

1 ROBERT RUBIN, SBN 85084
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
2 OF THE SAN FRANCISCO BAY AREA
131 Steuart Street, Ste. #400
3 San Francisco, CA 94105
Phone (415) 543-9444
4 Fax (415) 543-0296

5 JOAQUIN G. AVILA, SBN 65484
634 South Spring Street, 11th Floor
6 Los Angeles, CA 90014
Phone (213) 629-2512
7 Fax (213) 629-0266

8 WYNNE S. CARVILL, SBN 76019
LAURA R. GARRETT, SBN 221542
9 101 2d Street, Suite 1800
San Francisco, CA 94105
10 Phone (415) 369-7272
Fax (415) 369-8624

11 Attorneys for Plaintiffs
12
13

14 **UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
16

17 JUAN OLIVEREZ, PETER MATURINO,
and DELLA GARCIA,

18 Plaintiffs,
19

20 vs.

21 STATE OF CALIFORNIA; MONTEREY
COUNTY, CALIFORNIA; KEVIN
22 SHELLEY, in his official capacity as
California Secretary of State; CRUZ
23 BUSTAMANTE, in his official capacity as
California Lieutenant Governor,

24 Defendants.
25
26
27
28

Case No.: C 03-3658 SI

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE RE PRELIMINARY
INJUNCTION**

Date: August 15, 2003
Time: 9:00 a.m.
Place: Courtroom 10, 19th Floor
Judge: Hon. Susan Illston

Complaint Filed: August 5, 2003

**VOTING RIGHTS ACTION
THREE JUDGE COURT**

1 **TO DEFENDANTS STATE OF CALIFORNIA; MONTEREY COUNTY, CALIFORNIA;**
2 **KEVIN SHELLEY, SECRETARY OF STATE; CRUZ BUSTAMANTE, LIEUTENANT**
3 **GOVERNOR:**

4 PLEASE TAKE NOTICE that by this motion, Plaintiffs apply to the Court for an
5 immediate order restraining and enjoining¹ Defendants and their agents, servants, and employees
6 from proceeding with the Recall Election until they have properly complied with Section 5 of the
7 Voting Rights Act, 42 U.S.C. § 1973c. Plaintiffs further apply for an order directing Defendants
8 to show cause at a hearing before the Court why Defendants, their agents, servants, and employees
9 should not be restrained and enjoined pending trial of this action from undertaking any steps to
10 administer or conduct the Recall Election currently scheduled for October 7, 2003.

11 This motion is based on the failure of defendants to obtain the requisite preclearance under
12 Section 5 of the Voting Rights Act for circulation of the recall petition within an abbreviated time
13 period, or for the setting of the date of the Recall Election, or for any change in local voting
14 procedures, or for any other changes in the conduct of the Recall Election. No such voting
15 changes may be legally enforced until such time as preclearance is obtained from the United
16 States Attorney General or the United States District Court for the District of Columbia.

17 ///
18 ///
19 ///
20 ///
21 ///
22 ///
23 ///
24 ///
25 ///

26 _____
27 ¹ Although Plaintiffs have requested a three judge court, a single judge can hear and grant an
28 application for a temporary restraining order. *See* 28 U.S.C. § 2284(b)(3).

1 This motion is further based on the attached Memorandum of Points and Authorities, the
2 declarations and exhibits filed with this application, and all other the pleadings, records, and other
3 papers previously filed in this case, and upon such other and further oral and documentary
4 evidence as may be presented to the Court on this application.

5
6 Dated: August 7, 2003

LAWYERS' COMMITTEE FOR CIVIL RIGHTS
OF THE SAN FRANCISCO BAY AREA

7
8 By: /s/Laura R. Garrett
9 LAURA R. GARRETT
10 Attorneys for Plaintiffs
11 JUAN OLIVEREZ,
12 PETER MATURINO, and DELLA GARCIA
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 ROBERT RUBIN, SBN 85084
2 LAWYERS' COMMITTEE FOR CIVIL RIGHTS
3 OF THE SAN FRANCISCO BAY AREA
4 131 Steuart Street, Ste. #400
5 San Francisco, CA 94105
6 Phone (415) 543-9444
7 Fax (415) 543-0296

8 JOAQUIN G. AVILA, SBN 65484
9 634 South Spring Street, 11th Floor
10 Los Angeles, CA 90014
11 Phone (213) 629-2512
12 Fax (213) 629-0266

13 WYNNE S. CARVILL, SBN 76019
14 LAURA R. GARRETT, SBN 221542
15 101 2d Street, Suite 1800
16 San Francisco, CA 94105
17 Phone (415) 369-7272
18 Fax (415) 369-8624

19 Attorneys for Plaintiffs

20
21 **UNITED STATES DISTRICT COURT**
22 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
23

24 JUAN OLIVEREZ, PETER MATURINO,
25 and DELLA GARCIA,

26 Plaintiffs,

27 vs.

28 STATE OF CALIFORNIA; MONTEREY
COUNTY, CALIFORNIA; KEVIN
SHELLEY, in his official capacity as
California Secretary of State; CRUZ
BUSTAMANTE, in his official capacity as
California Lieutenant Governor,

Defendants.

Case No.: C 03-3658 SI

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE RE PRELIMINARY
INJUNCTION**

Date: August 15, 2003
Time: 9:00 a.m.
Place: Courtroom 10, 19th Floor
Judge: Hon. Susan Illston

Complaint Filed: August 5, 2003

**VOTING RIGHTS ACTION
THREE JUDGE COURT**

1 **I. SUMMARY OF ARGUMENT**

2 Voting changes must receive preclearance pursuant to Section 5 of the Voting Rights Act,
3 42 U.S.C. § 1973. Indeed, in a case arising out of this District argued by the same lawyers now
4 representing plaintiffs herein, the United States Supreme Court held that voting changes
5 administered by Monterey County could not be implemented unless and until preclearance was
6 secured. *Lopez v. Monterey County [Lopez I]*, 519 U.S. 9 (1996). Where preclearance is not
7 received, an injunction should issue as a matter of law. For a temporary restraining order under
8 Section 5 to issue, irreparable harm need not be established.

9 Here, Defendants have not received preclearance for voting changes relating to (i) the
10 change in time requirements for circulation of a recall petition, (ii) the setting of the date for the
11 election and (iii) all other changes in the conduct of the election as compared to the November 5,
12 2002, gubernatorial election. Absent Section 5 approval, these changes are legally unenforceable
13 and cannot be implemented in any election. Therefore, as a matter of law, Defendants should be
14 enjoined from any further implementation of their plan to hold a Recall Election unless and until
15 the enumerated changes are precleared pursuant to Section 5.

16 **II. INTRODUCTION**

17 Plaintiffs file this action to enforce the Section 5 preclearance provisions of the Voting
18 Rights Act, 42 U.S.C. § 1973c, in Monterey County, California. Plaintiffs seek a Temporary
19 Restraining Order under Federal Rule of Civil Procedure 65(b)¹ and 28 U.S.C. § 2284(b)(3)² to
20 address the failure of Defendants Monterey County, the State of California, Secretary of State
21 Kevin Shelley and Lieutenant Governor Cruz Bustamante (collectively "Defendants") to obtain
22 the necessary Section 5 preclearance for the circulation of recall petitions, for the setting of the
23 gubernatorial recall election currently set for October 7, 2003 ("Recall Election") to be

24 _____
25 ¹ Federal Rule of Civil Procedure 65(b) authorizes the granting of a Temporary Restraining
Order.

26 ² 28 U.S.C. § 2284(b)(3) authorizes a single judge in a three-judge court action to grant a
27 Temporary Restraining Order. Section 5 provides: "Any action under this section shall be heard
and determined by a court of three judges in accordance with the provisions of section 2284 of
28 Title 28 and any appeal shall lie to the Supreme Court." 42 U.S.C. § 1973c.

1 administered in part by Defendant Monterey County, and for other voting changes relating to the
2 Recall Election.

3 **III. BACKGROUND**

4 Monterey County, California is a political subdivision covered by and subject to the
5 Section 5 preclearance provisions of the Voting Rights Act, 42 U.S.C. § 1973c. Under Section 5,
6 a covered political subdivision cannot enforce or implement any voting qualification or
7 prerequisite to voting, or standard, practice, or procedure with respect to voting different from that
8 in force or effect on November 1, 1968, unless such a voting change has received the requisite
9 approval or preclearance under Section 5.

10 A covered political subdivision can secure Section 5 preclearance from either the United
11 States Attorney General or the United States District Court for the District of Columbia. A
12 covered political subdivision can submit the voting change to the United States Attorney General
13 for a determination that such a change does not have the purpose and will not have the effect of
14 retrogressing minority voting strength.³ If the United States Attorney General does not interpose
15 an objection within a 60-day period following the submission of the change affecting voting, the
16 change can be implemented in future elections. 28 C.F.R. § 51.1(a)(2). Alternatively, a covered
17 political subdivision can implement the change affecting voting in future elections if the political
18 subdivision obtains a declaratory judgment from the United States District Court for the District of
19 Columbia that the voting change does not have the purpose and will not have the effect of
20 retrogressing minority voting strength.

21 On July 23, 2003, defendant Shelley certified the Recall Petition for circulation *within* 180
22 days of the election and inauguration of Governor Gray Davis pursuant to a 1974 amendment to
23 the California Constitution, which had previously prohibited the circulation of a recall petition of
24 any officer until he had actually held office for at least six months.⁴ The change in the California

25 _____
26 ³ *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000). A retrogression of minority voting
27 strength occurs when the proposed voting change results in a denial or abridgment of the right to
28 vote. *See also* 28 C.F.R. § 51.52 (substantive Section 5 standard).

⁴ Prior to 1974, Section 1 of Article XXIII of the California Constitution provided “No
recall petition shall be circulated or filed against any officer until he has actually held his office
for 736 days.”

1 Constitution's provisions regarding the earliest date on which a recall petition can be circulated
2 constituted a change in voting standards, practices or procedures different from those in force or
3 effect on November 1, 1968, in Monterey County, within the meaning of Section 5 of the Voting
4 Rights Act, 42 U.S.C. § 1973c. Said change has not received preclearance pursuant to Section 5
5 of the Voting Rights Act.

6 On July 24, 2003, pursuant to Sections 15 and 17 of Article II of the California
7 Constitution, defendant Bustamante exercised his discretion to set the date of the Recall Election
8 by issuing a Special Election Proclamation ("Proclamation") that set the Recall Election for
9 October 7, 2003. Defendant Bustamante's setting of the Recall Election was a discretionary
10 setting for a special election within the meaning of 28 C.F.R. § 51.17(b) and has also not received
11 preclearance pursuant to Section 5 of the Voting Rights Act.

12 To accommodate the abbreviated election schedule, defendant Monterey County must also
13 implement other voting changes, including changes related to the reduction in the number of
14 polling places and the number of bilingual election workers. Avila Decl. ¶ 2. Defendant
15 Monterey County has not received preclearance for any such changes pursuant to Section 5 of the
16 Voting Rights Act.

17 Absent Section 5 approval, such changes are legally unenforceable and cannot be
18 implemented in any election. 28 C.F.R. § 51.10 ("It is unlawful to enforce a change affecting
19 voting without obtaining preclearance under Section 5."). But none of the defendants have
20 secured the requisite Section 5 approval.

21 Accordingly, Plaintiffs are entitled to a Temporary Restraining Order preventing
22 Defendants, their officers, agents, employees, attorneys and successors in office and all other
23 persons in active concert and participation with them, from any further implementation of their
24 plan to hold a Recall Election unless and until (i) the change in time requirements for circulation
25 of a recall petition, (ii) the setting of the date for the election and (iii) all other changes in the
26

27 for at least six months." This "grace" period was eliminated in 1974 by the adoption of
28 Proposition 9 — a recall election may now be started immediately following an official's election.

1 conduct of the election as compared to the November 5, 2002, gubernatorial election are
2 precleared pursuant to Section 5 of the Voting Rights Act.

3 **IV. PLAINTIFFS ARE ENTITLED TO A TEMPORARY RESTRAINING**
4 **ORDER**

5 Three-judge courts may only determine whether there has been compliance with the
6 Section 5 preclearance provisions. *Lopez v. Monterey County [Lopez I]*, 519 U.S. 9, 23 (1996)
7 (Section 5 enforcement action involving Monterey County). The United States Supreme Court
8 has held that three-judge courts in Section 5 enforcement actions lack the authority to determine
9 whether a voting change was adopted with a discriminatory purpose or whether a voting change
10 has a discriminatory effect on minority voting strength. *Id.* (the substantive determination is
11 reserved exclusively for the United States Attorney General or the United States District Court for
12 the District of Columbia).

13 **A. Changes Affecting Voting Require Section 5 Preclearance.**

14 The first *Lopez [I]* inquiry is to determine whether the changes constitute changes
15 affecting voting which must be submitted for Section 5 preclearance. The voting changes in
16 question consist of certification of the Recall Petition for circulation within 180 days of election,
17 the setting of the Recall Election for October 7, 2003, and subsequent changes to local voting
18 procedures. These are the precise changes typically held to be subject to the Section 5
19 preclearance provisions.

20 In *NAACP v. Hampton County Election Comm'n*, the United States Supreme Court held
21 that Section 5 was to be given a broad construction reaching formal as well as informal changes
22 and even changes affecting a single election. *NAACP v. Hampton County Election Comm'n*, 470
23 U.S. 166, 178 (1985). The Court also held that the regulations governing the administration of
24 Section 5 mandated a broad construction regarding the nature and scope of voting changes subject
25 to Section 5 preclearance: "Any change affecting voting, even though it appears to be minor or
26 indirect, even though it ostensibly expands voting rights, or even though it is designed to remove
27

1 the elements that caused objection by the Attorney General to a prior submitted change, must meet
2 the Section 5 preclearance requirement." 28 C.F.R. § 51.11 (1984).

3 Certification of the Recall Petition for circulation within 180 days of election and the
4 discretionary setting of the Recall Election for October 7, 2003 constitute changes affecting voting
5 that must be submitted for Section 5 preclearance. Pre-1974, Section 1 of Article XXIII of the
6 California Constitution provided that a recall petition could not be circulated or filed until the
7 officer had "actually held his office for at least six months." Proposition 9's elimination of this
8 requirement constituted a change in voting practice that is subject to Section 5's preclearance
9 requirement.

10 The elimination of the 180-day requirement necessitates the administration of substantial
11 voting changes — changes that may, in fact, be retrogressive for minority voters. But, again, this
12 Court, in order to issue injunctive relief, need only determine that the elimination of the 180-day
13 grace period is a voting change.

14 Additionally, "[a]ny discretionary setting of the date for a special election or scheduling of
15 events leading up to or following a special election is subject to the preclearance requirement." 28
16 C.F.R. § 51.17(b). And the United States Supreme Court has held on numerous occasions that
17 seemingly minor administrative changes *are* subject to the Section 5 preclearance provisions.
18 *Young v. Fordice*, 520 U.S. 273, 284 (1997) (where Court citing *Allen v. State Bd. of Elections*,
19 393 U.S. 544, 566-69 (1969) *NAACP, supra*, 470 U.S. at 175-17, and *Perkins v. Matthews*, 400
20 U.S. 379, 387 (1971), concluded that certain practices and procedures enacted by the State of
21 Mississippi to comply with the National Voter Registration Act of 1993 were subject to the
22 Section 5 preclearance provisions).

23 Finally, setting the Recall Election for October 7, 2003 shortens to 75 days the 158-day
24 period ordinarily provided election officials by Elections Code Sections 12000, 8061 and 8062 for
25 the administration of an election. In response, defendant Monterey County is attempting to
26 administer voting changes involving a reduction in the number of polling places, consolidation of
27 voting precincts, and a reduction in the assignment of bilingual election personnel to administer

1 this election. Avila Decl. ¶ 2. But Monterey County has failed to receive, or even seek,
2 preclearance of these significant changes. Avila Decl. ¶ 2.

3 Because these substantial changes have not been precleared, as required for covered
4 jurisdictions under Section 5 of the Voting Rights Act, those jurisdictions, including Monterey
5 County, cannot go forward with the recall election scheduled for October 7, 2003.

6 **B. The Voting Changes Have Not Received Section 5 Preclearance.**

7 The second *Lopez [I]* inquiry is whether the proposed changes have received the required
8 Section 5 preclearance. Securing Section 5 preclearance requires the formal submission of the
9 voting changes and an evaluation by the United States Attorney General or the filing of a
10 declaratory judgment action in the United States District Court for the District of Columbia. 42
11 U.S.C. § 1973c & 28 C.F.R. §§ 51.1(a)(2) (if preclearance from the United States Attorney
12 General is sought, the voting change must be submitted), 51.20 (form of submission), 51.26
13 (general contents of a submission), 51.27 (required contents of a submission), 51.28 (supplemental
14 contents), and 51.1 (a)(1) (judicial preclearance requires the filing of a declaratory judgment
15 action in the United States District Court for the District of Columbia).

16 Based on information and belief, which includes a review of Section 5 submission activity
17 and communications with voting officials in the United States Department of Justice, Defendants
18 have not secured the requisite Section 5 preclearance. Rubin Decl. ¶¶ 2, 3.

19 **C. Plaintiffs Satisfy The Standards For Injunctive Relief For Section 5**
20 **Actions And Need Not Demonstrate Irreparable Harm Under**
21 **Traditional TRO Standards.**

22 The third *Lopez [I]* inquiry is to determine the appropriateness of a temporary remedy.
23 Because the aforementioned changes are subject to Section 5 preclearance requirements but have
24 not received Section 5 approval, a temporary remedy is appropriate.

25 Plaintiffs need not demonstrate irreparable harm. *Lopez [I]* explicitly held that injunctive
26 relief should be granted if a change affecting voting has not received Section 5 preclearance.
27 *Lopez [I]*, 519 U.S. at 20 ("If a voting change subject to § 5 has not been precleared, § 5 plaintiffs
28 are entitled to an injunction prohibiting implementation of the change."). Similarly, in *United*

States v. State of Louisiana, 952 F. Supp. 1151 (W.D. La. 1997), *affirmed*, 521 U.S. 1101, a three-
SF #775629 v1 -6- Case No. C-03-3659 SI

1 judge court conducted an extensive review of three-judge panels convened under Section 5 and
2 "found no persuasive authority for the proposition that the traditional preliminary injunction test
3 applies to claims for injunctive relief in the face of a § 5 preclearance violation." *Id.* 952 F. Supp.
4 at 1159-60 & nn.10-11. Indeed, the jurisdiction of Section 5 enforcement courts is limited to
5 enforcing Section 5 compliance and nothing more. *Id.* at 1161 ("The Supreme Court has made it
6 abundantly clear that our sole job is to ensure timely compliance with § 5.") (Citing *Lopez I*).

7 The merits in a Section 5 enforcement action consist of determining whether the
8 requirements of *Lopez [I]* are met: whether a voting change is subject to Section 5 preclearance;
9 whether Section 5 preclearance has been obtained; and, if not, what temporary remedy is
10 appropriate. If a litigant is able to satisfactorily address the inquiry of voting change coverage and
11 the lack of Section 5 preclearance, then an injunction should issue, irrespective of whether
12 irreparable harm is demonstrated. *Id.*, 952 F. Supp. at 1162 (application of the traditional
13 requirements for the issuance of injunctive relief to a Section 5 enforcement action inapplicable
14 because such an application would be inconsistent with the general purpose of Section 5 — to
15 prevent the implementation of voting changes that had the potential for discriminating against
16 minority voting strength.).

17 Regardless, Plaintiffs meet the traditional "sliding scale" requirements for the issuance of
18 injunctive relief. *See, e.g., Miller v. California Pacific Med. Ctr.*, 19 F.3d 449, 456 (9th Cir. 1994)
19 (*en banc*) (quoting *United States v. Odessa Union Warehouse Co-op.*, 833 F.2d 172, 174 (9th Cir.
20 1987)). Plaintiffs have demonstrated either 1) probable success on the merits and the possibility
21 of irreparable injury, or 2) serious questions on the merits and the balance of hardships tipping
22 sharply in Plaintiffs' favor.

23 Plaintiffs have met the *Lopez [I]* requirements and, therefore, have demonstrated
24 probability of success on the merits. Additionally, Plaintiffs will suffer irreparable harm by
25 participating in an electoral process that violates federal law or by foregoing participation
26 altogether. *See Casarez v. Val Verde County*, 957 F. Supp. 847, 865 (W.D. Tex. 1997)
27 (proceeding with an election that violates federal law runs contrary to the public interest of
28 assuring that the election process is fair).

1 The threatened deprivation of a fundamental right, alone, constitutes irreparable harm.
2 *Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) ("alleged
3 constitutional infringement will often alone constitute irreparable harm"). And voting is a
4 fundamental right. *See Reynold v. Sims*, 377 U.S. 533, 555 (1964) (right to vote "is of the essence
5 of a democratic society, and any restrictions on that right strike at the heart of representative
6 government"); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (voting "is regarded as a
7 fundamental political right, because preservative of all rights.").

8 Even absent a high probability of success, the balance of hardships tips in favor of the
9 Plaintiffs. Plaintiffs are seeking this injunctive relief at the beginning of the electoral process. At
10 this point, the expenditures incurred by the Defendants are minimal compared to the expenses to
11 be incurred as the election schedule progresses toward an October 7, 2003 election. If Plaintiffs
12 prevail, injunctive relief will have preserved resources that would otherwise be wasted on an
13 illegal election. In the voting rights context, courts have recognized the harm to the community at
14 large when the rights of a segment of that community are infringed. "[S]ection 2 [of the VRA]
15 and its history reflect a strong national mandate for the immediate removal of all impediments,
16 intended or not, to equal participation in the election process . . . , when [the VRA] is violated the
17 public as a whole suffers irreparable injury." *Id.* 135 (citation omitted).⁵

18 **V. CONCLUSION**

19 For these reasons, this Court should grant Plaintiffs' motion for a Temporary Restraining
20 Order preventing Defendants, their officers, agents, employees, attorneys and successors in office
21 and all other persons in active concert and participation with them, from any further
22 implementation of their plan to hold a Recall Election unless and until (i) the change in time
23 requirements for circulation of a recall petition, (ii) the setting of the date for the election,
24

25 ⁵ In response to arguments that enjoining an election would result in low turnout and voter
26 confusion and that absentee voting had begun, the Supreme Court in *Clark v. Roemer*, opined that
27 continuing with illegal elections would have quite the opposite effect – "Voters may be more
28 confused and inclined to avoid the polls when an election is held in conceded violation of federal
law." 500 U.S. 646, 654 (1991) (holding that state should have been enjoined from conducting
elections prior to federal preclearance under section 5 of the VRA).

1 ///
2 ///
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

and (iii) all other changes in the conduct of the election as compared to the November 5, 2002 gubernatorial election are precleared pursuant to Section 5 of the Voting Rights Act.

Dated: August 7, 2003

LAWYERS' COMMITTEE FOR CIVIL RIGHTS
OF THE SAN FRANCISCO BAY AREA

By: /s/Laura R. Garrett
 LAURA R. GARRETT
 Attorneys for Plaintiffs,
 JUAN OLIVEREZ,
 PETER MATURINO, and DELLA GARCIA