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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14

15 AURELIO SALAZAR, JUAN
16 MARTINEZ, and BILL
MELENDEZ,

17 Plaintiffs,

18 v.

19
20 MONTEREY COUNTY,
CALIFORNIA; STATE OF
21 CALIFORNIA; KEVIN SHELLEY,
CALIFORNIA SECRETARY OF
22 STATE,

23 Defendants.
24

Case No. C03-03584 JF (HRL)

**PLAINTIFFS' EX PARTE
APPLICATION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE RE PRELIMINARY
INJUNCTION**

1 **TO DEFENDANTS MONTEREY COUNTY and STATE OF**
2 **CALIFORNIA:**

3 By this application, Plaintiffs apply to the Court for an immediate order
4 restraining and enjoining¹ Defendants and their agents, servants, and employees
5 from undertaking any steps to administer or conduct the Special Election for
6 Proposition 54 currently scheduled for October 7, 2003. Plaintiffs further apply for
7 an order directing Defendants to show cause at a hearing before the Court why
8 Defendants, their agents, servants, and employees should not be restrained and
9 enjoined pending trial of this action from undertaking any steps to administer or
10 conduct the Special Election for Proposition 54 currently scheduled for October 7,
11 2003.

12 This application is based on Plaintiffs' contention that the State of California
13 and Monterey County, California failed to obtain the requisite preclearance under
14 Section 5 of the Voting Rights Act before moving the election date for Proposition
15 54 from March 2, 2004 to October 7, 2003 and before significantly abbreviating the
16 time periods for the review, printing, and distribution of the ballot pamphlet for an
17 initiative election. Plaintiffs contend that Defendants have violated the Voting
18 Rights Act, and that no such changes may be legally enforced until such time as
19 preclearance is obtained from the United States Attorney General or the United
20 States District Court for the District of Columbia. This application is further based
21 on the memorandum of points and authorities filed with this application; the
22 declarations and exhibits filed with this application;

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

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the pleadings, records, and other papers previously filed in this case; and such other and further evidence and argument as may be presented to the Court on this application.

Dated: July 31, 2003

Respectfully submitted,
Mexican American Legal Defense
And Educational Fund

By: _____
Joaquin G. Avila

Attorneys for Plaintiffs.

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CALIFORNIA, KEVIN SHELLEY,
22 CALIFORNIA SECRETARY OF
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23

24 Defendants.
25

Case No. C03-03584 JF (HRL)

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

1 **I. INTRODUCTION.**

2 Plaintiffs file this action to enforce the Section 5 preclearance provisions of
3 the Voting Rights Act, 42 U.S.C. § 1973c, in Monterey County, California.
4 Plaintiffs seek a Temporary Restraining Order under Federal Rule of Civil
5 Procedure 65(b)¹ and 28 U.S.C. § 2284(b)(3).² Plaintiffs seek to restrain the
6 implementation of new voting changes emanating from the change in election date
7 for voter approval of an initiative constitutional amendment titled “Classification by
8 Race, Ethnicity, Color or National Origin” [hereafter cited as CRECNO Initiative].
9 Although Plaintiffs have requested a three-judge court, a single judge can hear and
10 grant an application for a temporary restraining order. *See* 28 U.S.C. § 2284(b)(3).

11 Initially, the California Secretary of State qualified the CRECNO Initiative for
12 the March 2, 2004, Primary Election. *See* Avila Decl. at ¶ 2, Ex. A. This initial
13 qualification resulted in the establishment of an election schedule that included time
14 tables and deadlines affecting the ability of voters to become informed on the
15 ramifications of the Initiative and to organize any campaigns supporting or
16 opposing it. *See* Avila Decl. at ¶ 3, Ex. B. On July 25, 2003, however, the
17 Secretary of State changed the election date for voter approval of the proposed
18 Initiative to October 7, 2003. *See* Avila Decl. at ¶ 4, Ex. C. This change in the
19 date of the election resulted in a new election schedule, with new deadlines and
20 shorter time tables. *See* Avila Decl. at ¶ 5, Ex. D.

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

25 ² 28 U.S.C. § 2284(b)(3) authorizes a single judge in a three-judge court
26 action to grant a Temporary Restraining Order. Section 5 provides: “Any action
27 under this section shall be heard and determined by a court of three judges in
28 accordance with the provisions of section 2284 of Title 28 and any appeal shall lie
to the Supreme Court.” 42 U.S.C. § 1973c.

1 The change in the Initiative election date from March 2, 2004, to October 7,
2 2004, and the corresponding changes in the timelines for preparation and
3 distribution of the ballot pamphlet constitute voting changes that must have the
4 requisite Section 5 approval before their implementation. Absent Section 5
5 approval, these changes are legally unenforceable and cannot be implemented in
6 any election. Neither Defendant State of California nor Defendant Monterey
7 County has secured the requisite Section 5 approval. *See* Avila Decl. at ¶ 6.

8 For these reasons, Plaintiffs are entitled to a Temporary Restraining Order
9 preventing the conduct of the October 7, 2003 election in Monterey County for
10 voter approval of the CRECNO Initiative and the corresponding implementation of
11 the time tables and deadlines specified in the new election schedule.

12 **II. BACKGROUND.**

13 Monterey County, California is a political subdivision covered by and
14 subject to the Section 5 preclearance provisions of the Voting Rights Act, 42
15 U.S.C. § 1973c. Under Section 5, a covered political subdivision cannot enforce
16 or implement any voting qualification or prerequisite to voting, or standard,
17 practice, or procedure with respect to voting different from that in force or effect
18 on November 1, 1968, the date of Section 5 coverage for Monterey County, unless
19 such a voting change has received the requisite approval or preclearance under
20 Section 5.

21 A covered political subdivision can secure Section 5 preclearance from either
22 the United States Attorney General or the United States District Court for the
23 District of Columbia. A covered political subdivision can submit the voting change
24 to the United States Attorney General for a determination that such a change does
25 not have the purpose and will not have the effect of retrogressing
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1 minority voting strength.³ If the United States Attorney General does not interpose
2 an objection within a 60-day period following the submission of the change
3 affecting voting, the change can be implemented in future elections. 28 C.F.R. §
4 51.1(a)(2). Alternatively, a covered political subdivision can implement the change
5 affecting voting in future elections if the political subdivision obtains a declaratory
6 judgment from the United States District Court for the District of Columbia that the
7 voting change does not have the purpose and will not have the effect of
8 retrogressing minority voting strength.

9 Until Section 5 preclearance is secured, however, the voting change cannot
10 be implemented or enforced in any election in a covered political subdivision. 28
11 C.F.R. § 51.10 (“It is unlawful to enforce a change affecting voting without
12 obtaining preclearance under Section 5.”).

13 **III. PLAINTIFFS ARE ENTITLED TO A TEMPORARY** 14 **RESTRAINING ORDER.**

15 In a previous Section 5 enforcement action involving Monterey County, the
16 United States Supreme Court specified the limited jurisdiction of a local three-
17 judge court in resolving the federal compliance issues presented by cases like this
18 one. *Lopez v. Monterey County [Lopez I]*, 519 U.S. 9 (1996). The Court held that
19 three-judge courts in Section 5 enforcement actions lack the authority to determine
20 whether the voting change was adopted with a discriminatory purpose or whether
21 the voting change has a discriminatory effect on minority voting strength. That
22 substantive determination is reserved exclusively for the United States Attorney
23 General or the United States District Court for the District of Columbia. *Id.* at 23.

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

1 Three-judge courts may only determine whether there has been compliance with the
2 Section 5 preclearance provisions:

3 The three-judge district court may determine only whether
4 § 5 covers a contested change, whether § 5's approval
5 requirements were satisfied, and if the requirements were
6 not satisfied, what temporary remedy, if any, is
7 appropriate. The goal of a three-judge district court
8 facing a § 5 challenge must be to ensure that the covered
9 jurisdiction submits its election plan to the appropriate
10 federal authorities for preclearance as expeditiously as
11 possible.

12 *Id.* (Citations omitted).

13 The Court further held that a three-judge court must issue injunctive relief to
14 prevent the implementation in an upcoming election of a voting change that has not
15 secured the requisite Section 5 approval:

16 A jurisdiction subject to § 5's requirements must
17 obtain either judicial or administrative preclearance before
18 implementing a voting change. No new voting practice is
19 enforceable unless the covered jurisdiction has succeeded
20 in obtaining preclearance. *Clark v. Roemer*, 500 U.S.
21 [646], at 652-653, 111 S.Ct. [2096], at 2100-2102
22 [1991]; *McDaniel v. Sanchez*, 452 U.S. 130, 137, 101
23 S.Ct. 2224, 2229, 68 L.Ed.2d 724 (1981); *Connor v.*
24 *Waller*, 421 U.S. 656, 95 S.Ct. 2003, 44 L.Ed.2d 486
25 (1975) (*per curiam*). If a voting change subject to § 5
26 has not been precleared, § 5 plaintiffs are entitled to an
27 injunction prohibiting implementation of the change. *Clark*
28 *v. Roemer, supra*, at 652-653, 111 S.Ct., at 2100-2102
(citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 572,
89 S.Ct. 817, 835, 22 L.Ed.2d 1 (1969)).

29 *Id.*, at 519 U.S. at 20. The only exception, according to the Court, might apply in
30 the case of a request for injunctive relief on the eve of the election. *Id.* at 21 (“In
31 *Clark*, we left open the question whether a district court may ever deny a § 5
32 plaintiff’s motion for an injunction and allow a covered jurisdiction to conduct an
33 election under an unprecleared voting plan. We suggested that ‘ “[a]n extreme
34 circumstance might be present if a seat’s unprecleared status is not drawn to the
35 attention of the [covered jurisdiction] until the eve of the election and there are
36 equitable principles that justify allowing the election to proceed.”). In both *Clark*
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1 and *Lopez [I]*, the Court did not find any such extreme circumstances.

2 In this case, the presently scheduled October 7, 2003 election is well over
3 two months away. Moreover, the Secretary of State only made clear his intent to
4 follow electoral procedures that have not been precleared a few days ago. Thus,
5 Plaintiffs' request for a Temporary Restraining Order does not implicate the
6 possible exception barring injunctive relief when requests for such relief are filed on
7 the eve of the election.

8 Here, no equitable considerations justify proceeding with the October 7,
9 2003 election. Indeed, California law provides for such eventualities, allowing a
10 ballot initiative election to be held at the next statewide election. *See* Cal. Elec.
11 Code § 9006 ("If, for any reason, any initiative or referendum measure . . . is not
12 submitted to the voters at the next succeeding statewide election, that failure shall
13 not prevent its submission at a succeeding statewide election.").

14 **A. The Change in Election Dates Constitute a Change Affecting**
15 **Voting and Requires Section 5 Preclearance.**

16 In accordance with *Lopez [I]*, the first inquiry is to determine whether the
17 changes, adopted by the State of California and to be implemented by Monterey
18 County, constitute changes affecting voting which must be submitted for Section 5
19 preclearance. The voting changes in question consist of a change in the date of an
20 election from March 2, 2004, to October 7, 2003, and changes in the timetables and
21 deadlines associated with the preparation and distribution of the ballot pamphlet.
22 Both represent the type of changes subject to the Section 5 preclearance
23 provisions.

24 There can be no serious debate that a change in the date of an election is a
25 change affecting voting that must be submitted for Section 5 preclearance. *NAACP*
26 *v. Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985). In *NAACP*, the
27 Court held that Section 5 was to be given a broad construction reaching formal as
28 well as informal changes and even changes affecting a single election. *Id.* The

1 Court also held that the regulations governing the administration of Section 5 also
2 mandated a broad construction regarding the nature and scope of voting changes
3 subject to Section 5 preclearance: “Any change affecting voting, even though it
4 appears to be minor or indirect, even though it ostensibly expands voting rights, or
5 even though it is designed to remove the elements that caused objection by the
6 Attorney General to a prior submitted change, must meet the Section 5 preclearance
7 requirement.” 28 C.F.R. § 51.11 (1984).

8 Moreover, the Court specifically noted that the Department of Justice had
9 “since 1980, reviewed approximately 58 changes in election dates” *NAACP*,
10 470 U.S. at 179. And, as the Court recognized, the construction placed upon the
11 Section 5 preclearance provisions by the United States Attorney General is entitled
12 to “considerable deference.” *Id.* See also *Lopez v. Monterey County [II]*, 525
13 U.S. 266, 281 (1999) (“Subject to certain limitations not implicated here, . . . we
14 traditionally afford substantial deference to the Attorney General’s interpretation of
15 § 5 in light of her central role . . . in formulating and implementing that section.”)
16 (internal quotations and citations omitted).

17 Accordingly, the change in the date of the election constitutes a voting
18 change requiring Section 5 preclearance. Yet the State and Monterey County have
19 failed to receive, or even to seek, pre-clearance of this significant change in the
20 previously established election date.

21 **B. The Departure From Established Timelines for Preparation and**
22 **Distribution of the Ballot Pamphlet for an Initiative Election**
23 **Constitutes a Change Affecting Voting and Requires Section 5**
24 **Preclearance.**

25 California’s Elections Code establishes specific and mandatory timelines for
26 the preparation, review, printing, and mailing of the ballot pamphlet covering voter
27 measures. The State disseminates the ballot pamphlet, whose contents are also
28 specifically prescribed in state law, *see* Cal. Elections Code §§ 9084-9091, to all
voters so that they may be informed about the propositions that they are slated to

1 decide. The ballot pamphlet, which includes the text of each proposition, an
2 impartial analysis, and signed arguments on each side of the issue, effectively
3 provides a common community focus for the public debate on a measure in the
4 weeks that precede the electorate's decision at the polls. In effect, then, the
5 State's well-established timelines also set up a minimum period of focused voter
6 debate on those propositions being presented.

7 In particular, California's Elections Code establishes three critical timelines
8 with respect to the ballot pamphlet – each of which the Secretary of State's
9 released timeline for the October 7, 2003 election will violate. *See* Avila Decl. at ¶
10 5; Ex. D. The State and Monterey County, however, have failed to receive, or even
11 to seek, pre-clearance of these significant departures from previously established
12 elections procedures.

13 The California Elections Code establishes:

- 14 1) that elections officials will begin mailing ballot pamphlets at least 40 days
15 before the election, *see* Cal. Elections Code § 9094(a);
- 16 2) that elections officials will provide copy of the final ballot pamphlet to the
17 printer at least 40 days before mailing is to commence, *see* Cal. Elections
18 Code § 9082, which is at least 80 days before the election; and
- 19 3) that elections officials will make the ballot pamphlet available for public
20 inspection (and possible court challenge) at least 20 days before the copy is
21 provided to the printer, *see* Cal. Elections Code § 9092, which is at least 100
22 days before the election.

23 The Secretary of State intends to violate each of these mandatory deadlines,
24 significantly reducing the amount of time that voters will have to consider the
25 CRECNO Initiative with the benefit of the ballot pamphlet materials, and
26 significantly reducing the period of time during which proponents and opponents
27 can frame and present their arguments to voters while cognizant of what material
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1 those voters will have before them in the ballot pamphlet.

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3 Under the timeline for the October 7, 2003 election, and for consideration of
4 the CRECNO Initiative, elections officials will begin mailing ballot pamphlets at
5 most 37 days (and probably many fewer⁴) before the election rather than the
6 mandated 40 days. The Secretary of State will provide the copy of the ballot
7 pamphlet to the printer only 37 days before the election, rather than the mandated
8 80 days. Finally, the public will be permitted to inspect and challenge the pamphlet
9 beginning only 57 days before the election, rather than the mandated 100 days.

10 Taken singly or together, these significant alterations in the availability of the
11 ballot pamphlet for voter consideration and debate constitute a substantial change
12 in voting procedure. Because that change has not been pre-cleared as required for
13 covered jurisdictions under Section 5 of the Voting Rights Act, those jurisdictions,
14 including Monterey County, cannot go forward with an election on the CRECNO
15 Initiative on October 7, 2003. Moreover, elections officials cannot go forward with
16 preparing and disseminating any ballot pamphlet covering the CRECNO Initiative
17 that does not comply with the State's well-established timelines.

18 The changes in timetables and deadlines associated with the election are also
19 changes affecting voting subject to the Section 5 preclearance provisions. The
20 applicable regulations governing the administration of Section 5 are clear: "Any
21 discretionary setting of the date for a special election or scheduling of events
22 leading up to or following a special election is subject to the preclearance
23 requirement." 28 C.F.R. § 51.17(b). Moreover, the Court has held on numerous
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26 ⁴ The Secretary of State's release timeline does not indicate how much
27 time is expected to elapse between the end of the public inspection period and the
28 beginning of the mailing of ballot pamphlets, but presumably the printer will require
at least some amount of time for actual printing of the pamphlet.

1 occasions that seemingly minor administrative changes are also subject to the
2 Section 5 preclearance provisions. *Young v. Fordice*, 520 U.S. 273, 284 (1997)
3 (where Court citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 566-69 (1969)
4 *NAACP, supra*, 470 U.S. at 175-17, and *Perkins v. Matthews*, 400 U.S. 379, 387
5 (1971), concluded that certain practices and procedures enacted by the State of
6 Mississippi to comply with the National Voter Registration Act of 1993 were
7 subject to the Section 5 preclearance provisions). In fact, it has been the practice
8 of the United States Attorney General to interpose objections based on changes to
9 election dates and procedures leading up to a initiative election. *See* Avila Decl. at
10 ¶ 7; Exs E1-E15 (Copies of “letters of objection” spanning from 1974 to 2001).

11 In summary, there can be no doubt that changes in the dates of elections and
12 changes in timetables and deadlines for preparation of ballot materials are the type
13 of changes subject to the Section 5 preclearance provisions.

14 **C. The Voting Changes Have Not Received Section 5 Preclearance.**

15 The second inquiry mandated by *Lopez [I]* is whether the proposed changes
16 in the dates of the Initiative election and the changes specified in the election
17 schedules have received the required Section 5 preclearance. These changes were
18 officially published on or about July 26, 2003, just a few days ago. *See* Avila Decl.
19 at ¶ 5; Ex. D.

20 Securing Section 5 preclearance requires the formal submission of the voting
21 changes and an evaluation by the United States Attorney General or the filing of a
22 declaratory judgment action in the United States District Court for the District of
23 Columbia. 42 U.S.C. § 1973c & 28 C.F.R. §§ 51.1(a)(2) (if preclearance from the
24 United States Attorney General is sought, the voting change must be submitted),
25 51.20 (form of submission), 51.26 (general contents of a submission), 51.27
26 (required contents of a submission), 51.28 (supplemental contents), and 51.1 (a)(1)
27 (judicial preclearance requires the filing of a declaratory judgment action in the
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1 United States District Court for the District of Columbia).

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3 Based on information and belief, which includes a review of Section 5
4 submission activity on the Department of Justice’s website, together with the fact
5 that the only in the past few days has the CRECNO Initiative even been set for the
6 October 7, 2003 election, Defendants have not secured the requisite Section 5
7 preclearance. See Dept. of Justice Website, Voting Rights Section, available at
8 http://www.usdoj.gov/crt/voting/sec_5/notices.htm.

9 **D. Plaintiffs Satisfy The Standards For Injunctive Relief For**
10 **Section 5 Actions And Need Not Demonstrate Irreparable Harm**
11 **Under Traditional TRO Standards.**

12 The third inquiry specified in *Lopez [I]* is to determine the appropriateness of
13 a temporary remedy. Since the changes in the dates of elections and in the election
14 schedule are subject to the Section 5 preclearance requirements and these changes
15 affecting voting have not received Section 5 approval, a temporary remedy is
16 appropriate.

17 The Court in *Lopez [I]* was explicit in holding that injunctive relief should be
18 granted if a change affecting voting has not received Section 5 preclearance. *Lopez*
19 *[I]*, 519 U.S. at 20 (“If a voting change subject to § 5 has not been precleared, § 5
20 plaintiffs are entitled to an injunction prohibiting implementation of the change.”).
21 There is no requirement that Plaintiffs must demonstrate irreparable harm.

22 In *United States v. State of Louisiana*, 952 F. Supp. 1151 (W.D. La. 1997),
23 affirmed, 521 U.S. 1101, a three-judge court concluded that the traditional
24 requirements for the issuance of injunctive relief could not be used to deny
25 equitable relief in a Section 5 enforcement action. The three-judge court conducted
26 an extensive review of three-judge panels convened under Section 5 and “found no
27 persuasive authority for the proposition that the traditional preliminary injunction
28 test applies to claims for injunctive relief in the face of a § 5 preclearance violation.”

1 *Id.* 952 F. Supp. at 1159-60 & nn.10-11. The court observed that the jurisdiction
2 of Section 5 enforcement courts was limited only to enforcing Section 5
3 compliance and nothing more. *Id.* at 1161 (“Three-judge courts convened as we
4 are have gone no further.”) (“The Supreme Court has made it abundantly clear that
5 our sole job is to ensure timely compliance with § 5: “The goal of a three-judge
6 district court facing a § 5 challenge *must* be to ensure that the covered jurisdiction
7 submits its election plan to the appropriate federal authorities for preclearance as
8 expeditiously as possible.”) (Citing *Lopez I*) (emphasis added by three-judge
9 court)..

10 The three-judge court further reasoned that the traditional requirements for
11 issuing injunctive relief, such as assessing whether there is a substantial probability
12 of success on the merits and irreparable harm, are simply inapplicable to a Section
13 5 compliance case. As the court pointed out, the merits in a Section 5 enforcement
14 action consist of determining whether the requirements of *Lopez [I]* are met:
15 whether voting change is subjection to Section 5 preclearance; whether Section 5
16 preclearance has been obtained; and, if not, what temporary remedy, if any, is
17 appropriate. If a litigant is able to satisfactorily address the inquiry of voting
18 change coverage and Section 5 preclearance, then an injunction should issue,
19 irrespective of whether irreparable harm is demonstrated. To hold otherwise would
20 result in a direct contravention of the directive of the Supreme Court in *Lopez [I]*
21 that injunctive relief is mandatory. As noted by the court, “[s]uch a result [denial of
22 injunctive relief because of the absence of irreparable harm] is foreclosed by
23 Supreme Court precedent.” *Id.*

24 Finally, the three-judge court held the application of the traditional
25 requirements for the issuance of injunctive relief to a Section 5 enforcement action
26 inapplicable because such an application would be inconsistent with the general
27 purpose of Section 5 to prevent the implementation of voting changes that had the
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1 potential for discriminating against minority voting strength. The court concluded:

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3 In the face of Congress’s purpose in enacting § 5, it is
4 simply inconceivable that we would have the authority to
5 deny an injunction for the purpose of proceeding to a
6 ‘trial on the merits.’ There is nothing to try in this case
7 after we determine whether the United States is entitled to
8 injunctive relief. The convening of this three-judge court
pursuant to § 5 was done precisely to avoid the delay
inherent in trials, such that we either issue an injunction
because the United States has shown that a covered
voting change has not been precleared, or we do not.
End of story.

9 *Id.* 952 F. Supp. at 1162 (footnotes and citations omitted).

10 On the basis of the explicit language in *Lopez [I]* and the court’s analysis in
11 the *United States v. Louisiana* case, this Court should grant the requested
12 Temporary Restraining Order without the necessity of having to demonstrate the
13 traditional requirements for the issuance of injunctive relief. There is an obvious
14 Section 5 violation, and this Court must correct it.

15 Even if this Court were to determine that this Circuit’s “sliding scale”
16 standard for the issuance of injunctive relief must be met, *see, e.g., Miller v.*
17 *California Pacific Med. Ctr.*, 19 F.3d 449, 456 (9th Cir. 1994) (en banc) (quoting
18 *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174 (9th Cir.
19 1987)), Plaintiffs have met this standard of demonstrating either 1) probable
20 success on the merits and the possibility of irreparable injury, or 2) serious
21 questions on the merits and the balance of hardships tipping sharply in Plaintiffs’
22 favor.

23 With respect to demonstrating probability of success on the merits, Plaintiffs
24 have shown that the requirements for issuing injunctive relief under *Lopez [I]* have
25 been met: voting changes subject to the Section 5 preclearance requirements have
26 not received the requisite Section 5 approval.

27 As to the requirement of irreparable harm, Plaintiffs would suffer such harm
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1 by either participating in an electoral process which violates federal law or by
2 foregoing participation altogether. Moreover, the threatened deprivation of a
3 fundamental right by itself constitutes a threat of irreparable harm. *Goldie's*
4 *Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984)
5 (“alleged constitutional infringement will often alone constitute irreparable harm”).
6 Voting is a fundamental right since it is preservative of all other rights in our
7 democracy. *See Reynold v. Sims*, 377 U.S. 533, 555 (1964) (right to vote “is of
8 the essence of a democratic society, and any restrictions on that right strike at the
9 heart of representative government”); *Yick Wo v. Hopkins*, 118 U.S. 356, 370
10 (1886) (voting “is regarded as a fundamental political right, because preservative of
11 all rights.”). In addition, proceeding with an election that violates federal law runs
12 contrary to the public interest of assuring that the election process is fair, *Casarez*
13 *v. Val Verde County*, 957 F. Supp. 847, 865 (W.D. Tex. 1997), and does not
14 violate federal statutes enacted to protect the voting rights of racial and ethnic
15 minorities. *See, e.g., Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala.
16 1984)(“[W]hen [the Voting Rights Act] is violated the public as a whole suffers
17 irreparable injury.”) (citation omitted).

18 The balance of the hardships also tips in favor of the Plaintiffs. Plaintiffs are
19 seeking this injunctive relief at the beginning of the electoral process. At this point,
20 the expenditures incurred by the Defendants are minimal compared to the expenses
21 to be incurred as the election schedule progresses toward an October 7, 2003
22 election. If Plaintiffs prevail, injunctive relief will have preserved resources that
23 would otherwise be wasted on an illegal election. In the voting rights context,
24 courts have recognized the harm to the community at large when the rights of a
25 segment of that community are infringed. “[S]ection 2 [of the VRA] and its history
26 reflect a strong national mandate for the immediate removal of all impediments,
27 intended or not, to equal participation in the election process . . . ,

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6 when [the VRA] is violated the public as a whole suffers irreparable injury.” *Id.* at
7 135 (citation omitted).⁵

8 **IV. CONCLUSION.**

9 For these reasons, this Court should grant Plaintiffs motion for a Temporary
10 Restraining Order preventing the implementation of a new election date and of
11 timetables and deadlines for preparation and distribution of the ballot pamphlets
12 have not received approval under Section 5 of the Voting Rights Act.

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14 Dated: July 31, 2003

MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND

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17 By: _____
18 Joaquin G. Avila

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