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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

AURELIO SALAZAR, et al.,

Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA, et al.,

Defendants.

Case No. C-03-03584 JF

ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION;
TEMPORARY ORDER RESTRAINING
MAILING OF OVERSEAS BALLOTS

Plaintiffs seek a temporary restraining order and preliminary injunction prohibiting Defendants from going forward with the special election on Proposition 54 (also known as the Classification by Race, Ethnicity, Color or National Origin (CRECNO) Initiative) currently scheduled for October 7, 2003 and from conducting any election to decide Proposition 54 other than on March 2, 2004. The Court has read and considered the legal briefing submitted on behalf of the parties as well as the oral arguments presented by counsel at a hearing on August 15, 2003.

Defendants concede that the state's decision to place Proposition 54 on the same statewide ballot as the vote on the recall of the Governor is a change in voting procedures within the meaning of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c ("Section 5"); that Monterey County is a covered jurisdiction pursuant to the Voting Rights Act, see Lopez v. Monterey

1 County, 519 U.S. 9, 12 (1996)¹; that accordingly Monterey County must obtain preclearance of such
2 changes from the United States Department of Justice or the United States District Court for the
3 District of Columbia prior to enacting or seeking to administer them; and that in the absence of such
4 preclearance neither Monterey County nor the state may proceed with the October 7, 2003 election.
5 Plaintiffs ask the Court to restrain any further preparations for the election immediately; Defendants ask
6 that the Court refrain from entering any order based upon their expectation that the Department of
7 Justice will act on their request for preclearance “well before” the election.

8 Plaintiffs argue that permitting Defendants to obtain Section 5 preclearance after the changes in
9 question already have been implemented undermines a primary purpose of the Voting Rights Act, which
10 is to ensure that covered jurisdictions do not implement changes in voting procedures until preclearance
11 has been obtained. They assert that permitting preparations for the October 7, 2003 election to go
12 forward improperly rewards Defendants for their alleged lack of diligence in seeking preclearance and
13 subjects the Department of Justice to undue pressure to grant preclearance and that even preparatory
14 actions being undertaken by Defendants in anticipation of the election violate the extremely broad
15 provisions of the Voting Rights Act. They acknowledge, however, that the Department of Justice has
16 authority to entertain Defendants’ current effort to obtain preclearance and that the basis for any
17 injunctive relief from this Court will dissipate if and when such preclearance is obtained.

18 Defendants contend that the public interest in allowing the electoral process to proceed is
19 compelling, that even a temporary interruption of their preparations for the October 7, 2003 election by
20 this Court would have the practical effect of delaying the election even if preclearance ultimately is
21 obtained, that they in fact sought preclearance as soon as it was practicable to do so following the
22 certification of the special election on the recall of the Governor, and that allowing the Department of
23 Justice a reasonable time within which to consider their request while at the same time allowing election
24 preparations to go forward appropriately balances the interests at stake.

25 _____
26 ¹Three other California counties—Kings, Merced and Yuba—also are covered jurisdictions but
27 are not parties to the instant case. Counsel for the state advises that a request for preclearance on
28 behalf of these jurisdictions is pending.

1 In a case such as this, the role of the district court is limited to a determination of 1) whether a
2 change in voting procedures triggers the preclearance requirement of Section 5, 2) whether
3 preclearance has been obtained, and 3) what temporary remedy, if any, is appropriate.
4 Lopez v. Monterey County, 519 U.S. at 23. The Court’s goal “must be to ensure that the covered
5 jurisdiction submits its election plan to the appropriate federal authorities for preclearance as
6 expeditiously as possible.” Id. at 24. It is clear in the present case both that the preclearance
7 requirement of Section 5 applies and that Defendants have not yet obtained preclearance. The only
8 question, therefore, is the appropriate extent of equitable relief.

9 This Court is extremely reluctant to intervene in or disrupt the electoral process unless it clearly
10 is compelled to do so. At the same time, permitting voting or other forms of direct political participation
11 to be affected by changes in voting procedures implemented in contravention of the Voting Rights Act
12 cannot be countenanced. Having considered the practical realities of the election process in light of
13 these principles, the Court finds for present purposes that the interests at risk if the election process is
14 permitted to proceed up to the point at which actual voting or other direct participation is implicated are
15 substantially outweighed by a compelling public interest in proceeding with the election as presently
16 scheduled, but that thereafter injunctive relief will be warranted in the absence of Section 5
17 preclearance. In the case of Proposition 54, voting is implicated first by Defendant Monterey County’s
18 stated intention to mail absentee ballots to registered voters residing overseas as soon as possible and
19 thereafter by the commencement of general absentee voting on September 8, 2003. Direct
20 participation is implicated by the August 31, 2003 deadline established by the state for public review of
21 the ballot pamphlet that will contain the arguments for and against Proposition 54.

22 Accordingly, and good cause therefor appearing, Defendants shall appear before this Court at
23 3:00 PM on Friday, August 29, 2003, there and then to show cause, if any they have, why they, their
24 agents, servants, employees and those in active concert or participation with them, should not be
25 restrained and enjoined pending trial of this action from accepting any ballots, including absentee
26 ballots, or operating any polling place in connection with the special election on Proposition 54 currently
27 scheduled for October 7, 2003. Counsel for Defendants shall advise the Court and opposing counsel

1 immediately of the substance of any and all communications from the United States Department of
2 Justice concerning the status of Defendants' request for Section 5 preclearance.

3 Pending the hearing, Defendant Monterey County is restrained from mailing absentee ballots to
4 overseas voters registered to vote in Monterey County until Section 5 preclearance has been obtained
5 or until further order of the Court.² An undertaking shall not be required.

6 This Order shall be served on Defendants on or before August 18, 2003, and proof of service
7 must be filed on or before August 20, 2003. Any response or opposition must be filed and served by
8 facsimile on Plaintiffs' counsel on or before August 26, 2003; any reply to such response or opposition
9 must be filed and served by facsimile on Defendants' counsel on or before August 28, 2003. Because
10 counsel have submitted substantial briefing and provided the Court with extended legal argument in
11 connection with Plaintiffs' application for a temporary restraining order, briefing with respect to this
12 Order to Show Cause shall be limited to the response, if any, that Defendants have received from the
13 United States Department of Justice to their request for preclearance pursuant to Section 5 of the
14 Voting Rights Act of 1965 and the legal effect of such response or lack thereof on the issues presented
15 by the instant case.

22
23 ²The purpose of this limited restraining order is to ensure that no person who casts a vote with
24 respect to the October 7, 2003 election does so pursuant to voting procedures that have not been
25 precleared pursuant to Section 5 of the Voting Rights Act. The Court notes that Monterey County
26 already has missed the statutory deadline for mailing absentee ballots to overseas voters and that this
27 order will further shorten the time available for mailing ballots to the voters in question, but it concludes
28 that it has no other alternative in view of the fact that the October 7, 2003 election cannot proceed in
the absence of Section 5 preclearance. The Court expresses no opinion as to what remedies, if any,
may be available to such voters under California law.

IT IS SO ORDERED.

DATED: August 15, 2003

(electronic signature authorized)

JEREMY FOGEL
United States District Judge

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