No. S198387

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JULIE VANDERMOST,

Petitioner,

v.

DEBRA BOWEN, SECRETARY OF STATE OF CALIFORNIA,

Respondent,

CITIZENS REDISTRICTING COMMISSION,

Intervener.

APPLICATION OF SENATOR DARRELL STEINBERG, PRESIDENT PRO TEMPORE OF THE CALIFORNIA STATE SENATE, TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT'S AND INTERVENER'S OPPOSITION TO PETITION FOR WRIT OF MANDATE; [PROPOSED] BRIEF AMICUS CURIAE

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INTRODUCTION

Pursuant to Rule 8.520(f) of the California Rules of Court, Senator Darrell Steinberg, President pro Tempore of the California State Senate, requests leave to file the accompanying amicus brief in support of respondent's and intervener's opposition to the petition for writ of mandate in the above-captioned case.

THE AMICUS CURIAE

Senator Darrell Steinberg is the President pro Tempore of the California State Senate, having been elected to that post by a majority of his colleagues in 2008. Senator Steinberg was first elected to the Senate in 2006 and represents the Sixth District, which is located in the County of Sacramento and covers the cities of Sacramento and parts of Elk Grove, Citrus Heights, and Rancho Cordova. Prior to serving in the Senate, Senator Steinberg served in the California State Assembly from 1998 to 2004.

Due to term limits, Senator Steinberg is ineligible to run again for the Senate when his term expires in 2014. Thus he has no direct personal interest in running in any of the Senate districts at issue in this case.

INTEREST OF AMICUS CURIAE

As President pro Tempore, Senator Steinberg presides over the Senate and is Chair of the Senate Rules Committee, which is charged with overseeing the day-to-day operation and smooth functioning of the Senate. As the leader of the Senate, Senator Steinberg is responsible for overseeing the legislative priorities of the Senate and for ensuring that the

house functions smoothly. His interest in this case arises out of the impact it will have on the legislative body for which he is responsible.

The Senate is currently in recess, but it will reconvene on Wednesday, January 4, 2012. Half of the seats in the Senate will be up for election in 2012, with many members intending to run for reelection. Election years are by their very nature more difficult for a legislative body, because the legislative agenda must compete with campaign issues for members' time and energy. An election following a redistricting year is even more difficult, as members and constituents work to familiarize themselves with the new districts. When one adds in the uncertainty over the referendum filed against the new redistricting plan, the problems are multiplied.

The legislative tasks before the Senate this year are enormous. The most pressing, of course, is dealing with the ongoing budget crisis. After enduring years of spending cuts, the State is still facing a budget deficit that somehow must be resolved. There are many more big issues, however: education, job creation, and the environment, to name just a few. Attention to all of these will suffer if members and constituents do not even know what districts candidates will be running in. Thus, as President pro Tempore, Senator Steinberg has a strong interest in knowing what districts will be used for the 2012 elections as soon as possible.

NEED FOR ADDITIONAL BRIEFING

In his accompanying brief amicus curiae, Senator Steinberg argues that the Court is not likely to know whether or not petitioner's referendum has qualified until well after it must decide whether to rule on the merits of the petition and if so, what districts to order elections officials

to use in the June and November 2012 elections. If the Court does issue a ruling on the merits, the only way to avoid interfering with the authority of the Citizens Redistricting Commission in the event the referendum fails to qualify is to order that the Commission's lines be used whether or not the measure qualifies.

This approach is not only supported by the Court's precedent in *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, but it is consistent with well-established case law regarding how courts should approach similar situations in which they are asked to issue preliminary relief before having a full record on which to rule.

Here, the only option available to the Court that minimizes harm to voters and candidates is to use the districts drawn by the Citizens Redistricting Commission. As demonstrated in the accompanying brief and in the briefs of the parties already on file with the Court, using any other plan runs the risk of having ordered different districts after the referendum fails to qualify. Even if the referendum were to qualify, the other options offered by petitioner are more disruptive to the election process and subject to legal challenge in federal court, a fact that would further compound the confusion surrounding the election and make it more difficult for the Senate to do its work.

None of the other parties has framed the problem before the Court this way or offered the Court a framework in which to assess the harms posed by choosing among the options that petitioner urges upon the Court. In short, none of the parties has focused on the fact that the Court must rule *before* knowing whether the measure will qualify, a procedural posture that sharply differentiates this situation even from *Assembly v. Deukmejian*. Because Senator Steinberg believes that his short brief

amicus curiae will aid the Court in making its decision, he respectfully requests leave to file the brief as amicus curiae.

RULE 8.520(f)(4) CERTIFICATION

No party or counsel for a party in this matter authored the proposed amicus brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief. The preparation and submission of this brief was funded by Senator Darrell Steinberg's candidate-controlled ballot measure committee – Committee for a New Economy (Steinberg Ballot Measure Committee) – which opposes the referendum.

Dated: December 21, 2011

Respectfully submitted,

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BRIEF AMICUS CURIAE

INTRODUCTION

The parties have extensively briefed the foundational issues of whether the Court has jurisdiction and petitioner Vandermost has standing. They have not, however, briefed the equally important question of what the Court can or should do, even if it has jurisdiction, given the unique time constraints presented by this case and the fact that the Court will almost certainly have to rule before it will know whether or not petitioner's referendum has qualified. If the measure fails to qualify, of course, it necessarily cannot stay the plan produced by the Citizens Redistricting Commission, and that plan must be used in the upcoming election.

Thus, the Court is in a difficult position, one far different and worse than it was in when it decided *Assembly v. Deukmejian* (1982) 30 Cal.3d 638. There, the redistricting referenda qualified on December 15, and the Court knew the referenda had qualified when it was deciding, in December and January, what interim plans to implement for the June election. Here, by contrast, the Secretary of State, who is overseeing the qualification process, has said there is "considerable doubt" the referendum will qualify.[1] That is because unlike the situation in *Assembly v. Deukmejian,* where proponents qualified the referenda quickly by gathering nearly 260% of the needed signatures for three separate referenda in only

[1] California Secretary of State Debra Bowen's Preliminary Opposition to Verified Petition ["SOS Pre. Opp."] at 1.

two months,[2] petitioner Vandermost collected only 140% of the needed signatures and took the full statutory time. That weak effort virtually guarantees that the referendum will not qualify during the random sampling process and will almost certainly have to go through a manual count, which the Secretary of State has said will not be completed until March, 2012.[3] The pressures of the election calendar, however, require that elections officials and candidates know which districts will be used by the end of January, at the absolute latest.

In *Assembly v. Deukmejian,* the Court held that even though the referenda had already qualified, the new plans must be used instead of the decade-old plans for the June election. All of the factors that compelled that conclusion are present here: deference to plans created by the constitutional body charged with drafting plans (here the Commission); the unconstitutional, malapportioned nature of the old lines; the need to avoid "an impermissible judicial statement about the success" of the referendum by resurrecting old lines; and the need to adopt the plan that "does the least amount of violence to the political process." (*Assembly v. Deukmejian, supra,* 30 Cal.3d at 675, 676, 677.)

In addition, however, the critical timing constraint present here but absent in *Assembly v. Deukmejian* – that the Court must decide the case without knowing whether the referendum will qualify – means the

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[2] For timing of the 1981 referenda qualification, *see Assembly v. Deukmejian*, *supra*, 30 Cal.3d at 644-645; for discussion of the number of signatures collected, *see* Return of Respondent Debra Bowen, California Secretary of State ["SOS Return"] at 3-4.

[3] SOS Pre. Opp. at 3.

Commission's current Senate plan is the only option for the June and November elections. It is also the one that is most consistent with the traditional analysis courts employ when they must decide whether to issue preliminary relief before they have a full record on which to rule: weigh the moving party's likelihood of success against the type of harm that could ensue from an erroneous decision.

Under this analysis, the correct outcome is clear: the Court should either deny the petition outright or hold that the Commission's current Senate plan will be used for the June and November elections regardless of whether the referendum subsequently qualifies in March.

ARGUMENT

THE COMMISSION'S CURRENT SENATE PLAN IS THE ONLY LEGAL AND PRACTICAL OPTION FOR THE JUNE AND NOVEMBER ELECTIONS

A. The Court Must Decide This Case Before It Knows Whether The Referendum Will Qualify

The outcome in this case is controlled in large part by timing: The Court must decide the case by the end of January, at the absolute latest, to ensure the viability of the June election but it will not know by then whether the referendum will qualify. The facts are straightforward.

1. There is virtually no chance the referendum will qualify through the random sampling process, which ends January 18, 2012.[4] Random sampling provides a relatively quick verification process by permitting elections officials to verify a small sample to see if the

[4] *See* SOS Pre. Opp. at 3. Registrars must report the results of the random sample to the Secretary of State by January 10, and the Secretary of State must finalize those results by January 18.

number of verified signatures in the sample equals at least 110% of the required number of signatures. (Elec. Code, § 9030; Cal. Code of Regs., tit. 2 §§ 20530-20540.) The vast majority of successful measures (45 out of the 49 measures that have qualified since 2005)[5] qualify through random sampling, because that process reduces the time needed to qualify for the ballot and proponents plan accordingly. Here, however, proponent Vandermost cut it very close, gathering only 709,013 raw signatures, even though she needs 504,760 verified signatures to qualify. Accordingly, she needs a validity rate of 71.1% to qualify by manual count, but a validity rate of 78.3% to qualify under random sampling. (SOS Pre. Opp. at 4.) As of December 20, her validity rate stood at 73.29%, with 254,093 of the signatures already counted. (*See* Declaration of Brian Metzker ["Metzker Decl."], Exh. A.)[6] That means that Ms. Vandermost will need a validity rate of 81.11% going forward for the rest of the signatures to qualify under

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[5] *See* Declaration of Jana M. Lean in Support of Preliminary Opposition ["Lean Decl."], ¶¶ 8-9. Of those 49 measures qualified since 2005, 48 are contained in the California Secretary of State's summary. *See* Declaration of Charles H. Bell, Jr. Regarding the Likelihood of Qualification of Referendum #1499, Exh. C.

[6] The Secretary of State's random sample update for the referendum can be found at: http://www.sos.ca.gov/elections/ballot-measures/pending-signature-verification.htm.

random sampling.[7] That is very unlikely given both her present validity rate and the fact that Los Angeles, where the average validity rate has been 3.37% lower than the statewide average since 2005, has not yet reported.[8] That is an important point because Los Angeles County has by far the largest number of signatures – 209,163 – representing 30% of the raw count. (Metzker Decl., Exh. A.)

2. As a result, a full count of every signature almost certainly will be required, which will not be completed until March 12, 2012. If a referendum falls within the 95-110% range during random sampling, a full count is required. (Elec. Code, § 9031.) The Secretary of State has said that process will be completed by March 12. (SOS Pre. Opp. at 3.) This is a laborious task, requiring elections officials in all 58 counties to manually verify and count every signature on the petitions.

3. It is unlikely the Court will know whether the referendum will qualify much before March 12. The qualification of the referendum is going to be close, even under the manual count process,

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[7] As of December 20, 2011, 254,093 of the total 709,013 signatures submitted for the referendum had been counted, leaving 454,920 uncounted signatures. The validity rate for the 254,093 counted signatures is 73.29%, or 186,234 valid signatures. To qualify by random sampling requires 555,236 valid signatures. Therefore, the validity rate for the remaining 454,920 uncounted signatures would need to be 81.11% or higher (calculated by dividing the remaining valid signatures needed (369,002) by the remaining uncounted signatures (454,920)). (Metzker Decl., ¶¶ 3-5; Exh. A.)

[8] For the 44 measures that have qualified since 2005 through random sampling, Los Angeles County's average validity rate (71.78%) was 3.37% below the statewide average validity rate (75.15%). (Metzker Decl., ¶¶ 6-8.)

because petitioner Vandermost needs a validity rate of 71.1% to qualify. As of December 20, her validity rate was 73.29% through the random sampling process. (Metzker Decl., Exh. A.) It is therefore likely it will be too close to call until the results are in from all 58 counties. In addition, some of the counties with the largest number of signatures – such as Los Angeles, Orange, Santa Clara, and San Bernardino – have not yet reported their random sample results, suggesting they will need most, if not all, of the statutory time to complete the full count. In sum, it is unlikely there will be much clarity on this issue before March 12, 2012.

4. The delay in qualification is due solely to petitioner Vandermost. Petitioner Vandermost claims she has "played by the rules" by filing her referendum within the statutory time period, but that is not really the case. As her previous petition with this Court shows, she was well aware of the unique timing issues presented with redistricting referenda when she was circulating her petitions. She knew how the timing played out in *Assembly v. Deukmejian,* and that the Court held it was too late to change lines even when the referenda in that case qualified on December 15. Petitioner had to have known that in order for her to have any chance of the Court revisiting its analysis in *Assembly v. Deukmejian*, it was critical that the referendum qualify quickly in November or early December through the random sampling process. But instead, her signature-gathering campaign foundered, crossing the finish line on the last possible day thanks only to a last-minute injection of cash from the

Republican Party to pay for signature gatherers.[9] If the referendum had had any real groundswell of support, it would have had no trouble gathering the needed signatures in 30, 45, or 60 days. In the end, the low number of raw signatures collected by Vandermost virtually assured that the referendum would have to go to a full count, and her campaign manager conceded as much when the referendum campaign turned in the petitions. (SOS Pre. Opp. at 7, fn. 9.) If Vandermost had gathered enough signatures to qualify through random sampling or if she had filed a very large number of raw signatures (such as the 800,000 number the Secretary of State discusses at pages 5-6 of her Preliminary Opposition), she would have standing now and be entitled to have the Court review interim options. But she has done neither.

5. The Court must decide this case well before March 12, 2012. The Court has already indicated that it intends to rule by the end of January. Given the exigencies of the election calendar, the Court's timing is correct. State and county elections officials, candidates, and political groups have been operating under the Commission's current plan for the last four months, and, according to the Secretary of State, it is already too late to change the lines for June. (SOS Pre. Opp. at 11.) As Ms. Lean of the Secretary of State's office noted, state and county elections databases have already been programmed and tested using the new Commission lines, and it would take approximately six weeks for elections

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[9] The California Republican Party contributed $475,000 to the referendum committee (known as "F.A.I.R. – Fairness & Accountability in Redistricting") between October 9-13, 2011 to help fund the last month of signature gathering. (Metzker Decl., Exh B.)

officials to implement new lines for June. (Lean Decl., ¶¶ 10-22.) That in turn could jeopardize the June election, by compressing other statutory deadlines too close to the election.[10]

In addition, candidates and voting groups have already made important strategic decisions based on the new lines. Candidates have had to decide whether to move to a new district, bow out of a race and forego fundraising because of a formidable opponent, challenge a popular candidate, or form new alliances with political groups. Voting groups have also begun aligning themselves with viable candidates, forming coalitions, and starting to plan election strategies based on the Commission's plan. As this Court stated in *Assembly v. Deukmejian*, *supra*, 30 Cal.3d at 658, a new plan could not be put into "effect in time to inform the electorate and the candidates of their districts before the primary election."

B. The Commission's Plan Should Be Used For The 2012 Elections Regardless Of Whether The Referendum Qualifies

As the preceding discussion demonstrates, the Court will have to decide this case without knowing whether the referendum qualifies. In this respect, the Court's task is similar to that of a court deciding whether to grant prospective relief under the preliminary injunction standard. That standard provides a useful guide here. A preliminary injunction can be granted only after a court weighs (1) the likelihood that the plaintiff will

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[10] In her Reply, petitioner argues that the Court could compress the candidate filing schedule by two weeks (Petitioner's Reply to Returns ["Pet. Reply"] at 21-22), but she ignores the Secretary of State's evidence about the very pragmatic problems facing elections officials, who must know what districts are to be used in order to prepare to hold the election in June.

prevail on the merits (here, whether the referendum qualifies) with (2) the relative balance of harms that is likely to result from granting or denying the interim relief. (*White v. Davis* (2003) 30 Cal.4th 528, 554.) Because the power is an extraordinary one, it should rarely if ever be exercised in a doubtful case. (*Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1040.) Most important, "'*[t]he ultimate goal* of any test to be used in deciding whether a preliminary injunction should issue *is to minimize the harm which an erroneous interim decision may cause*.'" (*White v. Davis*, *supra*, 30 Cal.4th at 554, *quoting IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73; original emphasis.)

The preliminary injunction standard leads to one conclusion: the Court's only legal and practical option is to implement the Commission's current Senate plan for the June and November election, whether or not the referendum qualifies.

First, because the Court does not know whether the referendum will qualify, it cannot impose any different lines – like the old

2001 lines or Anthony Quinn's so-called "simple nesting plan"[11] – before the referendum qualifies. That is because there would be no stay in place, and the Commission's current lines would have to be used for the 2012 elections. Moreover, even if the Court could impose different lines before knowing whether the referendum qualifies, practical considerations make that option impractical: the State would not be able to switch gears yet again back to the Commission's plan if the referendum fails to qualify in March. Thus, the timing constraints, caused entirely by Vandermost's weak signature-gathering campaign, require that the Commission's plan continue in place for the June and November elections.

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[11] The "simple nesting plan" drawn by Mr. Quinn is not a serious option. First, it is an entirely new plan, akin to special masters drawing a new interim plan, that would require review by court-appointed special masters or experts to determine whether Mr. Quinn's suggested pairings make any sense and if they comply with the Voting Rights Act and the other constitutional requirements of Article XXI, Section 2(d). For example, to what extent does the plan split cities, counties, or communities of interest? The Commission states that the proposal violates section 5 of the Voting Rights Act, and that would have to be analyzed. There is no time for any of that. (*Assembly v. Deukmejian*, *supra*, 30 Cal.3d at 658 fn. 15 ["[s]uch practical considerations also render infeasible any attempt by this court to draft reapportionment plans of its own" or consider "alternative plans" drawn by others].) Second, it is not a simple plan at all in at least one place: In proposed Senate District 15, Mr. Quinn proposes taking territory from *three*, not *two*, Assembly districts. (*See* Declaration of Dr. T. Anthony Quinn In Support of Petition for Writ at 3.) Third, the plan is unconstitutional on its face, with proposed Senate District 1 located west of Sacramento, not "on the northern boundary of the state" as required by article XXI, section 2(f) of the California Constitution. Fourth, it provides no deference to plans drawn by the bodies charged with drafting plans under the Constitution, either the Legislature's 2001 plan or the Commission's 2011 plan.

Second, if the referendum does qualify, the Court's analysis in *Assembly v. Deukmejian* – weighing the relative benefits and harms of using either the old or new lines – should control. The factors at issue now are the same as they were in 1982, and petitioner simply ignores this part of the Court's holding.[12]

As an initial matter, the 2001 lines are not a viable option because they are unconstitutional and malapportioned, as the Commission establishes in its return. (Citizens Redistricting Commission's Return at 27-30.) Moreover, the standard governing equal protection claims has been clarified since the Court's 1982 ruling in *Assembly v. Deukmejian.* There, the Court adopted the standard that "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

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[12] Vandermost implies that Charles T. Munger, the proponent of Proposition 20, is of the view that changes made by Proposition 20 were an "attempt to correct" the Court's approach in *Assembly v. Deukmejian.* (Pet. Reply at 16.) This is patently false: Mr. Munger makes clear that Proposition 20 did not disturb anything about *Assembly v. Deukmejian.* This is what he said: "In the end, the Court has authority to take whatever interim actions it deems proper, as well as the authority to order into place an interim plan it deems most appropriate. That is the teaching of *Assembly v. Deukmejian*, and it remains valid today." (Letter on behalf of Charles T. Munger, dated December 9, 2011 at 11-12.) Petitioner also ignores the fact that Mr. Munger argues that the Commission's lines should be given deference because of the nonpartisan and transparent manner in which the Commission operates. (*Id.* at 6.) Finally, although Mr. Munger's views on Propositions 11 and 20 may be interesting, they are irrelevant to the Court's task of interpreting these initiatives. (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 118 fn. 6 ["There is no necessary correlation between what the drafter understood the text to mean and what the voters enacting the measure understood it to mean."].)

16.4 percent is permissible only if the state can demonstrate the deviation is the result of a rational state policy." (30 Cal.3d at 667.) In 1983, however, the United States Supreme Court clarified that total deviations of more than 10% would likely state a prima facie case of invidious discrimination. (*Brown v. Thomson* (1983) 462 U.S. 835, 842.)[13] In addition, in 2004, the Supreme Court held that even a total deviation of less than 10% cannot escape judicial review, and deviations must be justified under neutral redistricting criteria. (*Cox v. Larios* (2004) 542 U.S. 947, 949-950.)

Equally important, the *Deukmejian* Court's conclusion that using the new plans for the interim elections "minimizes the potential disruption of the electoral process and political processes of the state" applies with equal force here. (*Assembly v. Deukmejian*, *supra*, 30 Cal.3d at 668.) If the Commission's Senate plan is ratified in November, 2012, "use of [it] now will cause *no disruption at all*." (30 Cal.3d at 668, original emphasis.) The right plan will have been used for all of the elections in the decade. If the Commission's Senate plan is rejected in November, the disruption will be no worse – and will probably be much better – than if the 2001 lines were used instead. That is because if the referendum is successful, a new plan will have to be used in the future no matter what, and some disruption will be unavoidable. "At least, however, if the new

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[13] Petitioner argues that *Brown* sanctions disparities exceeding 10% if they can be justified by a rational state policy. (Pet. Reply at 18.) That argument fails, however, where the Court has another option available to it that does not require such disparities and that has been used in a similar referendum situation in the past. That option, of course, is to order that the Commission's lines be used, just as the Court ordered that the Legislature's lines be used in 1982 despite the fact that the referenda had qualified.

[plan is] adopted temporarily in June and November, the [2012] elections will be run under a districting plan that is far closer to federal and state constitutional mandates than the out-dated plan of the last decade." (*Id.* at 669.)

Moreover, given the outdated nature of the 2001 lines, any resulting new plan is far more likely to be closer to the Commission's plan than to the old 2001 lines. That is especially true because proponent's objection to the Commission's plan is that she believes Republicans will lose seats under it.[14] But under Propositions 11 and 20, the Commission's membership is bipartisan and the Commission (or any other line-drawer) is forbidden from using political or partisan data or drawing lines for partisan purpose or effect. The whole point of Propositions 11 and 20 were to have the Commission "draw districts based on strict, nonpartisan rules." (Prop. 11, § 2(d); *see also* Cal. Const., art. XXI, § 2(e) ["The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against any incumbent, political candidate or political party."].) Thus, the very thing petitioner wants to change with a new plan – partisan effect – is the one thing any subsequent line-drawer (assuming the referendum passes) cannot consider. Put differently, petitioner's objection to the Commission's plan is not a legitimate one, and

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[14] *See* Pet. Reply at 2, 19; *see also* Verified Petition for Extraordinary Relief, ¶ 29.

does not provide a proper basis for changing the plan.[15] Thus, any resulting new plan is likely to be similar to the plan passed by the Commission.

In contrast, if the 2001 lines are used, and the Commission's Senate plan is ratified:

> the state will be faced with the anomalous situation of an election run under seriously malapportioned, unconstitutional districts, despite the fact that the [Commission] . . . and the people of the state have concurred in adopting a new reapportionment statute. The legislators elected in those malapportioned, unconstitutional districts would serve [four year terms] before the districts chosen by the people and their elected representatives could be given effect.
>
> (*Assembly v. Deukmejian*, *supra*, 30 Cal.3d at 668.)

And if the Commission plan is rejected in November, new lines will be required anyway. Thus "[u]nder *no* circumstances could the use of the old districts be less disruptive than the use of the new districts." (*Id.* at 675, original emphasis.)

Moreover, as the Court held, if qualifying a referendum by 5 percent of the voters could always stop the plans from going into effect

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[15] Petitioner Vandermost apparently misses the irony in her suggestion that in order to "avoid taking sides or falling into a 'political thicket'" the Court should cast aside the constitutional plan passed overwhelmingly (13-1) by a bipartisan citizens' Commission (four Republicans, five Democrats and four commissioners from neither party approved the plan) that operated under strict nonpartisan rules and could not draw lines for any partisan purpose or effect, to impose an ad hoc plan by a Republican "blogger." (*See* Citizens Redistricting Commission's Consolidate Preliminary Opposition (Case No. S196493) at 28.)

for four years, then a rule of using the old lines would have the "detrimental effect in the future of encouraging anyone who does not like" the plan to "look immediately to the Courts to undo it." (*Id.* At 667.) Petitioner simply ignores this.

In sum, as the Court concluded in *Assembly v. Deukmejian:*

> [G]iving equal weight to the possibilities that the referenda may succeed or fail, use of the [new plans] *minimizes* the potential disruption of the electoral process. It eliminates the danger of the worst possible scenario – use of old, unconstitutional plans in June and November despite approval of the new plans at the primary election. Further, the use of the [new plans] maximizes the likelihood that there will be no disruption at all.
>
> (*Id.* at 669, original emphasis.)

In the end, the "only alternative open to the court" (*Assembly v. Deukmejian, supra*, 30 Cal.3d at 674) is to require the Commission's current Senate plan to remain in place for the 2012 elections. Although that would no doubt have been the result had petitioner Vandermost qualified the referendum much earlier, her delay makes that holding all the more imperative.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Dated: December 21, 2011

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION PURSUANT TO RULE 8.204 OF THE CALIFORNIA RULES OF COURT

Pursuant to Rule 8.204 of the California Rules of Court, I certify that this brief is proportionately spaced, has a typeface of 13 points or more and contains 4,136 words as counted by the Microsoft Word 2010 word processing program used to generate the brief.

Dated: December 21, 2011

Robin B. Johansen

PROOF OF SERVICE

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

I am a citizen of the United States, over the age of 18, and not a party to the within cause or action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

On December 21, 2011, I served a true copy of the following document(s):

Application of Senator Darrell Steinberg, President pro Tempore of the California State Senate, to File Brief Amicus Curiae in Support of Respondent's and Intervener's Opposition to Petition for Writ of Mandate; [Proposed] Brief Amicus Curiae

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I declare, under penalty of perjury, that the foregoing is true and correct. Executed on December 21, 2011, in San Leandro, California.

Michael Narciso

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