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April 7, 2006

Clerk of the Court
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119

Re: *Padilla v. Lever*, No. 03-56259

Dear Ms. Catterson:

I hereby request this court's permission to submit this letter as an amicus curiae supporting defendants' petition for rehearing or rehearing en banc in the above-referenced case.

I am the William H. Hannon Distinguished Professor of Law at Loyola Law School in Los Angeles (I list my affiliation for identification purposes only). I specialize in election law. I have co-authored one of the leading casebooks in the field (Lowenstein and Hasen, *Election Law—Cases and Materials* (3d ed. 2004)), and have written *The Supreme Court and Election Law* (NYU Press 2003) and more than two dozen articles on election law. I also co-edit the quarterly peer-reviewed publication, the *Election Law Journal*, and I am the author of a widely-read web log on election-related issues, the Election Law Blog <<http://electionlawblog.org>>. My biography and list of publications is available on the Internet at <<http://www.lls.edu/academics/faculty/hasen.html>>.

I am writing this letter to bring to the court's attention recent events in California that bear on the need for this court to order rehearing or rehearing en banc. Unless this court grants rehearing and makes it clear that, at the very least, the panel's holding in this case should *apply prospectively and not retroactively*, California's election system will be thrown into turmoil. Indeed, the decision in this case threatens to wreak havoc on the upcoming June and November 2006 elections in California because its reasoning *threatens to call into question the legality of every state initiative* (and many local initiatives) that qualifies to appear on the ballot. Other states and localities in the Ninth Circuit with an initiative process that are subject to section 203 of the Voting Rights Act also face disruption. The court should be cautious before interfering with the California electoral process yet again. *See Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc) (reversing earlier panel decision to delay the 2003 California gubernatorial recall election on grounds that the selective use of punch card voting violated the Equal Protection Clause of the Constitution and section 2 of the Voting Rights Act).

Section 203 of the Voting Rights Act requires that election-related materials “provide[d]” by the state (such as ballots and voter pamphlets) must be available in multiple languages in areas where many speakers of these other languages reside. On November 23, 2005, a divided three-judge panel of this court held that the language assistance provisions of the Voting Rights Act (section 203) apply to petitions for the *recall* of state or local officers.¹

The dissenting judge noted, among other things, that two other circuits had read the “provided by” language in section 203 *not* to apply to initiative petitions, which—like recall petitions—are written, printed, and circulated by private parties and not at government expense. *Id.* at 926 (Canby, J., dissenting) (citing *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988) and *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988)).

Soon after the court’s ruling, I wrote an oped in the *Los Angeles Times* about the case arguing that “[a] little noticed ruling from the U.S. 9th Circuit Court of Appeals last month threatens to throw a monkey wrench into California’s initiative process, and it has already been used by City Council members in Rosemead to block a recall election.” Richard L. Hasen, *Putting a Chill on the Initiative Process*, L.A. TIMES, Dec. 12, 2005, available at: <<http://www.latimes.com/news/printedition/opinion/la-oehasen12dec12,1,3889903.story>>.

Unfortunately, my prediction has come true. Indeed, applying the logic of *Padilla* (which itself involved only recall petitions), federal district judges have kept recall *and initiative* measures off the ballots in at least three California jurisdictions: Loma Linda (see Steven Wall, *Judge Rules Loma Linda Petitions Invalid*, REDLANDS DAILY FACTS, Mar. 28, 2006, <http://www.redlandsdailyfacts.com/news/ci_3647820>); Monterey (*In re Monterey Initiative Matter*² (district court opinion posted at

¹ The upshot of this ruling is that in a county like Los Angeles, a recall petition would have to be circulated in five languages in addition to English. The requirement makes it physically impossible to comply with state law requirements for the form of recall petitions. See Cal. Elec. Code § 11041 (providing requirements for what must appear on each section of recall petition); Comments of Todd Kunoika, Election Law Blog, March 29, 2006, at <<http://electionlawblog.org/archives/005290.html#more>> (“A two hundred word notice of intention and a two hundred word response, written in legible, eight-point, English, turns into the equivalent of eight-hundred ‘words’ in Vietnamese or Chinese, and can not be fit on a single sheet of legal-sized paper. And you certainly can’t fit the material and still have room for any signatures.”).

² Plaintiffs in the Monterey matter filed an emergency motion with this court seeking a stay of the district court’s order, which would have had the effect of placing the Monterey measure back on the ballot. This court denied the motion for a stay, *In re County of Monterey Initiative Matter*, No. 06-15531, Order, Apr. 5, 2006 (order posted at <<http://electionlawblog.org/archives/monterey-9th-order.pdf>>), and ordered briefing in the appeal suspended pending this court’s resolution of the request for an en banc hearing in the *Padilla* case.

<<http://electionlawblog.org/archives/monterey.pdf>>; and Rosemead (*See Judge Puts Freeze on Recall Election* PASADENA STAR-NEWS, Jan. 18, 2006).

More lawsuits are on the way. *See, e.g.,* Gretchen Wenner, *Sludge Initiative on Hold*, BAKERSFIELD CALIFORNIAN, Apr. 5, 2006, *available at*: <<http://www.bakersfield.com/102/story/44620.html>?>.

Most disturbing are allegations that some legislative bodies have decided to keep measures off the ballot not out of any concern with the voting rights of protected minority groups, but because they oppose the measures politically.

The concern on the local level, however, may soon spill over into California's June primary election and upcoming November general election. One statewide initiative will appear on the June statewide ballot (see <http://www.ss.ca.gov/elections/elections_j.htm#2006Primary>), and a number are in various stages of the qualifying process for the November election (see <http://ss.ca.gov/elections/elections_j.htm#circulating>). It seems just a matter of time before someone begins challenging one or more of these 50+ measures in circulation as violations of section 203 of the Voting Rights Act, because, consistent with California law, these petitions have been (or are being or are about to be) circulated only in English.

Meanwhile, those who circulate initiative and recall petitions, and the election officials who are supposed to advise them, are unsure how to act. *See* Mark Garcia, *Petitions May Need Spanish Translation*, ORANGE COUNTY REGISTER, Apr. 3, 2006, *available at*: <http://www.ocregister.com/ocregister/homepage/abox/article_1086187.php> (“SAN JUAN CAPISTRANO — City officials are trying to determine whether a petition challenging a San Juan Hills Golf Course housing proposal for older adults and an amendment to the general plan was done correctly. [¶] The city was alerted today by the Orange County Registrar of Voters Office because the petition was not translated into Spanish, Assistant City Manager Bill Huber said. He said he wasn't sure whether the petition needs to be written in a second language.”).

Regardless of how this court ultimately resolves the application of section 203 to recall and initiative petitions, the court should grant rehearing to insure that its ruling *applies prospectively only*. There are strong reliance interests at stake for those who have participated in the initiative and recall processes: think of the many signature gatherers and proponents who have invested and are investing substantial time and money to qualify these measures. But beyond that, even recall and initiative proponents who would wish to comply with section 203 as construed by the *Padilla* majority *cannot* do so under existing state law. (See footnote 1, *supra*.) If section 203 ultimately is going to apply to recall and initiative petitions, this court should give time for California authorities to rewrite their laws so as to accommodate multi-lingual petition requirements.

As this court's experience with the California 2003 gubernatorial recall illustrates, delaying an election is serious business when there are significant reliance interests at

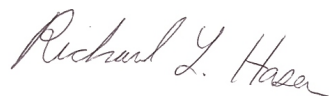
stake. *Shelley, supra*, 344 F.3d at 919 (“If the recall election scheduled for October 7, 2003, is enjoined, it is certain that the state of California and its citizens will suffer material hardship by virtue of the enormous resources already invested in reliance on the election’s proceeding on the announced date.”). This court should follow the path taken by a federal district court in Florida facing a similar claim under section 203. In *United States v. Metropolitan Dade County, Florida*, 815 F. Supp. 1475 (S.D. Fla. 1993), the court found that despite the county’s failure to provide a voter information pamphlet in multiple languages as required by 203, it should not enjoin or postpone the upcoming election. “Where an impending election is imminent and the election machinery is already in progress, a Court may take into account equitable considerations when prescribing appropriate relief.” *Id.* at 1478-79. As that court noted, even in *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court gave jurisdictions reasonable time to comply with the Court’s new constitutional principle of one person, one vote.

Finally, applying section 203 prospectively will *not* infringe on the voting rights of groups protected by section 203. As I noted in my *Los Angeles Times* oped, “The petitions serve merely to qualify initiative or recall questions for the ballot. Once those measures are on the ballot, then all voters in the jurisdiction get to vote and are entitled to relevant ballot materials in all languages required by the Voting Rights Act.”

For the foregoing reasons, this court should grant rehearing or rehearing en banc.

I wrote this letter on my own behalf because of the importance of the issues involved. I have asked counsel for one of the defendants to assist me with filing this letter brief.

Very Truly Yours,

A handwritten signature in cursive script that reads "Richard L. Hasen". The signature is written in dark ink and is positioned to the right of the typed name below it.

Richard L. Hasen