No. S188436

In the Supreme Court of the State of California

MONA FIELD, *et al.*,
Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO,
Respondent,

DEBRA BOWEN, as Secretary of State; JOHN ARNTZ, as the elections official for the County of San Francisco; DAVE MACDONALD, as the elections official for the County of Alameda; JESSE DURAZO, as the elections official for the County of Santa Clara; DEAN LOGAN, as the elections official for the County of Los Angeles; NEAL KELLEY, as the elections official for the County of Orange; RITA WOODWARD, as the elections official for the County of Tulare,
Defendants/Real Parties in Interest,

ABEL MALDONADO; YES ON 14 – CALIFORNIANS FOR AN OPEN PRIMARY; CALIFORNIA INDEPENDENT VOTER PROJECT,
Interveners/Real Parties in Interest

INTERVENER/REAL PARTIES' PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE; SUPPLEMENTAL RECORD

From Order of the Superior Court of San Francisco County
The Honorable Charlotte Walter Woolard, Presiding
Superior Court Case No. CGC-10-502018
Dept. 302, Telephone No.: (415) 551-3723

(Counsel Listed on Following Page)

NIELSEN, MERKSAMER, PARRINELLO,
MUELLER & NAYLOR, LLP
James R. Parrinello, SBN 63415
Marguerite Mary Leoni, SBN 101696
Christopher E. Skinnell, SBN 227093
2350 Kerner Boulevard, Suite 250
San Rafael, California 94901
Tel: (415) 389-6800
Fax: (415) 388-6874

Attorneys for Interveners/Real Parties in Interest
ABEL MALDONADO, YES ON 14 – CALIFORNIANS FOR AN OPEN PRIMARY, & CALIFORNIA INDEPENDENT VOTER PROJECT

TABLE OF CONTENTS

Page

I. INTRODUCTION ... 1

II. FACTUAL & PROCEDURAL BACKGROUND ... 3

A. Proposition 14 (The Top Two Candidate Open Primary Act) & Its Implementing Legislation (SB 6) ... 3

B. Superior Court Proceedings ... 6

C. Court of Appeal Proceedings ... 8

III. STANDARD OF REVIEW ... 9

IV. PETITIONERS' DOGGED RELIANCE ON PURPORTED "CONCESSIONS" BY REAL PARTIES MISREPRESENTS THE FACTS AND BETRAYS THE WEAKNESS OF PETITIONERS' CASE ... 10

V. PETITIONERS HAVE FAILED TO SHOW ANY LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR PARTY PREFERENCE CLAIM ... 13

A. The Trial Court Correctly Held That Petitioners Are Unlikely To Prevail On Their Party-Preference Claim, Because This Court Has Already Unanimously Upheld The Constitutionality Of Permitting Only Qualified Party Labels On The Ballot, In *Libertarian Party v. Eu* (1980) 28 Cal.3d 535 ... 13

1. The party-preference ban is not subject to strict scrutiny, as it imposes only a "slight" and "insubstantial" burden on associational and voting rights ... 15

2. The party-preference restriction serves important—indeed, compelling—state interests ... 18

3. There is no constitutional right to use the label "Independent," rather than "No Party Preference." 23

4. Restricting ballot labels to qualified parties does not violate *Stanson v. Mott* 25

5. Defendants and Interveners have not "conceded" that the party-preference restriction violates the Elections Clause.. 25

B. Petitioners Have Not Established That SB 6 Actually Does Limit Candidates To Identifying "Qualified" Parties On The Ballot 27

VI. THE BALANCE OF HARDSHIPS TIPS SHARPLY AGAINST A PRELIMINARY INJUNCTION 31

VII. PETITIONERS' EXTREME REQUEST TO HAVE SB 6 ENJOINED IN ITS ENTIRETY, AND PROPOSITION 14 DECLARED INOPERATIVE, IS WHOLLY UNJUSTIFIED, EVEN IF THERE WERE MERIT TO THEIR CLAIM 33

VIII. THE COURT SHOULD BE AWARE THAT IT HAS NOT RECEIVED A COMPLETE AND ACCURATE RECORD OF RELEVANT PLEADINGS IN THE PROCEEDINGS BELOW.. 35

IX. CONCLUSION 38

CERTIFICATION OF BRIEF LENGTH.. 39

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Party of Texas v. White
(1974) 415 U.S. 767 19

Ancora-Citronelle Corp. v. Green
(1974) 41 Cal.App.3d 146 9

Anderson v. Celebrezze
(1983) 460 U.S. 780 16

Burdick v. Takushi
(1992) 504 U.S. 428 .... *passim*

Butt v. State of Cal.
(1992) 4 Cal.4th 668 .... 2, 33

Calfarm Ins. Co. v. Deukmejian
(1989) 48 Cal.3d 805 .... 34, 35

Christian Nationalist Party v. Jordan
(1957) 49 Cal.2d 448 19

Coleman v. Southern Pacific Co.
(1956) 141 Cal.App.2d 121 30

Common Cause of Cal. v. Bd. of Supervisors
(1989) 49 Cal.3d 432 33

Cook v. Gralike
(2001) 531 U.S. 510 26

De Lancie v. Superior Court
(1982) 31 Cal.3d 865 30

Edelstein v. City & County of San Francisco
(2002) 29 Cal.4th 64 .... 6, 7, 15

Field v. Bowen,
Case No. A129946 8

Field v. Superior Court,
Case No. A129829 8

Iowa Socialist Party v. Nelson
(8th Cir. 1990) 909 F.2d 1175 .... 14, 19

Jackson v. County of Los Angeles
(1997) 60 Cal.App.4th 171 30

Jenness v. Fortson
(1971) 403 U.S. 431 .... 19, 20

Kleffman v. Vonage Holdings Corp.
(2010) 49 Cal.4th 334 30

LaRouche v. Fowler
(D.C. Cir. 1998) 152 F.3d 974 26

Legislature v. Eu
(1991) 54 Cal.3d 492 .... 3, 32

Libertarian Party v. Eu
(1980) 28 Cal.3d 535 .... *passim*

Lightfoot v. Eu
(9th Cir. 1992) 964 F.2d 865,
cert. den. (1993) 507 U.S. 919 .... *passim*

Lightfoot v. Eu
(9th Cir. July 6, 1992) 92 Cal. Daily Op. Service,
1992 U.S. App. LEXIS 15091 .... 16, 17

McLaughlin v. No. Carolina Bd. of Elec.
(4th Cir. 1995) 65 F.3d 1215, *cert. den.* (1996) 517 U.S. 1104 14

O'Connell v. Superior Court
(2006) 141 Cal.App.4th 1452 .... 9, 34

Partnoy v. Shelley
(S.D. Cal. 2003) 277 F.Supp.2d 1064 26

People v. Leonard
(1983) 34 Cal.3d 183 30

Rainbow Coalition of Okla. v. Okla. State Elec. Bd.
(10th Cir. 1988) 844 F.2d 740 14

Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8
(2010) 186 Cal.App.4th 1078 9

Rees v. Layton
(1970) 6 Cal.App.3d 815 .... 22, 25

Robbins v. Superior Court
(1985) 38 Cal.3d 199 9

Rubin v. City of Santa Monica
(9th Cir. 2002) 308 F.3d 1008,
cert. den. (2003) 540 U.S. 875 .... 14, 24

Schenley Affiliated Brands Corp. v. Kirby
(1971) 21 Cal.App.3d 177 .... 34, 35

Schrader v. Blackwell
(6th Cir.) 241 F.3d 783,
cert. den. (2001) 534 U.S. 888 .... 14, 15, 24

Stanson v. Mott
(1976) 17 Cal.3d 206 25

Tahoe Keys Prop. Owners' Assn. v. State Water Res. Control Bd.
(1994) 23 Cal.App.4th 1459 9

Tashjian v. Republican Party of Conn.
(1986) 479 U.S. 208 16

U.S. Term Limits v. Thornton
(1995) 514 U.S. 779 26

Vargas v. City of Salinas
(2009) 46 Cal.4th 1 25

Wash. State Grange v. Wash. Republican Party
(2008) 552 U.S. 442 .... 4, 20

Zelig v. County of Los Angeles
(2002) 27 Cal.4th 1112 36

CONSTITUTIONAL AUTHORITIES

CALIFORNIA CONSTITUTION

CAL. CONST. art. II, § 5 4

CAL. CONST. art. II, § 5(c) 18

U.S. CONSTITUTION

Elections Clause (U.S. CONST. art. I, § 4, cl. 1) 15, 25, 26

Fourteenth Amendment 15, 16

STATUTES

Cal. Code Civ. Proc. § 904.1, subd. (a)(6) 8

Cal. Elec. Code § 4 27

Cal. Elec. Code § 338 .... 24, 27, 29

Cal. Elec. Code § 2150(a)(8) 28, 29

Cal. Elec. Code § 2151 .... 4, 18, 28, 29

Cal. Elec. Code § 2152 18

Cal. Elec. Code §§ 5000-5200 19

Cal. Elec. Code § 5001 .... 22, 28, 29

Cal. Elec. Code § 5002 .... 28, 29

Cal. Elec. Code § 5003 .... 28, 29

Cal. Elec. Code § 5100 .... 24, 29

Cal. Elec. Code §§ 6000-6953 18

Cal. Elec. Code §§ 7000-7882 18

Cal. Elec. Code § 8002.5 .... *passim*

Cal. Elec. Code § 8062 33

Cal. Elec. Code § 8121(b) 22

Cal. Elec. Code § 8400 33

Cal. Elec. Code § 8403(a)(1) 33

Cal. Elec. Code § 8550(f) 28

Cal. Elec. Code § 8606 .... 6, 7

Cal. Elec. Code § 9084 .... 16, 18

Cal. Elec. Code § 10210 .... 14, 18, 24

Cal. Elec. Code § 13102(a) 1, 2

Cal. Elec. Code § 13105 .... *passim*

Cal. Elec. Code § 13302(b) 18, 19

Cal. Elec. Code § 13307.5 16

Cal. Gov't Code § 85601 16

Senate Bill 6 (2009-2010 Reg. Sess.),
codified at Stats. 2009, ch. 1 .... *passim*

CALIFORNIA RULES OF COURT

California Rule of Court 8.240 8

California Rule of Court 8.486, subd. (a)(3) 8

California Rule of Court 8.486(b) 36

California Rule of Court 8.486(b)(4) 38

California Rule of Court 8.486(c)(1)(C) 37

California Rule of Court 9.486(c)(1)(A) and (B) 37

I.

INTRODUCTION.

Petitioners provide no basis whatsoever for this Court to issue a writ suspending the operation of Proposition 14, California's new Top Two Open Primary law, enacted by the voters at the June 2010 Primary Election, and enjoining the enforcement of Proposition 14's implementing legislation, Senate Bill 6 (2009-2010 Reg. Sess.), *codified at* Stats. 2009, ch. 1 ("SB 6").

Petitioners seek such radical relief based on their claim that a single, minor provision of SB 6 (legislation that amended dozens of Elections Code provisions) is purportedly defective. Petitioners' assert that Elections Code § 13102(a), as amended, is unconstitutional insofar as it prevents candidates from stating their "preference" for non-qualified political parties (*e.g.,* the so-called "Coffee" party) on the ballot.

In the first place, this is right that minor party candidates have never had—enjoining Proposition 14 will not enable the use of the "Coffee Party" label, as the pre-existing electoral system would foreclose its use as well.

Second, Petitioners have never demonstrated, as a matter of statutory interpretation, that SB 6 does indeed ban the designation of a non-qualified party preference on the ballot. The applicable statutes on their face certainly do not do so.

And third, as the trial court correctly recognized, even if Petitioners' interpretation of Elections Code § 13102(a) were correct, their constitutional claim is squarely foreclosed by this Court's unanimous opinion in *Libertarian Party v. Eu* (1980) 28 Cal.3d 535, which Petitioners failed to *even cite* in their papers moving for a

preliminary injunction below. Accordingly, Petitioners cannot meet their burden of establishing a likelihood of prevailing on the merits.

Additionally, the balance of hardships tips sharply against the granting of relief. This Court in *Libertarian Party*, and the Ninth Circuit in *Lightfoot v. Eu* (9th Cir. 1992) 964 F.2d 865, 871, *cert. den.* (1993) 507 U.S. 919, have both held that the burdens imposed by laws like § 13102(a) that limit the use of party labels on the ballot to qualified political parties are "insubstantial" and "slight." This is the "slight" harm that Petitioners allege they will suffer if a preliminary injunction is denied.

By contrast, if the draconian injunction Petitioners seek were granted against the enforcement of Proposition 14 and SB 6 in their entirety, the voters' will as expressed in Proposition 14 would be thwarted, and their ability to reform their government—which this Court has repeatedly recognized to be one of the People's most precious constitutional rights—would be frustrated. Moreover, millions of voters—fully 20% of the electorate—and candidates who are not affiliated with a qualified political party and who gained the absolute right to participate in primary elections through the passage of Proposition 14, would have that right stripped from them, and once again be relegated to inconsequential status in primary elections.

And finally, even if there were any merit to the Petitioners' constitutional claim (which there is not), their "sledgehammer" approach demolishing Proposition 14 and SB 6 to remedy a "defect" in a single implementing provision must be rejected. This Court's case law holds that "[A] judicial remedy must be tailored to the harm at issue. [Citations.] A court should always strive for the least disruptive remedy adequate to its legitimate task." (*Butt v. State of*

Cal. (1992) 4 Cal.4th 668, 696.) If this Court believes relief is appropriate, it has far more precise tools for addressing any alleged defect, including statutory construction to avoid constitutional concerns, and carefully-targeted severance of the offending provision.

Proposition 14 was a landmark measure aimed at reforming a Legislature paralyzed by partisan bickering. Perhaps not surprisingly, it was vigorously opposed by the majority of members of the Legislature, including the leadership of both houses, and all the political parties.[1] Petitioners' seemingly innocuous plea to declare Proposition 14 "inoperative until the Legislature enacts new implementing legislation" would, in reality, doom the People's reform effort by allowing the Legislature to bury Proposition 14 through inaction. But this Court has recognized that the judiciary has a "solemn duty to jealously guard" the voters' ability to enact such changes, lest their elected officials insulate themselves entirely from reform. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 501.)

Both the Superior Court and the Court of Appeal for the First District denied Petitioners' request for relief. This Court should do so as well. The Petition for Writ of Mandate should be denied.

II.
FACTUAL & PROCEDURAL BACKGROUND.

A. Proposition 14 (The Top Two Candidate Open Primary Act) & Its Implementing Legislation (SB 6).

Proposition 14 is the latest in a series of reforms adopted by California voters in an effort to fix their dysfunctional government.

---

[1] *See, e.g.,* Maldonado Decl. in Support of Intervention, filed Aug. 17, 2010 (attached hereto as Exhibit A), ¶¶ 5-6.

Confronted with severe political gridlock in Sacramento, a $20 billion state budget deficit, state unemployment over 12%, and ever-more strident partisanship at all levels of government, Californians voted on June 8, 2010, to abandon the existing partisan primary electoral system for state offices, and most federal offices in favor of a non-partisan system.[2]

Proposition 14 amended the state Constitution to replace party primaries, which were open only to the registered voters of a party,[3] with a type of open primary election known as "top two," or "voter-nominated" primary election, in which any voter may vote at the primary election for any candidate for congressional or state elective office (now called "voter-nominated" offices) without regard to the political party preference of either the candidate or the voter. (CAL. CONST. art. II, § 5, as amended by Proposition 14; see also Elec. Code § 8002.5(b),[4] as amended by SB 6.) The two candidates receiving the highest vote totals for each office at the primary election, regardless of party preference, will then compete for the office at the ensuing general election. (CAL. CONST. art. II, § 5, as amended by Proposition 14; see also § 8141.5, added by SB 6, & § 15452, amended by SB 6.) This type of top-two primary system was upheld against constitutional challenge by the U.S. Supreme Court in *Wash. State Grange v. Wash. Republican Party* (2008) 552 U.S. 442.

Proposition 14's implementing legislation, SB 6, amended dozens of provisions of the Elections Code to conform them to the

---

[2] *See* Decl. of Allan Zaremberg in Support of Intervention, filed Aug. 17, 2010 (attached hereto as Exhibit B), ¶ 3.

[3] Independent/Decline to State voters might be allowed to vote in a party's primary under the former system, but only if the party deigned to permit it. (Cal. Elec. Code § 2151.)

[4] All references are to the California Elections Code, unless otherwise stated.

open primary system. Petitioners in this action challenge a single, solitary provision of SB 6, § 13105, which concerns the political party designation on the ballot for candidates for a voter-nominated office. That statutory section provides, in relevant part:

> (a) In the case of candidates for a voter-nominated office in a primary election, a general election, or a special election to fill a vacancy in the office of United States Senator, Member of the United States House of Representatives, State Senator, or Member of the Assembly, immediately to the right of and on the same line as the name of the candidate, or immediately below the name if there is not sufficient space to the right of the name, ***there shall be identified in eight-point roman lowercase type the name of the political party designated by the candidate pursuant to Section 8002.5. The identification shall be in substantially the following form: "My party preference is the _________ Party." If the candidate designates no political party, the phrase "No Party Preference" shall be printed instead of the party preference identification***. If the candidate chooses not to have his or her party preference listed on the ballot, the space that would be filled with a party preference designation shall be left blank.

(Emphasis added.)

Section 8002.5, which is referenced in § 13105, provides, in relevant part:

> (a) ***A candidate for a voter-nominated office may indicate his or her party preference, or lack of party preference, as disclosed upon the candidate's most recent statement of registration, upon his or her declaration of candidacy***. If a candidate indicates his or her party preference on his or her declaration of candidacy, it shall appear on the primary and general election ballot in conjunction with his or her name. The candidate's designated party preference on the ballot shall not be

> changed between the primary and general election. A candidate for voter-nominated office may also choose not to have the party preference disclosed upon the candidate's most recent affidavit.

(Emphasis added.)

B. Superior Court Proceedings.

On July 28, 2010, Petitioners filed suit in San Francisco Superior Court, seeking to have that court enjoin the enforcement of Proposition 14 in its entirety. Petitioners concurrently filed a motion for preliminary injunction to that effect.[5]

Petitioners' motion was based upon two flimsy grounds: First, as the Assembly Bill Analysis of SB 6 states, SB 6 "[e]liminates the ability of voters to write-in candidates for a voter-nominated office at a general election, and eliminates the ability of candidates to run as write-in candidates for a voter-nominated office at a general election." (§ 8606; Petitioners' Exhibit 12, pp. 14-15 [Exhibit 1 to Interveners' Supplemental Evidence to Cure Incompleteness].) Both this Court and the U.S. Supreme Court have expressly held that a ban on write-in voting is constitutional. (*Burdick v. Takushi* (1992) 504 U.S. 428; *Edelstein v. City & County of San Francisco* (2002) 29 Cal.4th 64.) Nevertheless, in both the trial court and the Court of Appeal writ proceeding (discussed below), Petitioners urged that § 8606 was unconstitutional based on their illogical reading of that section as permitting write-in votes to be cast but banning their *counting* at the general election.

---

[5] Real Parties in Interest Abel Maldonado, Californians for an Open Primary, and California Independent Voter Project promptly moved to intervene. (These real parties are, respectively, the legislative sponsor of Proposition 14, the campaign committee formed to support Proposition 14, and the developer of the initiative draft that eventually became Proposition 14 and SB 6.) That motion was granted. (See Petitioners' Exhibit 14.)

Second, Petitioners' challenged SB 6's provision, quoted above, concerning political party designations on the ballot for candidates for voter-nominated offices. In their moving papers, Petitioners inexplicably ignored—in fact, did not even cite—this Court's decision in *Libertarian Party of Cal. v. March Fong Eu* (1980) 28 Cal.3d 535 ("*Libertarian Party*"). That case held that the State could constitutionally limit party labels on the ballot to "qualified" parties.

Based on these two alleged "defects," Petitioners disingenuously asked the trial court to block implementation of Proposition 14 and SB 6 *in their entirety* until such time as the Legislature might enact "corrective" legislation. As they well recognize, however, suspending the Top Two Primary Act and letting it languish in the Legislature, hoping that its political opponents will devise a "fix" to SB 6, is as good as repealing it.

The Superior Court properly rejected Petitioners' motion on September 14, 2010, after a hearing on the merits.[6] The court first rejected Petitioners' strained reading of § 8606, holding that SB 6 clearly bans the *casting* of write-in votes at the general election for voter-nominated office, the constitutionality of which is squarely established by *Burdick* and *Edelstein*. Tellingly, in this Court Petitioners have entirely abandoned this challenge.

Relying on *Libertarian Party*, the trial court also rejected Petitioners' "party-preference" challenge.

---

[6] While the formal order denying the preliminary injunction was not entered until October 5, that order merely tracked the language of the Superior Court's tentative ruling, issued September 13, 2010, and affirmed in full by the trial court at the end of the September 14 hearing.

And finally, the trial court held that "Plaintiffs showing of imminent harm is not sufficient."

C. Court of Appeal Proceedings.

On September 29, 15 days after the trial court denied Petitioners a preliminary injunction, they filed a petition for writ of mandate in the Court of Appeal, First District, seeking to bar the application of Proposition 14 at the special election to fill late-state Senator Dave Cox's vacant seat in Senate District 1. (*Field v. Superior Court*, Case No. A129829.) On October 8, Interveners filed a preliminary opposition thereto, and the Court of Appeal summarily denied the petition several days later, on October 15.

The Superior Court's denial of a preliminary injunction was an immediately appealable order (Cal. Code Civ. Proc. § 904.1, subd. (a)(6)), and on October 5, 2010, Petitioners filed their notice of appeal. That appeal remains pending. Petitioners' opening brief is due in January.[7]

Under California Rule of Court 8.240, Petitioners can move for expedition—for "calendar preference"—in their appeal. They have not done so, nor have they made any other effort to expedite the appeal's resolution.

---

[7] Petitioners obscure from this Court the fact that this case is pending on appeal in the First District Court of Appeal. California Rule of Court 8.486, subd. (a)(3), requires that the Petitioners inform this Court of any pending appeal on the cover of the writ petition and the first paragraph of the petition. No such information appears on the Petition. The Petition itself does not even mention the appeal pending in this case, *Field v. Bowen*, Case No. A129946. The first reference to the pending appeal is buried on page 22 of the Memorandum accompanying the Petition, in footnote 9.

III.

STANDARD OF REVIEW.

"'"To issue an injunction is the exercise of a delicate power, requiring great caution and sound discretion, and rarely, if ever, should [it] be exercised in a doubtful case. . . ."' [Citations.]" (*Ancora-Citronelle Corp. v. Green* (1974) 41 Cal.App.3d 146, 148.)

A plaintiff must demonstrate (1) a "reasonable probability" of success on the merits, and (2) a likelihood of an imminent irreparable injury that outweighs the hardships to defendants if the injunction is granted. (*Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8* (2010) 186 Cal.App.4th 1078, 1099; *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 206.)

Moreover, in balancing the harms, "[w]here, as here, the plaintiff seeks to enjoin public officers and agencies in the performance of their duties, the public interest must be considered." (*Tahoe Keys Prop. Owners' Assn. v. State Water Res. Control Bd.* (1994) 23 Cal.App.4th 1459, 1472–1473; see also *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1471 [consideration of public policy is "mandatory"].) This consideration is particularly important here, where an injunction against the implementation of Proposition 14 and SB 6 would thwart the will of California's voters, strip millions of voters not affiliated with a political party of the right to participate in primary elections, and enable hostile legislators to frustrate the People's efforts to reform the State's dysfunctional political culture.

IV.

<u>PETITIONERS' DOGGED RELIANCE ON PURPORTED "CONCESSIONS" BY REAL PARTIES MISREPRESENTS THE FACTS AND BETRAYS THE WEAKNESS OF PETITIONERS' CASE</u>.

As they have all along, Petitioners continue to manufacture purported "concessions" by Defendants and Interveners,[8] in an effort to avoid having to convince the courts of the merits of their case. Upon even superficial scrutiny of the facts, however, these so called "concessions" fail to live up to Petitioners' hype.

For example, Petitioners trumpet that Respondent Secretary of State has "publicly admitted" that SB 6's party preference ban is "not lawful," and has made a "binding party admission as to all of Petitioners' claims regarding SB 6's Party Preference Ban." (Pet. at p. 33.) That is a bald misrepresentation, achieved by putting words in Respondent's mouth and deleting the words that Respondent actually did say.

In August 2010, the office of Respondent sent two e-mails to Intervener Maldonado's staff[9] to inform him of "technical changes/

---

[8] Throughout this opposition, the term, "Interveners," refers to Real Parties Abel Maldonado, Yes on 14 – Californians for an Open Primary, and California Independent Voter Project, interveners in the court below. The new applicants for intervention in this action are referred to as "Intervener-Applicants."

[9] Petitioners erroneously state that Intervener Maldonado "solicited" changes to SB 6. (Pet. at p. 29, note 26.) That is a misrepresentation of the record. The emails from Respondent Secretary of State's office to the office of Intervener Maldonado clearly show that the proposed changes to SB 6 originated in Respondent's office and were sent to Intervener Maldonado as a courtesy. The August 3, 2010 email states: "Per our conversation, attached please find a memo that summarizes technical changes/ clarifications to the provisions of SB 6 our office believes need to be

clarifications to the provisions of SB 6" that Respondent wished to propose "in an SB 6 cleanup bill." To the e-mail sent on August 3, Respondent attached an "SB 6 Cleanup Summary." In that summary, Respondent suggested changing the term, "No Party Preference Disclosed" to "No Party Preference Selected." Respondent wrote, in full:

> Changing the term "No Party Preference Disclosed" to "No Party Preference Selected." Using the term "disclosed" implies that a candidate, or a voter, actually has selected a party preference but is not disclosing it. That is permissible for candidates in certain circumstances (see Item 12 in this summary), but not in all instances. What the term should imply is that the voter has not chosen, made or state (sic) a party preference and is therefore "independent." We think "selected" achieves that goal much better than "disclosed."

(Exhibit C hereto [Decl. of Welch], p. 0010.)

By deleting the first clause and the last sentence in this quote, Petitioners hide from the Court that Respondent only wanted to change the word "disclosed" to "selected." Respondent never said that "No Party Preference Disclosed" was "unlawful," only that the phrase "No Party Preference Selected" "achieves the goal much better." Moreover, Respondent did not suggest the clean-up legislation to address any substantive legal concerns at all. Respondent expressly stated:

---

enacted prior to 2011 … Our attorneys are working on suggested language, but wanted to get this to you to give you an opportunity to review the issues." (Exhibit C hereto.) Respondent's e-mail to Intervener Maldonado of August 11, 2010, which Petitioners neglected to include in their Exhibit 5, stated further: "I previously sent you a memo re: SB 6 clarifications that our office believes need to be made prior to 2011 and promised to send along language when we had it finalized. Attached please find the promised language." (See Exhibit C hereto, page 0010.)

> The changes proposed are technical or what we would call policy clarifications. There is no attempt to make any policy changes . . . Please feel free to share the document liberally. It's not intended to be controversial. It's simply intended to ensure that Proposition 14 and SB 6 can be implemented clearly and easily—and be implemented as the voters, the author the Legislature, and the Governor intended when the measures were approved.

(Petitioners' Exhibit 5, Attachment 1, p. 1.)

Respondent further elaborated, in her e-mail of August 11 to Intervener Maldonado:

> We don't believe there is anything controversial included. Please let me know if you disagree. There are some clarifications—mainly dealing with how a person's party preference is disclosed and how it's listed when they don't want to disclose it—that people may want to word differently, but we don't believe there are any policy changes.

(Exhibit C, hereto, p. 0010.)

This is a far, far cry from an admission of unlawfulness or a concession that candidates have a right to use the term "Independent."

Petitioners also claim that "SB 6 Defendants have conceded that SB 6 bans minor-party candidates from stating any party preference (including 'Independent') on the ballot." (Pet at. p. 31.) This too is a misrepresentation. There has been no such "concession." Indeed, Interveners alleged in their Answer in the Superior Court that SB 6 on its face could be interpreted to allow a candidate to indicate on his or her nomination papers, and on the ballot, whatever political party appears on that candidate's voter registration card and nomination papers, whether that party is "qualified," or not. Interveners also raised this interpretation in

opposition to Petitioners' Petition for Writ of Mandate in the Court of Appeal. (Petitioners' Exhibit 20, p. 11.)

Interveners' alleged "concession," quoted by Petitioners on Page 32 of their Petition, is from Interveners' Sur-Reply in opposition to their motion for a preliminary injunction. The motion was filed very early in the trial court proceedings, before Answers were even due to be filed. In that motion, Petitioners argued that SB 6 allows only "qualified" political parties to use a party label on the ballot. Interveners argued in response that such a provision would be constitutional under *Libertarian Party* (discussed in more detail, *infra*). However, Petitioners have never established that SB 6 actually *does* prohibit candidates preferring non-qualified political parties from stating their non-qualified political party preference on their statement of registration their nomination papers, or on the ballot.

V.

PETITIONERS HAVE FAILED TO SHOW ANY LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR PARTY PREFERENCE CLAIM.

A. The Trial Court Correctly Held That Petitioners Are Unlikely To Prevail On Their Party-Preference Claim, Because This Court Has Already Unanimously Upheld The Constitutionality Of Permitting Only Qualified Party Labels On The Ballot, In *Libertarian Party v. Eu* (1980) 28 Cal.3d 535.

This Court has already rejected a challenge virtually identical to that raised by Petitioners and Intervener-Applicants. In *Libertarian Party*, *supra*, two candidates who qualified for the ballot by means of an independent candidacy petition sued the Secretary of State to force her to list their party preference as "Libertarian,"

rather than "Independent." Former Elections Code § 10210 (now § 13105) required that the name of the "qualified" political party with which a candidate was affiliated be printed on the ballot. Candidates not affiliated with a "qualified" political party were required to be designated "Independent." The Libertarian Party was not, at that time, a qualified political party in California.

As in this case, the plaintiffs in *Libertarian Party* claimed that section 10210 violated the due process and equal protection clauses. This Court *unanimously* rejected the candidates' challenge, holding that the party

> identification provision imposes an *insubstantial burden* on the rights to associate and to vote and that the statute serves a *compelling state interest to protect the integrity and stability of the electoral process in California*.

(28 Cal.3d at p. 542.)

Several federal circuit courts have come to the same conclusion, rejecting claims just like Petitioners'—that a State is constitutionally-obligated to permit candidates to list their preferred party label on the ballot, even where the party they prefer is not a "qualified" party. (*Schrader v. Blackwell* (6th Cir.) 241 F.3d 783, *cert. den.* (2001) 534 U.S. 888; *McLaughlin v. No. Carolina Bd. of Elec.* (4th Cir. 1995) 65 F.3d 1215, *cert. den.* (1996) 517 U.S. 1104; *Rainbow Coalition of Okla. v. Okla. State Elec. Bd.* (10th Cir. 1988) 844 F.2d 740; see also *Iowa Socialist Party v. Nelson* (8th Cir. 1990) 909 F.2d 1175; *Lightfoot,* 964 F.2d at p. 871 ["The State's interest in requiring that a candidate demonstrate a modicum of support is significant enough to justify not only refusing to place a candidate on the ballot, but also refusing to designate a candidate on the ballot as Libertarian."]; *Rubin v. City of Santa Monica* (9th Cir. 2002) 308

F.3d 1008, *cert. den.* (2003) 540 U.S. 875 [relying on *Schrader* to uphold statute preventing candidate from using the ballot designation "peace activist"].)

Citing *Libertarian Party* and these federal cases, the trial court in this case held that "insufficient evidence and case law support the argument that the party preference ban violates the Equal Protection Clause or the Elections Clause." That conclusion was correct; *Libertarian Party* applies with as much force under Proposition 14 and SB 6 as it did in 1980, and the result should be the same.

1. The party-preference ban is not subject to strict scrutiny, as it imposes only a "slight" and "insubstantial" burden on associational and voting rights.

As a preliminary matter, it is critical to note that there is no merit to Petitioners' claim that the party-preference ban is subject to strict scrutiny. (Pet. at p. 43.)[10]

---

[10] Petitioners claim that Respondents and Interveners have "never disputed" that strict scrutiny applies to this claim. (Pet. at p. 43.) This is misleading. In the trial court Petitioners never alleged that strict scrutiny applied to the party-preference claim, though they did allege that it applied to the now-abandoned challenge to SB 6's write-in voting ban (a patently incorrect claim in light of *Burdick* and *Edelstein*). The first time Petitioners claimed that strict scrutiny applied to the party-preference statutes was in their petition for writ in the Court of Appeal. Interveners never filed a full brief on the merits in the Court of Appeal; they only filed preliminary oppositions focused on rebutting Petitioners' claim that Proposition 14 would apply to the SD 1 special election on January 4. Had the Court of Appeal not denied the petition at that preliminary stage Interveners would have refuted the application of strict scrutiny to the party-preference statutes in a full briefing on the merits.

The Ninth Circuit, in *Lightfoot v. Eu, supra*, has expressly held that strict scrutiny is *not* applicable to California's statutes restricting the placement of party labels on the ballot to "qualified parties." (*Lightfoot v. Eu* (9th Cir. July 6, 1992) 92 Cal. Daily Op. Service 5941, 1992 U.S. App. LEXIS 15091, *10 fn.2 [amending the initial *Lightfoot* decision, 964 F.2d at p. 871].) That decision relied, in turn, on the U.S. Supreme Court's holding in *Burdick v. Takushi, supra*, that only "severe" burdens on voting and associational rights are subject to strict scrutiny. (504 U.S. at p. 434.) "[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." (*Id.*, quoting *Anderson v. Celebrezze* (1983) 460 U.S. 780, 789, and *Tashjian v. Republican Party of Conn.* (1986) 479 U.S. 208, 213-14.)

The *Libertarian Party* Court held that the burden imposed by the statutes limiting ballot labels to qualified parties was "insubstantial." (28 Cal.3d at pp. 542 and 545.) As the Court noted, "The Libertarian Party is in no way restricted in its associational activities or in its publication of the affiliation of its candidates. It is only proscribed, so long as it remains unqualified, from designating the affiliation on the ballot." (28 Cal.3d at p. 545.) Likewise here, Petitioners and Intervener-Applicants are not precluded from telling the voters of their preference for the "Reform," "Socialist Action," "Coffee" or "Independent" parties, in campaign mailings and other publicity, and in candidate statements printed in the voter information pamphlet sent to each household at taxpayer expense. (See §§ 9084 and 13307.5; Gov't Code § 85601.)

Following the lead of *Libertarian Party*, the Ninth Circuit in *Lightfoot v. Eu, supra*, held that the burden of limiting ballot labels to qualified parties was "slight." (964 F.2d at p. 871.) This latter characterization is especially significant, because in upholding Hawaii's ban on write-in voting in *Burdick* the Supreme Court likewise held that the burden imposed by that ban was "slight" (504 U.S. at p. 439), and that accordingly "the State ***need not establish a compelling interest*** to tip the constitutional scales in its direction." (*Id.*, emphasis added.)

It is true that the *Libertarian Party* Court used some of the language associated with strict scrutiny—most notably that the party label restrictions served a "compelling state interest." And, initially, *Lightfoot* held explicitly that strict scrutiny applied. However, *Libertarian Party* was decided 12 years before *Burdick* clarified the appropriate standard of review, and *Lightfoot* was decided a month before. *Burdick* showed that the *Libertarian Party* and *Lightfoot* courts should not have applied strict scrutiny, given their recognition of the minimal burdens that the challenged party label provisions imposed. Indeed, following the decision in *Burdick* the Ninth Circuit amended the *Lightfoot* opinion, to add a footnote recognizing its earlier application of strict scrutiny was incorrect in light of *Burdick*. (*Lightfoot, supra,* 92 Cal. Daily Op. Service 5941, 1992 U.S. App. LEXIS 15091, at p. *10 fn.2.)

Tellingly, however, the party label restrictions were upheld in both *Libertarian Party* and *Lightfoot*, even under that most stringent of standards, strict scrutiny.

2. The party-preference restriction serves important—indeed, compelling—state interests.

As the *Libertarian Party* Court held, the State has a "compelling interest in maintaining the classification set out in section 10210," *i.e.*, in maintaining the distinction between "qualified" parties and non-qualified parties. (*Id.* at p. 545.) Under California law a "qualified" political party is "subject to state regulation of its structure, powers, and duties." (28 Cal.3d at p. 541.) Moreover, the qualified parties have rights that non-qualified parties do not. For example, the State maintains voter registration rolls for the qualified parties. (§§ 2151-2152.) Only the qualified parties are permitted to have a letter or party contributor envelope mailed with the sample ballot to each voter registered as preferring that party. (§§ 13302(b), 13305.) Only the qualified parties are permitted to publish a statement of the party's "purposes" in the official ballot pamphlet. (§ 9084(e).) And the State conducts elections for officers of the qualified parties, in particular party central committees. (§§ 7000-7882.) The qualified parties continue to have these benefits under Proposition 14 and SB 6.[11]

Additionally, qualified parties continue to have an exclusive right to nominate candidates for President of the United States, to participate in presidential primaries and to limit participation therein by nonaffiliated voters. (CAL. CONST. art. II, § 5(c); §§ 6000-6953.) And although the qualified political parties no longer nominate candidates for state offices, Proposition 14 and SB 6 grant

[11] Petitioners imply that if the ability to use a political party designation on the ballot is limited to qualified political parties, then only the Democratic or Republican Party designations will appear. (See Pet. at p. 15 ¶ 31 & p. 32.) This is inaccurate. There are currently six qualified political parties in California.

the qualified parties new rights that they previously did not enjoy with respect to vote-nominated offices. Only the qualified parties will be permitted to print their endorsements for voter-nominated office in the sample ballot sent at taxpayer expense to each voter. (§§ 13302(b), 13305.)

As the courts have recognized, it is appropriate for the State to establish minimum qualifications for the parties to receive benefits, such as those listed above. (See *Libertarian Party*, *supra*, 28 Cal.3d at p. 545 [“It is settled . . . that the requirements a party must meet to be qualified are constitutional and they are not challenged here.”]; *Iowa Socialist Party, supra*, 909 F.3d at 1179-1180 [rejecting minor party’s demand that Iowa Secretary of State maintain voter rolls for the party].) Notably, Petitioners have not alleged that the party qualification statutes (see §§ 5000-5200) are unconstitutionally burdensome. Nor would such a claim warrant enjoining Proposition 14 or SB 6, which did not amend those statutory sections.

Recognizing that the State has a legitimate—indeed, compelling—interest in distinguishing between qualified and non-qualified parties, the *Libertarian Party* Court further held that maintaining the integrity of this system justifies regulating which party labels may appear on its ballots: “[I]f each independent candidate could decide for himself what nonqualified party he should be listed as affiliated with, the significance of qualified party affiliation would be masked.” (*Id.* at p. 545; see also 28 Cal.3d at p. 546, citing *Am. Party of Texas v. White* (1974) 415 U.S. 767, 781-788; *Jenness v. Fortson* (1971) 403 U.S. 431; *Christian Nationalist Party v. Jordan* (1957) 49 Cal.2d 448, 453.) The Court further elaborated as follows:

> As the United States Supreme Court explained in *Jenness*, "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—*the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election*."

(*Libertarian Party, supra*, 28 Cal.3d at p. 546 [italics added; court's italics removed].)[12]

As the Supreme Court recognized in *Washington State Grange, supra*, the purpose of allowing candidates to identify their party "preference" on the ballot is "providing voters with relevant information about the candidates . . . ." (552 U.S. at p. 458; see also § 8002.5(d) ["The party preference indicated by the candidate is shown for the information of the voters only . . . ."].) Removing the reasonable, nondiscriminatory constraints that exist in California's Election Code threatens to frustrate that informational purpose by enabling confusion, deception, and frustration of the democratic process. *Jenness* and *Libertarian Party* held that the State has a compelling interest in avoiding such evils in elections.

It is important to note that a voter has three alternatives when completing the voter registration card in California: (1) declare a

[12] Petitioners point out that under Washington State's top two open primary candidates are permitted to express a preference for whatever party they so desire. However, in this one respect Washington State's open primary system is not comparable because all voter registration there is non-partisan: one does not register as a Democrat or a Republican, or as an affiliate of any political party, in Washington State. (See Wash. Sec'y of State, *Register to Vote In Washington State, available online at* http://wei.secstate.wa.gov/osos/en/voterinformation/Pages/RegistertoVote.aspx [last visited Dec. 3, 2010] ["Party Registration: Washington State does not register voters according to political party."].)

preference for a qualified political party, (2) decline to state a party preference, or (3) fill in a blank on the card indicating a preference for a non-qualified party. (See Interveners' Request for Judicial Notice, filed herewith ["Interveners' RJN"], Exhibit A.) Current law and SB 6 allow only the qualified parties to appear on the ballot alongside the candidate's name.[13]

In the first place, allowing candidates to identify any party of their choosing on the ballot, without regard to whether such party is qualified, would enable candidates to mislead the voters, by saying that they "prefer" a party while espousing views that are diametrically opposed to the views that the label would seem to indicate.

A timely example is the "Tea Party." As widely discussed, there is no single entity that constitutes the Tea Party. Rather, it is a loosely affiliated coalition of individuals and groups, big and small, with no generally-accepted party platform or spokesperson. In such circumstances, a candidate could take advantage of a favorable political climate by using the "Tea Party" label, and there would be no objective way to determine whether that candidate was misleading voters. This is in contrast to the qualified party system, in which a party label indicates a "preference" for a known entity, with an official platform (printed in the voter information pamphlet), elected officers, official spokespersons, and publicly-distributed endorsements against which the candidates' views can be compared.

---

[13] Assuming, that is, that Petitioners' interpretation of SB 6 is accepted. As discussed in Section V.B, *infra*, that interpretation is questionable.

Moreover, even where the candidate has no intention of affirmatively misleading voters, allowing candidates to choose any party label they wish risks confusion. Here, the purported "Coffee Party" is relevant.[14] Multiple candidates could choose that designation, or similar ones, and voters would be left to guess at what that designation refers to. Again, with the qualified parties the reference is to a known quantity.

Citing *Rees v. Layton* (1970) 6 Cal.App.3d 815, Petitioners' claim that candidates can solve the confusion problem by "policing" themselves. First, *Rees* is distinguishable; it did not concern political party designations on the ballot. Moreover, self-policing in this context is possible *only with respect to the qualified parties*. SB 6 requires Respondent Secretary of State to post in a conspicuous and publicly available place on his or her Internet Website, the party preference history of each candidate for voter-nominated office for the preceding ten years, and to retain that posting until after the general election. (§ 8121(b).) Opposing candidates and the press can use these public records to call out "impostors"—*i.e.*, a candidate

[14] Also, because it closely regulates the qualified political parties, the State can place constraints on the names adopted by those parties to avoid confusion. (See § 5001(a) [The designated name [of a political body attempting to qualify as a party] shall not be so similar to the name of an existing party so as to mislead the voters, and shall not conflict with that of any existing party or political body that has previously filed notice pursuant to subdivision (b)."].) Allowing candidates to name their own "party" on the ballot presents the risk of confusion if a candidate chooses a "party" name that is similar to the designation of a "qualified" party—for example, if someone listed the "Republic" party on the ballot, voters may mistakenly assume that there is a typographical error and vote for the candidate under the mistaken belief that the candidate prefers the "Republican" party. Permitting candidates to choose any name they wish also threatens to undermine the political parties that have achieved formal qualification under the State-prescribed regulations.

who lists a preference for the "Democratic Party," despite having been registered with the Republican Party for 9.5 of the past 10 years. But if a candidate claims a preference for a minor, non-qualified party (*e.g.*, the Coffee Party), the opponents will not have a similar objective source of information to confirm or refute that claim.

These interests in protecting the integrity of the electoral process retain just as much force today as they did 30 years ago, and warrant the same result, especially in light of *Burdick*, which clarifies that the strict scrutiny does not apply.

3. There is no constitutional right to use the label "Independent," rather than "No Party Preference."

Petitioners also urge that *Libertarian Party* identified a constitutional "right" for minor party candidates to have the label "Independent" next to their name on the ballot. This grossly misrepresents *Libertarian Party*.[15]

In *Libertarian Party*, the State required the use of the term "Independent" by statute—the Court held that the Constitution did not require that the candidates be permitted to use a different label. It did not hold, however, that the State *must* permit the use of the "Independent" label—only that it *could*.

Nor do any of the other cases cited by Petitioners hold that there is a constitutional right of candidates not affiliated with a qualified political party to use the label "Independent" on the ballot, rather than being designated as "No Party Preference." (See *Rosen*

[15] Petitioners indicate that the trial court failed to rule on this "key argument." (Pet. at p. 27.) But there was no reason for the trial court to do so—this "key argument" was not even included in Petitioners' first amended complaint. (Petitioners' Exhibit 4.)

v. Brown (6th Cir. 1992) 964 F.2d 865 [striking down a law that prohibited candidates unaffiliated with a political party were from using any designation at all]; *Schrader, supra,* 241 F.3d at p. 783 [upholding Ohio's limitation of the use of party labels only to candidates of its qualified political parties]; *Rubin, supra,* 308 F.3d at p. 1008 [relying on *Schrader* to uphold statute preventing candidate from using the ballot designation "peace activist"]; *Lightfoot, supra,* 964 F.2d at p. 871 [upholding use of "independent" label where a statute, Cal. Elec. Code § 10210, so provided; no holding that such label is constitutionally-mandated].)

Libertarian Party is instructive on this point as well. In that case this Court also held:

> We note at the outset that it is not inaccurate to describe candidates who qualify for the ballot by the independent nomination method as independents, for such candidates are independent of the qualified political parties. . . . Until a political body or group is qualified pursuant to the procedures and regulations provided by the Legislature, it is not a party whose access to the ballot is secured under the provisions for nomination of qualified party candidates, and it would be misleading to designate the candidate of that political group as a political party candidate on the ballot."

(*Libertarian Party, supra*, 28 Cal.3d at p. 544.)

The same is true in this case with respect to the label "No Party Preference." Petitioners Martin and Mackler and Intervener-Applicants Chamness and Winkler apparently have no preference for any qualified "political party" as that term is defined in California law. (See §§ 338, 5100; Cal. Sec'y of State, *Qualified Political Parties for the November 2, 2010, General Election*, *available online at* http://www.sos.ca.gov/elections/elections _f.htm [last visited Dec.

3, 2010].) It is accurate and legal for them to be designated on the ballot as having "No Party Preference" under *Libertarian Party*.

4. Restricting ballot labels to qualified parties does not violate *Stanson v. Mott*.

Petitioners also claim that the party-preference restriction violates *Stanson v. Mott* (1976) 17 Cal.3d 206, and *Rees v. Layton, supra*. This claim borders on the frivolous.

First of all, *Libertarian Party* unanimously upheld such a restriction four years after *Stanson* was decided, and 10 years after the Court of Appeal decision in *Rees*.

Moreover, this very Court recently affirmed that *Stanson* "properly must be understood as singling out a public entity's 'use of the public treasury *to mount an election campaign*' as the potentially constitutionally suspect conduct . . . ." (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 36, quoting *Stanson, supra*, 17 Cal.3d at p. 218, italics added.) That does not remotely describe the party-preference restriction, a simple and content-neutral regulation based on the minimum qualification thresholds for political parties.

Rees concerned a city election ordinance that allowed only the incumbents to have their occupation listed on the ballot. Under SB 6, however, incumbents and challengers alike are subject to the same restrictions regarding which party labels they may list on the ballot.

5. Defendants and Interveners have not "conceded" that the party-preference restriction violates the Elections Clause.

In yet another example of Petitioners' attempts to put words in Defendants' and Interveners' mouths, Petitioners continue to claim that Defendants and Interveners have "conceded" that § 8002.5(a) violates the Elections Clause of the U.S. Constitution (U.S. CONST.

art. I, § 4, cl. 1), and that this "concession" is binding. As with each of the other "concessions" alleged by Petitioners, this claim has no merit.

In the first place, the courts have recognized that, regardless of the constitutional provision relied upon, challenges to election laws all apply the same "basic mode of analysis." (*Partnoy v. Shelley* (S.D. Cal. 2003) 277 F.Supp.2d 1064, 1072, quoting *LaRouche v. Fowler* (D.C. Cir. 1998) 152 F.3d 974, 987-88.) Thus, Petitioners' Elections Clause claim fails for the same reasons that their equal protection claim fails.

Moreover, Interveners have noted from the beginning that *Cook v. Gralike* (2001) 531 U.S. 510, and *U.S. Term Limits v. Thornton* (1995) 514 U.S. 779, the main cases on which Petitioners rely, are readily distinguishable; those cases do not concern qualified political party ballot designations for candidates, which the State has a compelling interest in regulating. *U.S. Term Limits* struck down a state's effort to limit the number of terms that a Member of Congress could serve. (514 U.S. at p. 779.) *Cook* concerned a provision, enacted in the wake of *U.S. Term Limits*, which tagged federal candidates who did not support a term limits amendment to the U.S. Constitution with a "scarlet letter" label on the ballot. (531 U.S. at p. 525.)

And finally, in the context of this proceeding it is worth noting that the Elections Clause only applies to elections for United States Senators and Representatives—*i.e.*, not to the special elections at issue in this Petition, which are for California Assembly and state Senate seats.

B. Petitioners Have Not Established That SB 6 Actually Does Limit Candidates To Identifying "Qualified" Parties On The Ballot.

While, as discussed above, there is no constitutional violation here, a threshold question is whether the challenged provision even supports Petitioners' fundamental premise: that SB 6 actually *does* prohibit candidates preferring non-qualified political parties from stating their non-qualified political party preference on their statement of registration, their nomination papers, or on the ballot. Contrary to the gloss Petitioners have put upon them, Elections Code §§ 8002.5(a) and 13105 do not, by their terms, limit voters to writing in the name of a qualified party on their voter registration cards.

Elections Code § 8002.5(a) (added by SB 6) actually provides, "A candidate for a voter-nominated office may indicate his or her party preference, or lack of party preference, *as disclosed upon the candidate's most recent statement of registration*, upon his or her declaration of candidacy." (Emphasis added.) That same section further provides, that "If a candidate indicates his or her party preference on his or her declaration of candidacy, it shall appear on the primary and general election ballot in conjunction with his or her name." Section 13105 provides for the party preference disclosed on the declaration of candidacy pursuant to § 8002.5(a) to be printed on the ballot.

Petitioners contend that the term "party" must refer only to a "qualified" political party, citing Elections Code § 338,[16] but that definition clearly does not apply to registration cards. (See Elec. Code § 4 [Elections Code's general definitions do not apply where

[16] Elections Code § 338, which was not amended by SB 6, reads, "'Party' means a political party or organization that has qualified for participation in any primary election."

"the context otherwise requires"].) Pursuant to §§ 2150(a)(8) and 2151, California's voter registration cards must allow the voter to declare the "political party" that he or she prefers. Those cards contain a list of the qualified parties; they also, however, contain a blank for registrants to write-in non-qualified parties as well. (See Interveners' RJN, Exhibit A; see also §§ 5002-5003.)[17] Petitioners have never explained why SB 6 should be interpreted to preclude the use of a written-in party preference on the ballot pursuant to §§ 8002.5(a) and 13105.

Petitioners make much of the fact that §§ 5002 and 5003[18] in the Elections Code division governing the process for qualifying a

---

[17] Indeed, the Verified First Amended Complaint (Exhibit 16 to Pet.) appears to indicate that Petitioners Martin and Mackler are actually registered with the Reform and Socialist Action parties respectively. (*Id.* at ¶¶ 58, 59; see also [Petitioner] Richard Winger, *Two Candidates and Four Voters File Lawsuit Against Certain Aspects of California Top-Two System*, BALLOT ACCESS NEWS (July 29, 2010), *available online at* http://www.ballot-access.org/2010/07/28/two-candidates-and-four-voters-file-lawsuit-against-certain-aspects-of-california-top-two-system/ [last visited Dec. 3, 2010] ["The two candidate-plaintiffs are Rodney Martin, *who is a registered member of the Reform Party*, and Jeff Mackler, *who is a registered member of Socialist Action Party*."] [emphasis added].) The Intervener-Applicants are more oblique on this point, but even if they are not currently so registered, SB 6 repealed former § 8550(f), which prevented a candidate from changing his or her party preference in the 13 months prior to the election; SB 6 permits candidates to change their party preference right up until the day they file their candidacy papers.

[18] Elections Code § 5002, which was not affected by SB 6, reads:

> Upon receipt of the notice specified in Section 5001, the Secretary of State shall notify each county elections official of the name of the political body and its intent to qualify as a political party.

new party, distinguish between a "qualified political party" and a political party seeking qualification by referring to the latter "political bodies," rather than "political parties." The division in which these statutory sections appear, specifically incorporates the definition of "party" contained in § 338. (§ 5000.)

Petitioners miss the point that SB 6 authorizes the disclosure on the ballot of the candidate's party preference as disclosed *on his or her voter registration card* (§ 8002.5(a)). The statutes governing voter registration cards (§§ 2150(a)(8) and 2151) are in a different division, and do not make a distinction between "qualified" and "non-qualified" political parties, referring to both as "political parties."[19] Sections 13105 and 8002.5(a) allow a candidate to include on the ballot whatever political party designation appears on his or her voter registration card. Sections 5002 and 5003 are relevant

---

> In preparing the statement of voters and their political affiliations, the county elections officials shall tabulate by political affiliation the affidavits of registration of members of political parties qualified pursuant to Section 5100, and political bodies formally declaring an intent to qualify as political parties pursuant to Section 5001. All other affidavits of registration, except those of persons declining to state a political affiliation, shall be tabulated as miscellaneous registrations.

Elections Code § 5003, also not affected by SB 6, reads:

> A political body within the first 70 days after filing the formal notice required by Section 5001 is entitled, upon request to the Secretary of State, to have counted toward its qualification as a political party affidavits of registration in which voters declared affiliation with the political body prior to the date the political body filed the formal notice with the Secretary of State.

[19] Petitioners are simply incorrect in stating (see Pet. at p. 55) that §§ 5002 and 5003 govern voter registration cards.

only insofar as they confirm that minor party affiliations can be included on the voter registration card as well, even before a "political body" files paperwork with the Secretary of State expressing its intention to try to become a "qualified" political party.

While the trial court was correct in holding that it would be constitutional to limit ballot labels only to expressing a preference for qualified parties, this Court need not reach that issue.[20] Rather, if there is any ambiguity on this point, the Court can—and should—resolve this petition on statutory grounds. "It is well established that '[this Court does] not reach constitutional questions unless absolutely required to do so to dispose of the matter before [it].'" (*People v. Leonard* (1983) 34 Cal.3d 183, 187, quoting *De Lancie v. Superior Court* (1982) 31 Cal.3d 865, 877.) Moreover, any ambiguity in the statutory language must be resolved in favor of a constitutional interpretation of SB 6. (*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 346.)

Under this interpretation of SB 6, the Petition must be denied because the harm that Petitioners seek to avoid is illusory.[21]

---

[20] Petitioners claim that the Superior Court "held that SB 6 imposes a 'party-preference ban.'" (Pet. at p. 26-27.) This is a misrepresentation of the Superior Court order. Petitioners never tendered to the Respondent Superior Court the issue of the proper construction the SB 6 provisions concerning the inclusion of a party preference designation on the ballot.

[21] Petitioners' argument that Interveners are "judicially estopped" from arguing this point implicitly acknowledges that if Petitioners' interpretation of SB 6 is rejected their petition must be rejected too. However, Petitioners' reliance on that doctrine is misplaced. For judicial estoppel to apply, "the seemingly conflicting positions 'must be clearly inconsistent *so that one necessarily excludes the other*.'" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 182, quoting *Coleman v. Southern Pacific Co.*

VI.

THE BALANCE OF HARDSHIPS TIPS SHARPLY AGAINST A PRELIMINARY INJUNCTION.

While the "harm" with which Petitioners are threatened is "insubstantial"[22] and "slight,"[23] Interveners *and the public interest* face grave harm if a preliminary injunction issues, suspending the Top Two Primary Act to let it languish in the Legislature hoping that its political opponents will devise a "fix" to SB 6. First of all, Proposition 14 was opposed by virtually the entire political establishment in Sacramento. (See Maldonado Decl. [Exhibit A hereto], ¶ 5.) California's voters adopted Proposition 14 for the purpose of reforming their dysfunctional government, to:

- "Reduce gridlock by electing the best candidates to state office and Congress, regardless of political party;
- "Give independent voters an equal voice in primary elections; and
- "Elect more practical individuals who can work together for the common good."

(Interveners' RJN, Exhibit B, Rebuttal To Argument Against Proposition 14, page 19.)

An injunction against Proposition 14 will frustrate the purpose. Judicial restraint is warranted here, where the Court is faced with a government reform measure and an injunction will place in the hands of a hostile Legislature the power to decide

---

(1956) 141 Cal.App.2d 121, 128.) Believing that SB 6 does not limit ballot labels to qualified parties does not "necessarily exclude" the conclusion that doing so would be constitutional, or vice versa.

[22] *Libertarian Party, supra*, 28 Cal.3d at pp. 542 and 545.

[23] *Lightfoot, supra*, 964 F.2d at p. 871.

whether Proposition 14 is ever implemented. (*Legislature v. Eu, supra,* 54 Cal.3d at pp. 511-12 [holding that to invalidate a voter-enacted legislative reform measure, term limits, threatened to "insulate the Legislature from any severe reform measures directed at that branch . . . ."].) As noted above, and detailed in Intervener Maldonado's accompanying declaration, Proposition 14 was opposed by nearly the entire political class in Sacramento. Granting an injunction would leave future implementation of Proposition 14 entirely at the tender mercies of that political class, effectively rendering the People's reform dead letter.

Second, Proposition 14 gives unaffiliated/DTS voters new constitutional rights to participate in primary elections. An injunction would deprive 3.4 million independent voters (represented by Intervener CAIVP) of their newly-won constitutional rights. (See Decl. of David Takashima in Support of Intervention, filed Aug. 17, 2010 [attached hereto as Exhibit D], ¶¶ 1-2, 4-5 and 7-12.)

Third, Proposition 14 gives many voters who *are* registered with the qualified parties new rights as well. Under the pre-Proposition 14 system, in districts heavily dominated by one party (*e.g.,* Democrats in San Francisco, Republicans in Orange County), voters of the other parties often had no meaningful opportunity to participate in the electoral process; the election was decided in the dominant party's primary, in which voters registered with other parties could not vote. (See §§ 2151, 13102; Maldonado Decl. [Exhibit A], ¶ 11.) Proposition 14 gives those voters the ability to cast a meaningful ballot in the primary, giving them the prospect of actually affecting elections. Enjoining enforcement of Proposition 14 would again relegate these voters to insignificant status.

And finally, an injunction against Proposition 14 would deprive candidates who are not affiliated with qualified parties of the ability to participate in the primary election. The only way for such candidates to have their name placed on the general election ballot would be to proceed as an independent candidate, with signature and timing requirements that are far more burdensome than the requirements of Proposition 14.[24]

VII.

PETITIONERS' EXTREME REQUEST TO HAVE SB 6 ENJOINED IN ITS ENTIRETY, AND PROPOSITION 14 DECLARED INOPERATIVE, IS WHOLLY UNJUSTIFIED, EVEN IF THERE WERE MERIT TO THEIR CLAIM.

Even if Petitioners' strained interpretation was accepted, and their claim deemed to have merit, they still would not be entitled to the extreme form of relief sought below. Given the significant public interests supporting enforcement of Proposition 14, the use of the finest judicial scalpel is warranted; Petitioners' requested relief is the judicial equivalent of a chainsaw.

"The scope of available preliminary relief is necessarily limited by the scope of relief likely to be obtained at trial on the merits." (*Common Cause of Cal. v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 442.) "[A] judicial remedy must be tailored to the harm at issue. [Citations.] A court should always strive for the least disruptive remedy adequate to its legitimate task." (*Butt, supra,* 4 Cal.4th at p.

[24] Compare § 8062 [65 to 100 signatures required to seek nomination of qualified party for statewide office] *with* § 8400 [1% of registered voters statewide—currently 173,041 voters—must sign nomination papers for an independent candidate to run statewide]; see also § 8403(a)(1) [only 60 days to collect signatures on independent nomination papers for statewide office].)

696; *O'Connell, supra,* 141 Cal.App.4th at pp. 1473-82 [reversing preliminary injunction against enforcement of allegedly unconstitutional statute as overly-broad and insufficiently tailored to the constitutional violation alleged].)

In this proceeding Petitioners challenge only one minor provision of SB 6, and do not challenge Proposition 14 itself at all. Even in the highly unlikely event that Petitioners were ultimately to prevail on the merits of their claim concerning this collateral provision, the harms they have alleged can be easily addressed without disrupting the overall enforcement of Proposition 14 or SB 6, including by severing the challenged restriction.

Petitioners' claim that the party label restrictions are not severable from the remainder of SB 6 is just wrong. (See Pet. at pp. 56-57.) This Court has prescribed three criteria for severability: "the invalid provision must be grammatically, functionally and volitionally separable." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821.)

As to the volitional requirement, the intent of the enacting body is the touchstone of the severance. (*Schenley Affiliated Brands Corp. v. Kirby* (1971) 21 Cal.App.3d 177, 199.) SB 6 contains an express severability clause:

> If any provision of this measure, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining provisions shall not be affected, but shall remain in full force and effect, and to this end the provisions of this measure are severable. The Legislature declares that this measure, and each section, subdivision, sentence, clause, phrase, part, or portion thereof, would have been passed irrespective of the fact that any one or more sections, subdivisions, sentences, clauses, phrases, parts, or portions is found to be invalid. If any provision of this measure is held invalid as applied to any person or circumstance, such

invalidity does not affect any application of this measure that can be given effect without the invalid application.

(SB 6, § 65.) The courts have held that the presence of such a clause is "persuasive evidence of the enacting body's intent to permit severance." (*Schenley Affiliated Brands, supra*, 21 Cal.App.3d at p. 199; see also *Calfarm Ins. Co., supra*, 48 Cal.3d at p. 821.)

As to the grammatical and functional requirements, severability is also clear in this case; the allegedly offensive provision could easily be carved out of SB 6, leaving the overall enforcement of Proposition 14 intact. At no point in these proceedings have Petitioners ever even attempted to argue that the "grammatical" and "functional" severability criteria are not met.

VIII.

THE COURT SHOULD BE AWARE THAT IT HAS NOT RECEIVED A COMPLETE AND ACCURATE RECORD OF RELEVANT PLEADINGS IN THE PROCEEDINGS BELOW.

Given the significance of the decision that this Court is being asked to make, and the speed with which it is being asked to make it, the Court should be aware that a full and accurate record of the relevant proceedings below has not been provided. Interveners have had less than a week to review the record and brief this opposition,[25]

[25] Petitioners filed their Petition herein on the Wednesday before Thanksgiving and then served it by "snail mail." Interveners received the mailed service copies on the following Monday, November 29. Though the custom in this case among the parties since day one has been courtesy service of briefs and documents by e-mail, Petitioners did not provide the Petition by e-mail, nor did they advise Interveners by telephone e-mail that the Petition had even been filed.

but even during that short time a number of defects have become apparent.

The most important of these defects relate to the record. California Rule of Court 8.486(b) requires that a petition for writ of mandate in this Court be accompanied by—among other things—"All documents and exhibits submitted to the trial court supporting and opposing the petitioner's position." However, Petitioners have omitted critical documents filed by Interveners in the trial court: they have excluded declarations by Intervener Abel Maldonado, CIVP officer David Takashima, and Yes on 14 Chair Allan Zaremberg. These declarations contain critical factual background relating to the purposes and history of Proposition 14, and are relevant to questions relating to the merits and the balance of hardships.[26] Indeed, Interveners cited them in connection with those issues in the superior court, in opposing Petitioners' motion for preliminary injunction. Interveners submit these missing documents herewith, as Exhibits A, B and D hereto.[27]

---

[26] In contrast to these sworn declarations, submitted to the trial court under penalty of perjury, Petitioners seek to rely on hearsay statements contained in numerous newspaper articles for which they seek judicial notice. (See Request for Judicial Notice In Support of Motion to Intervene by Michael Chamness, filed herein Nov. 24, 2010, Exhibits A, B E, F, G & L.) Interveners hereby object to having these newspaper articles judicially noticed. Judicial notice of these articles would be improper—the mere fact of their publication is irrelevant to this action, and the truth of the contents thereof is not susceptible to judicial notice. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1141 fn. 6.)

[27] Petitioners omitted these declarations from the record accompanying their petition for writ in the Court of Appeal as well, and Interveners objected to exclusion at that time and provided copies thereof to the Court of Appeal as a supplemental record, bound with Interveners' preliminary opposition. Petitioners have

Similarly, Petitioners have omitted a critical exhibit from the Declaration of Sean Welch (Petitioners' Exhibit 5). As discussed above, Petitioners rely on two e-mails from the Secretary of State to Intervener Maldonado in a meritless attempt to establish that the Secretary has "conceded" that the party label statutes are unlawful. Both of those e-mails were attached as exhibits to Mr. Welch's declaration, filed below, yet Petitioners have included only one of them in the record. The second e-mail is provided herewith, in Exhibit C hereto.

Nor is the omission of documents the only defect in the record. Documents included in the booklets of Exhibits to Petition for Writ of Mandate are miscopied. As just one example, beginning with page 5, the odd-numbered pages of the Verified First Amended Complaint (Petitioners' Exhibit 4) and its attachments are omitted. And the exhibits are not tabbed, nor the pages "consecutively numbered," as required by the Rule of Court 9.486(c)(1)(A) and (B), making the record very difficult to review and use. Where documents have attachments, they are not identified on the Table of Contents as required by Rule of Court 8.486(c)(1)(C).

Again, Interveners are providing supplemental records in an effort to aid the Court, but they have had but a short time to review the record, and may not have identified every defect therein. Given the monumental step Petitioners ask this Court to make—invalidating a major, landmark reform adopted by the voters—a full

---

included the preliminary opposition, but inexplicably removed these critical declarations from Interveners' brief.

record should be provided so that an informed decision can be made.[28]

IX.
CONCLUSION.

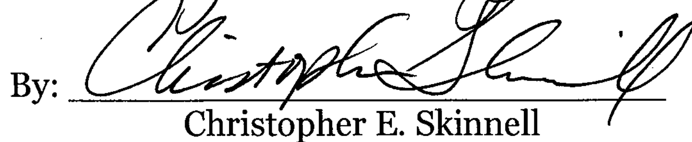
There is no justification for a writ to issue in this case. The petition should be denied, the upcoming special elections should be allowed to proceed as the voters intended, under the new "Top Two Open Primary" law, Proposition 14, and pending appeal should proceed in due course.

Respectfully submitted,

December 6, 2010

NIELSEN, MERKSAMER, PARRINELLO, MUELLER & NAYLOR, LLP

By:
Marguerite Mary Leoni

By: 
Christopher E. Skinnell

Attorneys for Interveners/Real Parties
ABEL MALDONADO, YES ON 14–CALIFORNIANS FOR AN OPEN PRIMARY, & CALIFORNIA INDEPENDENT VOTER PROJECT

---

[28] Rule of Court 8.486(b)(4) expressly provides, "If the petitioner does not submit the required record or explanations or does not present facts sufficient to excuse the failure to submit them, the court may summarily deny a stay request, the petition, or both."

CERTIFICATION OF BRIEF LENGTH

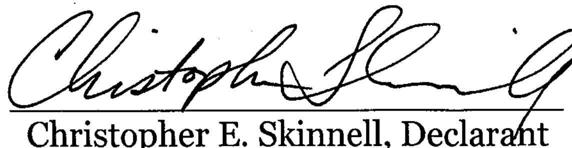
Christopher E. Skinnell, Esq., declares:

1. I am licensed to practice law in the State of California, and am one of the attorneys of record for Intervener/Real Parties in Interest ABEL MALDONADO, YES ON 14 – CALIFORNIANS FOR AN OPEN PRIMARY, and CALIFORNIA INDEPENDENT VOTER PROJECT in this action. I make this declaration to certify the word length of the Intervener/Real Parties' Preliminary Opposition to Petition for Writ of Mandate.

2. I am familiar with the word count function within the Microsoft Word software program by which this Preliminary Opposition was prepared. Applying the word count function to the Preliminary Opposition, I determined and hereby certify pursuant to California Rules of Court, Rule 8.204, that this Preliminary Opposition contains 10,533 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and of my own personal knowledge except for those matters stated on information and belief and, as to those matters, I believe them to be true. If called as a witness, I could competently testify thereto.

Executed on December 6, 2010, at San Rafael, California.



Christopher E. Skinnell, Declarant

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within cause of action. My business address is, 2350 Kerner Blvd., Suite 250, San Rafael, California 94901.

On December 6, 2010, I caused the foregoing document described as **INTERVENER/REAL PARTIES' PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE; SUPPLEMENTAL RECORD** to be served on the individuals listed below as follows:

See attached Service List	

_x_ **BY U.S. MAIL:** By following ordinary business practices and placing for collection and mailing at 2350 Kerner Blvd., Suite 250, San Rafael, California 94901, a true copy of the above-referenced document(s), enclosed in a sealed envelope; in the ordinary course of business, the above documents would have been deposited for first-class delivery with the United States Postal Service the same day they were placed for deposit, with postage thereon fully prepaid.

_x_ **BY ELECTRONIC SERVICE:** By transmitting by email to the above party(ies) at the above email addresses.

Executed in San Rafael, California, on December 6, 2010. I declare under penalty of perjury, that the foregoing is true and correct.

Keri L. Harmon

Field v. Superior Court for the County of San Francisco
No. S188436

SERVICE LIST

Gautam Dutta, Esq.
Attorney-at-Law
39270 Paseo Padre Parkway, #206
Fremont, CA 94538
(415) 236-2048
Email: dutta@businessandelectionlaw.com
(Attorney for Petitioners)

Mark Beckington, Esq.
Deputy Attorney General
Office of the Attorney General
300 South Spring St., Suite 1702
Los Angeles, CA 90013-1230
(213) 897-1096
Email: mark.beckington@doj.ca.gov
(Attorney for Real Party in Interest Debra Bowen)

Steve Mitra, Esq.
Office of the County Counsel, County of Santa Clara
70 W. Hedding St., 9th Fl., East Wing
San Jose, CA 95110-1770
(408) 299-5905
Email: steve.mitra@cco.sccgov.org
(Attorney for Real Party in Interest Jesse Durazo)

Mollie Lee, Esq.
Jonathan Givner, Esq.
Deputy City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682
(415) 554-4705
Email: mollie.lee@sfgov.org; jon.givner@sfgov.org
(Attorneys for Real Party in Interest John Arntz)

Patrice J. Salseda, Esq.
Senior Deputy County Counsel
Office of the Los Angeles County Counsel
500 West Temple Street, Rm. 652
Los Angeles, CA 90012
(213) 974-1895
Email: psalseda@counsel.lacounty.gov
(Attorney for Real Party in Interest Dean Logan)

Raymond S. Lara, Esq.
Deputy County Counsel
Office of the County Counsel
1221 Oak Street, Suite 450
Oakland, CA 94612
(510) 272-6700
Email: raymond.lara@acgov.org
(Attorney for Real Party in Interest Dave MacDonald)

Wendy J. Phillips, Esq.
Senior Deputy County Counsel
Office of the County Counsel
333 W. Santa Ana Blvd., Ste. 407
Santa Ana, CA 92702
(714) 834-6298
Email: wendy.phillips@coco.ocgov.com
(Attorney for Real Party in Interest Neal Kelley)

Kathleen A. Taylor, Esq.
Deputy County Counsel
2900 W. Burrel Ave.
Visalia, CA 93291
(559) 636-4950
Email: ktaylor@co.tulare.ca.us
(Attorney for Real Party in Interest Rita Woodard)

Clerk of the San Francisco County Superior Court
400 McAllister St., Room 103
San Francisco, CA 94102
(415) 551-4000
(Respondent)
(Via Hand-delivery & U.S. Mail Only)