

NO. 03-56259
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANDRA PADILLA, et al.,

Plaintiffs-Appellants,

v.

ROSALYN LEVER, et al.,

Defendants-Appellees

On Appeal from the United States District Court
for the Central District of California
Case No. SACV-02-1145 AHS (Anx)

**DEFENDANT-APPELLEE VIVIAN MARTINEZ'S
PETITION FOR REHEARING**

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INTRODUCTION

Defendant-Appellee Vivian Martinez (“Defendant”) hereby seeks rehearing of the November 23, 2005, Panel Opinion in this matter. Although Defendant strenuously, but respectfully, disagrees with the Opinion’s decision holding that section 203 of the Voting Rights Act applies to recall petitions circulated pursuant to California law, the purpose of this Petition for Rehearing is not to reargue the merits of the instant appeal. Rather, Defendant seeks rehearing for the limited purpose of (1) requesting correction of certain misstatements in the Panel’s Opinion and (2) obtaining clarification of the applicability of the Opinion to recall and other petitions that have already circulated or have been certified for the ballot throughout California.

ARGUMENT

I. THE COURT SHOULD GRANT REHEARING TO CORRECT CERTAIN MISSTATEMENTS IN THE OPINION REGARDING THE ALLEGATIONS IN THE COMPLAINT BELOW AND THE CLAIM AT ISSUE IN THE *ZALDIVAR* CASE

First, Defendant Martinez requests that this Court grant rehearing in order to correct the following statement that appears in footnote 11 of the Panel Opinion:

“Here, the Recall Proponents disingenuously claimed their petition was an innocuous request by those who signed the petition for additional information concerning Nativo Lopez, the officeholder whose ultimate recall was the goal of the signature gatherers.” (Opinion, at 15507, n. 11.)

The Opinion leaves the impression that the above statement is an established

fact — that is, that the Recall Proponents (including Defendant Martinez) in this case misled potential recall petition signers by claiming that their petition was only a request for additional information concerning Nativio Lopez. As the Court is surely aware, however, this was merely a naked *allegation* in Appellants’ First Amended Complaint. Defendant Martinez and the other recall proponents vigorously disputed the truth of this allegation and, indeed, an investigation by the Orange County District Attorney’s Office found no evidence of election-law violations on their part. (*See* Exhibit E to the Declaration of Steven J. Reyes in Support of Plaintiffs’ Ex Parte Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction.) Because the First Amended Complaint was dismissed before any discovery or trial was held, there was never any determination made below regarding the truth of this allegation.

Elsewhere in the Opinion, the Panel majority acknowledges that this and other such charges by the plaintiffs are just the stuff of allegations. *See, e.g.,* Opinion, at 15492 (“In their suit, *plaintiffs allege According to plaintiffs, Specifically, plaintiffs charge* that petition signature collectors told them that the petition was merely a form to request additional information and was not, in fact, a petition to recall Lopez.”) (emphases added). By contrast, the quoted statement in footnote 11 includes no similar disclaimer that this is the plaintiffs’ *allegation* and instead makes it appear to be a statement of proven fact. Defendant Martinez and the other recall proponents

should not have to worry that they will be memorialized in this Court’s published opinion as disingenuous deceivers who engaged in criminal activity in the manner in which they circulated the Nativio Lopez recall petitions. *See* Cal. Elec. Code, § 18600(a) (making it a misdemeanor to intentionally misrepresent or to make any false statement concerning “the contents, purport or effect” of any state or local initiative, referendum or recall petition to a person who is requested to sign the petition). The Opinion should therefore be amended to delete this sentence or to clarify that the charges therein are merely the *allegations* of the plaintiffs in this action.

Second, the Court should grant rehearing in order to correct the Panel Opinion’s description of the claim at issue in *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986), *overruled on other grounds by Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). The Opinion repeatedly characterizes the issue in *Zaldivar* as “whether the Voting Rights Act applies to recall *petitions*.” (Opinion, at 15498 (emphasis added); *see also id.* at 15496 (“Plaintiffs argued . . . that the defendant violated the Voting Rights Act by not translating the [recall] petitions into the appropriate minority language.”).) The issue in *Zaldivar*, however, was not whether the recall *petitions* themselves had to be printed in a minority language under the Voting Rights Act, but whether the *notice of intention to circulate a recall petition* had to be published in both English and the applicable minority language(s). *See Zaldivar, supra*, 780 F.2d at 833 (“we have no difficulty in concluding that a competent attorney, after reasonable

inquiry, could argue in good faith that a notice of intention to recall an office holder provides information relating to the electoral process.”); *id.*, at 826-27 (upon enactment of city ordinance requiring “all recall materials” to be printed in English and a minority language, recall proponents withdrew all circulating petitions and recirculated new, bilingual petitions, but did not cause a new notice of intention to be published in Spanish).¹

This Court should therefore grant the petition for rehearing and correct the Opinion’s description of the relevant issue in *Zaldivar*, particularly since the Panel Majority placed such reliance on the decision in that case. Defendant-Appellee also respectfully suggests that while the Court majority is reviewing the *Zaldivar* opinion, it should also reconsider whether a proper interpretation of the issue in that case alters the Court’s view of its bearing on the instant appeal.²

¹Counsel for Defendant-Appellee Martinez is very familiar with the factual context and legal issues in *Zaldivar* because he represented the recall proponents in that case.

²Upon reconsidering this issue, for example, the Court may conclude that a *notice of intention* to recall more appropriately falls within the Voting Rights Act’s coverage of all “*notices*, forms, instructions, assistance, or other materials or information relating to the electoral process” (42 U.S.C. § 1973aa-1a(b)(3)(A) (emphasis added)) than does a recall *petition*. Alternatively, the realization that the *Zaldivar* case involved a claim by the opponents of the recall that the Voting Rights Act had been violated by the proponents’ publication of the obscure notice of intention only in English, while the recall petitions themselves had been printed and circulated bilingually, might persuade the Panel Majority to recognize that Court of Appeals’ holding in that case was indeed “only that plaintiffs’ argument is not plainly frivolous under the first prong of Rule 11.” *Zaldivar, supra*, 780 F.2d at 834.

II. THE COURT SHOULD GRANT REHEARING TO MAKE EXPLICIT THAT ITS NEWLY ANNOUNCED INTERPRETATION OF THE VOTING RIGHTS ACT DOES NOT APPLY TO INVALIDATE ALL RECALL AND OTHER PETITIONS THROUGHOUT CALIFORNIA THAT HAVE ALREADY CIRCULATED OR BEEN CERTIFIED AS QUALIFYING FOR THE BALLOT

If the Panel Majority does not see fit to reconsider its holding regarding the applicability of the Voting Rights Act to recall petitions circulated under California law, the Court should at least grant rehearing in order to clarify that the Opinion does not apply to and invalidate recall and other petitions that were already circulated and certified as qualifying for the ballot prior to the issuance of the Court's decision. The failure of the Court to limit its ruling in this manner will result in great injustice and will only serve to frustrate, rather than promote, the worthwhile objectives of the Voting Rights Act and this Court's interpretation of it.

Already, some elected officials in California have attempted to seize on this Court's opinion to cancel previously scheduled elections and to reject previously circulated petitions in order to deny citizens their constitutional rights to petition their government and to recall their elected representatives. By definition, recalls, initiatives, and referenda all involve adversarial relationships between public officials and the citizens who elected them — or at least the substantial proportion of the citizenry who have qualified the measure for the ballot; in each instance, a significant portion of the electorate has seen fit to take action *in opposition* to the action (or inaction) of the

elected officeholders. Perhaps not surprisingly, then, the elected officials frequently respond by doing everything in their power (and often *beyond* their power) to thwart the citizens in the exercise of their fundamental petitioning rights. That is why the California Supreme Court has repeatedly admonished that it is the judiciary's "duty to jealously guard" the people's exercise of the recall, initiative, and referendum reserved powers. *See, e.g., Associated Home Builders, Inc. v. City of Livermore*, 18 Cal.3d 582, 591 (1976).

Just this past week, for example, the City Council in the City of Rosemead voted to cancel the previously scheduled recall election of two of their members based upon the Court's opinion in this case. (Worse yet, the Council took that action by a bare 3-2 majority, with the two members who are the subject of the recall providing the critical votes for cancellation of their own recall election!) The recall petitions had been circulated months ago, and the proponents had gathered more than twice the number of signatures necessary to force the election. And there were no complaints that anybody had been misled into signing the petitions because they didn't understand what they were being asked to sign. Yet the council majority seized upon the Panel Opinion to cancel the election, claiming that under the Court's decision, the recall petitions were illegal because they were not also printed in Chinese, Spanish, and Vietnamese. *See generally* Hasen, "Putting a Chill on the Initiative Process," *Los Angeles Times* (Dec.

12, 2005).³

In order to prevent officials in Rosemead and other cities from abusing the Panel Opinion in this manner, the Court should grant rehearing and clarify that the new rule announced in the Opinion does not apply to recall and other petitions that had already qualified for the ballot or were already in circulation prior to the Court's issuance of its Opinion on November 23, 2005. Where, as here, a new rule is *not* applied in the very case in which it is announced, courts may — and should — properly refuse to apply it retroactively. *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (Court will apply decisions retroactively “[w]hen this Court applies a rule of federal law to the parties before it”); *George v. Camacho*, 119 F.3d 1393, 1399 n.9 (9th Cir. 1997) (a new rule must be applied to pending cases only “if the new rule is applied in the case in which it was announced”). In such circumstances, courts will refuse to apply their decisions retroactively where: (1) the decision establishes a new principle of law; (2) the retroactive application of the decision will retard, not further, the purposes of

³The Rosemead officials are not likely to be the last ones to make this argument. As the cited article notes, although the instant appeal involved recall petitions, the Court's rationale and interpretation of the Voting Rights Act would appear to apply equally to initiative and referendum petitions, which also must receive the government's approval prior to being certified for the ballot. Many citizen-sponsored petitions have already qualified for the ballot in local jurisdictions throughout California and many more have completed or are in the final stages of circulation. For the proponents of these measures to have to start the qualification process anew would impose a tremendous and unfair burden on them and on the voters who signed these petitions.

the rule in question; and/or (3) the retroactive application of the decision will produce substantially inequitable results. *George v. Camacho, supra*, 119 F.3d at 1401; *Austin v. City of Brisbee, Arizona*, 855 F.2d 1429, 1432-43 (9th Cir. 1988).

Here, all three factors mandate that the Court's holding in this case not be applied retroactively. First, the decision here not only established a new rule, it actually *reversed* a prior one. Not only had the Courts of Appeals in two other circuits rejected claims that citizen-sponsored petitions must comply with the minority language requirements of the Voting Rights Act (*see Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988); *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988)), but the District Court in this very case specifically ruled *almost three years ago* that recall petitions in California do not have to be printed in multiple languages — a ruling that was at least temporarily affirmed by this Court in denying Appellants' Emergency Motion for Injunction Pending Appeal. The Panel Opinion has now reversed the District Court's ruling, but surely those citizens in California who relied in good faith upon these previous rulings to circulate their petitions only in English should not now have the thousands of signatures they gathered invalidated and the elections they petitioned for canceled because they did not have the foresight to predict the Panel Majority's decision. *See, e.g., Austin v. City of Brisbee, Arizona, supra*, 855 F.2d at 1433 (refusing to apply new decision retroactively where it "overruled clear past precedent").

The second factor also compels non-retroactive application of the Panel's recent

decision. The purpose of the rule in question — to promote “full participation in the electoral process” (Opinion, at 15512) — would be retarded, not furthered, by invalidating recall and other petitions that have already qualified for the ballot or are currently in circulation. *Every person who signed those petitions did so precisely because they wanted to participate in the electoral process by exercising their constitutionally protected right of initiative, referendum, or recall.* Even if it were the case that *more citizens* (i.e., minority language speakers) would be able to fully participate in the electoral process if recall and other petitions were printed in multiple languages, that is no reason to nullify the petitions that have already qualified or are in circulation. Retroactive application of the new rule and interpretation of the Voting Rights Act announced in the Panel Opinion to these petitions would serve only to deny those who have already signed the petitions their fundamental constitutional rights and frustrate their efforts to participate in the electoral process.⁴

⁴This would be true even if, as was alleged in the Complaint in this case, some petition signers complain that they were able to be misled into signing the petitions because they were not printed in their foreign language. The Court must surely be able to take notice that the number of such complainants — if they exist at all — is infinitesimal in relation to the number of voters who can read and understand the petition in English and were fully aware of what they are signing. As noted above, the California Elections Code provides harsh sanctions for those petition proponents and circulators who use deceptive and misleading tactics to obtain the signatures of unwitting voters — whether those voters speak English or some other language. There is simply no need to penalize the thousands of voters who have knowingly and legitimately signed recall and other petitions by invalidating those measures on the off-chance that some minority language speaker may have been misled into signing the

Finally, applying the Panel Opinion’s new rule retroactively would produce substantially inequitable results. As noted above, many parties, such as those who sponsored the recall petitions in Rosemead, reasonably relied upon the California Elections Code, the guidance and explicit approval of local elections officials, and the controlling precedent of the District Court in drafting and circulating their petitions in English only. To suddenly change the “rules of the game” now, after they have completed the process and done exactly what had been required of them to qualify their measures for the ballot, would “penaliz[e] [those] parties who ordered their affairs in reasonable reliance on a rule of law that was later invalidated.” *Austin*, 855 F.2d at 1432 (“Such inequity is undesirable, not only because of the harm to the party involved, but also because it discourages adherence to contemporary laws.”) The Court should act to prevent such an injustice — and to prevent the flood of litigation that will otherwise ensue in the lower courts as they are called upon to determine the applicability of the Court’s ruling to scores of statewide and local petitions throughout California — by granting rehearing and clarifying in the Panel’s Opinion that the decision does not apply to recall and other petitions that had already qualified for the ballot or were already in circulation prior to issuance of the Court’s Opinion.

petition by the failure to fully comprehend English.

Dated: December 13, 2005

Respectfully submitted,

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