to and usable by individuals with
24 disabilities.” 28 C.F.R. §35.150(b)(1).

25 It cannot be disputed that casting a vote independently and secretly
26 would be preferred over casting a vote with the assistance of a family
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1 member or other aide. However, the ADA does not require accommodation
2 that would enable disabled persons to vote in a manner that is comparable in
3 every way with the voting rights enjoyed by persons without disabilities.
4 Rather, it mandates that voting programs be made accessible, giving a
5 disabled person the opportunity to vote.³ Nothing in the Americans with
6 Disabilities Act or its Regulations reflects an intention on the part of
7 Congress to require secret, independent voting. Nor does such a right arise
8 from the fact that plaintiff counties attempted to provide such an
9 accommodation. Plaintiffs did not acquire rights by virtue of the
10 temporarily discontinued experiment with electronic voting machines.

11 Plaintiffs have established no likelihood of success on the merits of
12 their Americans With Disabilities Act claim.

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14 **2. Help America Vote Act of 2002:**

15 The Help America Vote Act (“HAVA”) mandates that each voting
16 system used in a federal election “shall be accessible for individuals with
17 disabilities . . . in a manner that provides the same opportunity for access and
18 participation (including privacy and independence) as for other voters.”
19 42 U.S.C. §15481(a)(3)(A). Under HAVA, any voting system in use on or
20 after January 1, 2006, must use “at least one direct recording electronic
21 voting system or other voting system equipped for individuals with
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23 ³ For example, in discussing the obligation to provide voting services to the
24 disabled, the Title II Technical Assistance Manual explains that a blind voter is not
25 entitled to cast a ballot in Braille, even though this method would allow him to vote in
26 private. Because the County “can demonstrate that its current system of providing
27 assistance is an effective means of affording an individual with a disability an equal
28 opportunity to vote, the County need not provide ballots in Braille.” Title II Technical
Assistance Manual, §7.1100.

1 disabilities at each polling place.” 42 U.S.C. § 15482(a)(3)(B).

2 One of the conditions for certification in Defendant’s directives is the
3 utilization of a Voter Verified Paper Audit Trail (“VVPAT”). Plaintiffs
4 assert that such a condition cannot be met by January 1, 2006, if at all, and, if
5 the Secretary’s Directives are followed, California counties will not be able to
6 offer voters with disabilities the accessible voting equipment HAVA
7 demands. The flaw in Plaintiffs’ argument, of course, is that it is based on
8 speculation. No evidence has been presented to the Court to establish that it
9 is impossible, or even difficult, for manufacturers of DREs to comply with
10 HAVA’s requirements by January 1, 2006. On the contrary, Amici
11 Electronic Frontier Foundation, et al., provide evidence that several DREs
12 are already equipped with VVPAT capability and have been federally
13 qualified. Plaintiffs also insist that DREs will not be certified in time to
14 allow them to vote independently in the November 2004 presidential
15 election. If this prediction is accurate, it is unfortunate. However, given its
16 effective date of January 1, 2006, HAVA does not compel a different result.

17 Plaintiffs’ claim under HAVA is not ripe. “A claim is not ripe for
18 adjudication if it rests upon contingent future events that may not occur as
19 anticipated and indeed may not occur at all.” *Texas v. United States*, 523 U.S.
20 296, 300, 118 S. Ct. 1257, 1259, 140 L. Ed. 2d. 406 (1998) (internal quotation
21 marks and citations omitted). Plaintiffs have not demonstrated a likelihood
22 of success on their claim that Defendant’s Directives are in contravention of
23 the Help America Vote Act.

24
25 **3. Equal Protection:**

26 Plaintiffs argue that the deprivation of the right to vote independently
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1 is tantamount to disenfranchisement of several hundred thousand disabled
2 voters. Additionally, they contend, because DRE's are far more accurate
3 than any other voting system, millions of voters will not have their votes
4 counted at all if DREs are not utilized;⁴ this loss of the fundamental right to
5 vote is a violation of the Fourteenth Amendment and the voters' right to
6 equal protection.

7 The decision of the Secretary of State to decertify touch-screen voting
8 machines, pending their compliance with certain auditing and security
9 requirements, is not subject to a strict scrutiny analysis, despite the
10 involvement of a fundamental right to vote.

11 A court considering a challenge to a state election law must
12 weigh the character and magnitude of the asserted injury to the
13 rights protected by the . . . Fourteenth Amendment that the
14 plaintiff seeks to vindicate against the precise interests put
15 forward by the State as justifications for the burden imposed by
16 its rule, taking into consideration the extent to which those

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18 ⁴ This conclusion is based on the declaration of Professor Henry E. Brady, Ph.D.,
19 who concluded, based on the number of residual votes in the March 2004 election in Los
20 Angeles County, that one in eight to one in five votes had not been counted. Dr. Brady
21 filed a second declaration, in which he acknowledged that his original conclusion was
22 based on erroneous data. However, he continues to believe that Los Angeles' residual vote
23 rate was higher than other large counties in California, demonstrating that the Inka Vote
24 system is not as reliable as DREs. The Court is not persuaded by Dr. Brady's opinion and
25 conclusions. In both declarations, Dr. Brady, who is not a statistician, relies only on
26 residual vote rate to draw his conclusions concerning the efficacy of different voting
27 systems. Additionally, he asserts as a basic premise that the vast majority of undervotes in
28 the March 2004 election were unintentional. The Court is not satisfied that there is any
scientifically tested or peer-reviewed research to support the notion that most undervotes
are unintentional or due to system error. Comparing only residual vote rates is not a
scientifically valid method of comparing voting system performance. (*See* Declaration of
Jonathan N. Katz). Accordingly, the Court does not consider the Brady declaration.

1 interests make it necessary to burden the plaintiff's right."

2 *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d. 245
3 (1992) (internal quotation marks and citations omitted).

4 [W]e have developed (although only recently) a framework for
5 assessing the constitutionality, under the First and Fourteenth
6 Amendments, of state election laws. When a State's rule imposes
7 severe burdens on speech or association, it must be narrowly
8 tailored to serve a compelling interest; lesser burdens trigger less
9 exacting review, and a State's important regulatory interests are
10 typically enough to justify reasonable restrictions. [citations]

11 *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 208, 119
12 S.Ct. 636, 649 (concurring opinion).

13 Because we are concerned here with a temporary change in the method
14 by which voters cast their ballots, the case involves not a severe restriction
15 on the right of citizens to vote, but rather a lesser burden, triggering less
16 exacting review. The Court will, therefore, determine whether there is a
17 rational basis for Defendant's action. See *Board of Trustees of the University of*
18 *Alabama v. Garrett*, 531 U.S. 356, 365-68, 121 S. Ct. 955, 963-64, 148 L. Ed. 2d.
19 866 (2001).

20 Defendant's decisions were based on the following findings:

- 21 1. The DRE voting systems currently in use do not produce an
22 accessible voter-verified paper audit trail which would permit voters to
23 independently verify the accuracy of their votes;
24 2. they do not permit meaningful recounts;
25 3. they may not permit a contest to be decided by a meaningful
26 recount;

1 4. it is extremely difficult, if not impossible, to determine whether
2 software has been compromised;

3 5. the technology is difficult to operate and repair; and

4 6. the machines may be subject to erroneous programming, tampering,
5 or manipulation.

6 Defendant's decision to suspend the use of DREs pending
7 improvement in their reliability is certainly a rational one, designed to
8 protect the voting rights of the state's citizens. Plaintiffs have established no
9 likelihood of success as to this claim, notwithstanding the possibility that the
10 Directives may have an unintentional discriminatory effect on the ability of
11 disabled persons to cast their votes in private.

12
13 4. Elections Code:

14 Plaintiffs cite Cal. Elections Code §§19227 for the proposition that
15 Defendant's Directives violate the mandate to provide at least one accessible
16 voting system per polling place for the blind and visually impaired. Section
17 19227(b) requires at least one voting unit that provides blind and visually
18 impaired persons with "access that is equivalent to that provided to
19 individuals who are not blind or visually impaired, including the ability for
20 the voter to cast and verify all selections made by both visual and nonvisual
21 means."

22 Plaintiffs contend that requiring manufacturers to install a Voter
23 Verified Paper Audit Trail in each DRE will violate the requirement that
24 visually impaired persons have equal access to verification of their votes.
25 However, Defendant is obligated by Elections Code §19205, to assure that
26 any voting system is safe from fraud or manipulation. Following an
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1 extensive study of the March election, the Office of the Secretary of State
2 concluded that numerous problems and concerns were disclosed, suggesting
3 that "DRE technology may not yet be stable, reliable and secure enough to
4 use in the absence of an accessible, voter-verified, paper audit trail
5 (AVVPAT)." (Report on the March 2, 2004, Statewide Primary Election
6 Prepared by the Office of the Secretary of State, p. 2).

7 Although a state must preserve the right to vote for all its citizens, it is
8 entitled to broad leeway in enacting reasonable, even-handed legislation
9 affecting elections. "[A]s a practical matter, there must be a substantial
10 regulation of elections if they are to be fair and honest and if some sort of
11 order, rather than chaos, is to accompany the democratic processes." *Storer v.*
12 *Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974).

13 Defendant's decision to modify DREs to include VVPAT technology
14 is a reasonable one, well within his discretion and authority, and consistent
15 with his obligation to assure the accuracy of election results.

16 [E]very electoral law and regulation necessarily has *some*
17 impact on the right to vote, yet to strike down every electoral
18 regulation that has a minor impact on the right to vote would
19 prevent states from performing the important regulatory task of
20 ensuring that elections are fair and orderly. The Supreme Court
21 recognized as much in *Burdick*, observing that "[e]lection laws
22 will invariably impose some burden upon individual voters."
23 *Weber v. Shelley*, 347 F.3d. 1101, 1104 (9th Cir. 2003) (internal quotation
24 marks and citations omitted).

25 Plaintiffs have not established a likelihood of success as to their claim
26 based on the California Elections Code.

1 5. Due Process:

2 Plaintiffs contend that the Secretary of State decertified DREs without
3 notice and a hearing. The record belies this contention. Public notice of a
4 three-day hearing was provided, in compliance with the requirements of
5 Elections Code §19204. Plaintiffs respond that the notice was inadequate, in
6 that it referred only to "Voting Systems for Use in November 2004 General
7 Elections" and did not advise that decertification was being considered.
8 Nonetheless, the evidence before the Court demonstrates that Plaintiffs
9 received actual notice that the issue of decertification was on the table.
10 There was significant public response to the notice, the vast majority of
11 which concerned the continued use of electronic voting machines. Further,
12 there was substantial public participation in the meeting, including
13 participation by advocates for voters with disabilities.

14 Plaintiffs have therefore failed to establish a likelihood of success as to
15 their due process claim.

16
17 6. Lack of Statutory Authority:

18 Plaintiffs assert the following premise in support of this contention:
19 By decertifying DREs and by requiring that DREs utilize a VVPAT, the
20 Secretary of State is making policy. Only the Legislature sets policy; the
21 Legislature then delegates authority to the Secretary to execute that policy,
22 according to certain standards. The Secretary must then issue Regulations,
23 pursuant to the Administrative Procedures Act; otherwise, his actions are
24 void.

25 The flaw in the argument is the initial conclusion that the Secretary is
26 improperly usurping the legislative authority to make policy by decertifying
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1 electronic voting machines absent compliance with certain requirements,
2 including the VVPAT. The policy at issue in this case has already been
3 established by the Legislature, as codified in Elections Code §19100, et seq.
4 The Secretary is authorized to approve and regulate voting machines and
5 devices, and to regularly review systems in use to assure fulfillment of the
6 provisions of the Elections Code and the Secretary's regulations. (Cal. Elec.
7 Code §§ 19100, 19200, 19205). If any voting systems are deemed by the
8 Secretary to be defective, obsolete, or otherwise unacceptable, "the Secretary
9 of State has the right to withdraw his or her approval previously granted..."
10 (Cal. Elec. Code §19222).

11 The Secretary is, therefore, not only authorized, but expressly directed,
12 to withdraw his approval of any voting system found to be defective or
13 unacceptable. "[T]he contemporaneous administrative construction of [an]
14 enactment by those charged with its enforcement . . . is entitled to great
15 weight, and courts generally will not depart from such construction unless it
16 is clearly erroneous or unauthorized." *People ex rel Lungren v. Superior Court*,
17 14 Cal. 4th 294, 309 (1996) (internal quotation marks and citations omitted).
18 Accordingly, Plaintiffs have failed to establish that they are likely to prevail
19 on their claim that the Secretary of State lacked statutory authority to issue
20 the Directives.

21
22 **7. Abuse of Discretion:**

23 As this Court has previously concluded in its evaluation of Plaintiffs'
24 other claims, the Secretary of State reasonably exercised his discretion in
25 concluding that DREs must not be used in California until specific steps are
26 taken to assure their reliability. Accordingly, Plaintiffs have failed to
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1 establish a likelihood of success as to their abuse of discretion claim.
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3 **8. California Administrative Procedures Act:**

4 Plaintiffs' argument that the Secretary's Directives are in violation of
5 the Administrative Procedures Act ("APA") is not well taken. The
6 Directives were issued, as previously observed, under the authority of the
7 Elections Code, which authorizes the Secretary, at §19222, to withdraw
8 approval of previously certified voting systems. As explained above, in
9 connection with Plaintiffs' sixth claim, the Secretary was not adopting a new
10 policy, the execution of which would require the adoption and approval of
11 regulations in compliance with the Administrative Procedures Act. He was
12 simply carrying out his responsibilities under laws and regulations already in
13 force.

14 This issue was the subject of oral argument at the hearing. The Court
15 questioned Plaintiff's counsel regarding the effect of Plaintiffs' contention
16 that the Decertification Directive was invalid as a result of the failure to
17 follow the APA. The Secretary of State acknowledged that the only
18 regulations adopted pursuant to the Elections Code were regulations
19 regarding tabulation of election results; no regulations have been
20 promulgated regarding voting equipment. Were the Court to accept
21 Plaintiff's contention that the April 30, 2004, Directive was invalid as a result
22 of the failure to follow the APA, the same fate would befall the original
23 November 20, 2003, Directive, which gave provisional certification to DREs,
24 and Plaintiffs would still not be entitled to the relief they seek.

25 Plaintiffs argued that certification of voting machines should be
26 treated differently from decertification of those machines. Plaintiffs noted
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1 that there is specific statutory authority for the certification of voting
2 machines. *See* Elections Code § 19205 (“The Secretary . . . shall establish the
3 specifications for and the regulations governing voting machines . . . The
4 criteria for establishing the specifications and regulations shall include, but
5 not be limited to . . . (a) the machine . . . shall be suitable for the purpose for
6 which it is intended[;] (b) [t]he system shall preserve the secrecy of the
7 ballot[; and] (c) [t]he system shall be safe from fraud or manipulation.”).

8 However, the Secretary countered that there is also specific statutory for the
9 withdraw of the Secretary’s approval. *See* Elections Code § 19222 (“The
10 Secretary . . . shall review voting systems periodically to determine if they are
11 defective, obsolete, or otherwise unacceptable. The Secretary . . . has the
12 right to withdraw his or her approval . . . of any voting system or part of a
13 voting system should it be defective or prove otherwise unacceptable after
14 such review.”). These statutes provide similar guidance to the secretary.
15 Machines may be certified by the Secretary if they are suitable for voting,
16 preserve secrecy, and are safe from fraud or manipulation. Elections Code §
17 19205. By the same token, the Secretary may decertify machines that are
18 “defective, obsolete, or otherwise unacceptable.” Elections Code § 19222.
19 The Court sees no meaningful distinction between these two statutes that
20 would justify imposing the requirements of the APA on the decertification
21 process without also imposing it on the certification process. In fact,
22 subjecting the certification process, but not the decertification process to the
23 APA would be more likely result, as § 19205 specifically refers to
24 “regulations” and § 19222 does not.

25 Therefore, Plaintiffs have failed to establish a likelihood of success on
26 the merits as to their Administrative Procedures Act claim.

1 9. Contracts Clause:

2 Plaintiffs allege that the decertification directives impair contracts in
3 violation of the United States and California Constitutions. In support, they
4 assert that Riverside County entered into contracts with Sequoia Voting
5 Systems and the California Voting Modernization Board for the use of
6 Sequoia AVC Edge DRE voting systems in their county. The decertification
7 Directive, they argue, impairs those contracts.

8 While factually accurate, the contention does not give rise to a basis for
9 injunctive relief in favor of Plaintiffs. The only plaintiffs with standing to
10 assert this claim are the plaintiff counties. A subordinate political entity,
11 such as a county, may not challenge a state's actions under the Contract
12 Clause. *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40, 53 S. Ct. 943, 946, 77
13 L. Ed. 1015, 1020 (1933); *Mallon v. City of Long Beach*, 44 Cal. 2d 199, 209
14 (1955). Accordingly, the county plaintiffs have failed to establish a
15 likelihood of success on the merits of their contracts claim.

16
17 10. Estoppel

18 This claim is based on the position of the plaintiff counties that they
19 detrimentally relied on Defendant's certification of DREs. Implied in this
20 argument is the contention that Defendant promised the counties they
21 would be able to continue to use the machines in the future. The fallacy in
22 this argument is found in the language of Elections Code §19222, which
23 authorizes the Secretary of State to decertify any voting system he finds to be
24 unreliable. Therefore, Plaintiffs have failed to establish a likelihood of
25 success on the merits of their estoppel claim.

1 As to all claims, Plaintiffs have failed to establish a likelihood of
2 success on the merits.

4 **VI. Irreparable Harm, Balancing of Hardships, and the Public Interest**

5 Although there is admittedly harm to the disabled plaintiffs, whose
6 right to vote unassisted is diminished by the absence of electronic voting
7 machines, that harm is not irreparable. The hardship suffered by Plaintiffs if
8 the DREs are not used is the inability to vote unassisted and in private. As
9 explained above, this is not a right currently protected by law. The hardship
10 faced by Defendant in the event the Court were to issue an injunction is that
11 he would be in danger of being precluded from following the duties
12 conferred on him by Cal. Elections Code §19205, and ensuring an accurate
13 count of all votes cast in the November election and thereafter. Similarly,
14 the public interest in the accuracy of the upcoming election cannot be
15 overestimated.

16 The interest of the Secretary of State in fulfilling his statutory duties
17 and the public interest in accurate, verifiable vote counts outweigh the
18 Plaintiffs' interest in an unassisted, private vote. Therefore, the irreparable
19 injury, balancing of interests, and the public interest factors weigh against
20 the granting of a preliminary injunction.

22 **VII. Conclusion**

23 Plaintiffs have not demonstrated a likelihood of success on the merits
24 as to any claim in this action. Defendant's decision to decertify touch-screen
25 voting machines and to withhold further certification until he is satisfied
26 that manufacturers and counties have complied with specified conditions is a
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1 reasonable one. It is based on studies conducted and information gathered
2 which convinced him that the voting public's right to vote is not adequately
3 protected by the systems currently in place.

4 Plaintiffs' Request for Temporary Restraining Order, or, in the
5 Alternative, Preliminary Injunction, is denied.

6 Dated: July 6, 2004

7 
8 FLORENCE-MARIE COOPER, Judge
9 UNITED STATES DISTRICT COURT

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