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 ALAMEDA COUNTY
 JAN 25 2012
 CLERK OF THE SUPERIOR COURT
 By R. P. de Jesus DEPUTY

9 *Attorneys for Intervener-Defendants*
 10 INDEPENDENT VOTER PROJECT, DAVID
 11 TAKASHIMA, ABEL MALDONADO &
 12 CALIFORNIANS TO DEFEND THE OPEN
 13 PRIMARY

14 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
 15 IN AND FOR THE COUNTY OF ALAMEDA

16 MICHAEL RUBIN, MANJA ARGUE, STEVE
 17 COLLETT, MARSHA FEINLAND, CHARLES
 18 L. HOOPER, KATHERINE TANAKA, C.T.
 19 WEBER, CAT WOODS, GREEN PARTY OF
 20 ALAMEDA COUNTY, LIBERTARIAN PARTY
 21 OF CALIFORNIA, and PEACE AND
 22 FREEDOM PARTY OF CALIFORNIA,

Plaintiffs,

vs.

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

Defendant.

25 INDEPENDENT VOTER PROJECT, DAVID
 26 TAKASHIMA, ABEL MALDONADO &
 27 CALIFORNIANS TO DEFEND THE OPEN
 28 PRIMARY,

Intervener-Defendants.

Case No.: RG11605301
 ASSIGNED FOR ALL
 PURPOSES TO JUDGE
 LAWRENCE JOHN APPEL

**INTERVENER-
 DEFENDANTS'
 OBJECTIONS TO WINGER
 DECLARATION IN
 OPPOSITION TO
 PLAINTIFFS' MOTION
 FOR PRELIMINARY
 INJUNCTION**

DATE: February 7, 2012
 TIME: 9:00 a.m.,
 DEPT: 16

1 Interveners hereby submit the following Objections to statements in the
2 Declaration of Richard Winger in Support of Injunctive Relief.

3 **OBJECTIONS**

4 1. **Statement: “B. First Opinion: A Top Two Primary**
5 **Electoral Scheme Inevitably Precludes Minor Party Candidates from**
6 **Appearing on a General Election Ballot, Except in Rare Instances When**
7 **Only One Major Party Runs in the Primary”, and ¶¶10 – 31.** (Winger
8 Declaration.) Inadmissible as irrelevant (Evid. Code § 350); relevant evidence
9 means evidence having any tendency in reason to prove or disprove any disputed
10 fact that is of consequence to the determination of the action. (Evid Code § 210);
11 the Ninth Circuit Court of Appeal in *Washington State Republican Party v.*
12 *Washington State Grange*, Slip Op., Case No. 11-35122 (Jan.19, 2012) held that the
13 Top Two Open Primary does not impose a severe burden on minor party rights
14 because “it gives major- and minor-party candidates equal access to the primary
15 and general election ballots [and] does not give the ‘established parties a decided
16 advantage over any new parties struggling for existence.’” The possibility that a Top
17 Two system makes it more difficult for minor-party candidates to qualify for the
18 general election ballot than regulations permitting a minor-party candidate to
19 qualify for a general election ballot by filing a required number of petition
20 signatures, “is an inherent feature of any top two primary system, and the Supreme
21 Court has expressly approved of top two primary systems.” Slip op. at 486-487,
22 citing *Williams v. Rhodes*, 393 U.S. 23, 21 (1986); see also, *Washington State*
23 *Grange v. Washington State Republican Party*, 552 U.S. 442 (2008).

24 **Court’s Ruling on Objection #1:**

25 **Sustained:** _____

26 **Overruled:** _____

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Court's Ruling on Objection #4:

Sustained: _____

Overruled: _____

5. **Statement: Winger Declaration, paragraph 26, concerning California blanket primary elections in 1998 & 2000.**

Irrelevant and inadmissible: the relevance of the former blanket primary to California's Top Two system and admissibility depend on the existence of preliminary facts that have not been proffered. Evid. Code § 403.

Court's Ruling on Objection #5:

Sustained: _____

Overruled: _____

6. **Statement: Winger Declaration, paragraph 27, concerning California blanket primary elections in 1998 & 2000.**

Irrelevant and inadmissible: the relevance of the former blanket primary to California's Top Two system and admissibility depend on the existence of preliminary facts that have not been proffered. Evid. Code § 403.

Court's Ruling on Objection #6:

Sustained: _____

Overruled: _____

7. **Statement: Winger Declaration, paragraph 28, concerning a California blanket primary election in 1999.**

Irrelevant and inadmissible: the relevance of the former blanket primary to California's Top Two system and admissibility depend on the existence of preliminary facts that have not been proffered. Evid. Code § 403.

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Court's Ruling on Objection #7:

Sustained: _____

Overruled: _____

8. Statement: Winger Declaration, paragraph 29 and Exhibit I, concerning California blanket primary elections in 1998 & 2000. Irrelevant and inadmissible: the relevance of the former blanket primary to California's Top Two system and admissibility depend on the existence of preliminary facts that have not been proffered. Evid. Code § 403.

Court's Ruling on Objection #8:

Sustained: _____

Overruled: _____

9. Statement: Winger Declaration, paragraph 30 and Exhibit J, concerning California blanket primary elections in 1998 & 2000. Irrelevant and inadmissible: the relevance of the former blanket primary to California's Top Two system and admissibility depend on the existence of preliminary facts that have not been proffered. Evid. Code § 403.

Court's Ruling on Objection #9:

Sustained: _____

Overruled: _____

10. Statement: Winger Declaration, paragraph 31, concerning the Washington State and California blanket primary elections. Irrelevant and inadmissible: the relevance of the blanket primary systems to California's Top Two system and admissibility depend on the existence of preliminary facts that have not been proffered. Evid. Code § 403.

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Court's Ruling on Objection #10:

Sustained: _____

Overruled: _____

11. **Statement: "C. Second Opinion: Minor Party Candidates and Minor Party Voters Suffer from a Severe Burden When Minor Party Candidates Are Precluded from Participation in the General Elections" (Winger Declaration, page 8.)** Inadmissible expert testimony on the legal conclusion of whether, providing political parties and would-be political parties two methods of becoming or remaining "qualified" constitutes a "severe burden" on First Amendment Rights. See 1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 97, pp. 644-646 [as a general rule, expert testimony on legal conclusions is inadmissible]; see also, *In re Brian J.*, 150 Cal. App. 4th 97 (2007).

Court's Ruling on Objection #11:

Sustained: _____

Overruled: _____

12. **Statement: "I have attached as Exhibit K a true and complete copy of an article I wrote for the San Francisco Bay Guardian, 'The Hidden Zinger in Prop. 14,' which explains this phenomenon."** (Winger Declaration, ¶ 32:17-19.) Article is inadmissible hearsay evidence. Evid. Code § 1200.

Court's Ruling on Objection #12:

Sustained: _____

Overruled: _____

1 13. “Minor party candidates and minor party voters are
2 under a severe burden when minor party candidates are generally
3 precluded from participation in the second round of elections. As my
4 first opinion shows, the “top-two” system prevents minor party
5 candidates from appearing on the ballot in November, except in races
6 in which only one major party member is running. This is a severe
7 burden on the rights of minor party candidates, because public interest
8 in broad political issues, and political philosophy, is highest during the
9 prime campaign season for federal office, September through
10 November of even-numbered years.” (Winger Declaration, ¶ 33.)
11 Inadmissible expert testimony on the legal conclusion of whether, as a practical
12 matter, precluding minor political parties from participation in second round
13 elections constitutes a “severe burden” on First Amendment Rights. See 1 Witkin,
14 Cal. Evidence (4th ed. 2000) Opinion Evidence, § 97, pp. 644-646 [as a general
15 rule, expert testimony on legal conclusions is inadmissible]; see also, *In re Brian J.*,
16 150 Cal. App. 4th 97 (2007).

17 **Court’s Ruling on Objection #13:**

18 **Sustained:** _____

19 **Overruled:** _____

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21 14. “Since the 19th century, Congress has told the states
22 that they must choose presidential electors, and members of Congress,
23 in November of even-numbered years. The U.S. Supreme Court forced
24 Louisiana to adhere to that federal law in *Foster v. Love* (1997) 522 U.S.
25 67.” (Winger Declaration, ¶ 34:6-9.) Inadmissible testimony of an expert witness
26 on a question of law; (*Communications Satellite Corp. v. Franchise Tax Bd.* (1984)
27 156 Cal.App.3d 726, 747); questions of law includes decisional law (Evid. Code §
28

1 160); interpretation of a judicial opinion is a question of law. *California School*
2 *Employees Assn. v. Kern Com. College Dist.*, 41 Cal. App. 4th 1003, 1008 (1996).

3 **Court's Ruling on Objection #14:**

4 **Sustained:** _____

5 **Overruled:** _____

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7 15. "Proposition 14 also puts a severe burden on voters
8 who wish to vote in November for candidates of minor parties." (Winger
9 Declaration, ¶ 335:19-20.) Inadmissible expert testimony on the legal conclusion
10 of whether, Proposition 14 imposes a "severe burden" on voters who wish to vote
11 for minor party candidates in November. See 1 Witkin, Cal. Evidence (4th ed.
12 2000) Opinion Evidence, § 97, pp. 644-646 [as a general rule, expert testimony on
13 legal conclusions is inadmissible]; see also, *In re Brian J.*, 150 Cal. App. 4th 97
14 (2007).

15 **Court's Ruling on Objection #15:**

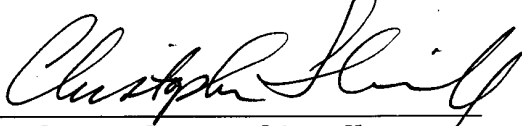
16 **Sustained:** _____

17 **Overruled:** _____

18 Respectfully submitted,

19 Dated: January 25, 2012

20 NIELSEN MERKSAMER
21 PARRINELLO GROSS & LEONI LLP

22 By: 

23 Christopher E. Skinnell
24 *Attorneys for Intervener-Defendants*

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PROOF OF SERVICE

I am employed in the County of Marin, State of California. I am over the age of 18 and not a party to the within cause of action. My business address is, 2350 Kerner Boulevard, Suite 250, San Rafael, California 94901.

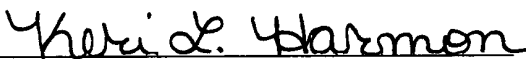
On January 25, 2012, I caused the foregoing document described as **INTERVENER-DEFENDANTS' OBJECTIONS TO WINGER DECLARATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** to be served on the individuals listed below as follows:

Dan Siegel, Esq. Michael Siegel, Esq. Siegel & Yee 499 14th Street, #220 Oakland, CA 94612 Ph: (510) 839-1200 Email: danmsiegel@gmail.com Email: michaeljwsiegel@gmail.com (Attorneys for Plaintiffs)	Mark Beckington, Esq. Deputy Attorney General Office of the Attorney General 300 South Spring St., Suite 1702 Los Angeles, CA 90013-1230 Ph: (213) 897-1096 Email: mark.beckington@doj.ca.gov (Attorney for Defendant Debra Bowen)
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BY FEDERAL EXPRESS: By following ordinary business practices and placing for pickup by FEDERAL EXPRESS at 2350 Kerner Boulevard, Suite 250, San Rafael, California 94901 on January 25, 2012, copies of the above documents in an envelope or package designated by FEDERAL EXPRESS with delivery fees paid or provided for.

BY ELECTRONIC SERVICE: By transmitting by email to the above party(ies) at the above email addresses.

Executed in San Rafael, California on January 25, 2012. I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.


Keri L. Harmon