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8 ATTORNEYS FOR AMICI CURIAE
9 RALPH NADER AND THE CENTER FOR
10 COMPETITIVE DEMOCRACY

11 CALIFORNIA SUPERIOR COURT
12
13 COUNTY OF SAN FRANCISCO
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15 MONA FIELD, RICHARD WINGER,
16 STEPHEN A. CHESSIN, JENNIFER
17 WOZNIAK, JEFF MACKLER, and
18 RODNEY MARTIN,

19 *Plaintiffs,*

20 vs.

21 DEBRA BOWEN, in only her official
22 capacity as California Secretary of State;
23 JOHN ARNTZ, in only his official
24 capacity as Director of Elections of the
25 City and County of San Francisco; DAVE
26 MACDONALD, in only his official
27 capacity as Registrar of Voters of the
28 County of Alameda; JESSE DURAZO, in
only his official capacity as Registrar of
Voters of the County of Santa Clara;
DEAN LOGAN, in only his official
capacity as Registrar-Recorder / County
Clerk of the County of Los Angeles; NEAL
KELLEY, in only his official capacity as
Registrar of Voters of the County of
Orange; RITA WOODARD, in only her
official capacity as Registrar of Voters of
the County of Tulare; and DOES 1-20;

Defendants.

CASE NO. CGC-10-502018

**RALPH NADER AND THE CENTER FOR
COMPETITIVE
DEMOCRACY'S NOTICE OF
APPLICATION AND
APPLICATION TO FILE
AMICUS BRIEF; [PROPOSED]
ORDER THEREON**

HEARING DATE: Oct. 3, 2012
HEARING TIME: 9:30 am
JUDGE: Hon. Harold E. Kahn
DEPARTMENT: 302

1 TO THE PARTIES AND COUNSEL OF RECORD:

2 *Please take notice* that on Oct. 3, 2012, 9:30 A.M. (or as soon as this matter may be heard
3 in Department 302 of California Superior Court, 400 McAllister St., San Francisco, CA 94102),
4 Ralph Nader and the Center for Competitive Democracy (“Amici”) will move the Court to give
5 them permission to file their proposed amicus brief. Counsel for Amici has already notified, via
6 telephone, counsel for Plaintiffs and Intervenor-Defendants that they will file this Application.

7
8 Amici respectfully submit this application to file the attached brief in support of Plaintiffs’
9 Motion for Reconsideration. Amici believe the order from which Plaintiffs seek reconsideration
10 represents an unprecedented misapplication of the law governing the award of attorneys’ fees in
11 public interest litigation, and that it therefore raises important issues of national significance.
12 Amici’s request is based on this Application, the accompanying Memorandum of Points and
13 Authorities, the pleadings submitted in this action, the oral argument of counsel, and any other
14 matters the Court may deem necessary and proper to consider.

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

This Court's August 1, 2012 Order (the "Order") appears to be an unprecedented misapplication of the law governing the award of attorneys' fees in public interest litigation. Without any finding that Plaintiffs' claims were frivolous or unreasonable, the Order directs them to pay nearly \$250,000 in attorneys' fees to parties who voluntarily intervened in this action challenging California's controversial "top two" primary election scheme. As such, the Order is contrary to well-settled precedent of the Supreme Court of the United States and the Supreme Court of California. The Order also violates the legal and policy principles governing the award of attorneys' fees in public interest litigation, which is intended to encourage – not penalize – parties such as Plaintiffs, who raise valid claims in an effort to protect and vindicate constitutional rights belonging not only to themselves, but also to the general public.

Interest of Amici

Amicus curiae Ralph Nader is widely recognized as the founder of the modern consumer rights movement. In 1965, the publication of Mr. Nader's book UNSAFE AT ANY SPEED, which documented the designed-in dangers of the American automobile, led to the adoption of basic safety features like seatbelts, collapsible steering columns and air bags. In an effort to discredit Mr. Nader and silence his advocacy for safer cars, General Motors Corporation ("GM") hired private investigators who followed him, tapped his telephones, and attempted to entrap him in compromising situations. Mr. Nader subsequently brought a lawsuit against GM, in which the New York Court of Appeals set a precedent by recognizing, for the first time, that "surveillance may be so 'overzealous' as to render it actionable" under the tort of invasion of privacy. *Nader v. General Motors Corp.*, 255 N.E. 2d 765, 771 (N.Y. 1970). GM settled the case, and Mr. Nader used the settlement funds to finance other impact litigation and advocacy on behalf of consumers, workers, the environment, freedom of information and other issues.

In the last four decades, Mr. Nader has founded numerous public interest organizations, which were instrumental in the establishment of federal laws and regulatory agencies that protect consumers, workers and the environment, including the Occupational Safety and Health

1 Administration (1970), the Environmental Protection Agency (1970), the National Highway
2 Traffic Safety Administration (1970), the Consumer Product Safety Commission (1972) and
3 many others. Such organizations have also brought successful litigation against unlawful and
4 abusive practices of the pharmaceutical, nuclear and automobile industries, and many others. The
5 ensuing attorneys' fees awarded to these non-profit organizations provide critical support for their
6 ongoing efforts to enforce the law and protect citizens' constitutional and statutory rights.

7 Mr. Nader's interest in this case is two-fold. First, as the founder of many non-profit
8 organizations that benefit from the award of attorneys' fees when they prevail in public interest
9 litigation, Mr. Nader opposes the imposition of attorneys' fees *against* public interest litigants
10 such as Plaintiffs. Second, as a former Green Party and independent candidate for public office,
11 Mr. Nader opposes "top two" primary election schemes like the one challenged in this case, on
12 the ground that they make it practically impossible for non-major party candidates and voters to
13 participate in the general election. Mr. Nader therefore supports Plaintiffs' effort to challenge the
14 constitutionality of California's top two primary in this case.

15 **Amicus Curiae Center for Competitive Democracy** ("CCD") is a non-partisan, non-
16 profit 501(c)(3) organization founded in 2005 to strengthen American democracy by increasing
17 electoral competition. CCD works to identify and eliminate barriers to political participation and
18 to secure free, open and competitive elections by fostering active civic engagement in the political
19 process. In furtherance of its mission, CCD engages in public outreach and education, advocacy,
20 and *pro bono* litigation challenging the constitutionality of state election laws.

21 This case is of interest to CCD because it involves a challenge to the constitutionality of
22 California's controversial top two primary election scheme. Supporters bill this scheme as an
23 "open" primary, but in fact, it effectively forecloses participation in the general election for all but
24 major party candidates. In other words, an "open" primary means a "closed" general election,
25 where only two candidates appear on the ballot. Invariably, both candidates are major party
26 nominees, as demonstrated by the results in Washington, which adopted top two in 2008, and
27 California, which did so in 2010. The two candidates might even be from the same party,
28 meaning the system potentially eliminates competition even between the two major parties. Top

1 two thus denies voters the opportunity to choose from a range of diverse ideas and agendas in the
2 general election – or even to express displeasure with the status quo.

3 CCD intends to file legal challenges to top two primary schemes that may be adopted in
4 other states. Like most non-profit public interest organizations, however, CCD cannot afford to
5 assume the risk of incurring substantial attorneys’ fees in order to pursue litigation testing the
6 constitutionality of state election laws. If this Court’s Order remains undisturbed, therefore, it will
7 have a significant chilling effect upon CCD’s ability to pursue its public interest mission, because
8 other courts may look to California for guidance in deciding such cases.

9 Discussion

10 Amici concur with the points raised by Plaintiffs in opposition to the Order, but write
11 separately because, although Amici do not reside in California, their interests will be impacted by
12 the imposition of attorneys’ fees against Plaintiffs. Amici are unaware of any case in which a
13 court has imposed attorneys’ fees against plaintiffs challenging the constitutionality of a statute,
14 absent a finding that their claims were frivolous or unreasonable. Certainly, no such case has been
15 cited. The Order thus appears to be an unprecedented misapplication of the law governing the
16 imposition of attorneys’ fees in public interest litigation, which will unavoidably chill the conduct
17 of parties who engage in such litigation nationwide. Amici therefore respectfully request that the
18 Court grant Plaintiffs’ Motion to Reconsider the Order.

19 It is a matter of settled law that courts may not impose attorneys’ fees against plaintiffs
20 who challenge the constitutionality of a statute pursuant to 42 U.S.C. § 1983, unless their claims
21 are found to be frivolous or unreasonable. *See Christiansburg Garment Co. v. EEOC*, 434 U.S.
22 412 (1978). In *Christiansburg Garment Co.*, the Supreme Court concluded that a court “may in
23 its discretion award attorney’s fees to a prevailing defendant in a Title VII case upon a finding
24 that the plaintiff’s action was frivolous, unreasonable and without foundation, even though not
25 brought in subjective bad faith.” *Id.* at 421. Two years later, the Court held that the same standard
26 applies in cases brought under Section 1983. *See Hughes v. Rowe*, 449 U.S. 5 (1980). As a result,
27 while plaintiffs who prevail in Section 1983 claims are ordinarily entitled to reasonable attorneys’
28 fees, defendants who prevail must meet a higher standard. Prevailing defendants may recover

1 attorneys' fees only if the plaintiff's action was "meritless in the sense that it is groundless or
2 without foundation." *Id.* at 14.

3 The rationale for applying a more stringent standard to defendants, the Court explained, is
4 that the imposition of attorneys' fees against plaintiffs "would substantially add to the risks
5 inhering in most litigation and would undercut the efforts of Congress to promote the vigorous
6 enforcement" of civil rights statutes by private litigants. *Id.* at 15 (quoting *Christiansburg*
7 *Garment Co.*, 434 U.S. at 422). Therefore, "the fact that a plaintiff may ultimately lose his case is
8 not in itself a sufficient justification for the assessment of fees." *Id.*

9 Similarly, the California Supreme Court has adopted a heightened standard governing the
10 imposition of attorneys' fees under Cal. Code of Civ. P. § 1021.5. *See In Re Adoption of Joshua*
11 *S.*, 70 Cal.Rptr.3d 372 (2008). Section 1021.5 entitles a plaintiff to collect attorneys' fees if,
12 among other requirements, the action "resulted in the enforcement of an important right affecting
13 the public interest." *Id.* at 378 (citation omitted). In such cases, the Court observed, the opposing
14 party liable for attorney fees is generally "the defendant person or agency sued, which is
15 responsible for initiating and maintaining actions or policies that are deemed harmful to the
16 public interest and that gave rise to the litigation." *Id.* at 380. But where attorneys' fees are sought
17 against a private litigant under Section 1021.5, the Court clarified, such fees are improper unless
18 the party's actions are found to "compromise the rights of the public or a significant class of
19 people." *Id.* at 378-80.

20 California law thus embodies the same principle enunciated by the Supreme Court with
21 respect to litigation under federal civil rights statutes: prevailing plaintiffs may be rewarded by an
22 award of attorneys' fees under Section 1021.5, but they should not be penalized by the imposition
23 of such costs if they lose, unless their action is found to be "detrimental to the public interest." *Id.*
24 at 380; *see Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th
25 603, 611-612 (Section 1021.5 "acts as an incentive for the pursuit of public interest-related
26 litigation that might otherwise have been too costly to bring.") (citation omitted).

27 In this case, the Court made no finding that Plaintiffs' claims were frivolous,
28 unreasonable, or adversely affected the public interest in any way. The Order therefore violates

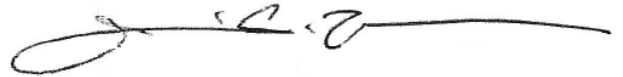
1 settled law governing the imposition of attorneys' fees in public interest litigation. Plaintiffs'
2 Motion for Reconsideration should be granted, and the Order should be vacated.

3
4 DATED: Sept. 17, 2012

5 Respectfully submitted,

6
7 LAW OFFICES OF JINA A. NAM &
8 ASSOCIATES

9 BY:

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11 JINA A. NAM, ESQ.
12 Attorneys for Amici Curiae
13 RALPH NADER AND THE CENTER
14 FOR COMPETITIVE DEMOCRACY
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ATTORNEYS FOR AMICI CURIAE
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CALIFORNIA SUPERIOR COURT

COUNTY OF SAN FRANCISCO

MONA FIELD, RICHARD WINGER,
STEPHEN A. CHESSIN, JENNIFER
WOZNIAK, JEFF MACKLER, and
RODNEY MARTIN,

Plaintiffs,

vs.

DEBRA BOWEN, in only her official
capacity as California Secretary of State;
JOHN ARNTZ, in only his official
capacity as Director of Elections of the
City and County of San Francisco; DAVE
MACDONALD, in only his official
capacity as Registrar of Voters of the
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only his official capacity as Registrar of
Voters of the County of Santa Clara;
DEAN LOGAN, in only his official
capacity as Registrar-Recorder / County
Clerk of the County of Los Angeles; NEAL
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Orange; RITA WOODARD, in only her
official capacity as Registrar of Voters of
the County of Tulare; and DOES 1-20;

Defendants.

CASE NO. CGC-10-502018

**[PROPOSED] ORDER GRANTING LEAVE
TO FILE AMICUS BRIEF**

HEARING DATE: Oct. 3, 2012
HEARING TIME: 9:30 am
JUDGE: Hon. Harold E. Kahn
DEPARTMENT: 302

1 For good cause shown, the application of Amici Curiae Ralph Nader and Center for
2 Competitive Democracy to file their Memorandum of Points and Authorities in support of
3 Plaintiffs' Motion for Reconsideration is granted.
4

5 IT IS SO ORDERED.
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7
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9 DATED: Oct. _____, 2012
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11 _____
12 HON. HAROLD E. KAHN
13 JUDGE, SUPERIOR COURT
14 COUNTY OF SAN FRANCISCO
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I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action.

Notice of Application and Application for Leave to File Amicus Brief; [Proposed] Amicus Brief; [Proposed] Order

A. Mark Beckington, Esq., Office of the Attorney General, 300 South Spring St., Suite 1702, Los Angeles, CA 90013; 213.879.1096 (attorney for Defendant Bowen).

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E. Marguerite Mary Leoni, Esq., Nielsen Merksamer, 2350 Kerner Blvd., Ste. 250, San Rafael, CA 94901; 415.389.6800 (attorney for Intervenor-Defendants).

F. Wendy J. Phillips, Esq., Office of Orange County Counsel, 333 W. Santa Ana Blvd., Ste. 407, Santa Ana, CA 92702; 714.834.6298 (attorney for Defendant Kelley).

G. Kathleen Taylor, Esq., Office of Tulare County Counsel, 2900 W. Burrell St., Visalia, CA 93291; 559.636.4950 (attorney for Defendant Woodard).

H. Brandi Moore, Esq., Office of Los Angeles County Counsel, 500 W. Temple St., Rm. 648, Los Angeles, CA 90012-2713; 213.974.1895 (attorney for Defendant Logan).

I. Gautam Dutta, Esq., 39270 Paseo Padre Pkwy. # 206, Fremont, CA 94538; 415.236.2048
(attorney for Plaintiffs)

Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelopes and placed them, postage prepaid, for collection and mailing with the U.S. Postal Service.

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

Executed on September 17, 2012, at Cerritos, California.

Andres Morales

ANDRIA MORALES