NO. C064430
(Sacramento County Superior Court No. 34-2010-80000460
(The Honorable Allen Sumner)

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

ALLAN D. CLARK
Petitioner

vs.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO,
Respondent,

DEBRA BOWEN, ETC., et al,
Real Parties in Interest.

PETITIONER'S REPLY TO PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE

IMMEDIATE STAY REQUESTED – ELECTION MATTER

Deborah B. Caplan [SBN 196606]; Lance H. Olson [SBN 077634]
Richard C. Miadich [SBN 224873]
OLSON, HAGEL & FISHBURN, LLP
555 Capitol Mall, Suite 1425, Sacramento, CA 95814
Telephone: 916.442.2952 / Facsimile: 916.442.1280

Counsel for Petitioner
ALLAN D. CLARK

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I. PETITIONER IS ENTITLED TO REVIEW OF THE BALLOT MATERIALS

The preliminary opposition of Sen. Maldonado and Yes on 14 – the political committee formed to support the measure, hereafter "Yes on 14 or Committee" – is rife with accusations presumably designed to show that petitioner is not entitled to equitable mandate relief. These characterizations are unfounded and petitioner wishes to respond to them. Stripped of the hyperbole and political spin, here are the facts:

(1) Petitioner filed this action 7 days into the 20 day review period. There is nothing untimely or dilatory about that. A subsequent amendment was filed one week later when it became clear that the Legislative Analyst's Office would not be taking action to voluntarily modify its fiscal analysis in light of new data. Petitioner had been in constant communication with counsel for LAO on that point from the time the petition was filed. All intervenors were notified of this possibility at the same hearing in which intervention was granted.

(2) Petitioner filed this action because he believes the ballot label and title and summary prepared by the Legislature are not fair and impartial and a legal challenge is the only way to change the ballot materials. He fully expected the trial court to resolve the petition. Claims that petitioner colluded with the Legislature to amend the materials are absolutely false, and counsel submitted a declaration in the trial court to that effect. (Exh. A ¶ 3-4.)[1]

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[1] This declaration was attached to the opposition to intervention. Yes on 14 is correct that petitioner did not include these in the appendix, as they did not seem necessary for this Court's review. Yes on 14 is also correct that several of its declarations were inadvertently omitted. Petitioner received the court's final judgment at 10:30 a.m. Friday. In order to timely file a petition with this Court, petitioner needed to have all materials to the outside printer by 3:00 p.m. This left a little over four hours to complete the petition and points and authorities and assemble the appendix. The declarations of Allen Zaremberg, Senator Abel Maldonado, Susan Kennedy should have been included, and petitioner apologizes to the court and counsel for the oversight.

(3) Petitioner entered into settlement discussions with Legislative Counsel only after the petition was filed. Counsel has engaged in such discussions in many cases involving ballot language. As with most negotiations, Legislative Counsel did not agree to all of petitioner's requested changes; some were accepted, some rejected and some modified. (*Id.* ¶ 4-5.)

(4) Petitioner believes that the language proposed in the stipulation would have been fair and impartial. (App. 442.) However, when Yes on 14 and the Governor objected to certain language, petitioner proposed alternative language to the trial court. Petitioner continues to believe that the title and summary is not fair and impartial and requests only such changes as would meet that standard.

Yes on 14 continues to insinuate that, in naming the Legislature, petitioner deliberately "failed to name any adverse party." (Committee Prelim. Opp. at 5.) In fact, petitioner named precisely the parties required to be named by the Elections Code – the Secretary of State, the State Printer, and the Legislature as the author of the materials in question.

There is more than a little irony in the fact that Sen. Maldonado and the Governor accuse petitioner of wanting a title and summary that favors his point of view, since the committee's own declarations demonstrate that the language at issue here was drafted, at least in part, by Sen. Maldonado, the author and primary champion of Proposition 14, and the staff of the Governor, who has made no secret of his desire to see Proposition 14 approved by the voters. (See Maldonado Decl. ¶ 6; Kennedy Decl. 5, 6 [attached to Committee Prelim. Opp.) In fact, in oral argument below, counsel for Sen. Maldonado and Yes on 14 stated several times that if the language of the title and summary were changed, Proposition 14 "could not win" in June. Petitioner submits that this claim speaks volumes.

At the end of the day, all this back-and-forth is not relevant to the issues before the Court. The only pertinent issues at this point are 1) what legal standard is to be used to evaluate a title and summary crafted by the Legislature for one of its own measures, and 2) do the ballot label and title and summary for Proposition 14 meet that standard?

II. DEFERENCE TO THE LEGISLATURE WHEN IT WRITES ITS OWN TITLE AND SUMMARY IS NOT APPROPRIATE AND IS INCONSISTENT WITH THE REQUIREMENT THAT THE TITLE AND SUMMARY MUST BE FAIR AND IMPARTIAL

The Governor and Yes on 14 argue that the Legislature's title and summary is not merely entitled to the "great" deference given to the Attorney General when he or she prepares the title and summary, but is entitled to even greater deference because the Legislature is entitled to a presumption of validity for its actions. The trial court agreed with this assertion.[2]

Petitioner's argument is simple and straightforward: If the Legislature is permitted to write the title and summary for its own measures, it must still meet the requirement that the title and summary be fair and impartial. The deference to the Legislature and presumption of validity that may attach to other legislative enactments are not appropriate in these circumstances, and such deference is

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[2] Yes on 14 makes much of the fact that the trial court held a lengthy hearing on the petition. This is true and petitioner appreciates the fact that the trial court spent a great deal of time listening to argument, etc. Petitioner has no quarrel with the trial proceedings, he simply disagrees with the trial court's conclusion that the same presumption of validity applies in cases such as this.

inconsistent with the court's obligation to ensure that the "official" materials voters take with them into the voting booth are neutral, accurate and non-argumentative.

The Governor and Yes on 14 claim that petitioner is urging a new legal theory before this Court that was not asserted below. This is inaccurate; in fact, see Roman Numeral III in petitioner's reply brief below: "THE LEGISLATURE IS NOT ENTITLED TO DEFERENCE IN THESE CIRCUMSTANCES." (App. 437.) Essentially the same arguments were made therein that are now presented to this Court.

A. Even if the Analogy to the Attorney General Is Apt, the Courts Have Not Allowed the Attorney General to Engage In Argumentation in the Title and Summary

The Governor and Yes on 14 cite cases indicating that the title and summary "need not contain a complete catalogue or index of all the measure's provisions." (See Committee Prelim. Opp. at 10, citing *Amador Valley Jt. Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219.) However, in the very same passage, but not cited by these parties, the Court also reminds that the Attorney General's title and summary "*must be true and impartial, and not argumentative or likely to create prejudice for or against the measure.*" (Emphasis added.) In other words, even the deference accorded the Attorney General does not permit a title and summary that is misleading or fails to reasonably inform the voters of the character and real purpose of the measure.

(*Brennan v. Bd. of Supervisors* (1981) 125 Cal.App.3d 87, 93[also reminding that the standard is "true and impartial and not argumentative" and affirming the trial court's decision to correct some characterizations in the ballot summary as "not *completely* accurate"].) Nor can the summary omit certain *essential* features of the measure. (*Id.* at 96, emphasis in original.)

Thus, even while allowing some deference in the choice of which points to include in the title and summary, none of these cases suggests that the principle of deference allows the Attorney General to violate the basic duty of fairness and impartiality in drafting the title and summary.

The Governor and Yes on 14 also ignore the fact that the deference shown to the Attorney General is based, in large measure, on the presumption that he or she can act as a neutral and objective source in describing the measure and the proposed changes to the law. Where the Attorney General is the proponent of a measure, not only is such deference eliminated, the Attorney General is not permitted to prepare the title and summary. (Elec. Code, § 9003.) In such instances, the Legislative Counsel is to prepare the ballot label and title and summary.

The principle that underlies this provision is fairly obvious – a person cannot be presumed to be completely impartial about a measure if he or she is also the proponent. In fact, this principle is what motivated the Legislature to assign the Attorney General the task of summarizing measures in the first place – proponents had been using misleading summaries and a more neutral system was

sought. That well-understood and common sense principle argues that the Legislature should not be entitled to the same level of deference that is accorded to the Attorney General for its own measures, but that the Legislature's choices should be more closely scrutinized.

B. Because the Legislature's Preparation of the Title and Summary for its Own Measures Has the Potential to Impact the Election, Constitutional Protections Require More Rigorous Scrutiny

Despite the vigorous objections of Yes on 14, the argument that a legislatively-drafted title and summary should be subjected to a more rigorous judicial review than is appropriate for other legislation, and even for the Attorney General's title and summary, has a constitutional dimension because the Legislature's practice has the potential to impact the right to free and fair elections. Two lines of cases are instructive.

1. The *Stanson* Line of Cases Prohibit the Government From Using its Resources To Influence Elections

Petitioner has asserted throughout these proceedings that the government may not use public resources to attempt to influence elections. (*Stanson v. Mott* (1976) 17 Cal.3d 206, 218.) The Court observed that "a fundamental goal of a democratic society is to attain the free and pure expression of the voters' choice of candidates" and the government must therefore avoid any feature that might adulterate or frustrate that choice, referencing article II, section 3 of the State Constitution, which provides that the Legislature shall provide for "free elections." (*Id* at 217, referring to Cal. Const., art. II, § 3.) Yes on 14 and the Governor

attempt to minimize the impact of *Stanson* by arguing either that *Stanson* is really about legislative authorization, which they argue is present here, or that there is no case specifically striking down a statute based on *Stanson* principles. The first argument is overstated and the second irrelevant.

It is true that SB 19 supplied a kind of legislative authorization, but that does not end the *Stanson* inquiry. While the issue of authorization was important in *Stanson*, the case also made clear that constitutional protections would be implicated if, in fact, legislation specifically authorized the government to use its resources to influence an election. (See *Stanson, supra*, 17 Cal.3d at 217 ["serious constitutional question would be posed by an explicit legislative authorization for the use of public funds for partisan campaigning"].) This point was recently also acknowledged in *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 29.

Yes on 14 suggests that *Vargas* limits the scope of *Stanson* because it acknowledges that the government may have a "point of view." (*Vargas, supra,* 46 Cal.4th at 40.) Petitioner acknowledges that the government may express its views in appropriate fora (e.g., legislators may prepare arguments in favor or against measures), but nothing in *Vargas* alters the basic constitutional concerns identified in *Stanson.*

The *Vargas* court did allow the City to publish a staff report identifying projected program cuts if a particular tax repeal measure passed, and did allow it to distribute this information through its regular newsletter and website. However,

the court also made clear that the city could not take out a billboard and advertise particular cuts, as "it would defy common sense to suggest that the City had not engaged in campaign activity." (*Id.* at 32.)

Use of the ballot materials to engage in electioneering in favor of the Legislature's measures is closer to the billboard than publication of the city's report and resolution. In doing so, the Legislature has essentially commandeered the official ballot materials – materials printed and mailed to voters at great public expense – thus allowing direct access to voters across the State, even in the voting booth. The materials are the ultimate "political campaign material" and are therefore prohibited.

Yes on 14 argues that *Stanson* cannot really mean this because no statutes have previously been invalidated under *Stanson*. While this may be true, it may simply be a function of the fact that the Legislature has not actively engaged in the title and summary process to the extent that it has recently. If the Legislature is going to engage in writing these materials, *Stanson* requires judicial scrutiny to ensure that one-sided arguments or electioneering messages disguised as "official" information do not interfere with the "free and pure expression of the voters' choice." (*Stanson*, *supra*, 17 Cal.3d at 217.)

2. The Courts Have Also Exercised Heightened Scrutiny of Legislative Action That May Have An Impact on the Fairness of Elections

Yes on 14, the Governor and the Attorney General and Legislature cite the well-established proposition that legislative enactments are entitled to great

deference and enjoy a presumption of validity. Petitioner does not disagree with this general proposition. However, there are limits to legislative authority and, in the end, it is the courts that must make the call whether a legislative enactment comports with constitutional requirements. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180.) The need for careful judicial review is increased where, as here, the question involves a construction of the Legislature's own authority. (*County of Riverside v. Superior Court (2003)* 30 Cal.4th 278, 284-286.)

Increased judicial scrutiny is also necessary where the legislative act threatens constitutional rights. Petitioner argued below, and to the Court, that legislative action mandating a non-neutral title and summary for one of its measures threatens the constitutional guarantee of free and fair elections, the constitutional guarantee that improper elections practices will be prohibited, and even the constitutional guarantee of equal protection. (Cal.Const., art. II, §§ 3, 4; art. I, § 7.) "[T]the 'fundamental' nature of the right to vote and the importance of preserving the integrity of the franchise require that the judiciary give close scrutiny to laws imposing unequal burdens or granting unequal advantages in this realm." (*Gould v. Grubb* (1975) 14 Cal.3d 661, 670.)

Although the Legislature retains discretion in formulating elections procedures and regulating the form and content of ballots, "as in all other areas of governmental action, however, the exercise of such discretion remains subject to constitutional limitations." (*Id* at 673.) Scrutiny is heightened in cases of

legislative action having a "real and appreciable impact" on the equality, fairness and integrity of the electoral process. (*Id.*, citing *Bullock v. Carter* (1971) 405 U.S. 134, 143.)

While the other parties to this case acknowledge that the courts have a role in protecting constitutional rights, they deny that such rights are implicated here. Petitioner disagrees. *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417 is instructive. In striking certain non-neutral language from a ballot question, the court made clear that it read *Stanson* as prohibiting the government from dictating "the wording on a ballot or the structure of a ballot" to favor one party or position. (*Id.* at 1433, citing *Citizens for Responsible Gov't v. City of Albany* (1997) 56 Cal.App.4th 1199, 1228-1229 and *Gould v. Grubb, supra.*)

The courts have not hesitated to apply this principle to amend non-neutral materials when presented to them. While *Citizens for Responsible Gov't v. City of Albany* and *Huntington Beach City Council v. Superior Court,* discussed above, involved ballot questions, similar judicial authority was exercised over a ballot summary in *Brennan v. Bd. of Supervisors* (1981) 125 Cal.App.3d 87, 93. It is not a leap to conclude that the "official" title and summary prepared for voters, part of the ballot pamphlet which is designed to be taken by the voter into the voting booth, should be entitled to similar neutrality and therefore similar judicial scrutiny to ensure that neutrality.

III. THE BALLOT LABEL AND TITLE AND SUMMARY ARE NOT FAIR AND IMPARTIAL AND REQUIRE CORRECTION

The fundamental problem with the ballot label and title and summary is that they reflect the viewpoint of one who sees the changes of Proposition 14 as positive. Indeed, even though the issue in this case is the correct legal standard, Yes on 14 cannot resist arguing why Proposition 14 is good and necessary. (Committee Prelim. Opp. at 1.) This is undoubtedly heart-felt, but it has no place in the official ballot label and title and summary.

Proposition 14 would unquestionably change California's process of elections – not just its primaries – in a significant way. In some respects, those changes may be unpredictable, as only two states use a "top two" system and one of those (Washington) adopted it relatively recently.

What we do know is that voters will be able to vote for candidates in the primary that they cannot currently vote for but they will be limited to fewer choices in the general election. Independents will no longer be permitted in the general, and all political parties will no longer be represented in the general. In addition, under Proposition 14, candidates will no longer have to disclose their party affiliations (in either the primary or general elections) and voters will no longer be able to rely on that information in voting.

These are significant and controversial changes. Understanding these trade-offs is likely to affect voters attitudes. For every person who wants "more choices" in the primary, there is a person who wants to see his or her party

represented in the primary. Undoubtedly, many people would like both, but that kind of hybrid system has been constitutionally foreclosed. (*California Democratic Party. v. Jones* (2000) 530 U.S. 567.)

So voters must make a choice among these alternative systems. In order to do so, they must *understand* the changes proposed by Proposition 14 and how it would vary from the current system. The ballot label and title and summary fail to do this because they present the changes only in a positive light; they do not accurately disclose the real nature of the changes to the system because they precisely because they want to put the measure in the best light. Giving voters only half of the information is not fair and impartial.[3] (App. 253.)

In the trial court's tentative decision, it added the sentence: "A political party participating in the primary election whose candidate is not one of the two candidates receiving the most votes will not have a candidate on the general election ballot." (Exh. B.) After counsel for Yes on 14 argued that the measure would not pass if the court allowed this language in the title and summary, the court deleted it, notwithstanding the absolute truth of the statement and notwithstanding the fact that this important point is otherwise omitted from the title and summary.

Petitioner submits that whether particular words or phrases are "fair," "impartial" or "neutral" are mixed questions of facts and law, and has submitted

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[3] Yes on 14 has attached Objections to the Binder and Winger declarations. Petitioner attaches his response as Exh. C.

evidence demonstrating that the current language is not neutral or, in some instances, not entirely accurate. (App. 251.) Based on the record, petitioner believes that the Court can draw legal conclusions about whether certain terms should be stricken.

A. "Reform" Is Not A Neutral Term

Petitioners have presented evidence and argument as to why "reform" is not neutral. The response from Yes on 14 is 1) it is not always positive; and 2) it has been used before. The Binder declaration indicates that "reform," when used in a political context, is not a neutral or impartial term; it connotes change in a positive direction. (App. 252.) And the fact that reform has been used before is not really relevant. It has also been struck before as non-neutral. (See App. 225.)

At the end of the day, "reform" is insufficiently neutral because it characterizes the proposed changes in a positive light for reasons that are unnecessary and serve no independent government purpose. (See *Huntington Beach City Council*, *supra*, 94 Cal.App.4th at 1434; *Citizens for Responsible Government, supra,* 56 Cal.App.4th at 1225.) Use of the term "reform" is not *necessary* to explain Proposition 14; the term "change" can serve exactly the same purpose without the baggage attached to "reform."

The trial court deleted the use of "reform" in the heading of the title and summary, but allowed it to be retained in other places. All references to "reform" should be modified to "change" where appropriate, or otherwise deleted. If the word is not neutral in one place, it cannot logically be considered neutral in others.

B. "Increases Rights To Participate in Primary Elections"

The language was selected by the lower court to replace "GREATER VOTER PARTICIPATION," both being used in bold and both being included in the heading of the label and title and summary, respectively. While the original language was objectionable as argumentative and misleading, the new language substituted by the court suffers from the same defects. As Yes on 14's political consultant advised the court, "eliminating" a right is seen as a "negative." (App. 369.) The Court can reasonably infer from that that "increasing" rights will invariably be seen as a "positive."

The emphasis on the "increased rights" in the primary is also misleading and not impartial to the extent it fails to advise that voters will "lose rights" to vote for a candidate of the party of their choice, or independent candidates, in the general election.[4] While some voters may ultimately agree that they prefer to expand their options in the primary, it is not the function of the title and summary to "sell" voters on what is good for them. The language is not necessary; to the extent it attempts to convey the process of choice in the primary, that information is separately provided. It should be stricken.

C. "Encourages Greater Participation" and "Gives Increased Options"

As noted above, a partisan primary allows parties to choose their

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[4] Also, every registered voter already has the "right to participate in the primary." They may not be able to participate in *every* primary, but the shorthand statement in the heading simply does nothing to advance the voter's understanding of the measure.

representatives for the general election, while the "top two" system would allow voters broadly to choose the general election candidates and party affiliation would no longer be a consideration. The rights currently provided to political parties to participate in the general election (Cal. Const., art. II, § 5) are eliminated by Proposition 14, yet no mention is made of this in the ballot title and summary. Although this right will be eliminated, that is not disclosed in the materials. As noted above, in voting for Proposition 14, voters are trading off more options in the primary for fewer later.

Yes on 14 urges that the claims that voters will have "more options" is literally true but, again that view reflects a particular perspective and fails to inform voters about the other important consequences. It may be literally true as to the primary, but false as to the general election and, from the perspective of some, false as to the process over-all.

The claim that Proposition 14 will "encourage increased participation" likewise reflects a very particular perspective. While Yes on 14 denies that it refers to voter turnout, the likelihood is that many voters will view it that way, and increased turnout claims are at best speculative and at worse inaccurate. (See App. 259.)

Neither of the above statements is fair or impartial. As petitioner's expert indicated, by "including only positive claims (even speculative or arguable propositions) but omitting information that might cause persons to have a negative reaction, [the title and summary] appears to be designed to increase support for the

measure." (App. 253.) Because both claims serve no independent government purpose other than to present the ballot measure in a favorable light, they should be stricken. (See *Huntington Beach City Council v. Superior Court, supra,* 94 Cal.App.4th at 1434; *Citizens for Responsible Government, supra,* 56 Cal.App.4th at 1225.)

Dated: March 16, 2010

Respectfully submitted,

OLSON HAGEL & FISHBURN LLP
Deborah B. Caplan
Lance H. Olson
Richard C. Miadich

By: _____
Attorneys for Petitioner
ALLAN D. CLARK

CERTIFICATE OF COMPLIANCE
WITH RULE 8.204 (c) (1) OF CALIFORNIA RULES OF COURT

Pursuant to Rule 8.204 of the California Rules of Court, I certify that this attached brief is proportionately spaced, has a typeface of 13 points or more, and contains 3857 words as counted by the Microsoft Office Word 2003 word processing program used to generate this brief, excepting the caption, tables, verification, and this certificate.

Dated: March 16, 2010

OLSON HAGEL & FISHBURN LLP

By: _____
DEBORAH B. CAPLAN

EXHIBIT A

Deborah B. Caplan [SBN 196606]
Lance H. Olson [SBN 077634]
Richard C. Miadich [SBN 224873]
OLSON HAGEL & FISHBURN LLP
555 Capitol Mall, Suite 1425
Sacramento, CA 95814
Telephone: (916) 442-2952
Facsimile: (916) 442-1280

Attorneys for Petitioner
ALLAN D. CLARK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

ALLAN D. CLARK,

Petitioner,

v.

DEBRA BOWEN, in her official capacity as CALIFORNIA SECRETARY OF STATE,

Respondent,

GEOFF BRANDT, in his official capacity as State Printer; the LEGISLATURE OF THE STATE OF CALIFORNIA; MAC TAYLOR, in his official capacity as Legislative Analyst.

Real Parties in Interest.

CASE NO.: 34-2010-80000460

DECLARATION OF DEBORAH CAPLAN

[ELEC. CODE, §§ 13314; 9092]

STATEWIDE ELECTION MATTER
IMMEDIATE ACTION REQUESTED

STATUTORY DEADLINE: MARCH 15, 2010

[PROPOSITION 14]

Date: March 9, 2010
Time: 9:00 a.m.
Dept.: 42

I, Deborah Caplan, being first sworn, depose and state as follows:

1. I am counsel for petitioner in the above-captioned action.

2. Along with Lance Olson and Richard Miadich, I prepared the Petition for Writ of Mandate filed in this action.

3. This action was filed because petitioner believes the current ballot label and title and summary are not fair or impartial and violate the law. The allegation that it was filed in collusion with the Legislature is false.

4. Our office prepared the requested changes to the ballot label and title and summary based upon what we believed would be fair and impartial summary of the chief points and purposes of Proposition 14. We included these requested changes in the petition because that is what our office has always done in these cases. We did not discuss the proposed language with Legislative Counsel or any representatives of the Legislature in advance of filing the lawsuit on March 2, 2010.

5. Subsequent to the filing of the lawsuit, we spoke with a representative of Legislative Counsel about the possibility of modifying the language to make it fair and neutral. Legislative Counsel did not accept all of petitioner's proposed changes, but came back with a proposal that accepted some modifications, rejected others and proposed alternatives for yet others.

6. Discussions similar to what took place in this case had also taken place with respect to Proposition 1E last year. After the petition was filed, the parties negotiated mutually agreeable language. Thereafter, it was submitted to the court for review and approval. We have also negotiated changes in language with other persons who authored particular ballot materials, including arguments. All changes were ultimately subject to judicial review and approval.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 3/9/10

DEBORAH CAPLAN

OLSON HAGEL & FISHBURN LLP
555 CAPITOL MALL, SUITE 1425, SACRAMENTO, CA 95814

DECLARATION OF SERVICE

Case Name : *Clark v. Bowen, etc., et al*
Case No: : **34-2010-80000460**
Court : **Sacramento County Superior Court**

I declare: I am a citizen of the United States, over the age of 18, and not a party to the within action. My business address is 555 Capitol Mall, Suite 1425, Sacramento, California, 95814. On March 19 2010, I served a true and correct copy of the following entitled documents:

DECLARATION OF DEBORAH CAPLAN

on the parties in said action as follows:

_X_ BY PERSONAL SERVICE: By causing said document to be hand delivered at the court hearing on March 9, 2010 to said parties listed below.

Edmund G. Brown, Jr.
Attorney General of California
Stephen P. Acquisto
Supervising Deputy Attorney General
Mark R. Beckington
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Tel.: 213.897.1096/Fax: 213.897.1071
Email: Mark.Beckington@doj.ca.gov

Counsel for Respondent DEBRA BOWEN, in her official capacity as CALIFORNIA SECRETARY OF STATE,
Real Party in Interest GEOFF BRANDT, in his official capacity as State Printer, and
Intervenor ATTORNEY GENERAL EDMUND G. BROWN, JR.

Diane Boyer-Vine
Office of the Legislative Counsel
State Capitol, Suite 3021
Sacramento, CA 95814
Tel.: 916.341.8200/Fax:
Email: Diane.Boyer@lc.ca.gov; Robert.Pratt@lc.ca.gov; Jeff.Deland@lc.ca.gov

Counsel for Real Parties in Interest
LEGISLATURE OF THE STATE OF CALIFORNIA and MAC TAYLOR, in his official capacity as Legislative Analyst

Marguerite Mary Leoni
NIELSEN MERKSAMER PARRINELLO MUELLER & NAYLOR, LLP
2350 Kerner Boulevard, Suite 250
San Rafael, CA 94901
Tel.: 415.389.6800/Fax: 415.388.6874
Email: mleoni@nmgovlaw.com; cskinnell@nmgovlaw.com

Counsel for Intervenors
SENATOR ABEL MALDONADO; YES ON 14 – CALIFORNIANS FOR AN OPEN PRIMARY

Andrea Lynn Hoch
Legal Affairs Secretary
Christopher Krueger
Chief Deputy Legal Affairs Secretary
OFFICE OF THE GOVERNOR
State Capitol
Sacramento, CA 95814
Tel.: 916.445-0873/Fax: 916.323.0935
Email: Andrea.Hoch@gov.ca.gov;
Christopher.Krueger@gov.ca.gov

Counsel for Intervenor
GOVERNOR ARNOLD
SCHWARZENEGGER

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on March 19 2010 in Sacramento, California.

ANN BARNER

EXHIBIT B

BALLOT LABEL

ELECTIONS. INCREASES RIGHT TO PARTICIPATE IN PRIMARY ELECTIONS. Reforms the primary election process for congressional, statewide, and legislative races. Allows all voters to choose any candidate regardless of the candidate's or voter's political party preference. Ensures that the two candidates receiving the greatest number of votes will appear on the general election ballot regardless of party preference.

The data are insufficient to determine whether state and local costs to administer elections will increase.

BALLOT TITLE AND SUMMARY

ELECTIONS. INCREASES RIGHT TO PARTICIPATE IN PRIMARY ELECTIONS. Encourages increased participation in elections for congressional, legislative, and statewide offices by reforming the procedure by which candidates are selected in primary elections. Gives voters increased options by allowing all voters to choose any candidate regardless of the candidate's or voter's political party preference. Ensures that the two candidates receiving the greatest number of votes will appear on the general election ballot regardless of party preference. Provides that candidates may choose not have a political party preference indicated on the primary ballot. A political party participating in the primary election whose candidate is not one of the two candidates receiving the most votes will not have a candidate on the general election ballot. Does not change primary elections for President, party committee offices and nonpartisan offices.

The data are insufficient to determine whether state and local costs to administer elections will increase.

EXHIBIT C

Deborah B. Caplan [SBN 196606]
Lance H. Olson [SBN 077634]
Richard C. Miadich [SBN 224873]
OLSON HAGEL & FISHBURN LLP
555 Capitol Mall, Suite 1425
Sacramento, CA 95814
Telephone: (916) 442-2952
Facsimile: (916) 442-1280

Attorneys for Petitioner
ALLAN D. CLARK

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Real Parties in Interest.

GOVERNOR ARNOLD SCHWARZENEGGER, ATTORNEY GENERAL EDMUND G. BROWN, JR., SENATOR ABEL MALDONADO; YES ON 14—CALIFORNIANS FOR AN OPEN PRIMARY,

Intervenors

CASE NO.: 34-2010-80000460

PETITIONER'S RESPONSES TO OBJECTIONS TO BINDER AND WINGER DECLARATIONS

[ELEC. CODE, §§ 13314; 9092]

STATEWIDE ELECTION MATTER
IMMEDIATE ACTION REQUESTED

STATUTORY DEADLINE: MARCH 15, 2010

[PROPOSITION 14]

Date: March 11, 2010
Time: 1:30 p.m.
Dept.: 42

OLSON HAGEL & FISHBURN LLP
555 CAPITOL MALL, SUITE 1425, SACRAMENTO, CA 95814

GENERAL RESPONSE TO OBJECTIONS

Intervenors' make several objections to David Binder's Declaration related to his qualifications as an expert in public opinion research. As a general matter, these objections are not well founded. Even if they were, however, such objections relate only to the weight of Mr. Binder's testimony, not its admissibility.

The California Evidence Code provides that "[a] person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, §720(a).) Once an individual is established as an expert, any questions about the degree of the individual's expertise more properly go to the weight to be given the expert's testimony by the trier of fact, not to the admissibility of his opinion. (See Comment to Evid. Code, § 720; *People v. Bolin*, (1998) 18 Cal.4th 297, 322.) David Binder's status as an expert in public opinion research is established by the fact that he has over 26 years of experience in conducting public opinion research, including public opinion polls and over one thousand focus groups. (Binder Dec., ¶ 3.) As a result, the objections to Mr. Binder's qualifications more properly go to the weight given to his opinions, rather than the admissibility of his testimony.

Additionally, Intervenors have introduced the declaration of David Townsend as an expert regarding public opinion. Mr. Townsend's qualifications and the basis for his opinions are similar to those of Mr. Binder. For example, both have been in the political consulting business for over 25 years and both own political consulting businesses that deal with public opinion research. Similarly, both base their opinions about public response to certain language on their years of experience with public opinion research and analysis. Intervenors undoubtedly believe Mr. Townsend is qualified to provide expert opinion regarding public opinion. This is further evidence that Intervenors' objections to Mr. Binder's qualifications are more properly directed toward the weight to be given those opinions, rather than the admissibility of his testimony.

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555 CAPITOL MALL, SUITE 1425, SACRAMENTO, CA 95814

SPECIFIC RESPONSES TO OBJECTIONS

Declaration/Intervenors' Objections	Petitioner's Response
1. Declaration of David Binder	
Mr. Binder's assertion that the term "reform" it not a neutral or impartial term lacks foundation because it is conclusory, not supported by sufficient facts and is based on conclusory hearsay. (Binder Decl., ¶ 7.)	"Expert opinions may be based on the expert's personal knowledge, including special knowledge, skill, experience, training and education."" (Evid. Code, § 801(b).) Mr. Binder's has over 26 years of experience in conducting public opinion research, including public opinion polls and over one thousand focus groups. Based on this experience, Mr. Binder formulated opinions about how voters react to certain words, including the word "reform." Mr. Binder's opinion is not based on the statements of any one person polled or interviewed; instead it is based on a quarter of a century of experience analyzing public opinion responses to the political process.
Mr. Binder is not qualified to offer this opinion. (Binder Decl., ¶ 7.)	"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, §720(a).) Mr. Binder's assertion regarding the word

	"reform" is offered to establish public response to this word, not to establish the actual meaning of the word "reform." Mr. Binder's substantial experience in public opinion research (discussed above) qualifies him as an expert in public opinion research and qualifies him to provide this opinion.
Mr. Binder's assertions that the term "change" is more neutral than the term "reform" and the term "reform" leads voters to vote in favor of reform lacks foundation because it is conclusory, not supported by sufficient facts and is based on conclusory hearsay. (Binder Decl., ¶ 8.)	"Expert opinions may be based on the expert's personal knowledge, including special knowledge, skill, experience, training and education." (Evid. Code, § 801(b).) Based on his personal knowledge gained from 26 years of experience in conducting public opinion research, including public opinion polls and over one thousand focus groups, Mr. Binder formulated opinions about how voters react to certain words, including the words "reform" and "change." Similarly, based on this experience, Mr. Binder formulated his opinion that the word "change" is more neutral than the word "reform," and that the term "reform" leads voters to vote in favor of reform. Additionally, Mr. Binder's opinion is not based on the statements of any one person polled or interviewed; instead it is based on a quarter of a century of experience analyzing

OLSON HAGEL & FISHBURN LLP
555 CAPITOL MALL, SUITE 1425, SACRAMENTO, CA 95814

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555 CAPITOL MALL, SUITE 1425, SACRAMENTO, CA 95814

	public opinion responses to the political process.
Mr. Binder is not qualified to offer this opinion. (Binder Decl., ¶ 8.)	"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, §720(a).) Mr. Binder's assertion regarding the neutrality of the words "reform" and "change" is offered to the voters' likely response to these words, not to establish their actual meaning. Mr. Binder's substantial experience in public opinion research (discussed above) qualifies him as an expert in public opinion research and qualifies him to provide this opinion.
Mr. Binder is not qualified to offer an opinion on whether references to "primary process reform" are fair and impartial, and are likely to prejudice voters in favor of Proposition 14. (Binder Decl., ¶ 9.)	"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, §720(a).) Mr. Binder's substantial experience in public opinion research (discussed above) qualifies him to render an opinion about whether the phrasing of ballot materials is likely to influence voters.

Mr. Binder's assertion that references to "primary process reform" are not fair and impartial, and are likely to prejudice voters in favor of Proposition 14 is an not a proper subject for expert testimony. (Binder Decl., ¶ 9.)	An expert witness can render an opinion on the ultimate issue in a case. (Jefferson, *California Evidence Benchbook* (4th ed. 2009) § 30.65, p. 696, ((citing Evid. Code, § 805; *People v. Olguin* (1994) 31 Cal.4th 1355, 1357).) Mr. Binder is not offering testimony on any purely legal question. Whether ballot materials are fair and impartial is mixed question of fact and law. Mr. Binder is rendering an opinion on the factual question of whether the words used in the Proposition 14 ballot materials induce a positive or negative response in public opinion, which will assist the court in making its legal determination about whether the ballot materials are fair and impartial.
Mr. Binder's assertion that the terms "greater voter participation" and "increase voter options" are not neutral lacks foundation because it is conclusory, not supported by sufficient facts and is based on conclusory hearsay. (Binder Decl., ¶ 10.)	"Expert opinions may be based on the expert's personal knowledge, including special knowledge, skill, experience, training and education." (Evid. Code, § 801(b).) Mr. Binder's opinion that phrases such as "greater voter participation" and "increase voter options" are not neutral was based on his extensive experience in public opinion research about positive and negative responses to language used in the political

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555 CAPITOL MALL, SUITE 1425, SACRAMENTO, CA 95814

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	process. Mr. Binder's opinion is not based on the statements of any one person polled or interviewed, but instead is based on a quarter of a century of experience analyzing public opinion responses to the political process.
Mr. Binder is not qualified to offer an opinion regarding voter participation. (Binder Decl., ¶ 10.) Mr. Binder's assertions regarding references to increased voter participation in the Proposition 14 materials lack relevance. (Binder Decl., ¶ 10.)	Mr. Binder did not offer an opinion about whether Proposition 14 will increase voter participation. Therefore he does not need to be qualified as an expert in voter turnout. Relevant evidence is any evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Mr. Binder's statements regarding the phrases "increase voter participation" and "increases voter options" are relevant to Mr. Binder's opinion about the public opinion response to these phrases and tend to prove that these phrases, as used in Proposition 14's title and summary, are not neutral.
Mr. Binder is not qualified to offer an opinion on whether the phrases used are designed to elicit a positive response. (Binder Decl., p. 3:	As discussed above, Mr. Binder is qualified to offer his opinion regarding public opinion responses to words and phrases used in the

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10.)	political process. Mr. Binder's opinion that the phrases "greater voter participation" and "increase voter options" are designed to elicit positive reactions are not offered to establish the Legislature's frame of mind in drafting this language. Instead, Mr. Binder's opinion is offered to establish that the terms are not neutral because voters respond positively to these terms. This opinion is also offered to show that public opinion about a phrase may be more negative when that phrase is coupled with additional information. This opinion is within Mr. Binder's area of expertise.
Mr. Binder's opinion in this regard lacks foundation because it is not supported by sufficient facts and is based on conclusory hearsay. (Binder Decl., p. 3: 10.)	"Expert opinions may be based on the expert's personal knowledge, including special knowledge, skill, experience, training and education." (Evid. Code, § 801(b).) Mr. Binder's vast experience in analyzing public opinion provides the basis for his opinion regarding voters response to phrases used in the political process and how those reactions may change when coupled with additional information. Mr. Binder's opinion is not based on the statements of any one person

	polled or interviewed; instead it is based on a quarter of a century of experience analyzing public opinion responses to the political process.
Mr. Binder's assertions about voter preferences regarding party affiliation lack foundation because they are conclusory, not supported by sufficient facts and based on conclusory hearsay. . (Binder Decl., p. 3: 10.)	"Expert opinions may be based on the expert's personal knowledge, including special knowledge, skill, experience, training and education." (Evid. Code, § 801(b).) Mr. Binder's vast personal experience in conducting focus groups on political matters provides him with personal knowledge regarding voter opinions about the importance of, and reliance on, political party affiliation on the ballot and voter opinions about the importance of independent, minor party and write-in candidates appearing on the ballot. Based on this knowledge, Mr. Binder provided his expert opinion regarding voter attitudes on these issues. Mr. Binder's opinion is not based on the statements of any one person polled or interviewed; instead it is based on a quarter of a century of experience analyzing public opinion responses to the political process.

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Mr. Binder's assertions about voter preferences regarding party affiliation are hearsay. (Binder Decl., p. 3: 10.)	Contrary to petitioner's assertion, Mr. Binder's opinion regarding voter attitudes about party affiliation were not based on the specific findings of a poll analyzing Proposition 14. Instead, this opinion is based on Mr. Binders experience in public opinion research. Therefore, this opinion is not based on hearsay.
Mr. Binder is not qualified to render an opinion about whether proposition 14's title and summary are "neutral" or "fair and impartial." (Binder Decl., p. 3: 10.)	"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, §720(a).) Mr. Binder's 26 years of experience in conducting public opinion research, including public opinion polls and over one thousand focus groups, qualifies him to render an opinion about whether ballot language will be perceived positively or negatively by the voters. This experience also qualifies him to render an opinion as to whether including only positive information and omitting negative information will receive a neutral response by the public.
Mr. Binder's assertion that Proposition 14's	An expert witness can render an opinion on

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title and summary are not neutral is not a proper subject for expert testimony. (Binder Decl., p. 3: 10.)	the ultimate issue in a case. (Jefferson, *California Evidence Benchbook* (4th ed. 2009) § 30.65, p. 696, (citing Evid. Code, § 805; *People v. Olguin* (1994) 31 Cal.4th 1355, 1357).) Mr. Binder is not offering testimony on any purely legal question. Whether ballot materials are fair and impartial is mixed question of fact and law. Mr. Binder is rendering an opinion on the factual question of whether the words used in the Proposition 14 ballot materials induce a positive or negative response in public opinion, which will assist the court in making its legal determination about whether the ballot materials are fair and impartial.
2. Declaration of Richard Winger	
Mr. Winger's testimony about the ballot label and title and summary containing statements that are false and/or misleading to voters is not a proper subject for expert testimony. (Winger, Decl. ¶ 12.)	An expert witness can render an opinion on the ultimate issue in a case. (Jefferson, *California Evidence Benchbook* (4th ed. 2009) § 30.65, p. 696, (citing Evid. Code, § 805; *People v. Olguin* (1994) 31 Cal.4th 1355, 1357).) Mr. Winger is not offering testimony on any purely legal question. Whether statements contained in the ballot label and title and summary for Proposition 14 are false or misleading is mixed question of fact and

	law. Mr. Winger's opinion in paragraph 12 is based on his extensive experience researching and examining how state election laws, including changes in primary elections systems, impact voter participation and voter turnout. That opinion goes to whether the statements in the ballot label and title and summary about increased voter choice, increased voter participation and increased voter turnout are factually supported, and will assist the court in making its legal determination about whether the ballot materials are false, misleading, or otherwise not fair and impartial.
Mr. Winger's testimony that the statement "Greater Participation in Elections" in the ballot label and title and summary for Proposition 14 is false and/or would be misleading to voters is not a proper subject for expert testimony. (Winger Decl., ¶ 13.)	An expert witness can render an opinion on the ultimate issue in a case. (Jefferson, *California Evidence Benchbook* (4th ed. 2009) § 30.65, p. 696, (citing Evid. Code, § 805; *People v. Olguin* (1994) 31 Cal.4th 1355, 1357).) Mr. Winger is not offering testimony on any purely legal question. Whether statement "Greater Participation in Elections" in the ballot label and title and summary for Proposition 14 is false and/or would be misleading to voters" is a mixed question of fact and law. Mr. Winger's opinion in paragraph 13 is based on his extensive

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OLSON HAGEL & FISHBURN LLP
555 CAPITOL MALL, SUITE 1425, SACRAMENTO, CA 95814

	experience researching and examining how state election laws, including changes in primary elections systems, impact voter participation and voter turnout. That opinion goes to whether the statement "Greater Participation in Elections" in the ballot label and title and summary is factually supported, and will assist the court in making its legal determination about whether that statement is false, misleading, or otherwise not fair and impartial.
Mr. Winger's testimony that voter turnout data from Louisiana and Washington – the only two states that currently use a "top-two" primary election system – shows that use of the top-two primary does not lead to increased voter participation or voter turnout is not relevant. (Winger Decl., ¶¶ 15-17.)	Testimony is relevant if it tends to logically, naturally, or by reasonable inference establish a material fact concerning a disputed issue. *People v. Harris* (2005) 37 Cal.4th 310, 377. In this litigation, Petitioner contends and Intervenor disputes, that the statements touting increased voter turnout and increased voter participation in the ballot label and title and summary for Proposition 14 are false, misleading, or otherwise not fair and impartial. Mr. Winger's testimony in paragraphs 15-17 discusses *primary election* data for the two other states that currently use a top-two primary system; his testimony does not, as Intervenors' objections suggest, seek to compare voter turnout in primary elections

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	with voter turnout in general elections. Mr. Winger's testimony and the data is it based upon tends to show that, in fact, the switch to a top-two primary system will not inevitably lead to increased voter participation or increased voter turnout in primary elections. As such, Mr. Winger's testimony in paragraphs 15-17 is relevant within the meaning of Evidence Code section 350.
Mr. Winger's testimony that the statement "gives voters increased options" in the ballot title and summary is false, misleading, or otherwise one-sided is not a proper subject for expert testimony. (Winger Decl., ¶ 18.)	An expert witness can render an opinion on the ultimate issue in a case. (Jefferson, *California Evidence Benchbook* (4th ed. 2009) § 30.65, p. 696, (citing Evid. Code, § 805; *People v. Olguin* (1994) 31 Cal.4th 1355, 1357).) Mr. Winger is not offering testimony on any purely legal question. Whether the statement "gives voters increased options" in the ballot title and summary for Proposition 14 is false, misleading or otherwise not fair and impartial is mixed question of fact and law. Mr. Winger's opinion in paragraph 18 is based on his extensive experience researching and examining how state election laws, including changes in primary elections systems, impact voter participation and voter turnout. That opinion goes to whether the statement "gives voters increased options" is

	factually supported, and will assist the court in making its legal determination about whether that statement in the ballot materials is false, misleading, or otherwise not fair and impartial.
Mr. Winger's testimony that "voters would have fewer options if Proposition 14 were adopted than they have under the current system" is not a proper subject for expert testimony. (Winger Decl., ¶ 19.)	An expert witness can render an opinion on the ultimate issue in a case. (Jefferson, *California Evidence Benchbook* (4th ed. 2009) § 30.65, p. 696, (citing Evid. Code, § 805; *People v. Olguin* (1994) 31 Cal.4th 1355, 1357).) Mr. Winger is not offering testimony on any purely legal question. Mr. Winger's testimony that "voters would have fewer options if Proposition 14 were adopted than they have under the current system" is based on his extensive experience researching and examining how state election laws, including changes in primary elections systems, impact voter participation and voter turnout. That opinion goes to whether the statements in the ballot materials concerning increased voter choice are factually supported, and will assist the court in making its legal determination about whether such statement in the ballot materials are false, misleading, or otherwise not fair and impartial.

OLSON HAGEL & FISHBURN LLP
555 CAPITOL MALL, SUITE 1425, SACRAMENTO, CA 95814

Dated: March 10, 2010

Respectfully submitted,

OLSON HAGEL & FISHBURN LLP
Deborah B. Caplan
Lance H. Olson
Richard C. Miadich

By: /Richard C. Miadich/
RICHARD C. MIADICH
Attorneys for Petitioner

OLSON HAGEL & FISHBURN LLP
555 CAPITOL MALL, SUITE 1425, SACRAMENTO, CA 95814

DECLARATION OF SERVICE

Case Name	:	*Clark v. Bowen, etc., et al*
Case No:	:	**34-2010-80000460**
Court	:	**Sacramento County Superior Court**

I declare: I am a citizen of the United States, over the age of 18, and not a party to the within action. My business address is 555 Capitol Mall, Suite 1425, Sacramento, California, 95814. On March 10, 2010, I served a true and correct copy of the following entitled documents:

PETITIONER'S RESPONSES TO OBJECTIONS TO BINDER AND WINGER DECLARATIONS

on the parties in said action as follows:

__X__ BY E-MAIL: By transmitting a true copy thereof to said parties at the internet address (es) indicated below.

Edmund G. Brown, Jr.
Attorney General of California
Stephen P. Acquisto
Supervising Deputy Attorney General
Mark R. Beckington
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Tel.: 213.897.1096/Fax: 213.897.1071
Email: Mark.Beckington@doj.ca.gov

Counsel for Respondent DEBRA BOWEN, in her official capacity as CALIFORNIA SECRETARY OF STATE,
Real Party in Interest GEOFF BRANDT, in his official capacity as State Printer, and
Intervenor ATTORNEY GENERAL EDMUND G. BROWN, JR.

Diane Boyer-Vine
Office of the Legislative Counsel
State Capitol, Suite 3021
Sacramento, CA 95814
Tel.: 916.341.8200/Fax:
Email: Diane.Boyer@lc.ca.gov; Robert.Pratt@lc.ca.gov; Jeff.Deland@lc.ca.gov

Counsel for Real Parties in Interest
LEGISLATURE OF THE STATE OF CALIFORNIA and MAC TAYLOR, in his official capacity as Legislative Analyst

Marguerite Mary Leoni
NIELSEN MERKSAMER PARRINELLO MUELLER & NAYLOR, LLP
2350 Kerner Boulevard, Suite 250
San Rafael, CA 94901
Tel.: 415.389.6800/Fax: 415.388.6874
Email: mleoni@nmgovlaw.com; cskinnell@nmgovlaw.com

Counsel for Intervenors
SENATOR ABEL MALDONADO; YES ON 14 – CALIFORNIANS FOR AN OPEN PRIMARY

Andrea Lynn Hoch
Legal Affairs Secretary
Christopher Krueger
Chief Deputy Legal Affairs Secretary
OFFICE OF THE GOVERNOR
State Capitol
Sacramento, CA 95814
Tel.: 916.445-0873/Fax: 916.323.0935
Email: Andrea.Hoch@gov.ca.gov;
Christopher.Krueger@gov.ca.gov

Counsel for Intervenor
GOVERNOR ARNOLD
SCHWARZENEGGER

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on March 10, 2010 in Sacramento, California.

ANN BARNER

DECLARATION OF SERVICE

Case Name : *Clark v. Sacramento County Superior Court*
Case No: : **C064430**
Court : **Court of Appeal, Third Appellate District**

I declare: I am a citizen of the United States, over the age of 18, and not a party to the within action. My business address is 555 Capitol Mall, Suite 1425, Sacramento, California, 95814. On March 16, 2010, I served a true and correct copy of the following entitled documents:

PETITIONER'S REPLY TO PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE

on the parties in said action as follows:

__X__ BY E-MAIL: By transmitting a true copy thereof to said parties at the internet address (es) indicated below.

__X__ BY OVERNIGHT DELIVERY: By placing said envelope for collection by authorized courier, with delivery fees provided for, in Sacramento, California, addressed to said parties.

Edmund G. Brown, Jr.
Attorney General of California
Stephen P. Acquisto
Supervising Deputy Attorney General
Mark R. Beckington
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Tel.: 213.897.1096/Fax: 213.897.1071
Email: Mark.Beckington@doj.ca.gov

Counsel for Respondent DEBRA BOWEN, in her official capacity as CALIFORNIA SECRETARY OF STATE,
Real Party in Interest GEOFF BRANDT, in his official capacity as State Printer, and
Intervenor ATTORNEY GENERAL EDMUND G. BROWN, JR.

Diane Boyer-Vine
Office of the Legislative Counsel
State Capitol, Suite 3021
Sacramento, CA 95814
Tel.: 916.341.8200/Fax:
Email: Diane.Boyer@lc.ca.gov; Robert.Pratt@lc.ca.gov; Jeff.Deland@lc.ca.gov

Counsel for Real Parties in Interest
LEGISLATURE OF THE STATE OF CALIFORNIA and MAC TAYLOR, in his official capacity as Legislative Analyst

Marguerite Mary Leoni
Christopher Skinnell
James Parrinello
NIELSEN MERKSAMER PARRINELLO MUELLER & NAYLOR, LLP
2350 Kerner Boulevard, Suite 250
San Rafael, CA 94901
Tel.: 415.389.6800/Fax: 415.388.6874
Email: mleoni@nmgovlaw.com; cskinnell@nmgovlaw.com; jparrinello@nmgovlaw.com

Counsel for Intervenors
SENATOR ABEL MALDONADO; YES ON 14 – CALIFORNIANS FOR AN OPEN PRIMARY

Andrea Lynn Hoch
Legal Affairs Secretary
Christopher Krueger
Chief Deputy Legal Affairs Secretary
OFFICE OF THE GOVERNOR
State Capitol
Sacramento, CA 95814
Tel.: 916.445-0873/Fax: 916.323.0935
Email: Andrea.Hoch@gov.ca.gov; Christopher.Krueger@gov.ca.gov

Counsel for Intervenor
GOVERNOR ARNOLD SCHWARZENEGGER

Hon. Allen Sumner
Superior Court of California
County of Sacramento
720 Ninth Street, Dept. 42
Sacramento, CA 95814
Email: GarciaM4@saccourt.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on March 16, 2010 in Sacramento, California.

Barner

ANN BARNER