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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MICHAEL CHAMNESS, ET AL.,

Plaintiffs,

v.

DEBRA BOWEN, in only her official capacity as California Secretary of State; DEAN LOGAN, in only his official capacity as Registrar-Recorder / County Clerk of the County of Los Angeles; and DOES 1-20,

Defendants,

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

Defendants-Intervenors.

2:11-CV-01479 ODW (FFMx)

MEMORANDUM IN SUPPORT OF DEFENDANT SECRETARY OF STATE'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: June 13, 2011
Time: 1:30 p.m.
Courtroom: 11
Judge: The Hon. Otis D. Wright, II

Trial Date: January 3, 2012

Action Filed: February 17, 2011

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INTRODUCTION

In 2010 California voters approved Proposition 14, a constitutional amendment that made major changes to the State's election system.

Before Proposition 14, California conducted partisan elections for state and federal offices. That is, voters affiliated with each of California's six ballot-qualified political parties voted separate ballots in the primary election to choose a party nominee. Each party's nominee, plus any independent candidates, would then appear on a single general election ballot. The candidate getting the most votes was elected to office.

Proposition 14 adopted a "top two" or "voter-nominated" election system. In this system, all primary election voters are given the same primary ballot on which all candidates (affiliated or non-affiliated) appear. Only the top two vote-getters, regardless of affiliation, go on to the general election.

The adoption of Proposition 14 required a significant reworking of the California Elections Code. Accordingly, the Legislature adopted Senate Bill 6 (SB 6), which adds, amends, or appeals approximately 60 statutes. This action challenges two specific provisions of SB 6.

First, plaintiff Chamness, a candidate in the recent special election in California's 36th Congressional District, objects to Elections Code section 13105(a), which required that he appear on the ballot with the words "No Party Preference" after his name. He would have preferred to use the term "Independent." This is the same challenge that was presented to the Court at March's preliminary injunction hearing and it should be rejected for the same reason that preliminary injunction was denied: Plaintiff Chamness has presented no evidence that there is any significant difference between the terms "No Party Preference" and "Independent," and he offers no evidence that the use of either term will gain or lose him even one vote. As a result, there is no basis to conclude that the term "No Party Preference" imposes a significant burden on his constitutional rights.

Second, plaintiffs Frederick and Wilson object to section 8606,[1] which prohibits the counting of write-in ballots at the general election. (The structure of a top-two primary system is to allow all candidates, including write-in candidates, to compete in the primary. But, as the name suggests, only the *top two* are allowed to compete in the general. Thus write-in candidates are not permitted at the general election.) This claim ignores the fact that the Supreme Court has upheld Hawaii's complete ban on write-in voting in both primary and general elections. California's law – which permits write-in voting in primary elections – is far less restrictive than Hawaii's law. Again there is no basis to conclude that the write-in ballot provisions of SB 6 impose any significant burden on plaintiffs' constitutional rights.

For these reasons, as detailed below, plaintiffs' motion for summary judgment should be denied.

STATEMENT OF FACTS

I. FACTS RELEVANT TO THE PLAINTIFF CHAMNESS' PARTY-AFFILIATION CLAIM.

A. Treatment Of Political Parties Under California Law.

Plaintiffs contend that SB 6 denies "minor party candidates" the right to state their party preference. (Plaintiffs' Memorandum at 13, ll. 21-22.) However, this terminology has no basis in California law. The Elections Code does not distinguish between "major" and "minor" parties. Instead, California recognizes political parties that have qualified to participate in primary elections and political bodies seeking to qualify for political party status.

As defined in the Elections Code, the term "party" means "a political party or organization that has qualified for participation in any primary election." § 338. A party becomes qualified to participate in a primary election by meeting at least one of three statutory tests. § 5100. These involve polling sufficient votes at the

[1] Unless otherwise noted, all statutory references are to the California Elections Code.

preceding gubernatorial election, having sufficient voters affiliate with the party, or petitioning for qualification. *Ibid*.

On the other hand, the term "political body" is used to refer to a "group of electors desir[ing] to qualify a new political party meeting the requirements of Section 5100." § 5001. A group may qualify as a political body by electing temporary officers at a caucus or convention, selecting a party name, and filing a formal notice with the Secretary of State. *Ibid*.

Qualification of a political party under California law is not onerous. Presently there are six qualified political parties: American Independent, Democratic, Green, Libertarian, Peace and Freedom, and Republican. (Undisputed Fact (UF) #46; Waters Decl., Exh. C.) Seventeen political bodies are currently attempting to qualify for political party status. (UF #47; Waters Decl., Exh. D.)

Throughout this brief, the Secretary of State will follow the statutory definitions when referring to political parties and political bodies.

B. California Partisan Elections Before The Adoption Of Proposition 14.

Before the adoption of Proposition 14, California conducted closed primary elections for partisan offices.[2] Each party chose its nominees on a primary election ballot that listed only that party's candidates. The candidates that a party chose at the primary election "[became] its official nominees at the general election . . . and [were] identified by their party affiliation on the general election ballot." *Libertarian Party v. Eu,* 28 Cal.3d 535, 541 (1980). Under this system, a political party could not be denied "the ability to place on the general election ballot the candidate who received, at the primary election, the highest vote among that party's candidates." Cal. Const., art. II, § 5, former subd. (b).

[2] Generally speaking, partisan offices were all offices other than judicial, school, county, and municipal offices. *See* former §§ 337, 334.

In addition to party nominees, a candidate could appear on the general election ballot through the process of independent nomination by petition. § 8300 et. seq.; *see Libertarian Party v. Eu*, *supra*, 28 Cal.3d at p. 541. For a statewide office, the nomination papers of an independent candidate had to be signed by voters equal to at least one percent of the number of registered voters in the entire state for the preceding general election; for other offices, the required percentage was three percent of registered voters in the area for the preceding general election. § 8400. If a candidate qualified for the general election by means of an independent nomination, the word "Independent" would be printed on the ballot after the candidate's name instead of a party designation. Former § 13105, subd. (a); *see Libertarian Party v. Eu, supra*, 28 Cal.3d at p. 542.

C. California's Adoption Of Proposition 14 And Its "Top Two" Primary System.

In June 2010, California voters approved Proposition 14, the "Top Two Candidates Open Primary Act." More than five million votes were cast on the measure. It was adopted by a margin of 53.8 to 46.2 percent. (UF #23; Dutta Decl, Exh. S.) Proposition 14 applies to elections held after January 1, 2011. (UF #51; Waters Decl., Exh. A-11 [Proposition 14, 5th Clause].)

Proposition 14 amended the California Constitution to do away with partisan primaries for state and congressional offices. It created a "top two" primary system where all candidates for a particular office appear on the same primary ballot and only the top two, regardless of political affiliation, go on to the general election.

> All voters may vote at a voter-nominated primary election for any candidate for congressional and state elective office without regard to the political party preference disclosed by the candidate or the voter, provided that the voter is otherwise qualified to vote for candidates for the office in question. The candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office shall, regardless of party preference, compete in the ensuing general election.

Cal.Const., art. II, § 5(a).

Proposition 14 allows a congressional or state candidate for a partisan office to have "his or her political party preference, or lack of political party preference, indicated upon the ballot for the office in the manner provided by statute." Cal. Const., art. II, § 5(b). But in contrast to prior law, a political party "shall not have the right to have its preferred candidate participate in the general election for a voter-nominated office other than a candidate who is one of the two highest vote-getters at the primary election[.]" *Ibid*. In other words, candidates may state a party preference on the ballot, but candidates do not run as party nominees.

On the following page is a graph used by the California Legislative Analyst in the June 2010 ballot pamphlet to describe the effect of Proposition 14.[3]

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[3] The entire ballot pamphlet concerning Proposition 14 is attached to the Waters Declaration as Exhibit A.

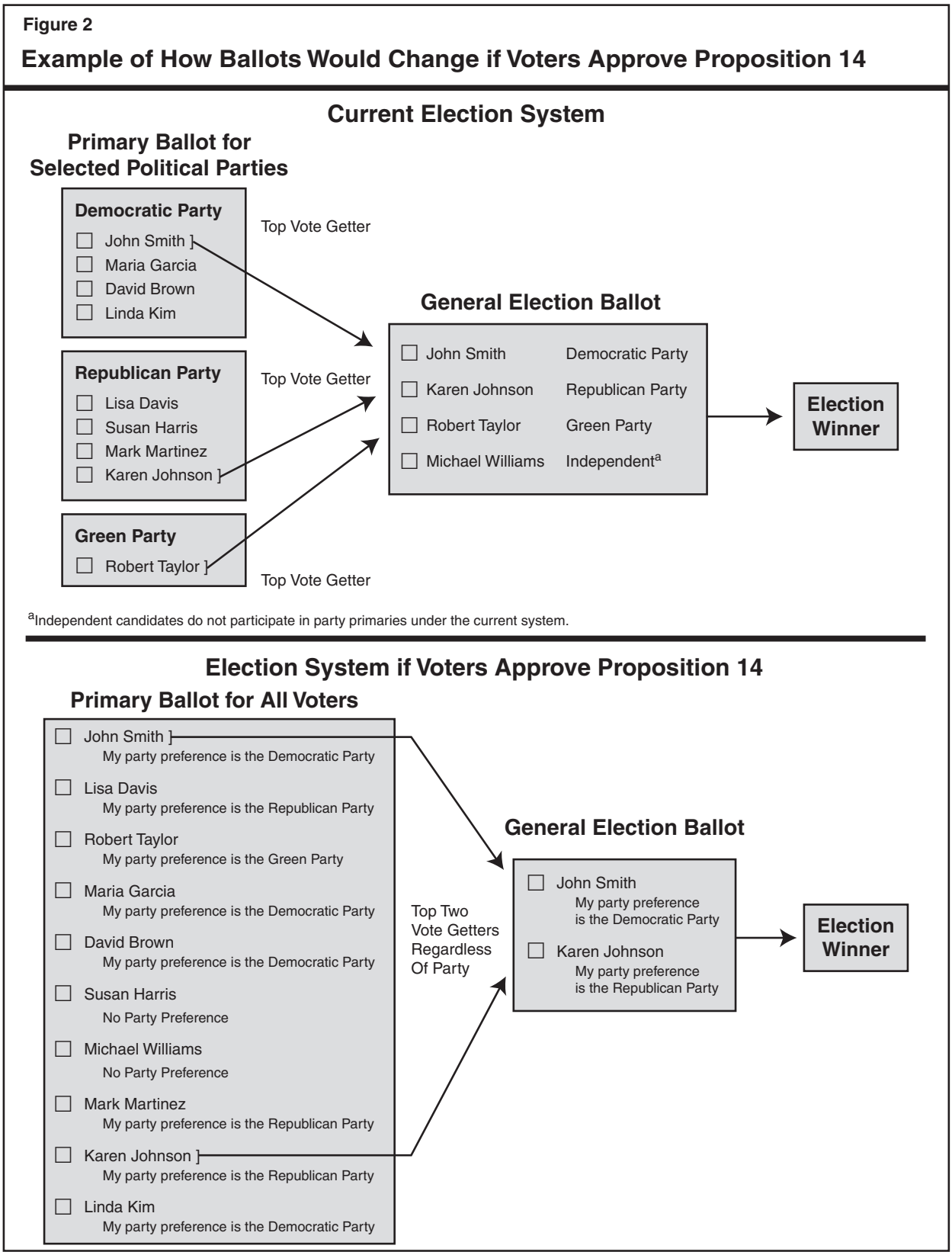
PROP 14 ELECTIONS. INCREASES RIGHT TO PARTICIPATE IN PRIMARY ELECTIONS.

ANALYSIS BY THE LEGISLATIVE ANALYST **CONTINUED**

Figure 2 illustrates how a ballot for an office might appear if voters approve this measure and shows how this is different from the current system.

Figure 2

Example of How Ballots Would Change if Voters Approve Proposition 14



D. SB 6 – The Legislation Adopted To Implement Proposition 14.

The operative provisions of Proposition 14 are only six paragraphs long. To implement Proposition 14, the Legislature enacted Senate Bill 6 (SB 6), a 21-page bill that adds, amends, or repeals approximately 60 sections of the Elections and Government Codes. (Dutta Decl., Exh. AA.) SB 6 was to become operative only if Proposition 14 was approved by the voters. (*Id*. § 67.)

As to the party preference issue presented by plaintiffs' motion for preliminary injunction, SB 6 added section 8002.5 to the Elections Code, which provides, in part:

> 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. . . . A candidate for voter-nominated office may also choose not to have the party preference disclosed upon the candidate's most recent affidavit of registration indicated upon the ballot.

§ 8002.5(a).

Additionally, section 13105 provides that a candidate's party preference may be designated on the ballot in one of three ways. First, next to or below the name shall be identified the "name of the political party designated by the candidate pursuant to Section 8002.5." § 13105(a). This designation shall be in the form, "My party preference is the _____ Party." *Ibid*. Second, "[i]f the candidate designates no political party, the phrase 'No Party Preference' shall be printed instead of the party preference identification." *Ibid*. Finally, a candidate may choose not to have his or her party preference listed on the ballot. In that case, "the space that would be filled with a party preference designation shall be left blank." *Ibid*. Because the Elections Code defines "party" as "a political party or organization that has qualified for participation in any primary election," the

Secretary of State interprets section 13105(a) to require that only the names of ballot-qualified parties can appear as a party preference on the ballot. *See* § 338 [definition of "party"].

E. The Two Special Elections Contested By Plaintiff Chamness.

Proposition 14 and SB 6 took effect January 1, 2011. Since then, a handful of special elections have been conducted under the new "top two" system. Plaintiff Chamness has been a candidate in two of those races.

On February 15, 2011, a special primary election was held in California Senate District 28, which is located in Los Angeles County. Plaintiff Chamness received 0.55% of the vote and finished last among eight candidates. (UF #48; Waters Decl., Exh. E.)

On May 17, 2011, a special election was held in CD 36, which is located in Los Angeles County. Plaintiff Chamness received 0.2% of the vote and finished sixteenth among seventeen candidates. (UF #49; Waters Decl., Exh. F.) The sample ballot for the CD 36 special election is reproduced on the following page.[4]

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/ / /

[4] The sample ballot is also attached to the Waters Declaration as Exhibit B-7.

PAGE 1

VOTER-NOMINATED OFFICES

All voters, regardless of the party preference they disclosed upon registration, or refusal to disclose a party preference, may vote for any candidate for a voter-nominated office. Voter-Nominated Offices. The party preference, if any, designated by a candidate for a voter-nominated office is selected by the candidate and is shown for the information of the voters only. It does not constitute or imply an endorsement of the candidate by the party indicated, and no candidate nominated by the qualified voters for any voter-nominated office shall be deemed to be the officially nominated candidate of any political party.

UNITED STATES REPRESENTATIVE

36TH DISTRICT SPECIAL PRIMARY ELECTION

(Unexpired term ending January 3, 2013) Vote for One

LORAINE GOODWIN Physician/Arbitrator/Teacher	My party preference is the Democratic Party	7 ➡ ○
MIKE GIN Mayor, City of Redondo Beach	My party preference is the Republican Party	8 ➡ ○
KATHERINE PILOT Longshore Office Clerk	No Party Preference	9 ➡ ○
MATTHEW ROOZEE Business Executive/Mathematician	No Party Preference	10 ➡ ○
MARIA E. MONTANO Public School Teacher	My party preference is the Peace and Freedom Party	11 ➡ ○
PATRICK "KIT" BOBKO Independent Businessman/Councilmember	My party preference is the Republican Party	12 ➡ ○
DEBRA BOWEN California Secretary of State	My party preference is the Democratic Party	13 ➡ ○
STEPHEN EISELE Businessman/Aerospace Entrepreneur	My party preference is the Republican Party	14 ➡ ○
DANIEL H. ADLER Parent/Entrepreneur/Producer	My party preference is the Democratic Party	15 ➡ ○
GEORGE NEWBERRY Businessman	My party preference is the Republican Party	16 ➡ ○
STEVE COLLETT Certified Public Accountant	My party preference is the Libertarian Party	17 ➡ ○
MICHAEL T. CHAMNESS Non-Profit Organization Consultant	No Party Preference	18 ➡ ○
MIKE WEBB City Attorney/Prosecutor	My party preference is the Republican Party	19 ➡ ○
MARCY WINOGRAD High School Teacher	My party preference is the Democratic Party	20 ➡ ○
CRAIG HUEY Small Business Owner	My party preference is the Republican Party	21 ➡ ○
JANICE HAHN Los Angeles City Councilwoman	My party preference is the Democratic Party	22 ➡ ○

PLEASE NOTE: The order in which candidates' names appear on the ballot is determined by a random drawing of the 26 letters of the alphabet. Additionally, candidates for federal, most state and some local offices change positions, or "rotate." This prevents a specific candidate's name from always appearing first, or last, on all ballots.

CONTINUE VOTING ON NEXT PAGE

II. FACTS RELEVANT TO THE WRITE-IN BALLOT CLAIMS OF OTHER PLAINTIFFS.

Plaintiffs Frederick and Wilson challenge a write-in ballot provision of SB 6. Specifically they challenge Elections Code section 8606, which states:

> 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.

Plaintiff Frederick claims that he wanted to run in the May 3, 2011 special election in California's Fourth Assembly District (AD 4), which includes part or all of Alpine, El Dorado, Placer, and Sacramento counties. (UF #50; Waters Decl., Exh. G.) Before the election, his lawyer wrote to the Secretary of State's Chief Counsel and asked that section 8606 not be enforced at the AD 4 special general election. (UF #27; Dutta Decl., Exh. W.) The request was refused:

> Finally, you ask Secretary of State Bowen, as California's chief elections officer, to disregard selected statutory requirements contained in Senate Bill 6, which was passed by the Legislature, signed by the Governor, and took effect on January 1, 2011, following voter approval of Proposition 14, the Top Two Candidates Open Primary Act, in June 2010. The Secretary of State has no intention of disregarding the California Constitution's requirement to uphold the provisions of Senate Bill 6 or any other provision of law.

(UF #28; Dutta Decl., Exh. X.)

Plaintiff Wilson cast a write-in ballot for plaintiff Frederick. (Wilson Decl., ¶ 4. At the time that he cast the ballot, he was aware that the ballot would not be counted. (UF #45; Wilson Decl., ¶ 6; Dutta Decl., Exh. X.) The ballot was not counted.

III. OTHER LITIGATION INVOLVING PLAINTIFF CHAMNESS AND HIS ATTORNEY RAISING THE SAME ISSUES RAISED HERE.

The present action is the fourth action challenging the party preference and write-in ballot provisions of SB 6. The first three actions were filed in state court.

Gautam Dutta, plaintiffs' counsel in the present federal proceeding, was also plaintiffs' counsel in the three state proceedings.

Field v. Bowen, San Francisco Superior Court No. CGC-10-502018, was filed July 28, 2010. (Waters Decl., Exh. H-1.) An order denying plaintiffs' motion for preliminary injunction was entered on October 5, 2010. (Waters Decl., Exh. I.) Regarding the write-in ballot claim, the superior court observed that "it is constitutional to ban write-in voting under U.S. and California Supreme Court precedent. (*See Burdick v. Takushi* (1992) 504 U.S. 428; *Edelstein v. City & County of San Francisco* (2002) 29 Cal.4th 164.)" (Waters Decl., Exh. I-2.) Regarding the party affiliation claim, the superior court stated that "insufficient evidence and case law support the argument that the party preference ban violates the Equal Protection Clause or the Elections Clause. *Ibid*. Plaintiffs appealed from that order and the appeal is now fully briefed. (Waters Decl., Exh. J-5 [3/24/11 entry].) On January 31, 2011, plaintiff Michael Chamness's motion to intervene in that appeal was denied. (Waters Decl., Exh. J-3.)

A petition for writ of mandate was filed in California's First Appellate District seeking immediate review of the denial of the preliminary injunction motion in the San Francisco Superior Court proceeding. On October 14, 2010, the Court of Appeal entered an order denying the writ petition. (Waters Decl., Exh. K-1.)

A second petition for writ of mandate was then filed in the California Supreme Court concerning the denial of the preliminary injunction motion in the San Francisco Superior Court proceeding. (Waters Decl., Exh. L-1.) Plaintiff Michael Chamness moved to intervene in that action. (*Ibid*.) The Court requested written opposition. (*Ibid*.) On December 15, 2011, the petition for writ of mandate and motion to intervene were denied. (Waters Decl., Exh. L-3.)

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ARGUMENT

I. STANDARD ON A MOTION FOR SUMMARY JUDGMENT

The basic standard for granting summary judgment is that the court must find there is "*no genuine dispute* as to any *material fact* and that the movant is entitled to judgment as *a matter of law*." Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial* ¶ 14:202 (The Rutter Group 2011) (quoting Fed.R.Civ.P. 56(c)(2), emphasis added by treatise). The evidence must be viewed in the light most favorable to the opposing party and all inferences are to be drawn in favor of the opposing party. *Schwarzer*, *supra*, ¶ 14.250, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "At the summary judgment stage, the nonmovant's version of any disputed fact is presumed correct." *Schwarzer*, *supra*, ¶ 14.251, *citing Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992); *McSherry v. City of Long Beach*, 584 F.3d 1129, 1135 (9th Cir. 2009).

II. SUMMARY JUDGMENT SHOULD BE DENIED ON PLAINTIFFS' CHALLENGE TO THE PARTY AFFILIATION PROVISIONS OF SB 6.

A. Plaintiffs' 1st And 14th Amendment Claims Fail Because The Party Affiliation Provisions Impose Only A Minimal Burden On Plaintiffs' Rights And Serve Important State Regulatory Interests.

The Constitution grants to the States "a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). As a practical matter, elections cannot be conducted in the absence of extensive State regulation of the election process: "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Burdick v. Takushi*, 504 U.S.

428, 433 (1992), quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974); *accord*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (hereafter *Timmons*) ["States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder"].

In election cases, the Supreme Court has developed a balancing test to accommodate both a candidate's speech rights and a State's interest in preserving fair and impartial elections. A court must "weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons, supra*, 520 U.S. at 358 (citations and internal quotations omitted). Regulations imposing severe burdens are subject to the traditional strict scrutiny test: They must be narrowly tailored and advance a compelling state interest. *Ibid*. "Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Ibid* (citations and internal quotations omitted). "This is true even when the regulations 'have the effect of channeling expressive activities at the polls.'" *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002).

Application of this balancing test is demonstrated by *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), which upheld Washington's top-two primary against a First-Amendment challenge. In the *Grange* case, Washington's top-two primary system – which allows candidates to state on the ballot a party preference – was challenged on the ground that it would lead voters to falsely assume that candidates were endorsed or approved by the named political party. *Id*. at 454. The Supreme Court rejected this assertion as "sheer speculation," noting that "[b]ecause respondents brought their suit as a facial challenge, we have no evidentiary record against which to assess their assertions that voters will be confused." *Id*. at 454-455.

Plaintiff Chamness's motion for summary judgment likewise is based on "sheer speculation." Although he refers to his claim as an as-applied challenge, the fact remains that he presents no evidence to support the conclusion that voters will be confused or put off by putting the words "No Party Preference" after his name on the ballot. Notably, he presents no survey evidence that voters find the statement "No Party Preference" to be inaccurate or pejorative. Without such evidence, plaintiff cannot carry his burden of showing that the burden on his expressive rights is severe.

Rather, in light of the overall structure of California's system of regulating elections and ballots, there is every reason to believe that voters will interpret the phrase "No Party Preference" to mean exactly what it is intended to mean: The candidate does not prefer any of the ballot-qualified parties. As set out in the Factual Statement above, the California Elections Code has long defined the term "party" to refer to a party that has qualified to participate in primary elections. § 338. At present there are six ballot-qualified parties: Green, American Independent, Libertarian, Peace & Freedom, Republican, and Democratic. California voters are accustomed to seeing these names, and no other party names, on the ballot. There is nothing in the record to suggest that voters will interpret the term "no party preference" to refer to something other than no preference for the qualified parties.

Although section 13105(a) prevents plaintiff Chamness from using his preferred term of "Independent" on the ballot, it does not "infringe 'core political speech' or favor one type of political speech over another." *See Rubin, supra*, 308 F.3d at 1015. Plaintiff remains free to support or discuss any issue he chooses. Plaintiff remains free to communicate with voters by public speeches, mailings, handbills, radio, television, internet, or otherwise. Section 13107(a)(3) allows every candidate to include on the ballot a brief designation of his current principal professions or occupation. Plaintiff Chamness chose the description "Non-profit

Organization Consultant." (Waters Decl., Exh. B-7.) Section 13307.5 gives every Congressional candidate the opportunity to place a 250-word statement in the sample ballot. There is no restriction on the content of that statement save that it cannot make reference to an opposing candidate. A candidate can use this statement to explain the nature of his affiliations, whatever they may be.

Further, section 13105(a) is viewpoint neutral. It simply preserves California's traditional distinction between those candidates affiliated with ballot-qualified parties and those that are not. Plaintiff Chamness's alleged affiliation with the "Coffee Party" could appear on the ballot if members of the "Coffee Party" met any of the statutory tests for ballot qualification, such as registering one-percent of the number of voters at the preceding gubernatorial election. § 5100(b).

In light of the above, there is no credible argument that the designation "No Party Preference" imposes a severe burden on the First Amendment rights of candidates who do not prefer one of the six political parties. *See Rubin, supra,* 308 F.3d at 1015 [prohibition on ballot labels such as "activist" does not severely burden candidate's First Amendment rights]; *Timmons*, *supra*, 520 U.S. at p. 364 [statute prohibiting candidates from appearing on ballot as candidate of more than one party does not impose severe burden on First Amendment rights]; *Schrader v. Blackwell,* 241 F.3d 783, 787 (6th Cir 2001) [statute denying party labels on the general election ballot to candidates of unqualified political parties does not impose severe burden on First Amendment rights].) Thus important regulatory interests will suffice to justify the restriction. *Timmons, supra*, 520 U.S. at 358-359 (citations and internal quotations omitted).

Here California has at least two important interests in using "No Party Preference" to describe unaffiliated candidates. First, there is a legitimate interest in maintaining the distinction between qualified political parties and non-qualified political organizations. *See Libertarian Party v. Eu*, *supra*, 28 Cal.3d at 546 ["The maintenance of the integrity of the distinction between qualified and nonqualified

parties serves a compelling state interest"]. Second, the State has an important interest in avoiding confusing or misleading party preference ballot designations. *See Norman v. Reed*, 502 U.S. 279, 290 (1992) [State has substantial interest in preventing "misrepresentation and electoral confusion," and to that end may prevent candidates from using party label if they are not affiliated with that party].

The inescapable fact is that if California is going to maintain its distinction between qualified political parties and non-qualified political organizations, some terminology will have to be used to describe candidates who do not prefer one of the qualified political parties. Plaintiff would prefer the term "Independent," but no doubt there are others who would prefer the term "No Party Preference." "Independent" is not a good choice to avoid confusion because the term could be confused with "American Independent," which is one of the six qualified political parties. Otherwise, there does not appear to be any significant difference between the two terms because in politics, an independent is by definition an individual not affiliated with a political party. There is no evidence in the record to suggest that either term is preferable to the other. There is certainly no evidence in the record to suggest that there is a constitutional distinction between the two terms.

None of the authority cited by plaintiff Chamness supports his contention that "it is unconstitutional to ban the ballot label of 'Independent.'" (Plaintiffs' Memorandum at 22, ll. 15.) *Rosen v. Brown,* 970 F.2d 169 (6th Cir. 1992), concerned an Ohio statute that prohibited unaffiliated candidates from using any ballot label, including the term "Independent." *Id.* at p. 174. The case was decided on summary judgment after plaintiff had presented three experts who testified in detail about the Ohio election system and concluded that "Ohio's ballot scheme is the equivalent of putting an unlabeled product on a shelf next to brand name products in a supermarket." *Id*. at p. 172. The district court granted summary judgment in favor of plaintiff and the Sixth Circuit affirmed, observing that the *evidence* showed that the lack of any ballot label "makes it virtually impossible for

Independent candidates to prevail in the general election." *Id*. at p. 176. The court was also influenced by the fact that the Supreme Court had earlier invalidated a series of Ohio election laws that made it "virtually impossible" for unaffiliated candidates to appear on the ballot. *Id*. at p. 177. *Rosen* was a fact-intensive decision that invalidated a state law that prevented unaffiliated candidates from using *any* ballot label. *Rosen* did not create a free-hanging fundamental right to use the ballot designation "Independent."[5]

Finally, plaintiff asserts that an unauthenticated email from an employee of the Secretary of State's staff contains a "binding admission" that "SB 6's Party Preference Ban Is Not 'Permissible'". (Plaintiffs' Memorandum at 23.) This is nonsense. As set out in Defendant's Opposition to Plaintiffs' Request for Judicial Notice, the email is inadmissible for several reasons.[6] Even if it were admitted, the document makes no admissions and simply shows that members of the Secretary of State's staff are doing their job of reviewing and commenting on new election laws.

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[5] Nor did either of the other two authorities cited for this proposition on page 22 of plaintiffs' memorandum. *Bachrach v. Secretary of the Commonwealth,* 415 N.E.2d 832 (Mass. 1981) was a fact-intensive decision concerning a Massachusetts statute that banned the use on the ballot of one term – "Independent" – and required the term "Unenrolled" if a candidate did not choose another designation. *Id*. at 833. In the context of the Massachusetts election system, the Court found that the prohibition of one particular designation was a form of "invidious discrimination" and "inherently suspect." *Id*. at 836-37. The Court was not called upon to consider a statute that does not single out one ideology and which treats equally all those not affiliated with ballot-qualified parties in the manner provided in SB 6.

Shaw v. Johnson, 247 N.W.2d 921 (Minn. 1976) is a brief per curium opinion in which the Minnesota Supreme Court considered whether use of the term "Independent" by a non-party candidate was prohibited by the state's Party Name Protection Act and whether its use would create voter confusion. *Id*. at 922. The Court found the Act inapplicable, and finding no evidence of confusion in the record, held that the particular candidate involved could use the term in the subject election. *Id*. at 922-923.

[6] The Court refused to take judicial notice of this document in its Order Denying Plaintiff's Motion for Preliminary Injunction. (Dkt. # 80 at 8-9.)

B. Plaintiffs' Elections Clause Claim Fails Because The Party Affiliation Provisions Are Impartial And Do Not Favor Or Disfavor Any Class Of Candidates.

In passing, plaintiffs argue that section 13105 violates the Election Clause of the federal constitution. (Plaintiffs' Memorandum at 24-25.) Again plaintiffs offer no evidence to support that assertion.

The Elections Clause (U.S. Const., art. I, § 4, cl. 1.) provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

"[T]he Elections Clause grants to the States 'broad power' to prescribe the procedural mechanisms for holding congressional elections." *Cook v. Gralike*, 531 U.S. 510, 523 (2001).

Plaintiffs make no credible argument that the party preference provisions of section 13105 are beyond California's "broad power" to prescribe rules for Congressional elections. Their reliance on *Cook v. Gralike* is misplaced. *Cook* concerned a provision of the Missouri Constitution that *instructed* every member of the Missouri congressional delegation to "to use all of his or her delegated powers to pass the Congressional Term Limits Amendment" set forth therein. *Id*. at 514. Those who disobeyed were to have the statement "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" printed next to their name on the ballot. Similarly, congressional candidates who did not pledge in writing to support the term limits provision were to have the statement "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed next to their name on the ballot. *Id*. at 514-515. Unsurprisingly, the Court concluded that these pejorative statements were an attempt to give binding instructions to Missouri's congressional delegation, and that the Elections Clause does not permit such binding instructions. *Id*. at 525-526.

Cook has no relevance here because section 13105 does not impose binding instructions on any candidate. Plaintiff Chamness offers no evidence that his ability to state "Independent" on the ballot is restricted because of his position on any issue. Rather the limitation is a natural consequence of California's legitimate interest in preserving the distinction between ballot-qualified parties and unqualified political organizations.

Anderson v. Martin, 375 U.S. 399 (1964), is inapposite. (See Plaintiffs' Memorandum at 25.) *Anderson* invalidated an Alabama statute that required all ballots to state the race of the candidates for elective office. *Id*. at 400. The Court bluntly stated that "The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls." *Id*. at 402. *Anderson* is irrelevant to the validity of section 13105.

III. SUMMARY JUDGMENT SHOULD BE DENIED ON PLAINTIFFS' CHALLENGE TO THE WRITE-IN BALLOT PROVISIONS OF SB 6

A. The Supreme Court's *Burdick* Decision Recognizes A State's Right To Ban Write-In Ballots In All Elections; California's Lesser Ban On Write-In Ballots In The General Election Is Clearly Valid.

In *Burdick v. Takushi*, the Supreme Court upheld Hawaii's complete ban on write-in voting in both primary and general elections. *Burdick v. Takushi*, *supra*, 504 U.S. at 430. In upholding this restriction, the Court rejected the argument that "the laws at issue here unconstitutionally limit access to the ballot by party or independent candidates or unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot." *Id*. at 434. Noting that Hawaii law provided easy access to the primary ballot, the Supreme Court found that any burden placed on voters and candidates by Hawaii's write-in vote prohibition "is a very limited one." *Id*. at 436-437.

Further, the Supreme Court found that Hawaii's interest in regulating its election process outweighed the slight burden imposed on a voter who would be unable to cast a write-in ballot. *Id*. at 439. Among other things, the state's interest

in avoiding unrestrained factionalism provided adequate justification for its ban on write-in voting. *Ibid*. The ban also promoted the two-stage, primary-general election process of winnowing out candidates. *Ibid*. Further, it avoided the problem of "party-raiding" and other political maneuvers that could enable circumvention of the primary election process. *Id.* at 439-440.

These factors apply with equal or greater force to California's ban on write-in voting in the general election for a voter-nominated office. For one thing, California law is far less restrictive than the Hawaii law upheld by the Supreme Court. Unlike the Hawaii law, which imposed a total ban on write-in voting in both the primary and the general election, section 8606 bans write-in votes only in the general election. California voters remain free to cast valid write-in ballots in the primary election. And any write-in candidate who finishes in the top two in the primary will appear on the general election ballot. § 8605(c). The burden on candidates and voters alike is far less than the already minimal burden that the Supreme Court found constitutional under the Hawaii system.

Moreover, California has identified legitimate concerns that must be weighed against the interests of voters and candidates in unrestricted write-in candidacies. In the findings and declarations accompanying Proposition 14, the voters stated that the measure was "intended to implement an open primary system in California." (Waters Decl., Exh. A-10 [Proposition 14, Second Clause, ¶ (a)].) Under this system the top two primary voter-getters "advance to a general election in which the winner shall be the candidate receiving the greatest number of votes cast in an open general election." (*Id*., ¶ (b).) Limiting write-in voting for a voter-nominated office to the primary election promotes the goal of identifying the two candidates who will compete in the general election.

Nor does the write-in vote ban interfere with plaintiffs' First Amendment rights. *Burdick* rejected a similar objection to Hawaii's more restrictive voting laws. *Burdick, supra*, 504 U.S. at 437-438. "[W]e have repeatedly upheld

reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." *Id*. at 438.

Plaintiffs' reliance on *Turner v. District of Columbia*, 77 F.Supp.2d 25 (D.D.C. 1999) is misplaced. (*See* Plaintiffs' Memorandum at 20.) *Turner* presented an extremely unusual set of facts. The District of Columbia had certified a ballot initiative to allow chronically ill patients to use marijuana. Before the election was held, but after the ballots were printed and mailed, Congress enacted an amendment to the District of Columbia Appropriations Act that prohibited federal money from being used to conduct an election to legalize marijuana. District residents voted on the medical marijuana initiative anyway because the ballots had already been printed. *Id*. at 27. The questioned presented by *Turner* was whether the votes should be counted and certified. The district Court held that the votes had to be counted because the votes had been lawfully cast. *Id*. at 33. *Turner* has no application to section 8606 because write-in votes cast in a top-two general election are not lawfully cast.

Finally, plaintiffs Frederick and Turner have no claim that they were "tricked" by section 8606. (See plaintiffs' memorandum at 18, l. 1.) By the time plaintiff Wilson cast his write-in ballot, he was aware that his vote would not be counted. (UF #45; Dutta Decl., Exh. X.) Plaintiff Frederick was also aware that he could not run as a write-in candidate at the AD 4 special general election. (UF #28; Frederick Decl., ¶ 14.) There was no trick.[7]

[7] "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." § 8606.

The effect of this ban was much discussed in the ballot pamphlet. The Rebuttal To Argument In Favor Of Proposition 14 stated "Proposition 14 will decrease voter choice. It prohibits write-in candidates in general elections." (Waters Decl., Exh. A-7.) The Argument Against Proposition 14 stated that "[t]he general election will not allow write-in candidates," and added that:

> Currently, when a rogue candidate captures a nomination, voters have the ability to write-in the candidate of their choice in the

(continued…)

Section 8606 is fully consistent with the First and Fourteenth Amendments.

CONCLUSION

For the reasons set forth above, plaintiffs' motion for summary judgment should be denied.

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Respectfully submitted,

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> general election. But a hidden provision PROHIBITS WRITE-IN VOTES from being counted in the general elections if Prop. 14 passes.
>
> That means if one of the "top two" primary winners is convicted of a crime or discovered to be a member of an extremist group, voters are out of luck because Prop. 14 ends write-in voting.

(Waters Decl., Exh. A-8, emphasis in original.)