

## Discrepancies Between Ballot Petitions and Ballot Text

*Martinez v. Monterey County*  
(*Jeremy Fogel, N.D. Cal. 5:05-cv-2950*)

A federal complaint challenged a ballot initiative as different in wording from the text circulated for ballot-access signatures and challenged the change in wording as a change in election procedures requiring preclearance pursuant to section 5 of the Voting Rights Act. In parallel litigation, the state's supreme court provisionally ruled that the electorate should not be denied an opportunity to vote on the initiative unless the text discrepancies were sufficiently misleading. A three-judge federal district court declined to interfere with state proceedings because the state court also had jurisdiction over the federal question. The initiative failed, and the state's supreme court subsequently ruled that the text discrepancies were not so great as to merit an injunction against including the initiative on the ballot.

*Subject:* Ballot measures. *Topics:* Ballot language; ballot measure; section 5 preclearance; matters for state courts; three-judge court; case assignment.

Two Monterey County voters filed a federal complaint in the Northern District of California's San Jose courthouse on July 20, 2005, to enjoin a November 8 ballot initiative as different in wording from the text circulated for ballot-access signatures, claiming the change in text to be a change in voting practices requiring preclearance pursuant to section 5 of the Voting Rights Act, because Monterey County was subject to section 5 preclearance requirements.<sup>1</sup> According to the complaint,

Proposition 77, a purported good government initiative, seeks to change the time and manner in which congressional, state legislative, and board of equalization districts in California are drawn in disregard of the California Constitution and the state elections code provisions designed to ensure the integrity of the initiative process and provide accurate information to the California electorate.<sup>2</sup>

The November election was a special election set by Governor Schwarzenegger for initiatives, including several favored by the governor.<sup>3</sup>

With their complaint, the plaintiffs filed an *ex parte* application for a temporary restraining order<sup>4</sup> and a request for a three-judge district court.<sup>5</sup>

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1. Complaint, *Martinez v. Monterey County*, No. 5:05-cv-2950 (N.D. Cal. July 20, 2005), 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 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

2. Complaint, *supra* note 1, at 1.

3. *See* Robert Salladay & Nancy Vogel, *Initiative Is Under Review*, L.A. Times, July 6, 2005, at 1.

The plaintiffs declined assignment of the case to a magistrate judge,<sup>6</sup> and the court assigned the case to District Judge Jeremy Fogel.<sup>7</sup> The plaintiffs amended their complaint on July 28.<sup>8</sup>

On August 1, the plaintiffs filed a request for a temporary-restraining-order hearing, attaching a decision by the superior court for the County of Sacramento enjoining the placement of Proposition 77 on the November ballot, finding that the differences in text were substantive.<sup>9</sup> Noting that the state-court injunction was stayed pending an appeal to be heard on August 5, Judge Fogel denied the plaintiffs a temporary restraining order on August 4, but Judge Fogel did agree to seek appointment of a three-judge court to be ready to hear the case at an appropriate time.<sup>10</sup>

On August 9, California's court of appeal declined to reverse the superior court by writ of mandate, noting that the text discrepancies resulted from the initiative proponents' negligence.<sup>11</sup> On August 12, California's supreme court granted review, staying the superior court's injunction, and stated that denying the electorate an opportunity to vote on the initiative depended on whether the text discrepancies were likely to have misled the petition signers.<sup>12</sup>

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4. Temporary-Restraining-Order Application, *Martinez*, No. 5:05-cv-2950 (N.D. Cal. July 20, 2005), D.E. 2.

5. Three-Judge-Court Request, *id.* (July 20, 2005), D.E. 5; *see* § 10304 (requiring that pre-clearance disputes be heard by a three-judge district court).

6. Declination, *Martinez*, No. 5:05-cv-2950 (N.D. Cal. July 20, 2005), D.E. 7.

7. Reassignment Order, *id.* (July 20, 2005), D.E. 9.

Judge Fogel was the Federal Judicial Center's director from October 3, 2011, through his retirement on September 14, 2018. Federal Judicial Center Biographical Directory of Article III Federal Judges, [www.fjc.gov/history/judges](http://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](http://www.fjc.gov/sites/default/files/07.25.18-Press%20Release-FJCannouncement.pdf) (announcing General John Cooke as Judge Fogel's successor).

8. Amended Complaint, *Martinez*, No. 5:05-cv-2950 (N.D. Cal. July 28, 2005), D.E. 11.

9. Hearing Request, *id.* (Aug. 1, 2005), D.E. 12 (including a July 21, 2005, injunction by Superior Court Judge Gail Ohanesian in *Lockyer v. McPherson*, No. 05CS00998); *see* Dean E. Murphy, *Setback for Schwarzenegger on a Redistricting Measure*, N.Y. Times, July 22, 2005, at A16; Jim Sanders, *Election Measure Rejected by Court*, Sacramento Bee, July 22, 2005, at A1; Nancy Vogel, *Gov.'s Remap Bid Ruled Invalid*, L.A. Times, July 22, 2005, at 1; John Wildermuth, *Redistricting Plan Thrown Off State Ballot*, S.F. Chron., July 22, 2005, at A1.

10. Opinion, *Martinez*, No. 5:05-cv-2950 (N.D. Cal. Aug. 4, 2005), D.E. 25; *see* Three-Judge-Court Request, *id.* (Aug. 4, 2005), D.E. 26.

11. *Costa v. Superior Court (Lockyer)*, 131 Cal. App. 4th 1105, 32 Cal. Rptr. 562 (2005); *see* Christian Berthelsen, *Redistricting Measure Loses in Appeals Court*, S.F. Chron., Aug. 10, 2005, at B2; Peter Hecht, *Appellate Ruling Halts Prop. 77*, Sacramento Bee, Aug. 10, 2005, at A3; Nancy Vogel, *Justices Bar Redistricting Effort*, L.A. Times, Aug. 10, 2005, at 1.

12. *Costa v. Superior Court (Lockyer)*, 128 P.3d 149, 39 Cal. Rptr. 3d 168 (Cal. 2005); *see* Bob Egelko & Christian Berthelsen, *California Supreme Court Overturns Appellate Ruling in Big Win for Governor*, S.F. Chron., Aug. 13, 2005, at A1; Dean E. Murphy, *Redistricting Referendum Resurrected in California*, N.Y. Times, Aug. 13, 2005, at A8; Jim Sanders, *Redistricting on Ballot to Stay*, Sacramento Bee, Aug. 13, 2005, at A1; Nancy Vogel, *Redistricting Back on Ballot*, L.A. Times, Aug. 13, 2005, at 1.

As the election approached, the decision of California's supreme court was that the proposition should be on the ballot pending a final decision on the merits, which the supreme court came to issue in February 2006.<sup>13</sup> On October 12, 2005, the federal three-judge district court denied the plaintiffs' motion to lift the federal-court stay.<sup>14</sup>

[The California Supreme Court's] ultimate determination of this issue may well moot the instant action; at the very least, its explication of California law will inform this Court's analysis of whether the discrepancies constitute a change in California's voting procedures sufficient to trigger Section 5.

While it is true, as Plaintiffs argue, that the question of whether the proponents of Proposition 77 have complied substantially with state election law is distinct from the *federal* question of whether there has been a change in voting procedures within the meaning of Section 5, *amicus curiae* notes correctly that the California Supreme Court itself has jurisdiction to decide, as a collateral matter, whether the asserted change in California's voting procedures requires Section 5 preclearance.<sup>15</sup>

On October 17, the plaintiffs filed a notice of appeal to the U.S. Supreme Court.<sup>16</sup> On November 8, the initiative failed.<sup>17</sup> On February 16, 2006, California's supreme court concluded that "the error committed by the proponents of Proposition 77 did not justify the action of the lower courts in withholding Proposition 77 from the election ballot."<sup>18</sup> The federal case was dismissed by stipulation on March 1.<sup>19</sup>

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13. *Costa v. Superior Court (Lockyer)*, 37 Cal. 4th 986, 128 P.3d 675, 39 Cal. Rptr. 3d 470 (2006).

14. Opinion, *Martinez*, No. 5:05-cv-2950 (N.D. Cal. Oct. 12, 2005), D.E. 81, 2005 WL 2562629 (decision by Circuit Judge Richard Tallman and District Judges Fogel and Susan Illston).

15. *Id.* at 7–8.

16. Docket Sheet, *Martinez*, No. 5:05-cv-2950 (N.D. Cal. July 20, 2005).

17. *Costa*, 37 Cal. 4th at 994, 128 P.3d at 676, 39 Cal. Rptr. 3d at 472; see Michael Finnegan & Robert Salladay, *Voters Reject Schwarzenegger's Bid to Remake State Government*, L.A. Times, Nov. 9, 2005, at 1; John Wildermuth, *Voters Reject Attempt to Take Boundary-Drawing from the Hands of State Legislators*, S.F. Chron., Nov. 9, 2005, at A14.

18. *Costa*, 37 Cal. 4th at 1030, 128 P.3d at 702, 39 Cal. Rptr. 3d at 502–03; see Jim Sanders, *Ruling Settles Ballot Dispute*, Sacramento Bee, Feb. 17, 2006, at A3.

19. Stipulated Dismissal, *Martinez*, No. 5:05-cv-2950 (N.D. Cal. Mar. 1, 2006), D.E. 112.