



# MALDEF

Mexican American Legal Defense and Educational Fund

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## MALDEF OPPOSES THE CALIFORNIA VOTERS FIRST INITIATIVE

The Mexican American Legal Defense and Educational Fund (“MALDEF”) opposes the California Voters First Initiative (“the Initiative”) because it is a fundamentally flawed attempt at reform that will lessen minority groups’ ability to influence the redistricting process. The Initiative is an attempt to fix an admittedly imperfect redistricting system. However, the Initiative has several serious defects that more than outweigh its benefits.

The protection of Latino voting rights has been a core part of MALDEF’s mission. Over the past four decades, MALDEF has been involved in numerous statewide and local redistricting campaigns both as advocates and litigants. We’ve seen what works and we have seen where the system breaks down. MALDEF does not consider redistricting from a partisan perspective. Our perspective is simply how redistricting complies with the U.S. Constitution, the Voting Rights Act, and how the plan affects Latinos and other minority groups.

Currently, the state legislature is responsible for the post-census redistricting of state and federal legislative boundaries. While any plan developed by the legislature must comply with the Federal and State Constitutions and the Voting Rights Act, there are relatively few other mandates that the legislature must consider when drawing district boundaries. These plans must be subsequently passed by the legislature and signed into law by the governor.

The Initiative removes the redistricting authority for state legislative and Board of Equalization districts from the legislature, and places it in the hands of an “independent” commission.<sup>1</sup> Congressional districts would still be drawn by the state legislature. Having two separate and simultaneous redistricting processes will challenge and curtail public participation and lead to the inconsistent and divergent application of redistricting criteria.

Under the Initiative, the state legislative redistricting would be conducted by a fourteen-member independent commission composed of five members from the largest political party, five from the second largest, and four from other parties or non-affiliated.<sup>2</sup> The Initiative would also establish a list of criteria to be applied in order of priority including, compliance with the Federal Constitution and the Voting Rights Act,<sup>3</sup> maintaining the integrity of cities, counties and “communities of interest,”<sup>4</sup> and “nesting” assembly districts within senate districts and senate districts within board of equalization districts.<sup>5</sup> The addition of some of these criteria will come

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1 Cal. Const. Art. XXI, Sec. 1; Cal. Const. Art. XXI, Sec. 2(a).

2 Cal. Gov. Code § 8252(f)-(g). All citations in this document refer to the proposed amendments to the relevant sections of the California Constitution and California Government Code.

3 Cal. Const. Art. XXI, Sec. 2(d)(1)-(2).

4 Cal. Const. Art. XXI, Sec. 2(d)(4). “Communities of interest” can include considerations of ethnic, cultural, economic, trade area, geographic, and other demographic factors.

5 Cal. Const. Art. XXI, Sec. 2(d)(6).

at the expense of maximizing minority political representation statewide for the reasons set forth below.

The intentions of the Initiative are laudable. It attempts to end partisan self-interest and allow for a redistricting process that respects the interest of racial minorities and other communities of interest. However, the inherently partisan nature of the Initiative's proposed method of redistricting would trade the problem of incumbent self-interest for a focus on party interest.

While MALDEF supports instituting redistricting reform, it must be real, effective reform that ensures that California's diversity is represented and that all of its diverse communities have a meaningful opportunity to participate in the process. It must be well thought out and fully take into account the interests of Latinos and other racial minorities. It must not create new redistricting criteria that will lessen the opportunities to create legislative districts that fully represent Latinos, African Americans, Asians and Pacific Islanders. This Initiative fails to provide effective reform, trading one set of problems for another, and will, in the end, jeopardize access of Latinos to the redistricting process.

### **1. The Initiative Mandates New, Problematic Redistricting Criteria.**

The Initiative will write new, problematic redistricting criteria into the California Constitution. These criteria will undermine the ability to achieve full representation for minority communities. Specifically, the requirements to keep city and county boundaries intact, and the nesting requirement will compromise the commission's ability to maximize minority representation. Certain redistricting criteria, such as compliance with the Voting Rights Act and respecting communities of interest are essential to ensure that the political strength of minorities is fully represented. However, it is likely that these guarantees will be undermined through the inclusion of the nesting and whole cities and counties requirements.

MALDEF has objected to the use of nesting as a criterion during prior attempts at redistricting reform.<sup>6</sup> This requirement has limited the ability of map drawers to create majority-minority districts. The limiting effects of nesting on the ability to maximize minority representation have also been demonstrated by the latest research conducted by political scientists and demographers.<sup>7</sup> There is no guarantee that the placement of nesting criteria as a lower priority than compliance with the Voting Rights Act prevents it from undermining minority interests. Rather, the history of the use of nesting in California and the social science data suggests that nesting, as a criterion, will nearly always have the potential to diminish the opportunity to maximize minority representation. No studies exist today that demonstrate that nesting would not have this effect in this redistricting proposal.

Additionally, the redistricting criteria mandated by the Initiative are flawed because they fail to adequately prioritize the maintenance of communities of interest in relation to other, less relevant, considerations for minority communities, such as maintaining the integrity of city and

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<sup>6</sup> See, *Wilson v. Eu*, 1 Cal.4th 707, 721-22 (1992).

<sup>7</sup> Bruce E. Cain and Karin Mac Donald, "The Implications of Nesting in California Redistricting" (August 2007). Accessible at [http://swdb.berkeley.edu/redistricting\\_research/Nesting\\_&\\_Redistricting.pdf](http://swdb.berkeley.edu/redistricting_research/Nesting_&_Redistricting.pdf).

county boundaries.<sup>8</sup> Communities of interest include neighborhoods and geographic regions with shared interests. There is no guarantee that the commission will properly consider communities of interest during redistricting given the competing interests of nesting and maintenance of city and county boundaries. As we discuss below, the composition of the commission is primarily based on partisanship and does not provide enough assurances that it will reflect California's diversity. This leaves serious doubts about whether it will adequately factor in the interests of minority groups.

While the criteria are already problematic, the outcome of the U.S. Supreme Court's decision in *Bartlett v. Strickland*,<sup>9</sup> could make the Initiative's nesting and whole cities and counties criteria insurmountable limits to the ability of the commission to create districts beneficial to racial minorities, especially those groups that are not able to constitute a majority in a district. The U.S. Supreme Court is reviewing North Carolina's legislative redistricting plan to determine if the State's criterion of keeping counties whole is in conflict with the Voting Rights Act. In this case the district in which African Americans have the opportunity to elect a candidate of their choice but do not comprise a majority of the district's population is being challenged because it does not comply with state redistricting criteria of not splitting whole counties. If the Initiative becomes law, a U.S. Supreme Court decision invalidating North Carolina's legislative districts would create the same limitations on the ability to draw districts beneficial to minorities in California.

Inscribing the nesting and other problematic criteria into the California Constitution will, in the best case scenario, permit the consideration of criteria that are potentially harmful to minority communities, and, at worst, create a legal obstacle to the ability to maximize minority representation in the redistricting process. This level of risk is unacceptable for any "reform" effort. For all these reasons we feel that the redistricting criteria fail to ensure that minority groups will be adequately represented.

## **2. The Initiative Diminishes the Diversity of the Redistricting Body.**

MALDEF opposes the Initiative because the independent commission will not adequately reflect the socio-economic, gender, racial and ethnic diversity of the state's population. The Initiative only offers hollow hopes that diversity be accounted for, and instead, removes decision making power from a legislative body that is increasingly representative of California.

The Initiative would replace the current system by having the State Auditor responsible for selecting the sixty "most highly qualified" persons from the applicant pool. The Auditor would then randomly select three Democratic commissioners, three Republican commissioners and two commissioners not affiliated with the two largest parties from the final applicant pool. This group of eight then selects six additional members from the applicant pool.

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<sup>8</sup> Cal. Const. Art. XXI, Sec. 2(d)(4). MALDEF believes that "communities of interest" should be ranked higher than maintaining city and county boundaries in any redistricting process.

<sup>9</sup> *Pender County v. Bartlett*, 649 S.E.2d 364 (NC 2007), cert. granted, *Bartlett v. Strickland*, 2008 WL 695628 (No. 07-689).

The California legislature, which is currently tasked with the redistricting process, provides representation of California's geographical diversity, and an increasingly accurate representation of the racial, ethnic, and gender diversity of the state. The Initiative, in contrast, only creates a general goal for diversity for six of the fourteen commissioners.<sup>10</sup> This limited goal does not create sufficient opportunity for diversity in the pool of applicants or diverse representation on the panel. The Initiative offers only empty promises of diversity in terms of the relevant pool of applicants, with no guarantees or mechanisms for ensuring diversity in the applicant pool.

Rather than ensuring diversity, the real requirement is that a particular partisan composition will be considered and guaranteed. The only mandate for the selection of the potential commissioners is by political party.<sup>11</sup> The only requirement for the selection of the commissioners is that five be from the largest political party, five be from the second largest, and four be from other parties or non-affiliated.<sup>12</sup> This means that partisanship will be the primary consideration for potential commissioners, and the primary consideration for the redistricting body itself.

### **3. Latinos' Voice in Redistricting is Diluted by the Initiative.**

While the Initiative fails to ensure that the redistricting commission will accurately reflect California's diversity, the process by which the commission is actually selected guarantees that the commission will dilute the relative ability of Latinos and African Americans to have their interests represented by the commission.

The Initiative requires that there be an equal number of representatives from the majority and minority parties. This requirement artificially inflates the power of a political party with relatively few Latinos, African Americans, Asians and Pacific Islanders over that of the other that is more reflective of California's diversity. This change is step back from the current system for these groups.

Removing decision making authority from legislative bodies where racial minority representation and influence have increased has been used as a technique to lessen these groups influence on policy matters. The Initiative, by removing the decision making power from the legislature and putting it in the hands of another body that will be less representative and less accountable, makes it harder for the people of the state to have access, understanding or input in the redistricting process.

### **4. Partisanship, not Diversity, is the Primary Focus of the Initiative.**

Because party affiliation is the only real mandate for the composition of the commission, the focus will be on partisan interests. Given the partisan composition of the commission, and its requirements for approving any redistricting plan, it is likely that the redistricting process will

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10 Cal. Gov. Code § 8252(g).

11 Cal. Gov. Code § 8252(d).

12 Cal. Gov. Code § 8252(f)-(g).

deadlock. This is likely to result in a districting plan that disadvantages minority communities because of the way in which any partisan deadlock will be resolved by the Initiative.

Under the Initiative, no plan can be passed without majority support from every political party represented on the commission.<sup>13</sup> This means that a political party can unilaterally block a redistricting plan if it doesn't meet the party's interests. The Initiative would resolve this deadlock by placing the ultimate redistricting authority in the hands of the California Supreme Court.<sup>14</sup> This is essentially what happened during the redistricting process in 1991 when the Governor vetoed the legislature's redistricting plan. The result was a plan that was developed by "Special Masters" appointed by the California Supreme Court. MALDEF opposed that plan because it failed to fully represent Latinos in California.

The Initiative creates a situation where deadlock is even more likely than under the current system and effectively places virtually all redistricting authority in the hands of whichever political party is most likely to have its plan approved by the California Supreme Court. The party that is in this position can use the threat of deadlock to effectively assert the most influence on the redistricting process, because it can always use the threat of having the Court decide to gain concessions from the other two parties.

### **5. The Initiative Eliminates Accountability.**

The Initiative places decision making authority over the composition of the redistricting commission in the hands of State Auditors, who are not accountable to the electorate.<sup>15</sup> This resulting commission, composed of unelected appointees, is likewise insulated from public accountability. For all the flaws that accrue when legislators draw their own districts, they must still balance multiple interests. They must balance their self-interest against their party interests, and their continuing accountability to their constituents. These interests, at least, have the benefit of acting as checks on each other, and provide some assurances that there will be some reigning in of self and party interest to the considerations of public good. The Initiative eliminates most of these benefits by eliminating accountability to the voters and focusing solely on partisanship.

### **6. The Initiative Makes it Difficult for Community Groups to Generate Meaningful Public Input into the Redistricting Process.**

The Initiative provides for the independent commission to redistrict only the state legislative districts (including the Board of Equalization) and leaves Congressional redistricting to the state legislature. MALDEF has opposed redistricting reform that separates redistricting authority into separate bodies because it makes it considerably more difficult for community groups to provide meaningful input into two separate and simultaneous redistricting processes.

This bifurcation will substantially increase the number of hearings that community groups must attend if they are to have meaningful input into the process. While the Initiative

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<sup>13</sup> Cal. Const. Art. XXI, Sec. 2(c)(5).

<sup>14</sup> Cal. Const. Art. XXI, Sec. 2(j).

<sup>15</sup> Cal. Gov. Code § 8252 et. seq.

encourages the meetings for the state and Congressional redistricting bodies to be held at the same time, it does not require it. This will likely result in separate and, perhaps, even competing hearings that will diminish public input and, thus, the ability to fully comply with redistricting requirements that focus on the Voting Rights Act and on communities of interest.

Without meaningful public participation it will be especially difficult to fully account for communities of interest in the redistricting process. Public testimony on communities of interest is critical in defining these geographic regions and the redistricting process must be designed to obtain expansive testimony on them. For these reasons, MALDEF believes that the bifurcated design of the Initiative will result in a lack of meaningful public participation that is necessary to increase minority participation in government and achieve other goals.

This bifurcated design poses other problems as well, especially given that the commission will be constituted at the very end of 2010, and will only have a few months at best to begin to develop the expertise necessary to develop representative and legal maps. In contrast, the Congressional redistricting will still be handled by the state legislature, and as in the past, the selection of the members of the committee tasked with handling the redistricting will have had plenty of time prior to the beginning of 2011 to develop the expertise and organization necessary to run successful hearings and develop legal and representative maps. This bifurcated design is likely to produce two bodies with very different levels of expertise and ability, which is, in turn, going to create problems for the interpretation of various legal requirements, such as compliance with the Voting Rights Act, and the inability to gather and account for the needs of various communities of interest.

## **Conclusion**

Because the Initiative fails to provide effective reform, trading one set of problems for another, and seriously compromises the interests of Latinos and other minorities protected under the Voting Rights Act, MALDEF opposes the Initiative. We will continue to work towards achieving real redistricting reform that ensures the Latino Community full participation in the redistricting process and ensures its full representation.