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

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9 **AMERICAN ASSOCIATION OF**  
10 **PEOPLE WITH DISABILITIES,**  
11 **et al.,**

12 **Plaintiffs,**

13 **vs.**

14 **KEVIN SHELLEY,**

15 **Defendant.**

16 **PETER BENAVIDEZ, et al.,**

17 **Plaintiffs,**

18 **vs.**

19 **KEVIN SHELLEY,**

20 **Defendant.**  
21

**Case No. CV 04-01526 FMC (PJWx)**

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

**Oral Argument: 07/02/04, 9:00 a.m.**

22 This matter is before the Court on the Benevadez Plaintiffs'  
23 Application for Temporary Restraining Order, or, in the Alternative,  
24 Preliminary Injunction (docket #5, Case No. 04-03318). For the reasons set  
25 forth below, the Court denies the Application for Temporary Restraining  
26 Order and the Alternative Motion.  
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1 **I. Introduction**

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

14  
15 **II. Background**

16 In 1999, the Accu-Vote-TS DRE voting system was approved for use in  
17 California.<sup>1</sup> In the ensuing years, other electronic voting systems,  
18 manufactured by a number of companies, were also given approval. By 2004,  
19 14 counties in California used some form of DRE touch-screen voting  
20 system, and 43% of the state's voters used a DRE machine in the March 2,  
21 2004 election. In response to reports of difficulties encountered throughout  
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23 <sup>1</sup> "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-screen  
25 directions tell the voter how to select candidates or issues by touching the screen over the  
26 corresponding choice. The voter may make changes by de-selecting a response already made,  
27 and making another selection in its place. The voter is required to review 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 (9<sup>th</sup> Cir. 2003).

1 the state during the March primary, Secretary of State Shelley (Defendant)  
2 conducted a review of DREs in use in California. The review identified  
3 problems in the areas of testing and certification of software, reliability,  
4 accuracy, training, and security.

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

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

22 These Directives are the subject of this lawsuit and request for  
23 injunction.<sup>2</sup>

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26 <sup>2</sup> 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."

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### III. Plaintiffs' Claims

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

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

### IV. Standard for Issuance of a Preliminary Injunction

The Ninth Circuit has stated the legal standard justifying the issuance of a preliminary injunction in a number of ways. *See, e.g., United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174 (9th Cir. 1987) (setting forth a four-part test that considers 1) likelihood of success on the merits; 2) the possibility of irreparable injury in the absence of an injunction; 3) a balancing of the harms; and 4) the public interest); *Regents of Univ. of California v. American Broadcasting Co.*, 747 F.2d 511, 515 (9th Cir. 1984)

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

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

## 19 20 **V. Likelihood of Success**

### 21 **1. Americans with Disabilities Act ("ADA")**

22 \_\_\_\_\_ The ADA applies to all programs, services, and activities of state and  
23 local governments, including elections. *See, e.g., AAPD v. Smith*, 227 F.  
24 Supp. 2d 1276, 1289 (M.D. Fla. 2002). Plaintiffs contend that decertification  
25 of touch-screen voting machines will alter the voting system and make the  
26 right to vote less accessible to disabled persons, citing 28 C.F.R. §35.151(b).

1 Plaintiffs assert that the Directives in question discriminate by reason of  
2 disability, amounting to state action that disproportionately burdens the  
3 disabled because of their unique needs.

4 The authority cited by Plaintiffs does not support their position. 28  
5 C.F.R. §35.151(b) deals with alteration of *facilities*, not equipment. It is clear  
6 from a reading of sub-paragraphs (b) and (c) of the regulation, that it refers  
7 only to the physical alteration of facilities, buildings, and similar structures,  
8 and not the alteration of equipment within such facilities. The Court's  
9 research has disclosed no provision in the ADA which would preclude the  
10 alteration of voting equipment.

11 With respect to the disparate-impact argument (that the elimination of  
12 voting machines would have a discriminatory effect against the visually and  
13 manually impaired), the evidence does not support such a conclusion.  
14 Although it is not disputed that some disabled persons will not be able to  
15 vote independently and in private without the use of DREs, it is clear that  
16 they will not be deprived of their fundamental right to vote. Each plaintiff  
17 declares that he or she has voted in the past and intends to vote in the future.  
18 Title II of the ADA precludes the exclusion of the disabled from the services,  
19 programs or activities of any public entity. 42 U.S.C. §12132. Title II  
20 requires only that programs be made "readily accessible to and usable by"  
21 people with disabilities. 28 C.F.R. §35.150. The evidence establishes that  
22 long before the conditional certification of DREs, counties utilized a number  
23 of programs to provide handicapped persons with ready access to voting  
24 equipment. As provided in the controlling regulations, a public entity may  
25 employ such means as "assignment of aides to beneficiaries . . . or any other  
26 methods that result in making its services, programs, or activities readily  
27

1 accessible to and usable by individuals with disabilities.” 28 C.F.R.  
2 §35.150(b)(1).

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

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

17  
18 2. Help America Vote Act of 2002:

19 \_\_\_\_\_The Help America Vote Act (“HAVA”) mandates that each voting  
20 system used in a federal election “shall be accessible for individuals with  
21 disabilities . . . in a manner that provides the same opportunity for access and  
22 participation (including privacy and independence) as for other voters.”

23 \_\_\_\_\_  
24 <sup>3</sup> For example, in discussing the obligation to provide voting services to the disabled, the  
25 Title II Technical Assistance Manual explains that a blind voter is not entitled to cast a ballot in  
26 Braille, even though this method would allow him to vote in private. Because the County “can  
27 demonstrate that its current system of providing assistance is an effective means of affording an  
individual with a disability an equal opportunity to vote, the County need not provide ballots in  
Braille.” Title II Technical Assistance Manual, §7.1100.

1 42 U.S.C. §15481(a)(3)(A). Under HAVA, any voting system in use on or  
2 after January 1, 2006, must use at least one direct recording electronic voting  
3 system at each polling place.

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

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

1 3. Equal Protection:

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

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

13 A court considering a challenge to a state election law must  
14 weigh the character and magnitude of the asserted injury to the  
15 rights protected by the . . . Fourteenth Amendment that the  
16 plaintiff seeks to vindicate against the precise interests put  
17 forward by the State as justifications for the burden imposed by

18 \_\_\_\_\_  
19 <sup>4</sup> This conclusion is based on the declaration of Professor Henry E. Brady, Ph.D., who  
20 concluded, based on the number of residual votes in the March 2004 election in Los Angeles  
21 County, that one in eight to one in five votes had not been counted. Dr. Brady filed a second  
22 declaration, in which he acknowledged that his original conclusion was based on erroneous data.  
23 However, he continues to believe that Los Angeles' residual vote rate was higher than other large  
24 counties in California, demonstrating that the Inka Vote system is not as reliable as DREs. The  
25 Court is not persuaded by Dr. Brady's opinion and conclusions. In both declarations, Dr. Brady,  
26 who is not a statistician, relies only on residual vote rate to draw his conclusions concerning the  
27 efficacy of different voting systems. Additionally, he asserts as a basic premise that the vast  
28 majority of undervotes in 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 its rule, taking into consideration the extent to which those  
2 interests make it necessary to burden the plaintiff's right.”

3 *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d. 245  
4 (1992) (internal quotation marks and citations omitted).

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

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

14 Because we are concerned here with a temporary change in the method  
15 by which voters cast their ballots, the case involves not a severe restriction  
16 on the right of citizens to vote, but rather a lesser burden, triggering less  
17 exacting review. The Court will, therefore, determine whether there is a  
18 rational basis for Defendant's action. *See Board of Trustees of the University of*  
19 *Alabama v. Garrett*, 531 U.S. 356, 365-68, 121 S. Ct. 955, 963-64, 148 L. Ed. 2d.  
20 866 (2001).

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

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

1 recount;

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

4 5. technology is difficult to operate and repair; and

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

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

13  
14 4. Elections Code:

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

23 Plaintiffs contend that requiring manufacturers to install a Voter  
24 Verified Paper Audit Trail in each DRE will violate the requirement that  
25 visually impaired persons have equal access to verification of their votes.  
26 However, Defendant is obligated by Elections Code §19205, to assure that

1 any voting system is safe from fraud or manipulation. Following an  
2 extensive study of the March election, the Office of the Secretary of State  
3 concluded that numerous problems and concerns were disclosed, suggesting  
4 that “DRE technology may not yet be stable, reliable and secure enough to  
5 use in the absence of an accessible, voter-verified, paper audit trail  
6 (AVVPAT).” (Report on the March 2, 2004, Statewide Primary Election  
7 Prepared by the Office of the Secretary of State, p. 2).

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

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

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

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

3  
4 5. Due Process:

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

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

19  
20 6. Lack of Statutory Authority:

21 \_\_\_\_\_Plaintiffs assert the following premise in support of this contention:  
22 By decertifying DREs and by requiring that DREs utilize a VVPAT,  
23 the Secretary of State is making policy. Only the Legislature sets  
24 policy; the Legislature then delegates authority to the Secretary to  
25 execute that policy, according to certain standards. The Secretary  
26 must then issue Regulations, pursuant to the Administrative

1 Procedures Act; otherwise, his actions are void.

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

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

1 7. Abuse of Discretion:

2 \_\_\_\_\_ As this Court has previously concluded in its evaluation of Plaintiffs'  
3 other claims, the Secretary of State reasonably exercised his discretion in  
4 concluding that DREs must not be used in California until specific steps are  
5 taken to assure their reliability. Accordingly, Plaintiffs have failed to  
6 establish a likelihood of success as to their abuse of discretion claim.

7  
8 8. California Administrative Procedures Act:

9 \_\_\_\_\_ Plaintiffs' argument that the Secretary's Directives are in violation of  
10 the Administrative Procedures Act is not well taken. The Directives were  
11 issued, as previously observed, under the authority of the Elections Code,  
12 which authorizes the Secretary, at §19222, to withdraw approval of  
13 previously certified voting systems. The Secretary was not adopting a new  
14 policy, the execution of which would require the adoption and approval of  
15 regulations in compliance with the Administrative Procedures Act. He was  
16 simply carrying out his responsibilities under laws and regulations already in  
17 force. Therefore, Plaintiffs have failed to establish a likelihood of success on  
18 the merits as to their Administrative Procedures Act claim.

19  
20 9. Contracts Clause:

21 \_\_\_\_\_ Plaintiffs allege that the decertification directives impair contracts in  
22 violation of the United States and California Constitutions. In support, they  
23 assert that Riverside County entered into contracts with Sequoia Voting  
24 Systems and the California Voting Modernization Board for the use of  
25 Sequoia AVC Edge DRE voting systems in their county. The decertification  
26 Directive, they argue, impairs those contracts.

1 While factually accurate, the contention does not give rise to a basis for  
2 injunctive relief in favor of Plaintiffs. The only plaintiffs with standing to  
3 assert this claim are the plaintiff counties. A subordinate political entity,  
4 such as a county, may not challenge a state's actions under the Contract  
5 Clause. *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40, 53 S. Ct. 943, 946, 77  
6 L. Ed. 1015, 1020 (1933); *Mallon v. City of Long Beach*, 44 Cal. 2d 199, 209  
7 (1955). Accordingly, the county plaintiffs have failed to establish a  
8 likelihood of success on the merits of its contracts clause.

9  
10 10. Estoppel

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

19  
20 As to all claims, Plaintiffs have failed to establish a likelihood of  
21 success on the merits.  
22

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

24 Although there is admittedly harm to the disabled plaintiffs, whose  
25 right to vote unassisted is diminished by the absence of electronic voting  
26 machines, that harm is not irreparable. The hardship suffered by Plaintiffs if  
27

1 the DREs are not used is the inability to vote unassisted and in private. As  
2 explained above, this is not a right protected by law. The hardship faced by  
3 Defendant in the event the Court were to issue an injunction is that he  
4 would be in danger of being precluded from following the duties conferred  
5 on him by Cal. Elections Code §19205, and ensuring an accurate count of all  
6 the votes cast in the November election and thereafter. Similarly, the public  
7 interest in the accuracy of the upcoming election cannot be overestimated.

8 The interest of the Secretary of State in fulfilling his statutory duties  
9 and the public interest in accurate, verifiable vote counts outweigh the  
10 Plaintiffs' interest in an unassisted, private vote. Therefore, the irreparable  
11 injury, balancing of interests, and the public interest factors also weigh  
12 against the granting of a preliminary injunction.

## 13 14 **VII. Conclusion**

15 The Court has determined that Plaintiffs have not demonstrated a  
16 likelihood of success on the merits as to any claim in this action.  
17 Defendant's decision to decertify touch-screen voting machines and to  
18 withhold further certification until he is satisfied that manufacturers have  
19 complied with specified conditions is a reasonable one. It is based on studies  
20 conducted and information gathered which convinced him that the voting  
21 public's right to vote is not adequately protected by the systems currently in  
22 place.

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