S198387

NO. S _____

IN THE SUPREME COURT OF CALIFORNIA

JULIE VANDERMOST

Petitioner,

vs.

DEBRA BOWEN, SECRETARY OF STATE
OF CALIFORNIA

Respondent.

VERIFIED PETITION FOR EXTRAORDINARY RELIEF IN THE FORM OF MANDAMUS OR PROHIBITION EMERGENCY STAY REQUESTED; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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INTRODUCTION

1. This Petition seeks relief under Proposition 20, Article XXI, § 3 upon the submission of sufficient raw signatures on the referendum against the Citizen's Redistricting Commission's certified Senate maps to establish that it is "likely to qualify and stay" the implementation of the challenged maps for the 2012 elections.

2. The Petitioner has "played by the rules," by presenting referendum petitions within the 90-day deadline which on their face have sufficient signatures to qualify and stay implementation of the Commission certified map, as provided for in the Constitution and amplified by Propositions 11 and 20. These Proposition 11 and 20 rules were put in place in 2008 and 2010 to avoid the situation arising from the Court's decision in *Assembly v. Deukmejian* – some 30 years ago – in which the Court imposed a partisan plan promptly rejected by the people. In doing so, the Court negated the People's referendum power.

3. If the Court declines to act, the People's special reservation of their right of referendum, established in law more than a century ago and enhanced by two ballot measures, will mean nothing in redistricting, even though Petitioner has conformed to all of the referendum rules set out in the Constitution, and in Propositions 11 and Proposition 20.

4. Petitioner understands that the qualification of this referendum will place a special burden upon the Court. Fortunately, the Petitioner has proposed two interim procedural remedies to aid the Court's exercise of its authority under Proposition 20, and three options for Court action to provide interim lines for 2012 elections, which the Court should evaluate with the assistance of an expert or special master now, even before the referendum qualifies for the ballot.

5. The two interim procedural remedies are: First, issue an order to the Secretary of State, immediately or upon determination that the

referendum petitions contain enough signatures at the random sample stage, to suspend the "in lieu petition filing" for 20 State Senate offices only, the filing period for which opens on December 30, 2011. These "in lieu petitions" affect only the amount of candidates' filing fees payable, not their access to the ballot. Second, appoint an expert or Special Master (not three retired judges) to begin the process of determining interim Senate districts for 2012.

6. The Petitioner proposes herein several interim remedies that the Court could implement when the referendum qualifies for the ballot: (1) That the Court consider imposing the current 2001 Senate District lines for the 2012 elections in the 20 odd-numbered Senate Districts only, which would require little time and money to implement; (2) if the Court believes those districts, even if unconstitutional under equal population standards cannot be implemented for interim purposes, that the Court "nest" within each Senate District two of the Assembly Districts approved by the Citizens' Commission. These districts have not been challenged by litigation or by referendum, meet constitutional criteria, and several different "nesting" options could be evaluated that meet all constitutional criteria with minimal adjustments. This option also would require little time and money to implement.

7. Approximately 710,000 California residents have signed Petitioner JULIE VANDERMOST'S referendum petition against the Citizens' Redistricting Commission's ("Commission") certified Senate maps. Petitioner VANDERMOST "presented" her referendum petitions to the Secretary of State, pursuant to Article XXI, section 2(i) and Article II, section 9(b), within 90 days after the enactment date of the Senate maps, by filing these signed petitions with California county election officials between November 9 and 13, 2011. The petitions contain sufficient "raw" signatures to suspend temporarily the implementation of the California

State Senate Maps that were adopted on August 15, 2011 by the Commission pursuant to the Commission's mandate under Article XXI, section 2 of the California Constitution to redistrict California following the decennial census of 2010.

8. The petition seeks a writ of mandate or prohibition directed to California Secretary of State DEBRA BOWEN, the Chief Elections Officer of the State of California, declaring the Senate maps have been stayed from implementation, and prohibiting the Secretary of State and county election officials acting at her direction from implementing such Senate maps for the June 5, 2012 primary election, until new interim Senate maps have been implemented by this Court. (Article XXI, section 3(b).)

9. Proposition 20, Article XXI, section 3(b)(3), authorizes the Petitioner to seek "relief" from this Court where the Petitioner's referendum petition is "likely to qualify and stay" the implementation of the Commission's certified Senate map from going into effect.

10. When the Petitioner's referendum qualifies for the ballot, staying the use of the Commission-certified Senate districts, only the existing 2001 Senate districts enacted by the Legislature would remain in effect, unless this Court orders other lines to be used for the 2012 elections. The Court may consider several options:

(A) Using the existing odd-numbered 2001 Senate Districts that would be up for election in 2012 on an interim basis, which also can be accomplished expeditiously and without map adjustments.

(B) Nesting of two whole Assembly Districts from the unchallenged Commission-certified Assembly District maps, within one Senate District, in the manner suggested in the Simple Nesting Plan herein, which can be accomplished expeditiously and without map adjustments; or

(C) Fashioning at least a partial new map that addresses deficiencies previously cited in the Commission's Senate map, but without redrawing of the entire state.

11. The process requested in paragraph 4 will best ensure timely and speedy implementation of the Article XXI, section 3(b)(3) and section 2(j) constitutional mandate to implement "interim" boundaries upon qualification of Petitioner's referendum, which stays the use of the Commission certified Senate maps.

12. Adopting the Commission's Senate maps, which are automatically stayed by the presentation of the Petitioner's referendum petitions containing a sufficient number of signatures to qualify the referendum for the ballot would obliterate the People's right of effective referendum which they strengthened by enacting Propositions 11 and 20, and would embroil the Court in the political thicket.

13. Unless this Court issues a writ of mandate, Respondent Secretary of State DEBRA BOWEN, who has stated she may nonetheless implement the Commission-certified Senate maps in order to avoid interference with the 2012 elections, may in fact implement the Senate District maps that have been stayed by the "presentation" of sufficient petition signatures on the Petitioner's referendum petition to the Secretary of State within the 90 day referendum deadline.

PARTIES

14. Petitioner JULIE VANDERMOST (hereinafter "Petitioner") is a resident and registered voter in Orange County. Petitioner is the proponent of a referendum against the Commission's certified Senate map. (Attorney General Ref. # 11-0028.) (See Petitioner's Request for Judicial Notice ("RJN"), "Petitioner's Request for Referendum title and summary, Attorney General's title and summary (Attorney General Ref. # 011-0028 and Secretary of State Release re Referendum #11-0028/1499, RJN,

Exhibit "A", pp. 001-050, incorporated by reference herein.).) Petitioner VANDERMOST caused to be timely presented to the Respondent, through county election officials, about 710,000 signatures on the referendum petition between November 9 and November 13, 2011.

15. Respondent DEBRA BOWEN ("Respondent") is the Secretary of State of the State of California and is sued in her official capacity. Respondent is the chief elections officer of the State of California and is responsible for certifying and implementing statutes that have been suspended by a lawfully qualified referendum petition, certifying statewide referendum measures for the ballot, directing county election officials to implement the precincting of the Senate District Maps, and preparing, printing, and mailing the state ballot pamphlet for each statewide election, all of which are paid for by taxpayer funds.[1] Respondent BOWEN has issued a summary of the "raw count" totals of petition signatures ascertained by the county election officials to whom the Petitioner has presented referendum petitions. (Secretary of State #1499, "Random Sample Update", RJN, Exhibit "C," pp. 0057-0059, incorporated by reference herein.)

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[1] The CITIZENS REDISTRICTING COMMISSION, the official governmental body charged by Article XXI, § 2(a) of the California Constitution with redistricting California after the 2010 decennial census, has no role to play that relates to the relief to be provided by this Court upon qualification of a referendum petition. The Commission is only responsible for the defense of legal challenges concerning the constitutionality or legality of certified maps for the State Senate. (Art. XXI, § 3(a).) This Court on October 26, 2011 dismissed without comment Petitioner's substantive constitutional and legal challenge in *Vandermost v. Bowen, et al.*, Case No. S 196493. The Commission is neither a necessary nor an indispensible party. Its participation in this matter would be *ultra vires* as well as an illegal expenditure of public funds to affect a ballot measure under *Stanson v. Mott* (1976) 17 Cal.3d 206.

JURISDICTION AND VENUE

16. This Court has original and exclusive jurisdiction and venue over petitions for relief where a referendum has been presented to the Secretary of State concerning the Commission's certified maps pursuant to Article XXI, §§ 2(i) and 3(b) of the California Constitution.

GENERAL ALLEGATIONS

Proposition 11

17. On November 4, 2008, California voters adopted Proposition 11. Proposition 11 amended Article XXI of the California Constitution to substitute a newly-created Citizens Redistricting Commission in the place of the Legislature to "adjust the boundary lines" of State Legislative and Board of Equalization districts following each decennial census (Art. XXI, § 1) and provided that the Commission shall "conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines, [] draw district lines in accordance with the criteria in this article, [] and conduct themselves with integrity and fairness." (Art. XXI, § 2(b).)

Proposition 20

18. On November 5, 2010, California voters adopted Proposition 20, which established specifically the right of referendum against Commission-certified maps for each type of district (Art. XXI, § 2(i)), providing for a stay of the effectiveness of Commission maps against which a referendum petition is filed (Art. XXI, §3(b)(1) and (2)), and authorized a petition for interim "relief" if a referendum was "likely to qualify and stay" the timely implementation of any map. (Art. XXI, § 3(b)(3).) This provision of Proposition 20 addressed and clarified the rule for the Supreme Court to apply to resolve a conflict between the Supreme Court's

contrasting holdings in *Assembly v. Deukmejian* ("*Assembly*") (1982) 30 Cal.3d 638 and *Legislature v. Reinecke* ("*Reinecke I*") (1972) 6 Cal.3d 595.

A. In *Reinecke I*, the legislative process was truncated due to the Governor's veto of legislative drawn districts. This Court acknowledged that the existing legislative districts were unconstitutional under the equal protection clause of the 14th amendment, yet left the existing 1960s district lines in effect for the following 1972 elections, as "readily available apportionment plans" (*Reinecke I*, supra, 6 Cal.3d at p. 598) notwithstanding their unconstitutionality. Following the failure of the Legislature and Governor to agree on new district lines in 1973, the Court appointed three Masters who drew new district lines for the succeeding elections in 1974 through 1980. The Court required all districts, except those that had been elected under the 1960s district lines in 1972, to stand for election in the court-drawn lines in 1974. (*Legislature v. Reinecke* ("*Reinecke IV*") (1973) 10 Cal.3d 396.)

B. In *Assembly*, the legislative process was truncated due to the qualification of referenda. This Court, on a 4-3 vote, declined to draw interim district lines and instead put into place the Legislature's state legislative districts that had been subject to qualified referenda, on grounds the existing district lines (the only statutes that remained in effect) were unconstitutional under the equal protection clause of the 14th Amendment. The Court also declined to draw "interim" district lines for the June 1982 primary and November 1982 general elections on the grounds it lacked adequate time to do so. The three dissenting Justices in *Assembly*, (Justices Mosk, Richardson and Kaus) believed that the *Reinecke* course kept the Supreme Court out of the "political thicket" by not allowing the maps that were part of the "truncated" legislative process to be used while they were subject to popular referendum vote.

C. In *Wilson v. Eu (I)*, the legislative process was incomplete –district plans enacted by the Legislature having been vetoed by the Governor as in 1971– and was "truncated" in the same manner that qualification of a referendum truncates the redistricting process. This Court unanimously ordered Masters to draw legislative districts for the 1992 elections and the remainder of the decade. (*Wilson v. Eu (I)*, 54 Cal.3d 471, 474; see *Wilson, supra*, 1 Cal.4th at p. 712.)

D. Proposition 20 resolves the conflict between precedent by making clear that in the truncated redistricting process, the Court may consider using a Special Master or Special Masters to establish new district lines when they are stayed by a "likely to qualify" referendum. Proposition 20 adopts the referendum model that automatically stays a statute from going into effect until the referendum is voted on by the people.

E. The Supreme Court is required to "give priority to ruling on a petition for writ of mandate or prohibition filed pursuant to [section 3(b)(2)] whether on the merits of a substantive legal challenge or on petition for "relief" relative to a referendum "likely to qualify." (*Id.*)

19. Upon the filing of a petition asserting that a referendum petition is "likely to qualify and stay" the operation of the Commission's certified Senate map, the "court shall fashion the relief that it deems appropriate, including but not limited to, the relief set forth in section 2(j) of Section 2." Section 2(j) provides that this relief is "for an order directing the appointment of special masters to adjust the boundary lines of that map in accordance with the redistricting criteria and requirements set forth in subdivisions (d)[the criteria], (e)[Commission shall not take candidates' residence or party affiliation into account], and (f) [consecutive numbering of districts from north to south]."

The Attorney General's Title and Summary of the Petitioner's Referendum Petition

20. On August 16, 2011, Petitioner VANDERMOST filed a request with the California Attorney General for title and summary for a referendum against the Resolution and Senate Map certified by the Commission on August 15, 2011. (RJN, Exhibit "A", pp. 001-042.)

21. On August 26, 2011, the California Attorney General issued a title and summary for the referendum against the Resolution and Senate Map certified by the Commission and assigned it an official number (No. 11-0028). (RJN, Exhibit "B", pp. 051-056.) The Attorney General issued the following Title: REFERENDUM TO OVERTURN STATEWIDE SENATE MAP CERTIFIED BY THE CITIZENS REDISTRICTING COMMISSION. The Attorney General wrote in her Summary of the measure: "This referendum petition, if signed by the required number of registered voters and filed with the Secretary of State will: (1) Place the revised state Senate boundaries on the ballot and prevent them from taking effect unless approved by the voters at the next statewide election; and (2) *Require court-appointed officials to set interim boundaries for use in the next statewide election.*" (Italics added.)

22. The CITIZENS REDISTRICTING COMMISSION urged the Attorney General to take out the second point of her Summary set forth in the italicized language above. (Letter from George Brown, Esq. and James Brosnahan, Esq. to George Waters, Deputy Attorney General, dated August 29, 2011, Declaration of Charles H. Bell, Jr., Exhibit "A", pp. 001-004) The Attorney General declined to do so. (Letter from George Waters, Deputy Attorney General to George Brown, Esq. and James Brosnahan, Esq. dated August 30, 2011, Declaration of Charles H. Bell, Jr., Exh. "B", pp. 005-006.)

23. The Proponent VANDERMOST performed the very difficult task of obtaining about 710,000 signatures in just 90 days relying on the title and summary of the Attorney General that the Commission maps would be stayed and "court appointed officials" would "set interim boundaries for use" in the 2012 election.

The Petitioner's Referendum

24. Petitioner VANDERMOST circulated referendum petitions for signatures at the time of the filing of this Petition. Petitioner VANDERMOST has collected approximately 710, 000 signatures which she "presented to the Secretary of State," through county election officials in the fifty eight California counties, between November 9 and 13, 2011. Pursuant to Elections Code § 9030(b), the county election officials must provide the "raw count" or total number of signatures submitted for verification, to the Secretary of State within eight working days. The Petitioner has submitted the Secretary of State's raw count total to the Court. (RJN, Exhibit "C".) This 710,000 signatures, more or less, is 140% of the 504,760 valid signatures required to qualify the Referendum (Attorney General No. 11-0028, and Secretary of State #1499), for the next statewide general election or special statewide election ballot. The Petitioner's referendum is highly likely to qualify for the next regularly scheduled statewide election. (Cal. Const., art. II, § 9(c); SB 202 (Ch. 558, Stats. 2011).)

25. Petitioner further alleges, based on information and belief, that Respondent will also order that the referendum to appear on the next scheduled statewide election, which is November 6, 2012. (See Cal. Const., art. II, § 9(c); and SB 202 (Ch. 558, Stats. 2011)[requiring initiative and referendum measures qualified after July 1, 2011 that would otherwise have been placed on the June 5, 2012 statewide ballot to be placed instead on the November 6, 2012 general election ballot.].)

26. Pursuant to Article II, section 9(a) of the California Constitution, the Petitioner's timely presentation to the Secretary of State of a sufficient number of raw signatures exceeding the maximum required signatures for qualification of the referendum temporarily and upon full qualification permanently stays the use of the Commission-certified Senate maps, which cannot be used as boundaries for the State Senate elections commencing with the primary election on June 5, 2012 and for the general election on November 6, 2012.

27. At that time, only the existing 2001 Senate lines enacted by the Legislature (Elections Code, §§ 21100-21140) will remain in effect and must be used in the place of the Commission-certified Senate maps whose use has been stayed, unless the Court determines that another option, including one of those proposed by the Petitioner herein, should be used instead.

28. The Court's implementation of the Commission-certified Senate maps in the face of a qualified referendum staying their use would disregard the constitutional referendum process that the people in enacting Propositions 11 and 20 provided as their backstop against potential abuse of the citizen redistricting process or its infection by partisan bias. Moreover, such a course of action would place the Court in the very "political thicket" that courts should avoid.

29. Petitioner VANDERMOST believes the Senate maps were created to further a partisan purpose or effect, and that they fail to meet the Commission's mandate to enact constitutional and impartial districts, and that to implement the referred map would place the Court in exactly the position it found itself in 1982. Following the Court's adoption of the referred 1982 maps, they were rejected four months later by the voters. (See Secretary of State "California Referenda 1912-Present," Items 48-50, p. 3; at < http:/ /www.sos.ca.gov/elections/ ballot-

measures/pdf/referenda.pdf> (last visited November 14, 2011).) The Court itself became a political issue, and this helped lead to the rejection of then Chief Justice Rose Bird and two other justices in the 1986 retention election.

FIRST CAUSE OF ACTION

Likely Qualification of Referendum, Stay of Challenged Senate District Maps, And Petition for Relief: Convening Special Masters to Establish Interim District Lines (Art. XXI, §§ 3(b)(2), 3(b)(3), 2(g), 2(j))

30. Petitioner re-alleges and incorporates by reference the allegations set forth in paragraphs 1through 29, inclusive above.

31. Petitioner VANDERMOST's referendum petition against the Commission-certified Senate maps is "likely to qualify" and stay the effectiveness" of the Senate maps, pending a public vote at the November 6, 2012 statewide general election.

32. The Respondent DEBRA BOWEN has already initiated steps with the county election officials to implement by December 16, 2011 the Commission-certified Senate maps that are the subject of the Petitioner's referendum petition (Secretary of State's County Clerk/Registrar of Voters Memorandum #11122, "Cal Voter 2011 Redistricting Process", RJN Exhibit "D", pp. 0060-0066), and has argued in her preliminary opposition to the Petitioner's Petition for Extraordinary Relief in the Form of Mandate or Prohibition in *Vandermost v. Bowen, et al.*, S 196493, that the Court should impose the Commission's plan notwithstanding a possible referendum stay, so as not to interfere with the conduct of the 2012 elections. (Bowen Prelim. Opp., pp. 9-10.)

33. Upon the filing of the referendum petitions with a sufficient number of raw signatures with election officials, the Petitioner seeks "relief" in the form of an order establishing an expert, a Special Master or

Masters to establish interim boundaries for the Senate districts for use in the June 5, 2012 primary and the November 6, 2012 general elections. (Art. XXI, §§ 3(b)(2), 3(b)(3) and 2(j).)

34. The Court, or an expert or Special Master or Masters can expeditiously establish new boundaries for the Senate maps, using "readily available" redistricting plans, in two particular ways, including but not limited to:

A. Using the 2001 district lines for the 2012 elections only, in the manner employed by this Court in *Reinecke v. Legislature* ("*Reinecke I*") (1972) 6 Cal.3d. 595). In that case, the Court imposed the 1960s district lines for the odd-numbered districts that were up for election in 1972. This action would only affect odd-numbered Senate districts up for election in 2012. The even-numbered Senate districts will not be affected by any action of this Court as they remain in effect through 2014.

B. Using the unchallenged State Assembly maps certified by the Commission as a basis for nesting two Assembly Districts to create new boundaries for Senate districts pursuant to the constitutional criterion of Art. XXI, § 2(b)(6). The Petitioner herein submits a Simple Nesting Plan that uses the unchallenged Commission Assembly districts to form Senate districts. These districts are numbered so that that those with the greatest population in currently odd-numbered districts (to be elected in 2012) are given odd numbers.

The Court could also redraw some but not all of the Senate Districts as demonstrated by the Petitioner's expert, Dr. T. Anthony Quinn's Model Constitutional Plan. (Quinn Dec., Exhibit "C".)

35. In 1991, this Court requested the Secretary of State to provide the Court with information and recommendations on the compression and/or waiver of certain election requirements and filing schedules for the 1992 primary election. (*Wilson v. Eu ("Wilson II")* (1991) 54 Cal.3d 546,

550.) This procedure is available to allow the Court to ensure that it has sufficient time to establish a schedule for the appointed expert or Special Masters to draw new boundaries for the June 5 and November 6, 2012 elections, to receive comments on the proposed boundaries and for this Court to review and adopt, either as proposed or as amended, such new boundaries.

36. In the event this Court determines there is insufficient time for the drawing of interim boundaries for the Senate, the Court should evaluate whether it should follow the guidance of *Reinecke* and the three dissenting Justices in *Assembly,* and leave in place for the 2012 elections, pending the outcome of the popular vote on Petitioner VANDERMOST's referendum, the existing boundaries of the Senate that have been used for the 2002, 2004, 2006, 2008, and 2010 elections.

ISSUANCE OF A WRIT OF MANDATE IS APPROPRIATE

37. A writ of mandate is also appropriate here because this action concerns constitutional rights and involves a matter of great public importance that necessitates prompt resolution. (*See, e.g., Brown v. Superior Court* (1971) 5 Cal.3d 509, 515 [granting writ to restrain election law violations because "[t]he public welfare thus requires an early resolution which can be achieved only by mandamus in the interest of orderly compliance with and administration of the particular laws".].)

38. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law on the First Cause of Action, in that no damages or other legal remedy could compensate Petitioner and the voters and taxpayers of California for the harm that they will suffer if Respondent is not ordered to refrain from certifying or implementing the challenged Senate district maps.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays for judgment as follows:

1. For immediate preliminary interim relief, that this Court:

(A) Issue an order directed to the Secretary of State suspending the requirement and filing period for "in-lieu petition" filing for only for candidates for State Senate in the odd-numbered districts up for election in June 2012; and

(B) Appoint an expert or special master to advise and assist the Court in preparing to provide interim boundary adjustments, if necessary, for the odd-numbered or all State Senate districts either by (a) using the existing odd-numbered 2001 districts; or (b) nesting the unchallenged Assembly districts; or establishing alternate, Court-drawn boundaries.

2. Upon qualification of the Petitioner's referendum petition: On the First Cause of Action, that this Court issue its alternative and peremptory writ of mandate commanding Respondent Debra Bowen, in her capacity as Secretary of State of the State of California, to (a) refrain from Implementing the Citizens Redistricting Commission's certified Senate map; (2) refrain from taking any other action implementing the Citizens Redistricting Commission's certified Senate maps, on the grounds that the implementation of the Commission-certified Senate maps are stayed pursuant to Article II, section 9(a) and Article XXI, section 2 (i); and that implementation of that Senate map would therefore be unconstitutional.

3. On the First Cause of Action, that this Court establish new interim State Senate District boundaries either by (a) using the existing odd-numbered 2001 districts; or (b) nesting the unchallenged Assembly districts; or establishing alternate, Court-drawn boundaries. Upon approval of the boundaries, and direct the California Secretary of State to

implement the new boundaries for the June 5, 2012 primary election and the November 6, 2012 general election.

4. That this Court grant Petitioner's costs, including out-of-pocket expenses and reasonable attorneys' fees; and

5. That this Court grant such other, different or further relief as the Court may deem just and proper.

Dated: November 25, 2011

Respectfully Submitted,

BELL, McANDREWS & HILTACHK, LLP

Charles H. Bell, Jr.
Thomas W. Hiltachk
Colleen C. McAndrews
Brian T. Hildreth
Ashlee N. Titus

By: _____
Charles H. Bell, Jr.
Attorneys for Petitioner
JULIE VANDERMOST

VERIFICATION

I, Julie Vandermost, declare:

I am the Petitioner herein. I have read the foregoing Petition for Extraordinary Relief in the Form of Mandate or Prohibition and know its content. The facts alleged in the Petition are within my knowledge and I know these facts to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on November 15, 2011, at San Juan Capistrano, California.

Julie Vandermost

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

INTRODUCTION

I. THE PETITIONER SUGGESTS OPTIONS TO KEEP THE COURT OUT OF THE POLITICAL THICKET, AVOID NEGATING THE REFERENDUM POWER EXERCISED BY THE PEOPLE, AND EFFECTIVELY ESTABLISH INTERIM SENATE DISTRICT BOUNDARIES FOR THE JUNE AND NOVEMBER 2012 SENATE ELECTIONS

The Petitioner is well aware of the predicament presented by the People's exercise of their reserved referendum power, a power they specifically applied to the redistricting process in Propositions 11 and 20.

The Court would enter the "political thicket" and negate the People's effort to exercise the referendum power by simply ordering the Citizens Redistricting Commission's Senate maps into effect for the very election at which the people seek a vote against them. The Court also faces time and option constraints. However, viable solutions exist that will enable the Court to avoid the "political thicket," respect the referendum power exercised by the People, and effectively establish interim Senate District boundaries for the June and November 2012 Senate Elections.

In 1972, the Supreme Court, in *Legislature v. Reinecke*, 6 Cal.3d 595, 598, faced a situation somewhat analogous to what it faces today. The Democratic-controlled Legislature in 1971 had passed redistricting plans that Republican Governor Reagan had vetoed. Democrats petitioned the Court to impose the Legislature's plans despite the Governor's veto; Republicans called on the Court to impose a plan drawn by a Republican-dominated commission.

The Court did neither. It simply kept the old legislative lines which it described as "readily available apportionment plans" (*Id.*), in effect for one more election cycle while encouraging the Legislature and Governor

to enact a redistricting plan in 1972 or 1973. When they failed to do so, the Court appointed Special Masters to redistrict for the decade of the 1970s. This decision has come down through the decades as a wise decision that kept the court out of the political thicket.

In 1981, the Court faced a similar situation. The Legislature's plans, signed by the Governor, were subject to referenda. Democrats encouraged the Court to impose the Legislature's referred plans as the temporary plans for the 1982 election cycle. Republicans encouraged the Court not to do so. In *Assembly v Deukmejian*, the Court, in a four to three decision authored by Chief Justice Rose Bird, temporarily imposed the Legislature's plans on the grounds that the old districts could not be used because they were unconstitutional, the Court had no time to fashion new districts, and using the plan enacted by the Legislature was the "least disruptive course." (30 Cal.3d at p. 674.)

This decision resulted in a very strong dissent from Justice Frank Richardson, joined in by Justices Stanley Mosk and Otto Kaus:

> Today, and by the thinnest of margins, the majority accepts as its own and in its entirety, a legislative package, the validity of which is under very serious referendum challenge. It does so in the face of a pending election in which the people of this state will, in just over four months, make a final and definitive judgment on the propriety of this very legislation. The majority is not compelled to do so. It acknowledges, as it must, that the qualification of the referenda for the June 1982 ballot has the effect of fully staying the operation of the 1981 legislation. Nonetheless, the majority completely disregards this stay and imposes upon the people of California a state legislative reapportionment plan which has been stopped dead in its tracks by operation of law and which is heavily veiled in a cloud of political uncertainty. The majority's adoption of this plan prejudges the result and its action can only be perceived as an official alignment of the court with one side in a partisan dispute as to which we should remain scrupulously neutral.

(*Assembly v Deukmejian, supra*, 30 Cal.3d at p. 680.)

Justice Mosk himself wrote a strong separate dissent:

> I join Justice Richardson's concurring and dissenting opinion. His position is irrefutable. Nevertheless, a bare majority of this court have become entangled in the "political thicket" by ignoring their obligation of neutrality on a partisan issue, a neutrality that can be observed only by maintenance of the status quo in legislative districting until the people speak at the forthcoming election. Legislature v. Reinecke (1972) 6 Cal.3d 595 [99 Cal.Rptr. 481, 492 P.2d 385], written by Chief Justice Wright and concurred in by a unanimous court, charts the course we should follow.

(*Assembly v Deukmejian, supra,* 30 Cal.3d at p. 693.)

The dissents by Justices Richardson and Mosk were prophetic; the consequences of the Court's 1982 decision were very damaging to its reputation. Just four months later, the people rendered their verdict on the referred plans the Court had imposed, by overwhelmingly defeating each of them. (Senate Reapportionment, Proposition 11, June 8, 1982, 62.2 percent "no'; Assembly Reapportionment, Proposition 12, June 8, 1982, 62.1 percent "no.", Source: Secretary of State Statement of the Vote, June 8, 1982.)

Thus, California's 1982 legislative elections were conducted in districts imposed by the Supreme Court that the people had themselves specifically rejected. Political attacks on the Court for this decision continued for several years and it was a factor in the decision of Republicans and others to oppose the reconfirmation of Chief Justice Bird in the 1986 confirmation fight.

The political situation in 2011 is analogous to 1981. Republicans have sponsored and funded the referendum against the Commission's Senate plan. While Republicans are satisfied that the Commission drew a fair Assembly plan, that satisfaction does not apply to the Senate plan. The

media have commented on a number of times that the Commission may have "delivered a two thirds majority in the Senate" to the Democrats. (See, for instance, "Democrats on California's Central Coast were handed a rare prize last week when the Citizens Redistricting Commission created a Senate district with no incumbent and a 12-percentage point Democratic voter registration edge," *Ventura County Star*, August 2, 2011; "Based on voter registration numbers in the new districts, strong Democratic candidates could win an additional three seats in the upper house in 2012, giving them a two thirds majority," *Sacramento Bee*, October 31, 2011.) Republicans have been dissatisfied with the Commission's Senate lines for these reasons.

The Court need not involve itself in any way in this political controversy. The Proponent, this Petitioner, has presented three avenues that allow the Court to remain scrupulously neutral in this political conflict while providing temporary district lines as needed for the 2012 election.

In June 2012, voters will choose candidates to run in the 20 odd-numbered Senate seats. Under the "top two" runoff that will be in effect, 40 candidates will contest in November for the 20 Senate districts. If they are running in the Commission's lines, these 40 candidates will have a vested interest in seeing that the Commission's districts remain in effect for the decade. This will place those attempting to defeat the Commission's map at a distinct political disadvantage.

This is a different situation than the Court faced in1982 since the referendum election was on the June ballot and the maps were rejected at the same time as candidates were nominated. That is because the people will not be given an opportunity to pass on this referendum until November 2012. The enactment of Senate Bill 202 moves all citizen ballot measures qualified after July 1, 2011, to the November ballot. With the referendum

vote on the November ballot, runoff candidates will be contesting for the 20 districts by that time.

The Proponent JULIE VANDERMOST asks only that there be a free and fair election to decide the fate of the Commission's maps, unencumbered by politicians seeking office under those maps. Adopting the Commission's Senate Districts would effectively stamp the Court as an agent for one political party and seriously damage the other political party. This is the political thicket the Court successfully avoided in 1972 and 1991.

II. ARTICLE XXI, §3(B)(1) AUTHORIZES THIS COURT TO EXERCISE SUCH JURISDICTION WITH RESPECT TO SUBSTANTIVE CHALLENGES TO THE COMMISSION'S SENATE MAP AND WHEN A REFERENDUM IS LIKELY TO QUALIFY AND STAY IMPLEMENTATION OF THE SENATE MAP

Propositions 11 and 20 amended Article XXI of the California Constitution to authorize "any voter" to challenge the validity of the Commission's Senate map in this Court. Moreover, Article XXI, section 3(b)(2), provides that "the California Supreme Court shall have original and exclusive jurisdiction in all proceedings in which a certified final map [of the Commission] is challenged or is claimed not to have taken timely effect."

The Court "shall give priority to ruling on a petition for a writ of mandate or a writ of prohibition filed pursuant to paragraph [3(b)] 2."

III. ARTICLE XXI, §3(B)(3) PROVIDES AS THE EXPRESS FORM OF RELIEF CONVENING SPECIAL MASTERS TO DRAW NEW BOUNDARIES FOR THE SENATE MAPS

A. The Referendum Stay and Right of "Relief"

The Petitioner's timely submission of a qualified referendum to the Secretary of State stays the effectiveness of the Commission-certified Senate maps.

Under the Elections Code, the County Registrars have 8 working days (excluding weekends and holidays) to count the "raw" total number of signatures submitted on petitions filed in their respective county and to notify Respondent Secretary of State. (Elec. Code, §9030(b).) On November 23, 2011, the Respondent Secretary of State determined that the petition contains at least 504,760 signatures, and she ordered the Registrars to examine and verify the validity of the signatures presented during the next 30 working days (Elec. Code, § 9030(d)) and 2)(RJN, Exhibit "C", pp. 0057-0059) this immediately suspends the operation of the Commission-certified Senate maps until such time as the signature verification process is complete. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 697, citing *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 654-57.)

Once the County Registrars have confirmed that the Petitioner has submitted at least 504,760 valid signatures, the suspension of the statute will remain in place and Respondent Secretary of State will then order that the referendum appear on the next scheduled statewide election, which is November 6, 2012. (Cal. Const., art. II, § 9(c); Ch. 558. Stats. 2011.)

The Proposition 20 amendments to Proposition 11 guaranteed the right of referendum, and made clear that upon likely qualification of the referendum, the effectiveness of the challenged map is stayed until after the referendum election. The Attorney General's title and summary (RJN, Exhibit "B", pp. 051-056) reflects that interpretation. "Any voter" can

petition the court for "relief," which may be to convene special masters to draw interim lines for the plan that is subject to referendum. The use of the term "relief" in both sections 3(b)(2) and 3(b)(3), with the latter cross-referencing of section 2(j) in section 3(b)(3), authorizes the Supreme Court to order a Special Master or Masters to draw "interim" boundary lines for the Senate.

Article XXI, § 3(b) was amended by Proposition 20 to add the italicized language:

> (b)(1) The California Supreme Court has original and exclusive jurisdiction in all proceedings in which a certified final map is challenged *or is claimed not to have taken timely effect.*

Under Article II, § 10(a), a referendum statute is superseded upon the "presentation" of sufficient petition signatures to the Secretary of State and does not take effect until the day after the election on the referendum. Thus, in addition to providing that the Supreme Court has jurisdiction, the language of Article XXI, § 3(b) also makes clear that the Court's authority arises when a referendum petition is likely to qualify and at that point the map "is claimed not to have taken timely effect."

Article XXI, § 2(i) provides:

> *Each certified final map shall be subject to referendum in the same manner that a statute is subject to referendum pursuant to Section 9 of Article II.* The date of certification of a final map to the Secretary of State shall be deemed the enactment date for purposes of Section 9 of Article II.

Article XXI, § 3(b)(2) provides:

> Any registered voter in this state may file a petition for a writ of mandate or writ of prohibition, within 45 days after the Commission has certified a final map to the Secretary of State, to bar the Secretary of State from implementing the plan on the grounds that the filed plan violates this

> Constitution, the United States Constitution, or any federal or state statute. *Any registered voter in this state may also file a petition for a writ of mandate or writ of prohibition to seek relief where a certified final map is subject to a referendum measure that is likely to qualify and stay the timely implementation of the map.* (Italics and underlining added.)

This language provides that a voter's writ petition is to "seek relief." The last part of the sentence says that relief can be sought when a referendum is likely to qualify. The use of "qualify and stay" makes clear that the map's effectiveness is stayed upon likely qualification of the referendum and *that stay is automatic.*

Section 3(b)(3) provides that this Court "shall give priority to ruling" on a petition for writ of mandate:

> "The California Supreme Court shall give priority to ruling on a petition for a writ of mandate or a writ of prohibition filed pursuant to paragraph (2). If the court determines that a final certified map violates this Constitution, the United States Constitution, or any federal or state statute, the court shall fashion the relief that it deems appropriate, *including, but not limited to, the relief set forth in subdivision (j) of Section 2.* (Italics added.)

B. The Attorney General's Title and Summary of Referendum 11-0028 Recognizes that Qualification of the Referendum Will Require the Court to Draw Interim Boundary Lines for the State Senate

The Attorney General's title and summary of the Petitioner's Referendum noted specifically that "This referendum petition, if signed by the required number of registered voters and filed with the Secretary of State will: (1) Place the revised state Senate boundaries on the ballot and prevent them from taking effect unless approved by the voters at the next statewide election; and (2) *Require court-appointed officials to set interim boundaries for use in the next statewide election*" (Italics added.) (Pet., ¶ 21.)

The Citizens Redistricting Commission urged the Attorney General to take out the second point of her Summary set forth in the italicized language above. (Declaration of Charles H. Bell, Jr., Exh. "A".) The Attorney General declined to do so. (Declaration of Charles H. Bell, Jr., Exh. "B".) (Pet., ¶ 22.)

As this Court and the appellate courts have noted, the Attorney General's title and summary is to be accorded deference, and her opinions given great weight, particularly where the Attorney General provides advice to agencies on interpretation of the Constitution and laws. (*Moore v. Panish* (1982) 32 Cal.3d. 535.) Moreover, the Attorney General's title and summary is presumed to be valid, to ensure that the public is not misled about the import of its acts in proposing initiatives or referring statutes passed by the Legislature (and here, maps certified by the Commission). As the Court of Appeal summarized in *Lungren v. Superior Court* (1996) 48 Cal.App.4th 435:

> Of course, "[t]he Attorney General's statement must be true and impartial, and not argumentative or likely to create prejudice for or against the measure. [Citation.] The main purpose of these requirements is to avoid misleading the public with inaccurate information. [Citations.]" (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization,* 22 Cal.3d 208, 243, (1978).) The ballot title and summary "must reasonably inform the voter of the character and real purpose of the proposed measure." (*Tinsley v. Superior Court,* 150 Cal.App.3d 90, 108 (1983), citing *Boyd v. Jordan,* 1 Cal.2d 468, 472 (1934).) Still, " '[o]nly in a clear case should a title ... [or summary] be held insufficient.' " (*Brennan v. Board of Supervisors,* 125 Cal.App.3d 87, 92–93 (1981), quoting *Epperson v. Jordan* 12 Cal.2d 61, 66 (1938).)

(Lungren v. Superior Court (1996) 48 Cal.App.4th 435, 440, 55 Cal. Rptr. 2d 690, 693.)

The Petitioner and the approximately 710,000 persons who signed the Petitioner's referendum petition believe the Attorney General's title and summary accurately reflects the effect of qualification of the referendum.

C. This Article XXI Relief Reverses the Court's Action and Relief in *Assembly v. Deukmejian* With Respect to the Circumstance in Which a Referendum is Filed and is "Likely to Qualify and Stay" the Effectiveness of the Senate Maps

The Proposition 20 amendment to Proposition 11 and Article XXI vitiate the main holdings with respect to the referendum stay power in *Assembly v. Deukmejian* (1982) 30 Cal.3d 638. In *Assembly*, this Court on a 4-3 vote declined to give effectiveness to the referendum stay provisions of Article II, sections 9 and 10 of the California Constitution in the face of qualified referenda against three Legislative redistricting plans, and imposed for the election of 1982 the Legislatively-drawn state district plans for the Senate and Assembly pending the referendum, on the grounds that the Court had insufficient time to draw alternative maps. The three redistricting plans subject to referendum were rejected by the voters at the June 1982 primary election.

Article XXI, §§ 3(b) and 2(j), read together, mandate the Court to act promptly, to make final substantive legal determinations as to the Petitioner's invalidity claims, and to fashion speedy and appropriate relief as it deems appropriate, using a Special Master or Masters (as the Court had done in 1973 and 1991) when the redistricting process has been "truncated", that is, left incomplete.

IV. THE COURT NEED NOT APPOINT RETIRED JUDGES AS COURT MASTERS

In 1973 and 1991, the Supreme Court faced the situation that the Governor had vetoed the Legislature's redistricting plans. The plans were

dead for the decade. Thus, the Court had to appoint Masters to craft a full plan for the coming decade. This is not the case here. The Commission's Senate map is only stayed until the people vote whether to accept or reject the Commission's Senate maps in 2012. It will suffice for the Court to appoint its own expert and task that person with evaluating options or devising an interim plan for use in the 2012 election.

This Court should direct the Commission to make available to that expert all the transcripts to the public hearings at which the Commission sought advice on how to fashion its maps. The expert could then decide if additional public hearings are necessary.

The Court should also direct the Commission to provide its expert with whatever technical services are necessary to fashion the map so the counties may conduct the 2012 election under the interim plan.

V. REMEDIES AVAILABLE TO THE COURT

The Petitioner has prayed for relief as follows on the grounds that the Court expeditiously could implement new boundaries for the Senate maps. There is an easy way for the Court to provide for an interim map for this one election. Petitioner has suggested remedies that require very little expert advice, will take little time, and will cost the court a minimal amount to implement:

A. Using the existing odd-numbered Senate Districts established in 2001, would also be an expeditious method of establishing Senate District lines that would impose no burden or time to implement by election officials, could be used on an interim basis without impacting Sections 2 or 5 of the federal Voting Rights Act. Dr. T. Anthony Quinn herein submits an analysis of the current district populations, the extent they deviate from the population norm, and the overall state population changes over the past several decades.

B. Nesting two, whole unchallenged Assembly districts drawn by the Commission within in a single, whole Senate district would allow the Court to expeditiously establish new Senate Districts. The Petitioner herein proposes, for the Court's consideration, a "Simple Nesting Plan" that does exactly that.

C. Partially redrawing the Commission's Senate map. This referendum was launched and is now successfully filed because of dissatisfaction with the manner in which the Commission drew its Senate map. Not all districts, however, need to be redrawn to provide an adequate interim plan. Proponent previously submitted a Model Constitutional Plan and that plan remains available for considerations by the Court's Master. A partial redraw can be done at little cost.

A. <u>The Simple Nesting Plan</u>

The use of the Simple Nesting Plan would expeditiously accomplish interim districting while fully respecting the People's right of referendum, avoiding the "political thicket" and meeting calendar requirements to establish interim boundaries for the 2012 elections. This approach would impose very little administrative burden on election officials who are tasked with preparing to conduct the 2012 legislative elections. The Petitioner's expert, Dr. T. Anthony Quinn, has prepared a declaration containing a Simple Nesting Plan that meets constitutional criteria and fully complies with the federal Voting Rights Act. (Quinn Dec., Exhibit "A".)

B. <u>The 2001 Senate Districts Option</u>

Upon stay of the Commission-certified Senate maps, only the existing 2001 Senate districts remain effective law. (Elections Code, §§ 21100-21140.) As set forth in the Declaration of the Petitioner's expert, Dr. T. Anthony Quinn, only the 20 odd-numbered Senate districts will be up for election in 2012. The 20-even numbered districts will remain unchanged until 2014. The voters will have an opportunity to accept for

reject the Commission's maps at the November 2012 election. If they accept the maps, the Commission maps will be used in 2014; if they reject the maps, the Court will need to appoint a Master to redo all the Senate districts for the decade. (Quinn Dec., ¶ 9.)

Thus, the only districts that could be affected by a Court decision to retain the old districts are the 20 odd-numbered districts. The 20 even-numbered districts will have new lines in 2014 regardless of what the Court does in 2011. The 20 even-numbered Senators would never run in the old districts under any circumstances. (Quinn Dec., ¶ 10.)

Should the Court decline to appoint "court-appointed officials" to devise an interim Senate plan for 2012, the Court has the option of simply leaving the current 2001-drawn districts in place for the 2012 election only. In so doing it would be following the precedent in *Legislature v. Reinecke*, and the course urged upon the Supreme Court by the three dissenting justices in *Assembly v. Deukmejian*. (Quinn Dec., ¶ 11.)

The *Reinecke* court wrote: "We believe that it will be far less destructive of the integrity of the electoral process to allow the existing legislative districts, imperfect as they may be, to survive for an additional two years than for this court to accept, even temporarily, plans that are at best truncated products of the legislative process." (*Reinecke I* (1972) 6 Cal.3d 595, 602.)

The Commission's Senate map is now part of a truncated process as a referendum has been filed against it.

In 1982, the Court in *Assembly v Deukmejian* chose not to follow the *Reinecke* precedent, and imposed a referred plan for the 1982 election. The Court noted that it has insufficient time to fashion interim maps the 1982 election, a situation not applicable here. But it also found that the old districts were unconstitutional due to massive changes in the state population. (Quinn Dec., ¶ 12.)

The *Assembly v. Deukmejian* Court wrote:

> "In the Senate, old Senate District 5 now contains 458,587 people, 22.5 percent less than the ideal number, while old Senate District 38 contains 904,725 people, 52.9 percent more than the ideal. Thus, the vote of a resident of former District 5 would be worth almost twice that of a resident of former District 38. The total deviation between the two districts is 75.4 percent. Real parties' figures show that the population of one old Senate district is more than 50 percent greater than the ideal; another is 41 percent greater than the ideal; 19 vary by 10 to 30 percent from the ideal; and 19 are within 10 percent of the ideal population size.
>
> "The Supreme Court has not established a rigid numerical limit for legislative districts. However, the high court has developed guidelines for permissible deviations. As summarized by one federal district court, a maximum deviation of less than 10 percent between the largest and smallest districts is permissible and need not be justified by the state. However, a maximum deviation of 10 to 16.4 percent is permissible only if the state can demonstrate that the deviation is the result of a rational state policy. A maximum deviation greater than 16.4 percent is intolerable under the equal protection clause."

(30 Cal.3d. at p. 667.)

This is not the situation found today. In 1982, the Court compared odd-numbered and even-numbered districts, which is a wrong comparison as the even-numbered districts, those elected in 2010 with terms running to 2014, will be unaffected by whatever action this court takes. (Quinn Dec., ¶ 13.)

In the case of the 20 odd-numbered Senate districts that come up for election in 2012, the percent deviation from largest to smallest is 38.7 percent; the largest district, Senate District 37, is over by 284,528 people, 30.5 percent, while the smallest district, Senate District 21, is under by

76,335, 8.2 percent. This is different than the population deviations cited in *Assembly v Deukmejian* because the state did not experience the dramatic population growth in the 2000 decade it did in the 1970 decade. (Quinn Dec., ¶ 14-16.)

The following are the current populations for the 20 odd- numbered Senate districts. The ideal Senate district population is 931,348:

SD 1:	1,002,597	(+71,249, 7.7%)
SD 3:	880,421	(-50,927, 5.4%)
SD 5:	1,032,613	(+101,265, 10.9%)
SD 7:	947,426	(+16,078, 1.7%)
SD 9:	878,605	(-52,743, 5.6%)
SD 11	876,710	(-54,638, 5.8%)
SD 13:	895,425	(-35,923, 3.8%)
SD 15:	903,066	(-28,282, 3%)
SD 17:	1,098,146	(+166,798, 17.9%)
SD 19:	911,685	(-19,663, 2.1%)
SD 21:	855,019	(-76,329, 8.2%)
SD 23:	899,067	(-32,281, 3.5%)
SD 25:	860,352	(-70,996, 7.6%)
SD 27:	857,163	(-74,185, 8%)
SD 29:	881,748	(-49,600, 5.3%)
SD 31:	989,662	(+58,314, 6.2%)
SD 33:	936,082	(+4,734, .5%
SD 35:	899,261	(-32,087, 3.4%)
SD 37:	1,215,876	(+284,528, 30.5%)
SD 39:	897,570	(-33,778, 3.6%)

Seventeen of the odd numbered districts are within 10 percent of the norm, and eight deviate by less than five percent. Only three deviate by more than 10 percent.

Some 719,627 Californians currently are "excess population" in over populated districts, some 591,775 Californians live in "under populated" districts. A total of 1,311,402 Californians are affected by these districts. That is 3.5 percent of the total population of California, 37,253,956. (Quinn Dec., ¶ 20.)

Thus, the population deviations today are not nearly as great as they were in 1981 when the Court declined to follow its *Reinecke* precedent.

C. Model Constitutional Plan

Although this option would require relatively more time than options A and B above, the Court could also redraw some but not all of the Senate Districts as demonstrated by the Petitioner's expert, Dr. T. Anthony Quinn's Model Constitutional Plan. (Quinn Dec., Exhibit "C".)

VI. TIMING ISSUES

This Court faces a much less complex problem with the referendum than confronted either the *Reinecke* or the *Assembly v. Deukmejian* Courts, specifically, the task of drawing interim districts for only one type of map, the State Senate maps, as contrasted with those Courts' need to consider drawing maps for Congress, the State Senate and the State Assembly.

1. Nesting or Using 2001 Senate Lines Will Require Little Time

This task can be alleviated further by (1) nesting the Assembly Districts; (2) adopting the existing 2001 odd-numbered Senate Districts; and utilizing the available statewide database housed at the University of California, the same database used by the Commission and citizens who drew and provided sample maps to the Commission, and the modern software programs that vastly improve and speed up the process of drawing maps with fully robust population and demographic data.

In 1991, this Court requested the Secretary of State to provide the Court with information and recommendations on the compression and/or waiver of certain election requirements and filing schedules for the 1992 primary election. (*Wilson v. Eu* (*"Wilson II"*) (1991) 54 Cal.3d 546, 550.) This procedure is available to allow the Court to ensure that it has sufficient time to establish a schedule for the Special Masters, if it chooses that option, to draw new boundaries for the June 5 and November 3, 2012 elections, to receive comments on the proposed boundaries and for this

Court to review and adopt, either as proposed or as amended, such new boundaries.

In the event this Court determines there is insufficient time for the drawing of interim boundaries for the Senate, the Court should either adopt the option of nesting the Assembly Districts or follow the guidance of *Reinecke* and the dissenting Justices in Assembly, and leave in place for the 2012 elections, pending the outcome of the popular vote on Petitioner VANDERMOST's referendum, the existing boundaries of the Senate that have been used for the 2002, 2004, 2006, 2008 and 2010 elections.

The Secretary of State's Preliminary Opposition in *Vandermost v. Bowen et al.* (Supreme Court Case number S 196493) contended first that the Court should leave the Commission's certified Senate maps in place in accordance with the Court's precedent in *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, because there is insufficient time for the Court and appointed special masters to complete drawing of new districts without interfering in a substantial way with the conduct of the June 5, 2012 primary election. (Bowen Prelim. Opp., pp. 9-10.)

The Bowen Opposition does not address the Petitioner's proferred options for the Court to consider if time constraints limited its opportunity to fashion new lines. (Pet., ¶ 36 A & B.) Two of the three options, if implemented, would not require as much time for the Secretary of State or local election officials to implement as would otherwise be required. For example, the Petitioner's suggestion to nest one Senate district with two Assembly Districts of the unchallenged Commission certified Assembly District maps as set forth in the Petition, ¶ 36 A, would require very little time and little computer work. Alternatively, use of the existing, odd-numbered 2001 Senate District boundaries of the challenged Senate maps, as outlined in the Petition, ¶ 36 B, would require less time to accomplish than the other suggested alternative.

2. Eliminating "In Lieu" Petitions for 20 Senate Districts Will Enable the Court to Avoid Interfering With the 2012 Election Schedule

The Secretary's Opposition also contains the Secretary's June 5, 2012 Presidential Primary Election Calendar which sets forth applicable dates for legally-required activities under the California Elections Code. (Bowen Opp., Lean Dec., ¶ 2 & Exh. "A".)

In particular, the Election Calendar provides for the opportunity for "voter-nominated candidates" to obtain petitions to secure signatures in-lieu of all or part of the [candidate] filing fee" for the offices sought. This "in-lieu" filing period opens on December 30, 2011 and closes on February 23, 2012. (Bowen Prelim. Opp., Lean Dec., Exh. "A," p. 1.) The Election Calendar next provides that declaration of candidacy must be completed and nomination papers may be circulated to obtain necessary signatures and returned between February 13, 2012 and March 9, 2012. (Bowen Prelim. Opp., Lean Dec., Exh. "A", p. 4.)

The Secretary's Opposition contends the "in lieu filing period" is "constitutionally-mandated." (Bowen Prelim. Opp., p. 11.) However, that misrepresents reality. While the Legislature enacted the opportunity for a candidate to obtain a reduction or elimination of the candidate's filing fee by obtaining signatures "in lieu" of such fees in response to this Court's decisions that held mandatory candidate filing fees would unconstitutionally infringe on the right to candidacy of indigent individuals (*Lubin v. Panish* (1973) 415 U.S. 709 [mandatory candidate filing fee violates equal protection for indigent candidates]; *Knoll v. Davidson* (1974) 12 Cal.3d 335), filing fees themselves are not constitutionally-mandated.

This Court could waive such filing fees altogether under its authority to adopt new redistricting plans as requested by the Petitioner. In fact, the

Court has done substantially more, waiving the Constitution's one –year residency rule for legislators set forth in Article IV, section 2, "in the exercise of [its] equitable powers to fashion remedial techniques in this area of the law." (*Reinecke IV* (1973) 10 Cal.3d 396, 406.)

Moreover, the Supreme Court in 1991 compressed the in-lieu filing period considerably. Upon receipt of information from the Secretary of State, the in-lieu filing period moved to the date of issuance of the 1992 decision (January 27, 1992) and the compressed schedule of candidate nomination filing period from February 6, 1992 to March 16, 1992, was adopted by the California Supreme Court. (See *Wilson v. Eu* (1992) 1 Cal. 4th 707, 713; *Wilson v. Eu* (1991) 54 Cal.3d 546, 550.)

The Secretary's Opposition also contends that the timetable for implementing changes to district lines for the June 5, 2012 voter-nominated primary election that might occur if the Court were to redraw them pursuant to the qualification of a referendum or a finding of unconstitutionality upon determination of the Petitioner's substantive challenge must take into account the Secretary's Cal Voter II processing time.

The Secretary of State's November 22, 2011 notice to county election officials suggests it can be accomplished bit only for the challenged Senate District but for Congressional Assembly and Board of Equalization Districts in about 3 weeks (November 22, 2011 – December 16, 2011). (RJN, Exhibit "D", pp. 0060-0066.)

While any Court-implemented interim or final district lines may not unduly interfere with the conduct of the June 5, 2012 elections, the Petitioner notes that (1) such processing is not done on the candidate qualification schedule, which reflects dates critical to candidacies for offices at that election; and (2) the Secretary's and county election officials' deadlines for completing these tasks is set forth in the Election Calendar. The most obvious final dates for completing this activity occur in early

April 2012 (in which several deadlines occur, or commence, with respect to placing voters within districts).

CONCLUSION

The Petitioner respectfully asks this Court to grant her Petition and afford the Petitioner and the People who have indicated their desire to vote on the Commission-certified Senate map "relief" -- and that the Court should issue its writ of mandate or prohibition to the Secretary of State, as specified in Article XXI, section 3(b)(2) prohibiting the Secretary of State from implementing the Senate plan, and order a Special Master or Special Masters to provide interim district boundaries for the Senate for the 2012 election as the Petitioner has outlined.

If prior to the Court taking such action, the Petitioner's referendum petition is submitted to election officials and the Petitioner further advises the Court, and the Court concurs, that the referendum is likely to qualify for the ballot and stay the effectiveness of the certified Senate maps, the Court should immediately provide the relief as the Petitioner has outlined above.

Dated: November 25, 2011 Respectfully Submitted,

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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 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF VERIFIED PETITION FOR EXTRAORDINARY RELIEF IN THE FORM OF MANDAMUS OR PROHIBITION EMERGENCY STAY REQUESTED contains 5,801 words, exclusive of those materials not required to be counted under Rules 8.204(c) and 8.468(a)(6).

Dated: November 7, 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 2, 2011, I served the following document(s) described as:

VERIFIED PETITION FOR EXTRAORDINARY RELIEF IN THE FORM OF MANDAMUS OR PROHIBITION EMERGENCY STAY REQUESTED; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

on the following party(ies) in said action:

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X **BY U.S. MAIL:** By placing said document(s) in a sealed envelope and depositing said envelope, with postage thereon fully prepaid, in the United States Postal Service mailbox in Sacramento, California, addressed to said party(ies), in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

X **BY ELECTRONIC MAIL:** By causing true copy(ies) of PDF versions of said document(s) to be sent to the e-mail address of each party listed.

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 2, 2011 at Sacramento, California.

Shannon Diaz

SHANNON DIAZ