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SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JULIE VANDERMOST,

Petitioner,

v.

DEBRA BOWEN, SECRETARY OF STATE OF CALIFORNIA,

Respondent.

APPLICATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF CHARLES T. MUNGER, JR.

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CHARLES T. MUNGER, JR.

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Attorneys for Proposed Amicus Curiae,
CHARLES T. MUNGER, JR.

Pursuant to the order of this Court dated December 9, 2011, Charles T. Munger, Jr. ("Munger") respectfully seeks leave of this Court to file an *amicus curiae* brief addressing the questions posited in the Court's order. Mr. Munger takes no position on the merits of the case before this Court or whether any relief should be granted or denied in these proceedings. Charles T. Munger, Jr.'s sole purpose in seeking to file an *amicus curiae* brief is to seek to provide the Court with his somewhat unique perspective on several provisions of Propositions 11 and 20 relevant to the Court's order.

Charles T. Munger, Jr. is intimately familiar with both Propositions 11 and 20, and with the electoral campaigns surrounding them. Those initiative measures amended Article XXI of the California Constitution regarding redistricting of state Senate, Assembly, Board of Equalization and Congressional district boundaries after each decennial census. Charles T. Munger, Jr. was a principal advocate for Proposition 11, and was the Yes on 11 campaign's largest financial supporter. As regards Proposition 20, he was intimately involved in its drafting, was its sole proponent (Elections Code § 342), was its largest financial supporter and directed the campaign for its passage. Mr. Munger respectfully submits his *amicus curiae* brief to address certain matters he believes are important to preserving the utility and integrity of

Propositions 11 and 20 for use in redistricting in future decades, as well as the Court's flexibility to address future redistricting disputes.

Charles T. Munger, Jr. believes that Propositions 11 and 20 require deference to the redistricting authority and process established by the voters in the amendments to Article XXI. By the same token, those amendments protect the right of referendum in the context of redistricting by specifically conferring original and exclusive jurisdiction on this Court before a petition officially qualifies for the ballot, i.e., when it is "likely to qualify," intending and enabling this Court to exercise broad authority to prepare for and implement interim remedies if a referendum qualifies.

Dated: December 20, 2011

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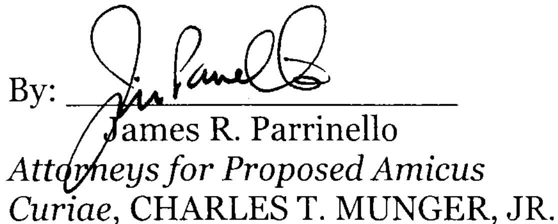
By: 
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I. INTRODUCTION.

Charles T. Munger, Jr. ("Amicus") submits this amicus curiae brief in an attempt to assist the Court as it addresses the particular facts and circumstances of the proceeding at issue. Amicus takes no position as to whether relief should be granted or denied in this proceeding. Rather, Amicus—one of the key supporters in the drafting and passage of Propositions 11 and 20—submits this brief to address certain matters he believes are important to preserving the utility and integrity of those initiatives for use in redistricting in future decades, as well as the Court's flexibility to address future redistricting disputes.

Amicus believes that Propositions 11 and 20 require deference to the redistricting authority and process established by the voters in the amendments to Article XXI. By the same token, those amendments protect the right of referendum in the context of redistricting by specifically conferring original and exclusive jurisdiction on this Court before a petition is determined to be "qualified," i.e., when it is found "likely to qualify," intending and enabling this Court to exercise broad authority to prepare for and implement interim remedies if a referendum qualifies. Should the Court deem it appropriate, the Court's authority includes

appointment of a special master and a broad array of options for the implementation of an interim plan.

Amicus has previously addressed issues raised by the parties' initial briefing[1], and limits this brief to the Court's Order dated December 9, 2011, which raised three issues for further briefing: what relief, if any, the Court should order in the event the referendum qualifies; what standard the Court should apply in determining whether a referendum is "likely to qualify"; and the extent of the Court's authority to entertain a petition for writ of mandate prior to formal qualification of a referendum petition.

II. RESPONSE TO COURT'S QUESTIONS.

1. WHAT RELIEF, IF ANY, SHOULD THE COURT GRANT IN THE EVENT THE REFERENDUM QUALIFIES?

If the referendum qualifies, the Court must choose a map to use for the upcoming elections, in this case, the Senate elections of 2012. Propositions 11 and 20 do not dictate what map the Court must choose, and Amicus takes no position. The Court may, following the precedent in *Assembly v. Deukmejian*, and depending on the facts and circumstances, choose a map identical to that certified by the CRC but stayed by the referendum; or the Court may

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[1] On December 9, 2011, Amicus submitted a 19 page letter to the Court pursuant to California Rules of Court, Rule 8.500(g). Rather than repeat those comments here, Amicus incorporates the letter by this reference.

select an alternative interim map that differs from the CRC map in whole or in part.

Proposition 20 is structured so that, in the event of a disagreement over a map so acute that it gives rise to a referendum, no side automatically prevails for the ensuing elections. On the one hand, a referendum proponent can not derail the implementation of a Commission-certified map merely by causing a referendum-based stay; on the other hand, referendum opponents cannot force a Commission-certified map into use because the referendum's formal qualification would come too late for an alternate map to be implemented. Rather, Proposition 20 enables both sides to plead in a timely way before this Court, so that the Court can decide what, if any, interim relief is suitable.

In a given case, it may not be known whether a referendum is officially qualified for the ballot until after the last date the Court believes it can delay ordering into effect an interim map. In such circumstances, the authors of Proposition 20 sought to balance the public interest in giving the proponent and signers of a referendum that would eventually qualify for the ballot a timely opportunity to seek relief, against the public interest in not having the implementation of a certified final map blocked by a referendum that ultimately would not qualify. Under such circumstances, the

Court has the authority to decide what, if any, interim relief should issue.

2. WHAT STANDARD SHOULD THE COURT APPLY IN DETERMINING WHETHER A REFERENDUM IS LIKELY TO QUALIFY WITHIN THE MEANING OF ARTICLE XXI, SECTION 3(b)(2)?

Amicus takes no position as to whether the referendum at issue in this case is "likely to qualify" pursuant to Cal. Const., art. XXI, §3(b)(2).[2] The "likely to qualify" language was one of several provisions added by Proposition 20 to give the Court flexibility to act in circumstances where a referendum was deemed likely to qualify but where the months-long procedural steps required by the Elections Code for formal qualification had not yet been completed.

Proposition 20 did not define what is meant by a referendum "likely to qualify." The term "likely to" is a common-sense term and generally understood to mean "more likely than not" or "probably," which are standard dictionary definitions. As used in §3(b)(2), the term refers to a referendum that the Court deems under all the circumstances is more likely than not to qualify for the ballot. The purpose of this provision, when coupled with §3(b)(1) and §3(b)(3), is to make clear this Court, and only this Court, has original and exclusive jurisdiction where a referendum is deemed likely to qualify

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[2] Unless indicated otherwise, all section references are to sections of Article XXI.

and stay a Commission-certified map, and to assure adjudication of that proceeding is given priority.

The history of redistricting litigation in prior decades made it abundantly clear to the drafters of Prop 20 that the more time the Court has to address redistricting disputes, the better. The "likely to qualify" language, together with moving the Commission's certification deadline date from September 15 to August 15 (see §2(g)), were designed to provide as much time for the Court as possible. The drafters of Prop 20 were cognizant of the legal uncertainties that could be created by the pendency of a referendum during an election cycle, and the purpose of these provisions is to provide as much time as possible for the Court to decide upon the proper course of action. It also must be kept in mind that under Prop 20 a preliminary determination that a referendum is likely to qualify does not set the Court in stone, so to speak. If the Court were to deem a referendum likely to qualify and based thereon undertake preliminary steps (e.g., appoint a special master, order the parties to submit alternative maps, etc.) in anticipation of actual qualification, and the referendum thereafter fails to qualify, or if the Court reverses its preliminary determination that the measure was "likely to qualify," the Court retains the ultimate authority to dismiss the petition outright because no relief at all would be in order.

3. IS THE 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 THE 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?

As stated above and in Amicus' December 9, 2011 letter to the Court at pp. 6-9, §3(b)(2) specifically confers on this Court original and exclusive jurisdiction in the event a referendum petition is "likely to qualify" for the ballot. This language was one of several provisions of Prop 20 that sought to give the Court more time to act or consider alternative courses of action in the event there was a pending referendum that was likely to qualify for the ballot.

The plain meaning and purpose of this language in the final sentence of §3(b)(2) is to make the Court's original and exclusive jurisdiction to act in such circumstances clear, not to limit the Court's inherent authority in any way. There is nothing in Prop 20's Title & Summary, Legislative Analyst's Analysis or ballot arguments that suggests the purpose of §3(b)(2) was to restrict or limit in any way the Court's exercise of its inherent authority.

As regards the Court's inherent authority to entertain a writ petition even if it cannot yet be determined whether a referendum is

likely to qualify for the ballot, it is unchanged by Props 11 and 20. This Court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus. (Cal. Const., art. VI, §10.) This Court exercises its original jurisdiction in exceptional cases involving urgent matters of overriding public importance. (*See, e.g., Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1066; *Wilson v. Eu* (1991) 54 Cal.3d 471.) It possesses broad inherent and implied powers necessary to function properly and effectively, to carry out its duties and to ensure the orderly administration of justice. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45; *Rutherford v. Owens-Illinois, Inc* (1997) 16 Cal.4th 953; *In re Amber S.* (1993) 15 Cal.App.4th 1260.)

Although not commonplace, in appropriate circumstances courts have entertained legal challenges to measures that had not yet qualified for the ballot. (*CTLA v. Eu* (1988) 200 Cal.App.3d 351 358; *San Francisco Forty-Niners v. Nishioka* (1999) 75 Cal.App.4th 637; *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769.) There is no ironclad rule prohibiting the exercise of jurisdiction over an initiative or referendum prior to its qualification, and it is within the Court's inherent authority to exercise such jurisdiction in circumstances where the public interest is served by doing so.

In *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, for example, this Court entertained three original petitions for writs of mandate challenging the legality of referenda against the Assembly, Senate, Congressional and Board of Equalization redistricting statutes enacted by the Legislature and seeking orders to have those plans used for the 1982 elections. The writ petitions were filed while the referenda were still in the signature gathering process. This Court issued its alternative writ of mandate after the referenda had been turned in to elections officials for verification but before they had qualified for the ballot.[3] While the reported opinion does not directly address the issue, it appears the Court exercised its inherent authority to entertain the petitions challenging the referenda before they qualified for the ballot.

III. CONCLUSION.

To reiterate, Amicus Charles T. Munger, Jr. takes no position on the merits of the case before the Court. He is concerned only with the proper application and interpretation of Propositions 11 and 20,

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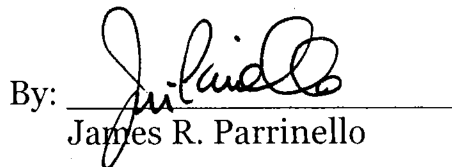
[3] The following time line was obtained from this Court's opinion in *Assembly v. Deukmejian* and the Register of Actions in the Clerk's office in San Francisco: the Assembly filed its petition for writ on 10/26/81; referendum petitions were submitted to elections officials on 11/18/81; this Court's order issuing Alternative Writ and setting oral argument was filed on 12/4/81; the Alternative Writ was issued on 12/9/81; the Secretary of State announced the referenda had qualified for ballot on 12/15/81. The 11/18/81 and 12/15/81 dates were obtained from *Assembly v. Deukmejian, supra*, 30 Cal. 3d at 645: the remaining dates were obtained from the Register of Actions page for SF No. 24348 (this was the original filing number assigned to *Assembly v. Deukmejian, supra*.)

and retaining their flexibility, utility and enforceability by the Court in future decades.

Dated: December 20, 2011

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI, LLP

By: 
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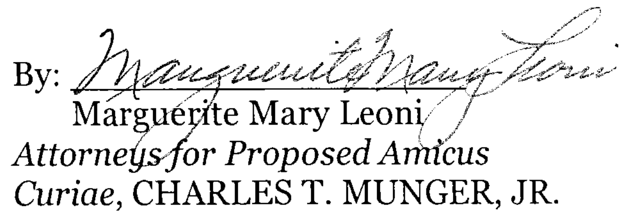
By: 
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Vandermost v. Bowen
Calif. Supreme Court Case No. S198387

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States employed in the County of Marin. I am over the age of 18 and not a party to the within cause of action. My business address is 2350 Kerner Blvd., Suite 250, San Rafael, CA 94901. I am readily familiar with my employer's practices for collection and processing of correspondence for mailing with the United States Postal Service and for pickup by Federal Express.

On December 20, 2011, I served a true copy of the foregoing **APPLICATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE; BRIEF AMICUS CURIAE OF CHARLES T. MUNGER, JR.** on the following parties in said action, by serving:

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__X__ **BY ELECTRONIC SERVICE**: By transmitting by email to the above party(ies) at the above email addresses.

__X__ **BY OVERNIGHT DELIVERY**:
FEDERAL EXPRESS: By following ordinary business practices and placing for pickup by FEDERAL EXPRESS at 2350 Kerner Blvd., Suite 250, San Rafael, CA 94901, copies of the above documents in an envelope or package designated by FEDERAL EXPRESS with delivery fees paid or provided for.

Executed in San Rafael, California on December 20, 2011.

I declare under penalty of perjury, that the foregoing is true and correct.

Paula Scott