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ALAMEDA COUNTY

JAN 31 2012

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 17 PRIMARY

18 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 19 IN AND FOR THE COUNTY OF ALAMEDA

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 24 ALAMEDA COUNTY, LIBERTARIAN PARTY  
 25 OF CALIFORNIA, and PEACE AND  
 26 FREEDOM PARTY OF CALIFORNIA,

*Plaintiffs,*

vs.

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

*Defendant.*

29 INDEPENDENT VOTER PROJECT, DAVID  
 30 TAKASHIMA, ABEL MALDONADO &  
 31 CALIFORNIANS TO DEFEND THE OPEN  
 32 PRIMARY,

*Intervener-Defendants.*

Case No.: RG11605301

ASSIGNED FOR ALL  
PURPOSES TO JUDGE  
LAWRENCE JOHN APPEL

**INTERVENER-  
DEFENDANTS' REPLY IN  
SUPPORT OF DEMURRER  
OF SECRETARY OF STATE  
BOWEN, IN WHICH  
INTERVENERS' JOINED**

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

BY FAX

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1 **I. INTRODUCTION.**

2 Intervener-Defendants submit this reply in support of the Secretary of State's  
3 demurrer, in which Intervener-Defendants have joined.

4 The demurrer should be sustained without leave to amend, because each  
5 cause of action is defective as a matter of law, and the defects cannot be cured by  
6 amendment.

7 Plaintiffs' first claim, based on their asserted difficulty in reaching the general  
8 election ballot, is identical to one that was dismissed in the Washington state  
9 litigation *as a matter of law* for failure to state a claim. The Ninth Circuit recently  
10 affirmed this ruling, and the same result is warranted here.

11 Plaintiffs second claim, challenging changes to the party qualification statutes  
12 (Elec. Code § 5100) is foreclosed by controlling Court of Appeal case law,  
13 specifically, *Peace & Freedom Party v. Shelley*, 114 Cal. App. 4th 1237 (2004).

14 And Plaintiffs' third claim, regarding alleged voter "confusion," is foreclosed  
15 by the Supreme Court's rulings in *Wash. State Republican Party v. Wash. State*  
16 *Grange*, 552 U.S. 442 (2008) ("*Grange*"), because California—like Washington—  
17 has closely followed guidelines for designing its ballot materials contained in the  
18 *Grange* opinion itself. The Court majority expressly stated that implementing a top-  
19 two primary in the manner laid out in that opinion "would be consistent with the  
20 First Amendment," 552 U.S. at 457.

21 **II. LEGAL STANDARD GOVERNING DEMURRERS.**

22 A demurrer is properly granted if one or more causes of action in the  
23 complaint fail to state a cause of action as a matter of law, assuming the truth of all  
24 facts pled in the complaint. *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.  
25 App. 4th 1149, 1153-54 (2011). Leave to amend will be denied where there is no  
26 reasonable probability that the plaintiff(s) could cure the legal defects in the  
27 challenged causes of action, and the "plaintiff has the burden of proving that an  
28 amendment would cure the defect." *Id.* (quoting *Schifando v. City of Los Angeles*,

1 31 Cal. 4th 1074, 1081 (2003)).

2 **III. THE MINOR PARTIES' BALLOT ACCESS CLAIMS ARE PROPERLY**  
3 **SUBJECT TO DEMURRER, JUST AS THEY WERE IN THE**  
4 **WASHINGTON TOP-TWO PRIMARY CHALLENGE.**

5 In the post-remand as-applied challenge to Washington's top two system, the  
6 Libertarian Party contended that "its rights are violated because I-872 makes it  
7 difficult for a minor-party candidate to progress to the *general* election ballot. A  
8 candidate, whether from a major or minor party, can attain a place in the general  
9 election only by finishing in the top two in the primary." *Wash. State Republican*  
10 *Party v. Wash. State Grange*, \_\_\_ F.3d 467, 2012 U.S. App. LEXIS 1050 (9th Cir.  
11 Jan. 19, 2012) ("*Wash. State Republican Party*"). Plaintiffs' First Claim for Relief is  
12 indistinguishable. The Ninth Circuit rejected this challenge last week, *id.* at \*20-  
13 \*24, and the same result is warranted here.

14 Seeking to avoid a well-deserved demurrer, Plaintiffs urge that the Ninth  
15 Circuit's opinion took a factual approach to its ruling, focusing on (1) when the  
16 minor party candidates were able to appeal to voters, and (2) whether the top two  
17 law "impermissibly limits the field of candidates from which the voters might  
18 choose." (Opposition to Demurrer, p. 4:13.) Plaintiffs further state that "[t]he  
19 Court made both of these determinations after the parties presented evidence to the  
20 trial court on cross-motions for summary judgment." (*Id.* at 4:14-15.) This is  
21 simply incorrect, and it misrepresents the procedural posture of that appeal.

22 The district court did take evidence, and did grant summary judgment to the  
23 State and to the Grange on January 11, 2011, *on the as-applied confusion/forced*  
24 *association claim*. *Wash. State Republican Party*, 2012 U.S. App. LEXIS 1050, \*12-  
25 \*13. However, with respect to the ballot access claim (and all of the Washington  
26 plaintiffs' other claims), the district court had issued an earlier order (on August 20,  
27 2009), granting the State's *motion to dismiss as a matter of law*, and without leave  
28 to amend, for failure to state a claim under FRCP 12(b)(6). *Id.* Both the summary

1 judgment order and the August 20, 2009 order granting the motions to dismiss  
2 were appealed to the Ninth Circuit. *Id.*

3 In its August 20, 2009 order granting the motions to dismiss, the  
4 Washington district court concluded that the ballot access claim was defective. *See*  
5 Intervener-Defendants' Request for Judicial Notice In Opposition to Preliminary  
6 Injunction, filed Jan. 25, 2012 (hereafter "RJN"), Exhibit B (Aug. 20, 2009, order in  
7 *Wash. State Republican Party v. Wash. State Grange*, Case No. 05-cv-00927-JCC  
8 (W.D. Wash.)). The Ninth Circuit affirmed that ruling, holding the district court  
9 "properly dismissed these claims." *Wash. State Republican Party*, 2012 U.S. App.  
10 LEXIS 1050, \*24. Tellingly, the Court did not vacate the ruling and remand for  
11 development of a factual record, as Plaintiffs' position would have required.

12 The basis of the district court's opinion was that "[t]he Supreme Court  
13 opinions in this case and in *Jones* foreclose Plaintiffs' ballot-access claims. That  
14 applies equally to the claim that minor parties are denied access to the general  
15 election ballot and to the claim that major parties could be 'operationally' denied  
16 such access." RJN, Exhibit B, p. 15. The Ninth Circuit likewise recognized that  
17 limiting access to the general election ballot is an inherent feature of any top-two  
18 system, and the Supreme Court has already "expressly approved of top two primary  
19 systems." *Wash. State Republican Party*, 2012 U.S. App. LEXIS 1050, \*24.

20 Moreover, applying the *Burdick* standard, the Ninth Circuit held that the top  
21 two system does not impose a "severe" burden on the parties' right, because (1)  
22 every party in Washington—major and minor party alike—has "broad access to the  
23 I-872 primary" and (2) all candidates compete at that primary on equal terms and I-  
24 872 thereby "gives minor party candidates the same opportunity as major-party  
25 candidates to advance to the general election." *Id.* at \*23-\*24. In coming to these  
26 conclusions, the Court looked only to the Washington law itself—not to any factual  
27 evidence. *Id.* at \*22-\*23.

1 **IV. PLAINTIFFS' CHALLENGE TO THE PARTY QUALIFICATION**  
2 **STATUTES ARE FORECLOSED BY PEACE & FREEDOM PARTY V.**  
3 **SHELLEY, 114 Cal. App. 4th 1237 (2004).**

4 Plaintiffs complain that political parties will no longer be able to maintain  
5 their "qualified" party status by having a candidate obtain 2% of the statewide vote  
6 at the gubernatorial election. However, California law provides two other means by  
7 which parties may retain their qualified status: (1) having registration equal to at  
8 least 1% of the votes cast at the last gubernatorial election, *see* Elec. Code § 5100(b),  
9 or (2) submitting a petition to the Secretary of State containing the signatures of  
10 registered voters equaling at least 10% of the votes cast at the last gubernatorial  
11 election, *see* Elec. Code § 5100(c). If either is a constitutional means of qualifying a  
12 party, and retaining qualification, Plaintiffs' claim must fail. In fact, the California  
13 Court of Appeal has already rejected a constitutional challenge to this provision, in  
14 *Peace & Freedom Party v. Shelley*, 114 Cal. App. 4th 1237 (2004).

15 No Peace & Freedom candidate received 2% of the statewide vote for any  
16 office at the 1998 gubernatorial election, so the party was unable to rely on  
17 Elections Code § 5100(a) to remain qualified.<sup>1</sup> Moreover, the Party did not submit a  
18 petition containing the signatures of registered voters equaling at least 10% of the  
19 votes cast at the last gubernatorial election. Therefore, the only option available to  
20 the Party for maintaining its qualification to participate in the March 2002  
21 gubernatorial primary was to maintain party registration equal to at least 1% of the  
22 votes cast at the last gubernatorial election, *see* Elec. Code § 5100(b).

23 <sup>1</sup> *See* Cal. Sec'y of State, *Statement of Vote: General Election* (Nov. 3, 1998),  
24 p. 11, available online at <http://www.sos.ca.gov/elections/sov/1998-general/sov98.pdf> (last visited January 31, 2012). Intervener-Defendants hereby  
25 request judicial notice of these results. Judicial notice may be taken of the official  
26 acts of government agencies under Evidence Code § 452(c). This includes  
27 documents published by the agency (*see Serrano v. Priest*, 5 Cal. 3d 584, 591  
28 (1971); *Moore v. Superior Court*, 117 Cal. App. 4th 401, 407 n.5 (2004)), as well as  
the records and files of such agencies (*Wolfe v. State Farm Cas. & Ins. Co.*, 46 Cal.  
App. 4th 554, 567 n.16 (1996); *Fowler v. Howell*, 42 Cal. App. 4th 1746, 1750  
(1996); *Hogen v. Valley Hospital*, 147 Cal. App. 3d 119, 125 (1983)).

1 To take advantage of that option, the Peace & Freedom Party was required to  
2 have 86,212 registered voters. Prior to the March 2002 election, the Secretary of  
3 State certified them as having only 70,832 registered voters, and disqualified them  
4 from the 2002 ballot. 114 Cal. App. 4th at 1241. The Party sued, challenging the  
5 Secretary's refusal (pursuant to Elections Code § 2226(a)) to include voters in the  
6 "inactive voter" file in the total party registrations.

7 Quoting *California Democratic Party v. Jones*, 530 U.S. 567 (2000), the  
8 Court of Appeal expressly held that "[A] State may require parties to demonstrate  
9 "a significant modicum of support" before allowing their candidates a place on that  
10 ballot. [Citation.]' . . . A 'significant modicum of support' from eligible voters is what  
11 section 5100, subdivision (b), and section 2226, subdivision (a)(2), are designed to  
12 ensure. And they do so in a reasonable and nondiscriminatory manner." *Peace &*  
13 *Freedom Party*, 114 Cal. App. 4th at 1247. Accordingly, it upheld the  
14 constitutionality of those provisions. *Id.*; see also *Storer v. Brown*, 415 U.S. 724,  
15 745 (1974) (suggesting that section 5100(b) meets constitutional muster).

16 Notably, the Court of Appeal also pointed out, in support of its ruling, that the  
17 Party also had a second option for retaining qualification—getting a petition signed  
18 by registered voters equal to 10% of the statewide vote at the last gubernatorial  
19 election, under Elections Code § 5100(c). 114 Cal. App. 4th at 1246.

20 In sum, the Court of Appeal has already rejected a constitutional challenge to  
21 the party qualification statutes in a case where the 2% statewide vote option was  
22 unavailable to the party. The Court of Appeal's ruling is binding on this Court.  
23 *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962) (under the  
24 doctrine of *stare decisis*, "[d]ecisions of every division of the District Courts of  
25 Appeal are binding upon . . . all the superior courts of this state . . . Courts  
26 exercising inferior jurisdiction must accept the law declared by courts of superior  
27 jurisdiction. It is not their function to attempt to overrule decisions of a higher  
28 court.")

1 **V. PLAINTIFFS' "CONFUSION" CLAIM IS ALSO DEFECTIVE AS A**  
2 **MATTER OF LAW, BECAUSE LIKE WASHINGTON, CALIFORNIA**  
3 **HAS CAREFULLY FOLLOWED THE SUPREME COURT'S**  
4 **GUIDANCE REGARDING THE DESIGN OF BALLOT MATERIALS.**

5 Though the Supreme Court did not decide an as-applied "confusion"  
6 challenge in *Grange*, it did anticipate that challenge and gave significant guidance  
7 as to how it believed the State could structure its ballot materials in a constitutional  
8 manner. Noting that "whether voters will be confused by the party-preference  
9 designations will depend in significant part on the form of the ballot[,]" *Grange*,  
10 552 U.S. at 455, the Court stated, "It is not difficult to conceive of such a ballot" that  
11 would "be printed in such a way as to eliminate the possibility of widespread voter  
12 confusion and with it the perceived threat to the First Amendment." *Id.* at 456. The  
13 Court further continued:

14 For example, petitioners propose that the actual I-872 ballot could include  
15 prominent disclaimers explaining that party preference reflects only the self-  
16 designation of the candidate and not an official endorsement by the party.  
17 They also suggest that the ballots might note preference in the form of a  
18 candidate statement that emphasizes the candidate's personal determination  
19 rather than the party's acceptance of the candidate, such as "my party  
20 preference is the Republican Party." Additionally, the State could decide to  
21 educate the public about the new primary ballots through advertising or  
22 explanatory materials mailed to voters along with their ballots. We are  
23 satisfied that there are a variety of ways in which the State could implement I-  
24 872 that would eliminate any real threat of voter confusion. And without the  
25 specter of widespread voter confusion, respondents' arguments about forced  
26 association and compelled speech fall flat. . . . [¶] . . . ***Our conclusion that  
27 these implementations of I-872 would be consistent with the First  
28 Amendment*** is fatal to respondents' facial challenge."

*Id.* at 456-57 (emphasis added; footnotes omitted).

24 Washington closely followed the Supreme Court's suggestions for  
25 implementing I-872. Because it did so, the Washington district court rejected the  
26 political parties' as-applied challenge, and the Ninth Circuit affirmed, holding, "The  
27 'form of the ballot' plainly supports the conclusion that I-872 does not impose a  
28 severe burden on the plaintiffs' freedom of association[,]" and that "[t]he form of

1 the ballot thus points to an absence of voter confusion.” *Wash. State Republican*  
2 *Party*, 2012 U.S. App. LEXIS 1050, \*14-\*15.

3 Proposition 14 and SB 6 also closely track the Supreme Court’s guidance,  
4 “point[ing] to an absence of voter confusion.” This is consistent with California case  
5 law holding that voters are presumed to read and understand the ballot materials  
6 presented to them. *See, e.g., Taxpayers to Limit Campaign Spending v. Fair Pol.*  
7 *Practices Comm’n*, 51 Cal. 3d 744, 769 (1990).

8 Tellingly, though the Washington district court and the Ninth Circuit did  
9 discuss methodological problems with the declaration of Mathew Manweller—  
10 Plaintiffs’ expert in this case—both ultimately concluded that his report was  
11 irrelevant on the legal question of whether the Washington top two ballot created  
12 the possibility of widespread voter confusion under a “reasonable, well-informed  
13 electorate” standard. *See Wash. State Republican Party v. Wash. State Grange*,  
14 2011 U.S. Dist. LEXIS 2448 (W.D. Wash. Jan. 11, 2011) (“The political parties also  
15 offer as evidence a study purporting to show that voters presented with the new  
16 ballots were confused about candidates’ political-party association, or lack thereof.  
17 (Dkt. No. 265-1 at 10-48.) It is not entirely clear whether the Court should consider  
18 such a study—particularly given the study’s limited parameters that did not include  
19 all of the educational information provided to voters—when the Court is presented  
20 with a legal question of whether the implementation of I-872 would create the  
21 possibility for widespread confusion among a reasonable, well-informed electorate.  
22 [Citation.] For example, the federal courts consider in their Establishment Clause  
23 jurisprudence whether a reasonable observer—mindful of the history, purpose, and  
24 context of a government monument or practice—would perceive a government  
25 endorsement of religion without resort to social or cognitive experiments.  
26 [Citations.] The Court sees no reason why a different approach should apply here.”),  
27 *aff’d*, \_\_\_ F.3d 467, 2012 U.S. App. LEXIS 1050 (9th Cir. Jan. 19, 2012).

28 This is consistent with the Supreme Court’s opinion itself. Not only did the

1 majority state its view that implementation in the manner that Washington and  
2 California have implemented the top two system “would be consistent with the First  
3 Amendment,” *Grange*, 552 U.S. at 457, but Chief Justice Roberts, in concurrence,  
4 proposed an objective approach to assessing this standing, stating, “*Nothing in my*  
5 *analysis requires the parties to produce studies regarding voter perceptions on*  
6 *this score*, but I would wait to see what the ballot says before deciding whether it is  
7 unconstitutional.” *Id.* at 461-62 (emphasis added).

8 In sum, Plaintiffs’ confusion claim is defective as a matter of law.

9 **VI. CONCLUSION.**

10 For the foregoing reasons, the demurrer should be sustained and the  
11 complaint dismissed without leave to amend.

12 Respectfully submitted,

13 Dated: January 31, 2012

14 NIELSEN MERKSAMER  
15 PARRINELLO GROSS & LEONI LLP

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17 By: \_\_\_\_\_  
18 Christopher E. Skinnell  
19 *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 31, 2012, I caused the foregoing document described as **INTERVENER-DEFENDANTS' REPLY IN SUPPORT OF DEMURRER OF SECRETARY OF STATE BOWEN, IN WHICH INTERVENERS' JOINED** 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: <a href="mailto:danmsiegel@gmail.com">danmsiegel@gmail.com</a> Email: <a href="mailto:michaeljwsiegel@gmail.com">michaeljwsiegel@gmail.com</a> (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: <a href="mailto:mark.beckington@doj.ca.gov">mark.beckington@doj.ca.gov</a> (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 31, 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 31, 2012. I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.



Paula A. Scott