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MESSAGE/INSTRUCTIONS

Re: VANDERMOST V. BOWEN

In the Supreme Court of the State of California**JULIE VANDERMOST,****Petitioner,**

Case No. S198387

v.

**DEBRA BOWEN, Secretary of State of
California,****Respondent.**

Original Proceeding

**RETURN OF RESPONDENT DEBRA BOWEN, CALIFORNIA
SECRETARY OF STATE, TO ORDER TO SHOW CAUSE**

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2 Witkin, California Evidence (5th Ed. 2008) *Jurisdiction* § 2855

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INTRODUCTION

Respondent Debra Bowen, California Secretary of State, respectfully submits this return to the order to show cause issued on December 9, 2011.

The order to show cause directs respondent Secretary of State and intervener Citizens Redistricting Commission to address the following issues:

- What standard or test should this court apply in determining whether a referendum is "likely to qualify" within the meaning of article XXI, section 3, subdivision (b)(2) of the California Constitution, for purposes of deciding when a petition for writ of mandate may be filed in this court under that constitutional provision?
- Is this court's authority to entertain a petition for writ of mandate prior to the formal qualification of a referendum petition limited to the circumstances set forth in article XXI, section 3, subdivision (b)(2), or does this court have other authority (including inherent authority) to entertain such a petition even if it cannot yet be determined whether such a referendum is "likely to qualify" for placement on the ballot?
- What relief, if any, should this court order in the event the referendum regarding the Senate redistricting map qualifies for the November 2012 ballot?

The Secretary of State's response follows.

ARGUMENT

I. TO DETERMINE WHETHER A REFERENDUM IS "LIKELY TO QUALIFY" WITHIN THE MEANING OF ARTICLE XXI, SECTION 3(B)(2), THE COURT SHOULD REQUIRE A PETITIONER TO ESTABLISH THAT FACT BY A PREPONDERANCE OF THE EVIDENCE.

Article XXI, section 3(b)(2) of the California Constitution permits any voter to 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.” This Court has “original and exclusive jurisdiction” over such petitions and “shall give priority to ruling” on them. (Cal. Const., art. XXI, § 3, subds. (b)(1), (b)(3).) Article XXI contains no description of the burden of proof applicable to such proceedings, therefore the normal rules apply. (See *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1154 [“the normal burden of proof applies in a mandamus proceeding under Code of Civil Procedure section 1085”].)

By default, the law places the burden of proof on the party seeking relief “as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” (Evid. Code, § 500; *State Personnel Bd.*, *supra*, 10 Cal.4th at p. 1154.) Such facts require proof by “a preponderance of the evidence.” (Evid. Code, § 115; *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 546.)

This Court has required litigants to meet a clear and convincing burden of proof in cases in which “particularly important individual interests or rights are at stake such as the termination of parental rights, involuntary commitment, and deportation.” (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487 [internal quotation omitted]; *see also* 1 Witkin, Cal. Evidence (4th ed. 2000) *Burden of Proof and Presumptions*, § 39, pp. 188–190 [listing approximately twenty categories of cases in which courts have required a higher burden of proof].) Although there are clearly important interests at stake in an action involving a final redistricting map, the interests are public, not private. Accordingly, this Court should utilize the default standard: Petitioner bears the burden of proving, by a preponderance of the evidence, that a referendum “is likely to qualify.”

Although it is difficult to articulate a single test to apply in analyzing whether a litigant has met his or her burden to establish by a preponderance

of the evidence that an initiative or referendum is likely to qualify for the ballot, there are ways of meeting the burden.

In the normal course of events, the earliest that a petitioner could show that a referendum is likely to qualify would be around November 23 of a redistricting year. The Commission must certify its final maps by August 15 (Cal. Const., art. XXI, § 2, subd. (g)), petitions in support of a referendum must be submitted to county elections officials within 90 days (Elec. Code, § 9014), and the county elections officials must report the raw count of signatures to the Secretary of State eight business days later. (Elec. Code, § 9030, subd. (b).) These dates are fixed by the Constitution and by statute, and unless the Constitution or statutes change, they will routinely result in a date of about November 23 to release the raw count. There is a significant historical record of what percentage of a raw count will be valid. (*See Democracy by Initiative: Shaping California's Fourth Branch of Government* (Center for Governmental Studies, 2nd ed. 2008) at p. 149.) A sufficiently high raw count might establish, before verification began, that a referendum is likely to qualify.

It is also possible that a referendum might be found likely to qualify prior to submission of petitions to county elections officials. For example, it appears that in 1981 more than 900,000 signatures were submitted in support of referenda concerning redistricting bills for Senate, Assembly, and congressional districts.¹ At that time, only 346,119 signatures were

¹ See *Roberti's New Army of Animal Lovers*, California Journal (March 1983) p. 2. (The first three pages of this article are attached in the Appendix.)

Respondent apologizes for citing a periodical, but given the short briefing schedule ordered by the Court, respondent has not had time to locate original sources.

required to qualify a referendum.² In that circumstance, it is possible that – well before the date of submission – a qualified professional involved in the referendum drive could have submitted a declaration with evidence sufficient to sustain a finding that the referenda were likely to qualify. (In this case, no qualified campaign professional has presented a declaration concerning the likelihood of qualification.)

Here, the low raw-signature count, measured against historical signature-validity rates, is insufficient to establish by a preponderance of evidence that the referendum is likely to qualify for the ballot.

(Respondent's Preliminary Opposition at pp. 4-8.)

II. THE COURT DOES NOT HAVE AUTHORITY TO ENTERTAIN A PETITION FOR WRIT OF MANDATE BEFORE IT IS DETERMINED THAT A REFERENDUM IS "LIKELY TO QUALIFY" FOR THE BALLOT.

The authority for court intervention granted by article XXI is specific:

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).) This language was added by Proposition 20 in 2010, at the same time that the date for Commission certification of new maps was advanced from September 15 to August 15.

These amendments reflect a shared understanding that the Court has no authority, other than that expressed in article XXI, to entertain a writ petition before it is established that a referendum is "likely to qualify."

(See *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291

["Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision;

² *Ibid.*

express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari”]; *Rodman v. Superior Court of Nevada County* (1939) 13 Cal.2d 262, 269 [“when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction, and *certiorari* will lie to correct such excess”]; 2 Witkin, *Cal. Procedure* (5th ed. 2008) *Jurisdiction* § 285, p. 891.)

To be sure, once the Court determines that it must adopt its own redistricting plan, e.g., because the body normally responsible for that task has failed to act, it has latitude to exercise “equitable powers to fashion remedial techniques in this area of the law[.]” (*Legislature v. Reinecke* (1973) 10 Cal.3d 396, 406-407 [enjoining application of one-year residency requirement for legislators contained in article IV, § 2, subd. (c) when new districts were created by court order less than one year before election]; *Reynolds v. Sims* (1964) 377 U.S. 533, 585.) However, this equitable power is a remedial power, it is not the power to entertain a petition in excess of authority granted by constitution or statute.

The Court lacks authority to entertain a petition concerning a referendum of a redistricting map where it has not yet been determined that the referendum is “likely to qualify” for the ballot.

III. ASSUMING THE REFERENDUM QUALIFIES FOR THE BALLOT, RESPONDENT BELIEVES THAT THE ONLY PRACTICAL RELIEF IS TO ORDER THE USE OF THE COMMISSION’S NEW SENATE MAP FOR THE 2012 ELECTION CYCLE.

As explained in respondent’s Preliminary Opposition filed December 6, 2011, respondent believes that it is not practical to draw new Senate lines this late in the election season. (Respondent’s Preliminary Opposition at pp. 11-14.) Accordingly, in the event the referendum regarding the Senate redistricting map qualifies for the November 2012 ballot, respondent

believes that the only practical relief would be for the Court to order that the Commission's new Senate map be used for the 2012 election cycle, pending a vote on the referendum at the November 2012 general election.

CONCLUSION

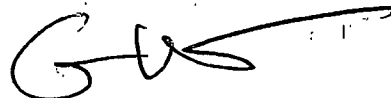
For the reasons set forth above, respondent respectfully submits that (a) in an action under article XXI, section 3, subdivision (b)(2), a petitioner bears the burden of showing that a referendum is likely to qualify by a preponderance of the evidence, (b) the Court lacks authority to entertain a petition for writ of mandate before it is determined that a referendum is likely to qualify for the ballot, and (c) the only practical relief in the present action is to order the use of Commission's new Senate map for the 2012 election cycle.

Dated: December 14, 2011

Respectfully submitted,

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APPENDIX

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California Journal

Monthly Analysis of State Government and Politics

MARCH 1983/\$2.50

ROBERTI'S NEW ARMY OF ANIMAL LOVERS

The '84 Democratic lineup

Special Section: Legislative District Maps



SPECIAL SECTION

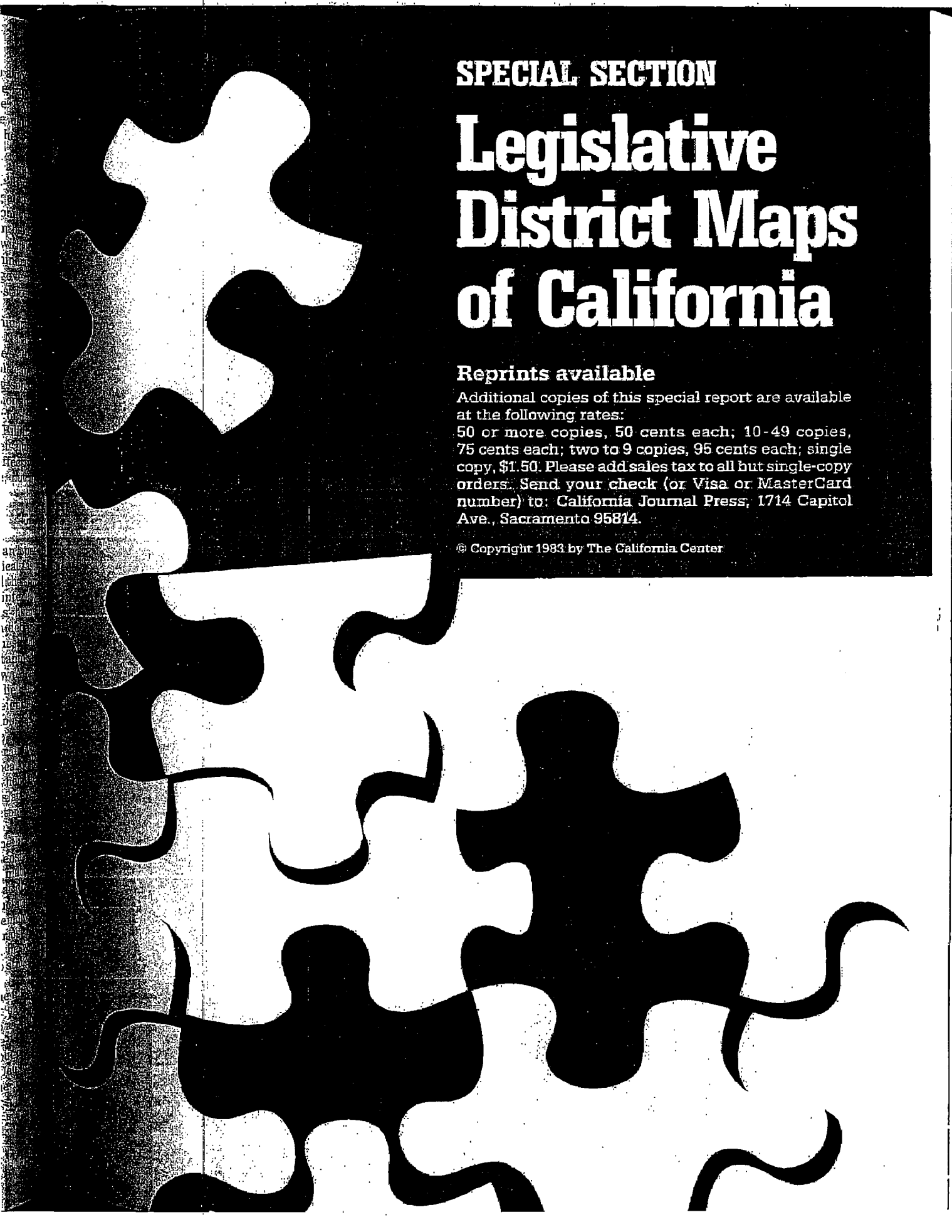
Legislative District Maps of California

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Final reapportionment maps (maybe)

After a year of battling in courts, ballot boxes and among themselves, California lawmakers have produced their second version of reapportionment for the 1980s. Because the first version was rejected by voters last June, the new one has to look different, and it does. All sorts of congressional and district boundaries have been changed. But the spirit of Reapportionment I remains in the latest version: to help the Democratic majority by protecting it from potential Republican gains. To do so, both plans concentrate as many Republican voters as possible in a relative handful of legislative and congressional districts while spreading the Democratic strength around.

Many Republican leaders, who fought successfully against Reapportionment I, seem willing now to let the issue die. Having been elected themselves last November under the lines of Reapportionment I, and having been protected by the latest version, they see no reason to fight another long and costly battle for change. Bucking the trend is GOP Assemblyman Don Sebastiani of Sonoma, who wants to nullify the new version and place a third reapportionment plan before voters.

Sebastiani, of the wine-making family, says his plan is more fair and better for the public because it would protect communities of interest, generally by being more respectful of city and county boundaries than the other two. At the moment, Sebastiani is raising money for a signature-

gathering campaign, which, he says, could cost about \$1 million. If all goes as planned, he says, he will have the required signatures, about 400,000, by June.

Even if he gets the signatures, Sebastiani is hardly out of the woods. He'll need millions of dollars for an election campaign, but more importantly he'll need Governor George Deukmejian to call a special election later this year so that the new district lines can be in place before preparations must begin for the elections of 1984.

Sebastiani hopes Deukmejian will make the call for November 8th, 1983, to coincide with municipal elections around the state. But Deukmejian, fighting to hold down state costs, is not enthusiastic about an election that would cost about \$20 million and would open him to charges of spending the sum to secure a political advantage for the GOP.

The most controversial part of the initial Democratic reapportionment was its recarving of the state's 45 congressional districts. Called an "outrageous gerrymander" by Republicans, it enabled Democrats to pick up six seats in last November's elections, a gain that represented nearly a quarter of the total gain that the party registered across the nation. To the degree that those gains forced President Reagan to change course on defense spending and other issues, California reapportionment has influenced the country.

The long reapportionment trail...

A calendar of confusion and controversy

September 15th, 1981 — Democratic majorities in the Senate and Assembly ram through three redistricting bills, one each for Senate, Assembly and congressional districts. In response to Republican protests, Democrats say that Republican-controlled legislatures in other states are behaving no less politically. The constitution requires reapportionment of the State Board of Equalization after each federal census, but lawmakers cannot agree on new districts and fail to pass a bill.

September 22nd, 1981 — President Reagan becomes the first California voter to sign a Republican-sponsored ballot petition to overturn the bills. If the signature drive is successful, voters in the June 8th primary election will be asked to approve or disapprove each bill. Meanwhile, Democrats file suit to block the referenda.

December 15th, 1981 — Secretary of State March Fong Eu announces that the Republican referenda have qualified for the June ballot. Needing signatures from 346,119 registered voters for each bill, the GOP, largely through a direct-mail campaign, collects over 900,000 for each.

January 28th, 1982 — State Supreme Court allows Republican referenda to appear on June 8th ballot, but hands Democrats a major victory by requiring that primary and general elections in 1982 be held on the new district lines. Republicans had hoped that the court would keep a moratorium on the bills, thus requiring that the elections be held on previous lines, which would give Republicans a better chance to pick up more seats. Because of federal laws, the court was unanimous in re-

quiring the new congressional lines, but split 4-3 on Senate and Assembly.

February 2nd, 1982 — The State Republican Party and the public interest lobbying group, Common Cause, formally open an initiative campaign to create a 10-member commission to handle reapportionment in the future.

June 8th, 1982 — Voters reject the three reapportionment bills. Republicans, Common Cause and nearly everyone else looks forward to voter approval of a new reapportionment commission in November.

June 21st, 1982 — Secretary of State March Fong Eu announces that the reapportionment commission initiative sponsored by Republicans and Common Cause has qualified for November 2nd ballot. Needing signatures from 563,790 registered voters, the two groups have gathered nearly 700,000.

November 2nd, 1982 — Voters reject the proposed new commission. Republicans and Common Cause blame defeat on overconfidence and insufficient advertising.

December 6th, 1982 — The 1983-84 Legislature convenes with lame-duck Governor Brown still in office. With new reapportionment bills required because of June referenda, Democrats rush to complete new package before January 3rd, 1983, when Republican Governor George Deukmejian takes charge.

January 2nd, 1983 — Brown signs two reapportionment bills into law — one for Congress and State Board of Equalization, the other for Senate and Assembly.

CERTIFICATE OF COMPLIANCE

I certify that the attached **RETURN OF RESPONDENT DEBRA BOWEN, CALIFORNIA SECRETARY OF STATE, TO ORDER TO SHOW CAUSE** uses a 13 point Times New Roman font and contains 2,119 words.

Dated: December 14, 2011

KAMALA D. HARRIS
Attorney General of California



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*Attorneys for Respondent Debra Bowen as
California Secretary of State*

DECLARATION OF SERVICE BY FACSIMILE, EMAIL, AND OVERNIGHT MAILCase Name: **Vandermost v. Bowen**No.: **S196493**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On December 14, 2011 at 4:00 P.M., I served the attached **RETURN OF RESPONDENT DEBRA BOWEN, CALIFORNIA SECRETARY OF STATE, TO ORDER TO SHOW CAUSE** by transmitting a copy via electronic mail, and by transmitting a true copy by facsimile machine, pursuant to California Rules of Court, rule 2.306. The facsimile machine I used complied with Rule 2.306, and no error was reported by the machine. My facsimile machine telephone number is (916) 324-8835. Pursuant to rule 2.306(h)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration. In addition, I placed a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Pursuant to Court Order dated December 9, 2011, hard copies are to follow via mail or overnight courier the following business day.

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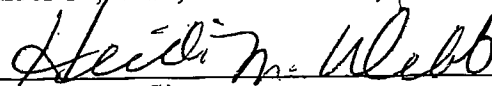
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 14, 2011, at Sacramento, California.

Heidi M. Webb

Declarant



Signature