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)

[PROPOSED] PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

[Filed With Motion for Leave to Intervene and to File Preliminary Opposition]

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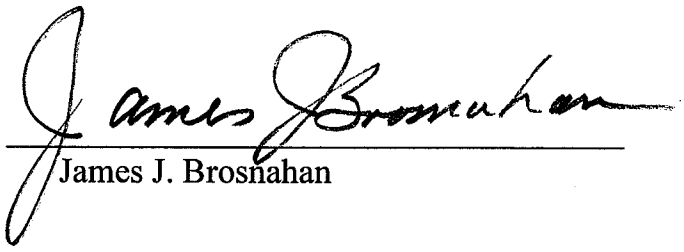
CERTIFICATE OF INTERESTED ENTITIES AND PERSONS

The undersigned certify that the Citizens Redistricting Commission knows of no person or entity that should be listed pursuant to rule 8.208(e) of the Rules of Court.

Respectfully submitted,

Dated: December 6, 2011

By: 

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INTRODUCTION

The Citizens Redistricting Commission is the constitutional body with "the sole legal standing to defend any action regarding a certified final map," including to respond to this challenge to the certified Senate maps. (Cal. Const., art. XXI, § 3, subd. (a).) Petitioner Vandermost, after identifying the Commission as the real party in her first petition filed in September 2011, declined to name or serve the Commission in this follow-on action. Her decision to omit the Commission is surprising given that she raises again many of the same faulty legal arguments made in her earlier, denied petition, to which the Commission previously responded. For example:

- Both petitions misinterpret Article XXI and argue erroneously that a showing that a proposed referendum is "likely to qualify" provides a basis for staying the certified maps or adjusting district lines.

- Both petitions argue incorrectly that Propositions 11 and 20 somehow "reversed" *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, which makes clear that only actual qualification of a referendum renders certified maps technically inoperative.

- Both petitions ignore Article XXI's requirement that, for maps to be adjusted, a referendum must *pass in an election* and the *Secretary of State* then must petition the Court to appoint masters to adjust the certified maps *to comply with the redistricting criteria*—which this Court has already held they do. (Cal. Const., art. XXI, § 2 (j).)

- Both petitions seek to downplay the careful, open deliberations of the Commission and the extensive public input process mandated by Article XXI, and would substitute for the Commission's judgment the "recommendations" of a known partisan blogger, T. Anthony Quinn.

The current Petition should be swiftly rejected. As a threshold matter, Vandermost has not met her burden to show that her proposed referendum is "likely to qualify" for the November 2012 ballot, which is a constitutional requirement for standing to file her Petition. (Cal. Const., art. XXI, § 3 (b)(2).)

The Secretary of State's analysis of the proposed referendum shows it is not likely to qualify. Vandermost collected far fewer than the 780,000 "raw" (unverified) signatures that she represented to the Court likely would be collected, and the early analysis of the signatures that she was able to gather shows that she has submitted at most about 467,000 verified signatures—far fewer than the 555,236 needed to qualify for the ballot based on random sampling, and less than the 504,760 verified signatures needed following even a full count.[1] No further analysis is necessary to deny the Petition.

The remainder of Vandermost's arguments should be summarily rejected. Even if Vandermost had shown that her referendum is "likely to qualify," such a showing is not a basis under Article XXI for staying the Commission's certified maps. Only the actual qualification of a referendum renders certified district maps technically inoperative. And the Court may appoint masters to adjust district lines to comply with the constitutional criteria only if the referendum succeeds and the Secretary of State petitions the Court for appointment of masters. (Cal. Const., art. XXI, § 2, subd. (j).) Absent a finding that the Commission's certified maps violate the Constitution—which they do not—Article XXI does not permit the Court or masters to wade into the line-drawing process. And the Court's previous review and rejection of all of Vandermost's constitutional challenges to the certified districts confirms that the maps are constitutional.

Moreover, the three proposed "alternatives" to the certified districts proffered by Vandermost suffer from multiple fatal constitutional defects, including violation of equal protection, violations of Sections 2 and 5 of the

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[1] Citations to evidence are contained in the Factual Background and Argument sections.

Voting Rights Act, and failure to adhere to the constitutionally mandated redistricting criteria that the Commission was obligated to follow, but Vandermost's proffered expert has not.

At bottom, Vandermost's renewed challenge to the certified Senate districts seeks to obtain a result that is irreconcilable with the will of the people of California in adopting Propositions 11 and 20; it seeks impermissibly to usurp the authority of the Commission as line-drawing body and to replace it with the preferences of a single paid "expert" with a results-oriented agenda.

The Petition should denied.

FACTUAL BACKGROUND

A. Proposition 11 (the Voters First Act)

In adopting Proposition 11 in 2008, the people of California amended the California Constitution and created a new constitutional body—the independent, 14-member Commission—tasked with responsibility for drawing Senate (and other) district lines following each U.S. Census.[2]

Proposition 11 responded to criticism of a legislative redistricting process that lacked transparency and favored incumbents. Its passage amended the Constitution to provide that the Commission shall, among other things,

[2] Portions of this Factual Background section are substantially similar to that provided in the Commission's brief filed on October 11, 2011. Because Vandermost's current Petition repeats many of the same arguments from her original petition, the Commission feels obligated to respond.

> (1) conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines; (2) draw district lines according to the redistricting criteria specified in this article; and (3) conduct themselves with integrity and fairness.

(Cal. Const., art. XXI, § 2, subd. (b).)

Article XXI, as amended, establishes six criteria that the Commission must consider in drawing new district lines, and the order of priority in which these criteria are to be applied. (Cal. Const., art. XXI, § 2, subd. (d).)[3]

B. Proposition 20

In November 2010, the voters approved Proposition 20, further amending Article XXI of the California Constitution to direct the Commission to also handle redistricting for U.S. Congressional districts.

Proposition 20 also defined the term "community of interest" in Article XXI, section 2, subdivision (d)(4); and it changed the date by which the Commission must submit certified maps to the Secretary of State from September 15 to August 15, 2011—and on August 15 in each year ending in the number one thereafter. (Cal. Const., art. XXI, § 2, subd. (g).)

C. The Selection of a Fair and Impartial Commission

The Voters First Act established a selection process for Commissioners that is rigorous, fair, and "designed to produce a commission that is

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[3] The Voters First Act, enacted by passage of Proposition 11, is contained in Article XXI of the California Constitution and Government Code sections 8251 through 8253.6.

independent from legislative influence and reasonably representative of this State's diversity." (Cal. Const., art. XXI, § 2, subd. (c)(1).)

The process for selection of the Commission is explained in detail in the Commission's brief filed in *Vandermost v. Bowen*, No. S196493. In short, the State Auditor conducted extensive statewide outreach to solicit more than 36,000 applications. (Gov. Code, §§ 8251 et seq.; Appen. 640.)[4] An independent Applicant Review Panel then screened applicants, applying rigorous conflict-of-interest rules. (Gov. Code, § 8252, subd. (a)(2) & (d).)

The Applicant Review Panel selected 60 qualified applicants as potential Commissioners: 20 registered Democrats; 20 registered Republicans; and 20 minority party, independent, or "decline to state" voters. (Gov. Code, § 8252, subd. (d).) Leaders of the major parties in the Legislature then were permitted to review the qualified applicants and to strike a subset, further narrowing the field of qualified, eligible applicants. (*Id.*, § 8252, subd. (e).) From this remaining pool, the State Auditor randomly selected three Democrats, three Republicans, and two voters unaffiliated with a major party to serve as the first eight Commissioners. (Gov. Code, § 8252, subd. (f).)

The first eight Commissioners reviewed the remaining pool of qualified applicants and appointed an additional six. The applicants were "chosen based on relevant analytical skills and ability to be impartial" as well as "to ensure the commission reflects this state's diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity." (Gov. Code, § 8252, subd. (g).)

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[4] Citations to "Appen." are to the Commission's Appendix of Exhibits, filed in this Court on October 11, 2011. Additional copies are being submitted concurrently with the hard copy of this brief.

The full Commission is comprised of five registered Republicans, five registered Democrats, and four registered voters unaffiliated with either major political party. (Cal. Const., art. XXI, § 2, subd. (c)(2).) Approval of final redistricting maps requires a supermajority of at least nine affirmative votes, which must include at least three votes of the Republican members, three votes of the Democratic members, and three votes of the unaffiliated members of the Commission. (Cal. Const., art. XXI, § 2, subd. (b)(5).)

The Commissioners are sworn to serve in a manner that is "impartial and that reinforces public confidence in the integrity of the redistricting process." (Cal. Const., art. XXI, § 2, subd. (c)(6).) They are prohibited from holding elected office for ten years following their appointment on the Commission, and cannot hold appointed office or work as a lobbyist or political consultant for five years following appointment. (*Ibid.*)

D. The Commission's Open and Extensive Public Hearing and Map-Drawing Process

In reaction to the backroom redistricting process previously conducted by the Legislature, the Constitution now requires "an open and transparent process enabling full public consideration of and comment on the drawing of district lines." (Cal. Const., art. XXI, § 2, subd. (b).)

The Commission took very seriously its mandate to "establish and implement an open hearing process for public input and deliberation" and to conduct an "outreach program to solicit broad public participation" in the redistricting process. (Gov. Code, § 8253, subd. (a)(7).) For example:

i. The Commission solicited testimony through extensive public outreach involving mainstream and foreign-language media, the Commission's website, social media, and through a long list of organizations, including, e.g.,

the Chamber of Commerce, Common Cause, the League of Women Voters, MALDEF, the NAACP, and the Asian Pacific American Legal Center (Appen. 643-644);[5]

ii. From the start of the redistricting process in January 2011 until August 2011, the Commission held 34 public input meetings in 32 locations across the state. Meetings were scheduled to be convenient for average citizens—typically during early evening hours at a government building or school—and many extended hours longer than scheduled to accommodate speakers. More than 2,700 people gave testimony or spoke at the public input hearings (Appen. 643);

iii. In addition, the Commission held more than 70 business meetings, during which the Commission regularly solicited public comment. All public meetings were broadcast live on the Commission's website and archived for later public review (*ibid.*);

iv. The Commission received and considered more than 2,000 written submissions containing testimony or maps from groups and individuals, reflecting proposed statewide, regional or other districts. Alternative map submissions were posted on the Commission's website (*ibid.*);[6]

v. The Commission or its staff also reviewed more than 20,000 written comments addressing the shared interests, backgrounds and histories of

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[5] Additional organizations that provided public outreach support are listed at <http://wedrawthelines.ca.gov/partners.html>.

[6] <http://wedrawthelines.ca.gov/map-submissions.html>.

California's communities, suggestions for district lines, and comments on the redistricting process generally (Appen. 644);

vi. The Commission received training and technical assistance from Q2 Data and Research, consultants with extensive experience with the computer programs used for line-drawing, to parse the U.S. Census data and use computer models and other programs needed for the complex, highly technical district line-drawing process. (*Ibid.*) The Commission also engaged Voting Rights Act legal counsel selected through an open bidding process;

vii. The Commission had full access to all demographic and other data that would have been available to the Legislature for use in redistricting, except they did not consider information about how the Commission's maps would affect incumbent politicians, an issue that cannot be considered following passage of Proposition 11 (see Cal. Const., art. XXI, § 2, subd. (e));

viii. On June 10, 2011, following 23 public input hearings and dozens of public business meetings in which comments also were received, the Commission issued its first set of draft maps. The maps were posted on the Commission's website and covered widely in the media.[7] The Commission received public comments on the draft maps during 11 more input hearings and in hundreds of additional written submissions, and revised and honed the maps over the next several weeks (Appen. 644);

ix. All of the Commission's public meetings and line-drawing sessions were broadcast live on the Commission's website, and video of those sessions is archived and available for public review. Transcripts of the

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[7] See, e.g., <http://wedrawthelines.ca.gov/maps-first-drafts.html>.

Commission's meetings, its draft and final maps, and all documents presented to the Commission and suitable for posting also are available on the Commission's website for public review.[8]

E. Certification of the Final Maps and Issuance of the Commission's Final Report

On July 29, 2011, the Commission released its preliminary final maps, together with a narrative explaining for the public's benefit the California Constitution's criteria for drawing district lines and the Commission's public input process.[9] The maps were posted for further public comment. (*Ibid.*)

On August 15, 2011, the Commission certified the final maps to the Secretary of State. (See Cal. Const., art. XXI, § 2, subd. (g).) These maps were accompanied by the Commission's 67-page Final Report summarizing the Commission's work, the redistricting process, and the districts. (Appen. 637-803.) The Secretary of State filed the maps the same day.

F. The Commission's Constitutional Authority to Defend "Any Action Regarding a Certified Final Map"

Following certification of the district maps, the Commission "has the sole legal standing to defend any action regarding a certified map ...." (Cal. Const., art. XXI, § 3, subd. (a).)

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[8] See, e.g., <http://wedrawthelines.ca.gov/transcripts.html> and <http://wedrawthelines.ca.gov/viewer.html>.

[9] <http://wedrawthelines.ca.gov/maps-preliminary-final-drafts.html>.

G. Vandermost's First Petition and the Court's Ruling

On September 15, 2011, Vandermost filed a 124-page petition challenging the certified Senate districts, with supporting declarations of T. Anthony Quinn and Brian T. Hildreth and a two-volume Request for Judicial Notice. On September 30, she filed a 126-page "Amended Petition" containing additional argument (the Prior Amended Petition or "Prior Pet.").

Her Prior Amended Petition argued, inter alia, (a) that a referendum that is "likely to qualify" effects a stay of the certified maps by operation of law (Prior Pet. ¶ 176); (b) that Propositions 11 and 20 somehow "reversed" this Court's precedent in *Deukmejian*, *supra*, 30 Cal.3d 638 (Prior Pet. at pp. 123-124); (c) that the Court may re-draw certified district lines even though the Commission's maps are constitutional in every respect (*id.* ¶¶ 3, 23); (d) that the preferences and judgment of Vandermost's proffered expert, Anthony Quinn, should replace the Commission's judgment and the open, intensive eight-month process mandated by Article XXI for drawing district lines (Prior Pet., passim); and (e) that Vandermost expected to gather at least 780,000 signatures by November 15 for her referendum effort, in order to demonstrate the referendum was "likely to qualify" (*id.* ¶ 177).

On October 26, the Court granted the parties' Requests for Judicial Notice; denied the Commission's motion to strike Anthony Quinn's declaration; and denied Vandermost's petition. (*Vandermost v. Bowen* No. S196493 (Oct. 26, 2011) 2011 Cal. LEXIS 11036.)

H. Vandermost's Second (Current) Petition

Vandermost filed her current Petition on December 2. She sued only the Secretary of State, noting in a footnote that she elected not to serve the

Commission, purportedly because the Commission's authority is limited to defending "constitutional challenges" to the certified maps. (Pet., fn. 1.)

The current Petition contains substantially similar legal arguments as Vandermost's first petition, and again relies on a declaration from her proffered expert, Quinn. The Petition alleges that she has gathered and submitted approximately 710,000 "raw" (unverified) signatures in support of her referendum effort, not the 780,000 that she expected to gather. (Pet. ¶ 7.)

The new Petition does not allege any constitutional defect in the Commission's certified maps or argue that the Senate districts otherwise fail to comply with Article XXI's redistricting criteria. (*Ibid.*)

On December 2, this Court ordered a preliminary response to the Petition by December 6.

LEGAL ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE VANDERMOST HAS NOT MET HER BURDEN TO ESTABLISH THAT HER PROPOSED REFERENDUM IS LIKELY TO QUALIFY FOR THE NOVEMBER BALLOT.

Vandermost, as petitioner, has the burden to show that the standing requirement of Article XXI, section 3 (b)(2), is satisfied—viz., that her proposed referendum is "likely to qualify." (See, e.g., *Pacific Legal Found. v. Cal. Coastal Com.* (1982) 33 Cal.3d 158, 169 [plaintiffs bear the burden of demonstrating a ripe controversy to support standing]; accord *DaimlerChrysler Corp. v. Cuno* (2006) 547 U.S. 332, 342 [plaintiffs must "carry the burden of establishing their standing under Article III"].)

Vandermost previously represented to this Court that she "is likely to obtain more than 780,000 'raw' (unverified) signatures ... in order to realize at least 504,760 with a full count (Elections Code § 9031) or 555,236 (110% of the 504,760 number) required to qualify by random sampling." (Prior Pet. ¶ 177.) She now seeks relief based on a lesser showing: 708,973 "raw," unverified signatures.[10] As the Secretary of State's website reflects, it appears unlikely that Vandermost's proposed referendum will qualify.

As of December 1, counties are reporting 69.18% verification of Vandermost's signatures. (*Ibid.*) If that statistic holds, Vandermost's 708, 973 unverified signatures will yield just **467,521** verified signatures, significantly below the 504,760 signatures needed based on a full count (and much fewer than the 555,236 needed to qualify by random sampling).

None of the large counties have reported verification data, and the mid-sized counties that have reported data show signature-verification percentages lower than in small counties. For example, Kern, Butte and Sonoma counties report verification based on random sampling at 66.7%, 66.4% and 63.6%, respectively.[11] Based on this trend, verification percentages from large counties such as Los Angeles and San Francisco—where petition-signers are likely more anonymous and the efforts of paid signature-gatherers are likely more rushed—will yield even lower percentages of valid signatures. As the Secretary of State previously explained to this Court, initiative proponents typically "lose up to 40% of gross signatures" during the verification process. (Secretary of State's

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[10] The Secretary of State's official "raw" signature count for Vandermost's proposed referendum is available at the Secretary's website, <http://www.sos.ca.gov/elections/pend_sig/init-sample-1499-120111.pdf>.

[11] <http://www.sos.ca.gov/elections/pend_sig/init-sample-1499-120111.pdf>.

Br. filed Oct. 11, 2011 in *Vandermost v. Bowen*, No. S196493, quoting *Democracy by Initiative: Shaping California's Fourth Branch of Government* (Center for Government Studies, 2d ed. 2008) at p. 149.) Vandermost's referendum petition is therefore not likely to qualify.

The Secretary of State is the constitutional officer charged with administering California's referendum process; where, as here, the Secretary has not indicated the referendum is "likely to qualify," the Petitioner's opinions about her likelihood of success should be disregarded. (E.g., *Deukmejian, supra*, 30 Cal.3d at p. 650 [the Secretary of State is "California's chief elections officer," authorized to speak on matters affecting elections]; accord *Styne v. Stevens* (2001) 26 Cal.4th 42, 53 [interpretations of a statute by an agency tasked with enforcing it are entitled to substantial weight].) Indeed, the serious doubts expressed by the Secretary of State about the likelihood of Vandermost's proposed referendum underscore that the Petitioner has not met her burden here.

For these reasons alone, the Petition should be denied.

II. ARTICLE XXI DOES NOT PROVIDE FOR A STAY OR ADJUSTING THE CERTIFIED MAPS EVEN IF THE REFERENDUM IS "LIKELY TO QUALIFY."

Article XXI, section 3, only provides a grant of standing for "any registered voter" to file a petition in this Court *if* a potential referendum is "likely to qualify" for an upcoming election. (Cal. Const., art. XXI, § 3, subd. (b)(2).) This plainly stated standing requirement is consistent with the basic principle that that courts avoid addressing "speculative future events" unripe for review. (*Pacific Legal Found., supra*, 33 Cal.3d at p. 173.) Section 3 does not, as Vandermost repeatedly has argued, operate to stay the certified maps based merely on a showing that a referendum is likely to qualify. (Compare Prior Pet. at pp. 121-124 with Pet. ¶¶ 19, 26, 31 & pp. 23-25.)

Vandermost simply is wrong that Propositions 11 and 20 re-wrote long-settled law so that "likely qualification" of a referendum would operate to stay the certified maps. (Pet. at p. 23.) Current Article XXI, section 2—as amended by Proposition 11—makes this clear: "Each certified final map shall be subject to referendum *in the same manner* that a statute is subject to referendum pursuant to Section 9 of Article II." (Cal. Const., art. XXI, § 2, subd. (i); italics added.) This "same manner" was addressed in *Deukmejian*, *supra*, where the Court explained that "under the mandate of article II of the state Constitution, *the filing of a valid referendum* challenging a statute normally stays the implementation of that statute until after the vote of the electorate." (30 Cal.3d at p. 656; italics added.)[12]

Deukmejian is clear that a "valid referendum" means "a duly qualified referendum" that is put to a vote of the full electorate. (*Ibid.* [quoting the Secretary of State and explaining that "In a Referendum, Voters are asked to Approve the Bill which the Legislature has enacted ('Yes' Vote) or to Disapprove ('No' Vote). . . . The question which is put to the voters is 'Shall (the bill) Become Law?'"]; see also *id.* at p. 657.) The other case Vandermost cites, *Rossi v. Brown* (1995) 9 Cal.4th 688, quotes *Deukmejian* and is consistent with it: "When a referendum petition *qualifies*, the newly enacted measure does not become effective ...." (*Rossi*, *supra*, at p. 697; emphasis added.)

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[12] Vandermost's argument that ***section 10*** of Article II supports her interpretation of "likely to qualify" is also wrong. (Pet. at p. 24.) *Deukmejian* considered section 10 and held it contains a negative implication of a stay only after a referendum has "duly qualified" for the ballot. (*Deukmejian*, *supra*, 30 Cal.3d at p. 656 ["There remains in the current provision, article II, section 10, subdivision (a), a clear negative implication that a statute challenged in its entirety *by a duly qualified referendum* is stayed from taking effect"].) Nothing in Article XXI affects *Deukmejian*'s interpretation of Article II, section 10.

Given this background, and read together with its preceding sections, Article XXI, section 3 (b)(2) states only that a voter may file a petition once she can prove that the referendum is likely to qualify—not that a showing that the referendum is likely to qualify would effect a stay of the certified maps:

> Any registered voter in this state may also file a petition for a writ of mandate or writ of 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.

(Cal. Const., art. XXI, § 3, subd. (b)(2).) The grant of standing to "any registered voter" also means that voters concerned about Vandermost's referendum (not just those in favor of it) could seek anticipatory relief if there was real concern the referendum would qualify for and pass in a general election, including to address constitutional infirmities with the referendum petition.

Constitutional provisions "should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others." (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 209.) Accepting Vandermost's contrary interpretation of Article XXI, section 3(b)(2) — while ignoring Article II, section 9 (governing referendum) and Article XXI, section 2(i) (stating that a map is subject to referendum "in the same manner as a statute") — would run afoul of this well-settled rule of constitutional interpretation.

Vandermost's reliance on the Attorney General's "title and summary" for her circulating referendum petition is also misplaced. First, the title and summary says nothing about the effect of "likely qualification" of a referendum: It says that the referendum petition, "if signed by *the required*

number of registered voters and filed with the Secretary of State, will ... [p]lace the revised State Senate boundaries *on the ballot* and prevent them from taking effect ...."[13] "Likely qualification" does not, of course, place a referendum on the ballot; only actual qualification does.

Second, the two-line "title and summary" does not purport to be a comprehensive opinion on a referendum's legal effect, and it certainly does not modify or override Article XXI's plain language, or this Court's precedent in *Deukmejian* and the other authority cited above. As Vandermost's cited case, *Lungren v. Superior Court* (1996) 48 Cal.App.4th 435, 439-440, explains, title summaries are not intended to reflect exhaustive legal analysis and are not given the weight afforded the Attorney General's opinions; title summaries are screened only for "substantial compliance with the 'chief purpose and points'" of a proposed referendum. (Compare *Moore v. Panish* (1982) 32 Cal.3d 535, 544 [rejecting AG's opinion as "not persuasive" on an issue of statutory interpretation]; *Unger v. Superior Court* (1980) 102 Cal.App.3d 681, 688.)

Third, the AG's title summary—as interpreted by Vandermost—is inconsistent with the Secretary of State's views as expressed in her prior brief to this Court. (Secretary of State's Br. filed Oct. 11, 2011 in *Vandermost v. Bowen*, No. S196493, at pp. 6-9.) The Secretary's brief explained that Article XXI, section 3, contains a grant of standing only. (*Ibid.*) To the extent the opinions of State officers might differ, the Secretary's views are afforded significantly greater weight. (*Deukmejian*, *supra*, 30 Cal.3d at p. 650 ["The Attorney General is not the official charged with ensuring proper application of

[13] <http://ag.ca.gov/cms_attachments/initiatives/pdfs/i968_title_and_summary_11-0028_final.pdf> (Dec. 5, 2011).

the state's elections laws. That is the role of the Secretary of State, California's chief elections officer."].)

Accordingly, even if Vandermost were able to show that the potential referendum is likely to qualify, that would not provide a basis under Article XXI to stay the certified maps. Only actual qualification would result in a stay.

III. EVEN IF THE REFERENDUM WERE TO QUALIFY, THAT WOULD NOT JUSTIFY APPOINTING MASTERS OR ADJUSTING SENATE LINES BECAUSE THE COMMISSION'S MAPS COMPLY WITH THE REDISTRICTING CRITERIA, AS THIS COURT RECOGNIZED IN DENYING THE PRIOR PETITIONS.

The Constitution sets forth the three limited circumstances in which the Court may consider adjusting district lines:

> [1] "If the court determines that a final certified map violates this Constitution" (Cal. Const., art. XXI, § 3 (b)(3)), or[14]
>
> [2] "If the commission does not approve a final map by at least the requisite votes[,] or"
>
> [3] "*if* voters *disapprove a certified final map in a referendum*, the Secretary of State shall immediately petition the California Supreme Court for an order directing the appointment of special masters to adjust the boundary lines of *that map in accordance with the redistricting criteria and requirements* set forth in subdivisions (d), (e), and (f)."

(Cal. Const., art. XXI, § 2, subd. (j); italics added.)

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[14] Article XXI, section (3)(b)(2), permits the Court to consider remedies for a constitutional violation only *if* the Court first determines such a violation has occurred. The Court previously rejected Vandermost's constitutional challenges to the certified maps. No other violations have been alleged.

None of the three conditions for appointing special masters or venturing into the line-drawing process exist here. The potential referendum has not even qualified for the ballot, let alone succeeded—and, of course, the Secretary of State has not petitioned this Court for the appointment of special masters following a successful referendum. (*Ibid.*)

On October 7, 2011, the Governor signed Senate Bill 202, amending the Elections Code to provide that any referendum that might qualify for the ballot would appear during the general election in November 2012.[15] Therefore, the necessary precondition to appointment of masters—that voters "disapprove a certified final map in a referendum"—could not happen for more than 11 months.

Moreover, even *if* the potential referendum were to qualify *and succeed* in November 2012, the mandate of special masters at that time would be merely to "adjust" *the Commission's certified maps* (referred to as "that map" in the block quotation above) to comply with the constitutional criteria. (Cal. Const., art. XXI, § 2, subd. (j).) Because the certified maps comply fully with the constitutional criteria, no adjustment by the special masters would be necessary.

Indeed, Vandermost has raised no new challenge to the constitutionality of the certified Senate districts. Nor could she: All such challenges were required to be filed by September 30 pursuant to Article XXI, section 3(b)(2). The Court's denial of Vandermost's earlier petition was a final ruling on the merits of her constitutional claims, and confirms the constitutionality of the certified Senate districts. (See, e.g., *Napa Valley Elec. Co. v. R.R. Com.* (1920)

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[15] See <http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0201-0250/sb_202_bill_20111007_chaptered.pdf>.

251 U.S. 366, 373 [where the Court has original jurisdiction, even a summary denial is a final ruling on the merits]; *In re Rose* (2000) 22 Cal.4th 430, 445 ["When the sole means of review is a petition in this court, however, our denial of the petition -- with or without an opinion -- reflects a judicial determination on the merits."].)

Accordingly, Vandermost's failure to show a violation of the redistricting criteria or other constitutional infirmity in the Commission's certified maps is fatal to her renewed requests for relief.

IV. PETITIONER'S ARGUMENTS ABOUT "REMEDIES AVAILABLE" ARE UNSUPPORTED BY LAW OR LOGIC.

A. As in *Assembly v. Deukmejian*, the Certified Maps Should Be Used in June and November 2012 *If* the Referendum Were to Qualify for the Ballot.

Even if, arguendo, the potential referendum were to qualify for the November ballot and render the certified senate maps technically inoperative, the approach taken in *Deukmejian*, *supra*, 30 Cal.3d 638, of using the certified maps pending a vote by the electorate on those maps is eminently sensible and would comport with the people's will in adopting Propositions 11 and 20.

Deukmejian concluded that the challenged maps—which, like a statute, were rendered technically inoperative by a referendum that had *qualified*—should be used anyway in the next election cycle because, inter alia, (1) the challenged maps are based on current Census data and thus are "far closer to the constitutional goal" of equal representation (the highest criterion in Article XXI) than the alternatives, and (2) permitting the voice of five percent of the electorate who had signed the referendum petition to override the maps would "perpetuate a potentially grave injustice on the majority of the people of the

state" who supported the redistricting process. (*Deukmejian*, *supra*, 30 Cal.3d at pp. 666, 670.)

Deukmejian's conclusion applies forcefully here because under Article XXI, as amended by Propositions 11 and 20, the people of this State are entitled to the benefits of the "open and transparent process enabling full public consideration of and comment on the drawing of district lines" that resulted from the Commission's multi-month public input and line-drawing process. (Cal. Const, art. XXI, § 2, subd. (b).) The Commission's work could not be approximated or replaced in time for use in the June 2012 election. An orderly process of representative government also requires primary elections to take place in the same districts as general elections, as *Deukmejian* recognized. (30 Cal. 3d at pp. 674-675.) And the certified maps comply with the constitutional criteria, as this Court held in rejecting Vandermost's first petition as well as the Radanovich petition in September.

Accordingly, the *Deukmejian* precedential path makes it clear that given the time remaining to the June election coupled with this Court's denials of the previous petitions, the Commission's districts should be used for both the 2012 primary and, of course, the general election whether the referendum qualifies or not. This Court, on this record, certainly could so hold.

B. Vandermost's Proposed "Alternatives" Are Not Viable and Would Violate the Constitution.

1. The 2001 Maps Cannot Be Used Because Doing so Would Violate Equal Protection.

The 2001 districts cannot be used in any future election because doing so would violate the equal protection guarantee of one person, one vote, given the changes in population density in many of the old districts. (*Deukmejian*,

supra, 30 Cal.3d at p. 667 [explaining that deviation in a district of more than 10% from ideal population size is suspect and that "deviation greater than 16.4 percent is intolerable under the equal protection clause"].)

Vandermost's prior brief to this Court admitted that "the existing 2001 Senate boundaries are unconstitutional under the Equal Protection Clause of the 14th Amendment ...." (Prior Pet. filed Sept. 30, 2011, at p. 80.) Yet she now argues for use of the 2001 district over the Commission's certified districts, which are constitutional in every respect. Her current summary of population deviations among the 20 "odd-numbered Senate districts" from the 2001 maps shows that three of these districts unconstitutionally have population deviations greater than 10%, and that two such districts (SD 17 and SD 37) are patently unconstitutional—deviating by 17.9% and 30.5%, respectively. (Pet. at p. 32.) Even with regard to other, old districts where the violation of one person one vote would be less stark, there is no "rational state policy" that supports selecting old districts over current, constitutional, certified ones. (*Deukmejian*, *supra*, 30 Cal.3d at p. 667.)

Moreover, adopting Vandermost's proposal to use old districts for 20 odd-numbered Senate districts would "run the serious risk of creating undesirable, [unforeseen] effects" in this and future election cycles—a risk that would "necessarily be magnified" because the Court is "not in as advantageous a position [as the Commission] to assess the impact of possible alternatives." (*Legislature v. Reinecke* (1973) 10 Cal.3d 396, 403.) For example, several of the old odd-numbered districts are in areas covered by Sections 2 or 5 of the

Voting Rights Act, yet no attempt has been made to ensure Voting Rights Act compliance given population changes during the last decade.[16]

Vandermost does not address the prospect that switching between old and new Senate districts could cause some residents to vote in both odd and even numbered districts (in 2012 and 2014), while others could be left out of a district altogether. There is no reasonable basis for inviting this type of mischief, based solely on the speculative and untested opinions of Vandermost's proffered expert. (*Roman v. Sincock* (1964) 377 U.S. 695, 711 [proposed changes to a redistricting plan "'cannot be allowed to result in an impermissible deprivation of [the citizens'] right to an adequate voice in the election of legislators to represent them."].)

In sum, Vandermost's proposal to use 2001 districts has no basis in Article XXI, law or logic. It is no alternative.

2. Vandermost's Proposal of "Simply Nesting" Senate and Assembly Districts Would Violate the Voting Rights Act and the California Constitution.

Vandermost's "simple nesting plan" would violate the Voting Rights Act ("VRA") as well as Article XXI by elevating a lower-order redistricting criteria ("nesting" of Senate districts within Assembly districts) over other higher-order criteria, including VRA compliance and respect for communities of interest, and it would create other adverse effects. (Pet. at p. 29.)

Article XXI, section 2, subd. (d) sets forth the six redistricting criteria in order of priority: (1) compliance with the U.S. Constitution; (2) compliance

[16] See <http://www.legislature.ca.gov/legislators_and_districts/districts/senatedistricts.html>, for a map of the 2001 Senate districts.

with the VRA; (3) "geographic contiguity"; (4) respect for the "geographic integrity of any city, county, city and county, local neighborhood, or local community of interest," to the extent possible; (5) encouraging geographic compactness, to the extent practicable; and (6) "[*t*]*o the extent practicable*, and *where this does not conflict* with the criteria above, each Senate district shall be comprised of two whole, complete, and adjacent Assembly districts ...." (Cal. Const., art. XXI, § 2, subd. (d)(1)-(6), italics added.)

As the Commission explained in its Final Report, while it strived to nest Assembly districts in Senate districts where practicable, "[c]ompliance with the Voting Rights Act often resulted in Assembly districts that could not be nested." (Appen. 681.) In addition, to minimize city and county splits (a higher-order criteria than nesting), the Commission created certain Senate districts from "blended" Assembly districts—to avoid repeating city and county splits that were unavoidable at the Assembly level. (*Ibid.*) The Commission also blended Assembly districts to respect communities of interest "where more than two Assembly districts had common interests or geographical characteristics that were common to a single Senate district." (*Ibid.*)

Vandermost's proposal for "simple nesting" would ignore the Commission's findings and its respect for higher-order criteria in favor of a plainly unconstitutional plan. For example, her "nesting plan" would violate Section 5 of the VRA. At least two of her proposed Senate districts (12 and 14) would impermissibly retrogress Latino-minority voting power and fall below the required Section 5 benchmarks for Merced and Kings counties.[17] As the

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[17] Merced County is a Section 5 covered jurisdiction with a 53.48% Latino VAP benchmark. The Commission's certified Senate district for Merced includes 59.14% Latino VAP, while Vandermost's proposed alternative reaches only 34.07% Latino VAP, a drastic reduction that undeniably violates Section 5.
(Footnote continues on next page.)

Commission's Final Report explained, due to the need to satisfy Section 5 benchmark in Kings County, "this district was not able to be fully nested." (Appen. 684.)

Vandermost's plan would—purportedly in favor of "nesting"—reduce the number of Latino districts with majority Citizen Voting Age Population (CVAP) from four (certified Senate districts 14, 24, 32 and 33) to three (Vandermost's proposed districts 24, 30 and 32).

Vandermost's nesting plan also would violate Article XXI by ignoring the extensive public input process that weighed in the Commission's decisions to respect communities of interest in certain circumstances over total nesting. For example, certified Senate district 1 was created in part to keep intact the Lake Tahoe basin, in light of overwhelming public support for keeping that community of interest together. (See, e.g., El Dorado County Bd. of Supervisors Resolution No. 82-2011, submitted June 28, 2011.)[18] Ignoring this public input, Vandermost's proposed nesting plan splits Lake Tahoe between her proposed districts 1 and 4. This is just one example of her effort to replace the Commission's open, reasoned decision-making process with the preferences of her supposed expert.

Finally, Vandermost's nesting plan would result in five more city and county splits than the certified district maps—an unacceptable result given that

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(Footnote continued from previous page.)

Kings County has a Latino VAP benchmark of 66.19%. The Commission's certified Senate District 14 includes 66.27% Latino VAP, while Quinn's proposed district 14 falls short of the benchmark with just 63.39% Latino VAP.

[18] Available at <http://wedrawthelines.ca.gov/viewer.html>.

Article XXI places higher importance on respecting city and county lines than on "nesting."[19]

3. No Basis Exists for Substituting Anthony Quinn's Districts for the Commission's Certified Districts.

The Commission's brief filed October 11, 2011, explained in detail why the "model plan" submitted by Quinn in support of Vandermost's first petition suffered multiple fatal defects and sought impermissibly to replace the Commission's analysis and judgment with Quinn's personal preferences. Vandermost has simply re-submitted Quinn's "model" plan with her new Petition. The plan is as unconstitutional today as it was in September.

V. RESPONSE TO PETITIONER'S "TIMING ISSUES."

For the reasons already discussed, none of the remedies sought by Vandermost are available and this Court should simply deny her Petition.

If, arguendo, the Court were to request further briefing on any issue presented, the Commission suggests that the Court set a schedule that would permit an expeditious ruling by this Court—e.g., supplemental briefs due within a week (or several weeks) following any request for further briefing.

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[19] The certified maps split 20 cities and 11 counties (excluding zero-population splits and cities or counties with populations greater than 931,349, the 2010 ideal senate district population), for reasons explained in the Final Report. Vandermost's nesting plan, by contrast, splits 22 cities and 14 counties.

CONCLUSION

For all the reasons discussed herein, the Petition should be denied.

Dated: December 6, 2011

Respectfully submitted,

MORRISON & FOERSTER LLP

By: _____
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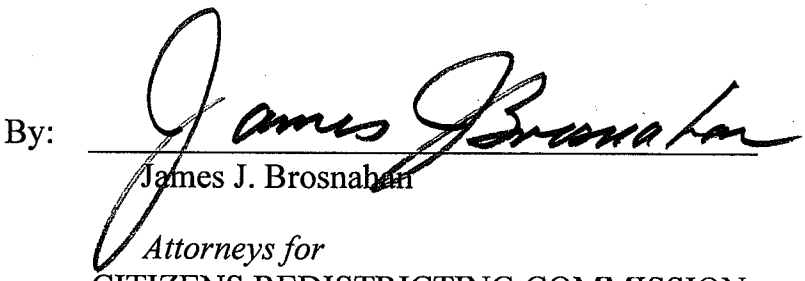
CERTIFICATE OF WORD COUNT

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 6,552 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 6, 2011

By: 

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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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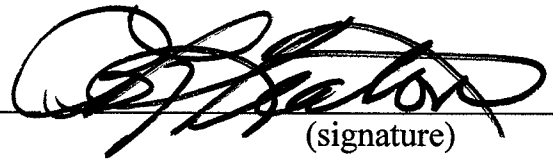
Executed at San Francisco, California, this 6th day of December, 2011.



B. Keaton (signature)

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