S. Ct. S272036

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LISA MORENO, JYNAIA BADIE, NANXUN ZHOU CONROY, BRUCE L. BIALOSKY, AND SYLVESTOR BLAND,

Petitioners,

v.

CITIZENS REDISTRICTING COMMISSION,

Respondent.

PRELIMINARY OPPOSITION OF CALIFORNIA CITIZENS REDISTRICTING COMMISSION TO EMERGENCY PETITION FOR WRITS OF PROHIBITION AND MANDATE OR OTHER EXTRAORDINARY OR IMMEDIATE RELIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This form is being submitted on behalf of the California Citizens Redistricting Commission. There are no interested entities or persons that must be listed in this certificate pursuant to California Rules of Court, rules 8.208 and 8.488.

Dated: December 7, 2021

Respectfully submitted,

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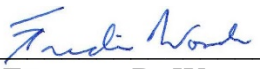
BY: 
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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

In response to this Court's request dated December 1, 2021, Respondent California Citizens Redistricting Commission hereby respectfully submits the following Preliminary Opposition to the Emergency Petition for Writs of Prohibition and Mandate or Other Extraordinary or Immediate Relief in this action.

INTRODUCTION

There is probably no public body in the State of California that has demonstrated more of a commitment to "an open and transparent process enabling full public consideration of and comment on" its work than the California Citizens Redistricting Commission ("CCRC" or the "Commission"). Fourteen citizens chosen to reflect the state's racial, ethnic, geographic, and gender diversity — five Democrats, five Republicans, and four individuals who are not registered with either of the major political parties — have worked selflessly and tirelessly throughout the past year in an effort to fulfill their assigned mandate to draw fair and impartial boundaries for 80 State Assembly districts, 40 State Senate districts, 52 Congressional districts, and four State Board of Equalization districts in compliance with constitutional and statutory requirements. As called for by the Constitution, they have at all times "conduct[ed] themselves with integrity and fairness." (Cal. Const., art. XXI, § 2, subd. (b)(3).)

These fourteen volunteers — strangers to each other when they first convened and selected, in large part, *precisely because* they had no previous redistricting experience — literally had to "start from scratch" in organizing themselves as a commission, hiring staff and consultants, educating themselves about the redistricting process and the legal framework governing it, developing the technology to allow the public to

participate in the drawing of district boundaries, and implementing an extensive outreach program to solicit and maximize public input into that process. And they had to accomplish all of this under extraordinary circumstances that included the challenges of a global pandemic that changed almost everything about life as we knew it and an unprecedented delay in the release of the federal census data that created great uncertainty and forced the Commission to conduct its line-drawing work under a condensed timeframe.

From September 20, 2021, when the Statewide Database completed its reformatting of the federal census data and first made the statewide redistricting database available to the Commission and the public, to November 10, 2021, when the Commission released its first set of preliminary draft maps (five days ahead of the deadline set by this Court), the Commission held almost 30 meetings to receive and consider public input on proposed district maps, culminating in four marathon day-and-night-long meetings on November 7-10, 2021, during which the Commission conducted its line-drawing in real time, in full public view, live-streamed over the internet for all the world to observe and follow. This followed three full days of meetings (October 21-23, 2021) set aside for members of the public to give presentations on their own proposed maps, and some fifty organizations and individuals signed up to do so. Countless others used the free mapping tools available on the Commission's website to submit their input on proposed district lines; in the final days leading up to the release of the Commission's initial draft maps, almost *one thousand* members of the public provided their input on a single day (November 9, 2021). In every step along the way, the Commission strived to be completely transparent and sought to engage the public as fully as possible so that anyone who wanted to could participate meaningfully in the line-drawing process.

The Commission is now in the final "home stretch" of the redistricting process. On November 17, 18, 19, 20, 22 and 23, 2021, the Commission held Draft Map Public Input meetings that focused on community responses to the preliminary draft maps released on November 10, 2021. Again, members of the public were able to sign up in advance to address the Commission by Zoom, and approximately 350 organizations and individuals presented their views on the preliminary maps to the Commission through that process, with an even greater number participating and providing input by telephone during the daily public comment periods. As this Preliminary Opposition is being prepared, the Commission is in the midst of conducting ten additional days of public meetings to revise and refine its draft maps in order to incorporate the public input it has been receiving, and further live line-drawing meetings are scheduled for almost every day of the next two-and-a-half weeks as the Commission races to complete the final maps for each set of districts for certification by the December 27, 2021, court-mandated deadline.

The instant Emergency Petition for Writs of Prohibition and Mandate or Other Extraordinary or Immediate Relief (the "Petition") — filed months after the supposedly illegal "secret" meetings it complains about took place and just weeks before the Commission's deadline to certify the final redistricting maps — is at best an untimely and unnecessary distraction as the Commission presses to finish its important work. At worst, the Petition represents a politically motivated attempt to obstruct the Commission's efforts by denying it the advice of its chosen counsel in these final crucial days of the redistricting process. In either case, as set forth briefly below, the Petition is utterly lacking in merit and should be summarily denied.

ARGUMENT

I. CCRC COMMISSIONERS HAVE NOT BEEN HOLDING ILLEGAL "SECRET" MEETINGS WITH INTERESTED PARTIES TO DISCUSS REDISTRICTING AND CERTAINLY HAVE NO INTENTION OF DOING SO IN THE NEXT TWO WEEKS PRIOR TO CERTIFYING THE FINAL REDISTRICTING MAPS

The Petition's principal allegation is that "current commissioners — illegally and repeatedly — communicated with stakeholders to discuss redistricting outside of the CRC's public meetings." (Petition, p. 25; see *id*., pp. 24-36.) The Petition therefore asks this Court to issue a writ "prohibiting the CRC from meeting or communicating with outside parties to discuss redistricting matters outside of a public meeting." (*Id*., p. 21.) The Petition, however, both mischaracterizes the nature of the interactions Commissioners have had with third parties and misinterprets the applicable law.

A. Commissioners Were Required To Undertake Many Preliminary Activities To Hire Staff and Consultants, To Educate Themselves and the Public About the Law, and To Engage the Public in Preparation for the Commencement of the Actual Redistricting Process

As noted above, when the fourteen citizens selected as Commissioners assumed their positions in August 2020, they were confronted with an enormous number of tasks and virtually no staff, prior experience, or existing infrastructure to assist them in performing their responsibilities. Recognizing that they could not possibly accomplish everything that needed to be done by deliberating and acting together as a single body, the Commissioners formed a number of two-person advisory subcommittees, each assigned to investigate and provide recommendations to the full Commission regarding certain subject matters and Commission responsibilities. Subcommittees were formed, for example, to deal with the recruitment and hiring of key staff, including an Executive Director, Chief

Counsel, and Outreach and Communications Directors; to address issues relating to the Commission's finances and administration; to develop a website and to address data management and cybersecurity issues; to prepare materials for public distribution about the Commission's function and the redistricting process; to work with the Statewide Database to design and maintain a community of interest (COI) tool for public input; and to coordinate with other agencies and interested parties regarding the ongoing delay in the release of the federal census data.

The Bagley-Keene Open Meeting Act (the "Act"), which governs the Commission's proceedings, by its terms does not apply to "[a]n advisory . . . subcommittee, or similar multimember advisory body of a state body" *unless* "the advisory body so created consists of three or more persons." (Gov. Code, § 11121, subd. (c); see Cal. Atty. Gen., "A Handy Guide to the Bagley-Keene Open Meeting Act," p. 3 [available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/bagleykeene2004_ada.pdf>].) Thus, contrary to the implication of the Petition (see p. 31), none of the Commission's two-person advisory subcommittees were required to hold their meetings in public or to comply with any of the other restrictions (e.g., public notice) imposed by that Act.

Of particular relevance to the Petition's claims, among the advisory subcommittees formed by the Commission were a subcommittee on VRA Compliance, which was tasked with learning about and advising the full Commission regarding how to comply with the federal Voting Rights Act in drawing district lines, one of the principal obligations of the Commission under article XXI, section 2, subdivision (d)(2), of the California Constitution, and a subcommittee on Outreach and Engagement, which was tasked with advising the Commission on the development and implementation of a program to fulfill its statutory mandate to establish "a

thorough outreach program to solicit broad public participation in the redistricting public review process." (Gov. Code, § 8253, subd. (a)(7).)

Once formed, the VRA Compliance subcommittee immediately set out to educate itself (and, ultimately, the full Commission) about the legal requirements imposed by the Voting Rights Act (VRA) and the best means of ensuring that the Commission's maps would meet those legal requirements. Among other activities, the subcommittee met virtually with and arranged for presentations by law professors and other VRA experts to obtain an overview of the VRA's requirements and the actions the Commission would need to take in order to satisfy those requirements; it heard from one of the former Chairs of the 2010 Commission, Angelo Ancheta, on how that Commission went about hiring counsel and consultants to ensure compliance with the VRA and the lessons learned from that experience; and it sought input from representatives of the affected minority communities themselves in an attempt to ensure that their perspective was considered in developing the Commission's program for VRA compliance.

The subcommittee's meetings, although not held publicly, were far from "secret." At every meeting of the full Commission, each advisory subcommittee provided a public report of its activities subsequent to the previous Commission meeting. For instance, at the Commission's November 18, 2020, public meeting, the VRA Compliance subcommittee gave a complete report on its meetings during the prior week with Loyola Law School Professor Justin Levitt and UCLA Professor Matt Barreto, the 2010 Commission's Racially Polarized Voting (RPV) analyst, which are the subjects of the notes that are referenced on page 32 of the Petition and are attached to the Declaration of Counsel in Support of Emergency Petition ("Columbo Decl.") as Exhibit 5, pages 3 & 4. Indeed, Professor Levitt made a presentation to the full Commission at its November 18th

public meeting covering the same issues that he had discussed with the advisory subcommittee earlier that week (including his recommendations on the pros and cons of publicly releasing any RPV analyses). (See <http://download.videossc.com/CRC/111820/CRC_111820.mp4> [video of Commission's 11/18/20 meeting]; <https://www.wedrawthelinesca.org/11_16_20_handouts> [handouts from the 11/16-18/20 meetings, including Prof. Levitt's Powerpoint presentation (Handout 9F)].) Similarly, the supposedly secret "undated memorandum from the VRA subcommittee" that the Petition claims was "newly disclosed" by the Commission only in response to a recent PRA request (see Petition, pp. 31, 32-33; Columbo Decl., Exh. 5, p. 6) was actually a handout from the Commission's November 18, 2020, meeting *that has been publicly available on the Commission's website for more than a year* and that was discussed at great length in that public meeting. (See <https://www.wedrawthelinesca.org/11_16_20_handouts> [Handout 9F Memo - VRA Compliance subcommittee].)

The work of the Outreach and Engagement subcommittee likewise had nothing to do with any "back-room, self-dealing" in secretly drawing district lines (see Petition, p. 24) and everything to do with developing an outreach program to educate people about the importance of redistricting and to encourage as much public participation as possible in that process, as mandated by Government Code section 8253, subdivision (a)(7).[1] To that

[1] Significantly, this was the first redistricting cycle in which the Commission was given the primary responsibility and funding for educating the public on redistricting. In 2010-11, educating the public about redistricting was largely done by nonprofits with funding from private foundations; the 2020 Commission's budget included funding for grants for that purpose. The current Commission therefore had to build its entire outreach and engagement program from the ground up, initially with

end, the subcommittee's members explored various approaches for educating the public and soliciting their input, seeking out the advice of those with prior experience with these issues, including local community and business leaders, public officials, and civic, philanthropic, nonprofit and government entities, in order to learn how best to educate and engage different communities throughout the state. Like the VRA Compliance subcommittee, the Outreach and Engagement subcommittee regularly reported on its activities to the full Commission in its public meetings, and many of the individuals and organizations contacted by the subcommittee were invited to give public presentations to the Commission about their experiences and advice regarding outreach efforts to specific populations. (See, e.g., <https://d3n8a8pro7vhmx.cloudfront.net/ccrc/pages/10/attachments/original/1624303163/Meeting-Agenda_Oct-28-2020_amended-Oct-28.pdf?1624303163> [Agenda Item 8 for CCRC's October 28-30, 2020, meeting, entitled: "Local/Field Level Nonprofit Panel: A panel of local nonprofits share how they engaged their constituents in civic engagement."].)

Based upon the information and advice provided by the Outreach and Engagement subcommittee, the Commission adopted a three-tiered approach to educating both the Commission and the public about the redistricting process. In the first phase, which occurred primarily from October 2020 through January 2021, various organizations were invited to give brief presentations to the Commissioners on outreach "best practices" for their communities, with a particular focus on populations that had historically been disenfranchised. In the second phase, the Commission

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just two part-time staff and no prior program to build on. And as noted, the Commission had to do it in the midst of a global pandemic.

launched its actual outreach efforts, dividing the state into 11 "outreach zones" and assigning two Commissioners to each zone to lead regional efforts; the intent was to mirror the process used by the California State Census Office's outreach efforts and enable the Commission to leverage the relationships with grassroots and other groups developed by the State Census Office in each zone. Commissioners reached out to various nonprofits and government entities in each of these zones, helping to build trust among local communities and the Commission, resulting in an outreach network for information and updates throughout the state. During this phase, the Outreach and Engagement subcommittee also contacted nearly 50 statewide organizations to leverage their local and regional networks.

The Commissioners' outreach and educational efforts principally took the form of a Powerpoint presentation, entitled "California Redistricting Basics," which focused on explaining the redistricting process in California and gave an overview of its history, an introduction to the Commissioners, and a description of the various ways in which the public could participate in the redistricting process; the presentations included a discussion of the six criteria that must be followed in the line-drawing process, including examples and guidance on how the public could describe their communities of interest. (A videotape of one such presentation, by Commissioner Taylor to the Valley Industry and Commerce Association on April 5, 2021, is referenced and linked to on page 28 of the Petition.) Although none of these presentations by individual Commissioners was subject to the Bagley-Keene Act's open meeting requirements, in order to promote full transparency, the Commission adopted a policy that any meetings at which a presentation was made by a Commissioner either had to be open to the public or video-recorded and posted on the Commission's website. A complete listing of all of the Commissioners' presentations was

also posted on the website so that any interested persons could know to whom the Commissioners were speaking. (See <https://www.wedrawthelinesca.org/outreach_calendar>.)

The Commission stopped taking requests for educational presentations in the beginning of June 2021 (and all such presentations by Commissioners ended in July 2021), when the outreach program switched to its final phase and the Commission began hosting virtual Community of Interest (COI) Public Input meetings, as well as spreading the word about online and other opportunities for the public to submit COI input. Building on the Commissioners' earlier outreach efforts, Commission staff began engaging thousands of stakeholder organizations throughout California, providing information about public meetings, online input tools, sign-ups for the social media toolkits and monthly newsletters, in order to encourage the public's participation in the redistricting process. Individuals wishing to provide their input at the COI Public Input meetings could enable video capabilities so that they could personally address the Commission, as they would have been able to do during an in-person meeting; technology allowed these virtual meetings to be as inclusive and accessible as possible.

Over the course of the next three months, while it awaited the release of the federal census data and the completion of the statewide redistricting database, the Commission held 35 regionally-focused and statewide COI Public Input meetings. Some 1,340 individuals provided their input during these virtual, Zoom-platform meetings, with thousands of other Californians listening in or watching the live-feed stream; on the busiest day, more than 80 people provided COI input or public comment to the Commissioners. The last COI Public Input meeting was held on September 10, 2021, after which the Commission switched its attention and focus to the actual redistricting line-drawing process upon receipt of the statewide redistricting database.

B. Commissioners Have Not Had Any Prohibited Non-Public Communications Related to the Drawing of District Lines

Against this background, the Petition's sensational allegation that "the CRC's commissioners have been holding secret meetings with keenly interested parties in violation of the California Constitution and the California Government Code, depriving the public of an opportunity to participate in and comment upon redistricting matters" (Petition, p. 36) can be seen in an entirely different, and more accurate, light. Far from *depriving* the public of an opportunity to participate in the redistricting process, the Commissioners' communications about which the Petition complains were all directed towards *improving* the public's opportunity to participate in that process and to ensuring that the process complied with constitutional and statutory requirements.

Nor did any of these interactions violate Government Code section 8253, subdivision (a)(3), which provides:

> Commission members and staff may not communicate with or receive communications about redistricting matters from anyone outside of a public hearing. This paragraph does not prohibit communication between commission members, staff, legal counsel, and consultants retained by the commission that is otherwise permitted by the Bagley-Keene Open Meeting Act or its successor outside of a public hearing.

Petitioners interpret this section to prohibit all communications (outside of a public hearing) between a Commissioner and any other persons that relate *in any way* to the subject of redistricting, broadly construed. Such an interpretation, however, is inconsistent with the constitutional and statutory scheme governing the Commission's activities and leads to absurd results that would thwart the Commission's ability to fulfill its mandate. (See, e.g., *People v. Pieters* (1991) 52 Cal.3d 894, 899 ["(W)e do not construe statutes in isolation, but rather read every statute

'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'"] [citation omitted]; *id*. at p. 898 ["It is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend."] [citation omitted].)

As noted above, in the same sentence in which Government Code section 8253, subdivision (a)(7) directs the Commission to "establish and implement an open hearing process for public input and deliberation," it also mandates that the Commission shall "promote [the process] through *a thorough outreach program to solicit broad public participation* in the redistricting public review process." (Emphasis added.) By definition, an "outreach" program requires the Commission to "reach out" to various organizations and individuals to "solicit" their participation in the hearing process: The Commission cannot simply notice a public meeting and hope that people somehow hear about it and attend; rather, the Commissioners and Commission staff must actively and affirmatively reach out to the targeted populations in order to educate and engage them in the process, precisely as the Commission did here. Yet under Petitioners' interpretation of Government Code section 8253, subdivision (a)(3), all such communications with third parties attempting to educate them about the redistricting process and encouraging them to participate in it would be prohibited outside of a noticed public hearing.[2] Such an interpretation fails

[2] Remember that Government Code section 8253, subdivision (a)(3)'s prohibition applies not just to communications between third parties and *members* of the Commission themselves, but also to any communications with the Commission's *staff*, rendering it unlawful, then, even for a staff member to engage in any outreach activities outside of a public meeting.

to harmonize subdivision (a)(3) with subdivision (a)(7), would prevent the Commission from fulfilling its public outreach mandate, and would lead to absurd results that surely were not intended by the voters who enacted Propositions 11 and 20.

Instead, the better and more reasonable interpretation of Government Code section 8253, subdivision (a)(3) — one that harmonizes the entire constitutional and statutory scheme, that is consistent with the case law, and that still achieves all of the electorate's objectives — construes the prohibition on communications between Commissioners, staff, and third parties outside of a public hearing to apply only to communications that relate directly to "redistricting," that is to the actual process and activity of "drawing district boundaries."

Although Government Code section 8253 does not define the term "redistricting," article XXI, section 1, subdivision (b), of the California Constitution (as amended by Propositions 11 and 20) does, equating "redistricting" with "adjust[ing] the boundary lines of the congressional, State Senatorial, Assembly, and Board of Equalization districts." (*Ibid*. ["In the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the Citizens Redistricting Commission described in Section 2 shall adjust the boundary lines of the congressional, State Senatorial, Assembly, and Board of Equalization districts (also known as "redistricting") in conformance with the standards and process set forth in Section 2."].) Article XXI, section 2 likewise equates "redistricting" with "the drawing of district lines," providing that the Citizens Redistricting Commission "shall: (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." (*Id*., art. XXI, § 2, subd. (b)

[emphasis added].) Government Code section 8253 itself incorporates a similar understanding that "redistricting" is limited to the line-drawing process, providing that the "redistricting public review process" shall "include hearings to receive public input before the commission draws any maps and hearings following the drawing and display of any commission maps." (Gov. Code, § 8253, subd. (a)(7).)

This is also the interpretation that courts, including this Court, have given to the term "redistricting." As this Court stated last year in *Legislature v. Padilla* (2020) 9 Cal.5th 867: "In California, the redistricting process begins with the Legislature preparing a dataset that combines the federal census data with voter registration data and historical statewide election results. (Gov. Code, § 8253, subd. (b).) The Legislature then provides this dataset to the Citizens Redistricting Commission." (*Id*. at p. 872; see also *id*. at p. 879 ["If the census data are sent to the states on July 31, 2021, and the Legislature takes one month to prepare the dataset to be used for redistricting, the Commission cannot begin its work until September 2021 at the earliest . . . ."].) While the Court in *Padilla* acknowledged that "[t]o carry out these duties, the Commission typically begins its work even before the census data are delivered to the state," the Court drew a distinction between these earlier activities and the actual "redistricting process," describing "this preliminary work" as including "arranging public hearings, soliciting public participation, and hiring staff and consultants." (*Id*. at p. 872.)[3]

[3] The U.S. Supreme Court has also explained that the usual meaning of "redistricting" is the redrawing of the boundaries of electoral districts. (See *Branch v. Smith* (2003) 538 U.S. 254, 299 [concurring and dissenting opinion of O'Connor, J.] ["The word 'redistricted' also is not hard to comprehend. [Webster's Collegiate Dictionary 980] (10th ed. 1993) (defining 'redistrict' to mean 'to divide anew into districts'); Black's Law

Thus, when properly interpreted, Government Code section 8253, subdivision (a)(3)'s prohibition against Commission members and staff communicating with anyone "about redistricting matters" outside of a public hearing applies only to communications about the Commission's actual line-drawing activities, such as input regarding where those lines should be drawn and which communities should be included within or excluded from a given district. In particular, section 8253, subdivision (a)(3) does not apply to any of the Commission's "preliminary work," such as "arranging public hearings, soliciting public participation, and hiring staff and consultants." (*Padilla*, 9 Cal.5th at p. 872.)

Here, the allegedly "secret" meetings and communications that the Petition challenges all related to the Commission's "preliminary work," and all occurred long before the Commission began the actual "redistricting public review process" in September 2021, and even before the Commission began to take any testimony regarding communities of interest in the COI Public Input hearings. The Commission and its members have rigorously complied with section 8253, subdivision (a)(3)'s prohibition against non-public communications with respect to the actual redistricting process, and the Petition contains no evidence to the contrary.[4]

Dictionary 1283 (7th ed. 1999) (defining 'redistrict' to mean '[t]o organize into new districts, esp. legislative ones; reapportion')."].)

[4] The Petition references notes from non-public VRA Compliance subcommittee meetings dated April 29, 2021, July 8, 2021, and August 30, 2021, implying that the communications in those meetings violated Government Code section 8253, subdivision (a)(3). (See Petition, pp. 34-35.) But all of those communications were between Commission members and the Commission's own legal counsel and consultants, and were thus authorized to occur outside of a public meeting under the express terms of the statute.

Similarly, the Petition (like Mr. Munger's May 7, 2021, letter) attempts to portray the meetings that Commissioners Sadhwani and Toledo attended with Common Cause on March 23 and April 21, 2021, as

Finally, the Petition does not allege that the Commission is currently (or has any time recently) been holding "secret" non-public meetings in violation of the law, and the Commission's posted schedule of almost-daily public meetings throughout the month of December would not allow for such meetings to occur in any event. It is well-established that a writ of mandate is an equitable remedy that will not issue where such relief is unnecessary. (*Sutro Heights Land Co. v. Merced Irr. Dist.* (1931) 211 Cal. 670, 704–05; *Mallon v. City of Long Beach* (1958) 164 Cal.App.2d 178, 190 ["A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued in the absence of any evidence that the acts are likely to be repeated in the future."]; see also *Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 518.) Moreover, because a writ of mandate generally requires the existence of a present duty, a writ of mandate will ordinarily not issue "merely in anticipation that the party will refuse to perform the duty when the time comes." (*Brandt v. Board of Supervisors* (1978) 84 Cal.App.3d 598, 601.) "If . . . there is no reasonable probability that past acts complained of will recur, injunctive relief will be denied. Injunctive power is not used as punishment for past acts and is ordered against them only if there is

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involving some sinister effort by Common Cause to influence the redistricting process. (See *id*., pp. 26-28.) The participants in those meetings, however, actually included all of the parties and amici curiae in the *Padilla* case, including representatives of the Legislature, the Secretary of State's office, and county elections officials (whom the Petition obliquely refers to as "several interested parties"), and as Commissioner Sadhwani publicly reported to the Commission, the meetings dealt solely with the anticipated further delay in the release of the census data, how the delay would affect the timeline for completing the redistricting process and preparations for the 2022 elections, and whether further relief should be requested from this Court. No substantive discussion on redistricting occurred in those meetings.

evidence they will probably recur." (*Mallon*, 164 Cal.App.2d at p. 190.)

Here, the Petition has not alleged, much less produced, any evidence to support such an allegation, that the Commission intends to hold any secret meetings or to engage in prohibited non-public communications with third parties within the next three weeks as it continues to revise and finalize the redistricting maps in response to public comments. To the contrary, the Petition admits that "the Commission will be holding *public* meetings nearly every day through December 18, 2021," with two additional days of public meetings scheduled starting on December 21, 2021. (Petition, p. 18, ¶ 22 [emphasis added].) Petitioners have therefore failed to meet their burden to produce evidence that there is a "reasonable probability that past acts complained of will recur." (*Mallon,* 164 Cal.App.2d at p. 190; see *People v. National Association of Realtors* (1981) 120 Cal.App.3d 459, 476 ["[W]here the injunction is sought solely to prevent recurrence of proscribed conduct which has, in good faith been discontinued, there is no equitable reason for an injunction."].) For this reason too, then, the Petition's request for a writ of prohibition must be denied.

II. THE COMMISSION HAS NOT CONCEALED OR WITHHELD ANY "SECRET VOTING ANALYSES" FROM THE PUBLIC

The Petition's second allegation is that the Commission has unlawfully concealed from the public a "secret voting analysis" that it has been using to influence the drawing of districts. (Petition, pp. 8, 36-38.) It therefore requests issuance of a writ of mandate to compel the Commission to disclose "any analyses commissioned or received by the CRC about voting patterns, including racially polarized voting." (*Id*., pp. 21-22.) The allegation is false and the relief sought is impermissible under the law.

As a factual matter, the allegation in the Petition is simply incorrect: ***The Commission has not concealed or withheld from the public any***

voting analyses it has received. The Petition seems to have overlooked that *more than six weeks ago*, in connection with the October 27-29, 2021, public visualization meetings, the Commission posted on its website four maps showing the results of racially polarized voting (RPV) analyses for each of the existing Assembly, State Senate, and Congressional districts, as well as a map showing the areas in the state in which racially polarized voting was found to exist in all three sets of districts. (See <https://www.wedrawthelinesca.org/10_27-29_21_handouts> [handouts for 10/27-29/21 meeting, including "Map 1 Assembly: Areas where all three Gingles preconditions are likely met" (available at <https://d3n8a8pro7vhmx.cloudfront.net/ccrc/pages/359/attachments/original/1635373201/map1_assembly.pdf?1635373201>); "Map II State Senate: Areas where all three Gingles preconditions are likely met" (available at <https://d3n8a8pro7vhmx.cloudfront.net/ccrc/pages/359/attachments/original/1635373203/map2_senate.pdf?1635373203>); "Map III Congress: Areas where all three Gingles preconditions are likely met" (available at <https://d3n8a8pro7vhmx.cloudfront.net/ccrc/pages/359/attachments/original/1635373207/map3_congressional.pdf?1635373207>); and "Map IV Gingles: Areas where all three Gingles preconditions are likely met" (available at <https://d3n8a8pro7vhmx.cloudfront.net/ccrc/pages/359/attachments/original/1635373208/map5_gingles3.pdf?1635373208>)].) These maps incorporate and memorialize the RPV analyses that the Commission's counsel has been relying upon in advising the Commission with respect to its obligations under the Voting Rights Act — precisely the analyses that the Petition has accused the Commission of "concealing" and that it requests be made public. The Commission has not "commissioned or received" any other "analyses of voting patterns, including racially polarized voting." (See Petition, pp. 21-22.)

To be sure, in the course of preparing their advice to the Commission, the Commission's *attorneys* have had additional communications with and have received additional writings from the consultant that *the attorneys hired* to assist *them* in analyzing racial voting patterns. (See Columbo Decl., Exh. 6, p. 6 [Strumwasser & Woocher's "Standard Agreement" with the CCRC, which provides that "[u]pon prior agreement by the Commission, the Contractor may obtain the services of an individual to conduct Racially Polarized Voting analysis."].) But the Commission's attorneys have not given the Commission any additional written information or analyses that they have received from their consultant; that information has instead been used by the attorneys themselves in fashioning their legal advice to the Commission.

Moreover, any additional analyses and writings prepared by the consultant for the Commission's counsel constitute attorney work-product under California law and are absolutely protected from compelled disclosure by a court. The consultant's analyses were prepared under the direction of counsel, for counsel's use and benefit, and they reflect the attorneys' research, impressions, and opinions on such issues as which districts should be analyzed to determine whether racially polarized voting exists and what factors should be considered in making that determination. Under Code of Civil Procedure section 2018.030, subdivision (a), "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable *under any circumstances*." (Emphasis added; see generally *Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1278-1279 [citing legislative history establishing that statutory protection for attorney work product "specifically would deny discovery of reports and opinions of experts obtained in anticipation of litigation and anything 'created' by or for a party or his agent…"].)

It is well-established that "[w]ork produced by an attorney's agents and consultants, as well as the attorney's own work product, is protected by the attorney work-product doctrine." (*Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 911; see also *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, 1079 ["reports prepared by an expert as a consultant are protected until the expert is designated as a witness"].) In addition, the protection afforded by the doctrine is not limited to writings created in anticipation of a lawsuit; an attorney's work product is protected from disclosure even when the attorney is acting in a non-litigation capacity and merely providing advice to a client. (See, e.g., *County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 833; *Rumac, Inc. v. Bottomley* (1983) 143 Cal.App.3d 810, 815.)

The Petition acknowledges that racially polarized voting analyses have traditionally been protected under the work-product doctrine and kept confidential, and that the Commission is following a similar practice and is adhering to the same legal advice that the 2010 Commission received from *its* counsel at the time (who were different attorneys than this Commission's counsel). (See Petition, p. 38; Columbo Decl., Exh. 5, pp. 3-5, 13.)[5] The Petition offers no reason or legal argument, however, for why that legal advice was and is incorrect, and for why the same protection for work product does not apply here — for none exists.

[5] The Petition mischaracterizes the contents of the notes it references with respect to the confidentiality of the RPV analyses. The notes merely describe the actions and legal position taken by the 2010 Commission as communicated to the VRA Compliance subcommittee by that Commission's former Chair, its RPV consultant, and Professor Levitt. The notes do not reflect any "decision" by the VRA Compliance subcommittee to treat the RPV analysis as confidential, much less any nefarious scheme to do so in order "to deprive opposition of targets to criticize" the Commission. (See Petition, p. 37.)

In sum, there is no factual or legal basis for the Court to grant the relief requested in the Petition with respect to this claim. The Commission has already publicly released all voting analyses that it has received and has relied upon in drawing district boundaries, and any other analyses that the Commission has *not* received are protected by the attorney work-product privilege.

III. THERE IS NO FACTUAL OR LEGAL BASIS FOR THE COURT TO ORDER THE COMMISSION TO TERMINATE ITS RELATIONSHIP WITH ITS CHOSEN COUNSEL

The Petition's final request for relief is perhaps its boldest: With less than three weeks remaining for the Commission to complete its work and certify the final redistricting maps for the Assembly, State Senate, House of Representatives, and Board of Equalization, the Petition requests issuance of a writ of mandate to compel the Commission "to terminate its relationship with Strumwasser & Woocher, LLP," the law firm that the Commission selected and contracted with in May 2021 to provide advice regarding compliance with the Voting Rights Act. (See Petition, pp. 21-22.) The asserted grounds for this extraordinary request is that Strumwasser & Woocher has previously "represent[ed] the California Legislature, as well as candidates and political action committees ('PACs') affiliated with the Democrat [sic] party." (*Id*., p. 8; see generally *id*., pp. 38-41.)

Noticeably lacking from the Petition is any citation to the *legal* basis for the relief requested or of this Court's authority to interject itself into the Commission's attorney-client relationship by issuing an order denying it the continuing services of its chosen counsel. There is no allegation in the Petition — nor could there be — that the Commission's hiring of Strumwasser & Woocher as its VRA counsel violated any constitutional or statutory prohibition. There is no allegation — nor could there be — that

Strumwasser & Woocher failed to disclose to the Commission in advance of the firm's selection its previous representation of the Legislature or its other political clients; to the contrary, all of the information on which the Petition relies was obtained from the disclosures contained in *the firm's own proposal* submitted in response to the Commission's Request for Information (RIF) for Legal Services. (See Columbo Decl., Exh. 7, pp. 12-13.)[6] There is no allegation — nor could there be — that Strumwasser & Woocher has breached its duty of loyalty to the Commission or has in any other manner violated its ethical obligations in the course of providing legal advice to the Commission during the past six months. Indeed, there is no allegation — nor could there be — that any of the firm's advice or any of the actions taken by the Commission to date in response to that advice have been anything other than scrupulously nonpartisan and impartial.[7]

Rather, it appears that the sole basis for the Petition's objection to the Commission's hiring and retention of Strumwasser & Woocher as its VRA counsel is that the firm has represented clients affiliated with a

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[6] The Petition actually cites to the wrong proposal submitted by Strumwasser & Woocher. The firm submitted proposals in response to the Commission's RIFs for both "VRA Counsel" and "Litigation Counsel," which involved two separate selection processes and two different contracts. The proposal included as Exhibit 7 to the Columbo Declaration is Strumwasser & Woocher's proposal for Litigation Counsel. (See *id*., Exh. 7, p. 1.) The firm's proposal to serve as VRA Counsel may be found on the Commission's website, available at <https://d3n8a8pro7vhmx.cloudfront.net/ccrc/pages/75/attachments/original/1614384017/SW-Levitt-VRA-Counsel-Proposal-to-CRC.pdf?1614384017>. The pertinent disclosures in the two proposals were identical, however.

[7] The Petition alleges that the Commission's hiring of Strumwasser & Woocher has somehow "compromised" its independence from the Legislature (Petition, p. 41), but the Petition does not explain exactly what that means or even what the interest of "the Legislature" as a collective body might be in the drawing of individual district lines.

political party other than the one favored by Petitioners and their attorneys. Needless to say, this provides no legal grounds for the relief requested in the Petition.

CONCLUSION

For all of the reasons cited above, the Emergency Petition for Writs of Prohibition and Mandate or Other Extraordinary or Immediate Relief lacks any merit and should be summarily denied.

Dated: December 7, 2021 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 8.204(C)(1)

I certify that, pursuant to California Rules of Court, rule 8.204(c)(1), the attached **PRELIMINARY OPPOSITION OF CALIFORNIA CITIZENS REDISTRICTING COMMISSION TO EMERGENCY PETITION FOR WRITS OF PROHIBITION AND MANDATE OR OTHER EXTRAORDINARY OR IMMEDIATE RELIEF** is proportionally spaced, has a typeface of 13 points or more, and contains 6,460 words, as determined by a computer word count.

Dated: December 7, 2021

Respectfully submitted,

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CALIFORNIA CITIZENS
REDISTRICTING COMMISSION
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BY: _____
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Attorneys for Respondent California Citizens Redistricting Commission

CERTIFICATE OF SERVICE

I hereby certify that on **December 7, 2021**, I caused to be electronically filed a true and correct copy of the foregoing with the Clerk of the Court using the EFS/TrueFiling system as required by California Rules of Court, rule 8.70. Participants in the case who are registered EFS/TrueFiling users will be served by the EFS/TrueFiling system. Participants in the case who are not registered EFS/TrueFiling users will be served via mail or by other means permitted by the court rules.

Dated: December 7, 2021

FREDRIC D. WOOCHER