DAN SIEGEL, SBN 56400
MICHAEL SIEGEL, SBN 269439
SIEGEL & YEE
499 14th Street, Suite 220
Oakland, California 94612
Telephone: (510) 839-1200
Telefax: (510) 444-6698

Attorneys for Plaintiffs
MICHAEL RUBIN, MANJA ARGUE, STEVE COLLETT, MARSHA FEINLAND, CHARLES L. HOOPER, KATHERINE TANAKA, C. T. WEBER, CAT WOODS, GREEN PARTY OF ALAMEDA COUNTY, LIBERTARIAN PARTY OF CALIFORNIA, and PEACE AND FREEDOM PARTY OF CALIFORNIA

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

MICHAEL RUBIN, MANJA ARGUE, STEVE COLLETT, MARSHA FEINLAND, CHARLES L. HOOPER, KATHERINE TANAKA, C. T. WEBER, CAT WOODS, GREEN PARTY OF ALAMEDA COUNTY, LIBERTARIAN PARTY OF CALIFORNIA, and PEACE AND FREEDOM PARTY OF CALIFORNIA, Plaintiffs, v. DEBRA BOWEN, in her official capacity as Secretary of State of California, Defendant.	Case No. RG11605301 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Hearing: February 7, 2012 Time: 9:00 a.m. Department: 16 Assigned for all Purposes: Judge: Hon. Lawrence John Appel Reservation Number R-1246546 Suit filed: November 21, 2011 Trial date: TBD

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I. INTRODUCTION

Plaintiffs MICHAEL RUBIN, *et al.*, ("Rubin") request a preliminary injunction to prohibit defendant DEBRA BOWEN, Secretary of State, from further enforcement of the "Top Two Candidates Open Primary Act," or Proposition 14, which has placed severe burdens on plaintiffs' fundamental rights as voters, candidates, and political parties. Since its implementation beginning January 1, 2011, Proposition 14 has violated plaintiffs' rights in at least three critical ways. First, Proposition 14 effectively denies access to the general election ballot to minor party candidates, thereby precluding minor party voters from effective political association and expression at the peak moment of the electoral process. Second, as a result of their exclusion from the general election ballot, minor political parties face dramatically increased requirements in order to qualify for subsequent elections. Third, by permitting candidates to self-select a political party "preference" without regard to party endorsement or authorization, Proposition 14 likely causes substantial and widespread voter confusion.

Rubin's motion for a preliminary injunction is made on the grounds that defendant's implementation of Proposition 14 violates plaintiffs' rights of political association and political expression as guaranteed by the First and Fourteenth Amendments of the United States Constitution and Article 1, section 2 and 3 of the California Constitution. Plaintiffs' motion is also made on the grounds that the Prop. 14 revisions to the California Constitution and Elections Code impermissibly disfavor minor political parties and minor party candidates in violation of the Elections Clause of the United States Constitution.

In order to prevent continuing and imminent harm to plaintiffs' fundamental rights as voters, candidates, and political parties, this Court should enjoin defendant from further implementation of Proposition 14.

II. STATEMENT OF FACTS

A. The Challenged Electoral Scheme Was Initiated by Intervener Maldonado, Who Refused to Vote for the 2009 California Budget Until the Legislature Placed Proposition 14 on the Ballot

Intervener-defendants acknowledge that Proposition 14 was not placed on the 2010 ballot after a petition of California voters, nor was the ballot initiative a result of a deliberative, openly-debated Legislative process. To the contrary, Proposition 14 was born during a moment of budget crisis, when then-Senator Abel Maldonado's vote was needed in order to continue funding support for public services. In exchange for his vote on a 2009 budget compromise, Senator Maldonado demanded that the Legislature place Proposition 14 on the 2010 primary ballot. (*See* Complaint in Intervention ¶6.)

B. Proponents Promised to "Open Up" Elections and Elect "More Practical Officeholders," But Did Not Disclose that Minor Parties Would Henceforth Be Excluded from General Elections

The proponents of Proposition 14 made multiple promises to voters in the Official Voter Information Guide, including:

> Proposition 14 will open up primary elections. You will be able to vote for any candidate you wish for state and congressional offices, regardless of political party preference. It will reduce the gridlock by electing the best candidates.
>
> Proposition 14 will give independent voters an equal voice in primary elections.
>
> Proposition 14 will help elect more practical officeholders who are open to compromise. ("Official Voter Information Guide," Defendant's Request for Judicial Notice in Support of Demurrer, Ex. 2 at 18.)

The Proposition 14 proponents did not disclose that minor party candidates would be effectively precluded from participation in most general elections if the Top Two Primary were implemented, or that minor political parties would face loss of ballot status as a result. The proponents also failed to disclose that individuals would now be able to self-designate a "party preference" without regard to a particular party's official endorsements. (*See* Official Voter Information Guide, *supra*.)

C. Proposition 14 Took Effect on January 1, 2011

On June 8, 2010, California voters approved Proposition 14, labeled as the "Top Two Candidates Open Primaries Act." Proposition 14 took effect in California on January 1, 2011. (Verified Complaint ¶21.) The implementation of Proposition 14 required amendments to the California Constitution which require that candidates for various state and federal offices run in a single primary election open to all registered voters, with only the top two vote-getters meeting in the general election. Cal. Const. Art. II, § 5(a). Candidates for office are permitted to designate a "preferred" political party on the ballot, and the political parties themselves have no ability to regulate which candidates designate their party as "preferred." Cal. Const. Art. II, § 5(b).

D. As a Rule, a Top-Two Primary Precludes Minor Party Candidates from Appearing on a General Election Ballot

As noted ballot access expert Richard Winger demonstrates in his declaration:

> Any election system in the United States in which all candidates from all parties run on a single ballot in the first round for office, and in which only the top two vote-getters may be on the ballot in the second round, inevitably results in a system that precludes minor party candidates from appearing in the second round. The rare exception to this rule occurs when only one major party member runs in the first round. (Expert Declaration of Richard Winger in Support of Injunctive Relief ¶10.)

Three states have adopted "top-two" electoral schemes: Louisiana, Washington, and California. Mr. Winger has tabulated and analyzed all of the "top-two" elections that have taken place in the United States. (Winger Dec. ¶¶ 10-36 and Exhs. B-J.) He identified 60 instances in which a minor party candidate has run for federal or state office in a "top-two" system, in which there were also at least two major party members running in the same race. (Winger Dec. ¶¶ 14-17 and Exhs. B, C, and D.) After reviewing all of this data, Winger concluded that:

> [A] "top-two" system . . . always results in an absence of minor party members qualifying for the second round if there were at least two major party members (Republicans or Democrats) running. (Winger Dec. ¶18.)

Winger's data includes two 2011 special elections conducted in California under the Proposition 14 "top-two" system. The results of these elections prove the rule that minor party candidates will be excluded from the general elections. (*Id.* at ¶14 and Ex. B.)

Winger also examined the history of "blanket primary" elections in Washington and California, and found that this history also supports the conclusion that a "top-two" system invariably precludes minor party candidates from the general election ballot. (*Id.* at ¶23.)

> Of course, blanket primary rules put the top vote-getter from each party into the second round. Nevertheless, there is enough similarity in the first round of blanket primary elections, and the first round of "top-two" systems, that one can use the blanket primary first round election returns to bolster the point that minor party members never place first or second in the first round, if at least two major party members are running. (Winger Dec. ¶23.)

Winger identified 718 instances in which a minor party candidate ran in a blanket primary against two major opponents (i.e., from the Democratic or Republican parties).

(Winger Dec. ¶¶ 23-31 and Exhs. G-J.) Out of 718 such elections, there are only two instances in which the minor party placed first or second. (*Id.* at ¶31.)

E. When Excluded from the General Election Ballot, Minor Parties Are Deprived of Political Association and Expression at the Most Important Moment in the Political Process

Public interest in the political process is highest during the "prime campaign season" for federal office, between September and November in even-numbered years. (Winger Dec. ¶33.) Regardless of the intentions of the Proposition 14 proponents, California cannot change the fact that public interest, in the entire nation and in the state, will always be highest during the general election period. (*Id.* at ¶34.) By depriving minor political parties the opportunity to participate in general elections, Proposition 14 has eliminated the parties' top opportunities to publicize their ideas about solutions to local and national problems. (*Id.*)

Voters who wish to support minor political parties and minor party candidates are also burdened by the implementation of Proposition 14. Over the last century, minor party candidates for Congress have received as little as 0.61% of the total votes cast to as much as 23.38% of the vote count. (*Id.* at ¶35.) In the last twelve years, the total votes cast for minor party candidates has fluctuated between 2.49% and 4.17%. (*Id.*)

Because nominees of the two major parties control the federal government and the state government in 49 out of 50 states, one of the few ways an ordinary voter may express him or herself in opposition to both major parties is by casting a vote in a congressional election for someone else. (*Id.* at ¶36.) But California's Proposition 14 system prevents voters from participating in this manner. Since January 1, 2011, it is impossible for a California voter to cast a vote for Congress, and have it tallied, without voting for someone who prefers the Democratic Party or the Republican Party.

Proposition 14 leaves California general election voters with no choices other than candidates who prefer the two major parties. (*Id.*)

F. By Blocking Access to the General Election Ballot, Proposition 14 Eliminated the Easiest Route for Minor Parties to Remain Ballot Qualified

Recognized political parties can remain ballot qualified by one of three routes. First, parties can poll two percent of the vote for any statewide race in a non-presidential (midterm) year on a general election ballot. Cal. Elections C. § 5100. Second, parties can obtain registration numbers equal to one percent of the previous gubernatorial vote. (*Id.*) Third, parties can garner petition signatures from at least 10 percent of registered voters. (*Id.*)

It is much easier for minor parties to remain ballot qualified via the first route, the two-percent-participation test, than the other two routes. (*See* Winger Dec. ¶32 and Ex. K.) In the 2010 gubernatorial election, the two percent participation threshold was just over 200,000 votes. With respect to the second route, the one-percent-registration test, a little more than 10 million people voted in the 2010 gubernatorial election. (*See* Request for Judicial Notice in Support of Injunctive Relief, Ex. 2.) That means that to maintain ballot-qualified status, a minor party must have over 100,000 registered members. (*Id.*) The third route, garnering petition signatures from 10 percent of registered voters, is an all-but-impossible hill for third parties to climb, requiring over 1,000,000 signatures. (*Id.*)

Under Proposition 14, the two-percent-participation test, the easiest mechanism for minor parties to remain ballot qualified, is effectively eliminated. Members of minor parties are rarely among the top two vote-getters in the primary election, and therefore do not proceed to the general election under Proposition 14.

G. By Permitting Candidates to Self-Identify a Party "Preference," Proposition 14 Causes Widespread Voter Confusion

Under Proposition 14, candidates are permitted to self-identify a political party "preference" that then appears on the ballot below the candidates name. (*See* Request for Judicial Notice in Support of Injunctive Relief, Ex. 1 (including sample ballot from 2011 Placer County Special Election conducted pursuant to Proposition 14 scheme).) Thus, without approval or action of any sort by the political party, the candidate decides how he or she wants to be branded.

Professor Matthew Manweller of Central Washington University conducted peer-reviewed cognitive experiments to determine the extent of voter confusion caused by Top-Two primary and general election ballots. (*See* Expert Declaration of Matthew Manweller in Support of Injunctive Relief ¶¶ 2-9 and Ex. B.) The experiments were conducted with Washington State voters, based upon a mock ballot that closely resembles the 2011 Special Election Ballot used in Placer County.

In the actual Placer County ballot, the candidates were listed as follows:

MEMBER OF STATE ASSEMBLY
4TH DISTRICT
Vote for One

- o DENNIS CAMPANALE
  My party preference is the Democratic Party
  Retired Fire Chief

- o BETH B. GAINES
  My party preference is the Republican Party
  Small business Woman

(*See* Request for Judicial Notice in Support of Injunctive Relief, Ex. 1.)

In the mock "top-two" Washington State ballot used in Professor Manweller's study, the candidates were listed as follows:

Governor
4 year term Vote for ONE

o John Smith
(Prefers Democratic Party)
o Mark Allen
(Prefers Republican Party)

(*See* Expert Declaration of Matthew Manweller in Support of Injunctive Relief ¶2 and Ex. B, at Appendix A.)

The results of Professor Manweller's experiments indicate that voters in a Top Two Primary are highly confused in terms of a perceived relationship between parties and candidates. (Manweller Dec. ¶4.) Voters are also confused, to a lesser extent, about the candidate's status in relation to the party. (*Id.*) As Professor Manweller notes:

> One major effect of the nonpartisan open primary is on the "brand" of political parties and their selected candidates. Research has shown that partisan brands are the single most powerful information cue voters have when they cast their ballots. In nonpartisan primaries, voters have less information and have more difficulty identifying candidates who hold similar values. (Manweller Dec. ¶6.)

The data collected from the experiments suggests that between one-fifth to one-third of voters misinterpret the primary election ballots in a Top Two primary election. (*Id.* at ¶7.) Of even greater concern, between one-third and one-half of such voters misinterpret the general election ballots. (*Id.*)

Furthermore, across all voter types, between 80% and 90% of respondents expressed a belief that candidates were affiliated or associated with a political party despite clear disclaimer language on the ballot informing voters that no such relationship exists. (*Id.* at ¶8.) Based on his research, Professor Manweller concluded that, "there can be no doubt that voters using a Top-Two system suffer from a significant level of voter confusion." (*Id.* at ¶9.)

III. LEGAL ARGUMENT

A. A Preliminary Injunction Should Be Granted to Protect Against Ongoing Violations of Fundamental Constitutional Rights

Code of Civil Procedure § 526(a) authorizes a Court to issue an injunction to restrain an ongoing violation of fundamental rights, or to remedy a great or irreparable injury to a party to the action. Cal. Civ. Proc. §§ 526(a)(1), (2). An injunction should be issued if a plaintiff seeking injunctive relief demonstrates a strong likelihood of success on the merits. Alternatively, in cases impacting elections, an injunction should be issued if the Court finds that plaintiff will be irreparably harmed by denial of an injunction, the balance of the hardships favors the plaintiff, and the public interest will be advanced by injunctive relief. *Gonzalez v. Arizona* (9th Cir. 2007) 485 F.3d 1041, 1051.

B. Proposition 14 Must Be Examined Under Strict Scrutiny Because it Imposes Severe Burdens on Voters, Candidates, and Political Parties

The Supreme Court applies two different standards of judicial review to ballot access restrictions. The Court applies a balancing test to "reasonable, nondiscriminatory restrictions," and the Court applies strict scrutiny to "severe restrictions." *Burdick v. Takushi* (1992) 504 U.S. 428, 434. If ballot access restrictions impose severe restrictions on ballot access, without fulfilling a compelling government interest, they should be enjoined. *See California Democratic Party v. Jones* (2000) 530 U.S. 567, 581 (holding that California's "blanket primary" system severely burdened the associational rights of political parties by denying them the right to exclude nonmembers from their candidate selection process).

1. First Severe Burden: Minor Party Candidates are Denied Access to the General Election Ballot

In reviewing the ballot access restrictions imposed by Proposition 14, the Court should look at the totality of the circumstances, taking the California electoral scheme as a whole. *See Williams v. Rhodes* (1968) 393 U.S. 23, 34. The right to vote is fundamental: "Other rights, even the most basic, are illusory if the right to vote is undermined." *Id.* at 30.

In order to protect voters' fundamental right of choice, election officials are required to grant access to the general election ballot to small political parties. *See Munro v. Socialist Workers Party* (1986) 479 U.S. 189, 193. Although states may condition a small party's access to the general election ballot upon a showing of a "modicum of support," the threshold may not exceed five percent of the electorate. *Jenness v. Fortson* (1971) 403 U.S. 431 (upholding a five percent requirement); *Lee v. Keith* (7th Cir. 2006) 463 F.3d 761 (rejecting a ten percent threshold); *Socialist Labor Party v. Rhodes* (S.D. Ohio 1970) 318 F.Supp. 1262 (rejecting a seven percent threshold). Under Proposition 14, however, defendant Bowen can deny ballot access to candidates who receive as much as 33 percent of the votes cast.[1]

As established by expert testimony, defendant has implemented a "top-two" primary system that inevitably precludes minor party candidates from appearing on the general election ballot. (*See* Winger Dec. ¶9.) So long as both major parties participate in any given election, the small parties have no opportunity to reach voters on the

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[1] This calculation is based upon a hypothetical scenario, in which three candidates run for a particular office. Under Prop. 14, if Candidate A receives 33.5 percent of the votes cast in a primary election, and Candidate B receives 33.5 percent of the votes cast, Candidate C could receive 33 percent of the votes cast and still not advance to the general election.

general election ballot. (Winger Dec. ¶17.) Because of their exclusion from the general election ballot, minor political parties are deprived of political association and expression at the most important moment in the political process. (Winger Dec. ¶¶ 33-36.)

In the totality of the circumstances, Proposition 14 places a severe burden on voter, candidate, and political party rights by denying minor party candidates access to the general election ballot. Therefore, strict scrutiny should be applied.

2. Second Severe Burden: Minor Political Parties Are Deprived of their Principal Method of Ballot Qualification

By denying minor party candidates access to the general election ballot, Proposition 14 has eliminated the easiest and most effective route for minor parties to remain ballot qualified. Up until January 1, 2011, minor parties could retain ballot status by obtaining two-percent of the votes in any statewide race during the midterm elections. Cal. Elections C. §5100. Now, parties can only remain ballot qualified if they obtain registration equal to one percent of the total midterm election vote, or if they obtain petition signatures equal to 10 percent of registered voters. (*See* Request for Judicial Notice in Support of Injunctive Relief, Ex. 2.) Based upon the Proposition 14 changes, two long-qualified parties, the Peace and Freedom Party and the Libertarian Party, face loss of ballot access. (*See* Winger Dec. ¶32 (noting that over 100,000 registered members are required to maintain ballot qualification, but the Libertarian Party has only 58,000 registered members and the Peace and Freedom Party has only 85,000 registered members).)

Although the minor political parties have not been completely deprived of the ability to qualify for subsequent ballots, the restrictions on their ballot access should be

taken as a whole. *See Williams, supra,* 393 U.S. at 34. Here, because the totality of California election laws under Proposition 14 imposes a severe burden on voting and associational rights by depriving minor political parties of their principal method of ballot qualification, strict scrutiny should be applied.

3. Third Severe Burden: Proposition 14 Likely Causes Widespread Voter Confusion

If a ballot design creates widespread voter confusion—leading voters to erroneously believe that they are selecting party nominees—then the ballots should be declared unconstitutional. *See Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, 456-57.

Stated in another way, if the design of a ballot compels association between a candidate and an unwilling political party, such that a candidate is permitted to appropriate the "brand" of a political party, the ballot should be invalided. *See Grange, supra,* 552 U.S. at 471 (Scalia, J., dissenting) (candidates should not be permitted to "appropriate the parties' trademarks . . . at the most crucial stage of election, thereby distorting the parties' messages and impairing their endorsement of candidates").

When defendant Bowen permits candidates to self-identify a party preference without party authorization, she compels an association between the candidate and the claimed party, in violation of party rights. As the majority of the U.S. Supreme Court declared in *California Democratic Party v. Jones* (2000) 530 U.S. 567:

> [A] corollary of the right to associate is the right not to associate. Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being. . . . In no area is the political association's right to exclude more important than in the process of selecting its nominee. *Jones, supra,* 530 U.S. at 574-575 (citations omitted).

The compelled association diminishes the party itself, as Professor Manweller describes: "partisan brands are the single most powerful information cue voters have when they cast their ballots." (Manweller Dec. ¶6.)

Here, Proposition 14 permits any candidate to self-select a party "preference" to appear next to his or her name on the official ballot. As common sense indicates, and as the studies conducted by Professor Manweller confirm, the average voter is likely to be highly confused, resulting in a perceived relationship between candidates and parties. (Manweller Dec. ¶4.) Some voters will likely perceive that the candidate is the official nominee of the claimed party. (*Id.*) As Professor Manweller concludes, "there can be no doubt that voters using a Top-Two system suffer from a significant level of voter confusion." (*Id.* at ¶9.)

Because the ballot under Proposition 14 likely causes voter confusion in regards to the relationship between candidates and their "preferred" political party, and because the likely confusion results in compelled association in violation of fundamental rights, Proposition 14 should be subjected to strict scrutiny.

C. Because Proposition 14 Severely Burdens Plaintiffs' Fundamental Rights, and Because the Balancing of the Harms Favors the Plaintiffs, this Court Should Grant Injunctive Relief

1. Proposition 14 Does Not Further Significant Government Interests

The interests proffered by Proposition 14 proponents do not justify abridgment of plaintiffs' fundamental rights as voters, candidates, and political parties. The Supreme Court has established that certain asserted government interests are illegitimate when individual associational rights are at risk. *See Grange, supra,* 552 U.S. at 446. The Court has specifically rejected asserted government interests such as "producing

officials who better represent the electorate" and "expanding candidate debate beyond the scope of partisan concerns." (*Id.*) Here, as in the *Grange* case, the asserted government interests include the illegitimate goal of producing "practical officeholders who are open to compromise." (*See* Defendant's Request for Judicial Notice in Support of Demurrer, Ex. 2 at 18.) To the extent that other government interests are asserted, such as the goal to "open up primary elections," these interests are far outweighed by the "closing up" of general elections—the most important moment in the political process—to minor parties, their candidates, and their supporters.

Another consideration in evaluating the government's interests is the process the government undertook prior to placing Proposition 14 on the ballot. As two Supreme Court justices have noted, the courts are not required to grant deference to the political branches of government if the political branches have not adequately weighed a policy's benefits and burdens. *See John Doe #1 v. Reed* (2010) 130 S.Ct. 2811, 2831, fn. 3 (Stevens, J., concurring).

> The degree to which we defer to a judgment by the political branches must vary up and down with the degree to which that judgment reflects considered, public-minded decisionmaking. Thus, when a law appears to have been adopted without reasoned consideration, for discriminatory purposes, or to entrench political majorities, we are less willing to defer to the institutional strengths of the legislature. 130 S.Ct. at 2831, fn.3 (citations omitted).

Here, as intervener Maldonado has disclosed, Proposition 14 was not subject to a thorough weighing of its benefits and burdens, but was instead placed on the ballot in exchange for then-Senator Maldonado's vote on a budget compromise. Because the Legislature did not fully consider Proposition 14, and because the burdens of the new electoral scheme were not disclosed to voters when they voted on the measure, this Court should not grant undue deference to the government's interests.

2. Injunctive Relief Would Protect Plaintiffs' Compelling Interests as Voters, Candidates, and Political Parties

As voters for minor political parties, plaintiffs' fundamental interests are indisputable. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims* (1964) 377 U.S. 533, 555.

> The right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates. The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens. *Anderson v. Celebreeze* (1983) 460 U.S. 780, 787-788.

Similarly, plaintiff minor political parties also have unimpeachable interests. "States may not use election regulations to undercut political parties' freedoms of speech or association." *U.S. Term Limits, Inc. v. Thornton* (1995) 514 U.S. 779, 833-834.

The Supreme Court has placed the highest importance on protecting political speech and expression. *See Citizens United v. Federal Elections Com'n* (2010) ____ U.S. ____, 130 S.Ct. 876, 895 ("As additional rules are created for regulating political speech, any speech arguably within their reach is chilled"). Plaintiffs' interests in this case are of the highest magnitude, and deserve the protection of this Court.

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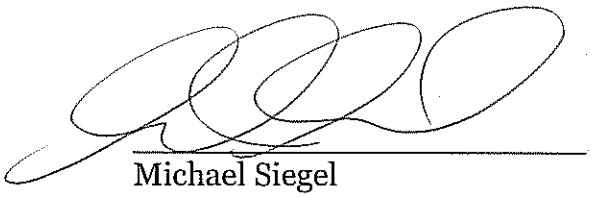
IV. CONCLUSION

Plaintiffs are now severely and irreparably injured by Proposition 14. Plaintiff small minor voters are denied the ability to effectively participate as members of their respective political parties. Plaintiff minor party candidates are denied the ability to communicate their message to general election voters. And plaintiff minor parties are denied the ability to disassociate themselves from political candidates who make false claims of political association on the very ballot itself. Plaintiffs' injuries will be redressed only if this Court declares Proposition 14 unconstitutional and enjoins defendant Bowen from further enforcement.

Dated: January 13, 2012

SIEGEL & YEE



Michael Siegel

Attorneys for Plaintiffs
MICHAEL RUBIN, *et al.*