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CALIFORNIA INDEPENDENT
VOTER PROJECT, ABEL
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TO DEFEND THE OPEN PRIMARY

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MICHAEL CHAMNESS, DANIEL FREDERICK and RICH WILSON

Plaintiffs,

vs.

DEBRA BOWEN, California Secretary of State and DEAN LOGAN, Los Angeles County Registrar-Recorder/County Clerk,

Defendants,

CALIFORNIA INDEPENDENT VOTER PROJECT, ABEL MALDONADO & CALIFORNIANS TO DEFEND THE OPEN PRIMARY,

Intervener-Defendants.

Case #11-cv-01479-ODW (FFMx)

INTERVENERS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

JUDGE: Hon. Otis D. Wright II
COURTROOM: 11
HEARING DATE: June 13, 2011
HEARING TIME: 1:30 p.m.

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I. INTRODUCTION.

Plaintiffs' motion for summary judgment calls to mind the aphorism attributed to Albert Einstein, that insanity is doing the same thing over and over again and expecting a different result. Faced with a ruling of this Court that already held they are unlikely to prevail on their facial and as-applied claims that the party label provisions of SB 6 are unconstitutional, Plaintiffs' approach is to double-down, reprising the same legal arguments previously rejected by this Court, without any additional evidence that would warrant an alteration to the Court's prior conclusions.

Plaintiffs once again fail to address the key cases that doom their party preference label claim, including *Libertarian Party of Cal. v. March Fong Eu,* 28 Cal. 3d 535 (1980) ("*Libertarian Party*"), and *Lightfoot v. Eu,* 964 F.2d 865 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993) ("*Lightfoot*"). These omissions are especially astonishing in light of the fact that *this Court referred to these cases as "binding" in its prior ruling denying their motion for a preliminary injunction*.

Moreover, in denying Plaintiff's prior motion for preliminary injunction, this Court held, "Plaintiff has not provided any evidence to allow the Court to distinguish why he is significantly harmed by stating that he has "No Party Preference" when he would suffer no harm by stating that he is 'Independent.' Because Plaintiff fails to present such evidence, the Court views his harm as speculative." Order Denying Plaintiff's Motion for Preliminary Injunction (Dkt. #80), pp. 17-18; *see also id*. at 14 and 19 (noting other evidentiary shortcomings in Plaintiffs' motion for preliminary injunction). Yet Plaintiffs have provided no new evidence to remedy these deficiencies. This failure is particularly significant because a party who will bear the burden of proof at trial (*i.e.*, Plaintiffs) must present affirmative *evidence* to support their claims when moving for summary judgment.

New in Plaintiffs' present motion is a claim that Plaintiff Frederick was denied his "fundamental" right to run as a write-in candidate, and that Plaintiff Wilson was denied his "fundamental" right to have a write-in vote for Plaintiff

Frederick counted. Left unmentioned, however, are controlling precedents that squarely foreclose these claims, namely *Burdick v. Takushi*, 504 U.S. 428 (1992) ("*Burdick*"), and *Edelstein v. City & County of San Francisco*, 29 Cal. 4th 164 (2002). Those cases are directly on point, expressly holding that a state may constitutionally ban write-in voting, as SB 6 does with respect to general elections for voter-nominated offices. Plaintiffs' counsel is well aware of these cases, as the San Francisco Superior Court cited them in rejecting the same claims in a parallel state court action in which he represents the plaintiffs as well. Yet Plaintiffs do not even cite *Burdick*, and they cite *Edelstein* only in passing, in a footnote, without acknowledging its holding that a ban on write-in voting is constitutional.

Though Plaintiffs purport to be concerned about the impact of the general election write-in voting ban and party label provisions of SB 6—two very minor provisions of very significant legislation that amended dozens of Elections Code sections— they ask this Court to block implementation of Proposition 14 *in its entirety* until the Legislature enacts "corrective" legislation. The trivial "defects" Plaintiffs purport to identify could never warrant such sweeping relief, even if there were any merit to them. Indeed, the sweeping relief Plaintiffs seek reveals this lawsuit for what it really is: a cynical attempt by the partisan opponents of Proposition 14 to give the Legislature—filled with other partisan opponents[1]—another opportunity to try to strangle the People's reform in its cradle. That attempt is unsupported by any evidence and lacks merit as a matter of law.

II. FACTUAL BACKGROUND.

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

Proposition 14 is one of a series of reforms adopted by California voters in an

[1] *See, e.g.*, Declaration of Abel Maldonado in Support of Intervention (Dkt. #27), ¶¶ 5-9 (hereafter "Maldonado Decl."). Interveners hereby incorporate, in support of their opposition, all documents previously filed in this action by Interveners or by Defendants or by the Court.

effort to fix their dysfunctional government, which is plagued with extreme partisanship. Not surprisingly, virtually the entire political establishment—including the leadership of both parties in the Legislature—opposed Proposition 14. *See* Maldonado Decl., *supra* note 1, ¶¶ 5-9. Nevertheless, Californians voted on June 8, 2010, to adopt Proposition 14.

Proposition 14 amended the state Constitution to replace political party primaries with a type of open primary election known as "top two," or "voter-nominated" primary election. Under the prior system, only candidates and voters registered with a qualified political party could participate in the primary elections; DTS voters and those affiliated with non-qualified parties were prohibited from participating in the primary elections.[2] Likewise, candidates who were unaffiliated with a qualified party were excluded from the primary, and were able to get their name on the general election ballot only by complying with onerous signature-gathering requirements prescribed by the "independent" nomination process found in Elections Code §§ 8300-8304, or through write-in candidacies.

Under Proposition 14, the qualified political parties no longer hold the primary nominating elections. Instead, any candidate, regardless of whether he or she is affiliated with a qualified party, may run in the primary for congressional or state elective office (now called "voter-nominated" offices). And having accorded new access to the primary election ballot for independent candidates and write-in candidates, and having simplified the ability of all candidates to participate in those elections, SB 6 then provides that only the top two vote-getters at the top-two primary election can appear on the general election ballot. (§ 8141.5.) There is no longer a separate process for "independent" nominations: (such a process is no longer necessary). Additionally SB 6 "[e]liminates the ability of voters to write-in

[2] 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. *See* Cal. Elec. Code § 2151. Other, voters who were affiliated with a non-qualified party could not participate at all.

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." Assembly Bill Analysis for Senate Bill 6 (2009-2010 Reg. Sess.), *codified at* Stats. 2009, ch. 1 ("SB 6"), p. 2, *available online at* http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sb_6_cfa_20090219_074318_asm_floor.html (last visited May 21, 2011) ("Assembly Bill Analysis"); *see also* Cal. Elec. Code §§ 8606, 8141.5.

In addition, any voter may vote at the primary election for any candidate without regard to the political party preference of either the candidate or the voter. *See* CAL. CONST. art. II, § 5 (as amended by Proposition 14); Cal. Elec. Code § 8002.5(b) (as amended by SB 6).[3] 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. *See* CAL. CONST. art. II, § 5 (as amended by Proposition 14); Cal. Elec. Code §§ 8141.5 (added by SB 6) and 15452 (as amended by SB 6). This type of top-two primary system was upheld against facial constitutional challenge by the U.S. Supreme Court in *Wash. State Grange v. Wash. Republican Party*, 552 U.S. 442 (2008), and against an as-applied constitutional challenge in *Wash. State Republican Party v. Wash. State Grange*, 2011 U.S. Dist. LEXIS 2448 (W.D. Wash. Jan. 11, 2011).

B. Prior State Court Proceedings.

As the Court is well aware, this is not the first lawsuit to challenge the constitutionality of the provisions of SB 6 (Proposition 14's implementing legislation) governing party labels on the ballot or the restrictions on write-in voting. Indeed, this is now the *fourth* court to be presented with the same challenges. The

[3] New Elections Code § 359.5, added by SB 6, defines "Voter-nominated office" to include: (1) Governor; (2) Lieutenant Governor; (3) Secretary of State; (4) State Treasurer; (5) Controller; (6) State Insurance Commissioner; (7) Member of the Board of Equalization; (8) Attorney General; (9) State Senator; (10) Member of the Assembly; (11) United States Senator; (12) Member of the United States House of Representatives.

Superior Court in San Francisco County,[4] the California Court of Appeal for the 1st Appellate District on an original writ,[5] and the California Supreme Court also on an original writ[6]—have all (rightly) denied efforts to enjoin Proposition 14 and SB 6; so did this Court, in denying Plaintiff Chamness's motion for a preliminary injunction. Currently pending before the California Court of Appeal is the Superior Court's denial of a preliminary injunction, on essentially the same claims presented here.[7]

On or about July 28, 2010, six plaintiffs (four registered voters and two congressional candidates), represented by counsel for Plaintiffs herein, brought constitutional challenges in California superior court against SB 6 and Proposition 14, claiming that (1) SB 6 is unconstitutional because it permits write-in votes to be cast yet mandates that those write-in votes be disregarded, and (2) that it is unconstitutional to limit candidates to stating a preference only for "qualified" political parties. *Field v. Bowen*, Case No. CGC-10-502018 (San Francisco Super. Ct.). As here, the plaintiffs in *Field* sought a preliminary injunction against the enforcement of Proposition 14 and SB 6 in their entirety. The trial court in *Field* properly denied that injunction, holding that (1) "it is constitutional to ban write-in voting under U.S. and California Supreme Court precedent . . . [w]hen Election Code sections 8141.5 and 8606 are read together, it is apparent that the Legislature intended to ban write-ins at the general election."; and (2) under the controlling California Supreme Court case law and federal case law it is constitutional for the State to limit party labels on the ballot to qualified parties. *See* Oct. 5, 2010 Order Denying Plaintiff's Motion for Preliminary Injunction in *Field v. Bowen*, San Francisco Superior Court, Case No. CGC-10-502018.[8]

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[4] *Field v. Bowen*, Case No. 10-502018 (San Francisco Super. Ct.).
[5] *Field v. Superior Court*, Case No. A129829 (Cal. Ct. App. 1st Dist.).
[6] *Field v. Superior Court*, Case No. S188436 (Cal.).
[7] *Field v. Bowen*, Case No. A129946 (Cal. Ct. App. 1st Dist.).
[8] This order was previously submitted to the Court as Exhibit D to the Secretary's Request for Judicial Notice in Opposition to Preliminary Injunction (Dkt. #41-5), and the Court granted

The appeal in *Field v. Bowen*, Case No. A129946 (Cal. Ct. App. 1st Dist.) is fully briefed. The parties have informed the Court that they wish to have oral argument, and are awaiting an argument schedule from the Court of Appeal.

III. PLAINTIFFS' MOTION SHOULD BE DENIED TO PERMIT DEFENDANTS AND INTERVENERS TO CONDUCT DISCOVERY.

Federal Rule of Civil Procedure 56(d), authorizes this Court deny a motion for summary judgment so that the non-moving party may seek discovery of facts to support its opposition. That would be appropriate here. This motion is premature. Both Interveners and Defendant Secretary have expressed their intention to seek discovery of Plaintiffs, following the issuance of a case scheduling order. *See* Parties' Joint Scheduling Conference Report (Dkt. #92), p. 3. Nevertheless, Plaintiffs rushed to the Court with this motion *before* a case scheduling order was even entered, and less than two weeks after discovery *could even be commenced* pursuant to Federal Rule of Civil Procedure 26(d)(1). There is no emergency that would *remotely* warrant depriving Defendants and Interveners of the opportunity to conduct discovery to defend against a summary judgment motion.

IV. PLAINTIFFS' CLAIMS THAT DEFENDANT SECRETARY HAS "CONCEDED" THE ILLEGALITY OF SB 6 ARE WITHOUT MERIT.

Plaintiffs continue to insist—as they did in their preliminary injunction motion—that Defendant Secretary of State has made a "binding party admission" that SB 6 violates the Constitution, in two e-mails from one of her staff members to a staff member in Lt. Governor Maldonado's office. *See* Motion for Summary Judgment (Dkt. #94), pp. 17-18, 23. As already discussed in Interveners' opposition to the prior motion, Plaintiffs' claims are a bald misrepresentation, and Interveners will not repeat that explanation at length here. As this Court already noted, "It is certainly disputed whether Defendant Bowen admitted that SB 6 violates the First

judicial notice thereof. For the Court's convenience, a copy is attached to this brief as well.

and Fourteenth Amendments. Indeed, while the email suggests changes to SB 6, the Court cannot find any language that constitutes such an admission." *See* Order Denying Plaintiff's Motion for Preliminary Injunction (Dkt. #80), p. 9.

V. STANDARD OF REVIEW.

A. Standard Governing Motions For Summary Judgment.

"Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." *Neb. v. Wyo.*, 507 U.S. 584, 590 (1993). *See also* Fed. R. Civ. Proc. 56(c)(2). "When the party moving for summary judgment would bear the burden of proof at trial, 'it must come forward with *evidence* which would entitle it to a directed verdict if the evidence went uncontroverted at trial.'" *C.A.R. Transp. Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (emphasis added) (quoting *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992)).

B. Substantive Standard Governing Election Law Challenges.

The United States Supreme Court has held that "when 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." *Burdick v. Takushi*, 504 U.S. 428, 434 (1991) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213-14 (1986)). Only election laws that impose a "severe" burden on voting or associational rights warrant strict scrutiny. 504 U.S. at 434.

VI. CONTROLLING UNITED STATES SUPREME COURT PRECEDENT—WHICH PLAINTIFFS HAVE REFUSED TO *EVEN CITE*—UNEQUIVOCALLY HOLDS THAT IT IS CONSTITUTIONAL TO BAN WRITE-IN CANDIDACIES AND WRITE-IN VOTING.

A. Plaintiff Frederick Had No Constitutional Right To Run As A Write-In Candidate In The AD 4 Special General Election.

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." Assembly Bill Analysis, p. 2; Elec. Code §§ 8141.5, 8606; *Field v. Bowen*, CGC-10-502018 (San Francisco Super. Ct.) (Oct. 5, 2010 order denying preliminary injunction).

The U.S. Supreme Court expressly held, in *Burdick*, that it is constitutional for a state to ban write-in voting and write-in candidacies *entirely*. SB 6, however, takes a more modulated approach, banning write-in voting and candidacies only at the *general* election for voter-nominated offices, but permitting them at the primary. Elec. Code §§ 8600, 8606 & 8141.5. Relying on *Burdick*, the California Supreme Court has upheld the constitutionality of an election system that permits write-in votes in the general election but not in the runoff—a system indistinguishable from SB 6. *Edelstein*, 29 Cal. 4th at 164. This approach allows widespread participation in the primary, but serves the legitimate "winnowing" function of the primary process, by focusing the general election on the leading candidates. *Id*. at 182; *see also Burdick*, 504 U.S. at 439; *Storer v. Brown*, 415 U.S. 724, 735 (1974).

Burdick squarely forecloses Plaintiffs' claims that: (1) Mr. Frederick had a fundamental constitutional right to run as a write-in candidate;[9] (2) Mr. Wilson had a fundamental constitutional right to cast and have counted a write-in vote for Mr. Frederick; and (3) allowing write-in candidacies and voting only in the primary is a severe burden on associational and voting rights, subject to strict scrutiny.

The United States Supreme Court in *Burdick* rejected the notion that a candidate has a fundamental right to wait until the "eleventh hour" to seek access to the ballot, or that voters have a fundamental right to vote for such a candidate. 504 U.S. at 436-39. The Court further held that where, as here, there are other adequate avenues for a candidate to attain access to the ballot, a "State's ban on write-in

[9] Curiously, Plaintiffs claim that this "constitutional" right was "conferred by Elections Code § 8601," *see* Mot. for Summ. Jud., p. 19:5-6. In fact, a right conferred by the Elections Code is not a constitutional right, but a statutory right that can be withdrawn by a subsequent statute.

voting imposes only a limited burden on voters' rights to make free choices and to associate politically through the vote." *Id*. And the Court *expressly* rejected the application of strict scrutiny to such a claim. *Id*. at 432. In sum, controlling U.S. Supreme Court case law forecloses Plaintiffs' write-in claims as a matter of law.

None of this can be a surprise to Plaintiffs. In the parallel state court action, which also challenges SB 6's write-in voting ban, the plaintiffs have acknowledged (albeit reluctantly) that a ban on write-in voting is constitutional under *Burdick* and *Edelstein.* Further, those cases were expressly cited by the San Francisco Superior Court in denying the State Court Plaintiffs' motion for preliminary injunction. The plaintiffs in the State Court Action are represented by the same attorney as the Plaintiffs in this action. Nevertheless, Plaintiffs' motion for summary judgment fails to *even cite Burdick*, much less distinguish it; the motion does contain one passing citation to *Edelstein*, in one of Plaintiffs' voluminous footnotes (p. 16, fn. 67), but that citation contains no acknowledgement that the California Supreme Court has held write-in voting may constitutionally be banned. Plaintiffs have certainly made no effort to distinguish the foregoing case law.

B. SB 6 Legally Permits Write-in Candidacies and Voting Only At The Primary Election; Plaintiff Wilson Was Not "Lured" Into Unwittingly Casting An Invalid Write-In Vote For Plaintiff Frederick At The AD 4 Special General Election On May 3, 2011.

Plaintiffs claim that by permitting write-in candidacies and voting at the primary election only, SB 6 somehow disenfranchises voters, by enticing them to cast a write-in ballot at the general election, and then discarding the ballot. This fanciful interpretation: (1) is inconsistent with the SB 6 statutory scheme, (2) is inconsistent the legislative history of SB 6, (3) is inconsistent with the authoritative interpretation of the Secretary of State, California's chief elections official, and (4) has already been rejected by the trial court in the parallel State Court Action.

New Elections Code § 8141.5 specifies who can appear on the general election ballot for a voter-nominated office. It provides, in relevant part:

> § 8141.5. ***Only*** ***the two candidates for a voter-nominated office who receive the highest and second-highest numbers of votes cast at the primary shall appear on the ballot*** as candidates for that office at the ensuing general election. … (Emphasis added.)

See also new CAL. CONST. art. II § 5(a).

With regard to write-in voting at the general election, therefore, new Electiosn Code § 8606 provides:

> § 8606. A person ***whose name has been written on the ballot as a write-in candidate*** at the general election for a voter-nominated office ***shall not be counted***. (Emphasis added.)

Considering these sections and the overall statutory scheme, the San Francisco Superior Court held, "it is constitutional to ban write-in voting under U.S. and California Supreme Court precedent . . . *[w]hen Election Code sections 8141.5 and 8606 are read together, it is apparent that the Legislature intended to ban write-ins at the general election*." *See* Exhibit A hereto; note 8, *supra*. In support of this conclusion the Court cited the Assembly Bill Analysis of SB 6, which unequivocally states that the bill "[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."

Hence, write-in voting is not permitted in the general election for voter-nominated offices: a candidate cannot legally qualify as a write-in under § 8600, discussed below, and a voter cannot scribble a name on a ballot as a purported "write-in" candidate—neither will be counted.

Moreover, it is undisputed that Plaintiff Wilson knew (or should have known), long before he ever cast it, that his write-in vote would not be counted at the AD 4 special general election. Mr. Wilson was not "lured" into unwittingly casting a write-in vote that would be discarded. Plaintiffs' counsel sent a letter to the Secretary of State on February 27, 2011 (before the special primary election was even held, on March 8), asking whether write-in candidacies and votes would be

permitted at a subsequent general election. *See* Frederick Decl. (Dkt. #96), ¶¶ 8-9; Dutta Decl. (Dkt. 99), Exh. W. The Secretary's general counsel replied on March 2 that write-in candidacies would *not* be permitted, and that write-in votes would not be counted. *See* Frederick Decl., ¶¶ 10-11; Dutta Decl., Exh. X. Plaintiff Wilson cast his ballot more than a month later—on or about April 8, 2011. *See* Wilson Decl. (Dkt. #97), ¶ 4. In other words, Plaintiff Wilson knew when he cast it that his write-in vote was not permitted at the general election, and would not be counted, but he cast it anyway, as an apparent protest against SB 6's provisions for write-in voting only at the primary election As the Supreme Court held in *Burdick*, a voter has no right to insist "that the State record, count, and publish individual protests against the election system or the choices presented on the ballot through the efforts of those who actively participate in the system." 504 U.S. at 441.

And finally, the rejection of Plaintiff Wilson's write-in vote took place pursuant to a provision of the Elections Code that pre-dated, and was not amended by, SB 6; Elections Code § 15341 already prohibited counting "protest" write-in votes for non-qualified candidates. Under that section, if a write-in candidate is not qualified under the statutory sections providing for write-in candidacies in Part 3 (commencing with Section 8600) of Division 8 of the Elections Code, no write-in vote will be counted for such candidate. Plaintiff Frederick did not qualify as a write-in candidate for the AD 4 Special General Election. No write-in candidacy at a general election for a voter-nominated office is authorized under Part 3 (commencing with Section 8600) of Division 8 of the Elections Code. Thus, no write-in vote for such an office would be counted in any event.[10]

[10] Apparently, the Secretary's staff issued a one-page memorandum in connection with the AD 4 election, advising the elections officials to provide a blank for write-in votes, and to disregard any votes cast with that blank. In light of SB 6's clear restriction on casting write-in votes, as articulated in SB 6's legislative history and the Superior Court's order denying a preliminary injunction in *Field v. Bowen*, Interveners disagree with the interpretation in that memorandum. It is not clear whether that memorandum will govern future elections as well, or

VII. PLAINTIFF CHAMNESS HAS FAILED TO ESTABLISH THE MERITS OF HIS CLAIMS REGARDING THE PARTY LABEL PROVISIONS OF SB 6.

A. The Party Ballot Label Provisions of SB 6 Are Constitutional.

In its thoroughly reasoned opinion denying Plaintiff Chamness's motion for preliminary injunction, this Court concluded that Mr. Chamness was unlikely to prevail on the merits of his claim that the party label provisions of SB 6 violate his constitutional rights. Plaintiffs have presented no new arguments, and no new evidence, that alters that conclusion. Plaintiff Chamness had no right to be identified as an "Independent" on the May 17 special election ballot.

1. Under controlling U.S. and California Supreme Court and Ninth Circuit case law, any burden on Mr. Chamness's rights is not severe, and strict scrutiny is therefore not applicable.

Plaintiffs continue to insist, without presenting any new arguments or evidence, that the burdens imposed on Mr. Chamness's rights are severe, and trigger strict scrutiny. There is no more merit to this claim now than there was several months ago, when this Court rejected the same contention. As this Court held then:

> [U.S.] Supreme Court, Ninth Circuit, and California case law suggests that refusing to allow Plaintiff to state the term "Independent" on the ballot is not a severe burden on Plaintiff's rights. *See Rubin v. City of Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002), *cert. denied*, 540 U.S. 875 (2003) (stating that a prohibition on ballot labels such as "activist" does not severely burden a candidate's First Amendment rights); *Timmons*, 520 U.S. at 364 (finding that a statute prohibiting candidates from appearing on a ballot as a candidate of more than one party does not impose a severe burden on First Amendment rights); *Lightfoot v. Eu*, 964 F.3d 865, 871 (9th Cir. 1992) (holding that requiring write-in candidates to meet certain thresholds before identifying party affiliation on the ballot was a "slight" burden); *Libertarian Party v. Eu*, 28 Cal. 3d 535, 545 (1980) (finding that

whether the interpretation contained therein will be revisited as additional elections are conducted.

> preventing a candidate from an "unqualified" party from designating his party affiliation on a ballot is a "clearly insubstantial" burden).

Order Denying Plaintiff's Motion for Preliminary Injunction (Dkt. #80), p. 12. The foregoing remains an accurate statement of the applicable case law. Particularly relevant are *Libertarian Party* and *Lightfoot*.

In *Libertarian Party*, the California Supreme Court unanimously held that the burden imposed by the statutes limiting ballot labels to qualified parties and denying candidates not affiliated with qualified parties the ballot label of their choice was "insubstantial." 28 Cal. 3d at 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." *Id*. at 545. Likewise here, Plaintiff was not precluded from telling voters of his preference for the "Coffee Party," or his "independence" from the qualified parties, in campaign mailings and other publicity, including the official ballot pamphlet, websites, press interviews, e-mails, etc.

Following the lead of *Libertarian Party*, the Ninth Circuit in *Lightfoot v. Eu* held that the burden of limiting the use of party labels on the ballot was "slight." 964 F.2d at 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 439, and that accordingly "the State need not establish a compelling interest to tip the constitutional scales in its direction." *Id*. (emphasis added).[11]

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[11] As Interveners have previously noted, 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

Several other federal circuit courts have likewise rejected claims just like Plaintiff's—that a State is constitutionally-obligated to permit candidates to list their preferred party label on the ballot. *See Schrader v. Blackwell*, 241 F.3d 783 (6th Cir.), *cert. denied*, 534 U.S. 888 (2001); *McLaughlin v. No. Carolina Bd. of Elec.*, 65 F.3d 1215 (4th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996); *Rainbow Coalition of Okla. v. Okla. State Elec. Bd.*, 844 F.2d 740 (10th Cir. 1988). *See also Iowa Socialist Party*, 909 F.2d at 1175 (8th Cir. 1990); *Rubin*, 308 F.3d at 1008 (Ninth Circuit relying on *Schrader* to uphold statute preventing candidate from using the ballot designation "peace activist").

2. Plaintiff Chamness still fails to provide evidence to demonstrate that he will suffer any unique harm as a result of the inability to be designated "Independent" on the ballot.

This Court has already noted Plaintiff Chamness's failure to produce evidence that he will suffer any unique harm based on his inability to be identified as "Independent" on the ballot, rather than as having "No Party Preference." *See* Order Denying Plaintiff's Motion for Preliminary Injunction, pp. 14, 17-19. Yet Plaintiffs still decline to provide any such evidence, continuing to insist that such harm is established, and is "severe," as a matter of law. *See* Motion for Summary Judgment, pp. 22. For this proposition Plaintiffs cite *Rubin v. City of Santa Monica*, and its citation of *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992). There continues to be no merit to this argument. The failure to provide evidence is fatal to Plaintiffs' claim.

As this Court noted in its prior order, the plaintiffs in *Rosen* provided *extensive factual evidence*, including expert testimony, showing harm to the plaintiff based on a history of efforts by the plaintiff to identify himself in the minds of voters

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footnote recognizing its earlier application of strict scrutiny was incorrect in light of *Burdick*. *Lightfoot v. Eu*, 92 Cal. Daily Op. Service 5941, 1992 U.S. App. LEXIS 15091, *10 n.2 (9th Cir. July 6, 1992) (amending the initial *Lightfoot* decision, 964 F.2d at 871). Tellingly, however, the party label restrictions were upheld in both *Libertarian Party* and *Lightfoot*, even under that most stringent of standards, strict scrutiny.

with the "Independent" label, and based on a long discriminatory history of Ohio election laws. Order Denying Plaintiff's Motion for Preliminary Injunction, p. 14. As before, Plaintiffs provide no equivalent evidence in support of their motion.

Nor does *Rubin* work some alchemical magic on *Rosen*, turning its holding into a *per se* rule of law and freeing Plaintiffs in this action of the need to carry their burden of proof. At issue in *Rubin* was a candidate's challenge to Santa Monica's refusal to let him list "activist" as his occupation on the ballot; it had nothing whatsoever with party ballot labels. 308 F.3d at 1004. Moreover, the *Rubin* court *declined* to apply strict scrutiny, holding that the City's restriction was not a "severe" burden, and it ultimately *upheld* the City's position, concluding that the restriction was constitutional. That is certainly not a case that supports relief here.

As the Ninth Circuit held in *Rubin*, "'ballots serve primarily to elect candidates, not as forums for political expression.' . . . A ballot is a ballot, not a bumper sticker. Cities and states have a legitimate interest in assuring that the purpose of a ballot is not 'transformed … from a means of choosing candidates to a billboard for political advertising.'" 308 F.3d at 1016 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 and 365 (1997)).

Plaintiff Chamness has noted (in a footnote) that publishing his views in the official ballot pamphlet is not free; however, he fails to provide any evidence that he could not afford a ballot statement, or—even if he could not—that he lacked other means of broadcasting his platform and affiliations to voters. As *Rosen* itself demonstrates, and *Libertarian Party* supports, and as this Court previously recognized, such evidence is necessary to meet Plaintiff's burden. Indeed, in this age of widespread Internet access and social media, the cost of spreading one's views is cheaper than ever, and Mr. Chamness's affiliation with the so-called "Coffee Party" was cited in several newspaper articles; likewise, his primary

platform as a candidate—opposing Proposition 14—was noted.[12]

3. The State's important regulatory interests are more than sufficient to justify the party label provisions of SB 6.

The State's important regulatory interests are more than sufficient to justify the limited burden imposed by the party label provisions of Proposition 14.

First, the courts have recognized that the State has important—indeed, compelling—interests in establishing minimum qualifications for the parties to receive certain benefits provided by the State.[13] And that being the case, the courts—including this Court (*see* Order Denying Plaintiff's Motion for Preliminary Injunction, p. 15)—have further held that the State has a compelling interest in limiting party labels on the ballot to qualified parties, to "maintain[] the distinction between 'qualified' political parties and 'non-qualified' political organizations." *Id*. (citing *Libertarian Party*, 28 Cal. 3d at 546; *Jenness v. Fortson*, 403 U.S. 432, 442 (1971)).[14] The Court also held that the State of California has a legitimate interest in

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[12] *See, e.g., Coffee Party Hopeful Fights Runoff Law*, DAILY NEWS OF L.A. (Feb. 28, 2011), p. A2 (available on Lexis-Nexis); Bradley, *Field Faces Off Tuesday for 28th Senate District Spot, Long Beach Press-Telegram* (Feb. 12, 2011) ("Among minor party candidates, UCLA grant writer Michael Chamness, a 41-year-old Venice resident, has said he is running to draw attention to Proposition 14, the 'top two' primary law that will send the leading two vote getters in nonspecial elections to the general election, even if they are in the same party.") (available on Lexis-Nexis).

[13] *See, e.g., Libertarian Party*, 28 Cal. 3d at 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 v. Nelson*, 909 F.2d 1175, 1179-80 (8th Cir. 1990) (rejecting minor party's demand that Iowa Secretary of State maintain voter rolls for the party).

[14] *See, e.g., Libertarian Party*, 28 Cal. 3d at 546:

> 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*."

(Italics added; court's italics removed) (citing *Jenness v. Fortson*, 403 U.S. 431 (1971); *Am. Party of Texas v. White*, 415 U.S. 767, 781-788 (1974); *Christian Nationalist Party v. Jordan*, 49 Cal. 2d 448, 453 (1957)). *See also id.* at 545 ("[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.").

"avoiding confusing or misleading party preference ballot designations." *Id.*

Plaintiffs seek to contest these interests by noting that prior to the enactment of SB 6 candidates unaffiliated with a major party were permitted to identify themselves as "independent" on the ballot. *See* Plaintiffs' Motion for Summary Judgment, p. 27. While indisputably true, that ability was conferred by statute, not by the Constitution, and reflected the method by which the candidate gained access to the general election ballot, the independent nomination petition route. Now that there are no longer "independent nominations," the statute has been altered and prescribes the label "No Party Preference" instead. There is no basis for Plaintiffs' claim that the Constitution compels the continued use of "independent."

Moreover, in the context of Proposition 14 and SB 6, permitting the use of the term "independent" would be affirmatively misleading to voters and would undermine the distinction between qualified and non-qualified parties. Prior to the enactment of Proposition 14 a candidate had three paths to the general election ballot: (1) as the nominee of a qualified party; (2) as a write-in candidate pursuant to Elections Code §§ 8600-8605; and (3) by means of an independent candidacy petition. As noted in *Libertarian Party*, "Independent" referred to "candidates who qualify for the ballot by the independent nomination method . . . ." 28 Cal. 3d at 544. Under Proposition 14, however, the separate qualified party and independent nomination routes are abolished. All candidates (except write-in candidates) now qualify for the ballot by means of a candidacy petition. In other words, under Proposition 14 and SB 6, virtually all candidates are "independent" within the meaning of *Libertarian Party*, because they access the ballot independent of the political parties. Permitting some candidates to use the designation "independent" therefore risks confusing voters that others are political party nominees.

Furthermore, even under Proposition 14, the pre-existing partisan primary process is preserved with respect to candidacies for President and Vice President. In this context the term "Independent" retains its old meaning, referring to presidential

candidates seeking to access the general election ballot by independent nominating petition. Allowing the use of the term "Independent" for voter-nominated offices as well, even though the term has a different meaning, would create confusion.

Plaintiffs also urge that SB 6 undermines "party quality control" by allowing candidates to change their party registration the same day they file for office, and have that new party preference label listed on the ballot, rather than having to be registered with the party for "an extended" period before filing candidacy papers. Again, the significance of this point is unclear; Plaintiffs have not challenged the constitutionality of SB 6's amendment to Elections Code § 8001(a), which abolished the "waiting period." Moreover, Plaintiffs' argument ignores another provision of SB 6 that is expressly tailored to this very concern—Elections Code § 8121(b), which requires the Secretary of State to post, in "a conspicuous place on his or her Internet Web site," the party registration history for every candidate for state or congressional office for the ten years preceding the election. Thus, interested voters, members of the press, opposing candidates, and political parties will be able to readily determine—and, if they wish, publicize—the party registration history of each candidate for state and congressional offices and root out "imposters." Indeed, this online disclosure provides greater information to voters than is provided under current law, which only informs the public of a candidate's present party registration, and not any recent, opportunistic changes to that registration.

Nor is the Secretary's website the only safeguard against candidates "fooling" voters by misstating their partisan preferences. An additional statutory provision enacted by SB 6 also permits political parties to print a list of the candidates they endorse in the sample ballot, which is provided to *each* voter by law. (Elec. Code § 13300.) This mechanism will further protect against "imposter" candidates.

4. It is accurate to say that Plaintiff has no "party" preference.

Plaintiff continues to claim that using the label "No Party Preference" on the ballot forces him to "lie" to the voters. That label is entirely accurate. Moreover, if

he does not like it he need not use it; he may choose to leave the party preference space blank instead. Cal. Elec. Code § 13105(a).[15] Section 13105(a) provides:

> (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.

Id. (emphasis added).

If Elections Code § 13105(a) is read to limit ballot labels to "qualified parties," that is because the term "party" has a specific statutory meaning, referring only to *qualified* parties. *See* Cal. Elec. Code § 338 ("'Party' means a political party or organization that has qualified for participation in any primary election."); *but see* discussion in § VII.B below concerning an alternative interpretation.

Plaintiff apparently has no preference for any qualified political "party" as that term is defined in California law—he instead prefers the "Coffee Party," a non-qualified party.[16] It is thus perfectly correct to say he has "No Party Preference."

5. Plaintiffs continue to rely on distinguishable cases.

Despite the "binding Supreme Court and Ninth Circuit case law" holding that

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[15] The claim that Plaintiff is "forced to lie" about his party preference is bald hyperbole.

[16] 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 Feb. 7, 2011) (the six "qualified" parties are Democratic, Republican, Libertarian, Green, Peace & Freedom and American Independent).

the State need not allow candidates to use any party label they wish (see Order Denying Plaintiff's Motion for Preliminary Injunction, p. 15), Plaintiffs continue to rely on non-binding case law from other jurisdictions to support their claim that they have a "fundamental" right to use the "Independent" label, specifically: *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), *Schrader v. Blackwell*, 241 F.3d 783 (6th Cir. 2001), and two forty-year-old, pre-*Libertarian Party/Lightfoot* opinions from other states' courts, *Shaw v. Johnson*, 311 Minn. 237, 247 N.W.2d 921 (1976), and *Bachrach v. Commonwealth*, 382 Mass. 268, 415 N.E.2d 832 (1981). As this Court previously noted, Schrader "is, in fact, contrary to [Plaintiffs'] position." Order Denying Plaintiff's Motion for Preliminary Injunction, p. 13. And the remaining cases are readily distinguishable. *Id*. at 12-13.

The inapplicability of *Rosen* to this case is already discussed above.

Shaw was not a constitutional case at all, but a statutory one based on the application of Minnesota law. It is thus completely inapposite to this case.

In *Bachrach*, "the Massachusetts Legislature permitted any other word [besides 'Independent'] to be used as a designation [on the ballot], and singled out only the word 'Independent' [for restriction] resulting in what the court determined was 'invidious discrimination.'" Order Denying Plaintiff's Motion for Preliminary Injunction, p. 13. "Here, the California Legislature treats all candidates who are not affiliated with a 'qualified party' equally. The only distinction is between those belonging to 'qualified parties' and those belonging to 'non-qualified parties,' an issue that is not being challenged here. Moreover, the California Legislature has not singled out one ideology or one word for reasons of 'invidious discrimination.'" *Id*.

Libertarian Party and *Lightfoot* each held that the State may impose reasonable restrictions on the ability of candidates to identify their partisan affiliations on the ballot, limiting party designations to qualified political parties and prescribing a single label for all other candidates. The designation of "No Party Preference" is just such a designation. Plaintiff has no constitutional right to insist

on another label that is more to his taste.

6. The party-preference provisions do not violate the Elections Clause, or any other constitutional provision.

Plaintiffs also revive their claim that the party label provision of SB 6 violate the Elections Clause of the U.S. Constitution. This claim still has no merit.

Cook v. Gralike, 531 U.S. 510 (2001), the main Elections Clause case on which Plaintiffs rely, remains distinguishable for the reasons articulated by the Court in its prior order. *See* Order Denying Plaintiff's Motion for Preliminary Injunction, p. 17. "Plaintiff [still] has not presented any evidence that his ability to state "Independent" on the ballot is restricted because he supports or opposes a particular measure, bill, or proposition. Rather, it appears to be limited for legitimate State reasons – namely, the State's important regulatory and procedural interest in maintaining the distinction between 'qualified' and 'non-qualified' parties." *Id*.

The other case Plaintiffs rely on, *Anderson v. Martin*, 375 U.S. 399 (1964), also does not concern party ballot designations for candidates, which the State has a compelling interest in regulating. Indeed, *Anderson* was not even an Elections Clause case. It was an Equal Protection case in which the Supreme Court struck down a Southern state's requirement that the race of congressional candidates appear on the ballot, holding that such a requirement promoted racial discrimination—a claim Plaintiffs have never made about Proposition 14. *Id*. at 403.[17]

B. The Party Ballot Label Provisions Are Susceptible To A Construction That Would Avoid The Constitutional Question.

It is constitutional to limit ballot labels only to expressing a preference for qualified parties and prescribing the use of "No Party Preference" for all other

[17] As Interveners previously noted in their opposition to the motion for preliminary injunction, the Eleventh Circuit characterized an argument that restrictions on non-qualified party candidates, as opposed to qualified party candidates, was unconstitutional under the Elections Clause and *Cook v. Gralike* as "frivolous." *Cartwright v. Barnes*, 304 F.3d 1138, 1142 n.4 (11th Cir. 2002), *cert. denied* 538 U.S. 908 (2003).

candidates; however, there is a basis on which this constitutional dispute can be avoided, as a matter of statutory construction. Indeed, the proper interpretation of SB 6's party label provisions is currently pending before the California Court of Appeal, in *Field v. Bowen*, Case No. A129946 (Cal. Ct. App. 1st Dist.).

California 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. Indeed, those provisions can be read as *permitting* candidates who prefer non-qualified political parties to state that preference on their statement of registration, their nomination papers, and on the ballot. 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." *Id*. (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 candidacy declaration per § 8002.5(a) to be printed on the ballot.

Pursuant to Elections Code §§ 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' Request for Judicial Notice (Dkt. #39-2), Exhibit B (Marin County voter registration card).[18] Plaintiff Chamness has availed himself of this option, registering with the "Coffee Party." *See* Chamness Decl. (Dkt. #95), ¶ 3 & Exh. 1.

[18] Interveners anticipate that, as in the state court proceedings, Plaintiffs will contend that the term "party" must refer only to a "qualified" political party, citing Elections Code § 338 ("'Party' means a political party or organization that has qualified for participation in any primary election."). But Elections Code § 4 provides that the Elections Code's general definitions do not apply where "the context otherwise requires."

Interveners are aware that Defendant Secretary of State has interpreted these provisions to permit only the designation of a qualified party on the ballot. As discussed above, Interveners believe that such an interpretation is constitutional under *Lightfoot* and *Libertarian Party*.

VIII. PLAINTIFFS' 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 CLAIMS.

Even if Plaintiffs' arguments were accepted, and their claims deemed to have merit, they still would not be entitled to the extreme form of relief sought. Injunctive relief "should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). "An overbroad injunction is an abuse of discretion." *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991). Given the significant public interests supporting Proposition 14, the use of the finest judicial scalpel is warranted; Plaintiffs' requested relief is the judicial equivalent of a chainsaw.

Plaintiffs challenge only two minor provisions of SB 6, and they disclaim any challenge to the constitutionality of Proposition 14 itself. Even in the highly unlikely event that Plaintiffs were ultimately to prevail on the merits of their claims concerning these collateral provisions, 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 restrictions.

Plaintiffs' claim that the write-in and party label provisions are not severable from the rest of SB 6 is just wrong. *See* Mot. for Summ. Judgment (Dkt. #94), pp. 28-29. Whether one portion of a state statute is severable from others is a matter of state law.[19] The California Supreme Court prescribes three criteria for severability:

[19] *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996); *Valley Outdoor, Inc. v. County of Riverside*, 337 F.3d 1111, 1114 (9th Cir. 2003) (applying California law to sever unconstitutional provisions of a Riverside County ordinance).

"the invalid provision must be grammatically, functionally and volitionally separable." *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 821 (1989).

As to the volitional requirement, the intent of the enacting body is the touchstone of the severance. *Schenley Affiliated Brands Corp. v. Kirby*, 21 Cal. App. 3d 177, 199 (1971). 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 Corp.*, 21 Cal. App. 3d at 199. *See also Calfarm Ins. Co.*, 48 Cal. 3d at 821.

As to the grammatical and functional requirements, severability is also clear in this case; the allegedly offensive provisions could easily be carved out of SB 6, leaving overall enforcement of Proposition 14 intact. Plaintiffs have not even tried to argue that the "grammatical" and "functional" severability criteria are not met.

IX. PLAINTIFFS' WILLFUL FAILURE TO CITE CONTROLLING CASE LAW IS SANCTIONABLE UNDER RULE 11.

The failure of a party (and his attorney) to acknowledge or distinguish adverse controlling precedents is sanctionable under Rule 11 where, as here those precedents render the party's arguments frivolous. *See United States v. Stringfellow*, 911 F.2d 225, 226 (9th Cir. 1990); *Peregoy v. Amoco Prod. Co.*, 929 F.2d 196 (5th Cir.), *cert. denied*, 502 U.S. 864 (1991). Plaintiffs' motion is striking in its failure to confront controlling precedents of the United States and California Supreme Courts, and the

Ninth Circuit, with respect to the claims on which it seeks judgment. Plaintiffs have failed to cite *Burdick* and *Lightfoot* at all, and they have included only passing citations to *Edelstein* and *Libertarian Party v. Eu* in footnotes, making no effort whatsoever to address (much less distinguish) their application to the claims raised.

Given the history of this litigation and the parallel State Court Action, it is clear that these omissions are willful and not negligent. As noted above, those cases have been extensively briefed in both actions, and were relied upon by this Court and the Superior Court in denying motions for preliminary injunctions.

X. CONCLUSION.

Plaintiffs' claims are defective as a matter of law. Accordingly, their motion for summary judgment should be denied; judgment should be granted in favor of Defendants and Interveners, either under Federal Rule of Civil Procedure 56(f)(1)) or as a sanction under Rule 11; and Interveners should be awarded their attorney's fees and costs incurred in defending this motion. Alternatively, the motion should be denied to permit Defendants and Interveners to conduct necessary discovery to support their oppositions.

Respectfully submitted,

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