S 198387

IN THE SUPREME COURT OF CALIFORNIA

JULIE VANDERMOST
Petitioner,

vs.

DEBRA BOWEN, SECRETARY OF STATE
OF CALIFORNIA
Respondent,

CITIZENS REDISTRICTING COMMISSION
Real Party in Interest.

PETITIONER'S REPLY TO RETURNS SUBMITTED BY RESPONDENT SECRETARY OF STATE AND INTERVENOR CITIZENS REDISTRICTING COMMISSION AND IN SUPPORT OF PETITION FOR WRIT OF MANDATE

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INTRODUCTION

More than 710,000 Californians – Democrats, Republicans and others -- have signed the Petitioner's referendum petitions. The petitions they signed contained the Attorney General's impartial title and summary which stated that qualification of the referendum would stay the use of the challenged Commission-drawn Senate maps and result in new, interim court-drawn lines. Propositions 11 and 20 affirmed and reinforced the Constitution's Article II referendum powers, including the referendum stay provision. The political thicket the Court must avoid is a thicket it would throw itself into by disregarding the people's fullest exercise of their referendum powers to stop laws in their tracks before the people have had a chance to vote on them.

The referendum stay provision of Article II, § 10, provided the people the protection that a statute creating a state single-payer health care system that would have radically changed health care delivery in California would not be imposed on them for six months before the people had the opportunity to reject it. (Referendum Against SB 2, Proposition 72, November 5, 2004.) Similarly, the referendum stay provision provided the people protection against the state implementing Indian gaming before they had an opportunity to reject it. (Referenda Against Indian Gaming Compacts, Propositions 94-97, February 2, 2008.) Finally, the referendum stay provision promised the voters in 1981 that gerrymandered redistricting plans adopted by the Legislature (one of which the late Congressman Phil Burton described as "my contribution to modern art") would not be put into effect before the people had the opportunity to reject them. (Referenda Against 1981 Redistricting Measures, Propositions 11-13, June 1982.) That promise went unfulfilled in 1982. There is no exception to the referendum power for elections. Indeed, the people in Propositions 11 and 20 made that abundantly clear. That promise should be fulfilled this year.

Whether partisan, parochial or procedural reasons caused these people to sign the Petitioner's petitions is unknown. 209,163 petition signers from Los Angeles County may have been concerned about the Commission's failure to increase Latino representation opportunities. 48,020 signers from San Bernardino County and 23,120 signers from Sacramento County may have been concerned about the Commission's division of those counties like pumpkin pies into small slices. 49,402 signers in Santa Clara County may have been concerned about the failure to create a new Latino Senate district combining parts of that county with Monterey County. 58,632 signers in San Diego County may have been concerned with the way that county was divided by the Commission. Media commentators all have noted that the Commission's maps favored Democrats. Many signers, alarmed about the state of California's economy, may have signed to better prevent the prospect of a safe, two-thirds majority in the State Senate to raise their taxes.

Here is what the respected political columnist for the Ventura County Star wrote about the Senate plan on December 13:

> "Political analysts from both parties agree that under the commission-approved Senate maps Democrats have a near-certain chance of gaining a two-thirds majority in the Legislature's upper house.
>
> "If that were to happen, Senate Republicans would become virtually irrelevant. There are only 15 Republicans among the 40 senators today, but that leaves Democrats two short of 27 votes needed for a two-thirds majority. Thus, at least two GOP votes are needed to pass any measure that enacts a tax increase, places a constitutional amendment on the ballot or adopts a bill that takes effect immediately.
>
> "Understandably alarmed at the prospect of losing their remaining influence in the Senate, Republican Party leaders launched a referendum to try to prevent the new districts from taking effect."

(Timm Herdt, "How 'likely' is State GOP to succeed?" *Ventura County Star*, December 13, 2011, < http://www.vcstar.com/news/2011/dec/13/editorial-how-likely-is-state-gop-to-succeed/?opinion=1>, last visited December 16, 2011.)

The Petitioner addresses herein the two questions the Court has posed, and comments further on the timing and choice issues raised by the Secretary of State and the Citizens' Redistricting Commission.

Question 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?

Response to Question 1: The Court should look to the language of Propositions 11 and 20 as a whole, including but not limited to the term "likely to qualify," in determining the meaning of the term "likely to qualify." This term is neither a burden of proof on the Petitioner nor a limitation on the Court's inherent authority to accept jurisdiction over the matter. In context, the people in enacting the provision in Proposition 20 intended to give the Court *broad, flexible authority* to take necessary remedial "relief" as described in Article XXI, § 2(j) before final qualification. The "relief" is to effectuate the political will of the people by giving fullest effect to the referendum stay provisions of Article XXI and Article II, §§ 9 and 10 when a referendum petition is submitted with sufficient raw signatures. The term is sufficiently flexible in meaning to allow the Court to make reasonable inferences that the referendum is likely to qualify for the ballot. The Court may look at the qualification status of the measure, prior to its actual or formal qualification for the ballot, including the pending and random sample count totals for that purpose. The petition signature verification totals as of this filing indicate likely qualification.

Question 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?

Response to Question 2: The Court's authority to entertain a petition for writ of mandate is within its inherent authority to entertain a writ petition where the matter is of immediate statewide concern and so affects the election process as to compel this Court's immediate exercise of its original jurisdiction (*County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845; *Legislature v. Reinecke* (1973)("*Reinecke I*") 6 Cal.3d 595, 601; *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 2.) Article XXI, § 3(b)(2) does not limit, but reinforces and broadens this Court's power to entertain relief as noted in the response to question 1 above.

I. RESPONSE TO THE COURT'S FIRST QUESTION: ARTICLE XXI, § 3(B)(2) AUTHORIZES THE COURT TO COMMENCE PREPARATIONS FOR INTERIM SENATE DISTRICT MAP DRAWING WHEN REFERENDUM PETITIONS ARE "LIKELY TO QUALIFY AND STAY" THE IMPLEMENTATION OF THE COMMISSION'S SENATE MAPS

A. The Meaning of "Likely" Is Drawn From Its Context

The Petitioner agrees that interpretation of a constitutional provision begins with the Constitution's plain language (*Amador Valley Joint Union High Sch. Dist. V. State Board of Equalization* (1978) 22 Cal.3d 208, 244-246). Further, as this Court pointed out in *Santa Clara Cty. Local Transportation Authority v. Guardino* (1995) 11 Cal. 4th 220, 235-236, the meaning of a constitutional term may be ascertained in light of the manifest purpose of the voters in enacting the term as part of a constitutional

scheme. On this question, as the Court noted in *Guardino*, "we agree with Justice Holmes that "a page of history is worth a volume of logic." (*New York Trust Co. v. Eisner* (1921) 256 U.S. 345, 349, [].) (*Id.* at p. 235.) The Court found the manifest purpose of Proposition 62 was to increase citizen control over local taxation by requiring voter approval of all new local taxes by all local government entities" that had been the subject of a "loophole" interpreting Proposition 13 by the courts. (*Id.*)[1]

The manifest purpose of the Proposition 20 amendments to Art. XXI, § 3(b)(2) were to close the "loophole" in the Court's interpretation of the right of referendum in *Assembly v. Deukmejian*, *supra*, which in that case deprived the public of the stay that would have kept the 1981 state legislative district lines that were the subject of the referendum from going into effect for six months before the voters had the opportunity (as they voted to do) to reject those lines. The Petitioner discussed this loophole in detail in her Petition (Pet. 2, 6-8, 19-21) and the evident intent of the proponent of Proposition 20 to take various steps to close this loophole at Part I.B. herein.

(i) No Basis for the Claim That Section 3(b)(2) Establishes a Burden of Proof

The Secretary of State argues that "likely" means "probably" will qualify; the Commission argues the same. Both argue that "likely to qualify" creates a burden of proof and they assert it must mean "preponderance of the evidence" (Bowen Ret. at pp. 2-3) or "more probable

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[1] "Given the evident intent of the drafters of Proposition 62 to close by legislation what they perceived were court-made "loopholes" in Proposition 13, it is unreasonable to believe they would have chosen to leave the *Richmond* "loophole" open and instead addressed only the issue whether to impose a voter approval requirement on general taxes levied by districts without property taxing power—an issue that had never arisen in the cases construing Proposition 13." (*Guardino*, *supra*, 11 Cal. 4th at 235.)

than not" (Comm. Ret. at pp. 12-13). This is purely speculative and wrong. Establishing a burden of proof is easy to state. Nothing in the language or ballot materials suggests that the language establishes a burden of proof. Drawn from its context, "likely to qualify" simply gives a clearer early start date for this Court to take action to effectuate the right of referendum. (See *infra* at pp. 7-9.)

(ii) No Basis for the Claim That Section 3(b)(2) Is a Limitation on This Court's Jurisdiction

The Commission also argues that the language is a limitation on this Court's authority, and questions whether the Court properly may assert jurisdiction any time prior to "formal" qualification of a ballot measure. This is unsupported speculation that is inconsistent with the record in *Assembly v. Deukmejian, supra*, and inconsistent with the action in many initiative and referendum cases, including *Assembly v. Deukmejian* and *Brosnahan v. Eu* (1982) 31 Cal.3d 1, in which the Commission's lead counsel in this case was the petitioner in a pre-qualification challenge to Proposition 8, the Victim's Bill of Rights. Indeed, rather than a limitation on the Court's authority in a mandate action, the context of the term in the amendments of Article XXI, §§ 2(i) and 3(b) adopted as part of Proposition 20, suggest it expanded the authority of the Court to accept a redistricting referendum petition at an early stage, more effectively to protect the people's power of referendum.

This Court had the occasion to interpret the meaning of the term "likely" in *People v. Superior Court (Ghilotti)* (2002) 27 Cal. 4th 888. The Court examined legal dictionaries and previous cases to analyze the question presented, and concluded that the term should be interpreted flexibly, in consideration of the language and purpose of the statute. The Court concluded that the meaning should be drawn from the context used in the statute in which it appears.

> "We ourselves consistently have given a similar flexible interpretation to the statute requiring a change of venue in any criminal case where there is a "reasonabl[e] likel [ihood]" the defendant cannot otherwise receive a fair trial. (Citations omitted).
>
> "Courts have also relied heavily on context to interpret and apply such closely related words and phrases as "probability," "reasonable probability" and "substantial probability." [Citations omitted].
>
> "We further note that when the Legislature wishes to employ a "more likely than not" standard, it has demonstrated its ability to do so in express terms." (Citations omitted). "Thus, mere use of the word "likely" is not proof that the Legislature intended to require the evaluators to predict a greater than 50 percent chance the person would reoffend. *We must therefore look to the context of the SVPA to determine what the Legislature meant by this term.*"

(*Id.*; see also *People v. Wilson* (4th Dist. 2006) 138 Cal.App.4th 1197 [Interpreting Penal Code, §273a in light of context of the statute].)

B. The Court Should Interpret "Likely to Qualify" To Authorize It Upon The Filing of a Petition to Commence Review of Possible Options To Adjust the Boundary Lines of the Senate Maps (Draw Interim Maps) for the 2012 Elections

As discussed above, the Court in *Assembly v. Deukmejian, supra,* exercised its original jurisdiction to take the challenges that had been filed prior to the referendum proponents' submission of referendum petitions for verification by election officials. The Court exercised its original jurisdiction due to the great public importance of the matter and potential impact on the upcoming June 1982 elections. Because the Court acknowledged the applicability of the referendum stay provisions but declined to provide relief contemplated by the stay itself as to legislative districts (i.e., that they could not be used for the June 1982 elections), it is implausible as the Commission asserts that the Article XXI, § 3 (b)(2)

language would have been enacted as a *limitation* on the Court's jurisdiction. Article XXI, § 2(i) made clear that the referendum power applied to redistricting; Article XXI, § 3(a) provided for "original and exclusive jurisdiction" in redistricting matters for this Court; and the Court's exercise of jurisdiction itself in such circumstances was not a problem that Article XXI, § 3(b)(2) reasonably could be inferred to address. Inherent authority to exercise jurisdiction was not an issue in *Assembly v. Deukmejian*, and therefore, the "likely to qualify" language could only mean that Proposition 20 intended to make clear the Court should start early to avoid the real problem – the *Assembly v Deukmejian* "dilemma" – to avoid thwarting the referendum stay power.

Putting "likely to qualify" in context, Article XXI, §3(b)(2)'s use of the term "likely to qualify" triggers jurisdiction for a petition to this Court, and also points to "relief" that the Court may prepare to fashion in the period before a referendum petition formally qualifies, because of the manifest statewide importance of timely redistricting for the first elections following the completion of that redistricting by the Commission.

C. The Proponent of Proposition 20 Agrees That the Proposition 20 Amendments Were Intended to Allow for Early Referendum (and Substantive Litigation) Challenges in This Court

Moreover, the background to inclusion of the amended provisions of Article XXI, § 3(b)(2) and §3 (b)(3) indicates clearly that the authors of the Proposition 20 amendments were trying to facilitate *the earliest possible Court review* of Commission-certified redistricting plans that were the subject of litigation or referendum. In the Proposition 20 proponent Charles T. Munger, Jr.'s letter to this Court dated December 9, 2011, his counsel confirms this intended effect of the "likely to qualify" provision:

> "The final sentence of §3(b)(2) states, 'Any registered voter in this state may also file a petition for writ of mandate or

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.' This sentence did not appear in Proposition 11, but was added by Proposition 20, [fn omitted]. The purpose of this sentence was to provide the Court with the ability to act in a situation where a referendum was likely to qualify, but where the months-long procedural steps required by the Elections Code and election officials for a referendum to be formally certified for the ballot had not yet been completed (see, e.g., Elections Code § 9030, *et seq.*)."

"Proposition 20 simultaneously enacted another change directly related to referenda and timing – it moved the date the [Commission] is required to certify maps up by 30 days, from September 15 to August 15 (§ 2(g)). The result of this change was to move forward by 30 days the timetable for referenda. As the Court is aware, citizen petitions calling for a referendum of a state statute must be submitted to election officials within 90 days of enactment. (Cal. Const., art. II § 9(b).) This same rule applies to maps certified by the [Commission] (§ 2 (i).) So, by moving the date by which the [Commission] must certify maps from September 15 to August 15, Proposition 20 moved the date for submission of referendum petitions from December 15 to November 15. As with the 'likely to qualify' amendment, this amendment sought to mitigate to the extent reasonably possible the time crunch the Court has been faced with in prior redistricting cases – by giving the Court more time to act or consider alternative courses of action in the event of a referendum likely to qualify for the ballot."

"The language in the final sentence of § 3(b)(2) – that a petition may be filed when a referendum is 'likely to qualify and stay the timely implementation of the map' – plainly confers judicial standing on a registered voter to file a petition with this Court, and *intends for the Court to have and to exercise jurisdiction to take appropriate action at the point a referendum is found 'likely to qualify' for the ballot, rather than having to wait what could be months for formal qualification – by which time it may be too late for any judicial effective action, thus thwarting the right of referendum.*"

(Italics supplied.)

D. The Petitioner Has Met the Standard of "Probability" or "Probable Qualification" Suggested by the Secretary of State and the Commission

Neither the Secretary of State nor the Commission contested the Petitioner's evidence set forth in RJN, Exh. C and D, as summarized in the Declaration of Charles H. Bell, Jr. re Likely Qualification of Referendum #1499, that all 48 initiative measures and referendum measures presented to the Secretary of State since 2005 that contained raw signature totals greater than 100% of the number of signatures required to qualify the measures for the ballot had actually qualified, by random sample or full count and that on the basis of this recent history, Referendum #1499 was likely to qualify for the ballot. Instead, both the Secretary of State and the Commission quote a general statement by Robert Stern, in *Democracy by Initiative: Shaping California's Fourth Branch of Government* (Institute for Governmental Studies, 2nd ed. 2008), unsupported by any data, that 40% of initiative and referendum petition signatures are invalid. This unsupported statement is directly contradicted by recent evidence submitted as RJN, Exhs. "C" and "D." Moreover, the Declaration of Jana Lean in Support of Preliminary Opposition by Secretary of State Debra Bowen, ¶¶ 7,8, submitted by the Secretary of State, confirms the Bell Declaration's assertion that the average signature validity rate of the 49 measures that qualified for the ballot between 2005 and 2011 was 74.82% for the 45 initiative measures and 72.1% for the 4 referendum measures. (Compare Bell Dec., ¶¶ 6, 7.) Thus, *the only uncontroverted evidence before this Court* suggests that this 40% figure is highly inaccurate and cannot be relied upon to make any inferences about whether the Petitioner's petition is likely to qualify.

Referendum #1499's random sample verification is not complete. However, as of December 19, 2011, the validity rate of reporting counties is 73.53%. This number is consistent with the averages of the past six years

and 49 ballot measures. On this basis, the Petitioner in fact meets the probability standards proposed by the Secretary of State and the Commission.

II. RESPONSE TO COURT'S SECOND QUESTION: THE COURT HAS INHERENT AUTHORITY TO ACCEPT A PETITION FOR WRIT OF MANDATE WHERE THE MATTER IS OF IMMEDIATE STATEWIDE CONCERN AND SO AFFECTS THE ELECTION PROCESS AS TO COMPEL THIS COURT'S IMMEDIATE EXERCISE OF ITS ORIGINAL JURISDICTION; HOWEVER ARTICLE XXI, § 3(B)(3) EXPANDS AND REINFORCES THE PUBLIC IMPORTANCE OF EARLY ACTION TO PREPARE TO IMPLEMENT "RELIEF" UNDER ARTICLE XXI, §2 (J)

The Court's authority to entertain a petition for writ of mandate is within its inherent authority to entertain a writ petition where the matter is of immediate statewide concern and so affects the election process as to compel this Court's immediate exercise of its original jurisdiction (*County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845; *Legislature v. Reinecke* (1973)("*Reinecke I*") 6 Cal.3d 595, 601; *Clean Air Constituency v. California State Air Res. Bd.* (1974) 11 Cal. 3d 801, 808; *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 2.) Article XXI, § 3(b (2) does not limit, but reinforces and broadens this Court's power to entertain relief as noted in the response to question 1 above.

In *County of Sacramento*, *supra*, the Petitioners sought relief in the Supreme Court to resolve a question of immediate public importance, like the case at bench, concerning the assessment of property tax in Sacramento County which required a number of steps to complete before the applicable deadline for implementing the tax. The Court stated:

> "... in making the writ returnable before this court, we also necessarily determined that the case is a proper one for the exercise of our original jurisdiction. (See Cal.Rules of Court,

> rule 56(a).) Indeed, the issues presented are of great public importance and must be resolved promptly. The assessment of all taxable property in Sacramento County is currently being undertaken, and the local assessment roll must be completed on or before July 1 (Rev. & Tax. Code, §616); unsecured property taxes became due on March 6 (Rev. & Tax. Code, s 2901) and, if unpaid, will become delinquent and subject to penalty on August 31 (Rev. & Tax. Code, § 2922). Petitioners list a number of administrative tasks relative to the equalizing, levying, collecting, and protesting of property taxes which must also be performed in the forthcoming months, and sufficiently show that the delay attendant upon first submitting this matter to a lower court would result in confusion in the administration of the tax laws and hardship and expense to the general public."

(66 Cal. 2d at p. 845.)

In *Clean Air Constituency v. California State Air Res. Bd.*, *supra*, this Court exercised jurisdiction to decide an important issue related to the California Air Resources Board's decision not to implement Clean Air legislation by regulation during the energy crisis. In accepting jurisdiction, the Court stated:

> "The Supreme Court has original jurisdiction in mandamus pursuant to article VI, section 10, of the California Constitution, and will exercise that jurisdiction in appropriate cases when 'the issues presented are of great public importance and must be resolved promptly.'"

(11 Cal.3d at p. 808.)

In *Assembly v. Deukmejian*, SF # 24348 & 24349, the lead petitioners filed their Petitions for Writ of Mandate on October 24, 1981, only five weeks after the start of the referendum qualification period and three weeks before the referendum proponents submitted their petition signatures to election officials for verification. Two companion lawsuits, *Burton et al. v. Eu*, SF # 24354 and *Senate of the State of California v. Eu*, SF #24356, were filed on November 2, 1981, also prior to the filing of the

proponents' referendum petitions. All the petitioners in what became the consolidated case *Assembly v. Deukmejian*, asked this Court to immediately exercise its original jurisdiction due to the statewide importance of the matter, and argued that this Court had the inherent authority to accept jurisdiction, citing *County of Sacramento v. Hickman*, *supra*. In fact, the Court granted an order for issuance of an alternative writ of mandate on December 4, 1981, and set an argument and briefing schedules prior to the "formal" qualification of the referendum petitions which occurred on December 15, 1981. There was no challenge in 1981 by the parties, nor any doubt expressed by the Court, to its exercise of its inherent power to take jurisdiction in that case.[2]

Within two months after this Court had exercised its original jurisdiction in *Assembly v. Deukmejian*, *supra*, another original writ petition was filed in this Court with the Commission's lead counsel in this case, Mr. Brosnahan, and others as petitioners, seeking the Court's expedited exercise of its original jurisdiction to decide two questions concerning the ballot measure known as Proposition 8, "The Victims' Bill of Rights," which proposed to enact sweeping reforms of the criminal justice system and laws: (1) whether the measure, which had attained 108.76% of the required signatures to qualify for the ballot but less than 110%, should be certified for the June 1982 ballot without a full count of signatures, and (2) whether the measure should be stricken from the ballot for alleged violation of the Constitution's "single subject" rule. This Court exercised its original jurisdiction, in *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 2, ruling that the first question was mooted by the Legislature's enactment of an urgency statute

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[2] In contrast to the Secretary of State position now, in 1981 the Secretary of State urged the Court to assert its original jurisdiction over the *Assembly v. Deukmejian* case on October 30, 1981, before the referendum petitions had been filed with her office. See Supplemental RJN, Exh. "A."

that modified the random sample verification threshold from 110% to 105% and on a 4-3 vote that the measure did not violate the single subject rule warranting its removal from the ballot as beyond the power of the people to enact initiative statutes and constitutional amendments. The Court stated:

> "...petitioners, who are electors in various counties of the state, filed with us an original petition for writ of mandate and prohibition to prevent respondent from certifying the initiative and to restrain her from performing any act in aid of submission of the measure to the voters. Because of the importance of the questions presented and the time constraints involved, we issued an alternative writ of mandate and expedited briefing and oral argument. (*Clean Air Constituency v. California State Air Resources Bd.*, 11 Cal.3d 801, 808(1974) [] and cases cited.) We also issued a stay prohibiting enforcement of the trial court's writ of mandate pending final disposition of the present proceeding.

(*Id.*)

Thus, this Court's case law makes clear that the Court can exercise its original jurisdiction under Article VI, § 10, in cases of great public importance involving matters of urgent concern, including those with respect to redistricting, ballot measure referenda and initiatives and elections, even before the formal qualification of those measures for the ballot.

In light of the foreclosure of effectiveness of the referendum stay provision vividly demonstrated in *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, the Proposition 20 amendments extending the referendum power effectively allowed for earlier Court preparation to consider potential remedies, and not to be foreclosed by the clock, from fully implementing the Constitution, including the unique provisions of the referendum stay that appear now in Article XXI, § 3(b) and nowhere else in the Constitution.

The Proposition 20 language most plausibly should be read to mean that instead of a limitation of its Article VI power, it expanded the Court's power expressly to assume jurisdiction and undertake preparatory action (as set forth in Article XXI, §§ 3(b)(2) and 2(j).) Thus, just as this Court interpreted the statutory use of the term "likely" at issue in *Ghilloti* flexibly to effectuate its purposes and balance competing values, and the district court in *People v. Wilson* interpreted Penal Code, § 273a flexibly to accommodate its purposes and competing values, this Court should interpret the meaning of the term "likely" in the phrase "likely to qualify" in Article XXI, § 3(b)(2) flexibly in the context of an expansion of its Article VI power.

Thus, in context, the term "likely" should be interpreted most favorably toward (1) the early exercise of jurisdiction by the Court (2) to consider its options and alternatives in advance of the formal qualification of Referendum SOS # 1499 and (3) in a manner that preserves and vivifies the full referendum power, including its stay provisions.

III. THE COURT WOULD TAKE SIDES AND FALL INTO THE "POLITICAL THICKET" BY ADOPTING THE COMMISSION'S SENATE MAPS FOR THE INTERIM 2012 ELECTIONS

As noted in the Petitioner's MPAs, this Court faces virtually the same situation that the Court faced in 1981 when on 4-3 vote it left in place gerrymandered Legislative district maps drawn by Legislative Democrats, signed by a Democratic governor, as interim lines for the 1982 elections. (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638.) While the ostensible reason the Court gave for doing so was "timing," i.e., the Court indicated it had insufficient time to draw interim lines without affecting the conduct of the 1982 primary election, that decision was criticized by Court dissenters not only as getting into the political thicket (appearing to take sides in a partisan battle) but also as ignoring the popular referendum process. (See

30 Cal. 3d at pp. 680, 693 (dissenting opinions of JJ. Kaus, Richardson and Mosk; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 684-685 (dissenting opinion of J. Richardson.)

As noted in the amicus letter of Charles T. Munger, Jr. dated December 9, 2011, to this Court, Propositions 11 and 20 attempted to correct this by adjusting both the timing factors and the Court's duties with respect to maps that were subject of a referendum, to facilitate Court action without this "timing" constraint.

A. The Court Justifiably Could Avoid Taking Sides or Falling Into the "Political Thicket" By Using As An Interim Map Solution Either Nesting the Commission's Unchallenged Assembly Districts To Form Each Senate District or Using the Existing Odd-Numbered 2001 Senate Districts.

(i) Response to Commission's Comments About the Petitioner's Simple Nesting Plan

The Petitioner has suggested as one option that the Court could quickly and inexpensively "nest" two whole, unchallenged Assembly districts drawn by the Commission which were not viewed as partisan in their effect into one whole Senate district as an interim solution. Similarly, the 2001 Senate Districts were viewed as bi-partisan and have been used for elections for this past decade.

Not only would the former approach comport with Article XXI, §2(d)(6), which makes such nesting a subordinate criterion for districts, but also it would allow this Court to avoid taking sides or falling into the "political thicket."

As noted in the Second Supplemental Declaration of T. Anthony Quinn, PhD., ("Quinn 2d Supp. Dec."), ¶¶ 2-3, this can be accomplished with little adjustment and, fortuitously, without violating the Voting Rights Act for the odd-numbered districts that would be electing State Senators in

2012. While the even-numbered interim districts would face Voting Rights Act section 5 retrogression problems, these problems are theoretical, since the affected districts would not be used for the interim elections, and would not be given effect for the 2014 elections, when either the Commission's lines would become effective as a result of their adoption by voters in November 2012, or would be supplanted by new-Court drawn maps for 2014 if the Petitioner's referendum succeeds. (Quinn 2d Supp. Dec., ¶¶ 14-16.) And in fact, the nesting approach provides an opportunity to elect an additional Latino Senator in a Section 5 county (Monterey County.)

(ii) Response to Commission's and Secretary of State's Comments About Use of Existing Odd-Numbered 2001 Districts

Similarly, as Charles T. Munger, Jr. notes in his December 9, 2011 letter to the Court, other potential interim remedies include using the existing 2001 Senate districts, drawing new interim maps, or using the Commission's districts. The Petitioner has noted that of these potential remedies, one -- use of the Commission's districts – would do violence to the referendum stay power of Article II, § 10 and Article XXI, § 2(i), much as would be the case if SB2's single payer health plan had been put into effect in 2004 before the people had the opportunity to vote on it.

Using the existing odd-numbered 2001 Senate districts with minor adjustments to 3 of those districts (SD 5, 17 and 37) as suggested in the Quinn 2d Supp. Dec., ¶¶ 25-33, poses no problem of population deviations. The Commission has encouraged this Court to apply the population deviations standard of *Assembly v Deukmejian*, *supra*, which it summarizes in its Return:

> "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."

(Comm. Ret. at p. 27.)

As demonstrated in the Quinn 2d Supp. Dec., ¶ 24, 17 of the current Senate districts have deviations of less than 8.2 percent, thus falling within the "rational state policy" deviation of 16.4 percent. Only three districts have deviations outside this a range. Quinn 2d Supp. Dec., ¶ 25, 26. Dr. Quinn demonstrates how each of these districts may "shed population" (the Commission's own term) to come within the 8.2 percent deviation. (Quinn 2d Supp. Dec., ¶¶ 27-28 (SD 5); 2-30 (SD 17); and 31-32 (SD 37).)

As an example, the Commission says that to bring largest district, SD 37, into compliance it "would need to shed 267,764 people." The Quinn 2d Supp. Dec., ¶ 31-32 shows how this may be done.

But the Court not even go this far. In *Brown v Thomson* (1983) 462 US 835, a case decided after *Assembly v. Deukmejian*, the United States Supreme Court faced a situation in which Wyoming had adopted a plan with one district deviating by more than 80 percent. Overall deviation was more than 16 percent. The Supreme Court found the Wyoming plan constitutional despite very large deviation in this one district because it reflected a rational state policy of keeping counties whole.

According to the Commission's own figures, the largest odd-numbered district (SD 37) is 30.55 percent over the ideal; the smallest (SD 21) is 8.2 percent under the ideal. Clearly this is within the range allowable under *Brown v. Thomson, supra*, given the unique "rational state policy" of protecting the people's right of referendum.

B. The Deference the Court Might Pay to the Commission's Maps in Substantive Litigation Is Not Applicable and Is Contrary to the Court's Duty to Implement the People's Political Power Exercised Through the Referendum

The Court may surmise that the Commission's Senate Maps were politically balanced because Proposition 11 created a bi-partisan formula for the adoption of redistricting maps so that the product would not be "partisan," and be tempted on that basis to defer to and authorize the interim use of the Commission's certified Senate Map. While the Petitioner believes that would be incorrect because the challenged Senate Maps in fact are widely seen as creating an unfair partisan advantage (unlike the Assembly Maps), partisan impact it is not relevant. The Court must give greater priority to implementation of the referendum stay power than deference to the Commission's maps because of the Commission's constitutional role, its multi-partisan composition formula, or whether the Court believes the Commission performed its assigned role well. That institutional deference falls where the implementation of a political power of referendum is at issue, and the Constitution says the maps are "stayed," unlike the deference the Commission's maps might be accorded in litigation challenges.

Proposition 11 created a formula of "partisan balance" in only nominal form, because the Commissioner selection process[3] (following Proposition 11's conflict of interest criteria)[4] eliminated obvious

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[3] Art. XXI, §§ 2(c) (3) & 2(c) (6).

[4] Gov. Code § 8252,subdivision (b)(2), provided:
(2) The State Auditor shall remove from the applicant pool individuals with conflicts of interest including:
(A) Within the 10 years immediately preceding the date of application, neither the applicant, nor a member of his or her immediate family, may have done any of the following:

"partisans" from the Commissioner selection pool, leaving only those who were nominally registered with a political party or who may have represented partisan interests without full disclosure.[5]

Only one Commissioner dissented from the Commission's adoption of the Senate maps, and that Commissioner, Dr. Michael Ward, publicly stated that the Commission engaged in political horse trading, but not partisanship. Ward, in a statement released on August 15, 2011 when the Commission formally adopted its Maps, described the process as "fundamentally flawed as the result of a tainted political process" and that the Commission "broke the law" by ignoring the federal Voting Rights Act and making decisions "based on political motives." He further stated, "This commission became the citizens' smoke-filled room, where average citizen commissioners engaged in dinner table deals and partisan gerrymandering, the very problems that this commission was supposed to prevent."

At page 2, *supra*, the Petitioner noted a *Ventura County Star* article summarizing the common view that the Senate district maps adopted by the

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(i) Been appointed to, elected to, or have been a candidate for federal or state office.

(ii) Served as an officer, employee, or paid consultant of a political party or of the campaign committee of a candidate for elective federal or state office.

(iii) Served as an elected or appointed member of a political party central committee.

(iv) Been a registered federal, state, or local lobbyist.

(v) Served as paid congressional, legislative, or Board of Equalization staff.

(vi) Contributed two thousand dollars ($2,000) or more to any congressional, state, or local candidate for elective public office in any year, which shall be adjusted every 10 years by the cumulative change in the California Consumer Price Index, or its successor.

[5] One "Republican" Commissioner, Vincent Barabba, criticized the Republican Party's criticisms of the Commission's processes and results in op-eds in the Sacramento Bee and the Contra Costa Times.

Commission favored Democrats. Other articles by well-known columnists such as the *Sacramento Bee*'s Dan Walters reflected a similar view. The fact the Senate district referendum qualification effort was funded in large part by the California Republican Party also indicates the "understandable" partisan perspective that the Commission's Senate maps would reduce the number of seats that could be won by Republicans by three, leaving the Senate Republican Caucus at under 13 members, short of the 1/3rd minority necessary to block state tax increases. (See Timm Herdt *Ventura County Star* article quoted at p. 2, *supra.*)

Thus, the Commission's Senate maps were even viewed by impartial media observers as favoring the Democrats, and if the Court were to leave these lines in effect on an interim basis, the result would again, as in 1982, favor the Democrats and vitiate the referendum process.

The Petitioner's attack on the Senate maps does not reflect a view that *all* the Commission's work product, such as its Assembly and Board of Equalization maps, favored Democrats. Moreover, there was no political or policy challenge to these state districts after the Commission had completed its public process. Only the Senate districts generated both legal and political (referendum) opposition as partisan products.

In sum, the constitutional requirement of "staying" the Senate Maps cannot be avoided under any theory of deference and should not be ignored, because doing so would entangle the Court in the political thicket.

IV. TIMING ISSUES

The Petitioner believes the Court could compress the odd-numbered Senate District candidate filing schedule by 14 days, giving the Court an additional 21 days to complete the task of preparing alternative Senate District Maps to implement an election calendar for the 20 odd-numbered Senate Districts, after the end of January 2012 date on which its Order to Show Cause indicated the earliest date for issuance of an opinion in this

matter. The proposed compressed candidate filing schedule for these Senate Districts would begin on February 23, 2012. The proposed schedule would accommodate waiver or compression of the Signature In Lieu Circulation Period, which if compressed could run concurrently with the modified Candidate Declaration of Candidacy and Nomination Papers Circulation Period. Under a concurrent schedule, both of these filing periods would run for 14 days (commencing February 24, 2012 and ending March 9, 2012) .

The proposed modification to the candidate schedule would not affect any candidate filing deadlines, county election official or Secretary of State duties with respect to the filing of candidate nomination papers, or any sample ballot or military and overseas voters vote-by-mail ballot distribution.

A. Petition In Lieu Of Filing Period

The current filing period runs from December 30, 2011 to February 23, 2012. As the Petitioner has previously discussed, this requirement could be waived by the Court for the 20 odd-numbered Senate districts, or the circulation period for these petitions could be made to run concurrently with the Candidates' Declaration of Candidacy and Nomination Petitions filing period. Similarly, the payment of the filing fee could be waived entirely for candidates for the 20 odd-numbered Senate districts who filed a statement or claim of indigence.

B. Candidate Declaration of Candidacy and Nomination Papers Circulation Period

The current filing period runs from February 9 to March 10, 2012. An additional five days is available if an incumbent officeholder fails to file nomination papers by the close of the regular filing period on March 10. The Petitioner proposes to compress this period from 25 to 14 days, beginning on February 24, 2012 and running to the current deadline date of

March 9, 2012. The Petitioner would not change the extension periods that currently apply in the circumstances where an incumbent of an office fails to file his or her nomination papers by the March 9, 2012, 5:00 pm deadline, or the new Top Two Primary provision for extending the filing deadline if the only candidate in a Voter – Nominated office election dies between the March 9, 2012 filing deadline and the March 14, 2012 extension deadline.

There is no rational justification for a one-month filing period, and the Court could shorten this period considerably. A candidate for State Senate is only required to obtain 40 valid petition signatures on his or her nomination petition, and this can be accomplished much more quickly and often is done in a single day by candidates who file at the last possible moment.

Moreover, under the Top Two Primary System implemented with the passage of Proposition 14, a candidate may obtain petition signatures from any registered voter who resides in his or her district; the former requirement that partisan candidates obtained nomination petition signatures from registered voters of the candidate's party no longer applies, and this should make it significantly easier for candidates to obtain 40 valid signatures. The Petitioner's success in obtaining 710,000 signatures within 90 days is good evidence in support of her contention that this timetable could be compressed substantially.

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PROPOSED REVISION TO CANDIDATE FILING SCHEDULES
ODD –NUMBERED STATE SENATE DISTRICTS ONLY

Activity	Current Schedule	Proposed Schedule	Time Allotted
Signatures In-Lieu of Filing Fees §§ 8020(b), 8061, 8105, 8106(b)(3)	12/30/11 to 2/23/12 (E-158 to E-103) Sufficiency & Supplemental Deadlines 3/4/12; 3/9/12	Waive or Run Concurrently With Candidate Declaration of Candidacy and Nomination Petitions Beginning 2/24/12	Currently: 55 days Proposed: 0-14 days if waived or run concurrently; no change for sufficiency or supplementation unless waived
Declaration of Candidacy and Nomination Papers §§ 333, 8020, 8040, 8041, 8061-63, 8100, 8105, 8106	2/13/12 to 3/9/12 (E-113 to E-88)	Compress to 2 Weeks 2-24/12 to 3/9/12 (E – 102 to E-88)	Currently: 25 days Proposed: 14 days Opening Date Pp'd 11 Days
Statement of Economic Interests Gov. Code § 87200-87203, 87500	2/13/12 to 3/9/12 (E-113 to E – 88)	Conform to Declaration of Candidacy & Nomination Papers Filing Schedule 2/24/12 to 3/9/12 (E – 102 to E-88)	Currently: 25 days Proposed: 14 days Opening Date Pp'd 11 Days
Candidate Statements in Official Sample Ballot Gov. Code § 85601(c); Elec. Code §13307.5	2/13/12 to 3/9/12 (E-113 to E – 88)	Conform to Declaration of Candidacy & Nomination Papers Filing Schedule 2/24/12 to 3/9/12 (E – 102 to E-88)	Currently: 25 days Proposed: 14 days Opening Date Pp'd 11 Days

Activity	Current Schedule	Proposed Schedule	Time Allotted
Nomination Documents Forwarded to Sec'y of State §§ 8070, 8082	2/13/12 to 3/9/12 (E-113 to E – 88)	Conform to Declaration of Candidacy & Nomination Papers Filing Schedule & Extension Period 2/24/12 to 3/14/12 (E – 102 to E-88)	Currently: 25 -30 days Proposed: 14 - 19 days Opening Date Pp'd 11 Days
Nomination Period Extension if incumbents fail to file by 3/9/12 5 pm deadline § 8022	3/10/12 to 3/14/12 (E-87 to E – 83)	No Change	No Change
Nomination Period Extension if Only Voter-Nominated Candidate in Race Dies § 8025	3/10/12 to 3/23/12 (E – 87 to E – 74)	No Change	No Change
Nomination Documents Forwarded to Sec'y of State § 8082	3/14/12 (E-83)	No Change	No Change
Political Party Endorsements to County Election Officials § 13302(b)	3/14/12 (E -83)	No Change	No Change

Activity	Current Schedule	Proposed Schedule	Time Allotted
Candidate Ballot Designation Challenge Period § 13307	No Fixed Schedule Must be Completed by 3/29/12 – Current Deadline for Sec'y of State to Submit Certified List of Candidates (E-68)	No Change	No Change
Deadline for Sec'y of State to Submit Certified List of Candidates §§ 8120-8125	3/29/12 (E-68)	No Change	No Change
Statement of Write-in Candidacy and Nomination Papers § 8601	4/9/12 to 5/22/12 (E-57 to E-14)	No Change	No Change
Military & Overseas Ballots 42 USC § 1973ff-1	4/21/12 (E-45)	No Change	No Change
Sample Ballots – County Mailing §§ 13300, 13303, 13304	4/26/12 to 5/26/12 (E-40 to E – 10)	No Change	No Change

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CONCLUSION

For the reasons set forth in the Petitioner's Petition for Extraordinary Relief, her Reply to Preliminary Oppositions, and this Reply to the Secretary of State's and Commission's Returns, the Court should expeditiously exercise its jurisdiction in this matter, obtain the advice and assistance of a Special Master or Masters to adjust the boundary lines of the Senate Maps and issue an order adopting those maps for the June and November 2012 elections and adjust the candidate filing schedule for candidates for the odd-numbered Senate Districts only to effectuate the people's exercise of their referendum rights through Referendum Secretary of State # 1499.

Dated: December 19, 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 **PETITIONER'S REPLY TO RETURNS SUBMITTED BY RESPONDENT SECRETARY OF STATE AND INTERVENOR CITIZENS REDISTRICTING COMMISSION AND IN SUPPORT OF PETITION FOR WRIT OF MANDATE** contains 7,662 words, exclusive of those materials not required to be counted under Rules 8.204(c) and 8.468(a)(6).

Dated: December 19, 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 19, 2011, I served the following document(s) described as:

- **PETITIONER'S REPLY TO RETURNS SUBMITTED BY RESPONDENT SECRETARY OF STATE AND INTERVENOR CITIZENS REDISTRICTING COMMISSION AND IN SUPPORT OF PETITION FOR WRIT OF MANDATE**

on the following party(ies) in said action:

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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.

X **BY HAND DELIVERY:** By placing said document(s) in a sealed envelope and causing said envelope to be served on said party(ies), by hand delivery.

X **BY FEDERAL EXPRESS MAIL:** By placing said documents(s) in a sealed envelope and depositing said envelope, with postage thereon fully prepaid, FEDERAL EXPRESS MAIL BOX, in Sacramento, California, addressed to said party(ies).

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 19, 2011 at Sacramento, California.

Shannon Diaz
SHANNON DIAZ