S198387

IN THE SUPREME COURT OF CALIFORNIA

JULIE VANDERMOST

Petitioner,

vs.

DEBRA BOWEN, SECRETARY OF STATE OF CALIFORNIA

Respondent.

PETITIONER'S REPLY TO PRELIMINARY OPPOSITIONS AND OPPOSITION TO CITIZENS REDISTRICTING COMMISSION'S MOTION TO INTERVENE

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I. WHAT THE PETITION SEEKS

The Petitioner's timely-filed petition asks the Court to take two preliminary steps to prepare to draw interim Senate district lines to give full effect to the People's referendum power in redistricting which Proposition 20 vivified. Of these preliminary steps, the first would give the Court the benefit of expert advice concerning its options at the earliest possible date if the Citizens' Commission's lines are stayed by qualification of the referendum. The second is to waive or postpone a technical "election deadline" which the Petitioner has demonstrated to be insignificant to the conduct of the Senate elections, and the Secretary of State concedes can and has been modified or waived in the past.

II. "LIKELY TO QUALIFY" AND QUALIFICATION STAY

The Petitioner noted in her Petition that her referendum petition is not likely to qualify without a full count of signatures. The Petitioner submitted enough signatures (well above the total valid number necessary to qualify her referendum), and comparable recent referendum and initiative qualification data regarding signature verifications, for the Court to infer that the referendum is "likely to qualify." The "likely to qualify" standard has not been judicially interpreted; however, it is more like a *prima facie* standard. Thus, the Petitioner clearly has standing now to seek "relief" under Article XXI, sections 3(b)(2), 3(b)(3) and 2(j), and brings this action on a timely basis. Both Respondent Secretary of State and Proposed Intervenor Citizens Redistricting Commission disregard the Article XXI, section 3(b)(3) language and attempt to substitute a "virtual certainty" standard. This is simply not what Proposition 20 says about standing to sue and ripeness.

The Petitioner has not argued that the Senate lines are stayed upon "likely qualification." However, the qualification picture is likely to

become quite clear for the Court upon completion of the random sample verification. While the deadline for county election officials to complete this task is January 10, 2012, nearly half of the counties have completed a random sample or a full count already, more than 30 calendar days before the deadline. The Secretary of State's Certification and Random Sample Worksheet for Proposition 27, SOS #1451 shows that a recent redistricting initiative had its random sample verification completed on June 24, 2010, 23 days before its random sample deadline of July 16, 2010. (Petitioner's RJN, Exh. D, p. 80.) Were the Secretary of State to direct the remaining counties that have not as of December 7 completed their random sample verifications to complete such random samples with similar speed for this referendum petition, the Court would know with much greater certainty as early as December 19 – just 12 days from today – whether the referendum had attained sufficient signatures so that qualification is highly likely.

Both the Secretary of State and the Commission misread Article XXI, section 3(b)(3) to say the Court is authorized to appoint a Special Master only upon a finding of unconstitutionality of the Senate maps. This argument ignores the second sentence of section 3(b)(2), which authorizes a voter to "seek relief" in the case of likely qualification of a referendum against a Commission map or maps. Such relief can include anything the Court deems appropriate, including the appointment of a Special Master. Nothing in Article XXI suggests the Court is precluded from doing so. As noted in her petition the Petitioner does not ask the Court to appoint three Special Masters as it did in 1991 to conduct hearings and enact maps for Congress and the full Legislature for the decade. The task is much simpler here, just to provide for 20 Senate districts for one election.

III. THE SECRETARY OF STATE'S ARGUMENTS REGARDING TIMING ISSUES

The fundamental timing question which the Secretary's opposition poses is whether regular administrative procedures for processing of ballot measure petitions should trump the People's effective right to vote on the Commission's Senate districts in November 2012, by ignoring the critically important stay provision of Article II, sections 9 and 10, adopted by reference in Article XXI. The Petitioner disagrees, and has provided the Court two interim remedies to prepare to sustain the People's referendum power, and has suggested here a third remedy that could be accommodated by Court order or Secretary of State administrative direction, to speed the random sample and if necessary the full count verification process. The Petitioner has also provided the Court (and its expert or Special Master) two possible remedies that would be permissible for the Court to impose as interim lines for 2012.

The Secretary of State uses the 1991 Special Masters proceeding as the template for the Court to consider on the issue of timing. But in this case, a Special Master or Masters would have several advantages: (1) the public record of the hearings of the CRC so that the Masters would not need to conduct hearings themselves; (2) limited scope of the project, which is concerned with 20 Senate districts, not 40 Senate districts, 80 Assembly districts, 53 Congressional districts, and 4 Board of Equalization districts; (3) the new technology for fashioning lines, which permits the accomplishment of the task very rapidly, as noted in the Quinn Declaration submitted with the initial petition, as quickly as within one week of beginning the actual line drawing.

As discussed fully in the Petitioner's Petition and Memorandum of Points and Authorities (Pet., ¶ 18; Pet. MPAs., pp. 18-20), Proposition 20 laid out a roadmap for avoiding the absurd outcome obtained in *Assembly v.*

Deukmejian, 30 Cal. 3d 638 (1982), of ignoring the legal effect of a qualified referendum and installing the very maps that have been stayed. This effort to avoid the *Assembly v. Deukmejian* outcome should not be dismissed by the Court when other non-disruptive remedies are available.

The Petitioner is only making suggestions here for consideration by a Court-appointed expert. A Special M aster or Masters could immediately review the options of drawing new districts, using the existing districts, or nesting the Assembly districts, possibly with some fine tuning to improve compliance with the criteria if contiguity or other issues arise.

The Secretary of State asserts that if the referendum qualifies, she will "immediately file a petition with this Court seeking guidance on how to proceed." The Secretary of State's offer of a prospective petition is totally ineffectual -- more like an invitation to gaze at the barn door after the cows have left. The point of the Petitioner's petition is for the Court to seek expert advice now on how to proceed in that eventuality, so that disruptions in the election preparation can be minimized while preserving the constitutional right of referendum which at least 711,000 Californians have sought to exercise.

IV. INTERIM DISTRICT LINES OPTIONS

The Petitioner concedes that three of the existing 2001 Senate districts have maximum population deviations greater than the current constitutional standards. It appears the Commission agrees as it urges upon this Court the standard of *Assembly v Deukmejian* (1982) 30 Cal.3d 638, in which districts deviating by less than 16.4 percent were adjudged to be permissible in a temporary plan. (See Supplemental Declaration of T. Anthony Quinn, PhD. ("Quinn Supp. Dec."), ¶¶ 16-18.) Elections have been held throughout the past decade in these districts with unequal populations. However, Courts have greater latitude to impose such lines on

a temporary basis to harmonize and give effect to other constitutional imperatives, including honoring the People's right of referendum guaranteed by Proposition 20. Using the odd-numbered 2001 Senate districts does not affect Voting Rights Act concerns. (Quinn Supp. Dec., ¶ 9.) Moreover, adopting a nesting plan does not affect Voting Rights Act concerns for the odd-numbered districts that will have elections in 2012. (Quinn Supp. Dec., ¶¶ 1-8.)

Justification for using the odd-numbered existing 2001 Senate maps is: (1) it is only temporary: if the referendum succeeds, new maps must be drawn; if it fails, the Commission's maps will be used; (2) it is the only way for the state to effectively preserve the right of referendum enacted by Proposition 20; (3) in most cases, the harm to voters is negligible, because in all cases they are voting in the same districts in which they voted in 2008, with similar deviations, and many are voters who would be in Commission districts where their vote due to district numbering would be deferred to 2014, so the worst case is having the right to vote in an extra election.

Similarly, using nested districts is a modest detour to preserve a state constitutional right of referendum. Only 20 districts will be affected, most of which are substantially nested in the Commission's plan in any event.

V. THE REFERENDUM POWER AND PROPOSITION 20 AND THE COMMISSION'S ARGUMENTS *NEC AMICUS POPULUM*

The Commission's arguments would result in the evisceration of the right of referendum which the People deliberately provided for in Proposition 20. (This portion of Proposition 20 is ignored by the Commission's description of that measure, just as it ignores the Petitioner's assertion that this case is not a challenge to the legal validity of the

Commission's Senate maps.) The Commission is surely "no friend of the People."

The Commission distorts the meaning of the words "likely to qualify" into "must actually qualify" by focusing exclusively on Article XXI, section 2(j) and ignoring section 3(b)(3). But in using the words "likely to qualify" in section 3(b) (3), the authors of Proposition 20 sought to activate the court before actual qualification in order to avoid the outcome in *Assembly v. Deukmejian*. (Pet., ¶ 18; Pet's MPAs, p. 27.) In that case the court used the delay inherent in the actual qualification calendar as an excuse to use in the 1982 election the same lines that would be suspended by qualification of the referendum, thus inflicting the manifest injustice of using lines that the people may invalidate (and in 1982, did invalidate).

The Commission (Proposed Opp., p. 17) sets out "the three limited circumstances" in which the Court may adjust lines. But Article XXI, section 3(b) (2) grants a fourth path for a petitioner to seek "relief": when a referendum is "likely to qualify and stay the timely implementation of the map." Clearly if the referendum actually qualifies, "relief" is available under this clause, and there is nothing to suggest that this relief cannot include adjustment of the lines that have by then been stayed.

The Commission asserts that the Court could not even adjust the lines if the referendum succeeds, because it has already found the Commission lines constitutional. What a blatant disregard for the right of referendum. There are many ways for the constitutional criteria to be met, and the success of a referendum would surely require the Court to consider, through Special Masters, adjustment of the maps to produce a less objectionable product.

VI. OPPOSITION TO COMMISSION'S MOTION FOR LEAVE TO INTEREVENE

The Commission improperly seeks to intervene in, and thwart, the People's political and policy challenge to its Senate maps, with a series of arguments why the people cannot effectively refer those maps. The Commission only has authority to defend challenges to the Commission's certified maps. That challenge ended with the Court's dismissal, without opinion or comment, of the Petitioner's earlier challenge to the legality of the Senate maps. This petition is not such a challenge to the Commission's Senate maps, as the People's referendum expresses a political or policy objection to those lines, not a legal challenge. The Commission's terse claims about the Petitioner's action (Mtn. to Intervene, fn. 2) appear to be (1) "defenses" of the Commission's purported authority under the Constitution, (2) the meaning of the Propositions 11 and 20 amendments with respect to referendum stays in light of this Court's 1982 decision in *Assembly v. Deukmejian, supra*, (3) assertions about this Court's lack of authority to provide interim relief by redrawing maps not found to be unconstitutional or unlawful, and (4) objections to "imposing" the Petitioner's suggested plans. None relates to defenses of the Commission's certified maps themselves.

To the extent the Petition addresses options for the Court to consider in the event a referendum qualifies and stays the Commission's certified maps, the Petitioner has no objection to the Court inviting the Commission to offer its perspective as an *amicus curiae* on possible options. However, this does not in the Petitioner's view make the Commission an indispensable party in this action.

The Commission already offered its advice (and attempted to affect the language of the Attorney General's Title and Summary of the Petitioner's referendum.) (See Pet. RJN, Exhibits "C" and "D.") Will the

Commission's lawyers seek to intervene directly in the referendum election campaign (e.g., challenging ballot arguments) under this asserted "broad authority" of Article XXI, section 3(a)?

Unlike the situation in *Cook v. Superior Court* (2008) 161 Cal.App.4th 569, in which the Secretary of State was specifically required to be named as a "respondent" or "real party in interest" (Elec. Code, § 13314(b)(4) ["The Secretary of State shall be named as a respondent or a real party in interest in any proceeding under this section concerning a measure or a candidate described in Section 15375, except for a candidate for judge of the superior court".]), Article XXI, section 3(a) does not so provide for the Commission. The Secretary of State, not the Commission, has the responsibility to implement districting maps and the "relief" sought is mandate or prohibition against the Secretary of State's performance of duties. Moreover, *Cook*'s dismissal of the case in that instance was for improper venue, not failure to name a party deemed to be indispensable for the statutory reasons identified above.

It is not only unseemly but *ultra vires* for the Commission, a creature of the People, to intervene to thwart the People's exercise of their reserved constitutional power to challenge those Senate maps in the political arena. Whether the Commission may be *amicus curiae*, it is not a necessary or indispensable party.

VII. CONCLUSION

The Court should appoint an expert or Special Master now to help it evaluate its options upon the qualification of the Petitioner's referendum, and should be prepared to waive or postpone the "petition in lieu" signature gathering process for candidates for the 20 odd-numbered Senate districts up for election in 2012. The Court should consider supplemental orders in furtherance of its jurisdiction, such as requesting or ordering the Secretary

of State to require county election officials to expedite the random sample verification process (and ultimately the full count process) for the Petitioner's redistricting petition signatures.

The Court should retain jurisdiction of the Petitioner's Petition and consider other and further relief if and when the referendum qualifies and stays operation of the Citizens' Commission's Senate district maps.

Dated: December 7, 2011 Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. R. CT. 8.204(c) AND 8.486(a)(6)

Pursuant to rule 8.204(c) and 8.486(a)(6), I certify that the foregoing brief is one-and-a-half spaced and is printed in 13-point Times New Roman Font. In reliance upon the word count feature of Microsoft Word, I certify that the attached **PETITIONER'S REPLY TO PRELIMINARY OPPOSITIONS AND OPPOSITION TO CITIZENS REDISTRICTING COMMISSION'S MOTION TO INTERVENE** contains 2,442 words, exclusive of those materials not required to be counted under Rules 8.204(c) and 8.468(a)(6).

Dated: December 7, 2011 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Shannon Diaz, Declare:

I am a resident of the State of California and over the age of eighteen years and not a party to the within-entitled action; my business address is 455 Capitol Mall, Suite 600, Sacramento, California 95814. On December 7, 2011, I served the following document(s) described as:

- **PETITIONER'S REPLY TO PRELIMINARY OPPOSITIONS AND OPPOSITION TO CITIZENS REDISTRICTING COMMISSION'S MOTION TO INTERVENE**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 7, 2011 at Sacramento, California.

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