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March 31, 2006

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

***Re: Melendez et al v. County of Monterey,* No. 06-15531 (In re: County of Monterey Initiative Matter)**

Dear Ms. Catterson:

I hereby request this court's permission to submit this letter as an amicus curiae supporting plaintiffs-appellants' emergency motion for an injunction pending appeal 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 the fact that the lower court's decision in this case threatens to wreak havoc on the upcoming June and November 2006 elections in California because its reasoning *calls into question the legality of every state and local initiative that qualifies to appear on the ballot*. Other states and localities in the Ninth Circuit with an initiative process (including Montana and Washington State) also face disruption until this court decides the merits of this appeal or at least grants a stay.

This court should stay the district court's order, and make it clear that until this court ultimately decides the merits of this appeal, initiatives working their way through the electoral process in jurisdictions in this circuit may not be removed from the ballot because of any alleged failure of the petition circulators to comply with section 203 of

the Voting Rights Act. Otherwise, the Ninth Circuit could cause disruption to yet another election in California. *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).

Plaintiffs-Appellants' Emergency Motion for an Injunction Pending Appeal (filed March 28, 2006) ("Motion") sets forth the relevant facts and legal arguments that I do not repeat here. Instead, I briefly set forth the context of the district court's opinion, and why the extraordinary relief sought by the plaintiffs-appellants should be granted in this case.

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 three-judge panel of this court issued its opinion in *Padilla v. Lever*, 429 F.3d 910 (9th Cir. 2005), *petition for rehearing and suggestion for rehearing en banc pending*. The *Padilla* Court, in an opinion by Judge Pregerson, 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] Judge Canby dissented, noting, 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-oe-hasen12dec12,1,3889903.story>. 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

[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 (Motion at 7, n.1.) The requirement makes it physically impossible to comply with state law requirements for the form of recall petitions. See 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.").

Wall, *Judge Rules Loma Linda Petitions Invalid*, REDLANDS DAILY FACTS, March 28, 2006, *available at*: <http://www.redlandsdailyfacts.com/news/ci_3647820>); Monterey (the subject of the case at bar, and, since the district court's decision in the case at bar, another initiative being taken off the ballot: Larry Parsons, *Board Braces for Measure C Fight*, MONTEREY COUNTY HERALD, Mar. 29, 2006, *available at*: <http://www.montereyherald.com/mld/montereyherald/14215207.htm>); and Rosemead (*See Judge Puts Freeze on Recall Election*¸ PASADENA STAR-NEWS, Jan. 18, 2006). 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 because they oppose the measures politically.

The concern on the local level, however, may soon to 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. It seems just a matter of time before someone begins challenging one or more of these 50+measures in circulation (see Motion at 6) 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.

Regardless of how this court ultimately resolves the application of section 203 to initiative petitions, the equities merit a stay of the district court's order. 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 initiative proponents who would wish to comply with section 203 *cannot* do so under existing state law. (See footnote 1, *supra*.) If section 203 ultimately is going to apply to 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 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; *see also* Motion at 12-13.

Finally, granting the stay pending appeal 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 plaintiffs-appellants' motion for a stay of the district court's order.

I wrote this letter on my own behalf because of the importance of the issues involved. I have asked counsel for the appellants to assist me with filing this letter brief because I cannot make alternative arrangements given the press of time.

Very Truly Yours,

Richard L. Hasen

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