S198387

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JULIE VANDERMOST,

Petitioner,

v.

DEBRA BOWEN, SECRETARY OF STATE OF CALIFORNIA,

Respondent.

Submitted Pursuant to Cal. Const., art. XXI, § 3, subd. (a)

RETURN TO COURT'S ORDER TO SHOW CAUSE DATED DECEMBER 9, 2011

[Filed With Supplemental Appendix of Exhibits, Declaration of Karin Mac Donald and Request for Judicial Notice]

JAMES J. BROSNAHAN (SBN 34555)
GEORGE C. HARRIS (SBN 111074)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: 415.268.7000

BENJAMIN J. FOX (SBN 193374)
MORRISON & FOERSTER LLP
555 West Fifth Street
Los Angeles, California 90013-1024
Telephone: 213.892.5200

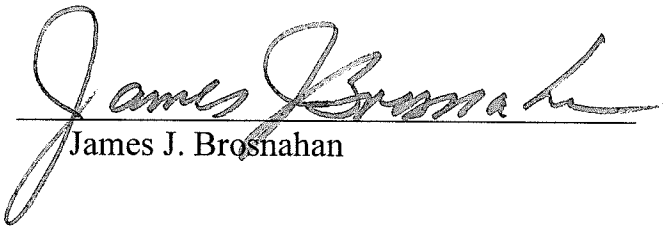
Attorneys for Intervenor / Real Party in Interest
CITIZENS REDISTRICTING COMMISSION

CERTIFICATE OF INTERESTED ENTITIES AND PERSONS

The undersigned certify that the Citizens Redistricting Commission knows of no person or entity that should be listed pursuant to rule 8.208(e) of the Rules of Court.

Respectfully submitted,

Dated: December 14, 2011

By: 
James J. Brosnahan

Counsel for Intervenor / Real Party in Interest
CITIZENS REDISTRICTING COMMISSION

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INTRODUCTION

The Citizens Redistricting Commission respectfully submits this supplemental brief to respond to the Court's questions in its Order dated December 9, and to address the remedies that would be appropriate *if* Vandermost's proposed referendum were to qualify for the November ballot.

Issue No. 1: Standard for determining "likely to qualify". Article XXI, section 3, subdivision (b)(2), should be construed in accordance with its ordinary meaning: For registered voters to have standing to file petitions in this Court, it must be "more probable than not" that a proposed referendum will qualify for the ballot. This interpretation is consistent with Article XXI's plain language, as would be understood by the electorate that amended the Constitution, and with the will of the people in passing Propositions 11 and 20.

Construing Article XXI's words according to their natural and ordinary meaning also is consistent with the ballot materials for Proposition 20—which constitutes the "legislative history" because Proposition 20 added the "likely to qualify" language to Article XXI—as well as this Court's precedent and past treatment of initiatives and referenda. It also will make for sound policy by providing a sufficient hurdle to screen unripe controversies concerning *potential* referenda from actual controversies affecting elections.

Under this straightforward standard, also applied by the Secretary of State, Vandermost has not satisfied her threshold burden to establish standing.

Issue No. 2: The Court's original jurisdiction. Where, as here, the Constitution has been amended to provide a specific grant of original jurisdiction to address petitions in the situation where a potential referendum is "likely to qualify," the specific jurisdictional grant must be harmonized with

the more general grant of original jurisdiction in Article VI, section 10. This Court explained recently in *Greene v. Marin County Flood & Water Conservation Dist.* (2010) 49 Cal.4th 277, 290 that, to avoid conflict, "a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision." The "likely to qualify" standard thus governs.

Even if the constitutional standing provisions were not in conflict, the heightened standard for extraordinary relief required by Article VI, section 10, would necessarily be unmet where a petitioner cannot show that a potential referendum is "likely to qualify." This conclusion also follows from the Court's prior use of mandamus jurisdiction—which, to the Commission's knowledge, has been invoked only for qualified referenda, and certainly not based on a showing *less than* likely to qualify for an election.

Proposed path if the referendum qualifies. For the reasons explained in the Commission's prior briefs (and addressed further herein), the approach taken in *Assembly v. Deukmejian* (1982) 30 Cal.3d 638 of using the Commission's certified maps pending a vote by the electorate on those maps is eminently sensible and the best alternative—indeed, quite possibly the only constitutional alternative. Using the certified maps would comport with Article XXI's current mandate to use maps generated from an "open and transparent" process enabling public participation. It would honor the will of the majority of voters in California that already exercised their initiative power to create the Commission and authorize it to serve as the line-drawing body. And it would avoid further legal challenges—because the Commission's maps have survived the previous challenges in this Court and are constitutional in every respect.

At bottom, Vandermost's current Petition does not present grounds for relief and should be denied.

FACTUAL BACKGROUND

A. Proposition 11 (the Voters First Act)

In adopting Proposition 11 in 2008, the people of California amended the California Constitution and created a new constitutional body—the independent, 14-member Commission—tasked with responsibility for drawing Senate (and other) district lines following each U.S. Census.

Proposition 11 responded to criticism of a legislative redistricting process that lacked transparency and favored incumbents. Its passage amended the Constitution to provide that the Commission shall, among other things,

> (1) conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines; (2) draw district lines according to the redistricting criteria specified in this article; and (3) conduct themselves with integrity and fairness.

(Cal. Const., art. XXI, § 2, subd. (b).)

Article XXI, as amended, establishes six criteria that the Commission must consider in drawing new district lines, and the order of priority in which these criteria are to be applied. (Cal. Const., art. XXI, § 2, subd. (d).)[1]

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[1] The Voters First Act, enacted by passage of Proposition 11, is contained in Article XXI of the California Constitution and Government Code sections 8251 through 8253.6.

B. Proposition 20

In November 2010, the voters approved Proposition 20, further amending Article XXI of the California Constitution to direct the Commission to also handle redistricting for U.S. Congressional districts.

Proposition 20 also amended Article XXI in ways applicable to the Senate districts. It defined the term "community of interest" in Article XXI, section 2, subdivision (d)(4); and it changed the date by which the Commission must submit all certified maps to the Secretary of State from September 15 to August 15, 2011—and on August 15 in each year ending in the number one thereafter. (Cal. Const., art. XXI, § 2, subd. (g).)

Proposition 20 also inserted the "likely to qualify" language contained in Article XXI, section 3, subdivision (b)(2).

C. The Selection of a Fair and Impartial Commission

The Voters First Act established a selection process for Commissioners that is rigorous, fair, and "designed to produce a commission that is independent from legislative influence and reasonably representative of this State's diversity." (Cal. Const., art. XXI, § 2, subd. (c)(1).)

The process for selection of the Commission is explained in detail in the Commission's brief filed in *Vandermost v. Bowen*, No. S196493. In short, the State Auditor conducted extensive statewide outreach to solicit more than 36,000 applications. (Gov. Code, §§ 8251 et seq.; Appen. 640.)[2]

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[2] Citations to "Appen." are to the Commission's Appendix of Exhibits, filed in this Court on October 11, 2011 (in No. S196493), and resubmitted in this action on December 6 with the Commission's Preliminary Opposition. Citations to "Supp. Appen." are to the Commission's concurrently submitted Supplemental Appendix of Exhibits.

An Independent Applicant Review Panel then screened applicants, applying rigorous conflict-of-interest rules. (Gov. Code, § 8252, subd. (a)(2) & (d).)

The Applicant Review Panel selected 60 qualified applicants as potential Commissioners: 20 registered Democrats; 20 registered Republicans; and 20 minority party, independent, or "decline to state" voters. (Gov. Code, § 8252, subd. (d).) Leaders of the major parties in the Legislature then were permitted to review the qualified applicants and to strike a subset, further narrowing the field of qualified, eligible applicants. (*Id.*, § 8252, subd. (e).) From this remaining pool, the State Auditor randomly selected three Democrats, three Republicans, and two voters unaffiliated with a major party to serve as the first eight Commissioners. (Gov. Code, § 8252, subd. (f).)

The first eight Commissioners reviewed the remaining pool of qualified applicants and appointed an additional six. The applicants were "chosen based on relevant analytical skills and ability to be impartial" as well as "to ensure the commission reflects this state's diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity." (Gov. Code, § 8252, subd. (g).)

The full Commission is comprised of five registered Republicans, five registered Democrats, and four registered voters unaffiliated with either major political party. (Cal. Const., art. XXI, § 2, subd. (c)(2).) Approval of final redistricting maps requires a supermajority of at least nine affirmative votes, which must include at least three votes of the Republican members, three votes of the Democratic members, and three votes of the unaffiliated members of the Commission. (Cal. Const., art. XXI, § 2, subd. (b)(5).)

The Commissioners are sworn to serve in a manner that is "impartial and that reinforces public confidence in the integrity of the redistricting process." (Cal. Const., art. XXI, § 2, subd. (c)(6).) They are prohibited from holding

elected office for ten years following their appointment to the Commission, and cannot hold appointed office or work as a lobbyist or political consultant for five years following appointment. (*Ibid.*)

D. The Commission's Open and Extensive Public Hearing and Map-Drawing Process

In reaction to the backroom redistricting process previously conducted by the Legislature, the Constitution now requires "an open and transparent process enabling full public consideration of and comment on the drawing of district lines." (Cal. Const., art. XXI, § 2, subd. (b).)

The Commission took very seriously its mandate to "establish and implement an open hearing process for public input and deliberation" and to conduct an "outreach program to solicit broad public participation" in the redistricting process. (Gov. Code, § 8253, subd. (a)(7).) For example:

i. The Commission solicited testimony through extensive public outreach involving mainstream and foreign-language media, the Commission's website, social media, and through a long list of organizations, including, e.g., the Chamber of Commerce, Common Cause, the League of Women Voters, MALDEF, the NAACP, and the Asian Pacific American Legal Center (Appen. 643-644);[3]

ii. From the start of the redistricting process in January 2011 until August 2011, the Commission held 34 public input meetings in 32 locations across the state. Meetings were scheduled to be convenient for average citizens—typically during early evening hours at a government building or

[3] Additional organizations that provided public outreach support are listed at <http://wedrawthelines.ca.gov/partners.html>.

school—and many extended hours longer than scheduled to accommodate speakers. More than 2,700 people gave testimony or spoke at the public input hearings (Appen. 643);

iii. In addition, the Commission held more than 70 business meetings, during which the Commission regularly solicited public comment. All public meetings were broadcast live on the Commission's website and archived for later public review (*ibid.*);

iv. The Commission received and considered more than 2,000 written submissions containing testimony or maps from groups and individuals, reflecting proposed statewide, regional or other districts. Alternative map submissions were posted on the Commission's website (*ibid.*);[4]

v. The Commission or its staff also reviewed more than 20,000 written comments addressing the shared interests, backgrounds and histories of California's communities, suggestions for district lines, and comments on the redistricting process generally (Appen. 644);

vi. The Commission received training and technical assistance from Q2 Data and Research, consultants with extensive experience with the computer programs used for line-drawing, to parse the U.S. Census data and use computer models and other programs needed for the complex, highly technical district line-drawing process. (*Ibid.*) The Commission also engaged Voting Rights Act legal counsel selected through an open bidding process;

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[4] <http://wedrawthelines.ca.gov/map-submissions.html>.

vii. The Commission had full access to all demographic and other data that would have been available to the Legislature for use in redistricting, except they did not consider information about how the Commission's maps would affect incumbent politicians, an issue that cannot be considered following passage of Proposition 11 (see Cal. Const., art. XXI, § 2, subd. (e));

viii. On June 10, 2011, following 23 public input hearings and dozens of public business meetings in which comments also were received, the Commission issued its first set of draft maps. The maps were posted on the Commission's website and covered widely in the media.[5] The Commission received public comments on the draft maps during 11 more input hearings and in hundreds of additional written submissions, and revised and honed the maps over the next several weeks (Appen. 644);

ix. All of the Commission's public meetings and line-drawing sessions were broadcast live on the Commission's website, and video of those sessions is archived and available for public review. Transcripts of the Commission's meetings, its draft and final maps, and all documents presented to the Commission and suitable for posting also are available on the Commission's website for public review.[6]

E. Certification of the Final Maps and Issuance of the Commission's Final Report

On July 29, 2011, the Commission released its preliminary final maps, together with a narrative explaining for the public's benefit the California

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[5] See, e.g., <http://wedrawthelines.ca.gov/maps-first-drafts.html>.

[6] See, e.g., <http://wedrawthelines.ca.gov/transcripts.html> and <http://wedrawthelines.ca.gov/viewer.html>.

Constitution's criteria for drawing district lines and the Commission's public input process.[7] The maps were posted for further public comment. (*Ibid.*)

On August 15, 2011, the Commission certified the final maps to the Secretary of State. (See Cal. Const., art. XXI, § 2, subd. (g).) These maps were accompanied by the Commission's 67-page Final Report summarizing the Commission's work, the redistricting process, and the districts. (Appen. 637-803.) The Secretary of State filed the maps the same day.

F. The Commission's Constitutional Authority to Defend "Any Action Regarding a Certified Final Map"

Following certification of the district maps, the Commission "has the sole legal standing to defend any action regarding a certified map ...." (Cal. Const., art. XXI, § 3, subd. (a).)

G. Vandermost's First Petition and the Court's Ruling

On September 15, 2011, Vandermost filed a 124-page petition challenging the certified Senate districts, with supporting declarations of T. Anthony Quinn and Brian T. Hildreth and a two-volume Request for Judicial Notice. On September 30, she filed a 126-page "Amended Petition" containing additional argument (the Prior Amended Petition or "Prior Pet.").

Her Prior Amended Petition argued, inter alia, (a) that a referendum that is "likely to qualify" effects a stay of the certified maps by operation of law (Prior Pet. ¶ 176); (b) that Propositions 11 and 20 somehow "reversed" this Court's precedent in *Deukmejian*, *supra*, 30 Cal.3d 638 (Prior Pet. at pp. 123-124); (c) that the Court may re-draw certified district lines even though the

[7] <http://wedrawthelines.ca.gov/maps-preliminary-final-drafts.html>.

Commission's maps are constitutional in every respect (*id.* ¶¶ 3, 23); (d) that the preferences of Vandermost's proffered expert, Anthony Quinn, should replace the Commission's judgment and the open, intensive eight-month process mandated by Article XXI for drawing district lines (Prior Pet., passim); and (e) that Vandermost expected to gather at least 780,000 signatures by November 15 for her referendum effort, in order to demonstrate the referendum was "likely to qualify" (*id.* ¶ 177).

On October 26, the Court granted the parties' Requests for Judicial Notice; denied the Commission's motion to strike Quinn's declaration; and denied Vandermost's petition. (*Vandermost v. Bowen* No. S196493 (Oct. 26, 2011) 2011 Cal. LEXIS 11036.)

H. Vandermost's Second (Current) Petition

Vandermost's current Petition contains substantially similar legal arguments as her first petition, and again relies on a declaration from her proffered expert, Quinn. The Petition alleges that she has gathered and submitted approximately 710,000 "raw" (unverified) signatures in support of her referendum effort, not the 780,000 that she expected to gather. (Pet. ¶ 7.)

The new Petition does not allege any constitutional defect in the Commission's certified maps or argue that the Senate districts otherwise fail to comply with Article XXI's redistricting criteria. (*Ibid.*)

On December 6, the Commission filed its motion to intervene and proposed preliminary opposition, which the Court granted on December 9. The Commission's Preliminary Opposition explained why Article XXI, section 3, subdivision (b)(2)'s language does not provide that the Commission's certified maps would be stayed based on "likely qualification" of a referendum.

The Court's order dated December 9 directed the parties to submit supplemental briefs on two jurisdictional questions, "in addition to addressing issues relating to what relief, if any, this court should order in the event the referendum regarding the Senate redistricting map qualifies":

> (1) What standard or test should this court apply in determining whether a referendum is "likely to qualify" within the meaning of article XXI, section 3, subdivision (b)(2) of the California Constitution, for purposes of deciding when a petition for writ of mandate may be filed in this court under that constitutional provision?
>
> (2) Is this court's authority to entertain a petition for writ of mandate prior to the formal qualification of a referendum petition limited to the circumstances set forth in article XXI, section 3, subdivision (b)(2), or does this court have other authority (including inherent authority) to entertain such a petition even if it cannot yet be determined whether such a referendum is "likely to qualify" for placement on the ballot?

The Court's order of December 9 denied Vandermost's request for preliminary relief in advance of a final decision on her current Petition.

LEGAL ARGUMENT

The Commission's Preliminary Opposition explained that Article XXI, section 3, subdivision (b)(2), provides only a grant of standing; it does not effect a stay of certified final maps based on "likely qualification" of a proposed referendum. (Prelim. Opp. 13-17.) The Commission's prior brief also explained that Vandermost, as petitioner, bears the burden of proof to establish standing to file her Petition. (See, e.g., *Pacific Legal Found. v. Cal. Coastal Com.* (1982) 33 Cal.3d 158, 169; accord *DaimlerChrysler Corp. v. Cuno* (2006) 547 U.S. 332, 342.) This brief responds to the two questions

posed by the Court—the meaning of "likely to qualify" and whether the Court should entertain Vandermost's Petition in the absence of a showing the referendum is likely to qualify—and then addresses, as further suggested by the Court, what relief would be appropriate if the referendum actually qualified.

I. ISSUE NO. 1—DEFINING "LIKELY TO QUALIFY": PETITIONER HAS THE BURDEN TO SHOW THAT, AT A MINIMUM, IT IS MORE PROBABLE THAN NOT THAT THE REFERENDUM ACTUALLY WILL QUALIFY.

A. Under Article XXI's Plain Language, a Petitioner Has Standing Where She Can Show That, at a Minimum, It is More Probable Than Not the Referendum Will Qualify.

Interpretation of a constitutional provision begins with the Constitution's plain language. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 244-246 ["A constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words."]; see also *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842-843 [analysis of constitutional text begins with plain language, which may obviate any need to look further for intent].)

Where, as here, an amendment is by initiative, courts look to the ordinary meaning of the words as would be understood by the electorate. (See, e.g., *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 902 ["We are confident that the average voter, unschooled in the patois of criminal law, would have understood the plain language of [the statute at issue] to encompass all misdemeanors and all felonies."]; *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114 ["In the case of a voters' initiative ... we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less."].)

The term "likely" is commonly understood to mean: "1. having a high probability of occurring or being true: very probable," or "2. in all probability: probably." (Merriam-Webster's Collegiate Dict. (11th ed.) at p. 721.)

Webster's International Dictionary defines "likely" as:

> 1. of such a nature or so circumstanced as to make something probable ... [or] 2 a: seeming to justify belief ... b: having a better chance of existing or occurring than not ... [or] in all probability: probably.

(Webster's New Int'l Dict. (1981) at p. 1310.)[8]

The Court of Appeal has also recognized that: "The ordinary meaning of 'likely' is more probable than not." (*In re Y.R.* (2007) 152 Cal.App.4th 99, 100 [overruled in part on an unrelated point by *In re S.B.* (2009) 46 Cal.4th 529, 537]; see also *People v. Russell* (2005) 129 Cal.App.4th 776, 787 ["'Likely' means 'probable' or ... 'more probable than not.'"]; *People v. Savedra* (1993) 15 Cal.App.4th 738, 744 ["in ordinary usage ... 'likely' means 'probable' or, as the jurors put it, 'more probable than not.'"].)[9]

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[8] (See Webster's II New Riverside Univ. Dict. (1994) at p. 693 ["likely" is defined as "1. Possessing or displaying the characteristics or qualities that make something probable..."]; Garner's Modern American Usage (3d ed. 2009) at p. 514 ["it is common to use *likely* as an equivalent of *probably*"]; Garner, A Dict. of Modern Legal Usage (2d ed. 1995) at p. 530 [likely: "most often it indicates a degree of probability greater than five on a scale of one to ten"].)

[9] This Court has noted, in a different context, that "likely" can have differing meanings based on the circumstances—including, e.g., when used to address whether a sexually violent predator should be committed based on a likely risk of re-offending. (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 917-918.) Cases addressing the public's need to be protected from sexually violent predators or the repeated use of deadly weapons are, or course, *sui generis*, and do not inform the Court's decision on a standing issue.

In this context, "to qualify" means, of course, qualified by the Secretary of State to be placed on the ballot. (*Deukmejian*, *supra*, 30 Cal.3d at pp. 656-657.) Accordingly, the ordinary meaning of "likely to qualify" is that it is more probable than not (or more likely than not) that a proposed referendum actually will qualify for the ballot.

Interpreting "likely to qualify" to require Vandermost to show, at a minimum, that qualification of a proposed referendum is "more probable than not" comports with Article XXI's plain language, is understandable to the average voter, and provides a test that is easily applied. Under this straightforward standard—also applied in the Secretary of State's brief filed December 6—Vandermost has not met her threshold burden. (*Deukmejian*, *supra*, 30 Cal.3d at p. 650 [the Secretary of State is "California's chief elections officer," whose opinions on matters affecting elections should be given weight]; accord *Styne v. Stevens* (2001) 26 Cal.4th 42, 53 [interpretations of a statute by an agency tasked with enforcing it are entitled to substantial weight].)

As the Secretary of State's Preliminary Opposition explained, initiative proponents typically "lose up to 40% of gross signatures" during the verification process. (Secretary of State's Br. filed Dec. 6, 2011, quoting *Democracy by Initiative: Shaping California's Fourth Branch of Government* (Center for Government Studies, 2d ed. 2008) at p. 149.) Based on this estimate, Vandermost would have needed to submit **841,267** signatures to make it likely for her proposed referendum to qualify following a full count.[10] Vandermost's 708,973 "raw" (unverified) signatures are substantially short of this target—and significantly fewer than the 780,000-plus signatures she told this Court in September 2011 would be gathered in support of the referendum.

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[10] 841,267 x 60% = 504,760, needed to qualify the proposed referendum.

The Secretary of State's considered opinion that, at best, it is too soon to tell whether Vandermost's proposed referendum is likely to qualify should be afforded substantial weight. (Secretary of State's Br. filed Dec. 6, 2011 filed Dec. 6, 2011.) On this record, Vandermost's count of "raw" signatures does not make her proposed referendum likely to qualify.

B. The Ballot Materials for Propositions 11 and 20 Do Not Evidence Any Intent of Voters to Depart from a Plain, Dictionary Definition of "Likely to Qualify."

The ballot materials accompanying Propositions 11 and 20 underscore that the people of California, in adopting Proposition 20—which included the "likely to qualify" language—did not intend any special or technical meaning to govern these words. The ballot materials do not even mention challenges by referendum to the Commission's certified, final maps. They make clear, instead, that in adopting these propositions, voters would be vesting redistricting authority *solely in the Commission.* (Supp. Appen. 1-10; see *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 445 [where enacted language is imprecise, "we look to the ballot materials as further indicia of voter intent"]; *Apartment Assn. of Los Angeles, supra*, 24 Cal.4th at p. 844 [even where ballot materials stated that constitutional amendment is to "be liberally construed," this "does not license either enlargement or restriction of its evident meaning"].) This secondary material shows that the people of California did not intend any special or technical meaning to govern the words "likely to qualify."

The Legislative Analyst's summary of Proposition 11 (as restated in Proposition 20 for the 2010 ballot) does not mention potential challenges to the Commission's maps by referendum; it merely contrasts the former system (districts drawn by legislators and approved by the Governor or, where they

could not agree, by the Court) with the current one (districts drawn by the Commission):

> In the past, district boundaries for all of the offices listed above were determined in bills that became law after they were approved by the Legislature and signed by the Governor. On some occasions, when the Legislature and the Governor were unable to agree on redistricting plans, the California Supreme Court performed the redistricting.
>
> In November 2008, voters passed Proposition 11, which created the Citizens Redistricting Commission *to establish new district boundaries* for the State Assembly, State Senate, and BOE beginning after the 2010 census. To be established once every ten years, the commission will consist of 14 registered voters—5 Democrats, 5 Republicans, and 4 others—who apply for the position and are chosen according to specified rules.
>
> When *the commission sets district boundaries*, it *must meet the requirements of federal law* and other requirements, such as not favoring or discriminating against political parties, incumbents, or political candidates....

(Supp. Appen. 4; emphasis added.)[11]

The arguments in favor of Proposition 20 similarly focused on the Commission's authority as the line-drawing body: "Proposition 20 simply extends the redistricting reforms voters passed in 2008 (Prop. 11) so the voter-approved independent Citizens Redistricting Commission, instead of politicians, draws California congressional districts in addition to drawing state

[11] See also <http://voterguide.sos.ca.gov/propositions/20/analysis.htm>.

legislative districts." (Supp. Appen. 7.)[12] Arguments against Proposition 20 attacked the proposition's main financial supporter and claimed that the proposed constitutional amendment would cost taxpayers—but said nothing about any potential referendum, let alone about any change to existing law governing referenda. (Supp. Appen. 7-8.)

In sum, nothing in the "legislative history" for Article XXI, section 3's amendments suggests the voters were informed that Proposition 20's adoption could affect in any way the rules governing challenges to certified maps by referendum. The voters got what they enacted—"no more, no less"—based on the Analyst's summary indicating that the Commission's final certified maps would be used unless those maps failed to comply with the law. (*Hodges*, *supra*, 21 Cal.4th at p. 114.) Given this backdrop, the interpretation of "likely to qualify" should begin and end with ordinary meaning.

C. Applying a More-Probable-Than-Not Standard to Evaluate Whether the Proposed Referendum is "Likely to Qualify" Is Consistent with Law and Makes for Sound Policy.

Applying a more-probable-than-not standard for judging the standing of "any registered voter" to file a petition in this Court where a referendum effort is pending also comports with the Court's precedent and makes practical sense. The standard is sufficient to serve a gate-keeping role that would bar unripe petitions, and it would afford voters the core benefits of Propositions 11 and 20.

Deukmejian acknowledged the "potentially grave injustice on the majority of the people of this state" that would result from permitting the will

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[12] Also available at <http://voterguide.sos.ca.gov/propositions/20/arguments-rebuttals.htm>.

of "5 percent of the voters, by signing referendum petitions" (for a referendum that *actually had qualified*) to override the majority's rights:

> Although the Constitution of our state grants the power to initiate a referendum to 5 percent of the voters, it does *not* require that the effect of that referendum be articulated in a manner that does such serious injury to conflicting and equally compelling constitutional mandates.

(*Deukmejian*, *supra*, 30 Cal.3d at p. 670.)

Here, the "compelling constitutional mandate" is the people's mandate that created the Commission and vested constitutional authority for redistricting in the Commission, following an extensive, open and transparent process for public participation and comment. (Cal. Const., art. XXI, § 2, subd. (b).)

Accordingly, Vandermost's bombastic pronouncements concerning the "people's right to referendum power" must be weighed against the people's right to enjoy the benefits of two initiatives that have *already passed* and been adopted into our Constitution. (V'most Reply 5-7.) *Deukmejian* and other settled precedent struck the balance by recognizing that only a *qualified* referendum effects a technical stay of a certified map or statute. (*Deukmejian*, *supra*, 30 Cal.3d at pp. 656-657; *Brown v. Rossi* (1995) 9 Cal.4th 688, 697; accord *Santa Clara Cty. Local Transp. Authority v. Guardino* (1995) 11 Cal.4th 220, 242 [a qualified referendum "requires the vote to be held"].) The plain-meaning interpretation of "likely to qualify" proposed here by the Commission is consistent with this Court's precedent, which recognizes that a potential referendum and a qualified referendum are not the same thing.

Interpreting "likely to qualify" to require Vandermost to show it is more probable than not that the proposed referendum will qualify also would provide

a sufficient hurdle to serve an appropriate gate-keeping function: Petitions could not be filed that raise questions as to the validity of certified maps unless a voter has a real reason for calling the maps into question. A lesser standard, by contrast, would permit petitions that address "speculative future events" unripe for review. (*Pacific Legal Found.*, *supra*, 33 Cal.3d at p. 173.)

For all these reasons, the ordinary meaning of "likely to qualify" should apply, and Vandermost should be held to her burden to demonstrate that it is more probable than not that the proposed referendum will qualify for the ballot.

II. ISSUE NO. 2—THE COURT'S JURISDICTION IN ORIGINAL PROCEEDINGS AND THE CIRCUMSTANCES IN WHICH SUCH JURISDICTION SHOULD BE EXERCISED.

A. The More Recent, Specific Jurisdictional Grant in Article XXI Trumps the General Grant of Original Mandamus Jurisdiction in Article VI.

Article XXI, section 3(b)(2) of the California Constitution, as amended by Propositions 11 and 20, provides a grant of *specific* original jurisdiction to this Court to hear a petition for writ of mandate or prohibition by a registered voter seeking relief regarding the Commission's certified maps only "where a certified map is subject to a referendum measure that is likely to qualify and stay the timely implementation of the map." Article VI, section 10 of the Constitution provides a *general* grant of jurisdiction by which this Court has "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari and prohibition."

The principles that should be applied in reconciling these overlapping constitutional provisions were explained recently in *Greene v. Marin County Flood & Water Conservation Dist.*, *supra*, 49 Cal.4th 277:

> [R]udimentary principles of construction dictate that when constitutional provisions can reasonably be construed so as to avoid conflict, such a construction should be adopted. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 596; see also *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) As a means of avoiding conflict, *a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision.*" (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 371.)

(*Greene, supra*, at p. 290 [emphasis added]; cf., Code Civ. Proc., § 1859 [in construing a statute or determining legislative intent, "when a general and particular provision are inconsistent, the latter is paramount to the former"].)

Article XXI, section 3(b)(2) addresses the specific issue here: when does a putative referendum meet the jurisdictional threshold for seeking extraordinary relief in this Court? As a recent and specific provision, it is deemed to make a limiting exception to the older, general provision in Article VI, section 10.

While the courts of this State have inherent authority to resolve controversies (see Cal. Const., art. VI, § 1 [reserving the "judicial power" to the courts]), the Legislature may put reasonable restrictions on that authority.[13]

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[13] This Court also has inherent authority to protect its own jurisdiction. (See, e.g., *People ex rel. S.F. Bay etc. v. Town of Emeryville* (1968) 69 Cal.2d 533, 538 ["no explicit constitutional grant is necessary to authorize issuance of such auxiliary writs as supersedeas, long recognized to be an attribute of the inherent power of the courts to preserve their own jurisdiction"].) No auxiliary writ of this kind has been sought or would be appropriate here. For the reasons discussed in part III, *infra*, there is no action necessary now to protect the Court's ability to provide any appropriate relief should the proper showing be made that the referendum is likely to qualify.

As *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45 explained:

> The sum total of this matter is that *the legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions.* This power has been described as follows: ... [T]he mere procedure by which jurisdiction is to be exercised may be prescribed by the Legislature, unless, indeed, such regulations should be found to substantially impair the constitutional powers of the courts, or practically defeat their exercise.

(*Id.* at p. 54, quoting *Brydonjack v. State Bar* (1929) 208 Cal. 439, 444.)

A fortiori, what the Legislature can do through statute, the people can do through a constitutional amendment. Here, Article XXI, section 3(b)(2) puts reasonable limits on this Court's inherent authority, as well as its general authority under Article VI, section 10 to issue a writ of mandate or prohibition in the specific circumstance of a putative referendum on the Commission's maps: the Court may exercise original jurisdiction (through mandamus or otherwise) when the referendum is "likely to qualify."

B. Exercising Original Mandamus Jurisdiction Under Article VI, Section 10 Would Not Be Appropriate at This Stage in Any Event.

Even if the standard for review under Article VI, section 10—an issue of "great public importance [that] must be resolved promptly" (*San Francisco Unified Sch. Dist. v. Johnson* (1971) 3 Cal.3d 937, 944)—were applied here, there would be no basis for the Court to exercise its mandamus jurisdiction. The Court has exercised its jurisdiction with regard to putative referenda or initiatives only when they have actually qualified for the ballot. (See, e.g., *Deukmejian*, *supra*, 30 Cal.3d 638 [qualification of referendum for ballot];

Perry v. Jordan (1949) 34 Cal.2d 87 [qualification of initiative for ballot].) The Commission is aware of no case in which the Court exercised mandamus jurisdiction where a referendum or initiative was merely "likely" to qualify, let alone where not even that showing had been made.

Even if it were thought that the timing and importance of the 2012 election in general supported action by the Court, surely the mere attempt to qualify a referendum does not by itself meet that standard. Article XI, section 3(b)(2) establishes as a constitutional matter when an effort to qualify a referendum is of substantial importance that it rises to a level that this Court's original mandamus jurisdiction is appropriate. The Court should exercise its mandamus jurisdiction only when and if Vandermost is able to demonstrate that her referendum is likely to qualify for the ballot. Should the Court believe otherwise, we address below, as directed by the Court, the question of relief.

III. EVEN IF THE REFERENDUM WERE TO QUALIFY, THE COMMISSION'S CERTIFIED MAPS SHOULD BE USED FOR THE 2012 ELECTIONS BECAUSE THE MAPS ARE CONSTITUTIONAL, SUPPORTED BY THE WILL OF THE MAJORITY OF VOTERS WHO ADOPTED PROPOSITIONS 11 AND 20, AND THE ONLY VIABLE ALTERNATIVE.

A. As in *Assembly v. Deukmejian*, the Certified Maps Should Be Used in June and November 2012 Even *If* the Referendum Were to Qualify for the Ballot.

If, arguendo, the potential referendum were to qualify for the November ballot and render the certified senate maps technically inoperative, the approach taken in *Deukmejian*, *supra*, 30 Cal.3d 638, of using the certified maps pending a vote by the electorate on those maps is eminently sensible and would comport with the people's will in adopting Propositions 11 and 20.

Deukmejian concluded that the challenged maps—which, like a statute, were rendered technically inoperative by a referendum that had qualified—should be used anyway in the next election cycle because, inter alia, (1) the challenged maps are based on current Census data and thus are "far closer to the constitutional goal" of equal representation (the highest criterion in Article XXI) than the alternatives, and (2) permitting the voice of five percent of the electorate who had signed the referendum petition to override the maps would "perpetuate a potentially grave injustice on the majority of the people...." (*Deukmejian*, *supra*, 30 Cal.3d at pp. 666, 670.)

Deukmejian's conclusion applies forcefully here because under Article XXI, as amended by Propositions 11 and 20, the people of this State are entitled to the benefits of the "open and transparent process enabling full public consideration of and comment on the drawing of district lines" that resulted from the Commission's multi-month public input and line-drawing process. (Cal. Const, art. XXI, § 2, subd. (b).) The Commission traveled the State taking testimony and hearing public comment from thousands of voters. The Commission evaluated and debated in public, in the manner prescribed by Article XXI, section 2, application of the six redistricting criteria in order of priority, and it applied those criteria to the diverse communities of interest and landscape of this State. (See Statement of Facts and evidence cited.) The Commission's work could not be replaced for the June 2012 election. (E.g., *Deukmejian*, *supra*, 30 Cal.3d at pp. 665-666 ["Given the imminence of the 1982 primary election, only two options are available."].)

An orderly process of representative government requires primary elections to take place in the same districts as general elections, as *Deukmejian* recognized. (*Id.* at pp. 674-675.) Indeed, *Deukmejian* considered whether the challenged maps should be used for the same primary election at which voters

would be asked to approve or reject those maps by referendum. The Court explained that, even in that instance, use of the challenged maps would "minimize the potential disruption of the electoral and political processes of the state." (*Id.* at p. 668.) This conclusion is even truer today, where the Commission's certified maps will not be put to a referendum vote, even if the referendum qualifies, until months after the June primary.[14] For this additional reason, adopting any plan other than the Commission's certified, final districts for the June 2012 primary would change the status quo and deprive the people of the benefits of the Commission's work—without a further vote of the people.

Finally, and most significantly, the Commission's certified maps comply with the constitutional criteria, as this Court held in rejecting Vandermost's first petition in September. (*Vandermost v. Bowen* No. S196493 (Oct. 26, 2011) 2011 Cal. LEXIS 11036.) The Court's denial of Vandermost's earlier petition was a final ruling on the merits of her constitutional claims. (*Napa Valley Elec. Co. v. R.R. Com.* (1920) 251 U.S. 366, 373 [where the Court has original jurisdiction, a summary denial is a final ruling on the merits]; *In re Rose* (2000) 22 Cal.4th 430, 445 ["When the sole means of review is a petition in this court, however, our denial of the petition -- with or without an opinion -- reflects a judicial determination on the merits."].) Indeed, Vandermost concedes that her current Petition does not raise any constitutional challenge to the final, certified Senate maps. (V'most Reply Br. filed Dec. 7, 2011, at p. 7.)

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[14] On October 7, 2011, the Governor signed Senate Bill 202, amending the Elections Code to provide that any referendum that might qualify would appear during the general election in November 2012. (See <http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0201-0250/sb_202_bill_20111007_chaptered.pdf>.)

The time to bring constitutional or statutory challenges to the Commission's final, certified maps passed on September 30, 2011. (Cal. Const., art. XXI, § 3, subd. (b)(2) [all constitutional or statutory challenges must be brought "within 45 days after the commission has certified a final map"].) The same cannot be said for any "alternative" plan proposed by Vandermost or any other plan that could be submitted. Use of any plan other than the Commission's certified maps would almost certainly invite further legal challenges, including to the constitutionality of the "replacement" maps. No basis exists in law or logic for throwing upcoming elections into disarray by using untested—and potentially unconstitutional—alternative plans.

Accordingly, the *Deukmejian* precedential path makes it clear that given the time remaining to the June election, coupled with this Court's denial of the previous petitions challenging the constitutionality of the Senate maps, the Commission's Senate districts should be used for both the 2012 primary and the general election, whether or not the referendum qualifies for the November ballot. This Court, on this record, certainly could so hold.

B. "Interim Remedies" That Would Exceed the Relief Available Even If the Referendum Qualified and *Succeeded* in an Election Should Not Be Considered.

The Court's order dated December 9 denied Vandermost any preliminary relief in advance of a final decision on her Petition. For the reasons explained above, in the Commission's view, no "interim" or other remedies are needed or appropriate. If, arguendo, the Court were to consider interim steps, the "relief" proposed by Vandermost goes further than relief that would be available even if the referendum *succeeded*. As such, Vandermost's requested relief is necessarily unavailable. (Cf., *Cont'l Baking Co. v. Katz*

(1968) 68 Cal.2d 512, 528 ["[t]he general purpose of such an injunction is the preservation of the status quo until a final determination of the merits"].)

The Constitution sets forth the three limited circumstances in which the Court may consider adjusting district lines:

> [1] "If the court determines that a final certified map violates this Constitution" (Cal. Const., art. XXI, § 3 (b)(3)), or[15]
>
> [2] "If the commission does not approve a final map by at least the requisite votes[,] or"
>
> [3] "*if* voters *disapprove a certified final map in a referendum*, the Secretary of State shall immediately petition the California Supreme Court 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), (e), and (f)."

(Cal. Const., art. XXI, § 2, subd. (j); italics added.)

Article XXI, section 2, subdivision (j)'s reference to adjusting the boundaries of "that map" following a successful referendum at the general election refers to adjustment of the Commission's certified final map—the only "certified final map" mentioned in the subdivision quoted above. This interpretation is consistent with the ballot materials for Propositions 11 and 20, which made clear to voters that, following amendment of the Constitution, the Commission—not legislators or the Court—would draw maps in the first instance. (Supp. Appen. 4-5.) Vandermost's proposed "interim plans," by

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[15] Article XXI, section (3)(b)(2), permits the Court to consider remedies for a constitutional violation only *if* the Court first determines such a violation has occurred. The Court previously rejected Vandermost's constitutional challenges to the certified maps. No other violations have been alleged.

contrast, do not use the Commission's certified final maps but suggest completely different alternatives (which, as the following sections explain, are unconstitutional in any event). (Pet. at pp. 28-30, 33.) Moreover, because the task of special masters appointed following a successful referendum in November would be to adjust the Commission's maps "in accordance with the redistricting criteria," no changes to the Commission's final certified maps would be necessary.

C. Vandermost's Proposed "Alternatives" to the Commission's Certified Maps Are Not Viable and Would Violate the Constitution.

1. The 2001 Maps Cannot Be Used Because Doing so Would Violate Equal Protection.

Vandermost proposes as a first alternative that the Court order the use of the 2001 Senate districts rather than the districts certified by the Commission. The 2001 districts cannot be used in any future election because doing so would violate the equal protection guarantee of one person, one vote, given the changes in population density in many of the old districts. (*Deukmejian*, *supra*, 30 Cal.3d at p. 667.) *Deukmejian* explained that "deviation" among districts is measured by assessing the range of variance between the highest-populated district and the least-populated district in a map or plan:

> [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; emphasis added.) Applying this standard, 19 out of 20 of the 2001 odd-numbered Senate districts deviate by more than 16.4% and are thus patently unconstitutional. (See Quinn Decl. filed Dec. 2, 2011, at ¶ 18, stating the current populations of the 2001 Senate districts.)[16]

Vandermost's original petition in this Court acknowledged "the existing 2001 Senate boundaries are unconstitutional under the Equal Protection Clause of the 14th Amendment ...." (Prior Pet. filed Sept. 30, 2011, at p. 80.) Yet she now argues for use of the 2001 districts. In doing so, Vandermost ignores the relevant population deviation *among* the 2001 districts and focuses instead on deviation percentages of each 2001 district from the "ideal" population of a Senate district (931,349 people). (Quinn Decl. filed Dec. 2, 2011, at ¶ 18.) Even using this incorrect frame of reference (deviation from the "ideal," rather than in comparison to other 2001 districts), Vandermost concedes that three 2001 districts are unconstitutional. (*Ibid.*)

To address these stark equal protection violations, Vandermost's proffered expert, Quinn, suggests that the Court could simply "order that these three districts be reduced in size so that the districts electing in 2012 are within the 10 percent deviation range." (Quinn Reply Decl. filed Dec. 7, 2011, at ¶ 18.) Again, Quinn's proposed "fix" addresses only the three odd-numbered districts that deviate unconstitutionally from ideal population size, not those that deviate unconstitutionally from the population of other districts. (*Ibid.*; compare *Deukmejian*, *supra*, 30 Cal.3d at p. 667.)

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[16] The two 2001 districts that vary by less than 16.4 percent between them are 2001 district 17, which has a population of 1,098,146, and 2001 district 37, which has a population of 1,215,876. The deviation between these two districts is 12.6%—still unconstitutional under the circumstances. (See Quinn Decl. filed Dec. 2, 2001, at ¶ 18; see also MacDonald Decl. Ex. C.)

In any event, Vandermost's suggestion that the 2001 lines for three Senate districts could be "revised" without running afoul of the Constitution ignores Article XXI, section 2's six criteria, as well as the realities of current populations in the State. For example, 2001 Senate district 37 in Riverside County now has a population of 1,215,876. (MacDonald Decl. Ex. C.) To come within a 10% deviation of the least populated Senate district (2001 district number 21), district 37 would need to shed 267,764 people. (*Ibid.*) However, the districts immediately to 2001 district 37's north (2001 districts 18 and 31) and to its south (2001 district 40) are also overpopulated. (*Ibid.*) As a result, any "re-drawing" of 2001 districts would require the Court to reconfigure population clusters in the greater Los Angeles area, which would be certain to produce population ripple-effects throughout this densely packed region (if not through the entire state). (*Legislature v. Reinecke* (1973) 10 Cal.3d 396, 403 [venturing into the line-drawing process would "run the serious risk of creating undesirable side effects"—a risk that would "necessarily be magnified" because the Court is "not in as advantageous a position [as the Commission] to assess the impact of possible alternatives"].) Moreover, re-drawing Los Angeles-area districts would affect Voting Rights Act ("VRA") Section 2 Latino districts in Los Angeles, causing unanticipated effects and likely violating the VRA.

The Commission's certified maps, by contrast, pass constitutional muster: The Commission explained in its Final Report that it "strive[d] for a total population deviation of zero" and "would allow no more than a 2.0% total deviation except where further deviation would be required to comply with the federal Voting Rights Act or allowable by law." (Appen. 649-50.) The Commission's certified Senate maps' maximum total deviation between districts is only 1.98%. (Appen. 726.) Unlike the 2001 maps proposed by Vandermost, the Commission's certified Senate maps adhere to equal protection standards and are appropriate for use in the 2012 election cycle.

Accordingly, Quinn's statement in his reply declaration (at ¶ 18) that "the situation is easily resolved" by re-drawing the 2001 districts in unspecified ways ignores the Equal Protection clause of the 14th Amendment, the Voting Rights, and Article XXI's other criteria. (Cal. Const., art. XXI, § 2, subd. (d).)[17]

2. Vandermost's Proposal of "Simply Nesting" Senate and Assembly Districts Would Violate the Voting Rights Act and the California Constitution.

Vandermost's "simple nesting plan" would violate the Voting Rights Act as well as Article XXI by elevating a lower-order redistricting criteria ("nesting" of Senate districts within Assembly districts) over other higher-order criteria, including VRA compliance and respect for communities of interest, and it would create other adverse effects. (Pet. at p. 29.)

Article XXI, section 2, subdivision (d) sets forth the six redistricting criteria in order of priority, with nesting being the sixth, lowest-order criteria: (1) compliance with the U.S. Constitution; (2) compliance with the VRA; (3) "geographic contiguity"; (4) respect for the "geographic integrity of any city, county, city and county, local neighborhood, or local community of interest," to the extent possible; (5) encouraging geographic compactness, to the extent practicable; and (6) "[*t*]*o the extent practicable*, and *where this does*

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[17] Quinn's assertion that using decade-old districts would pose no real problem also is inconsistent with his Internet blog articles: "the current [2001] districts are unconstitutional." (Supp. Appen. 16.) The Commission does not respond in detail here to Quinn's assertions that he is "not partisan" and "not a blogger." Suffice it to say, the statements are belied by his publicly available Internet posts. (See, e.g., <http://www.foxandhoundsdaily.com/2011/07/9186-excluding-the-public-the-redistricting-commission-goes-dark/>; <http://www.foxandhoundsdaily.com/2011/05/8941-redistricting-commission-tries-repeal-one-person-one-vote/>; <http://www.foxandhoundsdaily.com/2011/07/9175-the-redistricting-commission-descending-a-racial-quagmire/>.)

not conflict with the criteria above, each Senate district shall be comprised of two whole, complete, and adjacent Assembly districts ...." (Cal. Const., art. XXI, § 2, subd. (d); italics added.)

As the Commission explained in its Final Report, while it strived to nest Assembly districts in Senate districts where practicable, "[c]ompliance with the Voting Rights Act often resulted in Assembly districts that could not be nested." (Appen. 681.) In addition, to minimize city and county splits (a higher-order criteria than nesting), the Commission created certain Senate districts from "blended" Assembly districts—to avoid repeating city and county splits that were unavoidable at the Assembly level. (*Ibid.*) The Commission also blended Assembly districts to respect communities of interest "where more than two Assembly districts had common interests or geographical characteristics that were common to a single Senate district." (*Ibid.*)

Vandermost's proposal for "simple nesting" would ignore the Commission's findings and its respect for higher-order criteria in favor of a plainly unconstitutional plan. First, the proposed nesting plan would violate Section 5 of the VRA. Contrary to Quinn's pronouncements (see, e.g., Quinn Reply Decl. ¶¶ 5-9), his proposed "nesting plan" would fall well below the 2001 benchmarks for covered Section 5 counties and impact California's Section 5 preclearance submission to the Department of Justice for the covered jurisdictions (Monterey, Yuba, Merced, and Kings Counties).[18]

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[18] It is also uncertain that the Department of Justice would pre-clear a "partial" plan where the affects on future plans are uncertain. "The Attorney General will not consider on the merits... Any submitted change directly related to another change that has not received Section 5 preclearance if the Attorney General determines that the two changes cannot be substantively considered independently of one another." (18 C.F.R. § 51.22(a)(2).)

Quinn's reply declaration argues that, under his nesting plan, the "only" Section 5 covered jurisdiction that would be impacted is Monterey County, because it is in odd-numbered Senate districts (districts 13 and 15 in Quinn's nesting plan). He fails to address, however, that his proposed Senate districts 13 and 15 fall far below the 2001 benchmark levels and thus violate Section 5: His proposed district 13 covering north Monterey County falls from the 2001 benchmark of 26.22% Latino Voter Age Population ("LVAP") to 17.66% LVAP. Similarly, Quinn's proposed Senate district 15 reduces the benchmark for South Monterey from 53.48% LVAP to 51.31% LVAP. (Appen. 722-723.) Neither result is permissible under Section 5 of the Voting Rights Act.

In addition to the Section 5 violations, Vandermost's proposed "simple nesting" plan increases dramatically the number of deferred voters—those who are scheduled to vote for Senate representative in 2012 but would instead not vote until 2014—and would inevitably "double-defer" some voters.[19] The Commission's certified maps minimize the number of deferred voters by choosing from among three numbering alternatives to reduce deferrals. (Supp. Appen. 18-29.) Quinn's proposed nesting plan results in deferrals for at least 4,592,350 voters, an increase of 15.5% over the 3,972,984 voters who will be deferred under the Commission's maps. (MacDonald Decl. Exs. A-B.)[20]

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[19] The Commission agrees that some level of voter-deferral is inevitable in any Senate redistricting plan, as voters move between "odd" and "even" numbered districts. The number of deferred voters is nonetheless important.

[20] For example, Quinn's proposed districts 33 and 34 create more deferrals by their numbering: His proposed district 34 contains 529,759 residents from a 2001 odd-numbered district and only 398,611 residents from a 2001 even-numbered district. Quinn's proposed district 33, on the other hand, contains 513,062 residents from a 2011 even-numbered district and 421,083 residents from a 2001 odd-numbered district.

Quinn's proposed nesting plan also raises the specter of "double-deferral" where individual voters would be deferred in 2012 *and* 2014 due to the implementation of another set of maps after the 2012 elections. The worse-case scenario is not, as Petitioner casually asserts, "having the right to vote in an extra election," but rather being denied the right to vote in both the 2012 and 2014 elections. (V'most Reply at 5.) These ill effects would not occur with the Commission's certified Senate districts, yet are virtually guaranteed under Quinn's nesting proposal.

Double-deferral also raises other potential VRA violations because none of Quinn's proposed Section 2 "nested" Senate districts (his proposed district nos. 24, 30, and 32) would vote for senators in 2012.[21] As a result, under Quinn's proposal, the brunt of double-deferral will fall on voters of color who would be unable to vote for their senators of choice in 2012 elections and could be further deferred under an as-yet determined set of maps.

It is therefore not surprising that the Commission considered and declined to draw completely nested Senate and Assembly districts, in favor of compliance with Article XXI, section 2's higher-order criteria.[22]

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[21] With the Commission's certified maps, district 33—a VRA Section 2 district—will elect State senators in 2012.

[22] The Commission's Preliminary Opposition identifies other fatal flaws in Vandermost's nesting proposal, including that it ignores community-of-interest testimony and input from voters across the State. The Commission respectfully refers the Court to its prior brief for this discussion.

3. No Basis Exists for Substituting Mr. Quinn's Districts for the Commission's Certified Districts.

The Commission's brief filed October 11, 2011, explained in detail why the "model plan" submitted by Quinn in support of Vandermost's first petition suffered multiple fatal defects and sought impermissibly to replace the Commission's analysis and judgment with Quinn's personal preferences. Vandermost has simply re-submitted Quinn's "model" plan with her new Petition. The model Quinn plan is still unconstitutional today.

CONCLUSION

For all the reasons discussed herein, the Petition should be denied.

Dated: December 14, 2011

Respectfully submitted,

MORRISON & FOERSTER LLP

By: _____
James J. Brosnahan

Attorneys for Intervenor / Real Party in Interest
CITIZENS REDISTRICTING COMMISSION

CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that, pursuant to rules 8.204(c) and 8.486 of the Rules of Court, the text of this brief was produced using 13 point Roman type and contains 9,160 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 14, 2011

By: _____

James J. Brosnahan

Counsel for Intervenor / Real Party in Interest
CITIZENS REDISTRICTING COMMISSION

PROOF OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105-2482. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on December 14, 2011, I served a copy of:

RETURN TO COURT'S ORDER TO SHOW CAUSE DATED DECEMBER 9, 2011

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California, this 14th day of December, 2011.

B. Keaton (signature)

SERVICE LIST

Charles H. Bell, Jr. Bell, McAndrews & Hiltack, LLP 445 Capital Mall, Ste. 600 Sacramento, CA 95814 cbell@bmhlaw.com Fax: (916) 442-7759	Service via Email, Fax and Mail Attorneys for Petitioner Julie Vandermost
Lowell Finley Chief Counsel Office of the Secretary of State 1500 11th St. Sacramento, CA 95814 Lowell.Finley@sos.ca.gov Fax: (916) 651-8295	Service via Email, Fax and Mail Attorneys for California Secretary of State
Kamala D. Harris Attorney General of California Douglas J. Woods Senior Assistant Attorney General Peter A. Krause Supervising Deputy Attorney General George Waters Deputy Attorney General 1300 I Street, Suite 125 P.O. Box 944255 Sacramento, CA 94244-2550 George.Waters@doj.ca.gov Fax: (916) 324-8835	Service via Email, Fax and Mail Attorneys for California Secretary of State