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INDEPENDENT VOTER PROJECT, DAVID TAKASHIMA, ABEL MALDONADO & CALIFORNIANS TO DEFEND THE OPEN PRIMARY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE 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,

vs.

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

Defendant.

INDEPENDENT VOTER PROJECT, DAVID TAKASHIMA, ABEL MALDONADO & CALIFORNIANS TO DEFEND THE OPEN PRIMARY,

Intervener-Defendants.

Case No.: RG11605301

ASSIGNED FOR ALL PURPOSES TO JUDGE LAWRENCE JOHN APPEL

INTERVENER-DEFENDANTS' REQUEST TO FILE SURREPLY TO NEW ARGUMENTS RAISED BY PLAINTIFFS IN REPLY BRIEF OR TO STRIKE BELATED REPLY ARGUMENT; AND [Proposed] SURREPLY

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

I. REQUEST TO FILE SURREPLY OR TO STRIKE NEW ARGUMENT.

Interveners request permission to file this Surreply Brief to address a wholly new argument, raised for the *very first time* in Plaintiffs' Reply in Support of Plaintiffs' Motion for Preliminary Injunction, filed on January 31, 2011: "that the California Constitution provides greater protection of associational rights than the United States Constitution," and therefore Proposition 14 and SB 6 must survive strict scrutiny. (Reply at p. 1:13-19; *see also id.* at pp. 4-5.) In the alternative, Interveners request that this argument not be considered by the Court in reaching its decision on the pending motion for a preliminary injunction.

Plaintiffs never raised this argument in their opening brief. They did not cite a single California case in connection with their argument that a "strict scrutiny" standard of review applies to their claims—only federal cases. *See* Memorandum of Points & Authorities in Support of Plaintiffs' Motion for Preliminary Injunction, p. 9 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000)).[1] Indeed, they did not cite a single California case addressing California's freedom of association clause *anywhere in their opening brief at all.*

As the courts have widely recognized, it is improper and unfair to present new arguments in a reply brief,

> Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time *will not be considered*, unless good reason is shown for failure to present them before.

Neighbours v. Buzz Oates Enterprises, 217 Cal. App. 3d 325, 335 n.8 (1990) (quoting 9 Witkin, CAL. PROC. (3d ed. 1985) § 496, p. 484) (emphasis added). *See*

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[1] In making this new argument regarding the California Constitution, Plaintiffs now effectively concede that strict scrutiny does not apply under *Burdick* and *Jones*.

also Varjabedian v. City of Madera, 20 Cal. 3d 285, 295 n.11 (1977). Plaintiffs have not provided any reason for not presenting this argument in their opening brief. The argument must be disregarded, or, at a minimum, Interveners are entitled to an opportunity to address it.

II. SURREPLY.

The applicable standard of review of Plaintiffs' claims is the same under the California Constitution as under federal Constitution. Strict scrutiny does not apply; the more deferential standard set forth in *Burdick v. Takushi,* 504 U.S. 428 (1992), does. "'[I]n analyzing constitutional challenges to election laws, [the California Supreme C]ourt has followed closely the analysis of the United States Supreme Court.'" *Edelstein v. City & County of San Francisco,* 29 Cal. 4th 164, 179 (2002) (quoting *Canaan v. Abdelnour,* 40 Cal. 3d 703, 710 (1985)).

The California Supreme Court has held that even though in some instances "[t]he California free speech clause is broader and more protective than the First Amendment free speech clause ...," that "does not mean that it is broader ... in all its applications." *Id.* "Generally, when [the California Supreme Court] interpret[s] a provision of the California Constitution that is similar to a provision of the federal Constitution, [it] will not depart from the United States Supreme Court's construction of the similar federal provision unless [the Court is] given cogent reasons to do so." *Id.*

Plaintiffs flatly acknowledge that Article I, section 3(a), of the California Constitution, which is the location of the state Constitution's freedom of association clause, "largely mirrors the federal constitution . . . ." (Reply at p. 4:23.) In other words, this Court is being asked to "interpret a provision of the California Constitution that is similar to a provision of the federal Constitution," and Plaintiffs have presented no "cogent reasons" for concluding that this Court must assess their challenges to Proposition 14 any differently under the California Constitution than under the U.S. Constitution. *Edelstein,* 29 Cal. 4th at 179.

In *Edelstein*, the California Supreme Court was asked to decide the constitutionality of San Francisco's ban on write-in voting at runoff elections for municipal offices. Nearly 20 years before, in *Canaan*, the Court had held that a write-in voting ban was subject to strict scrutiny, and was unconstitutional, relying on the First Amendment *and Article I, section 2(a) of the California Constitution.* However, the U.S. Supreme Court subsequently upheld a ban on write-in voting in *Burdick*, applying a less stringent level of scrutiny, and the California high court was asked to reconsider its opinion in *Canaan*. Concluding—based on *Burdick*—that it had misinterpreted prior federal cases laying down the standard for evaluating election law challenges, the *Edelstein* Court overruled *Canaan* and adopted the holding of *Burdick* instead, including the standard of review set forth therein. Tellingly, the Court did not continue to adhere to *Canaan* on the ground that the California Constitution provided greater protection than the U.S. Constitution.[2]

Also instructive on this point is *Kunde v. Seiler*, 197 Cal. App. 4th 518 (2011), *rev. denied*, 2011 Cal. LEXIS 10995 (Cal., Oct. 26, 2011). In *Kunde* the plaintiff, a registered Democrat, sought an order prohibiting the San Diego County registrar from including a proposed insert from the Republican Party of San Diego in the mailing of a sample ballot. The plaintiff contended state law did not permit the Party to include a one-page letter that—along with a request for contributions—contained electioneering materials stating the Party's positions on various local election contests and one statewide ballot measure. He also contended that if state law did permit the inclusion of the letter, then state law violated the speech and associational rights of other groups who were not permitted to include inserts in the

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[2] Though *Edelstein* addressed the free speech clause, the courts have recognized that election law challenges employ the "same basic mode of analysis" regardless of whether they are based on equal protection, due process or free speech/associational rights. *Partnoy v. Shelley*, 277 F. Supp. 2d 1064, 1072 (S.D. Cal. 2003) (quoting *LaRouche v. Fowler*, 152 F.3d 974, 987-88 (D.C. Cir. 1998)); *See also Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011) (same).

sample ballot. The Court of Appeal concluded that Elections Code § 13305 permitted the inclusion of the electioneering material proposed by the party, and that that provision did not violate the U.S. Constitution.

Relevant here, the plaintiff also alleged a violation of associational and speech rights under the California Constitution. Noting that the plaintiff had not developed a separate argument under the California Constitution, the Court declined to consider it, but the Court further noted that in any event "the analysis would be substantially the same as under the federal Constitution in this context." *Kunde*, 197 Cal. App. 4th at 535 n.12 (citing *Edelstein*).

The sole case that Plaintiffs rely upon, *Hart v. Cult Awareness Network*, 13 Cal. App. 4th 777 (1993), is not to the contrary. First of all, that case is not an election law case; it addressed a religious discrimination claim under the Unruh Civil Rights Act, Cal. Civ. Code § 51, in which a member of the Church of Scientology sought a court order prohibiting the Cult Awareness Network ("CAN") from denying his membership application. The trial court held that the Act did not apply to CAN because it was not a "business establishment" as that term was defined in the Act. On appeal, the Court of Appeal agreed, in part based on its view that an alternative interpretation would raise serious constitutional questions regarding the Act's impacts on CAN's associational rights. Though that court noted in passing that the California Constitution may, in some instances, be more protective of associational rights than the U.S. Constitution, it concluded that application of the Unruh Act to CAN would be unconstitutional under either constitution. In other words, that case did not apply the two constitutional provisions differently, and it provides no basis for doing so in this case.

III. CONCLUSION.

By relying so heavily on their new argument that the California Constitution prescribes a different standard of review than the U.S. Constitution, Plaintiffs have implicitly acknowledged that strict scrutiny does not apply to their various claims

under the First and Fourteenth Amendments. However, the California Supreme Court has made clear in *Edelstein* that the same standard applies to election law challenges under the California Constitution as applies under the U.S. Constitution. For the reasons that Plaintiffs' claims must fail under the federal constitution, as set out in Defendant's and Interveners' oppositions, their claims must fail under the state constitution as well.

Respectfully submitted,

Dated: February 2, 2012

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

By: _____
Christopher E. Skinnell
Attorneys for Intervener-Defendants

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 February 2, 2012, I caused the foregoing document described as **INTERVENER-DEFENDANTS' REQUEST TO FILE SURREPLY TO NEW ARGUMENTS RAISED BY PLAINTIFFS IN REPLY BRIEF OR TO STRIKE BELATED REPLY ARGUMENT; AND [Proposed] SURREPLY** to be served on the individuals listed below as follows:

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X **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 February 2, 2012, copies of the above documents in an envelope or package designated by FEDERAL EXPRESS with delivery fees paid or provided for.

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

Executed in San Rafael, California on February 2, 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

Paula A. Scott