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December 21, 2011

Chief Justice Tani Cantil-Sakauye and Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102-4797

RE: Application to File Amicus Curiae Brief and Amicus Curiae Brief Requesting Denial of Petition for Extraordinary Relief in *Vandermost v. Bowen*, No. S198387, filed on December 2, 2011.

To the Honorable Chief Justice and Associate Justices of the Supreme Court:

California Common Cause ("Common Cause") respectfully requests that this Court summarily deny the Petition for Extraordinary Relief in the Form of Mandamus or Prohibition in *Vandermost v. Bowen*. Petitioner urges this Court to command the Secretary of State to refrain from implementing the Citizens Redistricting Commission's certified Senate maps and to establish interim boundaries for the 2012 elections using either the 2001 district lines or drawing new Senate lines. Common Cause believes these remedies are inappropriate and should be denied.

STATEMENT OF INTEREST

Common Cause is a nonpartisan citizens' organization dedicated to ensuring open, accountable, and effective government in California. Common Cause works to strengthen public participation in the political process and to ensure that process serves the public interest. To that end, Common Cause has pursued redistricting reform for several decades. Most recently, we led efforts to reform California's state redistricting process by drafting Proposition 11. As one of the original proponents, Common Cause's goal was to create the Citizens Redistricting Commission ("Commission") as an alternative to the Legislature drawing all state district lines, and to give the Commission the responsibility of drawing state districts that would follow new, prioritized mapping criteria and rules for transparency and public engagement. We also endorsed and worked for the passage of Proposition 20, which expanded the responsibility of the Commission to draw congressional district lines and added additional language about communities of interest, timing of the adoption of maps, and referendum rules.

DISCUSSION

I. THE COURT SHOULD DELAY SCHEDULING ANY HEARING FOR ORAL ARGUMENTS UNTIL AFTER JANUARY 10, 2012, THE DEADLINE FOR COUNTY ELECTIONS OFFICIALS TO COMPLETE THE RANDOM SAMPLE VERIFICATION OF PETITION SIGNATURES.

Petitioner argues that the suspension of the Commission-drawn Senate maps is mandatory based on the fact that Petitioner has presented petition signatures to the Secretary of State within the 90-day referendum deadline.

The Secretary of State has detailed the following procedure for verifying signatures for the qualification of a referendum:

> Once petitions are filed, county elections officials have 8 working days to determine a raw count of the signatures submitted and report their findings to the Secretary of State.
>
> Once the statewide total reaches at least 100% of the required amount of signatures (504,760), the Secretary of State directs the counties to begin a random sample verification of signatures. Counties have 30 working days to complete a random sample of 3% or 500 signatures, whichever is greater, and report their results to the Secretary of State.
>
> If the statewide random sample total projects more than 110% of the required amount of signatures (555,237), the referendum would qualify for the ballot. If the statewide total is less than 95% of the required amount of signatures (479,522), the referendum would fail to qualify for the ballot.
>
> If the statewide total falls between 95% and 110%, counties would be required to perform a full check of signatures and report their results to the Secretary of State within 30 working days. Once the statewide full count total reached 100% of the required amount of signatures, the referendum would qualify for the ballot.

(California Secretary of State, Referendum – Elections & Voter Information, http://www.sos.ca.gov/elections/ballot-measures/referenda.htm.)

According to the Secretary of State, county elections officials are currently still engaged in only the first stage of signature verification. At this stage, each county must

take a 3 percent sample of the petition signatures submitted for the respective county and engage in a verification process where the signatures are sorted into three categories: valid, invalid and duplicates. (*See* http://www.sos.ca.gov/elections/pend_sig/init-sample-1499-122011.pdf.) Verification involves the counties typing in the addresses of the sampled signatures into a database and comparing the signatures and addresses to the database of registered voters. As of December 20, 2011, several of the most populous counties—including Los Angeles and Orange Counties—have not completed their signature verification. Counties have until January 10, 2012 to complete the verification process. (http://www.sos.ca.gov/elections/ballot-measures/pending-signature-verification.htm.)

This verification process is significant because the outcome will determine whether there are sufficient number of valid referendum signatures to qualify to appear on the ballot for voter consideration, or whether the number is within a range where the signatures must undergo a further full check of all signatures (requiring an additional 30 days), or whether there are an insufficient number of valid signatures for the referendum to qualify. Given the importance of the completion of this stage in establishing whether the referendum has qualified, we respectfully suggest that the Court schedule its hearing for oral arguments for after January 10, 2012, at the earliest, to await the results of the random sample verification.

II. THIS COURT SHOULD BE WARY OF PARTISAN EFFORTS TO UNDERMINE THE CITIZEN REDISTRICTING COMMISSION'S MAPS.

In passing Proposition 11 in 2008 and Proposition 20 in 2010, voters squarely confronted the partisan gridlock of the Legislature and what they saw as a root cause: the hyper-partisan district lines drawn in 2001 by the Legislature to protect incumbents of each party. (*Redistricting Reform in California: Prop 11 on the November 2008 California Ballot*, Center for Gov'tal Studies, *available at* http://www.cgs.org/images/publications/redist_memo_rpt_102408_fin.pdf.) To address continuing governmental dysfunction, voters sought to expel partisan considerations from the redistricting process by both creating the nonpartisan, Citizens Redistricting Commission, and mandating prioritized criteria by which the Commission is to draw for Congressional districts, state Senate and Assembly districts, and State Board of Equalization districts.

First, Proposition 11 mandated an intensely scrutinized, unusually transparent process to select the fourteen Californians who would serve on the Commission. The Commissioners ultimately went through a year-long process that involved the screening of 30,000 applicants, where they not only had to survive robust conflict of interest rules (including removal for working as a consultant to a campaign committee, being a

registered lobbyist, or donating $2,000 or more to a candidate in any year), complete a battery of essays, disclose personal and familial interests, and be interviewed by the Bureau of State Audits, but they were also screened by the Legislature for partisan bias and other concerns. Paramount in the selection criteria was that the applicants have "relevant analytical skills, *ability to be impartial*, and appreciation for California's diverse demographics and geography." (Gov't Code § 8252, subd. (d), italics added.) In the Findings and Purpose, as well as throughout both the Constitutional and statutory provisions of Proposition 11, the impartiality of the Commissioners is a predominant consideration in the selection and redistricting process. (*See, e.g.*, Cal. Const. Article XXI, § 2, subd. (c), stating that "The selection process is designed to produce a Citizens Redistricting Commission that is independent from legislative influence and reasonably representative of this state's diversity.".)

Second, in passing Propositions 11 and 20, voters amended Article XXI to incorporate new redistricting criteria in prioritized order. These six prioritized criteria replaced previous malleable criteria that incumbents and parties manipulated to justify self-serving gerrymandering at the expense of compliance with the Voting Rights Act, respect for communities, neighborhoods, cities and counties, and other important factors. In Propositions 11 and 20, voters sent a clear message that narrow partisan and incumbent interests were inappropriate to consider in the drawing district lines.

Those same narrow partisan interests that were rejected by voters are at the heart of Petitioner's efforts here. While Article XXI commands that "Districts shall not be drawn for the purposes of favoring or discriminating against a . . . political party," Petitioner admits that "Republicans have sponsored and funded the referendum against the Commission's Senate plan" because they are not satisfied that the Commission drew a plan that is "fair" to Republicans. (Pet. at p. 20.) Indeed, Petitioner points directly to the potential loss of two Republican seats as the primary motivation for challenging the Senate maps. (*Ibid.*) As refreshing as Petitioner's candor is, voters plainly intended to keep out of the redistricting process the consideration of these kinds of partisan gains and losses. When the Commission drew lines for each level of government, they were appropriately careful not to draw based on incumbent or partisan considerations.

Petitioner also recites the history of this Court's actions around the redistricting processes of the 1970s, 1980s, 1990s as evidence that the Court should stay the Commission-drawn Senate maps and implement interim alternative maps, in order to avoid the political thicket. (Pet. at 20-22.) Contrary to Petitioner's analogy, the circumstances surrounding this Commission-led redistricting are dramatically different from the partisan-driven, incumbent-protective redistricting processes of the past. In previous decades, the line drawing has been carried out by the Legislature to benefit the party in power (1970s, 80s and 90s) or to protect incumbents of both parties (2000s).

The 2011 redistricting process initiated by the voters broke dramatically with the past. In stark contrast to the partisan-driven efforts of past decades, in 2010 a citizen-led Commission specifically selected with an eye to avoiding those partisan battles led a redistricting effort in which, for the first time in California history, over 20,000 Californians provided input. Moreover, the Commission—with its five Republicans, five Democrats, and four nonpartisan members—was able to achieve the required super-majority vote to adopt congressional and state district lines. There simply was no pitched partisan battle between a Legislature dominated by one party and a Governor of another party as there had been in decades past. The only partisan interests that would drag the Court into a political thicket are Petitioner's.

Each form of relief Petitioner suggests is a thinly-veiled attempt to preserve the current partisan makeup of the state Senate at the expense of implementing the Commission's nonpartisan maps. Granting Petitioner relief here would not keep this Court neutral. Rather, deciding to credit the Petitioner's partisan request for relief would draw the Court into the thicket on behalf of partisan concerns and at the expense of the nonpartisan, transparent, and open redistricting process that voters created by passing Propositions 11 and 20.

III. WITHOUT A FINDING OF A CONSTITUTIONAL OR STATUTORY VIOLATION, THERE IS NO BASIS FOR FASHIONING THE RELIEF PETITIONER SEEKS.

The California Constitution grants a registered voter the right to file a petition for a writ of mandate or prohibition where a referendum is likely to qualify. (Article XXI, § 3, subd. (b)(2).) However, the Constitution expressly states that the sole basis for granting any relief—including setting aside a final certified map drawn by the Commission—is a determination by this Court that the "map violates [California's] Constitution, the United States Constitution, or any federal or state statute . . . ." (Cal. Const., art. XXI, § 3, subd. (b)(3).)

This Court previously dismissed Petitioner's claim that the Commission's certified maps violated California or federal law, and Petitioner has not reasserted those claims here. Because the Court summarily rejected Petitioner's prior claims in their entirety, the Court should find here that there is no basis for fashioning the relief sought by Petitioner.

IV. THIS COURT SHOULD DENY PETITIONER'S REQUEST FOR RELIEF.

a. The 2001 Maps Are No Longer Valid.

The very reason we redistrict political lines every ten years is to accommodate for population changes that happen because of births, deaths, and people moving from one area to another. Districts must be drawn to have populations that are relatively equal in order to ensure that the votes of persons who live in district A have relatively the same weight as those who live in district B. (*See* U.S. Const., art. I, § 2; see also *Reynolds v. Sims* (1964) 377 U.S. 533, 568.)

The California Constitution, as amended by Proposition 11 and Proposition 20, states that "Senatorial, Assembly, and State Board of Equalization districts shall have reasonably equal population with other districts for the same office, except where deviation is required to comply with the federal Voting Rights Act or allowable by law." (Cal. Const., art. XXI, § 2, subd. (d)(1).)

Based on the total population of the state, the ideal population is calculated for each type of district. The ideal size of a Senate district in California is 931,349. (Citizens Redistricting Commission, Final Report on 2011 Redistricting, *available at* http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf.)

Using the 2001 lines for the upcoming 2012 lines would violate both the U.S. Constitution and the California Constitution because of significant population shifts over the decade. Petitioner's summary of the population within the 2001 districts shows wide deviation from the ideal population, in some instances significantly over 10 percent, the threshold that courts have consistently applied as violative of the one-person, one-vote principle. (*Assembly v. Deukmejian* (1982) 30 Cal 3d 638, 667)

By contrast, an examination of the Commission-drawn Senate maps shows that "twenty-nine of the 40 Senate districts have a deviation from the ideal of less than 0.50%, and the remaining 11 Senate districts deviate less than 1.0% from the ideal. Senate districts achieved an overall average deviation from the ideal of 0.449%." (Citizens Redistricting Commission, Final Report on 2011 Redistricting, *available at* http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf.)

Because allowing the 2001 lines to remain would violate both the U.S. and California Constitutions, we urge the Court to reject this proposed remedy.

b. **Accepting Petitioner's Nesting Plan Would Disregard Constitutional Criteria and Voter Intent.**

This Court should reject Petitioner's proposed nesting plan because it renders meaningless the constitutionally-mandated redistricting criteria and is inescapably and inappropriately partisan. First, Article XXI, Section 2 lists nesting as the sixth of six prioritized criteria that the Commission is to consider when drawing district lines. (Cal. Const., Art. XXI, §2, subd. (d).) Second, the Article includes limiting language stating that nesting is to be considered only to the extent that it does not risk impinging on the precedence of higher-ranked criteria. (*Ibid.*) Voters thus considered nesting to be a relatively low priority.

Petitioner's proposed relief of simply nesting the Commission-drawn Assembly districts into Senate lines renders the voter-mandated, Constitutionally-enshrined redistricting criteria meaningless by elevating nesting from the last criterion to the first and possibly sole criterion for Senate district lines. Discarding the voter-mandated priority contradicts the plain language of the Constitution and the will of the voters reflected there. The Commission weighed all the appropriate factors in deciding when to nest and when not to nest. To grant Petitioner's request to nest all Senate districts usurps the discretion of the Commission to apply the Constitutional criteria, and disregards the input of the tens of thousands of Californians who provided information to the Commission.

Petitioners simultaneously claim that the Commission-drawn Senate lines "were created to further a partisan purpose or effect," while asking the Court to fashion relief using the Commission-drawn Assembly lines as building blocks to redraw the Senate lines. The same Commission used the same process, the same testimony from 20,000 Californians, and the same data to draw the district lines of Senate, Assembly, Board of Equalization, and Congress. The only explanation for Petitioner's embrace of the Assembly, Board of Equalization and congressional lines and rejection of the Senate lines is the calculation that the Senate lines will displace at least two Republican incumbents and may result in a Senate Democratic super-majority. Petitioner seeks to skirt the Commission's nonpartisan process by appealing to the Court. As discussed above, consideration of the fortunes of political parties is what voters wanted to remove from the redistricting process. We therefore respectfully ask this Court to reject Petitioner's partisan efforts to reach a more advantageous political result by discarding the prioritized criteria and the Commission's judgment by simply nesting districts.

c. **The Court Should Again Reject Petitioner's Proposed Alternate Map.**

As this Court has previously recognized, it is likely there are innumerable ways to satisfy districting criteria in a reasonable way. (*Legislature v. Reinecke* (1972) 6 Cal.3d

505, 602.) Put simply, however, there is no basis for adopting the Petitioner's proposed alternate map. The map is reflective only of the opinion of one individual, Dr. Anthony Quinn. On the other hand, the Commission's Final Report showed that the Commission's final certified map was drawn in light of unprecedented and historic public participation: more than 2,700 Californians participated in 34 public meetings in 32 locations around the state, and over 20,000 Californians submitted written comments.

Petitioner's alternative map is based on the erroneous and outdated conception of the redistricting criteria held by one individual. Even if this alternative map were a reasonable application of Article XXI's criteria (which it is not), this would not be a reason to substitute Dr. Quinn's map for the Commission's map.

V. THE COURT SHOULD LET THE COMMISSION-DRAWN LINES STAND FOR THE JUNE AND NOVEMBER 2012 ELECTIONS.

Because the Court has not found a violation of the Constitution or any statute, and because Petitioner's suggested relief is inappropriate, Common Cause asks the Court to consider another option: let the Commission-drawn lines stand for the June and November 2012 elections.

The passage of Propositions 11 and 20 reflected the judgment of the voters that the redistricting process needed to be removed from the political process, constrained by specific prioritized criteria, and open and transparent to the public. This Court previously summarily rejected Petitioner's allegations that the certified maps drawn by the Commission failed to abide the constitutionally-mandated criteria and process. Common Cause therefore urges the Court to deny Petitioner relief at this stage.

Additionally, despite Petitioner's politically-motivated dissatisfaction with the certified maps, the process the Commission followed for drawing the maps was the most open and transparent redistricting process in California history. More than 2,700 Californians spoke at public meetings held around the state, and over 20,000 Californians submitted written comments.

Because this Court previously rejected Petitioner's claims that the maps failed to follow the constitutional criteria, and recognizing that the Commission conducted a historically open and transparent process, Common Cause urges the Court to let the Commission-drawn lines remain in place for the June and November 2012 elections.

CONCLUSION

Common Cause urges this Court to deny Petitioner's Petition for Extraordinary Relief in the Form of Mandamus or Prohibition. Common Cause and its members have

worked tirelessly to pass the kind of redistricting reform that would strengthen public participation, encourage openness, and make California's government more effective for its citizens. We believe the Citizens Redistricting Commission has faithfully and reasonably executed the command Californians gave them by passing Propositions 11 and 20.

This petition and the relief it seeks attempts to inject the concern for which party wins and which party loses into the redistricting process. Granting Petitioner's requested relief at this stage would draw this Court into the controversy on the side of an admittedly partisan effort.

For these reasons, we urge you to summarily deny Petitioner's petition.

Sincerely,

Kathay Feng, SBN 187092
Executive Director
California Common Cause

Vandermost v. Bowen
No. S198387

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that I am employed by Common Cause, whose address is 3303 Wilshire Boulevard, Suite 310, Los Angeles, CA 90010. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on December 21, 2011, I served a true and correct copy of the foregoing Request for Denial of Petition for Extraordinary Relief on the following parties in said action:

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Service via Electronic Mail

X : BY ELECTRONIC SERVICE [Code Civ. Proc. sec 1010.6; CRC 2.251] by electronically mailing a true and correct copy through Common Cause's electronic mail system from kfeng@commoncause.org to the email addresses stated on the attached service list per instructions of the Court and in accordance with Code of Civil Procedure section 1010.6.

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

Executed at Los Angeles, California, this 21st day of December, 2011.

Kathay Feng