

No. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LEGISLATURE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALEX PADILLA, in his official capacity as Secretary of State
of the State of California,

Respondent.

**EMERGENCY PETITION FOR WRIT OF MANDATE
AND REQUEST FOR IMMEDIATE RELIEF;
MEMORANDUM OF POINTS AND AUTHORITIES**

CRITICAL DATE: JULY 13, 2020

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PETITION FOR WRIT OF MANDATE

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

INTRODUCTION

The LEGISLATURE OF THE STATE OF CALIFORNIA respectfully petitions this Court for a writ of mandate ordering respondent ALEX PADILLA, in his official capacity as California Secretary of State, to accept redistricting plans from the California Redistricting Commission four months after the constitutional deadline of August 15, 2021, by which the Commission must approve final redistricting maps following the decennial census.

The Commission will require extensions of time to complete redistricting because the completion of the census has been delayed due to the COVID-19 pandemic. As a result, the Secretary of Commerce has requested that Congress extend the deadline by which the Census Bureau must release census data to the states from April 1 to July 31, 2021. The Commission cannot draw maps that satisfy state and federal law until it has the census data in a form it can use to redistrict the state.

The LEGISLATURE is required to provide the Commission with a dataset that consists of the census data overlaid with state voter registration data and historical election results and that reassigns the state prison population to each person's last known residential address. Neither the Commission nor members of the public can begin drawing draft maps until the dataset is complete. The process of building that dataset will take approximately 30 days.

Under the Census Bureau's new schedule, the LEGISLATURE cannot even begin assembling the dataset until after the

July 1, 2021 deadline for the Citizens Redistricting Commission to release draft maps to the public. Cal. Gov't Code § 8253(a)(7). There is also no way that the Commission could meet the constitutional requirement that it approve and deliver final maps to the Secretary of State by August 15, 2021, because the dataset will not even be ready by then. Cal. Const., art. XXI, § 2(g).

Therefore, the LEGISLATURE respectfully seeks an order extending those deadlines by four months to account for the delay occasioned by the Census Bureau's release of census data.

By this verified petition, petitioner alleges as follows:

NEED FOR EMERGENCY RELIEF

1. If the LEGISLATURE does not receive census data until July 31, 2021, it cannot prepare the dataset that the Commission must use to draw district lines until after the August 15, 2021 constitutional deadline for issuance of final maps. Thus, unless this Court extends the August 15, 2021 deadline, the Commission cannot perform its constitutional function in time for the 2022 elections. That would mean either that the elections would have to be held in malapportioned districts in violation of the state and federal Constitutions or that this Court would have to draw the lines itself, as the Constitution now requires if the Commission is unable to complete its work. *See* Cal. Const. art. XXI, § 2(j).

2. Resolution of this issue is necessary now, because if the Court does not act, the LEGISLATURE will have to consider placing a constitutional amendment on the November 2020 ballot to extend the time by which the Commission must act. The LEGISLATURE'S deadline to place a constitutional measure on the ballot is July 26, 2020, and it must

have time to move a constitutional measure through both houses and garner the necessary two-thirds vote in each house. *See* Cal. Const. art. XVIII, § 1. The LEGISLATURE returns from a recess shortened by the pandemic on July 13, giving it less than two weeks to accomplish that.

3. Addressing the problem occasioned by the Census Bureau's delay through a constitutional amendment should be avoided if at all possible. At a minimum, adding a ballot measure would cost the State \$4-6 million and would require a supplemental ballot pamphlet to be printed and mailed to all voter households, because it would be too late to include the measure in the regular voter pamphlet. Even then, there is no guarantee that the measure would be approved, and the Commission would have to operate without knowing whether it would have time to perform its constitutional task. Moreover, it makes little sense to permanently amend the Constitution simply to fix a unique timing problem that is unlikely to recur.

4. That outcome is not necessary. This Court can and should issue emergency relief directing the Secretary of State to accept final maps drawn by the Commission up to four months after the August 15, 2021 date set by the Constitution, or until December 15, 2021.

JURISDICTION

5. The Court has original jurisdiction over this matter pursuant to article VI, section 10 of the California Constitution, Code of Civil Procedure sections 1085 and 1086, and Rule 8.486 of the California Rules of Court, to decide an issue where, as here, the case presents issues of great public importance that must be resolved promptly. *Vandermost v. Bowen*, 53 Cal. 4th 421, 451-53 (2012). This is such a case because it

involves the ability of the LEGISLATURE to perform its duty to supply the redistricting dataset to the Citizens Redistricting Commission and the Commission's duty to adopt legislative and congressional district boundaries in time for the 2022 elections.

6. Petitioner is entitled to a writ of mandate because it does not have a "plain, speedy, and adequate remedy, in the ordinary course of law." Cal. Code Civ. Proc. § 1086. Action by this Court is necessary in order to ensure that the 2022 legislative and congressional elections are held in districts that satisfy the requirements of the state and federal Constitutions.

7. Original relief is necessary in this Court rather than a lower court because this matter presents an issue of broad public importance that requires speedy and final resolution: whether the Citizens Redistricting Commission will be able to draw district lines that meet constitutional requirements in time for elections officials and candidates to conduct orderly elections in the new districts. That issue needs final resolution now in order for the Commission to conduct its task knowing that it will have sufficient time for public participation and for it to reach the level of consensus required by the Constitution. Resolution is also needed now so that the LEGISLATURE can avoid having to place a costly constitutional amendment on the November 2020 ballot because of the Census Bureau's delay in releasing the census data.

PARTIES

8. Petitioner LEGISLATURE OF THE STATE OF CALIFORNIA is vested with the State's legislative power, and consists of the Senate and the Assembly. Cal. Const. art. IV, § 1. The

LEGISLATURE is required to create and maintain the Statewide Database used for all state and local redistricting. Cal. Gov't Code § 8253(b). The Statewide Database in turn creates the redistricting dataset, which consists of the decennial census data overlaid with state voter registration data and historical election results. The LEGISLATURE is required to deliver the dataset to the Redistricting Commission and ensure the public ready access to the data. Neither the Commission nor the public can begin to draw draft maps until the dataset is completed.

9. Respondent ALEX PADILLA is the California Secretary of State and is sued in his official capacity only. Respondent PADILLA is the State's chief elections officer (Cal. Elec. Code § 10), and is responsible for overseeing the State's elections, including ensuring that all elections for Congress, and the State Assembly, Senate, and Board of Equalization are conducted using the current district boundaries. Respondent PADILLA is currently required to accept the final certified maps from the Redistricting Commission no later than August 15, 2021. Cal. Const. art. XXI, § 2(g).

FACTUAL BACKGROUND

10. The California Redistricting Commission is the state body required to adjust the boundary lines for congressional, State Assembly, Senate and Board of Equalization districts every 10 years following the decennial census. *See generally* Cal. Const. art. XXI. The Commission is required to release draft maps by July 1, 2021 (Cal. Gov't Code § 8253(a)(7)), and adopt final maps by August 15, 2021 (Cal. Const. art. XXI, § 2(g)). The Commission that will be charged with redistricting in 2021 has not yet been selected and is not required to be formed until

August 15, 2020. Cal. Gov't Code § 8252(g). For that reason, the LEGISLATURE has not named the Commission as a party to this action. However, the Commission that was formed to draw the 2011 lines remains in existence until early July, and the LEGISLATURE understands that the Commission may wish to take a position regarding a remedy for the census delay.

11. The United States Secretary of Commerce is charged with overseeing the decennial census. The Secretary is required to release census data to each state no later than April 1 in the year following the decennial census, which would be April 1, 2021 for this redistricting cycle. 13 U.S.C. § 141(b).

12. On April 13, 2020, the Secretary of Commerce announced that as a result of the COVID-19 pandemic, the release of census data to the states for redistricting purposes would be delayed four months, from April 1 until July 31, 2021. Request for Judicial Notice (“RJN”), Ex. A (2020 Census Operational Adjustments Due to COVID-19).¹ Census Day was April 1, 2020, which occurred when many parts of the country were subject to shelter-in-place orders. According to the Secretary’s announcement, the Census Bureau stopped all field operations because of the COVID-19 pandemic and is not scheduled to resume field operations until June 1. The delay in field operations will in turn delay the release of census data to the states. The Secretary’s announcement stated as follows:

¹ The Secretary’s announcement and work plan can also be seen here: <https://2020census.gov/en/news-events/operational-adjustments-covid-19.html>.

In order to ensure the completeness and accuracy of the 2020 Census, the Census Bureau is seeking statutory relief from Congress of 120 additional calendar days to deliver final apportionment counts. Under this plan, the Census Bureau would extend the window for field data collection and self-response to October 31, 2020, which will allow for apportionment counts to be delivered to the President by April 30, 2021, *and redistricting data to be delivered to the states no later than July 31, 2021.*

Id. (emphasis added).

13. As a result, delay in the release of census data to the State is inevitable. On information and belief, petitioner alleges that although Congress has not yet passed legislation extending the deadline as requested by the Secretary, such legislation is likely to pass given the bipartisan support for an extension. The four-month extension was proposed by the Trump administration and the Democratically-controlled House included the four-month extension as requested by the Secretary in the COVID-19 related legislation, the HEROES Act, which it passed on May 15, 2020. *See* 116 HR 6800, Div. G, tit. II, § 70201 (May 15, 2020) (permitting the Census Bureau to provide states census data for redistricting up to 16 months after Census Day). Thus, it is likely that legislation with the four-month extension will be adopted. Regardless, the Census Bureau is proceeding with its Census Operational Adjustment Plan, the census field operation has already been delayed, and the current deadline of April 1, 2021 will not be met.

14. The Census Bureau's delay in releasing census data to California will make it impossible for the LEGISLATURE to build and provide a dataset to the Citizens Redistricting Commission in time for the Commission to draw draft maps by July 1, 2021, as required by statute, and

final maps by August 15, as required by the Constitution. *See* Cal. Gov't Code § 8253(a)(7); Cal. Const. art. XXI, § 2(g).

15. The Census Bureau's proposed release date of July 31, 2021, is already after the Commission's July 1 deadline to release draft maps, making that impossible to meet. The Commission's constitutional deadline for adopting final maps by August 15, 2021 will also be impossible to meet because the redistricting dataset necessary to draw plans will not be ready by then, and there would be no time for the Commission to hold the required public hearings and provide for the public comment periods required under the Voters FIRST Act. *See* Cal. Gov't Code § 8253(a)(7).

16. The Commission cannot begin to draw draft maps or even understand the demographic changes that are in play until it has received the dataset from the LEGISLATURE. The dataset consists of the decennial census data that are merged with individual voter registration data and historical election results, both of which are collected from the State and county registrars of voters. And for the first time this redistricting cycle, the dataset must reassign the state prison population from the location of the prison, as assigned in the census data, to a prisoner's last known place of residence. All of these adjustments must occur before the dataset is ready for the Commission and the public to use for drawing redistricting maps.

17. The census provides the data necessary to ensure that each district meets the equal population standards of the Equal Protection

Clause,² as well as data on race and ethnicity in all the census blocks in the state. The state voter registration data and historical election results (known as the “statement of vote”) are needed in order to ensure compliance with the federal Voting Rights Act. In addition, Propositions 11 and 20, the propositions that established redistricting by the Commission, require that the Commission take into account communities of interest, which may in turn require data regarding economic and social characteristics provided by both census and state information.

18. The Commission is not the only body that relies on the LEGISLATURE for the dataset. The dataset is critical to the general public as well, and the LEGISLATURE has an obligation to ensure the public ready access to redistricting data, so the public can draw and submit plans to the Commission. *See* Cal. Gov’t Code § 8253(b). In this way, members of the public and numerous interest groups will be able to create their own redistricting maps for submission to the Commission. During the 2011 redistricting, the Commission received more than 2,000 written submissions, including state, regional, and district maps generated by the public. *Vandermost v. Bowen*, 53 Cal. 4th 421, 445 (2012). The LEGISLATURE will not be able to provide the public with the dataset in a timely fashion if the relevant deadlines are not moved back.

19. The statewide dataset cannot be constructed until the Census Bureau releases the census data to the State. As discussed above,

² “Congressional districts shall achieve population equality as nearly as is practicable, and Senatorial, Assembly, and State Board of Equalization districts shall have reasonably equal population. . . .” Cal. Const. art. XXI, § 2(d)(1).

that will now occur on or by July 31, 2021. The Statewide Database³ will need approximately 30 days to construct the dataset. Overlaying the state data on to the census data is a complicated process because the two sets of data are in different geographical units that require the state data to be disaggregated and then reassembled by census blocks, the smallest unit of census data.

20. In 2011, it took five weeks to construct the dataset. The Census Bureau delivered the census data to the State on March 8, 2011, and the LEGISLATURE delivered the dataset to the Commission on April 13, 2011. RJN, Ex. C (Census Bureau Press Release from March 8, 2011 announcing release of data to California) and Ex. D (Letter dated April 13, 2011, from the Legislature to the Commission delivering dataset). There is an added step this time that was absent in 2011: For the first time this cycle, inmates in state prisons will be assigned for redistricting purposes not to their place of incarceration, but to their last place of residence. Cal. Elec. Code § 21003. This requires census data to be adjusted by reducing the population from the census blocks where prisons are located and reassigning those individuals to the census geography that best corresponds to their last known residence, based on Department of Corrections data. Despite this extra step and the fact that it took five weeks last cycle, the LEGISLATURE hopes to reduce the time this cycle to approximately 30 days.

21. If the census data are delivered to the State by July 31, the LEGISLATURE should be able to deliver the dataset to the

³ The Statewide Database is funded and overseen by the Legislature, and housed at the University of California, Berkeley's School of Law. *See* <https://statewidedatabase.org/>.

Commission at the end of August or early September 2021. That is well past the Commission's current deadline to release draft maps (July 1) and approve final maps (August 15). As a result, the Commission will not be able to meet its statutory and constitutional deadlines to draft and finalize redistricting plans.

22. If the constitutional deadline is not extended to coincide with the four-month delay the Census Bureau has requested, the Commission will either have to submit the existing, outdated and malapportioned plans to be used in the 2022 elections or this Court will have to exercise its jurisdiction, appoint special masters to redraw the boundaries, and certify the final maps. *See* Cal. Const. art. XXI, § 2(j). Neither option is a good one, and both options would frustrate the will of the voters in adopting Propositions 11 and 20, which was to have a citizens commission draw the lines through a process that maximizes public input.

23. Extending the deadlines by which the Commission must release draft maps and adopt final maps by four months would allow the Commission to comply with the transparency and public input requirements of the Voters FIRST Act, namely to hold public hearings to receive public input both before and after releasing draft maps, permit at least 14 days to receive public comment after releasing the first draft maps, permit 7 days for public comment after releasing any subsequent drafts, and permit at least three days for public display after releasing final maps. Cal. Gov't Code § 8253(a)(7).

24. Extending the deadlines would not adversely affect the administration of the 2022 statewide elections. Given the Census Bureau's delay, legislation has already been introduced in the Legislature to move the 2022 statewide primary election from March to June 2022. RJN Ex. E

(Senate Bill 970).⁴ Completing the maps by December 15, 2021 would not interfere with administration of the Statewide primary election on June 7, 2022. For example, the period during which candidates can request nomination documents would not begin until February 14, 2022, three months after the plans would be final. *See* Cal. Elec. Code § 8020(b) (nomination documents first available on the 113th day before the primary election). Moreover, elections officials would have almost six months to implement the new boundaries in elections software, only one month less than they would have had if the plans were finalized on August 15, 2021 for a March 2022 primary.

25. This Court has broad equitable powers in redistricting cases to adjust deadlines, adopt plans, or grant other relief. *Vandermost v. Bowen*, 53 Cal. 4th at 483. This request asks for only a modest exercise of that power.

FIRST CAUSE OF ACTION

(Writ of Mandate – Cal. Const. art. VI, § 10 and Code of Civil Procedure §§ 1085, 1086)

26. Petitioner hereby realleges and incorporates paragraphs 1 through 25 above as if fully set forth herein.

27. Under article VI, section 10 of the California Constitution and Code of Civil Procedure sections 1085 and 1086, the Court should exercise its original jurisdiction and issue a writ of mandate to compel the Secretary of State to accept the Commission’s final maps four months after the constitutional deadline for release of final maps. A writ should issue because the Commission is required by the Constitution to

⁴ SB 970 can also be accessed here: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB970.

submit certified final maps to the Secretary of State by August 15, 2021, but due to the Census Bureau's current proposal to delay releasing census data until or by July 31, 2021, it will be impossible for the Commission to comply with that deadline. Therefore, an order should issue requiring the Secretary of State to accept final certified plans four months after the current deadline, up to and including December 15, 2021. Coincident with moving the constitutional deadline, the Court should also move the statutory deadline by which the Commission must release its draft maps by four months, to November 1, 2021.

28. The writ should issue because the LEGISLATURE has no plain, speedy and adequate remedy in the ordinary course of law.

WHEREFORE, petitioner prays for judgment as follows:

1. That this Court issue a writ of mandate pursuant to article VI, section 10 of the California Constitution and Code of Civil Procedure sections 1085 and 1086 requiring respondent ALEX PADILLA to accept the final Commission redistricting maps for the State's Assembly, Senate, Board of Equalization and congressional districts up to December 15, 2021, notwithstanding article XXI, section 2(g) of the California Constitution, and extend the date by which the Commission must release draft maps for public comment up to November 1, 2021, notwithstanding Government Code section 8253(a)(7).

2. That this Court grant such other, different, or further relief as the Court may deem just and proper.

Dated: June 3, 2020

Respectfully submitted,

OLSON REMCHO, LLP

By: /s/ Robin B. Johansen
Attorneys for Petitioner Legislature
of the State of California

VERIFICATION

I, Robin B. Johansen, declare:

I am one of the attorneys for petitioner the California Legislature. I make this verification for the reason that petitioner is absent from the county where I have my office. I have read the foregoing Emergency Petition for Writ of Mandate and Request for Immediate Relief and believe that the matters therein are true and on that ground allege that the matters stated therein are true.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day of June, 2020, at San Mateo, California.

/s/ Robin B. Johansen

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Because of the COVID-19 pandemic, the federal census has been delayed and the Secretary of Commerce has requested Congress to extend the deadline by which the Census Bureau must release the census data, from April 1, 2021 to July 31, 2021. In light of that delay, the Legislature respectfully requests that the Court issue an original writ to allow the Citizens Redistricting Commission sufficient time to adopt State redistricting plans.

The Commission cannot begin drawing maps until it has received a dataset from the Legislature containing the census data combined with statewide voter registration data and election results. That dataset will take at least four weeks to prepare after the Census Bureau has provided the State with census data, meaning that the dataset could not be ready before August 31, 2021. Thus, the Census Bureau's delay will make it impossible for the Commission to meet its constitutional deadline of August 15, 2021 to complete its redistricting plans. Without relief from the Court, the Commission will be unable to conduct redistricting as the voters intended when they passed Propositions 11 and 20, with extensive public input throughout the process and sufficient time for deliberation.

Despite the fact that the Commission's deadlines to draft and adopt redistricting plans are a year away, action by the Court is necessary now. Without an order from the Court by July 13, 2020, the Legislature will have to consider placing a constitutional amendment on the November 2020 ballot to move those deadlines. The last possible date the Legislature could vote to place such a measure on the November ballot is July 26, 2020, which means the Legislature would have less than two weeks after

returning from a recess shortened by the pandemic to consider and adopt the constitutional amendment that requires a two-thirds vote of each house of the Legislature.

That legislative option, however, is ill-advised for several reasons. First, placing the measure on the ballot would cost at least \$4-6 million at a time when the State's coffers have been severely diminished by the COVID-19 virus. Second, amending a constitution permanently to address a one-time delay is not a good precedent to set. Third, if the Commission must wait until November to know how much time it will have, it will be unable to plan an effective redistricting calendar of public hearings and public comment periods. Finally, the measure may not pass, leaving the Commission no viable way to complete its task and requiring this Court to step in at a much later date. All of this can be avoided by the Court issuing an order moving back the Commission's deadlines by four months, equal to the Census Bureau's delay. Such relief will not adversely affect the State's ability to administer the 2022 elections.

For all these reasons, the Legislature respectfully requests that the Court extend the State's redistricting deadlines for four months to be consistent with the delay occasioned by the Census Bureau. Doing so now will avoid the need for an unnecessary constitutional amendment and provide certainty to the newly formed Commission and the many members of the public who wish to participate in the redistricting process.

I.

FACTUAL BACKGROUND

A. The Commission Selection Process

In November 2008, California voters approved Proposition 11, which created the California Citizens Redistricting Commission and charged it with making adjustments to the boundary lines for State Assembly, Senate, and Board of Equalization districts every 10 years in the year following the decennial census. In 2010, the voters adopted Proposition 20, which required the Commission to redistrict the State's congressional boundaries as well. *See generally* Cal. Const. art. XXI; *Vandermost v. Bowen*, 53 Cal. 4th 421 (2012) (discussing in detail the establishment of the Commission and its work in the 2011 redistricting cycle). The purpose of the two measures was to create a diverse citizens commission that would redraw the state's representative boundaries through a transparent and open process that encourages public participation.

The Commission consists of 14 members, five of whom are registered with the State's largest political party, five of whom are registered with the State's second largest party, and four of whom are not registered with either party. Cal. Const. art. XXI, § 2(c)(2).

The Commission is selected through a multi-step process that is meant to create a diverse and qualified membership. *See* Cal. Gov't Code §§ 8252(a)(1) (application process must promote a diverse and qualified applicant pool) and 8252(g) (final six members chosen in part to reflect State's diversity). First, the State Auditor oversees an exhaustive outreach and application process open to all registered California voters. The Auditor must remove from the applicant pool any applicant who has a conflict of interest as specifically defined by statute. *Id.* § 8252(a)(2).

Second, the Auditor forms an Applicant Review Panel, consisting of three independent qualified auditors, that interviews the applicants and selects the most qualified applicants, 20 of whom are registered with the largest political party, 20 of whom are registered with the second largest political party, and 20 of whom are not registered with either party. *Id.* §§ 8252(b), (d). The Applicant Review Panel must make its selections by May 15, and it has just completed that process.

Next, the four legislative leaders may each exercise up to two strikes for each sub-pool, for a total of eight strikes per sub-pool. *Id.* § 8252(e). The strike process must occur by June 30, 2020. The legislative leaders have not yet exercised their strikes. Next, no later than July 5, the State Auditor randomly selects eight applicants from the remaining applicants to be on the Commission (three from the largest party pool, three from the second largest party pool and two from the pool not registered with either party). *Id.* § 8252(f). Finally, no later than August 15, the eight selected commissioners must meet and select six additional commissioners, two from each sub-pool. The final six appointees shall be “chosen to ensure the commission reflects the state’s diversity.” *Id.* § 8252(g). As a result, the full commission may not be formed before August 15, 2020.

B. The Commission’s Relevant Deadlines

Once the new Commission has been formed and commences its work in late summer and early fall, it will likely be occupied with hiring staff and consultants (including a demographer and redistricting legal counsel), becoming familiar with the redistricting process, and setting a timetable for public hearings and to receive public input. *See id.* § 8253(a)(5).

The Commission must “establish and implement an open hearing process for public input and deliberation that shall be subject to public notice and promoted through a thorough outreach program to solicit broad public participation in the redistricting public review process.” *Id.* § 8253(a)(7). The Commission must hold public hearings to receive public input before drawing any maps, and then must hold additional public hearings following the drawing of any draft maps. Public comment must be taken for at least 14 days from the date of public display of any draft maps, seven days for any subsequent draft maps, and at least three days for the final maps. *Id.*

The Commission must release draft maps by July 1, 2021 and adopt final maps by August 15, 2021. *Id.* § 8253(a)(7)); Cal. Const. art. XXI, § 2(g). The Commission must approve any final maps by a super-majority vote with at least nine of the sixteen commissioners approving the plans. *Id.* § 2(c)(5). Three of the five commissioners registered with each of the two largest political parties and three of the four who are not registered with the two largest parties must approve the maps. *Id.*

In order to promote public participation last cycle, the Commission held more than 70 business meetings and 34 public hearings in 32 cities throughout the state. *Vandermost v. Bowen*, 53 Cal. 4th at 445-46. In addition to oral testimony, the Commission received more than 2,000 written submissions including draft maps, and received input and suggestions from more than 20,000 groups and individuals. *Id.* The Commission held 23 public hearings before issuing its draft maps and an additional eleven public hearings after releasing the draft maps. *Id.*

Given the success of the Commission’s work last cycle, it is likely the Commission will want to undertake a similarly exhaustive

process of public hearings throughout the State and soliciting public comment. Such an ambitious plan will take time to implement and execute.

The Commission, however, cannot begin to draw draft maps or even fully understand the demographic changes that are in play this redistricting cycle until it has received the dataset from the Legislature. That dataset consists of the decennial census data merged with individual voter registration data and historical election results. *See* RJN, Ex. B (Creating California’s Official Redistricting Database, August 2011).

While the census provides the data necessary to ensure that each district meets the equal population standards of the Equal Protection Clause,⁵ and it also provides data on ethnicity, the state voter registration data and historical election results (known as the “statement of vote”) are necessary to ensure compliance with the federal Voting Rights Act. For example, voter registration and statement of vote data are necessary to perform racially-polarized voting (RPV) analysis, which in turn is necessary to determine whether a particular district or area may raise concerns under section 2 of the federal Voting Rights Act. *See*

⁵ “Congressional districts shall achieve population equality as nearly as is practicable, and Senatorial, Assembly, and State Board of Equalization districts shall have reasonably equal population. . . .” Cal. Const. art. XXI, § 2(d)(1).

Thornburg v. Gingles, 478 U.S. 30 (1986).⁶ In addition, the Commission is required to take into account communities of interest, which may in turn require economic and social data supplied by the census.

The statewide dataset, however, cannot be constructed until the Census Bureau releases the census data to the State. Declaration of Karin Mac Donald in Support of Emergency Writ of Mandate (“Mac Donald Decl.”), ¶ 5. Once the State receives the census data, it will need approximately 30 days to construct the dataset (*id* at ¶ 6) for reasons discussed in more detail in the Statewide Database’s report for the 2011 cycle and the accompanying Declaration of Karin Mac Donald.⁷ *See generally* Mac Donald Decl.; RJN, Ex. B. Overlaying the state data on to the census data is a complicated process because the two sets of data are in different geographical units that require the state data to be disaggregated and then reassembled by census blocks. *See generally* Mac Donald Decl. In addition, during this cycle, unlike in previous cycles, the Statewide Database must match the prison population with an inmate’s last known

⁶ In order to state a claim under section 2 of the Voting Rights Act, a plaintiff must show the existence of three preconditions: (1) that the racial or minority group is sufficiently large to constitute a majority in the relevant district; (2) the minority group is politically cohesive, and (3) the majority votes sufficiently as a bloc to usually defeat the minority’s preferred candidate. *Thornburg, supra*, 478 U.S. at 48-49. Racially-polarized voting (also known as “RPV” analysis) is a means by which to show the existence or absence of the second and third pre-conditions, namely whether the majority and minority group vote in a cohesive manner. That analysis in turn, requires a study of how racial groups have voted in previous elections, and whether there is a difference in the way they have voted for certain candidates or ballot measures; hence the need for statement of vote data when redistricting.

⁷ The Statewide Database is located at the University of California, Berkeley and funded by the Legislature.

address. Cal. Elec. Code § 21003. That adds an additional step that will require additional time. Mac Donald Decl., ¶ 8.

C. The Census Bureau's Delay

On April 13, 2020, the Secretary of Commerce announced that as a result of the COVID-19 pandemic, the release of census data to the states for redistricting purposes would be delayed four months, from April 1 until July 31, 2021. RJN, Ex. A (2020 Census Operational Adjustments Due to COVID-19).⁸ Census Day was April 1, 2020, which occurred when many parts of the country were subject to shelter-in-place orders. According to the release, the Census Bureau stopped all field operations because of the COVID-19 pandemic and was not scheduled to resume field operations until June 1. The delay in field operations will in turn delay the release of census data to states for up to four months, from April 1 to July 31, 2021. *Id.*

Although the April 1, 2021 release date is set by federal statute, Congress is expected to pass legislation moving the dates back as requested by the Trump Administration. A provision doing just that was approved by the House of Representatives when it passed the HEROES Act on May 15, 2020. *See* 116 HR 6800, Div. G, tit. II, § 70201 (May 15, 2020) (permitting the Census Bureau to provide states census data for redistricting up to 16 months after Census Day). In any event, even in the absence of federal legislation, the Census Bureau is proceeding with its Census Operational Adjustment Plan, and the current deadline of April 2021 certainly will not be met.

⁸ The Secretary's announcement and work plan can also be seen here: <https://2020census.gov/en/news-events/operational-adjustments-covid-19.html>.

ARGUMENT

I.

THE COURT SHOULD ACT NOW IN ORDER FOR THE REDISTRICTING PROCESS TO SUCCEED

The Legislature recognizes that it is asking the Court to extend two deadlines a year in advance of the date when they fall due. Yet working backwards from those deadlines, it becomes apparent that the Legislature and the Commission must know very soon whether both bodies will have sufficient time in which to perform their duties under the Voters First Act. Most immediately, unless this Court acts by July 13, 2020, the Legislature will have to decide whether to put a constitutional amendment on the November 2020 ballot asking the voters to allow the Commission more time in which to do its work. As discussed more fully below, that will not only increase the cost of the November election, but it will result in months of uncertainty for both the Legislature and the Commission until they know whether the voters will approve the measure.

For these reasons the Court should exercise its original jurisdiction to relieve the Commission of its constitutional duty to adopt final maps by August 15, 2021, and require the Secretary of State to accept those plans up to December 15, 2021. This Court has repeatedly “exercised its authority to entertain and decide petitions for original writs of mandate related to the referendum, initiative and redistricting process in circumstances in which an expeditious ruling was necessary to the orderly functioning of the electoral system.” *Vandermost v. Bowen*, 53 Cal. 4th 421, 452 (2012). The Court has long held that it may exercise its writ authority to decide matters of statewide importance that must be resolved promptly. *County of Sacramento v. Hickman*, 66 Cal. 2d 841, 845 (1967).

This case easily meets that standard. In 2008, California voters made clear that they wanted redistricting to be conducted by a citizens' commission with maximum public participation. If the deadlines are not moved, the Commission will not be able to accomplish its task in the manner prescribed by Proposition 11, namely with public hearings both before and after draft maps are released and with substantial public comment periods after draft and final maps are released. Cal. Gov't Code § 8253(a)(7). None of that can occur by the constitutional deadline of August 15, 2021 if the Census Bureau does not release census data until July 31. Thus, the effect of the Census Bureau's delay on the Commission's constitutional deadline to complete its work raises a matter of great statewide public importance.

This case also raises an issue that must be resolved promptly. Because the deadline is in the Constitution, it can only be moved by court order or constitutional amendment.⁹ If the Court decides not to grant relief, the Legislature will have to propose a constitutional amendment. However, the period to do so is fast closing. The Secretary of State has informed the Legislature that the last day it can place a constitutional amendment on the November election ballot is July 26, 2020. *See generally* Declaration of Edson Perez ("Perez Decl."); RJN, Ex. F (Email from James Schwab to Legislature regarding November 2020 ballot deadlines and costs). The Assembly adjourns for summer recess on June 19, 2020, and the Senate on July 2, 2020, but both houses reconvene on July 13. RJN, Ex. G (2020 Legislative Calendars). The Legislature will need to know whether or not

⁹ The Governor cannot suspend or move a constitutional deadline through emergency executive order. *See* Cal. Gov't Code § 8571.

the Court will grant relief by the time it reconvenes. Even that timing is compressed, as the Legislature will have less than two weeks to move a constitutional amendment through the Legislature and garner the necessary two-thirds vote in each house. *See* Cal. Const. art. XVIII, § 1.

Finally, the Court's holding in *Vandermost v. Bowen*, 53 Cal. 4th 421 (2012), demonstrates that the case is ripe for adjudication. There, the Court took and decided a question that was not even certain to arise: What redistricting map should be used for the 2012 statewide Senate elections if a referendum against the 2011 Senate redistricting plan automatically stayed that plan by qualifying for the same ballot? *See* Cal. Const. art II, § 10(a). At the time the proponents of the referendum filed their original writ with this Court, the measure had not yet qualified for the ballot and it was not at all clear whether it would. If the referendum failed to qualify, there would be no need for the Court to decide anything, because the 2011 plan would automatically go into effect. At the same time, election deadlines were fast approaching, and it was clear that if the Court waited to act until it knew whether the referendum had qualified, it would likely be too late to implement a plan other than the 2011 Senate plan. Thus, despite the uncertainty about whether the referendum would qualify, the Court found the case was ripe for adjudication, holding that "the potential detrimental consequences resulting from this court's deferring action until later in the signature verification process may reasonably support a judicial determination that the proposed mandate action is sufficiently 'ripe' to permit this court to exercise jurisdiction over the mandate at that earlier juncture." *Vandermost*, 53 Cal. 4th at 456.

In *Vandermost*, it was not clear whether the referendum would qualify and therefore whether there was a need for Court

intervention. Here, it is certain that the release of census data to the State will be delayed. That in turn means there now exists an unavoidable collision between the constitutional deadline of August 15 and the Commission's ability to draft redistricting plans consistent with the requirements that it hold public hearings and provide adequate public comment periods after releasing draft and final maps. In short, deferring a decision until some later date will only increase the "detrimental consequences to the orderly process" of the State's redistricting in time for the 2022 elections. *Id.* at 464.

A. The Legislature and the Commission Need to Know Whether They Will Have Enough Time to Perform Their Constitutional Functions

Even under a normal schedule, the redistricting calendar for the Legislature and the Commission is highly compressed, as is clear from a quick review of what happened with the 2011 redistricting:

March 8, 2011: Census data sent to State to begin creation of Statewide Database. RJN, Ex. C.

April 13, 2011: Legislature sends redistricting database to Commission. RJN, Ex. D.

June 10, 2011: Commission issues preliminary maps. Mac Donald Decl., ¶ 4.

July 29, 2011: Commission issues preliminary final maps. *Id.*

August 15, 2011: Commission issues final maps. *Id.*

The sections that follow describe what must happen within the space of a little more than five months.

1. **The Legislature must first prepare the database**

Once the census data are provided to the states, the Legislature is responsible for providing the dataset that the Commission will use to draw district lines. Cal. Gov't Code § 8253(b). The dataset must also be available to the public and easily accessible for anyone who wishes to participate in the redistricting process. *Id.*

The census data do not arrive ready for the Commission's use. As described in the Declaration of Karin Mac Donald and in the Statewide Database report from 2011, the population and ethnicity data from the census must be merged with voter registration and election result data from county elections officials. Mac Donald Decl., ¶ 5; RJN, Ex. B. As discussed above, this information is necessary for the Commission to draw districts that are equal in population but also that comply with the federal Voting Rights Act.

It is no small task, however, to produce a workable database with all of these data. For redistricting purposes, the voter registration and historical electoral data need to be placed into census blocks, which are the basic units used to draw districts equal in population. RJN, Ex. B. That task requires some fairly sophisticated calculations and disaggregation of data, as described in the August 2011 report by Dr. Kenneth McCue for the Statewide Database. RJN, Ex. B. As a result, the Legislature will almost certainly require 30 days to provide the database to the Commission. MacDonald Decl., ¶ 9. If the census data are not released until July 31, then the dataset would not be available to the Commission until the end of August or first of September.

2. The Commission must have time to take testimony and draw maps

As noted in the Statement of Facts, the Commission can take public testimony about how various interest groups believe district lines should be drawn, but it cannot begin drawing lines until it has the census data. That is because the districts must have equal populations, and the only way to draw equipopulous districts is to use the census data. The same is true for the Commission's duty to comply with the Voting Rights Act.

Thus, the census data form the foundation for the Commission's work. That work is difficult enough under normal circumstances, because it requires 14 strangers of differing political persuasions to coalesce into a group capable of drawing four sets of district boundaries for the biggest state in the nation. Not only must they find a way to work together under pressure and in public, but they must achieve a supermajority consensus in order to adopt final maps.¹⁰ If they cannot agree, the task falls to this Court, which must appoint special masters to draw the lines and then approve final maps for certification to the Secretary of State. Cal. Const. art. XXI, § 2(j).

B. Placing a Constitutional Amendment on the November 2020 Ballot Would Be A Costly, Unnecessary and Disruptive Alternative During the Current Pandemic Crisis

Absent prompt action by this Court, the Legislature will have to consider placing a constitutional amendment on the November 2020 ballot. That in itself will cost at least an additional \$4 to \$6 million for

¹⁰ Article XXI, section 2(c)(5) requires the affirmative votes of three of the five commission members from each of the two major political parties and three of the four members who are not affiliated with either party.

printing supplemental ballot materials. Perez Decl., ¶ 3; RJN, Ex. F. As of July 1, it will be too late to place information about a constitutional amendment in the regular voter pamphlet, and any proposed amendment adopted after that will require a supplemental voter pamphlet sent to all voting households in the State. RJN, Ex. F.

Printing costs are not the only disadvantage of this option, however. Drafting and passage of a bill to place a constitutional amendment on the ballot will require the Legislature's attention when it is most needed elsewhere to deal with an unprecedented health crisis and a ballooning budget deficit. Worse, there will be months of uncertainty for the Legislature and the Commission as they wait to learn whether the amendment will pass. The effect on the newly formed Commission will be severe, as it struggles to plan for public hearings and meetings without knowing how quickly it will be forced to act.

Finally, there is the basic principle that a constitution should not be amended unnecessarily. The pandemic that delayed the census is unprecedented, and with any luck, it is unlikely to occur again in a census year. Amending the Constitution to deal with a problem that may never arise again should be avoided if at all possible.

C. This Court Has Frequently Intervened to Ensure Timely Redistricting in the Past

Compared to prior redistricting cases decided by this Court, the Legislature's request is an extremely modest one: to move two deadlines in response to an unprecedented situation that no one could have foreseen. As demonstrated below, there is ample precedent for the Court to take far more extensive measures than what are necessary here. Not only has the Court moved redistricting deadlines in the past, but when it had no

other way of ensuring that valid lines would be drawn in time for upcoming elections, it has taken on the line-drawing task itself, despite the fact that the task was constitutionally committed to another coequal branch. As this Court emphasized most recently in *Vandermost v. Bowen*, 53 Cal. 4th at 483, the Court has very broad equitable powers in redistricting cases. This request pales in comparison to other instances that required the Court's intervention.

In fact, this Court has had to exercise its original jurisdiction in nearly every redistricting process since the United States Supreme Court's one person, one vote decision in *Baker v. Carr*, 369 U.S. 186 (1962).¹¹ Petitioner's current request to extend only two deadlines will allow all three branches of government, including this Court, to avoid the kinds of litigation that have characterized California redistricting in the past. A simple review of prior cases demonstrates how disrupting that litigation can be.

1. The 1960s

In the aftermath of *Baker v. Carr*, *supra*, this Court exercised its original jurisdiction to ensure that Assembly and Senate districts were redrawn to comply with *Reynolds v. Sims*, 377 U.S. 533 (1964). After the Assembly and the Senate were unable to agree on a set of plans, the Court gave the Legislature another opportunity to adopt new plans, but it also announced that it had prepared temporary plans in the event no agreement was reached. *Silver v. Brown*, 63 Cal. 2d 270, 278-79 (1965). Eventually,

¹¹ The only exception was the 2001 redistricting, which was the product of a bipartisan compromise, but which also may have been the catalyst for the initiative which established the Citizens Redistricting Commission in 2008. *See Vandermost v. Bowen*, 53 Cal. 4th 421, 477-78 (2012).

the Legislature enacted plans, although some of them were not available for use until the 1968 elections. The matter required two more trips to this Court before it was finally settled. *Silver v. Reagan*, 67 Cal. 2d 452 (1967); *Silver v. Brown*, 63 Cal. 2d 316 (1965).

2. The 1970s

In 1971, the Legislature and the Governor were unable to agree on redistricting plans and they, along with other elected officials, petitioned this Court to resolve the impasse. In *Legislature of California v. Reinecke*, 6 Cal. 3d 595 (1972), the Legislature argued that the Court should order that its plans be used for the 1972 elections, despite the fact that they had been vetoed by the Governor. The Court rejected the Legislature's argument with respect to the legislative districts, holding that the old districts should be used for the 1972 elections and that the Legislature should enact new plans prior to 1974. *Id.* at 602. The Court ordered use of the Legislature's congressional plan, however, because California was entitled to more congressional seats following the 1970 census, making the current congressional plan unusable. The Court warned, however, that if the impasse continued, it would draw its own plans in time for the 1974 elections. *Id.* at 598.

3. The 1980s

The 1981 redistricting produced a new problem for the Court: a referendum of the Assembly, Senate, and congressional plans passed by the Legislature and signed by the Governor. The December 1982 qualification of the referendum meant that the plans were stayed until they were either approved or rejected by the voters. Shortly before the referendum qualified, the California Assembly and Senate as well as

members of the California congressional delegation asked the Court to decide (1) whether errors in the petitions disqualified the referendum and if not, (2) which plans should be used for the June primary election.

Assembly v. Deukmejian, 30 Cal. 3d 638 (1982).

After extensive briefing and oral argument, the Court ruled on January 28, 1982, that the errors in the petitions were not disqualifying. The Court went on to hold, however, that even though qualification of the referendum stayed the effectiveness of the Legislature's plans, those plans would have to be used for the 1982 elections because California was entitled to two new congressional seats and there were unconstitutional population disparities among the existing legislative districts. *Id.* at 665. Finally, the Court held that the uncertainty caused by the litigation required that filing deadlines for candidates to file their nomination papers be postponed by 24 days. *Id.* at 678-79.

4. The 1990s

In 1991, the Legislature and the Governor once again could not agree on the legislative and congressional redistricting plans that had to be in place for the June 2, 1992 election. On September 6, 1991, Governor Pete Wilson filed a petition for writ of mandate against the Secretary of State and the State Assembly, asking this Court to exercise its original jurisdiction and arrange for drafting and adoption of appropriate redistricting plans. *Wilson v. Eu*, 54 Cal. 3d 471 (1991). Less than three weeks later, the Court exercised its original jurisdiction and appointed special masters to conduct redistricting, noting that it was the Court's duty to ensure the electorate equal protection of the laws. *Id.* at 473 (citing *Legislature v. Reinecke*, 6 Cal. 3d 595, 598 (1972)). Reluctant to delay the

June primary, the Court ordered the special masters to hold hearings and then present their recommendations no later than November 29, 1991. *Wilson v. Eu*, 54 Cal. 3d 546, 548 (1991). The Court provided a 30-day period for briefing and public comment following release of the special masters' report, and it scheduled oral argument for January 6, 1992. On January 27, 1992, the Court issued a lengthy decision, adopting the special masters' plans with minor exceptions.

In the interim between appointment of the special masters and adoption of the special masters' plans, the Court also had to address pending election deadlines. In order to allow enough time for the counties to prepare, the Court adopted a proposal provided by the Secretary of State, noting that it "involves an initial, 'preliminary,' reliance by the counties and others on the Masters' recommended but unapproved plans, and assumes we will ultimately approve those plans with only minor changes." *Id.* at 548-49. As noted above, that is what occurred, making it more difficult for the Court to order any major changes in the boundaries recommended by the special masters. The Court also adopted the Secretary of State's other recommendations, which included significant changes to election deadlines in order to accommodate the delay in finalizing district lines. *Id.* at 549-50.

5. The 2010s

As discussed above, in 2011, the first Citizens Redistricting Commission successfully adopted redistricting plans, but referendum proponents circulated a referendum against the Commission's Senate plan. In *Vandermost v. Bowen*, 53 Cal. 4th 421 (2012), this Court exercised its original jurisdiction and held that even if the referendum did qualify, the

Commission's Senate plan should still be used for the 2012 election.
53 Cal. 4th at 471-78.

6. Summary

If one thing is clear from this review, it is that redistricting litigation is costly, disruptive, and a strain on everyone involved. It is far preferable for the redistricting process to follow its constitutional course than for it to end up in this Court. A simple order from the Court extending the timeline for the Commission to issue its draft and final maps would allow the constitutional process to proceed as the voters intended it to.

D. Extending the Commission's Deadlines Would Not Disrupt the 2022 Elections

Finally, extending the deadlines as requested by the Legislature will not adversely affect the administration of the 2022 statewide elections. Even before the Secretary of Commerce announced the census delays, the Legislature was considering moving the statewide primary election date in non-Presidential election years from March back to June, when it traditionally has been held. Now with the delay, there is more urgency on the part of the Legislature to pass such legislation. Senate Bill 970, which would move the primary election in 2022 from March to June, is now moving through the Legislature with bipartisan support. *See* RJN, Ex. E.¹² It appears inevitable that the 2022 statewide primary will be in June.

If the Commission adopted final plans by December 15, 2021, that would not interfere with administration of the Statewide primary election on June 7, 2022. For example, the period during which candidates

¹² SB 970 can also be accessed here: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB970.

can request nomination documents would not begin until February 14, 2022, three months after the plans would be final. *See* Cal. Elec. Code § 8020(b) (nomination documents first available on the 113th day before the primary election). Moreover, elections officials would have almost six months to implement the new boundaries in elections software, only one month less than they otherwise would have assuming the plans were finalized on August 15, 2021 for a March 2022 primary. That should be more than sufficient time to implement the new boundaries for a June election. For example, the six-month lead time contemplated here is more than the Elections Code requires for boundary changes. Cal. Elec. Code, § 12262 (jurisdictional boundary changes must occur at least 125 days before an election).

CONCLUSION

The COVID-19 pandemic has spawned any number of problems for the State of California, including a delay in receipt of the census data that conflicts with the constitutional deadline for redistricting. That problem can be solved simply by moving two deadlines – one statutory and one constitutional – to allow the California Citizens Redistricting Commission the time needed to accomplish its task. The Legislature respectfully requests that the Court exercise its original jurisdiction and issue the writ.

Dated: June 3, 2020

Respectfully submitted,

OLSON REMCHO, LLP

By: /s/ Robin B. Johansen
Attorneys for Petitioner Legislature
of the State of California

**BRIEF FORMAT CERTIFICATION PURSUANT TO
RULE 8.204 OF THE CALIFORNIA RULES OF COURT**

Pursuant to Rule 8.204 of the California Rules of Court, I certify that this brief is proportionately spaced, has a typeface of 13 points or more and contains 9,454 words as counted by the Microsoft Word 365 word processing program used to generate the brief.

Dated: June 3, 2020

/s/ Robin B. Johansen

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is 1901 Harrison Street, Suite 1550, Oakland, CA 94612.

On June 3, 2020, I served a true copy of the following document(s):

**Legislature of the State of California's
Emergency Petition for Writ of Mandate
and Request for Immediate Relief**

on the following party(ies) in said action:

Steven Reyes
Chief Counsel
Secretary of State
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Sacramento, CA 95814
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*Attorney for Respondent Secretary
of State Alex Padilla*

- BY UNITED STATES MAIL:** By enclosing the document(s) in a sealed envelope or package addressed to the person(s) at the address above and
 - depositing the sealed envelope with the United States Postal Service, with the postage fully prepaid.
 - placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, located in Oakland, California, in a sealed envelope with postage fully prepaid.
- BY OVERNIGHT DELIVERY:** By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

- BY MESSENGER SERVICE:** By placing the document(s) in an envelope or package addressed to the persons at the addresses listed and providing them to a professional messenger service for service.
- BY FACSIMILE TRANSMISSION:** By faxing the document(s) to the persons at the fax numbers listed based on an agreement of the parties to accept service by fax transmission. No error was reported by the fax machine used. A copy of the fax transmission is maintained in our files.
- BY EMAIL TRANSMISSION:** By emailing the document(s) to the persons at the email addresses listed based on a court order or an agreement of the parties to accept service by email. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on June 3, 2020, in Oakland, California.

Nina Leathley

(00410494-10)