



SECRETARY OF STATE
KEVIN SHELLEY
STATE OF CALIFORNIA

August 25, 2003

Via Electronic Mail and Overnight Delivery

Adrienne Fernandez
Voting Section
Civil Rights Division
Room 7254 - NWB
Department of Justice
1800 G St., N.W.
Washington, DC 20006

RE: Submission 2003-2714

Dear Ms. Fernandez:

I trust that you have received by electronic mail and overnight delivery my letter dated August 21, 2003, with various attachments. That letter was in response to your request for additional information regarding the preclearance of the placement of Propositions 53 and 54 on the October 7, 2003 statewide special election ballot in California. I believe that letter, together with the earlier documents transmitted, provide the information required pursuant to 28 C.F.R. 51.27.

As a threshold matter, as I discussed during our conversation on August 21, 2003, I am concerned that the expedited review granted California's request for preclearance of the recall procedures, as indicated in the letter from Mr. Rich dated August 19, 2003, is apparently not being repeated with respect to Propositions 53 and 54. This is true despite the close similarities of the issues involved, and the fact that the recall and ballot measures are being considered at the same election, on the same ballot, by the same electorate. There was, for example, no request with respect to the recall for optional information, as set forth in 28 C.F.R. 51.28, that you are now asking for in connection with the ballot measures. There was no discussion as to whether the acts in question were discretionary or non-discretionary. The Department simply expedited the review and determined that preclearance was appropriate.

When I asked about this disparity, you indicated that the difference in treatment was based on the fact that in choosing the date for the recall, the Lieutenant Governor exercised limited discretion,

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whereas with respect to the selection of the date for the ballot measures, the Secretary of State had greater discretion. That distinction is based on a fundamental misunderstanding of the California Constitution, and the nature of an order granting temporary injunctive relief.

Under Article II, section 8 of the California Constitution, the Secretary of State had **no** discretion to place Proposition 54 on any ballot other than the one for the October 7, 2003 election, a conclusion supported by the California Supreme Court's action in *Eisenberg v. Shelley*, of which you are aware. Moreover, the fact that the *Salazar* court has, in issuing a limited temporary restraining order against Monterey County, preliminarily stated that placement of the measures on the ballot requires preclearance, does not alter the terms of the California Constitution, or the Secretary of State's mandatory duty to place initiative measures on the ballot. Indeed, as I am sure you are aware, it is settled law that a court's statement expressed in connection with issuing preliminary injunctive relief is, by definition, not a determination on the merits of any issue.

Moreover, given the shortness of time and the widespread publicity that has accompanied this matter, I am troubled by your request for yet additional information, pursuant to 28 C.F.R. 51.28. That information is clearly optional and, under the circumstances, would be duplicative of that which is before you. The fact is, in connection with your questions about publicizing the request for preclearance, that issue is the subject of highly publicized litigation in the United States District Court, Northern District of California (*Salazar v. Monterey County*, C0-3 03584 JF (HRL)), involving attorneys with the Mexican American Legal Defense and Educational Fund (MALDEF). Attorneys in that case and MALDEF are fully aware of the preclearance issues that are the subject of our various transmittals to you. Indeed, on August 6, 2003, the California Attorney General provided to MALDEF's counsel copies of our August 4, 2003 preclearance submission. This case and the issues raised therein have received widespread attention throughout California and much of the nation. This entire matter is very much in the public domain, as it should be.

You have also asked what effect the shortened schedule of this election is likely to have on minority voting. Given the very short period of time available, no studies have been conducted on this issue, and anything we could say on this issue would be purely speculative. We suggest, in this regard, that you may wish to contact the plaintiffs in *Salazar* and proponents of Proposition 54, who may well have conducted studies or polling. In general, as acknowledged in my August 21, 2003 letter to you, the short timeframe for this election does pose many problems, and may well affect turnout of both minority and non-minority voters. The California Constitution, however, compels the timeframe, and this office lacks the discretion to change the date of the election.

In addition, you asked whether the Secretary of State will conduct outreach to minority groups about the fact that the election will be on October 7, 2003. In the weeks leading up to the October 7, 2003 election, the Secretary of State's office will be conducting outreach efforts statewide, including to minority voters.

Finally, you have asked two additional administrative questions. First, you ask whether the California Ballot Pamphlet will be available in Spanish on the Secretary of State's website. Indeed, a Spanish version of the Ballot Pamphlet will appear on our website shortly. Second,

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you asked about the contents of the sample ballots that county election officials provide to their voters. That issue is addressed by Elections Code sections 13300 *et seq.* The preparation and distribution of sample ballots is entirely a county function in which the State has no part.

I trust that with these additional supplemental responses, the Department of Justice will expeditiously finalize its determination of whether or not preclearance is appropriate. Simply stated, at this point, there is simply no further information in our possession that would aid you in that determination. We look forward to a determination well before the August 29, 2003 federal court hearing in the *Salazar* matter.

Sincerely,

RANDY RIDDLE
Chief Counsel