

Preclearance of a Gubernatorial Recall Election

Salazar v. Monterey County (5:03-cv-3584)
and *Oliver v. California* (5:03-cv-3658)
(Jeremy Fogel, N.D. Cal.); *Hernandez v. Merced
County* (1:03-cv-6147) and *Gallegos v. California*
(1:03-cv-6157) (Oliver W. Wanger, E.D. Cal.)

When the state set a special election on whether to recall the governor, a ballot initiative was moved from a primary election to the earlier special election. Separate federal cases alleged that the recall and the early ballot initiative could not be held because they had not been precleared pursuant to section 5 of the Voting Rights Act as required for four of California's counties. The state obtained preclearance just as a three-judge court met to review the case. The judge presiding over two similar cases in another of the state's districts allowed the court presiding over the cases filed earlier to decide the issues.

Subject: Recall elections. *Topics:* Section 5 preclearance; three-judge court; enjoining elections; news media; ballot measure.

Three voters in Monterey County, California, filed a federal complaint in the Northern District of California's San Jose courthouse on August 1, 2003, complaining that it was invalid for the state to move a ballot initiative from a March 2, 2004, primary election to a special October 7, 2003, election because the change had not been precleared pursuant to section 5 of the Voting Rights Act, as required for elections in Monterey County.¹ With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction² and a request for a three-judge court.³ The court assigned the case to a magistrate judge.⁴ Three days later, in response to the plaintiffs' declination to proceed before a magistrate judge,⁵ the court assigned the case to District Judge Jeremy Fogel.⁶

1. Complaint, *Salazar v. Monterey County*, No. 5:03-cv-3584 (N.D. Cal. Aug. 1, 2003), D.E. 1; see Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (2015) (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. *Shelby County v. Holder*, 570 U.S. 529 (2013).

2. Motion, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Aug. 1, 2003), D.E. 3.

3. Request, *id.* (Aug. 1, 2003), D.E. 6.

4. Scheduling Order, *id.* (Aug. 1, 2003), D.E. 2.

5. Declination, *id.* (Aug. 4, 2003), D.E. 7.

6. Reassignment Order, *id.* (Aug. 4, 2003), D.E. 9.

Tim Reagan interviewed Judge Fogel for this report at the Federal Judicial Center on August 2, 2012. Judge Fogel has been the Center's director from October 3, 2011, through

On August 5, another three Monterey County voters filed a federal complaint challenging on section 5 grounds the special election itself—an election on a petition to recall the governor.⁷ The court assigned the case to Judge Susan Illston in San Francisco.⁸ On August 6, the plaintiffs filed a notice that their case was related to Judge Fogel’s case.⁹ On August 7, the recall plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.¹⁰ On August 11, Judge Fogel determined that the second case was related to the one already before him, and so he took assignment of the second case.¹¹

On the morning of August 15, Judge Fogel heard the motions for immediate injunctive relief.¹² Judge Fogel began by observing that absentee voting in the October 7 election would begin on September 8, and even earlier than that for overseas voters.¹³ After the hearing, Judge Fogel issued temporary restraining orders.¹⁴ He enjoined Monterey County “from mailing absentee ballots to overseas voters registered to vote in Monterey County until Section 5 preclearance has been obtained or until further order of the Court.”¹⁵ Judge Fogel also set a hearing for August 29, at which the defendants would show cause, if any, why they should not be enjoined from accepting ballots in the special election absent preclearance.¹⁶

On August 21, Judge Fogel requested that the circuit’s chief judge appoint a three-judge panel,¹⁷ which she did on the following day.¹⁸

September 14, 2018. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/judges; see Supreme Court Press Release, July 25, 2018, www.fjc.gov/sites/default/files/07.25.18-Press%20Release-FJCAnnouncement.pdf (announcing General John Cooke as Judge Fogel’s successor).

7. Complaint, *Oliver v. California*, No. 5:03-cv-3658 (N.D. Cal. Aug. 5, 2003), D.E. 1; see Claire Cooper, *Big Names Prepare for Election*, *Sacramento Bee*, Aug. 6, 2003, at A3.

The cases before Judge Fogel did not concern California’s three other counties covered by section 5: Kings, Merced, and Yuba. Temporary Restraining Order at 2 n.1, *Oliver v. California*, No. 5:03-cv-3658 (N.D. Cal. Aug. 15, 2003), D.E. 20, 2003 WL 22025009 [hereinafter *Oliver v. California* Temporary Restraining Order]; Temporary Restraining Order at 2 n.1, *Salazar v. California*, No. 5:03-cv-3584 (N.D. Cal. Aug. 15, 2003), D.E. 20, 2003 WL 22025010 [hereinafter *Salazar v. California* Temporary Restraining Order].

8. Scheduling Order, *Oliver v. California*, No. 5:03-cv-3658 (N.D. Cal. Aug. 5, 2003), D.E. 2.

9. Notice of Related Cases, *id.* (Aug. 6, 2003), D.E. 3.

10. Motion, *id.* (Aug. 7, 2003), D.E. 4.

11. Order, *Salazar v. California*, No. 5:03-cv-3584 (N.D. Cal. Aug. 11, 2003), D.E. 13.

12. Transcript, *id.* (Aug. 15, 2003, filed Aug. 21, 2003), D.E. 28; Minutes, *id.* (Aug. 15, 2003), D.E. 19.

13. Transcript, *supra* note 12, at 10–11.

14. *Oliver v. California* Temporary Restraining Order, *supra* note 7; *Salazar v. California* Temporary Restraining Order, *supra* note 7; see Peter Fimrite, *Federal Judge Warns He May Postpone Election*, *S.F. Chron.*, Aug. 16, 2003, at A1.

15. *Oliver v. California* Temporary Restraining Order, *supra* note 7, at 4; *Salazar v. California* Temporary Restraining Order, *supra* note 7, at 4.

16. *Oliver v. California* Temporary Restraining Order, *supra* note 7, at 4; *Salazar v. California* Temporary Restraining Order, *supra* note 7, at 3–4.

17. Letter, *Salazar v. California*, No. 5:03-cv-3584 (N.D. Cal. Aug. 21, 2003), D.E. 25.

18. Order, *id.* (Aug. 26, 2003), D.E. 40.

Judge Fogel's approaches to both the pending election and to his work on the case before the three-judge panel would act were similar: apply the law, but do no harm.¹⁹ On the one hand, he wanted to interfere with the election as little as possible; on the other hand, he wanted to avoid tying the panel's hands unnecessarily.²⁰

The three-judge court heard argument on August 29²¹ and ordered additional argument for September 5.²² The defendants wanted more time, so the court gave them as much as they could while still allowing for the possibility of effective relief, if necessary.²³

The recall case drew a lot of public attention.²⁴ Three-judge court proceedings were held in the ceremonial courtroom, and a second courtroom was used as an additional listening site.²⁵ The circuit judge on the panel traveled from Sacramento for the proceedings.²⁶

On September 5, the court denied the plaintiffs injunctive relief, because by then California had received preclearance for all aspects of the special election except for the consolidation of polling places in Monterey County, and the county agreed to forego the consolidation and to provide additional bilingual poll workers at the polls.²⁷ The court dismissed the actions as moot on November 12.²⁸ On February 6, 2004, the parties filed an approved settlement agreement on an award of attorney fees.²⁹

Meanwhile, actions concerning section 5 preclearance for the ballot initiative³⁰ and the gubernatorial recall³¹ in Kings County and Merced County

19. Interview with Hon. Jeremy Fogel, Aug. 2, 2012.

20. *Id.*

21. Minutes, *Oliver v. California*, No. 5:03-cv-3658 (N.D. Cal. Aug. 29, 2003), D.E. 28; Minutes, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Aug. 29, 2003), D.E. 59.

22. Order, *Oliver*, No. 5:03-cv-3658 (N.D. Cal. Aug. 29, 2003), D.E. 27, 2003 WL 22047533; Order, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Aug. 29, 2003), D.E. 58, 2003 WL 22047535; see Claire Cooper, *Court Rulings Delayed a Week*, Sacramento Bee, Aug. 30, 2003, at A3.

23. Interview with Hon. Jeremy Fogel, Aug. 2, 2012.

24. *Id.*

25. *Id.*

26. *Id.*

27. Order *Oliver*, No. 5:03-cv-3658 (N.D. Cal. Sept. 5, 2003), D.E. 30; Order, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Sept. 5, 2003), D.E. 75; see Herbert A. Sample, *Voting Rights Challenge Settled: Federal Officials, Judges and Monterey County Reach Accord Over Election Plans*, Sacramento Bee, Sept. 6, 2003, at A3; Mark Simon, *Judges Kill Rights Suit, Back Recall on Oct. 7*, S.F. Chron., Sept. 6, 2003, at A11.

28. Order *Oliver*, No. 5:03-cv-3658 (N.D. Cal. Nov. 12, 2003), D.E. 36; Order, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Nov. 12, 2003), D.E. 83.

29. Docket Sheet, *Oliver*, No. 5:03-cv-3658 (N.D. Cal. Aug. 5, 2003); Docket Sheet, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Aug. 1, 2003). The agreement is not available on PACER.

30. Complaint, *Hernandez v. Merced County*, No. 1:03-cv-6147 (E.D. Cal. Aug. 25, 2003), filed as Ex. 2, Notice, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Aug. 28, 2003), D.E. 46 [hereinafter Aug. 25, 2003, Related Case Notice] (noting related cases filed in another district); Docket Sheet, *id.* (Aug. 25, 2003) [hereinafter *Hernandez* Docket Sheet].

were filed in the Eastern District of California on August 25, 2003, and assigned to Judge Oliver W. Wanger.³² On August 29, Judge Wanger requested a three-judge court.³³ He set a temporary restraining order hearing for September 3.³⁴ Judge Wanger was mindful of the competing tensions of section 5's requirements and the lateness of the actions' filings, especially considering the considerable experience with election law by one of the plaintiffs' attorneys.³⁵ Judge Wanger was aware of the earlier cases filed in the Northern District, but his cases included matters that applied specifically to the counties of Kings and Merced.³⁶

As with Judge Fogel's cases, preclearance mooted Judge Wanger's cases. Pursuant to a faxed letter from counsel, the September 3 hearing was canceled,³⁷ and the plaintiffs voluntarily dismissed their actions.³⁸

On October 7, the ballot initiative, Proposition 54, which would have stopped the state from collecting most racial and ethnic data, failed.³⁹ In addition, Governor Gray Davis was recalled and Arnold Schwarzenegger was elected as his replacement.⁴⁰

31. Complaint, *Gallegos v. California*, No. 1:03-cv-6157 (E.D. Cal. Aug. 25, 2003), filed as Ex. 1, Aug. 25, 2003, Related Case Notice, *supra* note 30; Docket Sheet, *id.* (Aug. 25, 2003) [hereinafter *Gallegos* Docket Sheet].

32. See Order, *id.* (Aug. 27, 2003), D.E. 4 (determining that the two cases are related and should be assigned to the same judge); see also Aug. 25, 2003, Related Case Notice, *supra* note 30.

Tim Reagan interviewed Judge Wanger for this report by telephone on August 13, 2012.

Judge Wanger retired from the bench on October 1, 2011, to return to private practice. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/judges; Wanger Jones Helsley PC, wjhattorneys.com; see John Ellis, *Loss of Judge Will Further Clog Fresno Court*, *Fresno Bee*, Sept. 16, 2011.

33. Request, *Hernandez*, No. 1:03-cv-6147 (E.D. Cal. Aug. 25, 2003), D.E. 5.

34. Order, *id.* (Aug. 31, 2003), D.E. 17.

35. Interview with Oliver W. Wanger, Aug. 13, 2012 (noting how important it is for the court to understand the history of an election case, including its prelitigation history and the history of related litigation, and how difficult it is to master this history in a short period of time).

36. *Id.*

37. *Gallegos* Docket Sheet, *supra* note 31; *Hernandez* Docket Sheet, *supra* note 30.

38. Dismissal, *Gallegos v. California*, No. 1:03-cv-6157 (E.D. Cal. Sept. 22, 2003), D.E. 23; Dismissal, *Hernandez*, No. 1:03-cv-6147 (E.D. Cal. Aug. 25, 2003), D.E. 23.

39. See Stephen Magagnini, *Prop. 54 Soundly Beaten*, *Sacramento Bee*, Oct. 8, 2003, at 9; *Propositions 53 and 54*, *L.A. Times*, Oct. 8, 2003, at 26; Tanya Schevitz, *Prop. 54 Defeated Soundly*, *S.F. Chron.*, Oct. 8, 2003, at A12.

40. See Michael Finnegan, *Gov. Davis Is Recalled; Schwarzenegger Wins*, *L.A. Times*, Oct. 8, 2003, at 1; Margaret Talev, *It's Arnold: Schwarzenegger Coasts to Victory as Davis Is Ousted in Historic Vote*, *Sacramento Bee*, Oct. 8, 2003, at 1.