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## **APALC OPPOSES CALIFORNIA VOTERS FIRST INITIATIVE WHICH WILL APPEAR AS PROP. 11 ON NOVEMBER 4, 2008 BALLOT**

### **Position Paper Dated July 22, 2008**

The Asian Pacific American Legal Center (APALC) supports the notion of reforming California's redistricting process through the establishment of an independent redistricting commission, a set of fair redistricting criteria, and an open and transparent process. We have supported previous reform proposals. However, we oppose the California Voters FIRST initiative because it takes the wrong approach to achieving reform and would represent a step back from the status quo for communities of color in California. The initiative will appear as Prop. 11 on the November 4, 2008 ballot.

This position paper provides our perspective on redistricting reform, outlines our reasons for opposing Prop. 11, and also offers recommendations for what future reform attempts should look like. Our perspective comes from our work as a nonpartisan, nonprofit civil rights organization that advocates on behalf of Asian and Pacific Islander American (APIA) communities.

### **I. APALC Perspective on Redistricting Reform**

#### **A. What the Purpose of Redistricting Reform Should Be**

APALC supports redistricting reform primarily as a means of guarding against the dilution of racial and ethnic minority voting power. Having participated in the 1991 and 2001 statewide redistrictings, we saw APIA communities harmed by incumbents acting in their own self-interest at the expense of community voting power. Based on our experience in 1991 and 2001, we believe that some regulation of the redistricting process is warranted as a way of constraining the ability of map-drawers to draw districts for incumbent or partisan advantage. Accordingly, we have supported redistricting reform over the past four years and have been involved in numerous discussions during that time.

Others have supported redistricting reform for good government reasons – as a solution to legislative gridlock in Sacramento. They argue that redistricting reform will make elections more competitive, replace so-called hyper-partisan legislators with moderate legislators, and increase the spirit of cooperation in the legislature. From what we have seen, those arguing this include the proponents and various supporters of Prop. 11.

We disagree. We do not buy into the notion that redistricting reform is the cure for legislative gridlock. Those seeking to address legislative dysfunction should look to proposals that address the budget process and the initiative process as well as proposals that address the influence of

special interest money on politics. Redistricting reform should be first and foremost about ensuring fair representation for historically underrepresented minority communities.

### B. The Type of Approach That Redistricting Reform Should Take

Beyond differences on what the purpose of redistricting reform should be, we have a different perspective on the type of approach redistricting reform should take. From what we have seen, those espousing good government reasons for wanting reform have generally favored an approach that maximizes constraints on the commission's flexibility to draw lines (which flexibility we believe is necessary to draw lines that protect minority voting power); and that maximizes the degree to which both the legislature and individual discretion are removed from the process of selecting commissioners (which we believe leads to a significant risk of a non-diverse commission).

Proposals embodying this approach, including Prop. 11, generally contain the following provisions: (1) additional redistricting criteria such as nesting that constrain line-drawing flexibility without affirmatively adding protection for minority communities; (2) limitations on what information may be considered by the commission; (3) a commission selection process in which the only role of legislators is to strike applicants from the nominee pool and in which commissioners are selected at random instead of being hand-picked; and (4) a requirement that a vote to pass a redistricting plan includes votes of commissioners from each partisan grouping.

We believe that a more judicious regulatory approach is warranted. The imposition of constraints cannot be done in an overboard fashion, and must preserve the flexibility needed by line-drawers to draw district lines protective of minority voting power. Also, regulation of legislative involvement in the redistricting process does not require legislative involvement to be cut out entirely or commissioners to be randomly selected in order to have an adequately independent commission. Hand-picking of commissioners by legislators or another entity, together with a requirement that commissioners are chosen to reflect diversity, provides a strong mechanism for ensuring diversity in the commission. If a reform proposal provides no other mechanism, then the proposal will negatively impact minority communities by giving them fewer seats at the map-drawing table.

## **II. Ways in Which Prop. 11 Represents a Step Back for Minority Communities**

We characterize Prop. 11 as taking an “everything but the kitchen sink” approach to constraining incumbent- and partisan-based gerrymandering, similar to other good government proposals that aspire to break legislative gridlock. While some supporters of Prop. 11 believe that this approach will also increase protections for minority communities, some of the initiative's provisions which seek to maximize constraints on line-drawing will actually do the opposite. These provisions (1) create a large risk that the line-drawing body will lack diversity; (2) reduce flexibility to draw minority community-favorable districts without adding affirmative protections for minority communities; and (3) make the most likely outcome to be either a stalemate or a deal that comes at the expense of minority communities.

A. Prop. 11 Poses a Significant Risk That Communities of Color Will Have Fewer Seats at the Map-Drawing Table Than They Do Now

In recent years, the legislature has become increasingly representative of California's diverse population. We believe that any reform proposal must not diminish the number of seats that minority communities have at the map-drawing table. Any reform proposal must contain provisions which affirmatively ensure that the legislature's diversity is retained within the replacement commission.

Prop. 11 fails to accomplish this. Prop. 11 poses a significant risk that minority communities would get fewer seats at the map-drawing table than they do now. This is because Prop. 11 does not do enough to ensure either that its pool of 60 nominees is diverse, or that commissioners are chosen from the nominee pool with an eye toward diversity.

During the nominee selection stage – in which three auditors review applicants and choose 60 individuals to constitute the nominee pool from which commissioners are picked – Prop. 11 requires that the 60 nominees have an “appreciation for California’s diverse demographics and geography.” This is not a requirement that the nominees themselves reflect California’s diversity, or even a requirement that the three auditors attempt to constitute a diverse nominee pool. Under a plain meaning reading, this is simply a requirement that nominees be able to “appreciate” that California has a diverse population, and is wholly insufficient to ensure a diverse nominee pool.

During the commission selection stage – in which 14 commissioners are picked from the nominee pool – Prop. 11 provides that the majority of commissioners (8 of 14) are picked at random without any regard to whether the randomly picked commissioners reflect California’s diversity. The fact that these eight commissioners are randomly chosen creates a significant risk of ending up with a non-diverse commission, and Prop. 11 provides no second-chance mechanism to mitigate this risk (such as a “do-over” in the event that the first random draw produces a non-diverse group). This is in contrast to a process of hand-choosing commissioners, such as legislators or another body choosing some of the commissioners, which can serve as a mechanism to affirmatively ensure that the commission is diverse.

In our view, Prop. 11’s selection process creates an unacceptable risk that the commission would be less diverse than the legislature. Prop. 11 cuts off all but a minimal amount of legislative involvement in the commission selection process without providing another means of ensuring diversity in the commission.

B. Prop. 11’s Redistricting Criteria Reduce Flexibility to Draw Districts Which Respect Minority Communities

To best protect minority communities, any reform proposal should include a set of redistricting criteria that prioritizes (1) Voting Rights Act compliance and (2) communities of interest. These two criteria constrain mapmakers’ ability to draw incumbent- or partisan-favored districts at the expense of minority communities by affirmatively requiring mapmakers to protect community voting power.

Other criteria such as keeping counties and cities intact, nesting and compactness can also serve as ways of constraining incumbent- or partisan-based gerrymandering. But these criteria do so by simply reducing mapmakers' flexibility in drawing lines without providing any affirmative protection for minority communities. Moreover, some of these criteria (such as nesting) can actually impair minority representation, as a study by the Institute of Governmental Studies at UC Berkeley indicates. We believe that these criteria should be omitted in any reform proposal.

In our view, Prop. 11's redistricting criteria fall short and do not represent an improvement for minority communities. While Prop. 11 adds communities of interest as a criterion, Prop. 11 dilutes its potency by failing to require line-drawers to prioritize it over geographic integrity of cities and counties. Prop. 11 also adds nesting and compactness as additional criteria which line-drawers must follow but which contribute nothing to keeping minority communities together. We characterize Prop. 11's criteria as reducing line-drawing flexibility to draw minority-favorable districts without adding meaningful protections that benefit minorities.

Moreover, we believe that Prop. 11 would exacerbate the impact of an adverse decision by the U.S. Supreme Court in the pending Bartlett v. Strickland case. In Bartlett, a county in North Carolina which was split between two districts is challenging North Carolina's redistricting plan on the basis that the plan violates the requirement in the North Carolina state constitution that counties be kept whole. While the state argues that it was necessary to split the county in question in order to draw a plan that complies with the Voting Rights Act, the county contends that the district being challenged does not meet the threshold for Voting Rights Act protection.

Civil rights advocates fear an adverse decision in which the Supreme Court establishes a higher threshold which parties must meet in order to show that a district is protected under the Voting Rights Act, in which case the state could no longer justify splitting the county in question on the basis of achieving Voting Rights Act compliance. A higher threshold for Voting Rights Act protection would limit the ability of mapmakers to use Voting Rights Act compliance as a justification for not adhering to other required redistricting criteria. This is because fewer minority-favorable plans could meet the post-Bartlett test for Voting Rights Act claims, and mapmakers would be forced to pass such plans over in favor of plans that maximize compliance with other required criteria.

Prop. 11 would exacerbate the effect of such an adverse decision. By adding additional mandatory criteria such as nesting and compactness, Prop. 11 increases the number of scenarios in which line-drawers must pass over maps that do not meet the post-Bartlett test but still would be beneficial to minority communities because the line-drawers must instead favor maps that maximize compliance with other required criteria.

C. The Most Likely Outcome of Commission Deliberations Is Either a Stalemate or a Deal That Comes at the Expense of Minority Communities, Given the Partisan Make-Up of Prop. 11's Commission and Prop. 11's Partisan Vote Requirement

Prop. 11 requires that the commission be made up of 5 persons affiliated with the largest political party in California, 5 persons affiliated with the second largest political party, and 4 persons affiliated with neither party. Currently and for the foreseeable future, Prop. 11's commission

would consist of 5 Democrats, 5 Republicans and 4 persons affiliated with neither party (which would include both voters who are decline-to-state and voters who are affiliated with third parties).

This mandatory partisan make-up, together with the vote required to pass a map (3 Democrats, 3 Republicans, 3 other), make stalemate the most likely outcome of commission deliberations. This is because a small number of commissioners can block a plan – any 3 of 5 Democrats, any 3 of 5 Republicans, or any 2 of 4 commissioners not affiliated with either party. While it is important to have safeguards against one-sided partisan gerrymanders in which one party runs over another, Prop. 11's vote requirement is not really a safeguard, but rather a set-up for stalemate. This is not good public policy.

Moreover, we are concerned about the consequences of throwing the redistricting process to a group of court-appointed special masters, which is essentially what Prop. 11 would do. Every time the commission fails to reach agreement, which would be more often than not given the likelihood of stalemate that Prop. 11 creates, minority communities would be forced to take their chances with a small group of line-drawers who are not accountable to anyone and whose appointment is not subject to any diversity requirement.

We are also concerned about what kind of map would result in the event that the commission does approve a plan. The difficulty imposed by Prop. 11's rigorous partisan vote requirement on the commission's ability to reach consensus would likely force the commission to place a premium on reaching a deal that manages to satisfy the requisite 3 of 5 Democrats, 3 of 5 Republicans and 3 of 4 persons affiliated with neither party, rather than on protecting minority voting power. Our fear is that the commission's success in meeting Prop. 11's partisan vote requirement will come at the expense of minority communities.

### **III. Recommendations for Future Reform Attempts**

We believe a simpler approach would provide adequate constraints against incumbent- and partisan-based gerrymandering without posing the risks to minority communities that Prop. 11 does. The recommendations below are not meant to be exhaustive, but rather illustrative of the approach that redistricting reform should embrace.

#### **A. Commission Selection Process**

Prop. 11 seeks to completely remove legislative involvement in the commission selection process; the only role that legislators have is to strike applicants from the pool of 60 nominees. We disagree that this is necessary to achieve an adequately independent redistricting commission.

In our view, an adequate level of independence is achieved by a structure in which the legislature does not both select the nominee pool, and also appoint commissioners from the nominee pool. In other words, an acceptable level of independence is achieved if some entity separate from the legislature either selects the nominee pool, or appoints commissioners from the nominee pool.

One example of this approach is SCA 3 (Lowenthal), a legislative proposal we supported in 2006. SCA 3 would have provided for a 11-member commission, 8 members of which are appointed by the legislative leaders from a pool of nominees that was first constituted by an entity independent of the legislature.

More importantly, any reform proposal must provide a strong mechanism for ensuring diversity in the commission. This is best accomplished by a process of some entity hand-choosing commissioners, whether legislators or another body. A random selection of commissioners, particularly one with no second-chance redraw, poses too large of a risk that the commissioners will not be diverse.

**B. Redistricting Criteria**

Any reform proposal should include a streamlined set of criteria that, on the one hand, provides affirmative protections for minority communities by prioritizing Voting Rights Act compliance and communities of interest over other criteria while, on the other hand, omits criteria such as nesting and compactness that merely constrain line-drawers' flexibility without doing anything to protect minority communities. Additionally, any reform proposal should avoid limiting what information the commission can consider in its deliberations, particularly information that is relevant to determining Voting Rights Act compliance.

**C. Commission Make-Up and Vote Requirement**

We believe that a less rigorous partisan vote requirement avoids Prop. 11's stalemate problem while still providing some protection against a partisan gerrymander. One example is the vote requirement in SCA 3, which would have required the vote of 6 of 11 commissioners to approve a plan, with at least 1 of 4 Democrats, 1 of 4 Republicans, and 1 of 3 commissioners affiliated with neither party voting to approve the plan.

**IV. Conclusion**

The initiative proponents may argue that while Prop. 11 is far from perfect, it still represents an improvement over the status quo for minority communities. We disagree. We believe that minority communities will likely end up with fewer seats at the map-drawing table, and will be adversely impacted by line-drawers' lack of flexibility to draw districts which respect minority voting power.

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Questions about APALC's position on Prop. 11 should be directed to Eugene Lee, Voting Rights Project Director at APALC, who can be reached at 213-241-0212 or elee@apalc.org.