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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

MICHAEL RUBIN, et al.,

Plaintiffs,

v.

**DEBRA BOWEN, in her official capacity as
Secretary of State of California,**

Defendant.

INDEPENDENT VOTER PROJECT, et al.,

Intervener-Defendants,

Case No. RG11605301

ASSIGNED FOR ALL PURPOSES TO
JUDGE LAWRENCE JOHN APPEL

**DEFENDANT SECRETARY OF
STATE'S MEMORANDUM OF POINTS
AND AUTHORITIES IN OPPOSITION
TO MOTION FOR PRELIMINARY
INJUNCTION**

Date: February 7, 2012
Time: 9:00 a.m.
Dept: 15
Judge: Hon. Lawrence J. Appel
Trial Date: None
Filed: November 21, 2011

BY FAX

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INTRODUCTION

In the June 2010 primary election, California voters approved Proposition 14, a legislative constitutional amendment that changed the process for nominating and electing candidates for state and congressional office. Proposition 14 ended the former system of partisan primary and general elections for these offices. In its place, the measure created an open primary system in which each voter may select any state or congressional candidate in the primary election, regardless of the voter's or the candidate's party preference, and in which the top two primary votegetters then compete in the general election.

More than a year after Proposition 14 went into effect, plaintiffs seek a preliminary injunction that would force California to scrap the open primary just as the 2012 election gets underway. Plaintiffs contend that Proposition 14 will deny small political parties and their candidates access to the general election ballot, will deprive small parties of their principal method for maintaining qualified political party status, and will cause voter confusion by allowing candidates to self-designate their party preference. None of these arguments has legal or factual merit, and none supports the drastic remedy of a preliminary injunction that would upend the California political process in the midst of an election year.

To begin with, plaintiffs have not established that Proposition 14 imposes a severe burden on their ballot access rights. Small party candidates may access the primary ballot just like major party candidates. And Proposition 14 does not exclude small party candidates from the general election ballot. Voters will decide who appears on that ballot, and nothing prevents them from nominating candidates who prefer smaller parties.

Further, plaintiffs have not shown that Proposition 14 impacts political party qualification requirements to the detriment of small parties and their supporters. All political parties, including small parties, retain constitutionally sufficient means of maintaining qualified party status.

As for evidence of alleged voter confusion, plaintiffs rely almost exclusively on the declaration of an associate professor based in Washington state. But this declaration is of limited value: it does not directly assess the California elections system or examine how that system will be implemented in practice. Moreover, plaintiffs ignore provisions of the Elections Code

1 intended to inform the electorate about the open primary system and ignore steps being taken by
2 the Secretary of State and county registrars to educate the public. In the absence of contrary
3 evidence, these measures are sufficient to alleviate concerns over alleged voter confusion.

4 Separately, an injunction at this juncture would seriously disrupt the electoral process. The
5 2012 elections process is already underway. Not only do the relative harms weigh against an
6 injunction, but plaintiffs' delay warrants denial of their motion under the doctrine of laches.

7 Plaintiffs' motion is brought amid a dynamic legal environment that undermines their
8 position. In 2008, the United States Supreme Court rejected a facial challenge to Washington
9 state's top two elections system. (*Washington State Grange v. Washington State Republican*
10 *Party* (2008) 552 U.S. 442 (hereinafter "*Washington I.*") And the Ninth Circuit just upheld the
11 constitutionality of Washington's system against an as-applied challenge, rejecting arguments
12 nearly identical to those presented by plaintiffs here. (*Washington State Republican Party v.*
13 *Washington State Grange* (9th Cir. 2012) ___ F.3d ___, 2012 WL 149475 (hereinafter
14 "*Washington II.*")

15 In short, plaintiffs have not shown that they are likely to prevail on the merits or that
16 balance of the harms weighs in their favor. The motion for a preliminary injunction should be
17 denied.

18 STATEMENT OF FACTS

19 The allegations of plaintiffs' complaint, including each of plaintiffs' three alleged causes of
20 action, are summarized in the Secretary of State's demurrer, set concurrently for hearing with the
21 motion for preliminary injunction. (See Demurrer, filed December 21, 2011, pp. 4:1-5:14.)
22 Further, the demurrer summarizes Proposition 14 and its background, including differences
23 between the former partisan system and the new open primary system. (*Id.*, pp. 5:15-7:26.) In
24 the interest of judicial economy, the Secretary of State invites the Court's attention to these
25 sections of the demurrer and incorporates that information herein.

26 STANDARD OF REVIEW—INJUNCTIVE RELIEF

27 The party seeking injunctive relief bears the burden to make a prima facie showing of
28 entitlement to relief. (*Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d

1 131, 138.) In determining whether to grant a preliminary injunction, courts consider two factors:
2 (1) the likelihood that the plaintiff will prevail on the merits of its case at trial; and (2) the interim
3 harm that the plaintiff is likely to sustain if the preliminary injunction is denied compared to the
4 harm the defendant will suffer if it is issued. (*Ibid.*) Irrespective of any injury the plaintiff will
5 suffer, injunctive relief must be denied if there is no likelihood the plaintiff will prevail on the
6 merits. (*Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1252.)

7 Special restrictions apply to injunctions sought against government officials. "There is a
8 general rule against enjoining public officers or agencies from performing their duties." (*Tahoe*
9 *Keys Property Owners' Assn. v. State Water Res. Control Bd.* (1994) 23 Cal.App.4th 1459, 1471.)
10 Injunctive relief should be denied where it could cause harm to the public good. (*Cota v. County*
11 *of Los Angeles* (1980) 105 Cal.App.3d 282, 292.)

12 STANDARD OF REVIEW—ELECTIONS LAW CHALLENGES

13 The courts have recognized that states must regulate the elections process: "Common sense,
14 as well as constitutional law, compels the conclusion that government must play an active role in
15 structuring elections; 'as a practical matter, there must be a substantial regulation of elections if
16 they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the
17 democratic processes.'" (*Burdick v. Takushi* (1992) 504 U.S. 428, 433, quoting *Storer v. Brown*
18 (1974) 415 U.S. 724, 730.) "States may, and inevitably must, enact reasonable regulations of
19 parties, elections, and ballots to reduce election- and campaign-related disorder." (*Timmons v.*
20 *Twin Cities Area New Party* (1997) 520 U.S. 351, 358.)

21 As such, review of voting regulations under the United States Constitution does not
22 automatically require strict scrutiny, but instead follows a flexible balancing standard:

23 A court considering a challenge to a state election law must weigh 'the character
24 and magnitude of the asserted injury to the rights protected by the First and
25 Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise
26 interests put forward by the State as justifications for the burden imposed by its
27 rule,' taking into consideration 'the extent to which those interests make it
28 necessary to burden the plaintiff's rights.'

(*Burdick v. Takushi, supra*, 504 U.S. at p. 434, quoting *Anderson v. Celebreeze* (1983) 460 U.S.
780, 788.)

1 Under this standard, “when those rights are subjected to ‘severe’ restrictions, the regulation
2 must be ‘narrowly drawn to advance a state interest of compelling importance.’” (*Burdick v.*
3 *Takushi, supra*, 504 U.S. at p. 434, quoting *Norman v. Reed* (1992) 502 U.S. 279, 289.) “But
4 when a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’
5 upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory
6 interests are generally sufficient to justify’ the restrictions.” (*Burdick v. Takushi, supra*, 504 U.S.
7 at p. 434, quoting *Anderson v. Celebrezze, supra*, 460 U.S. at p. 788.)

8 “No bright line separates permissible election-related regulation from unconstitutional
9 infringements on First Amendment freedoms.” (*Timmons v. Twin Cities Area New Party, supra*,
10 520 U.S. at p. 359.) But “[b]ecause ‘the State’s important regulatory interests are generally
11 sufficient to justify reasonable, nondiscriminatory restrictions,’ . . . a party challenging such a
12 regulation bears a ‘heavy constitutional burden.’” (*Rubin v. City of Santa Monica* (9th Cir. 2002)
13 308 F.3d 1008, 1017.)

14 The same balancing test advanced by the United States Supreme Court in elections cases
15 has been followed by the California Supreme Court in cases arising under the California
16 Constitution: “[I]n analyzing constitutional challenges to election laws, [the California Supreme
17 Court] has followed closely the analysis of the United States Supreme Court.” (*Edelstein v. City*
18 *and County of San Francisco* (2002) 29 Cal.4th 164, 179, quoting *Canaan v. Abdelnour* (1985)
19 40 Cal.3d 703, 710.) Thus, like the federal courts, the California courts assess an election
20 regulation by determining whether it imposes a “severe restriction” on voting rights or only a
21 “limited burden” on those rights, and then weighing the interests advanced by the regulation.
22 (See *Edelstein v. City and County of San Francisco, supra*, 29 Cal.4th at pp. 182-183 [applying
23 balancing test to voting regulation challenged under California’s free speech clause].)

24 ARGUMENT

25 I. CALIFORNIA HAS LEGITIMATE, NON-DISCRIMINATORY INTERESTS THAT SUPPORT 26 THE IMPLEMENTATION OF AN OPEN PRIMARY SYSTEM.

27 As discussed in the demurrer to the complaint, Proposition 14 furthers a number of
28 legitimate state interests. (See Demurrer, filed December 21, 2011, p. 10:1-21.) Among other

1 things, it was designed to “encourage increased participation in elections” and “give[] voters
2 increased options” by enabling them to choose any candidate regardless of party preference. (*Ibid.*,
3 citing June 8, 2010 Voter Information Guide.) In addition, proponents of the measure expressed
4 the hope that it would reduce political gridlock, encourage more practical officeholders, and
5 reduce excessive partisanship. (*Ibid.*)

6 As discussed below, these legitimate, non-discriminatory interests of the state and its voters
7 are sufficient to justify the modest impact that Proposition 14 may have on the matters raised by
8 plaintiffs. Contrary to plaintiffs’ assertions, Proposition 14 does not impose severe burdens on
9 small parties and their members that must survive strict scrutiny analysis.

10 **II. PROPOSITION 14 DOES NOT UNCONSTITUTIONALLY BURDEN GENERAL ELECTION**
11 **BALLOT ACCESS BY SMALL POLITICAL PARTIES AND THEIR MEMBERS.**

12 Plaintiffs first contend that Proposition 14 will impose a severe burden on small parties and
13 their supporters by, in their words, “effectively den[ying] access to the general election ballot to
14 minor party candidates.” (Mot. for Prelim. Inj., p. 1:9-12.) Proposition 14 performs no such
15 function. Candidates affiliated with small political parties or who express no political party
16 preference have equal access to the primary election ballot and thereby have an equal opportunity
17 to qualify as one of the top two votegetters who will qualify for the general election ballot. Under
18 existing authority, this imposes at most a minimal burden on the parties and their members and
19 does not infringe on their associational or speech rights.

20 Contrary to plaintiffs’ assertion that elections officials are “required to grant access to the
21 general election ballot to small political parties,” the courts have not recognized an unfettered
22 right by political parties to this type of ballot access. (See *Washington I, supra*, 552 U.S. at pp.
23 458-459 [upholding facial constitutionality of top two elections system].) “States may condition
24 access to the general election ballot by a minor-party or independent candidate upon a showing of
25 a modicum of support among the potential voters for the office.” (*Munro v. Socialist Workers*
26 *Party* (1986) 479 U.S. 189, 193.) “States are not burdened with a constitutional imperative to
27 reduce voter apathy or to ‘handicap’ an unpopular candidate to increase the likelihood that the
28 candidate will gain access to the general election ballot.” (*Id.*, at p. 198.)

1 In *Munro*, the United States Supreme Court upheld a Washington law that required minor
2 party candidates to receive a minimum of one percent of the primary vote before advancing to the
3 general election. (*Munro v. Socialist Workers Party, supra*, 479 U.S. at pp. 196-197.) The Court
4 viewed the primary as “an integral part of the entire election process ... [that] functions to winnow
5 out and finally reject all but the chosen candidates.” (*Id.* at p. at 196, quoting *Storer v. Brown*,
6 *supra*, 415 U.S. at p. 735.) “[T]he State can properly reserve the general election ballot ‘for major
7 struggles,’ . . . by conditioning access to that ballot on a showing of a modicum of voter support.”
8 (*Ibid.*) “Thus, the State of Washington was clearly entitled to raise the ante for ballot access, to
9 simplify the general election ballot, and to avoid the possibility of unrestrained factionalism at the
10 general election.” (*Munro v. Socialist Workers Party, supra*, 479 U.S. at p. 196.)

11 Proposition 14 performs a similar function. It enables voters to choose among all
12 candidates for a state or congressional office, regardless of party, in the primary election. This
13 election then narrows the choice in the general election to one between the top two primary
14 votegetters. In effect, the measure sets up a run-off in the general election between the top two
15 primary candidates. Nothing in the State or Federal Constitution precludes a state from adopting
16 this type of electoral system. (See *Washington I, supra*, 552 U.S. at pp. 458-459.)

17 Plaintiffs assert that Proposition 14 is too onerous because it hypothetically may exclude a
18 candidate who receives as much 33 percent of the primary vote if two other candidates each
19 receive 33.5 percent of the vote. (Mot. for Prelim. Inj., p. 10:9-20.) But the cases cited by
20 plaintiffs in support of this argument consider an entirely different situation: the allowable
21 thresholds for party qualification and candidate nominations. (See *Jenness v. Fortson* (1971) 403
22 U.S. 431; *Lee v. Keith* (7th Cir. 2006) 463 F.3d 763; *Socialist Labor Party v. Rhodes* (S.D. Ohio
23 1970) 318 F.Supp. 1262.) Under plaintiffs’ scenario, the third-place candidate misses the general
24 election ballot due to insufficient support among the voters, not because of unduly onerous
25 qualification requirements imposed by the state. Plaintiffs cite no authority holding that state
26 officials must reserve a place on the general election ballot for every primary candidate who
27 exceeds a minimum vote threshold.

1 Plaintiffs suggest that the “totality of the circumstances” demonstrates a severe burden on
2 small parties but never define those circumstances. Plaintiffs do not claim that other state laws
3 combine with Proposition 14 to exclude small parties and their members from the ballot.

4 (Compare *Williams v. Rhodes* (1968) 393 U.S. 23, 30-32 [analyzing state election laws].)

5 Plaintiffs characterize the general election as “the most important moment in the political
6 process” and assert that Proposition 14 will therefore impose special burdens on small parties.
7 (See Mot. for Prelim. Inj., p. 11:1-8.) But by allowing all qualified candidates to compete in the
8 primary election, California provides sufficient access to the general election ballot and does not
9 infringe on the constitutional rights of the parties and their members. (See *Washington I, supra*,
10 552 U.S. at pp. 458-459.)

11 For evidence in support of their ballot access argument, plaintiffs rely exclusively on the
12 declaration and opinion of Richard Winger. But the Winger Declaration does little more than
13 offer historical evidence that minor party candidates have rarely reached the top two spots in
14 general elections for state and congressional office and have usually received only a small
15 percentage of the vote. (See Richard Winger Declaration, ¶¶ 10-31.) The declaration does not
16 establish that small party candidates will never reach the general election ballot under the top two
17 system. (*Ibid.*) Nor does it show that small parties will be unable to effectively participate in the
18 primary election or in the electoral process. (*Ibid.*)

19 Plaintiffs have not shown a likelihood of success on this claim. They cannot demonstrate
20 that Proposition 14 imposes a severe burden on their associational and expressive rights or that
21 any limited burden outweighs California’s interest in establishing a top two open primary system.

22 **III. PROPOSITION 14 DOES NOT VIOLATE THE RIGHTS OF SMALL PARTIES TO**
23 **MAINTAIN QUALIFIED POLITICAL PARTY STATUS.**

24 **A. California Provides Three Means for Political Groups to Qualify as**
25 **Political Parties.**

26 As used in the California Elections Code, the term “party” means “a political party or
27 organization that has qualified for participation in any primary election.” (Elec. Code, § 338.)
28 “Until a political body or group is qualified pursuant to the procedures and regulations provided
by the Legislature, it is not a *party* whose access to the ballot is secured under the provisions for

1 nomination of qualified party candidates” (*Libertarian Party v. Eu* (1980) 28 Cal.3d 535,
2 544, original emphasis [construing former law].)

3 California provides three ways for a party to qualify to participate in a primary election:
4 (1) polling at least two percent of the vote for a statewide office in the preceding gubernatorial
5 election; (2) having voters equal to at least one percent of the vote in the preceding gubernatorial
6 election declare their intention to affiliate with the party; and (3) having voters equal to at least
7 ten percent of THE preceding gubernatorial vote petition for qualified party status. (Elec. Code
8 § 5100, subs. (a), (b) & (c).) Once a party has become qualified, it “shall maintain its
9 qualification to participate in any subsequent primary election by complying with any of the
10 conditions specified in Section 5100.” (Elec. Code, § 5101, subd. (a).)

11 **B. Proposition 14 Does Not Impose a Severe Burden on Small Parties by**
12 **Reducing Methods for Political Party Qualification.**

13 Plaintiffs assert that Proposition 14 imposes a severe burden on small parties by depriving
14 them of what they view as the easiest route to qualified status—obtaining two percent of the vote
15 for a statewide office in gubernatorial elections. No court has yet to interpret the effect of
16 Proposition 14 on the two-percent rule established by Elections Code section 5100, subdivision
17 (a). But even if small parties are now unable to use this route to qualified status, Proposition 14
18 does not impose a severe burden on plaintiffs’ associational rights. They retain the other methods
19 of achieving qualified status—one percent of voters registering as party members or ten percent
20 petitioning for qualified status—and these methods satisfy constitutional concerns.

21 In *Peace and Freedom Party v. Shelley* (2004) 114 Cal.App.4th 1237, the Court of Appeal
22 rejected a similar claim under circumstances arguably more burdensome than those presented
23 here. The Peace and Freedom Party challenged the Secretary of State’s practice of not counting
24 inactive voters in determining whether the party qualified under subdivision (b) of section 5100
25 for official status. Upholding the practice, which meant that the party fell short of the number of
26 registrations needed to qualify under subdivision (b), the Court of Appeal, deciding under state
27 law that allowed “Independent” candidacies, found only a minimal burden:
28

1 PFP [Peace and Freedom Party] concedes that nothing in the relevant code
2 sections, or in the superior court's interpretation of them, prevents a candidate
3 registered as a member of PFP from being on the general election ballot. Rather,
4 PFP only was prevented from being deemed a qualified political party eligible to
5 participate in the primary election pursuant to section 5100, subdivision (b). . . .
6 [¶] And, despite the failure to participate in the primary election, an individual PFP
7 candidate could qualify to have his or her name on the general election ballot by
8 nomination [cit. omit.], with the limitation that the designation "independent,"
9 rather than the party affiliation, would be printed on the ballot by the candidate's
10 name. [Cit. omit.] . . . Requiring the candidate be identified as an independent,
11 rather than a PFP candidate, "imposes an insubstantial burden" on the
12 associational and voting rights of the candidate and the citizenry, and "serves a
13 compelling state interest to protect the integrity and stability of the electoral
14 process in California."

15 (*Peace and Freedom Party v. Shelley*, *supra*, 114 Cal.App.4th at p. 1246, first brackets added,
16 quoting *Libertarian Party v. Eu*, *supra*, 28 Cal.3d at p. 542.)

17 *Shelley's* rationale applies fully to plaintiffs' claims. Plaintiffs retain the alternate methods
18 of qualifying for ballot access. And members of qualified small parties may designate their party
19 preference on primary and general election ballots. Significantly, *Shelley* found an insubstantial
20 burden even though the Peace and Freedom Party was unable to qualify under one of the three
21 methods authorized by law. Similarly, small parties do not face a substantial burden even if they
22 are unable to qualify under subdivision (a) of section 5100.

23 Nor can it be said that the hurdles established by subdivisions (b) and (c) of section 5100
24 are objectively too high. Similar or higher percentage requirements for ballot access by
25 independent candidates and small parties have been upheld as constitutional. (*Jeness v. Fortson*,
26 *supra*, 403 U.S. at pp. 439-440 [state law requiring political body to receive 20 percent of vote to
27 achieve ballot status and requiring independent candidate or candidate of nonqualified small party
28 to submit nominating petition signed by five percent of registered voters]; *American Party of
Texas v. White* (1974) 415 U.S. 767, 782 [state law requiring parties to show support from
electors equal to at least one percent of the gubernatorial vote in last election].) "[T]he State's
admittedly vital interests are sufficiently implicated to insist that political parties appearing on the
general ballot demonstrate a significant, measurable quantum of community support." (*American
Party of Texas v. White*, *supra*, 415 U.S. at p. 782.)

1 Plaintiffs once again misplace their reliance on the Winger Declaration. The declaration
2 merely shows small parties have rarely finished among the top two votegetters in past elections.
3 (Richard Winger Declaration, ¶¶ 32-35.) It does not show that small parties would be unable to
4 maintain qualified status under the registration or petition methods. (*Ibid.*)

5 Moreover, plaintiffs' argument suffers from an inherent flaw. In taking aim at Proposition
6 14, their party qualification argument misses its target. If plaintiffs believe that the qualification
7 requirements are too restrictive, their challenge should be directed at the requirements
8 themselves, not at the elections system implemented by Proposition 14.

9 Because plaintiffs have not shown a likelihood that they will succeed in establishing that
10 Proposition 14 impermissibly infringes on the ability of small parties to maintain qualified party
11 status, this part of their argument cannot support the issuance of injunctive relief.

12 **IV. PLAINTIFFS HAVE NOT SHOWN THAT PARTY PREFERENCE DESIGNATIONS UNDER**
13 **PROPOSITION 14 WILL INEVITABLY CAUSE WIDESPREAD VOTER CONFUSION.**

14 **A. States May Design Ballots that Eliminate the Likelihood of Widespread**
15 **Voter Confusion Among a Well-Informed Electorate.**

16 Alternatively, plaintiffs assert that ballots implementing Proposition 14 will inevitably
17 confuse voters into thinking that a candidate expressing preference for a party is the nominee of
18 that party, infringing on the associational interests of the political party. But courts have flatly
19 rejected the assertion that ballots cannot be designed to eliminate the possibility of wide-spread
20 voter confusion.

21 "An assertion that voters will misinterpret the party-preference designation 'depends upon
22 the belief that voters can be "misled" by party labels. But "[o]ur cases reflect a greater faith in the
23 ability of individual voters to inform themselves about campaign issues.'" (*Washington I, supra,*
24 *552 U.S. 442, 454, quoting Tashjian v. Republic Party of Connecticut (1986) 479 U.S. 208, 220.*)
25 "There is simply no basis to presume that a well-informed electorate will interpret a candidate's
26 party-preference designation to mean that the candidate is the party's chosen nominee or
27 representative or that the party associates with or approves of the candidate." (*Washington I,*
28 *supra, 552 U.S. at p. 454.*)

1 Of course, “whether voters will be confused by the party-preference designations will
2 depend in significant part on the form of the ballot.” (*Washington I, supra*, 552 U.S. at p. 454.)
3 But “[i]t is not difficult to conceive of . . . a ballot” that is “printed in such a way as to eliminate
4 the possibility of widespread voter confusion and with it the perceived threat to the First
5 Amendment.” (*Id.* at p. 456.)

6 Indeed in *Washington I*, the Supreme Court recognized a variety of means to eliminate
7 potential confusion, including prominent ballot disclaimers, informative candidate statements and
8 public education programs. (*Washington I, supra*, 552 U.S. at p. 456.) “We are satisfied that
9 there are a variety of ways in which the State could implement [state law I-872] that would
10 eliminate any real threat of voter confusion.” (*Id.* at p. 456.)

11 On remand, the Ninth Circuit concluded that the form of the ballot adopted by the State of
12 Washington “plainly supports the conclusion that I-872 does not impose a severe burden on the
13 plaintiffs’ freedom of association.” (*Washington II, supra*, 2011 WL 149475 at p. 5.) Noting that
14 that Washington had implemented each of the Supreme Court’s suggestions, the Ninth Circuit
15 concluded that “[t]he form of the ballot thus points to an absence of voter confusion.” (*Ibid.*)

16 **B. California Has Adopted Measures Designed to Inform Voters About the**
17 **Top Two Systems and Minimize Possible Voter Confusion.**

18 California has taken steps to eliminate possible voter confusion regarding the effect of party
19 preference designations by candidates. These steps are sufficient to satisfy the standards
20 recognized by the Supreme Court and the Ninth Circuit in *Washington I* and *Washington II*.

21 For example, in the state ballot pamphlet for a voter-nominated office (i.e., a state or
22 congressional office subject to the top two primary system), the Secretary of State must include a
23 written explanation of the electoral procedure for such offices. (Elec. Code, § 9083.5, subd. (b)
24 [specifying language that must appear in ballot pamphlet]; see also Elec. Code, § 9084 [ballot
25 pamphlet shall contain a written explanation of the appropriate election procedures for party-
26 nominated, voter-nominated, and nonpartisan offices as required by section 9083.5]; Gov. Code,
27 § 88001, subd. (l) [same].) Posters and other printed material containing this explanation must be
28

1 supplied to voting precincts and conspicuously posted both inside and outside every polling place.
2 (Elec. Code, § 9083.5, subd (d); Elec. Code, § 14105.1.)

3 Moreover, on the nonpartisan part of the direct primary election ballot, there must appear a
4 heading for “Voter-Nominated and Nonpartisan Offices” and below that a statement that explains
5 the process for voter-nominated offices. (Elec. Code, § 13206, subd. (b); cf. Elec. Code, § 13230
6 [allowing heading and statement to be omitted when ballot is larger than may be conveniently
7 handled].) This statement tells voters that they may vote for any voter-nominated candidate, that
8 the candidate’s party preference is selected by the candidate and shown for information purposes
9 only, that the party preference designation does not constitute or imply an endorsement by the
10 party indicated, and that no candidate nominated by the voters shall be deemed the officially
11 nominated candidate of any political party. (Elec. Code, § 13206, subd. (b).)

12 A similar notification is provided when a person registers to vote. (Elec. Code, § 2151,
13 subd. (b)(1).) The voter registration card explains that any voter may vote for any candidate at a
14 primary election for state elective or congressional office, regardless of the disclosed party
15 preference of the voter or the candidate. (*Ibid.*)

16 Moreover, nothing in Proposition 14 or its implementing legislation prevents a political
17 party or party central committee from endorsing, supporting or opposing a candidate for a voter-
18 nominated office. (Elec. Code, § 359.5, subd. (b).) A qualified political party may have their
19 endorsements of candidates for voter-nominated offices printed in the sample ballot mailed to
20 voters. (Elec. Code, § 13302, subd. (b).)

21 In addition to these notifications, the Secretary of State has been directed to “conduct public
22 voter education campaigns, using existing resources, for the purpose of publicly disseminating
23 information regarding the roles of the parties in primary elections for party-nominated offices,
24 voter-nominated offices, and nonpartisan offices.” (Elec. Code, § 8005.) The Secretary of State
25 has posted information on its web site and taken other actions to assist county registrars in
26 educating the public. (See Declaration of Joanna Southard, ¶¶ 4-8.)

27 Plaintiffs do not discuss these voter education efforts. In the absence of contrary evidence,
28 these efforts are sufficient to overcome plaintiffs’ objections of possible voter confusion.

1 **C. The Manweller Declaration Does Not Establish that the California Top**
2 **Two Election Process Will Generate Widespread Voter Confusion.**

3 In asserting the likelihood of widespread voter confusion, plaintiffs rely almost exclusively
4 on the declaration of Mathew Manweller, an associate professor of political science at Central
5 Washington University. With his declaration, Professor Manweller submits the results of
6 cognitive research experiments he conducted on Washington State voters concerning their
7 understanding of candidates' political party preference. (Manweller Declaration, Exh. B.)

8 Regardless of its academic merit, the Manweller study offers no support for plaintiffs'
9 argument that Proposition 14 will inevitably lead to voter confusion. Professor Manweller
10 limited his study to the Washington system and did not assess the California electoral process.
11 His study does not account for the ballot and ballot pamphlet disclosures mandated by California
12 law or the outreach efforts of the Secretary of State. Moreover, his study was limited to responses
13 to an email questionnaire. (Manweller Declaration, Exh. B, pp. 259-260.) As Professor
14 Manweller himself recognized, this format does not reflect "real world" campaigns in which
15 candidates and political parties may alleviate voter misconceptions. (*Id.*, Exh. B, pp. 266-267.)

16 Even when applied to Washington law, a similar declaration by Professor Manweller was
17 dismissed by the Ninth Circuit dismissed as "not relevant." (*Washington II, supra*, 2011 WL
18 149475 at p. 5.) Among other things, the Ninth Circuit criticized his study for failing to provide
19 voters with the ballot inserts and voter pamphlets the state provides to voters. (*Ibid.*)

20 Plaintiffs are left with no relevant evidence to support their speculative assertions of voter
21 confusion. They have failed to meet their burden to show a likelihood of success on the merits.

22 **V. THE BALANCE OF THE HARMS WEIGHS AGAINST INJUNCTIVE RELIEF AT THIS**
23 **STAGE OF THE ELECTIONS PROCESS.**

24 A preliminary injunction that enjoins the top two elections process would seriously harm
25 the interests of California voters and candidates. It would, of course, prevent Californians from
26 utilizing an elections process approved by a majority of voters in the June 2010 election. An
27 injunction of this type could alter the outcome of the elections process.

1 Plaintiffs are seeking an injunction after the 2012 elections process has already begun.
2 (Declaration of Joanna Southard, ¶¶ 2-3.) As shown by the June 2012 elections calendar,
3 potential candidates have been able to seek “signatures in lieu” for ballot qualification since
4 December 30, 2011, and the period for declarations of candidacy and filing nominating petitions
5 begins on February 13, 2012. (*Id.*, ¶ 3.) Other pre-election deadlines have come and gone. (*Ibid.*)
6 Candidates have presumably planned for these events and the election on the assumption that the
7 elections process will follow the mandates of Proposition 14.

8 Moreover, an injunction would impose severe burdens on county registrars. (See
9 Declaration of Dean C. Logan.) Registrars would be forced to convert back to the former system
10 after preparing for the new system for over a year. (*Ibid.*) This would impose particular burdens
11 on Los Angeles County, the nation’s largest elections district (*Ibid.*)

12 Citing a concurring opinion of two United States Supreme Court justices, plaintiffs assert
13 that Proposition 14 deserves no deference because it was quickly approved for the ballot by the
14 state legislature. (Mot. for Prelim. Inj., p. 14.) But this ignores the fact that the measure was
15 approved by the voters after a full election campaign.

16 Further, plaintiffs err in arguing that *Washington I* rejected the interests that California has
17 asserted in support of Proposition 14 as illegitimate. (See Mot. for Prelim. Inj., p. 14.) In fact,
18 *Washington I* did not reject these interests but merely recited an earlier decision overturning a
19 California law permitting non-party members to vote in another party’s partisan primary, a law
20 that the Supreme Court assessed under a strict scrutiny standard. (*Washington I, supra*, 552 U.S.
21 at 446, citing *California Democratic Party v. Jones* (2001) 530 U.S. 567.)

22 Under these circumstances, the balance of the harms clearly weighs in favor of permitting
23 Californians to implement their chosen electoral system in the 2012 election.

24 **VI. PLAINTIFFS’ MOTION SHOULD BE DENIED UNDER THE DOCTRINE OF LACHES DUE**
25 **TO THE DELAY IN SEEKING INJUNCTIVE RELIEF.**

26 The equitable doctrine of laches applies to “an unreasonable delay in asserting a claim
27 resulting in prejudice to the party against whom the claim is asserted.” (*Quick v. Pearson* (2010)
28 186 Cal.App.4th 371, 379.) “The doctrine applies with particular force in the context of

1 preliminary injunctions against governmental action, where litigants try to block imminent steps
2 by the government.” (*Perry v. Judd* (E.D. Va. 2012) __ F.Supp.2d __, 2012 WL 113865
3 [denying preliminary injunction sought by presidential candidate who unreasonably delayed
4 bringing action to compel access to primary election ballot].)

5 Here, plaintiffs have sought injunctive relief more than one-and-a-half years after passage
6 of Proposition 14 and more than one year after the measure went into effect. Since Proposition
7 14 went into effect there have been four special elections for state legislative and congressional
8 offices that have used the new electoral process. (See Declaration of Joanna Southard, ¶¶ 9-11 .)
9 Plaintiffs could have sought injunctive relief and judicial resolution of their arguments in
10 connection with these elections or could have brought this action with respect to the 2012 election
11 much earlier. Instead, they have waited until after the commencement of the 2012 election
12 process, when an injunction would likely cause greatest possible disruption in that process.

13 Plaintiffs’ delay was unreasonable. Their request for injunctive relief should be denied on
14 the equitable ground of laches.

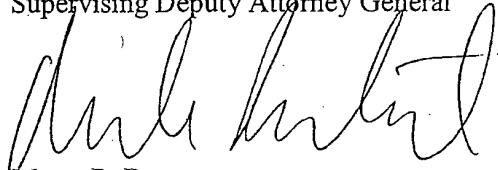
15 **CONCLUSION**

16 For the above reasons, plaintiffs’ motion for preliminary injunction should be denied.

17 Dated: January 25, 2012

Respectfully Submitted,

18 KAMALA D. HARRIS
19 Attorney General of California
20 PETER A. KRAUSE
21 Supervising Deputy Attorney General



22 MARK R. BECKINGTON
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DECLARATION OF SERVICE BY ELECTRONIC AND U.S. MAIL

Case Name: **Rubin, Michael, et al. v. Debra Bowen**

No.: **RG11605301**

I declare:

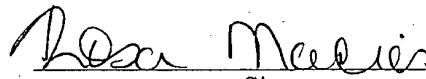
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 S. Spring Street, Suite 1702, Los Angeles, CA 90013.

On January 25, 2012, I served the attached **DEFENDANT SECRETARY OF STATE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION** by transmitting a true copy via electronic mail and by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Los Angeles, California 90013, addressed as follows:

[SEE ATTACHED SERVICE LIST]

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 25, 2012, at Los Angeles, CA 90013.

Rosa Macias
Declarant


Signature





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