S 198387

IN THE SUPREME COURT OF CALIFORNIA

JULIE VANDERMOST
Petitioner,

vs.

DEBRA BOWEN, SECRETARY OF STATE
OF CALIFORNIA
Respondent.

CONSOLIDATED REPLY TO COMMON CAUSE'S AND SENATOR DARRELL STEINBERG'S AMICI CURIAE OPPOSITIONS TO PETITION

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I. *AMICI CURIAE* SHARE THE SECRETARY OF STATE'S AND THE COMMISSION'S DISREGARD OF THE REFERENDUM POWER

Common Cause (Ltr. Br. 8) and Senate Democratic Leader Darrell Steinberg (Steinberg Br. 12-18) join the Secretary of State and the Commission in giving short shrift to the people's referendum power. They ask the Court to disregard the people's right to referendum.

The right of referendum in this context is the right to correct a political injustice. 710,000 signers of the Petitioner's referendum sought to "veto" the Commission's Senate Maps until the whole voting population of the State could approve or override the Maps in the November 2012 election. To impose this political injustice as an interim solution simply would vitiate the referendum power and render the language of Article XXI, §§ 2(i), 2(j) and 3(b)(2) surplusage, an historical footnote. The Court would fail to "jealously protect" the people's reserved power. The Court simply must decline the Secretary of State's, the Commission's and Amicis' invitation to do that.

A. The Referendum Power Operates Like a Gubernatorial Veto, Subject to Popular Sustaining or Overriding at the Referendum Election

One of the central tenets of the referendum power is that it used to approve or reject a statute *before* that statute becomes effective. Indeed, even the initial enactment of the referendum power in 1911 was clear that a referendum petition operates ***before*** a law becomes effective: "Upon the presentation to the secretary of state within 90 days after the final adjournment of the legislature of a [referendum] petition certified as herein provided...no such act or section or part of such act shall go into effect until and unless approved by a majority of the qualified electors voting

thereon; but if a referendum petition is filed against any section or part of any act the remainder of such act shall not be delayed from going into effect." (SCA 22, Stats. 1911, Ch. 22, § 1.)

The "stay" power of the people's reserved power – deemed precious by this Court in *Amador Valley Joint Unified Sch. Dist. v. Board of Educ.* (1978) 22 Cal.3d. 208, and other cases – is not like the temporary stay a court might impose.

Rather, it is, as the 1911 ballot materials (SCA 22, Stats. 1911, Ch. 22, § 1) describe it, "the people's ability to veto or negative such measures as the legislature may viciously or negligently enact." The 1911 ballot materials[1] repeatedly confirm this original intent to provide the people with a "veto" power over enactments that had not yet taken effect:

- The referendum will be used to "prevent objectionable measures taking effect." (SCA 22, Stats. 1911, Ch. 22 (Arguments in Favor of Proposition 7).)
- The referendum will give "the people the power to arrest, and prevent the taking effect, of vicious or objectionable acts of the legislature." (*Id.*)
- The referendum will safeguard the people's ability to "veto or negative such measures as [the legislature] may viciously or negligently enact." (*Id.*)

Subsequent rewrites of the referendum provision that followed did not change this intent. (*Assembly v. Deukmejian, supra,* 30 Cal.3d at pp. 655-56.)

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[1] *See Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519.

Case law also supports this conclusion. For example, in *Rossi v. Brown* (1995) 9 Cal.4th 688, 697 [38 Cal. Rptr. 2d 363, 889 P.2d 557] the Supreme Court made clear that "[w]hen a referendum petition qualifies, the newly enacted measure ***does not become effective*** and may not be implemented until it is approved by the voters." (emphasis added).) Similarly, in *Assembly v. Deukmejian*, *supra*, the Supreme Court stated:

> "The referendum is the power of the electors to approve or reject statutes. ..." (Cal. Const., art. II, § 9, subd. (a).) As the Secretary of State has pointed out, "In a Referendum, Voters are asked to Approve the Bill which the Legislature has enacted ('Yes' Vote) or to Disapprove ('No' Vote). ... The question which is put to the voters is 'Shall (the bill) Become Law? (Yes or No).'" (Memo. from Sect. of State's office to county clerks and registrars of voters (Sept. 24, 1981).) Approval of the referendum is approval of the bill....
>
> Therefore, under the mandate of article II of the state Constitution, the filing of a valid referendum challenging a statute normally stays the implementation of that statute until after the vote of the electorate. ***The statute takes effect only if approved by the voters***.

(30 Cal.3d at pp. 656-57 (emphasis added).)

The present situation presents a more compelling reason for the Court to exercise its jurisdiction and sustain the referendum power in this situation than the situations in 1973 and 1991, when the governors vetoed legislative-drawn maps and the Legislatures failed to override those vetoes, because with the Redistricting Commission, there is no veto override as with the Legislature's power to override a gubernatorial veto. The referendum power exercised by the people is the only such power, and as the Petitioner has argued, if it is not sustained, the people's power of referendum will be inoperative for redistricting.

B. Opposing Parties' Reliance on *Assembly v. Deukmejian* Ignores the Real Impact of the Decision

Steinberg (Steinberg Br. 14-17) urges the Court to follow the course of 1982 with respect to the referendum power, which former Justice Richardson, in commenting on the initiative power in *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, traced in his dissent:

> "A brief review of the current reapportionment struggle reveals why from a policy standpoint it is so *essential* that the people retain, in its pure form, their constitutional initiative power over reapportionment, even if both a legislative and an initiative plan have been adopted in the same census period.
>
> In 1981, following the 1980 census, the Legislature purported to reapportion the legislative and congressional districts, pursuant to a constitutional grant of such power. (Cal. Const., art. XXI.) After charges that this plan (Plan I) was greatly and unfairly gerrymandered, referendum petitions challenging Plan I were promptly circulated and the referendum qualified for the June 1982 Primary Election ballot. At this point, responding to litigation challenging the referendum, and despite clear and applicable precedent calling for a stay of the 1981 reapportionment legislation as to legislative districts (*Legislature v. Reinecke* (1972) 6 Cal.3d 595), a bare majority of this court, while permitting the referendum to proceed, ordered that the new, challenged and subsequently invalidated voting boundaries applied to the 1982 legislative and congressional elections. (*Assembly v. Deukmejian,* supra, 30 Cal.3d 638.) Our action thereby assured that, though the legislative plans might change, the authors would not."
>
> "At the June 1982 referendum election, the people of California overwhelmingly rejected Plan I. However, because of our ruling, the present Legislature was elected pursuant to the invalid 1981 district boundaries. Those same legislators drafted a new plan (Plan II) and, in January of this year, effectuated it. The challenged initiative before us is intended to replace Plan II."

"The Legislature, in adopting Plan II, denominated it an "urgency" measure as to legislative districts. By this device the Legislature effectively prevented the people from once again exercising in 1983 their referendum right to invalidate Plan II. (See Cal. Const., art. II, § 9, subd. (a).)"

"The full import of today's opinion thus becomes manifest. The Legislature precluded the people from another *referendum* similar to that which last year threw out Plan I. Now the majority of this court not only wrenches from the people their only remaining legal tool, the *initiative* power, but slams the door to the polling place in the face of the people's attempt to exercise their additional power, also constitutionally protected, to "alter or reform" their government when the public good requires it. (*Id.*, art. II, § 1.) Together, marching in lockstep, the Legislature as to the referendum and now this court as to the initiative, have effectively and completely prevented the people from *any* exercise of their popular will. The unfortunate consequence of today's ruling is that on this matter of great public moment, the people are thereby blocked from expressing through their ballots their own wishes as to the boundaries of the districts from which their legislative representatives are elected. This decision no longer can be made by the people. The Legislature and this court have made it for them. This dubious result is reached notwithstanding the following: constitutional mandates that the people have reserved to themselves *all political power,* our repeated assurances that the people's initiative is a "most precious" right, and the absence of any constitutional prohibition whatever against reapportionment by initiative. As a consequence, the ultimate sovereign, the people, find themselves imprisoned within the walls erected by their own servants, the Legislature and this court."

(34 Cal.3d. at pp. 683- 685.)

Steinberg suggests that "balancing the relative benefits and harms of using either the old or new lines – should control," and in balancing them offers both the allure of "minimal disruption of the electoral process and the political processes" and a critique of the options proposed by the Petitioner.

(*Id.*) [2] We address the options at Part II below. However, as noted above, the people's exercise of the referendum power was intended in some respects to disrupt the political process of the state, to avoid the imposition of laws (and in this case, Senate District maps) they prefer to vote on before the Maps become effective. The Petitioner has offered a minimal disruption plan for adjusting the candidate filing timetable. While potential disruption to plans of candidates is possible, that consideration clearly is subordinate to the effectuation of the popular will expressed by the likely qualification of the Petitioner's referendum.

Steinberg's argument (Steinberg Br. 18-19) drawn from *Assembly v. Deukmejian* (1982) 30 Cal. 3d at p. 667, that to allow the referendum power to operate to stay the use of the Commission's lines will cause people to resort to the courts to resolve redistricting disputes is ironic and incorrect, as is his argument that "5% of the voters could always stop plans from going into effect for 4 years." In fact, if the Court were to draw "interim" lines and the voters approve the Commission's Senate Maps in November 2012, those lines would go into effect for special elections in the interval and for all districts as early as June 2014.

Amicus Common Cause (Common Cause Ltr. Br. 4-5) badly misstates history when it states:

> "Petitioner also recites the history of this Court's actions around the redistricting processes of the 1970s, 1980s, 1990s as evidence that the Court should stay the Commission-drawn Senate maps and implement interim alternative maps, in order to avoid the political thicket. (Pet. at 20-22.) Contrary to

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[2] The Petitioner agrees with Steinberg (Steinberg Br. 12-13) that the Court's decision with respect to interim relief – drawing lines – is akin to equitable relief and that preliminary injunction standards may provide the Court guidance. Article XXI, § 3(b)(3) and 2(j) should guide the Court in this respect: "Relief" is appropriate when the likelihood of succeeding on the merits (the referendum is "likely to qualify and stay the effectiveness of" the Senate Maps) and the relative balance of harms tips in favor of preserving the referendum stay power while drawing interim maps that both comply with the Constitution.

> Petitioner's analogy, the circumstances surrounding this Commission-led redistricting are dramatically different from the partisan-driven, incumbent-protective redistricting processes of the past. In previous decades, the line drawing has been carried out by the Legislature to benefit the party in power (1970s, 80s and 90s) or to protect incumbents of both parties (2000s)."

As Petitioner fully explained, the redistricting of the 1970s and 1990s was conducted by Supreme Court Masters, not by incumbent politicians. The "line drawing carried out by the legislature to benefit the party in power" in the 1980s was imposed for the 1982 election by this Court in *Assembly v Deukmejian*. This is the very result Petitioner is urging the Court to avoid in 2012.

Common Cause echoes the Commission's and Steinberg's recitation of the non-partisan composition and conduct of the Commission in adopting the Senate Maps, as a justification for imposing those Senate Maps on deference grounds. (Common Cause Ltr. Br. 3-4.) The Petitioner addressed the reasons such deference is inapplicable where the political process of referendum is at issue. (Pet. Reply 19-20.) Yesterday's Pro-Publica report "How the Democrats Fooled California's Redistricting Commission," <http://www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission>, last visited December 22, 2011, calls into question whether the process that Common Cause and the Commission defend was free of political taint or influence.

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II. THE PETITIONER PROFFERED A "SIMPLE NESTING PLAN," "USE OF EXISTING DISTRICTS" AND A "MODEL CONSTITUTIONAL PLAN" TO DEMONSTRATE THE RELATIVE COST, TIME AND PROCESS OPTIONS; IT IS FOR A COURT EXPERT OR MASTER TO EVALUATE THESE AND OTHER OPTIONS AS THE COURT DIRECTS

Steinberg (Steinberg Br. 13-19) attacks the Petitioner's three proferred plans but ignores the fact that the Petitioner offered these as suggested approaches among different options to reconcile the exercise of the referendum in this instance with the electoral necessity of fixing the Senate District boundaries for the June and November 2012 elections. The Petitioner has clearly argued that it is for the Court's expert or Special Master to evaluate these and other options in fashioning interim relief.

The Petitioner has stated the "relative benefits and harms" of using each of these approaches.

With respect to the use of the existing 2001 odd-numbered Senate Districts, the obvious problem is that the districts do not comply with the reasonable population equality requirements of Article XXI, § 2(d)(1) or the federal constitution. However, the Petitioner has identified possible changes to bring the lines – with minimal adjustments – within the standards set by *Brown v. Thompson* (1983) 462 U.S. 835 (and the requirements of justification of such population disparities restated in *Cox v. Larios* (2004) 542 U.S. 947.) Steinberg's implied assertion (Steinberg Br. 15, fn. 13) that the interim solution in *Assembly v. Deukmejian, supra*, which ignored the people's referendum process, defeats an interim solution that preserves the right of referendum and constitutional population equality concerns is simply wrong.

With respect to the Petitioner's "Simple Nesting Plan," Steinberg notes that in one instance, proposed SD 15, that three, not two, Assembly Districts are affected. This is correct; however, as the November 22, 2011

Quinn Dec., p. 3, points out, the portion of the third Assembly District used to make the parts of proposed SD 15 "contiguous" are unpopulated and accomplish the greater purpose of making proposed SD 15 a district for which Latinos are likely to elect a Latino candidate of choice. Common Cause (Common Cause Ltr. Br. 7) incorrectly characterizes the Petitioner's "Simple Nesting Plan" as ignoring the first five criteria of Article XXI, § 2(d) in favor of the sixth criterion ("nesting"). This is simply wrong. The "Simple Nesting Plan" meets all six criteria. The Commission's Senate District Maps ignored the last one.

Finally, the Petitioner reasserts that it is the Court's expert or Special Master who can quickly evaluate and propose adjustments to Senate District Maps for interim use, at minimal cost, that fully comply with all constitutional requirements and which can obtain pre-clearance from the Department of Justice under section 5 of the Voting Rights Act.[3]

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[3] The Petitioner notes that none of the Commission's certified maps, including the Senate Maps that are the subject of the referendum, have obtained Department of Justice ("DOJ") pre-clearance under Section 5 at this time. The maps were not submitted to the DOJ until November 16, 2011. Moreover, if the Court were to draw lines that fully comply with Article XXI, § 2(d) in the first instance, that should not prevent their use on an "interim basis" for the 2012 elections. (*Upham v. Seamon* (1982) 456 U.S. 37, 44):

> "Although a [federal] court-devised redistricting plan such as the one at issue need not be precleared under § 5, *Connor v. Johnson,* 402 U.S. 690, 691*(per curiam),* the court should take into account the appropriate § 5 standards in fashioning such a plan, *McDaniel v. Sanchez,* 452 U.S. 130, 149..."

(See also *Abrams v. Johnson* (1997) 521 U.S. 74, 75-76.)

CONCLUSION

The Common Cause and Steinberg amicus briefs disregard and would vitiate the people's referendum power. The Court should exercise its jurisdiction to grant the Petitioner relief when the referendum is "likely to qualify." The referendum is "likely to qualify" based upon the record of the past 49 initiatives and referendum and the preliminary verification statistics maintained by the Secretary of State.

Dated: December 22, 2011 Respectfully Submitted,

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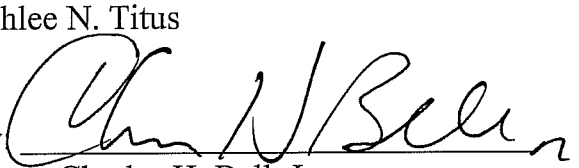
By 
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CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. R. CT. 8.204(c) AND 8.486(a)(6)

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 **CONSOLIDATED REPLY TO COMMON CAUSE'S AND SENATOR DARRELL STEINBERG'S AMICI CURIAE OPPOSITIONS TO PETITION** contains 2,742 words, exclusive of those materials not required to be counted under Rules 8.204(c) and 8.468(a)(6).

Dated: December 22, 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 22, 2011, I served the following document(s) described as:

- **CONSOLIDATED REPLY TO COMMON CAUSE'S AND SENATOR DARRELL STEINBERG'S AMICI CURIAE OPPOSITIONS TO PETITION**

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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 22, 2011 at Sacramento, California.

Shannon Diaz

SHANNON DIAZ