Testimony to Voting Modernization Board

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My name is Dan Tokaji, and I am a staff attorney with the ACLU Foundation of Southern California. My office represents the plaintiffs in *Common Cause v. Jones*, the federal lawsuit that resulted in the court order requiring the California Secretary of State to decertify Votomatic and Pollstar punch-card machines effective March 1, 2004. The plaintiffs in the case include Common Cause, the Southern Christian Leadership Conference of Greater Los Angeles, the Southwest Voter Registration Education Project, the Chicano Federation of San Diego County, the AFL-CIO, and individual voters from counties that continue to use Votomatic and Pollstar machines.

The matters before this Board are of the utmost importance not only to the citizen groups that my office represents, but also to voters throughout the State of California. While the proper criteria for distributing Proposition 41 funds cannot easily be reduced to a rigid formula, the most urgent priority of this Board should be to replace the pre-scored punch card machines still used by voters in nine California counties -- which collectively comprise more than half the State's voters – in time for the March 2004 elections. The landmark court order that was issued in the *Common Cause v. Jones* litigation, the first of its kind anywhere in the country, requires that these counties replace their outdated Votomatic and Pollstar voting systems by the next presidential elections.

While we appreciate the opportunity to appear before you today, we must express at the outset our consternation that so little has been done so far to solicit the input of those who are most directly

affected by the enormous changes taking place in California's voting system. I am referring, of course, to the voters themselves. There appears to have been no attempt whatsoever to invite or to include California voters or citizen groups to the first meeting of this Board, which took place on June 6, 2002. Nor has there been any apparent effort by this Board to do outreach or obtain community input prior to today's meeting. Yet it is the People of the California who have the most direct stake in the decisions that this Board will ultimately make.

Unfortunately, as I shall explain, this is not the first time that the People of California have been shut out of the decisionmaking process regarding election reform. Given that we are talking about the right to vote – which the United States Supreme Court has long recognized to be among the most fundamental rights protected by the Constitution – it is regrettable that there has not been a greater effort on the part of public officials to obtain input from the citizens whom they are sworn to serve.

In order to put the instant proceedings in context, it is necessary to have some understanding of the efforts of the ACLU, Common Cause, and other citizen groups to force the State to make sorely needed improvements to the infrastructure of our democracy. For many years, the State of California has had an election system that violates the basic voting rights of Californians, because it employs voting machines with widely disparate rates of reliability. The worst offenders are Pollstar and Votomatic punchcard machines, the same type of machines that caused so many problems in Florida. Because of their tendency to result in hanging chads, dimpled chads, and the like, many punchcard ballots wind up not being counted even though voters who cast them fully intended to cast votes. These outdated machines have nevertheless continued to be used in nine California counties: Los

Angeles, San Diego, Santa Clara, Alameda, San Bernardino, Sacramento, Solano, Shasta, and Mendocino. As shown by statistics released at Assembly hearings in January 2001, these machines have uncounted vote rates (i.e., combined overvote and undervote rate) more than twice that of any other system used in California.

The result of the disparities in voting equipment used in this state is that voters in some counties – and a disproportionately large number of people of color – have been disenfranchised, and will continue to be disenfranchised until they are replaced. In Los Angeles County, for example, the uncounted vote rate was over **four and one-half times** that of neighboring Riverside County. While Los Angeles County had a 2.7% uncounted vote rate, Riverside County's was only 0.6%.

Worse still, African Americans, Latinos, and Asian Americans, who disproportionately reside in those counties using Votomatic-style machines, are hardest hit by the technology gap. According to one study, based on data from the 1996 election, only 58.3% of white voters voted on outdated punch card machines, compared to 80.8% of African American voters and 66.6% of Latino voters. That same study found that nationwide "Hispanics are much more likely than whites to live in punch card counties, although this disparity would be eliminated entirely if Los Angeles County abandoned its use of punch cards." Eliminating the racial inequalities that result from the use of antiquated punch card systems must be given the highest priority.

The public's attention was focused on these defects in our voting systems for the first time during the 2000 election. But those who have looked carefully at the issue – including people within the Secretary of State's office – have been aware of the problem for years. Indeed, the Secretary of

State's files contain documents dating back to the 1970's regarding the "chad" problem associated with pre-scored punch card machines.

Because of these glaring defects in California's voting systems, the ACLU brought suit in April 2001 on behalf of Common Cause and other groups, to force the Secretary of State to decertify Votomatic and Pollstar punch-card machines. We brought the *Common Cause v. Jones* lawsuit to ensure that California would not become the next Florida – and, in particular, sought to have these machines replaced no later than 2004.

After initially disclaiming responsibility and seeking to have the lawsuit thrown out, Secretary Jones finally, in September 2001, conceded that punch-card voting machines are "obsolete" and agreed to decertify them. Nevertheless, Jones refused to require their replacement in time for the 2004 elections

Secretary Jones' office conducted hearings on the date of decertification in November 2001. But while the Secretary of State invited vendors and county registrars to testify at the hearing, the People of the State were not encouraged to have their voices heard. The Secretary of State's office heard hours of testimony from vendors and county officials, but refused to hear from the citizens whose votes are systematically discounted as a result of the continuing use of Votomatic and Pollstar systems. When the citizen groups that my office represents sought permission to speak at the November 2001 hearing, we were refused permission by the Secretary of State. In a written response to our request to testify, the Secretary of State's office informed us that they were only interested in hearing from those "directly affected" by the decision regarding conversion date.

With all due respect to the Secretary of State, there is no one more "directly affected" by the continuing use of outdated voting equipment than the People of the State of California, whose voting rights are put at risk by our antiquated voting technology. Through their enactment of Proposition 41 and Proposition 43 in the March 2002 elections, California voters have unambiguously expressed their desire that everyone's vote be counted.

In the *Common Cause v. Jones* case, we spoke to dozens of election officials throughout the country, who met the challenge of upgrading the infrastructure of democracy. The experience of other jurisdictions – several of which have made transitions in far less time than that available to the nine California counties – confirms that it can be done in time for the 2004 elections.

Nevertheless, the Secretary of State refused to take action to make sure that outdated punch-card systems were replaced by 2004, instead setting a 2005 decertification date. As a result, the federal court was forced to step in to protect voters' rights. In view of the overwhelming evidence showing that replacement by 2004 is feasible, the court (Judge Stephen V. Wilson) entered an order in Plaintiffs' favor on February 20, 2002. The February 20, 2002 order required that, within seven days, Secretary Jones enter into a consent decree providing for a 2004 replacement date.

Rather than consenting to a 2004 decertification date, the Secretary of State asked for reconsideration of the February 20, 2002 court order. Again, the Secretary of State's attempt to delay election reform was decisively rejected by the federal court. In May 2004, the district court issued its final judgment requiring decertification of Pollstar and Votomatic punch-card machines by March

1, 2004.

Against this backdrop, I shall lay out the criteria that numerous citizen groups whose voices have thus far not been heard believe should guide this Board in determining how to distribute Proposition 41 monies.

First and foremost, this Board must provide funds to the nine counties that are required to replace their systems by that date under the *Common Cause v. Jones* court order. If these machines continue to be used in the 2004 presidential elections, the voting rights of 8.4 million California voters -- including a disproportionate number of people of color -- will be violated.

As a civil rights advocate, I am all too familiar with the saying: "Justice delayed is justice denied." This reminds us of the many years following the Supreme Court's landmark decision in *Brown v. Board of Education*, when public schools remained segregated, long after the illegality of such practices was clearly established as a matter of law. The phrase "all deliberate speed" became a justification for foot-dragging by an intransigent bureaucracy resistant to change, resulting in the denial of the rights of thousands of schoolchildren to an equal education. It is of the utmost importance that replacement of the worst machines – the Votomatic and Pollstar systems that are the voting equivalent of the horse and buggy – be given the highest priority in the distribution of Proposition 41 funds.

The next consideration in distributing Proposition 41 funds should be the population of the counties making a transition to better voting equipment. Allocating monies in other ways – for instance, by the number of polling places rather than number of people – risks disadvantaging larger

urban counties, many of which are in the greatest need of replacing their voting systems. To deny these counties adequate funds would violate voting rights protected by the federal and state constitutions as well as the Voting Rights Act, could exacerbate the technology gap that already has a disparate impact on people of color, and might well result in additional litigation. The evidence we obtained in the context of the *Common Cause v. Jones* case confirms that there is no legitimate justification for allocating monies based on the number of polling places rather than the number of voters. Polling places with a smaller number of voters can simply use fewer machines.

Third, this Board should ensure that counties convert to systems that best accommodate the needs of voters with disabilities and voters of limited English proficiency. Under both the federal and state constitutions, everyone has the right to vote and to have their vote counted. This emphatically includes people who are disabled and people who are not fluent in English. Here again, the failure to safeguard the rights of all California voters could well result in additional litigation. If the needs of disabled voters are not met, then litigation under the Americans with Disabilities Act and other civil rights laws is all but certain. If the needs of non-English speakers are not met, then the State and counties could face litigation under Section 203 of the Voting Rights Act.

Finally, this Board should provide incentives for counties to convert to systems that best meet the needs of all their voters – even if it means greater up-front costs per voter. In addition to access for people with disabilities and for non-English proficient voters, the criteria that voting systems should meet include: (1) accurately recording voters' choices; (2) providing an auditable record of votes cast; (3) having an effective means by which voters can "check" their ballots, to determine whether they have overvoted and undervoted; and (4) protecting the privacy of all those who seek to

cast their votes, including people with disabilities and people of limited English proficiency. Again, these factors cannot be reduced to a rigid formula. But this Board should take into consideration how well counties' proposed systems meet these criteria in distributing Proposition 41 funds.

In making the important decisions for which it is responsible, this Board should be cautious of decisions that are penny-wise but pound-foolish. In this regard, it is important to bear in mind that, while the initial costs of converting to touch-screen systems may be greater than converting to optical scan systems, those costs even out over approximately a fifteen-year time span, according to the Cal Tech/MIT report on election reform. That is because of the greater costs associated with printing optical scan ballots.

Without question, the decisions that this Board makes will have an impact on Californians for many years to come. It is unfortunate that the voices of Californians have, to this point, not fully been heard, and that so little effort has been made to solicit the input of those most directly affected by the coming changes to our voting system. Decisions about election reform cannot simply be left to county bureaucrats, however well intentioned, nor to vendors with a financial stake in the outcome of these proceedings. The voices of all the People of California, so long diminished by our inadequate voting systems, must now be heard.