S198387

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JULIE VANDERMOST,

Petitioner,

v.

DEBRA BOWEN, SECRETARY OF STATE OF CALIFORNIA,

Respondent.

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

REPLY TO AMICUS CURIAE BRIEF OF CHARLES T. MUNGER, JR.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONS

INTRODUCTION

The amicus brief filed by Charles T. Munger, Jr. does not support the arguments advanced by petitioner Vandermost, nor does it challenge the key points made by the Citizens Redistricting Commission and the Secretary of State: (1) "likely to qualify" should be construed according to its ordinary meaning, which requires Vandermost to show it is more probable than not that her proposed referendum actually will qualify for the ballot; (2) the recent, specific grant of original jurisdiction in Article XXI, section 3 trumps the general grant of original jurisdiction in Article VI, section 10; (3) exercising original mandamus jurisdiction would be unwarranted at this stage in any event; and (4) the Commission's certified final Senate maps should be used in 2012 even if the proposed referendum were to qualify.

For the reasons discussed in depth in the Commission's and Secretary of State's briefs, Vandermost's Petition should be denied. Nothing in Mr. Munger's amicus brief affects the correctness of that conclusion.

LEGAL ARGUMENT

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

The Commission's brief filed December 14 explained that "likely to qualify," as used in Article XXI, section 3, subdivision (b)(2), should be construed according to its ordinary meaning, as would be understood by the electorate that added this language to the Constitution by adopting Proposition 20. (Return to Order to Show Cause at pp. 12-19.) The Secretary of State agrees, explaining that a preponderance-of-the-evidence standard should apply. (SOS's Return to Order to Show Cause at pp. 1-4; SOS's Preliminary Opp.

filed Dec. 6.) Mr. Munger apparently also agrees: "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." (Amicus Br. at p. 4.)

The amicus brief does not respond to the Commission's point that the Secretary of State's views concerning "likely qualification" of Vandermost's proposed referendum should be given substantial weight, since the Secretary of State is California's "chief elections officer" authorized to speak on matters affecting elections. (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 650.) According to the Secretary of State, Vandermost's 708,973 "raw" signatures are insufficient to demonstrate her proposed referendum is likely to qualify.

Mr. Munger's discussion of the intent of the drafters and proponents of Proposition 20—which is unsupported by citation to authority (including, e.g., the ballot materials for Proposition 20)—is irrelevant:

> As we have stated: "The opinion of drafters or of legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent."

(*Greene v. Marin County Flood & Water Conservation Dist.* (2010) 49 Cal.4th 277, 294, fn.6 [rejecting arguments by principal sponsor of Prop. 218, which were unsupported by the plain language or ballot materials; quoting *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744, 765, fn.10]; see also *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 743 [materials not included in the voters pamphlet are "not helpful in interpreting the intent of the voters" in amending the Constitution]; *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699-700 [opinions of legislators who authored legislation are not considered].)

Accordingly, for the reasons explained in the Commission's and Secretary of State's prior briefs, the Court should interpret Article XXI, section 3's "likely to qualify" language to provide only a grant of standing to file a petition if the petitioner can show it is more probable than not that a proposed referendum actually will qualify for the ballot.

II. REPLY TO ISSUE NO. 2—THE COURT SHOULD NOT EXERCISE ORIGINAL MANDAMUS JURISDICTION BECAUSE THE SPECIFIC JURISDICTIONAL GRANT IN ARTICLE XXI TRUMPS THE MORE GENERAL GRANT IN ARTICLE VI, AND MANDAMUS RELIEF WOULD NOT BE APPROPRIATE IN ANY EVENT.

The Commission's brief explained that *Greene v. Marin County Flood & Water Conservation District*, *supra*, sets forth the applicable legal principles for reconciling potentially overlapping constitutional provisions: "a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision." (49 Cal.4th at p. 290.)

Mr. Munger's brief does not cite or otherwise address *Greene*, *supra*, nor does it respond to the other supporting authority cited in the Commission's brief. His amicus brief simply asserts—without citation to authority—that the rules governing original jurisdiction are "unchanged by Props 11 and 20." (Amicus Br. at p. 7.) For the reasons explained in the Commission's brief (at pages 19-21), the Commission respectfully disagrees.

This case does not fit the extraordinary circumstances for invoking original jurisdiction under Article VI in any event. (See, e.g., *San Francisco*

Unified Sch. Dist. v. Johnson (1971) 3 Cal.3d 937, 944.)[1] The low "raw" count of signatures presented by Vandermost, juxtaposed with the comprehensive, publicly vetted, and constitutional maps prepared by the Commission, presents no crisis requiring this Court's immediate intervention. Mr. Munger's amicus brief does not support a contrary view.

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

Mr. Munger's amicus brief "takes no position" regarding use of the Commission's certified final maps if the referendum were to qualify. (Amicus Br. at p. 8.) For the reasons discussed in the Commission's Preliminary Opposition and Return, the precedential path outlined in *Deukmejian*, *supra*, of using the Commission's certified final maps for the 2012 elections makes good sense and would honor the people's will in adopting Propositions 11 and 20.

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[1] *Deukmejian*, *supra*, considered a referendum that actually had qualified for the ballot and effected a technical stay of maps prepared by the Legislature and approved by the Governor. (30 Cal.3d at p. 657.) That petitions for extraordinarily relief might have been filed before the referendum actually qualified says nothing about this Court's jurisdiction to act now on Vandermost's proposed referendum: *Deukmejian* did not address the Court's jurisdiction to act if the referendum had not qualified. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 ["[I]t is axiomatic that cases are not authority for propositions not considered."].) Presumably, if the referendum in *Deukmejian* had not qualified for the ballot, the Court would have dismissed the petitions.

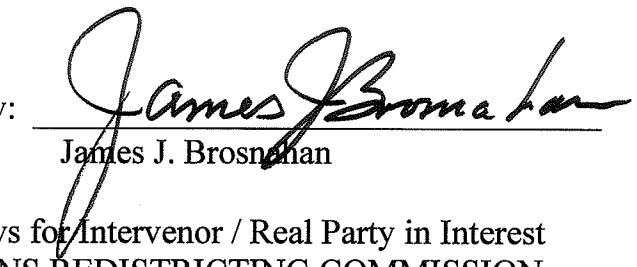
CONCLUSION

For all the reasons stated, Vandermost's Petition should be denied.

Dated: December 22, 2011

Respectfully submitted,

MORRISON & FOERSTER LLP

By: 

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CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that, pursuant to rules 8.204(c) and 8.486 of the Rules of Court, the text of this brief was produced using 13 point Roman type and contains 1,091 words. Counsel relies on the word count of the computer program used to prepare this brief.

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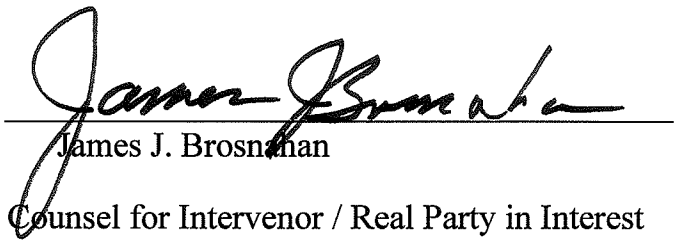
By: 

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PROOF OF SERVICE

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

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Executed at San Francisco, California, this 22nd day of December, 2011.

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