

MEMORANDUM

TO: Members of the California Citizens Redistricting Commission

FROM: Robin B. Johansen, Thomas A. Willis, and Kristen M. Rogers

DATE: April 24, 2021

RE: Citizens Redistricting Commission Deadlines

The Commission, like all participants in state and local redistricting, has been required to adjust to significant delays in delivery of federal census data. This memo outlines why the date of delivery of the federal census data in August 2021 is the trigger date for the Commission's deadlines under the California Supreme Court's ruling in *Legislature of the State of California v. Padilla*, 9 Cal.5th 867 (2020).

Our office served as the Legislature's counsel in the *Padilla* case, and we have participated in legal proceedings involving redistricting over the last five decades. In the *Padilla* case, which the Legislature filed after consulting with the Redistricting Commission in existence at the time, the California Supreme Court extended the Commission's statutory and constitutional deadlines by four months because the census data needed for decennial redistricting would not be released to the State in time for the Commission to meet the existing deadlines.

Although no party requested it, the Court also anticipated that the census data could be delayed by more than four months, and on its own motion, it established a mechanism to extend the Commission's deadlines by the amount of any further delay in the State's receipt of the census data. Specifically, the Court said:

In the event of further federal delay, we conclude the relevant state deadlines should be shifted accordingly, for the reasons outlined here. Thus, while we today grant a minimum four-month adjustment to the relevant deadlines, we also order that the deadlines be further extended by the length of any additional delay in release of the federal census data beyond four months.

9 Cal. 5th at 881.

On March 26, 2021, Karin Mac Donald, the Director of the state-supported Statewide Database, informed the Commission that the Census Bureau would release an interim data product known as “legacy format summary redistricting data” by mid-to-late August, 2021. The Census Bureau has now announced that the legacy data will be available no later than August 16, 2021. These announcements mean that states will have census data considerably earlier than the September 30th date by which the Census Bureau previously said they should expect it. Although the data will require reformatting, Director Mac Donald has confirmed that can be done.

The earlier arrival of the legacy data has raised questions about the Commission’s deadlines for release of preliminary and final redistricting maps under the Supreme Court’s decision in *Padilla*. In a memorandum to the Commission, former Commissioner Angelo Ancheta has argued that the Commission’s deadline for certification of final maps is triggered by the September 30, 2021 release date, not the August 16, 2021 date for release of the legacy data. Although he argues that the Commission “should consider” much earlier target dates, former Commissioner Ancheta concludes that the Commission has until February 14, 2022 to certify final maps under the Supreme Court’s decision in *Padilla*. That date, as we explain more fully below, would give the Commission even more time to issue its final maps than it would have been entitled to under current law had the pandemic never occurred.

We respectfully disagree with former Commissioner Ancheta’s conclusion. Based on the Supreme Court’s opinion in *Padilla* and on our experience bringing not only that case but also other redistricting cases during prior cycles, we conclude that release of the legacy data is the trigger date from which to determine the Commission’s deadlines under the Supreme Court’s opinion. Thus, for example, if the legacy data arrive on August 16, 2021, then the Commission’s deadline for final certification would be extended from December 15 to December 31, 2021. *This is the only interpretation that is consistent with the Court’s opinion and with the Court’s stated goal of harmonizing the voters’ intent with the realities created by the COVID-19 pandemic.*

A. Under The Supreme Court’s Decision, The Commission’s Deadline Is Calculated From Release Of The Federal Census Data On Or Before August 16, 2021

Former Commissioner Ancheta argues that the Supreme Court “consistently references only the official P.L. 94-171 dataset as ‘the federal census data’” that will trigger the

Commission's new deadlines once it arrives.¹ However, the term "P.L. 94-171" does not appear anywhere in the Court's decision, and we have found nothing to support the argument that the term "federal census data" is limited to the data that are scheduled to be released by September 30th.

Former Commissioner Ancheta does not dispute the fact that the legacy data are also "federal census data," and he offers no evidence suggesting that the Statewide Database lacks the required expertise to reformat the legacy data and ensure its accuracy. As demonstrated below, the data are the same, just in a different format. Thus, the facts are clear that the State will receive federal census data no later than August 16, 2021 and that those data can be formatted to provide the dataset that the Commission needs in order for it to do redistricting.

Nevertheless, Mr. Ancheta argues that under the *Padilla* opinion, the Commission's deadline for certification of final maps should be calculated from September 30, 2021, the date for release of the reformatted P.L. 94-171 data, as opposed to release of the legacy data on or before August 16th. That interpretation is at odds with the Supreme Court's clearly stated intent that the Commission should certify maps as soon as possible and that its deadline for doing so should be no longer than the additional federal delay.

The Supreme Court based its order on its inherent authority to reform statutes and constitutional provisions in order to preserve them. 9 Cal. 5th at 876-77. In doing so, it stressed that its "guiding principle is consistency with the Legislature's (or, as here, the electorate's) intent" *Id.*, quoting *Kopp v. Fair Pol. Practices Com.*, 11 Cal. 4th 607, 615. Accordingly, the Supreme Court provided a remedy that would allow the same amount of time for the redistricting process that there would have been in the absence of the census delay under the existing statutory and constitutional framework. Ordinarily, the process, which includes time for preparation of the statewide dataset, would have occurred between April 1 (the date the Census Bureau was required to release P.L. 94-171 data) and August 15 (the constitutional deadline for final maps). That amounts to 136 days, or four and one-half months. Using the legacy data release date of August 16 and requiring the final maps to be completed by December 31 would amount to 137 days, which is one more day than if there had been no census delay due to the COVID pandemic.

¹ Ancheta Mem. at 3. P.L. 94-171 refers to Public Law 94-171, the federal statute that governs the Census Bureau's release of redistricting data to the states.

In contrast, using the later release date of September 30, 2021, as former Commissioner Ancheta has urged, would push final certification of the district lines to February 14, 2022, and that would allow *five more weeks* with the redistricting dataset than if there had been no census delay. That cannot be what the Supreme Court intended. Indeed, when previously contemplating 2021 census data arriving early, the Court admonished, “the Commission should make every effort to expedite its process and release the preliminary and final maps in advance of the deadlines.” 9 Cal.5th at 882.

The only argument that Mr. Ancheta makes for a February deadline appears to be that the public comment periods would occur over more holidays. Ancheta Mem. at 8. Yet a December 31, 2021 deadline would actually include only one more state holiday – Christmas Day – than the number of holidays that would occur under the Court’s original deadline of December 15, 2021.²

Moreover, the issue of the Christmas holiday has not deterred the Court in the past. When the Court appointed special masters to conduct the 1991 redistricting, it ordered them to release their proposed maps by November 29, 1991, with public comment in the form of amicus briefing due on December 29, 1991. *Wilson v. Eu*, 54 Cal. 3d 471, 474 (1991). As demonstrated in Part C below, the Court is likely to take the same approach again in order to avoid disruption with the June primary.

B. The Legacy Data Are The Same As The Traditional P.L. 94-171 Data But In A Different Format

Mr. Ancheta implies that the legacy data may not be suitable to use as the starting point for the Commission’s dataset. Ancheta Mem. at 5-6. In support, he offers only a Census Bureau official’s statement that the legacy data are not in the “user-friendly” format that the Bureau will ultimately provide and will need to be carefully formatted. Ancheta Mem. at 5-6.

Mr. Ancheta acknowledges that the Legislature is responsible for constructing and delivering the dataset necessary for redistricting. Ancheta Mem. at 2. Government Code section 8253(b) states in relevant part that the “Legislature shall take all steps necessary to ensure that a complete and accurate computerized database is available for redistricting, and

² A list of state holidays is available at the California Department of Human Resources, <https://www.calhr.ca.gov/employees/pages/state-holidays.aspx>.

that procedures are in place to provide the public ready access to redistricting data and computer software for drawing maps.”

Section 8253(b) is an acknowledgement that since the mid-1990’s, the Legislature has funded and overseen the creation of a centralized database that can be used by everyone – the public, the State, and hundreds of local jurisdictions – for redistricting purposes. In response to significant problems with competing datasets that persisted in the 1980’s and in 1991, the Legislature established the Statewide Database³ at the University of California, Berkeley, to provide a permanent dataset that is maintained and updated on a continuous basis. Proposition 11 acknowledges the importance of that arrangement and confers on the Legislature the duty to decide how to construct and maintain the database. This responsibility was left with the Legislature by Proposition 20, even as Congressional redistricting authority was transferred to the Commission.

Accordingly, the Statewide Database, in conjunction with the Legislature, has determined both (1) that the legacy data released by the Census Bureau are the same as the data contained in the traditional P.L. 94-171 format, and (2) that it has the technical capability to construct the database from the legacy data that will result in an accurate dataset for the Commission to use. In a memorandum dated March 26, 2021 to the Commission, Karin Mac Donald, Director of the Statewide Database, stated that based on her research and discussions with Census Bureau staff, the legacy data are “identical” to the data that the Bureau will release by September 30, 2021 in the traditional P.L. 94-171 format. Further, Director Mac Donald reported that the Census Bureau has confirmed that none of the data will be changed between the time the legacy data are released and when the reformatted data are released in September; rather the Bureau needs the additional time to reformat the data. In addition, after she issued her March 26 memorandum, Director Mac Donald subsequently concluded the use of the legacy data will add not two but just one week to the processing timeline, meaning an accurate dataset for the Commission to use is expected by September 23rd.

Finally, Director Mac Donald stated in the memorandum that the Statewide Database would conduct an independent accuracy test of the legacy data by having the State’s Demographic Research Unit independently process the legacy data using different systems and

³ For ease of reference, we will refer to the entity responsible for constructing and maintaining the database as the “Statewide Database” and refer to the actual database as the “database” or “dataset.”

then compare the accuracy of the dataset. For all these reasons, Director Mac Donald stated she is confident that the state dataset will be as accurate as it would have been had it been constructed from the reformatted data released in September.

As a result of these developments, the Legislature will be authorizing additional funding to process the legacy data and to proceed with its use in order to help all users, including not only the Commission but also local jurisdictions who are legally mandated to use the database and the general public, by providing the redistricting dataset *five weeks* sooner than would have been the case if it waited for the release on September 30th.

C. The Supreme Court Is Highly Unlikely To Delay The June 2022 Election

Mr. Ancheta quotes the Supreme Court’s statement that “[i]n the event that an additional extension of time risks interference with the timeline for conducting elections, appropriate parties may seek further relief in this court.” Ancheta Mem. at 3, citing 9 Cal. 5th at 881. From this, Mr. Ancheta concludes that “[t]he Supreme Court’s language suggests that the Commission’s work should not be tied to, or be unduly burdened by, the electoral calendar” *Id.*

Any suggestion that the Supreme Court would move the June 2022 primary in order to accommodate Mr. Ancheta’s proposed schedule is inconsistent with both the Court’s ruling as well as past judicial practice. Indeed, such an order would be unprecedented. Each time the Court has been faced with redistricting challenges that threatened to derail a scheduled election, it has purposefully adopted a remedy that permits the election to go forward as planned. The changes it has made to the election calendar have been minor adjustments, not the wholesale rescheduling of an election.

For example, when the State failed to enact legislative or congressional redistricting bills in time for the 1972 primary and general elections, the Supreme Court did not order a delay of the scheduled election. Rather, the Court framed its task as “determin[ing] how this impasse should be resolved in time for the orderly conduct of the 1972 elections,” and undertook to decide which redistricting plans should be used for the scheduled election in the event that the Legislature could not enact valid maps in time. *See Legislature v. Reinecke*, 6 Cal. 3d 595, 601, 603-04 (1972).

During the 1980 census cycle, the State’s redistricting plans were automatically stayed by a referendum petition. *Assembly v. Deukmejian*, 30 Cal. 3d 638 (1982). In describing

its approach to defining potential remedies, the Court gave “consideration to any practical alternative which is available,” *id.* at 660, and quickly rejected a proposal to order a split primary to accommodate a longer timeline for selecting a redistricting plan: “The court is reluctant to step in and make such sweeping changes in the electoral process.” *Id.* at 658 n.15.

Ultimately, after noting that proposed changes to the primary could have a serious impact on the state treasury, voter turnout, deadlines for the general election, and time for computer programming, the Court ordered that the Legislature’s referred plans be used as an interim measure for the 1982 elections. The goal of minimizing the potential disruption of the electoral process and ensuring that the 1982 elections could proceed as planned was central to the Court’s decision. *See id.* at 658 n.15 and 669, 678 (“The new plans are temporarily adopted solely because they represent the only alternative available to this court that both maximizes adherence to equal protection principles and minimizes disruption to the election process.”).

Even where litigation over redistricting plans resulted in the delay of interim election-related deadlines, the Court has consistently ensured that the election date remains intact. In 1982, for example, the Court’s consideration of *Assembly v. Deukmejian* necessitated extending the deadline for in lieu petition signature gathering by twenty-four (24) days, and the Court extended other related deadlines commensurately. 30 Cal. 3d at 678-79 (in-lieu signature gathering, candidate filing declarations, and filing nomination papers). But the Court was clear that “in no event should such extensions be permitted to delay the primary election.” *Id.* at 679.

Ten years later, the State redistricting plans met a similar legislative impasse, and the Supreme Court again resolved the controversy in a manner that ensured the primary election would not be disrupted. *Wilson v. Eu*, 1 Cal. 4th 707 (1992). Although the Court emphasized that the election should not be moved, it permitted interim election-related deadlines to be shortened or adjusted as necessary. And in 2012, again faced with a referendum challenge to the first Citizen Redistricting Commission’s State Senate redistricting plan, the Court made clear that it would proceed expeditiously “to avoid potential disruption of the statewide primary and general elections to be held in June and November 2012.” *Vandermost v. Bowen*, 53 Cal. 4th 421, 435, 443 n.15 (2012).

As each of these cases illustrates, although election-related deadlines for filing nomination papers, submitting signatures in lieu of filing fees, or the like may be adjusted to

accommodate a redistricting delay, the date of the election remains a fixed star. The Supreme Court has never signaled a willingness to move an election to accommodate such a delay, and its decision in *Legislature v. Padilla* did not depart from precedent. Indeed, a critical component of the filing in *Legislature v. Padilla* was that the Commission deadlines could be delayed to December 15, 2021 without substantially disrupting the electoral calendar. The same cannot be said of the timeline proposed by Mr. Ancheta.

Because the period for gathering signatures in lieu of paying a filing fee begins on December 16, 2021,⁴ some adjustments will need to be made to certain deadlines for conducting the June primary. The Supreme Court's precedents described above demonstrate that this can be done, but the deadlines should be kept as intact as possible. In a recent meeting with two members of the CRC and various stakeholders, elections officials stated firmly that pushing the deadline for release of district lines much beyond December 31, 2021 would make it very difficult for them to prepare for the June 7, 2022 primary.

CONCLUSION

It is important to remember that we are dealing with a constitutional deadline that the Supreme Court has extended in order to reform a provision that would otherwise have been nullified by unavoidable circumstances. This is not a power that the Court uses frequently or lightly. As the Commission's own counsel has pointed out, failure to adhere to that deadline could result in the Commission losing its authority to draw the lines under article XXI, section 2(j) of the Constitution. We continue to conclude the release of the legacy data is the trigger date for determining that deadline under the Supreme Court's opinion.

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⁴ California Secretary of State, <https://www.sos.ca.gov/elections/upcoming-elections/statewide-direct-primary-election-june-7-2022>.