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Three Californias measure is a mortal threat to our state

By David A. Carrillo and Stephen M. Duvernay

Tim Draper's "Three Californias" measure qualified for this November's ballot, and it is a mortal threat to our state. We review the arguments one could use to stop this measure from appearing on the ballot.

The Measure Is Ripe for Pre-Election Challenge

There are few constraints on an initiative's subject matter. The attorney general has a constitutional duty to prepare a circulating title and summary for any measure, and the proponents are then free to gather signatures to qualify it for the ballot. Cal. Const. art. II, Section 10(d); Cal. Elec. Code Section 9002.

Judicial intervention is the only means to prevent an unconstitutional measure from reaching the ballot. The bar is high: "[I]t is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity." *Brosnahan v. Eu*, 31 Cal. 3d 1, 4 (1982).

Yet the California Supreme Court has also explained that "the principles of popular sovereignty which led to the establishment of the initiative and referendum in California ... do not disclose any value in putting before the people a measure which they have no power to enact." *Am. Fed'n of Labor v. Eu*, 36 Cal. 3d 687, 697 (1984). Pre-election review is appropriate to challenge a measure that, like this one, exceeds "the power of the electorate to adopt the proposal in the first instance." Id. at 695. There are two paths to stop an invalid measure from appearing on the ballot: The attorney general can seek judicial relief from its duty to prepare a circulating title and summary, or citizens can petition for writ relief to prevent the secretary of state from acting on a proposed initiative.

The Measure Exceeds the Initiative Power

The measure is an initiative statute, not a constitutional amendment: It adds two new sections to the Government Code. It exceeds the electorate's initiative statute power in three ways.

First, the measure exceeds the initiative power because it attempts a radical change merely by statutory changes, not the constitutional amendment that is required. An initiative statute has zero effect on Article III, sections 1 and 2 of the state constitution, which provide that "The State of California is an inseparable part of the United States of America," and that "The boundaries of the State are those stated in the Constitution of 1849 as modified pursuant to statute." Draper will argue that the initiative is a permissible statutory modification. Not so. Section 2 does not permit further statutory modification — it means that the state's boundary includes statutory changes made between 1849 and 1972, when the current constitutional provision was adopted. *See People v. Weeren*, 26 Cal. 3d 654, 660-61 (1980). And it could not permit further statutory modification on the grand scale of redefining the state's border to create three new states.

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Tim Draper at a summit in Lisbon, Nov. 1, 2017.

The measure also exceeds the initiative statute power because it is a revision. It both makes "far reaching changes in the nature of our basic governmental plan," *Professional Engineers v. Kempton*, 40 Cal. 4th 1016, 1046 (2007), and "substantially alter[s] the basic governmental framework set forth in our Constitution," *Strauss v. Horton*, 46 Cal. 4th 364, 441 (2009). Breaking California into three new states is the definition of a fundamental change to the state government structure, because it *abolishes* the state government. Measures that change the state's governmental framework to that degree can only be initiated by the state legislature, or by calling a constitutional convention, neither of which can be done by the electorate with an initiative statute. *Legislature v. Eu*, 54 Cal. 3d 492, 506 (1991).

Finally, the measure is beyond even the revision power: It attempts the organic act of forming three new states with three new constitutions, not a set of changes to an existing constitution expected to continue in force. These ultimate acts of popular sovereignty — ordaining and establishing new governments — can only be accomplished by the people exercising their full sovereignty in a state constitutional convention. *Livermore v. Waite*, 102 Cal. 113, 117-18 (1894).

The Measure Does Not Satisfy the Admissions Clause

The measure fails to satisfy the federal requirements for subdivision. Article IV, section 3 of the U.S. Constitution requires approval from the state legislature and Congress to create new states:

"New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."

The measure purports to satisfy the requirement that an existing state's legislature consent to subdivision by providing that passage represents "legislative consent ... given by the people." That is inadequate.

The electorate and legislature are distinct political entities, and neither the California nor the U.S. high courts have interpreted their respective constitutions to equate a state's legislature with its electorate in this context. Although the electorate exercises some legislative power through the initiative process, *Professional Engineers* at 1038, the electorate and the legislature are constitutionally distinct entities, and the admissions clause specifically refers to the "legislature" of a state. The measure's attempt to sidestep this requirement fails.

Finally, the measure also violates the U.S. Constitution's guarantee clause (Art. 4, section 4) because it commandeers constitutional authority expressly delegated to state legislatures. *Cf. Morrisey v. State*, 951 P.2d 911, 916-17 (Colo. 1998) (initiative directing state legislature to propose federal constitutional amendment violated guarantee clause because it "usurp[ed] the exercise of representative legislative power").

Conclusion

This is not Draper's first attempt to break California: First six new states (twice), and now three. It's time for some public-spirited member of the bar to step up, and challenge this measure. Show Draper that we are one state, indivisible. Save California.

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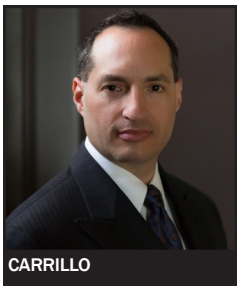
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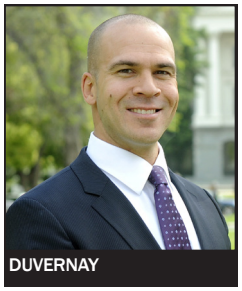
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