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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

14 AURELIO SALAZAR, JUAN
MARTINEZ, and BILL MELENDEZ,

16 Plaintiffs,

17 v.

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

22 Defendants.

24 AND RELATED ACTION.

Case No. 03-03584-JF (HRL)
[Related to Case No. 03-3658-JF)

**AMENDED SECRETARY OF
STATE KEVIN SHELLEY'S
RESPONSE TO ORDER TO SHOW
CAUSE RE PRELIMINARY
INJUNCTION: OPPOSITION TO
MOTION FOR PRELIMINARY
INJUNCTION**

VOTING RIGHTS ACTION

DATE: AUGUST 29, 2003
TIME: 3:00 P.M.
COURTROOM: 3

THREE JUDGE PANEL:

Honorable Consuelo M. Callahan
Honorable Jeremy Fogel
Honorable Ronald M. Whyte

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1 **INTRODUCTION**

2 Based on the preclearance requirements of Section 5 of the Voting Rights
3 Act, Title 42, United States Code, section 1973c, plaintiffs seek a preliminary injunction
4 to remove California Proposition 54 from the October 7, 2003 ballot. As this Court is
5 aware, however, the Secretary of State already sought preclearance from the United
6 States Department of Justice (“US DOJ”). The US DOJ informed the Secretary of State
7 that it does not object to the October 7, 2003 election date, nor does it object to the recall
8 election procedures. The US DOJ requested, and the Secretary of State provided,
9 supplemental information on certain pending issues, and a decision from US DOJ on
10 those issues is expected shortly. Until the US DOJ has decided whether preclearance is
11 warranted, this Court should refrain from considering the issuance of injunctive relief.

12 Federal regulations indicate that preclearance is required for any
13 “discretionary” setting of a special election date. Significantly, the Secretary of State had
14 *no* discretion regarding the setting of the October 7, 2003 special election, and *no*
15 discretion regarding placement of Proposition 54 on the October 7th ballot. Article II,
16 section 8 of the California Constitution requires the Secretary of State to submit an
17 initiative measure at “the next general election held at least 131 days after it qualifies or
18 at a special statewide election held prior to that special general election.” Accordingly, as
19 a matter of settled law, the nondiscretionary placement of an initiative measure on the
20 October 7, 2003 ballot is not subject to preclearance.

21 The California Constitution imposes strict time constraints on the
22 scheduling of a recall election. Once the October 7th special election was scheduled in
23 compliance with those constitutional deadlines, the constitution further mandated that
24 Proposition 54 be placed on the October 7th ballot. But in order to comply with the
25 overriding dictates of the California Constitution, certain statutory and administrative
26 deadlines had to be truncated. The Secretary of State’s constitutional role regarding the
27 propositions on the ballot – aside from his mandatory duty to place the matters on the
28 ballot in the first place – is the preparation and publication of the ballot pamphlet. The

1 Plaintiffs filed their First Amended Complaint (FAC) on August 21, 2003.^{3/} As against
2 the State defendants the *Salazar* plaintiffs allege that Section 5 is violated by “[t]he
3 changes to the ballot initiative election date and the procedures adopted by the Secretary
4 of State and set forth in the October 7, 2003 Voter Guide . . . and any additional as yet
5 undiscovered voting changes . . .” which have not been precleared under Section 5. FAC,
6 p. 7, ¶ 22, ll. 5-9; *Salazar* Memorandum of Points and Authorities (*Salazar* Memo.), p. 8,
7 ll. 13-22. Plaintiffs ask this Court to enjoin further implementation or enforcement of
8 the alleged voting changes in the ballot election initiative date and in the initiative
9 election procedures until the alleged voting changes are pre-cleared under Section 5.
10 FAC, at p. 10, ll. 8-15.

11 On August 12, 2003 this Court issued an order relating this case to *Oliveres*
12 *et al. v. Monterey, et al.*, Case No. 03-03568-JF.

13 Hearing on plaintiffs’ ex parte application for a temporary restraining order
14 (TRO) and order to show cause re preliminary injunction was held on August 15, 2003.
15 On that date, this Court issued an order directing defendants to “show cause . . . why they
16 . . . should not be restrained and enjoined pending trial of this action from accepting any
17 ballots, including absentee ballots, or operating any polling place in connection with the
18 special election on Proposition 54 currently scheduled for October 7, 2003.” Order, p. 3,
19 ll. 23-27. The order also directed the parties to limit “briefing with respect to this Order
20 to Show Cause . . . to the response, if any, that defendants have received from the United
21 States Department of Justice to their request for preclearance pursuant to Section 5 of the
22 Voting Rights Act of 1965 and the legal effect of such response or lack thereof on the
23 issues presented by the instant case.” Order, p. 4, ll. 11-15.^{4/}

25 3. The amendments appear to add to and clarify Plaintiffs’ claims against
26 Monterey County.

27 4. The State defendants respectfully submit that the August 15, 2003 Order to
28 Show Cause misstates their position in its assertion that they “concede that the state’s
decision to place Proposition 54 on the same statewide ballot as the vote on the recall of

1 On August 22, 2003, the United States Court of Appeals for the Ninth
2 Circuit issued an order establishing a three-judge panel pursuant to Title 28, United
3 States Code, section 2284.

4 **CALIFORNIA’S REQUEST FOR PRECLEARANCE**

5 Out of an abundance of caution, and to avoid unnecessary delays in this
6 unprecedented statewide special election, the Secretary of State submitted the entire
7 statewide special election calendar to the US DOJ on August 4, 2003, seeking
8 preclearance on behalf of California’s four covered counties (Kings, Merced, Monterey
9 and Yuba).^{5/} Declaration of John Mott-Smith in Opposition to Application for
10 Temporary Restraining Order (Mott-Smith Decl.), p. 2, ¶ 7 and Exhibit A.

11 On August 11 and 13, 2003, California supplemented its original
12 preclearance request with a copy of the complaint in the related case, *Oliveres*, and a
13 copy of the ballot pamphlet for the June 1974 primary election, setting forth the text of,
14 and arguments for and against, Proposition 9. Mott-Smith Decl., p. 2, ¶ 7 and Exhibits B
15 and C.

16 On August 19, 2003, the US DOJ responded to California’s preclearance
17 request:

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22
23 the Governor is a change in voting procedures within the meaning of Section 5 of the
24 Voting Rights Act of 1965, 42 U.S.C. § 1973c (“Section 5”)” Order, p. 1, ll. 24-26
25 [emphasis added]. As stated above, the State defendants had no discretion regarding the
placement of Proposition 54 (and Proposition 53) on the statewide ballot.

26 5. A copy of California’s August 4, 2003, preclearance request is attached as
27 Exhibit B to the Corrected Notice of Other Actions. The August 4th preclearance request
28 is also attached as Exhibit A to the Declaration of John Mott-Smith in Opposition to
Application for Temporary Restraining Order.

1 The Attorney General does not interpose any objection to the
2 setting of October 7, 2003 as the date for the special
3 gubernatorial recall election; the procedures for conducting
4 the November 5, 1974, special referendum election; the
5 repeal of then-existing recall procedures; or the adoption of
6 new recall procedures.^{6/}

7 Recall Election Preclearance Letter, p. 1.

8 The US DOJ also sought “clarification . . . whether . . . the State intended to
9 submit for preclearance under Section 5 the change in the date for the initiative election
10 from March 2, 2004, to October 7, 2003, and the several attendant changes to the
11 timetable for certain events leading up to this election.” *Id.*^{7/} These questions were
12 reiterated by the US DOJ during a teleconference held on August 20, 2003. Secretary of
13 State’s Second Advice of Communication from the United States Department of Justice,
14 p. 2, ll. 1-4.

15 In an August 21, 2003 letter, the Secretary of State responded to the US
16 DOJ’s request for clarification:

17 [O]ur August 4, 2003 letter to you specifically referred to the
18 two ballot measures that will appear on the October 7 ballot.
19 We included the text of the measures and related information
20 as well as a copy of the *Salazar* complaint, which set forth the
21 specific changes in the ballot measure procedures, including
22 truncating statutorily-imposed deadlines—that the plaintiffs
23 contended required your preclearance. As you note, it may
24 now be the court’s view that not only these ancillary
25 changes—but also the nondiscretionary, constitutional
26 placement of the two measures on the October 7, 2003
27 ballot—require preclearance. Based solely on this preliminary
28 statement by the court, and out of an abundance of caution,
we again seek preclearance, specifically, of the placement of
the two ballot measures on the special statewide election, as
well as the specific deadline changes of the type that the
Salazar plaintiffs identify.

6. A copy of the August 19, 2003, letter from the US DOJ (Recall Election
Preclearance Letter) is attached as Exhibit A to the Secretary of State’s Advice of
Communication from the United States Department of Justice.

7. A copy of the Secretary’s August 21, 2003, letter to the US DOJ is attached as
Exhibit A to the Secretary of State’s Third Advice of Communication from the United
States Department of Justice (Third Advice).

1 Third Advice, Exhibit A, p. 2. With this August 21, 2003 letter, the Secretary of State
2 provided to the US DOJ the following six exhibits: (1) Special Election Proclamation;
3 (2) Sections 15 and 17 of Article II of the California Constitution; (3) California
4 Elections Code section 9040; (4) Section 8(c) of Article II of the California Constitution;
5 (5) Media Release Announcing Qualification of Proposition 54; (6) Table of Dates; and
6 (7) Press Release Inviting Argument. Third Advice, Exhibit. A, at Exhibits 1-6.

7 The Secretary's August 21, 2003, letter also provides the background to
8 California's request for preclearance concerning Proposition 54:

9 [O]n July 24, 2003, California Lieutenant Governor Cruz
10 Bustamante proclaimed a special statewide election to be held
11 on October 7, 2003 for the purpose of determining whether
12 Governor Gray Davis shall be recalled and to elect a
13 successor should the Governor be recalled. (See [Third
14 Advice, Ex. A, at] Exhibit 1. . . .)

15 . . . Pursuant to Section 8(c) of Article II of the Constitution
16 of California, Proposition 54 was placed on the October 7,
17 2003 ballot. (See [Third Advice, Ex. A, at] Exhibit 4)
18 The propriety of placing the two measures on the special
19 election ballot was challenged in a Petition for Writ of
20 Mandate filed with the California Supreme Court (*Eisenberg*
21 *v. Shelley*, S117763). The Court denied the petition
22 summarily on August 7, 2003, essentially affirming the
23 correctness of the Secretary of State's non-discretionary
24 placement of the measures on the October 7, 2003
25 ballot^[8]

26 The Secretary of State's primary constitutional role with
27 respect to the October 7, 2003 election is the publication and
28 distribution of the California Ballot Pamphlet. In order to
comply with the California state constitutional provisions
referenced above, the Secretary of State has been required to
adjust certain dates that are designed to facilitate

23 8. A copy of the Petition for Writ of Mandate in *Eisenberg* is attached as Exhibit
24 A to defendants' Corrected Notice of Three Other Actions or Proceedings: *Eisenberg v.*
25 *Shelley; Request for "Expedited Consideration" of [California's] Submission under*
26 *Section 5 of the Voting Rights Act; and Davis, et al. v. Shelley, et al.* (Corrected Notice of
27 Other Actions), filed in this Court on August 11, 2003. A copy of the California
28 Supreme Court's denial of the *Eisenberg* petition is attached as Exhibit B to Defendant
Secretary of State's Request to Take Judicial Notice of Orders of the California Supreme
Court in Opposition to Plaintiffs' Ex Parte Application for Temporary Restraining Order
and Order to Show Cause Re Preliminary Relief.

1 administration of the process for producing and distributing
2 the Ballot Pamphlet. The dates adjusted are set forth in the
3 attached table. (See [Third Advice, Ex. A, at] Ex. 6-Table of
4 Dates.) The adjustments are specifically tailored to comply
5 with the state constitutional provisions referenced above as
6 well as with the spirit of the administrative and statutory
7 deadlines utilized in regular elections.

8 Third Advice, Exhibit A, § I, pp. 2-3.

9 The specific date adjustments are discussed in the text of the Secretary of
10 State's August 21, 2003, letter to the US DOJ. The Secretary set out these dates in table
11 form as well. Third Advice, Exhibit A, §§ II, pp. 2-3 and Table 6.

12 NOTICE OF OTHER ACTIONS OR PROCEEDINGS

13 As identified in State defendants' Notices of Other Actions, two cases
14 pertaining to the October 7th election addressed issues related or similar to those
15 presented here. See, *Eisenberg v. Shelley* (Cal. Supreme Court Case No. 117763); and
16 *Takash, et al. v. Shelley*, (Sacramento Superior Court Case No. 03CS01147).^{9/} As noted
17 above, the *Eisenberg* petitioner asked the California Supreme Court to prohibit the
18 Secretary from submitting Proposition 54 to the voters at the October special statewide
19 election. On August 7, 2003, the California Supreme Court summarily denied the
20 *Eisenberg* petition.^{10/}

21 9. A copy of the Verified Petition for Writ of Mandate and Complaint for
22 Declaratory and Injunctive Relief in *Takash* is attached as Exhibit A to the Defendant
23 Secretary of State's Second Notice of Pendency of Other Action or Proceeding: *Takash*
24 *v. Shelley* (Second Notice of Other Action).

25 10. On or about August 25, 2003, the State defendants learned that two additional
26 cases implicating the issues before this court have been filed in the United States District
27 Court for the Eastern District of California. These are *Gallegos, et al. v. State of*
28 *California, et al.*, CIV-F-03-6157 REC (LJO), and *Hernandez, et al. v. Merced County,*
et al., CIV-F-03-6147 OWW (DLB). *Gallegos* is brought under Section 5 of the Voting
Rights Act for declaratory and injunctive relief. The suit seeks to address the alleged
failure of defendants Kings County, Merced County, and the State of California to obtain
preclearance for voting changes (including precinct consolidation) which relate to the
gubernatorial recall election currently set for October 7, 2003. Plaintiffs Dolores
Gallegos and Lea Hernandez seek a declaratory judgment that the "various changes in the

1 In *Takash*, filed on August 3, 2003, petitioners allege “irreparable harm” on
2 the basis of the Secretary’s “failure . . . to follow mandatory time lines for the
3 preparation, review, printing, and mailing of the ballot pamphlet covering voter
4 measures.” Second Notice of Other Action, Exhibit A, p. 1, ¶ 1. Like the *Salazar*
5 plaintiffs, the *Takash* petitioners alleged that California Elections Code sections 9082,
6 9092 and 9094(a) establish “mandatory time lines” having “the effect of setting up a
7 minimum period of focused voter debate for those propositions being presented.” Second
8 Notice of Other Action, Exhibit A, pp. 1-2, ¶¶ 5-6.

9 And like the *Salazar* plaintiffs, the *Takash* petitioners sought declaratory,
10 preliminary and permanent relief moving Proposition 54 to the March 2, 2004 election
11 ballot, and compelling the Secretary’s strict compliance with California Elections Code
12 sections 9082, 9092 and 9094(a). Second Notice, Exhibit A, p. 8, ¶¶ A-D; *Salazar* FAC,
13 pp. 5-6, ¶ 17 (alleging “minimum mandatory time lines for the preparation, review,
14 printing, and mailing of the ballot pamphlet for an initiative election”). Both the *Salazar*
15 plaintiffs and the *Takash* petitioners are represented by the Mexican American Legal

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18 Recall Election procedures constitute changes affecting voting" within the meaning of
19 Section 5. They also ask the Court to enjoin the election unless and until all changes in
20 the conduct of the election are precleared by the Justice Department. The Gallegos
21 plaintiffs have notified State defendants that on Friday, August 29, 2003, they will move
22 for a temporary restraining order. State defendants have not yet determined whether the
23 court will hear argument on this date. Counsel for *Gallegos* plaintiffs include Robert
24 Rubin (San Francisco), Joaquin Avila (Los Angeles), and Wynne Carvill (San Francisco).

25 Like *Gallegos*, *Hernandez* is a voting rights action brought under Section 5.
26 Plaintiffs Lea Hernandez, Antonio Salazar, and Dolores Gallegos seek declaratory and
27 injunctive relief to address the alleged failure of Kings County, Merced County, the State
28 of California, and the Secretary of State "to obtain the necessary Section 5 preclearance"
for numerous voting changes relating to the election date (including precinct
consolidation) "and the timelines, deadlines, and procedures bring applied to the
[Proposition 54] election currently scheduled for October 7, 2003." Copies of the
Gallegos and *Hernandez* complaints will be submitted to this Court under separate cover.

1 Defense and Educational Fund. The *Takash* petition was denied by the Sacramento
2 Superior Court on August 14, 2003.

3 **ARGUMENT**

4 **I. THE SECRETARY'S PLACEMENT OF PROPOSITION 54 ON THE**
5 **BALLOT FOR THE OCTOBER 7, 2003 SPECIAL STATEWIDE**
6 **ELECTION WAS NON-DISCRETIONARY**

7 The Secretary's placement of Proposition 54 on the October 7, 2003 ballot
8 was nondiscretionary, because such placement was required by article II, section 8(c) of
9 the California Constitution. Article II, section 8 provides in pertinent part:

10 (b) An initiative measure may be proposed by presenting to
11 the Secretary of State a petition that sets forth the text of the
12 proposed statute or amendment to the Constitution and is
13 certified to have been signed by electors equal in number to 5
14 percent in the case of a statute, and 8 percent in the case of an
15 amendment to the Constitution, of the votes for all candidate
16 for Governor at the last gubernatorial election.

17 (c) The Secretary of State shall then submit the measure at the next
18 general election held at least 131 days after it qualifies or at any
19 special statewide election held prior to that general election. The
20 Governor may call a special statewide election for the measure.

21 Cal. Const., art. II, §§ 8(b)-(c).¹¹

22 The Secretary certified Proposition 54 for presentation to California's
23 electors on July 15, 2002. At that time, it was assumed that the measure would be
24 considered on March 2, 2004, the date of the next statewide general election and for that
25 reason the March 2004 date is shown on the face of the July 2, 2002 certificate.

26 On July 24, 2003, however, Lieutenant Governor Cruz Bustamante issued a
27 proclamation scheduling a special statewide election on October 7, 2003, for the purpose
28 of determining whether Governor Gray Davis shall be recalled and to elect a successor
should the Governor be recalled. Because of this unprecedented intervening event, the
California Constitution required Proposition 54 to be placed on the October 7th ballot. As

11. The governing provisions of article II, section 8, have been controlling law since 1966. Enacted in 1966 as article IV, section 22, the provisions were later moved to article II, section 8 in 1976, without changing the text, through passage of Proposition 14.

1 a matter of law, the Secretary lacked discretion with respect to this statewide change, and
2 preclearance is not required.

3 Federal regulations indicate that the placement of Proposition 54 on the
4 October 7th election ballot does not require preclearance. Specifically, 28 C.F.R. 51.17
5 provides that “[a]ny discretionary setting of the date for a special election or scheduling
6 of events leading up to or following a special election is subject to the preclearance
7 requirement.” 28 C.F.R. 51.17(b); emphasis supplied. Because section 8(c) of article II
8 of the California Constitution mandates that Proposition 54 be placed on the October 7,
9 2003 ballot, such placement is not “discretionary” and thus preclearance under Section 5
10 is not required.

11 **II. TO COMPLY WITH THE OVERRIDING CONSTITUTIONAL**
12 **MANDATE THAT PROPOSITION 54 BE PLACED ON THE**
13 **OCTOBER 7TH BALLOT, CERTAIN STATUTORY AND**
14 **ADMINISTRATIVE DEADLINES HAD TO BE ADJUSTED**

15 The constitutional requirement that Proposition 54 be placed on the
16 October 7, 2003 election ballot renders the decision to adjust statutory and administrative
17 deadlines, for all pragmatic purposes, "non-discretionary" within 28 C.F.R. 51.17(b).
18 Although the Secretary of State might have set any given deadline a day earlier or a day
19 later, the constitution requires that the dates be set in a manner that, while preserving the
20 rights of candidates and voters, allowed the election to be conducted within the
21 constitutionally-imposed timelines. These mandatory deadlines also require a truncated
22 pre-election schedule. Thus, the truncated schedule is not "discretionary" within the
23 meaning of 28 C.F.R. 51.17(b).^{12/}

24 12. Under Section 5, covered jurisdictions must obtain preclearance for voting
25 standard changes that occur after a specified “applicable date” for that jurisdiction, and
26 changes imposed before the applicable date are not subject to preclearance. Monterey
27 County’s applicable date is November 1, 1968. 28 C.F.R., Part 51, subpart H, Appendix
28 to Part 51. Since Plaintiffs argue that the Secretary’s use of a substantial compliance
standard in setting the dates for administration of the process for producing and
distributing the California Ballot Pamphlet is a change for Voting Rights Act purposes,

1 The Secretary’s August 4, 2003 request for preclearance in no way changes
2 the fact that placement of Proposition 54 on the ballot was nondiscretionary under article
3 II, section 8(c) of the California Constitution. As noted above, the two California state
4 courts which have considered the propriety of this placement—including the Supreme
5 Court of California—have denied petitioners relief. The California Supreme Court, in
6 denying the petition, essentially affirmed the correctness of the Secretary of State’s non-
7 discretionary placement of this measure on the October 7, 2003 ballot.

8 The constitutional provisions mandating placement of Proposition 54 on the
9 October 7, 2003 election ballot have remained unchanged since 1966. This fact
10 distinguishes this case from *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (*Lopez-*
11 *II*), in which the state mandate that led to the challenged voting changes was created after
12 the controlling date established for preclearance. *Lopez-II* held that “[Section 5’s]
13 preclearance requirement applies to a covered county’s nondiscretionary efforts to
14 implement a voting change required by state law.” *Id.* In the case at bar, however, the
15 controlling constitutional requirement that an initiative be presented to the voters at the
16 next election has remained unchanged since 1966.

17 The applicable federal regulations provide that “[t]he conduct of a special
18 election . . . is subject to the preclearance requirement *to the extent that the jurisdiction*
19 *makes changes in the practices or procedures to be followed.*” 28 C.F.R. 51.17(a). Here,
20 there has been no change to the controlling constitutional requirements.

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24
25 the relevant question is whether the substantial compliance standard was a change
26 imposed after the applicable date. The answer to that question is no, because the
27 “substantial compliance” standard has been the applicable standard since 1939. *Hart v.*
28 *Jordan*, 14 Cal. 288 (1939). Consequently, the voting standard challenged here
antedates the relevant applicable date by 29 years. The dates adjusted do not require
preclearance.

1 **III. THE BALANCE OF HARMS FAVORS DEFERRING A DECISION**
2 **UNTIL THE U.S. DEPARTMENT OF JUSTICE HAS ISSUED ITS**
3 **DECISION ON THE REQUEST FOR PRECLEARANCE**

4 The Secretary has sought preclearance with respect to the date adjustments
5 required by his non-discretionary placement of Proposition 54 on the October 7, 2003
6 election ballot. If preclearance has not been granted on the issues pending before the US
7 DOJ by the time of the hearing on Plaintiffs’ request for a preliminary injunction, this
8 Court should refrain from issuing injunctive relief until the US DOJ makes its anticipated
9 determination.

10 The October 7, 2003 recall election date has been precleared. As
11 previously explained, the actual placement of Proposition 54 on that election ballot does
12 not require preclearance. And the need to adjust the statutory and administrative
13 deadlines was imposed by the overriding constitutional deadlines.

14 The public interest in allowing the electoral process to proceed is no less
15 compelling today than it was when the Court issued its August 15, 2003 Order. Now, as
16 then, the premature grant of injunctive relief – before the US DOJ has issued its decision
17 on whether to grant preclearance – “would have the practical effect of delaying the
18 election even if preclearance is ultimately obtained” Order, p. 2, ll. 19-21. Now, as
19 then, “allowing the Department of Justice a reasonable time within which to consider
20 their request while at the same time allowing election preparations to go forward
21 appropriately balances the interests at stake.” Order, p. 2, ll. 22-24.

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CONCLUSION

For these reasons the plaintiffs' request for preliminary injunction should be denied pending the US DOJ's determination on the request for preclearance.

Dated: August 26, 2003

Respectfully submitted,
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of the State of California
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