In the Supreme Court of the State of California

JULIE VANDERMOST, **Petitioner,** **v.** **DEBRA BOWEN, Secretary of State of California,** **Respondent,** **CITIZENS REDISTRICTING COMMISSION,** **Real Party in Interest.**	Case No. S196493
GEORGE RADANOVICH; CHARLES PATRICK; GWEN PATRICK; OMAR NAVARRO; TRUNG PHAN, **Petitioners,** **v.** **DEBRA BOWEN, Secretary of State of California,** **Respondents,** **CITIZENS REDISTRICTING COMMISSION,** **Real Party in Interest.**	Case No. S196852

CONSOLIDATED INFORMAL OPPOSITION OF CALIFORNIA SECRETARY OF STATE DEBRA BOWEN

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INTRODUCTION

Respondent Debra Bowen, California Secretary of State, submits this informal opposition to the writ petitions filed in *Vandermost v. Bowen*, No. S196493, and *Radanovich v. Bowen*, No. S196852.

This informal opposition addresses two issues. First, respondent presents the Court with the 2012 primary election calendar. The Court should note that the first formal use of the new districts drawn by the real party Citizens Redistricting Commission (Commission) will occur on December 30, 2011. Any delay in ruling on petitioners' constitutional challenges to the maps and, should the Court determine the maps require adjustment, appointing special masters to re-draw them could jeopardize timely preparation for the June 5, 2012, primary election. Second, respondent contends that Article XXI does not authorize the relief sought in the *Vandermost* proceeding concerning the circulating referendum of the new Senate map. Specifically, Article XXI does not authorize the appointment of special masters to draw new maps simply on a showing that a referendum is "likely" to qualify. It would in any event be too late to draw a new map by the time petitioner Vandermost could demonstrate the likelihood of qualification.

Respondent takes no position on the merits of petitioners' legal challenges to the new maps drawn by the Commission.

FACTUAL STATEMENT

I. CALENDAR FOR THE 2012 PRIMARY ELECTION – THE FIRST FORMAL USE OF THE COMMISSION'S NEW MAPS WILL OCCUR ON DECEMBER 30, 2011.

The 2012 statewide primary election will be held on June 5. The first formal use of the new maps occurs on December 30, 2011, when candidates may begin to circulate petitions to secure signatures in lieu of paying a filing fee. At the very beginning of the election process, candidates must

pay a filing fee to the Secretary of State in the amount of either one or two percent of first-year salary for the office they seek. (§ 8103.)[1] In lieu of paying that fee, candidates can submit petitions containing, depending on the office, 1,500 to 10,000 signatures. (§ 8106.) The in-lieu signature process is constitutionally required. (*See Knoll v. Davidson* (1974) 12 Cal.3d 335, 349 [former § 6555 violates the equal protection clause of the 14th Amendment in that it requires a filing fee as a condition to becoming a candidate].)

The process of conducting an election for the 153 congressional, Senate, and Assembly seats that will be contested in 2012 is very complex. Rather than summarize the process here, the Secretary of State will simply note that the calendar for the 2012 primary election is attached as Exhibit A to the accompanying Declaration of Jana Lean, Chief of the Elections Division, California Secretary of State. The window for the Court to act without jeopardizing the June 2012 primary election is quite narrow.

II. SCHEDULE FOR PROCESSING THE PROPOSED REFERENDUM OF THE SENATE MAP.

Petitioner Vandermost alleges that she is "likely" to obtain sufficient signatures to qualify a referendum. (*Vandermost* First Amended Petition (FAP) ¶ 17.) The last day on which she can submit referendum petitions is November 14, 2011.[2]

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[1] Unless otherwise noted, all statutory references are to the Elections Code.

[2] The Commission certified the new maps on August 15, 2011. That is the enactment date for purposes of a referendum. (Art. XXI, § 2(i).) Petitions in support of a referendum must be submitted to the Secretary of State within 90 days of enactment. (Art. II, § 9(b) [referendum petitions must be submitted to Secretary of State within 90 days of enactment date].) The 90th day following August 15 is November 13, a Sunday. Because the final day is a Sunday, the deadline will extend to the next business day.

The chart on the following page demonstrates when it might be determined whether or not the proposed referendum qualifies for the ballot. The chart is based on the Secretary of State's August 26, 2011 memorandum to county elections officials. (Lean Decl., Exh D.) The chart, like the underlying memorandum, assumes that referendum petitions are submitted on November 13 and that each step takes the maximum time permissible.[3]

By law, county elections officials have eight business days to complete a raw signature count and certify the results to the Secretary of State. The Secretary of State compiles the statewide total and notifies the counties whether it meets the minimum. As the chart demonstrates, no official count of the raw number of signatures is likely to be available from the counties until about November 23, 2011, with the Secretary of State determining the statewide raw count shortly thereafter. It likely will not be known whether the referendum qualifies until mid-January, and perhaps as late as March. The earlier date assumes that the referendum is supported by sufficient signatures to qualify using a random sampling technique to verify the eligibility of signers and authenticate their signatures. The latter date assumes that verification and authentication of all signatures is necessary.

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[3] As stated in the previous paragraph, the last day for petitioner Vandermost to submit petitions in support of her referendum is November 14. The November 13 date is used in this chart because it was the date used in respondent's August 26 memorandum to county elections officials.

REFERENDUM PROCESSING SCHEDULE	
11/13/11	Last day proponent can circulate and file petitions with county elections officials. All sections are to be filed at the same time within each county within 90 days of the enactment date. (Art. II, § 9(b); § 9014; § 9030(a).)
11/23/11	Last day for counties to determine the raw count of signatures and to transmit total to the Secretary. (§ 9030(b).)
12/2/11	Secretary determines whether raw count meets the minimum number of required signatures and notifies the counties. (§ 9030(c).)
1/18/12	Last day for counties, by random sampling, to determine number of qualified signers and certify result to Secretary. (§§ 9030(d), (e).)
1/28/12	Secretary determines, based on county certificates, result of random sampling. If result is less than 95% of required number, petition fails. If result is over 110%, petition qualifies. If result is between 95% and 110%, Secretary notifies counties that a hand count of signatures is required. (§§9030(f), (g); 9031(a).)
3/13/12	Last day for counties to determine, by hand count, to determine number of qualified signers and certify result to Secretary. (§§ 9031(b), (c).)
3/17/12	Secretary determines, based on county certificates, whether petition qualifies. (§§ 9031(d); 9033.)

ARGUMENT

I. PETITIONER VANDERMOST HAS NOT ESTABLISHED THAT THE SENATE REFERENDUM IS LIKELY TO QUALIFY.

Petitioner Vandermost's allegations regarding the status of the referendum of the Senate map are opaque. Petitioner states that she must obtain 504,760 valid signatures (which is correct). She also states that she

is "likely" to obtain more than 780,000 raw signatures which, in her opinion, will allow the referendum to qualify through a statutorily-prescribed random sampling technique. (*Vandermost* FAP ¶ 175.)[4] It is impossible to assess the validity of these statements because petitioner offers no evidence to support them.

It is by no means clear that the Senate referendum will qualify. The number of signatures required to qualify a referendum is the same number required to qualify a statutory initiative. (Art. II, § 9(b) [referendum must be signed by electors equal to 5% of all votes in previous gubernatorial election]; Art. II, § 8(b) [statutory initiative must be signed by electors equal to 5% of all votes in previous gubernatorial election].) The Center for Governmental Studies reports that initiative proponents "lose up to 40% of gross signatures they have collected in the verification check," thus "signature gatherers must collect well over 750,000 gross signatures for initiative statutes . . . to be reasonably assured of qualification."[5]

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[4]Petitioner apparently recognizes that the constitutional requirement for actual evidence that the referendum is likely to qualify for the ballot is not superseded by section 9022. Section 9022(b) creates a presumption that submission of petition sections, properly verified by their circulators, establishes "that the petition presented contains the signatures of the requisite number of qualified voters," unless and until an official investigation proves otherwise. In fact, an official investigation is conducted in every case. The names and addresses listed by those who sign a referendum petition are checked, by the random sample and/or full count methods, against the voter rolls to determine if a valid registration is on file and whether the signature on the petition matches the signature on the voter's affidavit of registration. (§§ 9030(d), (e), (f), (g); 9031(a), (b).) The signature is counted only if a match is found. No referendum is placed on the ballot until the minimum number of valid signatures has been verified in this manner.

[5] At the time this CGS study was written, 433,971 valid signatures were required to qualify a referendum. (*Id.* at 149.) At present, the number is 504,760. (Lean Decl., Exh. D, p. 2.)

(*Democracy by Initiative: Shaping California's Fourth Branch of Government* (Center for Governmental Studies, 2nd Ed. 2008) at 149.)[6] Further, the median qualification expenditure for an initiative in 2006 (the most recent year for which data is available) was $2,848,259. (*Id.* at 181, Table 4.5.) As of October 9, 2010, a committee raising money for the Senate referendum reported receipts of less than $600,000.[7]

Ms. Vandermost's statement does not establish that the Senate referendum is likely to qualify. Until an official raw count of signatures submitted to county elections officials is available in late November or early December, petitioner holds all the cards here; she alone has access to the relevant information. The Court cannot conclude that the referendum is likely to qualify without testimony from the professionals Ms. Vandermost has retained to gather signatures.

II. ARTICLE XXI DOES NOT AUTHORIZE THE APPOINTMENT OF SPECIAL MASTERS TO DRAW NEW MAPS SIMPLY ON A SHOWING THAT A REFERENDUM IS "LIKELY" TO QUALIFY.

Petitioner contends that the new Senate map "is stayed upon likely qualification of the referendum and *that stay is automatic.*" (*Vandermost*

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[6] Available on line at http://cgs.org/index.php?option=com_content&view=article&id=164:PUBLICATIONS&catid=39:all_pubs&Itemid=72.

[7] F.A.I.R. – Fairness and Accountability in Redistricting, Committee No. 1339774, "Late and $5,000+ Contributions Received," accessible at the Secretary of State's Cal-Access website, http://cal-access.sos.ca.gov/Campaign/Committees /Detail.aspx?id = 1339774&view=late1. This committee is a new committee and at this point its reporting obligation is limited to contributions in excess of $5,000. It may be that the committee has other resources. It may be that other committees are supporting the referendum drive. The point is that at this point only petitioner has access to detailed information concerning circulation efforts, and petitioner has not presented any such information to the Court.

FAP at 123, emphasis in original.) This argument misreads article XXI, section 3(b)(2), which states:

> Any registered voter in this state may file a petition for a writ of mandate or writ of prohibition, within 45 days after the commission has certified a final map to the Secretary of State, to bar the Secretary of State from implementing the plan on the grounds that the filed plan violates this Constitution, the United States Constitution, or any federal or state statute. 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.

Petitioner's reading of the second sentence of section 3(b)(2) disregards the differences between the first sentence and second sentence. The first sentence permits barring the Secretary of State from implementing the plan upon a showing that the plan is unconstitutional or violates the Voting Rights Act. Read *consistently* with the first, the second sentence authorizes a registered voter to "seek relief" by extraordinary writ where a referendum "is likely to qualify and stay the timely implementation of the map." It is the *qualification* of the referendum that stays timely implementation of the map, as is the case with statutes (see art. XXI, § 2(i) [each certified map subject to referendum in the same manner that a statute is subject to referendum]; *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 656-657 [a statute challenged by "a duly qualified referendum" is stayed from taking effect]); it is the *likely* qualification of such a referendum that supplies a registered voter with the sufficient beneficial interest to seek judicial relief in mandamus or prohibition.

A petitioner showing that a referendum against a plan is likely to qualify must still prove entitlement to relief consistent with allowing ordinary electoral procedures to move forward subject to interdiction by the qualification of a referendum petition. Not only is petitioner's reading of

section 3(b)(2) unreasonable, but here there has been no showing that the proposed referendum is likely to qualify.

Petitioner is also mistaken when she asserts that section 3(b)(3) authorizes this Court, upon a finding that the final certified State Senate map is the subject of a referendum that is likely to qualify for the ballot, to employ one of the forms of relief set forth in section 2(j): the appointment of special masters, with instructions to draw a new State Senate map for review and certification by this Court.[8] Section 3(b)(3) states:

> The California Supreme Court shall give priority to ruling on a petition for a writ of mandate or a writ of prohibition filed pursuant to paragraph (2). *If the court determines that a final certified map violates this Constitution, the United States Constitution, or any federal or state statute,* the court shall fashion the relief that it deems appropriate, including, but not limited to, the relief set forth in subdivision (j) of Section 2.

(Emphasis added). Petitioner simply ignores the first clause of the second sentence of section 3(b)(3), which allows the appointment of special masters and the drawing of new lines only "[i]f the court determines that a final certified map violates this Constitution, the United States Constitution,

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[8] Paragraph 23 of the First Amended Verified Petition states:

> Upon the filing of a petition asserting that a referendum petition is "likely to qualify and stay" the operation of the Commission's certified Senate map, the "court shall fashion the relief that it deems appropriate, including but not limited to, the relief set forth in section 2(j) of Section 2." Section 2(j) provides that this relief is "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)[the criteria], (e)[Commission shall not take candidates' residence or party affiliation into account], and (f) [consecutive numbering of districts from north to south]."

or any federal or state statute[.]"[9] When read in context, it is clear that special masters may be appointed to draw new maps only where the Court has first found a constitutional or statutory violation. (*See People v. Leal* (2004) 33 Cal.4th 999, 1008 ["It is our task to construe, not to amend, the statute. In the construction of a statute ... the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted...." (internal citation and quotation marks omitted)].) Here there has been no such finding.

III. THE CONDUCT OF THE JUNE 2012 PRESIDENTIAL PRIMARY ELECTION WOULD BE JEOPARDIZED BY STARTING THE SPECIAL MASTER PROCESS FAR INTO THE ELECTION PREPARATION CYCLE

Based on what we now know, petitioner Vandermost is unlikely to be able to demonstrate before late November or December that her referendum is likely to qualify for the ballot. Even assuming that the likelihood of qualifying a referendum for the ballot authorizes the appointment of special masters, it would by then be too late to prepare and implement a new Senate map in time for the June 5, 2012, primary.

In the 1991 redistricting, after the legislative redistricting process resulted in stalemate, this Court appointed special masters on September 26, 1991, and instructed them to commence public hearings within 30 days and to file their recommendations by November 29. This Court also

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[9] Article XXI, section 2(j) also makes this remedy available if the Commission fails to certify a final map or if the voters disapprove a certified final map in a referendum election. In this case, it is undisputed that the Commission timely certified a final State Senate map, and the voters have not disapproved that map in a referendum election. Indeed, the referendum being circulated against the State Senate map has not qualified for the ballot and Petitioner has yet to submit evidence that it is likely to qualify for the ballot.

ordered a 30-day period of briefing and public comment following the filing of the masters' recommendations. The special masters held six days of public hearings in Sacramento, San Francisco, San Diego and Los Angeles. This Court, after a public hearing, adopted new plans on January 27, 1992 for the June 2, 1992 primary. (*Wilson v. Eu* (1992) 1 Cal.4th 707, 712-713.)

In the 1960s, a mid-decade redistricting plan for the Senate was necessary after the United States Supreme Court held that both houses of a bicameral state legislature must be apportioned by population. (*See Silver v. Brown* (1965) 63 Cal.2d 270, 275.) This Court set a December 9, 1965 deadline for legislative *adoption* of state Senate and Assembly maps to avoid disruption of the June 1966 primary election. (*Id.* at 277-278.)

There are major practical restraints on the appointment of special masters and the drawing of new plans this close to the 2012 election. First, special masters, should they be appointed, presumably would have to schedule public hearings throughout the state and submit tentative plans to the Court. The Court would then have to schedule a period of public comment and then adopt, reject, or modify the plan in a written opinion, after oral argument. In 1991 special masters were appointed on September 26 and the completion of the line-drawing process required compression of the election calendar that pushed the process to the very limits of what is possible. As set out above, petitioner Vandermost has not yet established that her referendum is likely to qualify and likely will not be able to do so until late November at the earliest. This is too late to start the line-drawing process without compressing the election calendar in a way that infringes the rights of candidates and voters.

Second, the first day that candidates can circulate in-lieu petitions in the new districts is December 30, 2011. In the 1991 cycle, this Court entered an order extending the date for filing in-lieu petitions until February

10 of the election year. This resulted in a significant compression of the period to circulate in-lieu petitions. As noted earlier, the circulation of in-lieu petitions is constitutionally required. (*See Davidson, supra*, 12 Cal.3d at 349.) Respondent urges the Court to refrain from compressing the in-lieu circulation period unless strictly necessary.

Third, as established by the Declaration of Jana Lean, Chief of the Elections Division, Office of the California Secretary of State, it will require a significant amount of time for state and local elections officials to implement changes to the new maps. The Office of the Secretary of State will require six weeks to implement changes. (Lean Decl., ¶ 13.)

CONCLUSION

The relief sought by petitioner Vandermost – appointment of special masters to draw new districts on a showing that the referendum is "likely" to qualify – is not authorized by Article XXI. Even if such relief were authorized, it appears that it will not be known whether the Senate referendum is "likely" to qualify until late November at the very earliest. For special masters to re-draw lines and conduct public hearings that late into the election cycle would jeopardize the orderly conduct of the 2012 primary election. The Court should not start a new drafting exercise so close to the election.

Respondent takes no position on petitioners' legal challenges to the new Senate and Congressional maps. As California's chief elections official, respondent requests only that the Court decide on the merits of those challenges as soon as reasonably possible.

Dated: October 11, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached CONSOLIDATED INFORMAL OPPOSITION OF CALIFORNIA SECRETARY OF STATE DEBRA BOWEN uses a 13 point Times New Roman font and contains 2,667 words.

Dated: October 11, 2011

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Vandermost v. Bowen**
No.: **S196493**

Case Name: **Radanovich v. Bowen**
No.: **S196852**

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; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with **Golden State Overnight** and/or **Fedex**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On October 11 2011, I served the attached **Consolidated Informal Opposition of California Secretary Of State Debra Bowen** by transmitting a true copy via electronic mail addressed as follows:

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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 October 11, 2011, at Sacramento, California.

Janice Smialek
Declarant

Signature

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