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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT

Asari

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9 GREEN PARTY OF ALAMEDA COUNTY, LIBERTARIAN PARTY OF CALIFORNIA,
10 and PEACE AND FREEDOM PARTY OF CALIFORNIA

11 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
12 COUNTY OF ALAMEDA

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

21 Plaintiffs,

22 v.

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

25 Defendant.

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

Intervener-Defendants.

Case No. RG11605301

**PLAINTIFFS' RESPONSE TO
SURREPLY OF INTERVENER-
DEFENDANTS**

Hearing: March 6, 2012
Time: 9:00 a.m.
Department: 16

Assigned for all Purposes:
Hon. Lawrence John Appel

Reservation Number R-1246546

Suit filed: November 21, 2011
Trial date: TBD

1 **I. SUMMARY**

2 This Court faces an open question, under federal and state law, as to whether
3 Proposition 14 impermissibly burdens plaintiffs’ fundamental rights to participate in the
4 political process. Under the California Constitution, plaintiffs are guaranteed expansive
5 protections of their freedom of speech, their right to petition government, and their
6 right to equal privileges and immunities. Because Proposition 14 burdens plaintiffs’
7 fundamental rights under the California Constitution by denying their rights of ballot
8 access and political association, this Court should grant injunctive relief.
9

10 **II. ARGUMENT**

11 **A. The Constitutional Validity of the “Top Two” Electoral Scheme**
12 **Remains an Open Question under Both State and Federal Law**

13 The U.S. Supreme Court has considered only one challenge to a “top two”
14 electoral regime: namely, the “voter confusion” challenge considered in *Washington*
15 *State Grange*. *Washington State Grange v. Washington State Republican Party* (2008)
16 552 U.S. 442, 458-459. In *Washington State Grange*, the Court noted that it had not
17 yet decided whether or not a “top two” regime impermissibly restricts “ballot access.”
18 *Id.* at 458, fn. 11. Recently, the 9th Circuit considered a ballot access claim in
19 conjunction with the challenged Washington “top two” law, I-872. *Washington State*
20 *Republican Party v. Washington State Grange* (9th Cir. Jan. 19, 2012) ___ F.3d ___,
21 2012 WL 149475. In this recent decision, the Ninth Circuit erroneously stated that the
22 U.S. Supreme Court “expressly approved of top two primary systems” and cited *Cal.*
23 *Democratic Party v. Jones* (2000) 530 U.S. 567, 585-86. *Washington State Republican*
24 *Party* at *8. The portion of *Jones* cited by the Ninth Circuit is merely dicta: in *Jones* the
25 Court in fact *overturned* California’s blanket primary system, citing the severe burdens
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1 placed on the freedom of association of political parties. As the *Washington State*
2 *Grange* footnote 11 makes clear, the “top two” ballot access issue is yet to be decided.

3 Even if this Court were to find that the U.S. Supreme Court had, in 2000,
4 preemptively decided the “top two” ballot access issue, however, intervener-defendants
5 concede that Proposition 14 could nevertheless be overruled under the California
6 Constitution, so long as “cogent reasons” exist for doing so. (Surreply at 2 (citing
7 *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 179).)

9 **B. The California Constitution Guarantees Multiple Rights that are**
10 **Burdened by Proposition 14, Including the Freedom of Speech,**
11 **the Right to Petition Government, and the Right to Equal**
12 **Privileges and Immunities**

13 “Rights guaranteed by [the California] Constitution are not dependent on those
14 guaranteed by the United States Constitution.” Cal. Const. art. I, §24. As the California
15 Supreme Court has explained:

16 This statement [in art. I, §24] extends to all such rights, including article I’s
17 freedom of speech. For the California Constitution is now, and has always been, a
18 document of independent force and effect particularly in the area of individual
19 liberties. As a general rule, article I’s free speech clause are not only as broad and
20 as great as the First Amendment’s, they are even broader and greater. *Fashion*
Valley Mall, LLC v. NLRB (2007) 42 Cal.4th 850, 862-63 (citations omitted).

21 Thus, California courts have protected free speech rights in various contexts where the
22 U.S. Supreme Court has declined to exercise authority. *See, e.g., Fashion Valley Mall,*
23 *supra*, 42 Cal.4th at 870 (union representing mall workers may urge boycott of mall
24 store); *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 476 (plum growers not
25 bound to participate in state-mandated marketing campaign); *Robins v. Pruneyard*
26 *Shopping Center* (1979) 23 Cal.3d 899, 902 (petition gatherers have free speech rights
27 in privately owned shopping center). *See also Gerawan, supra*, 24 Cal.4th at 491
28 (listing cases establishing expansive reach of California Constitution). In reciprocal

1 fashion, the U.S. Supreme Court has respected California's "sovereign right to adopt in
2 its own Constitution individual liberties more expansive than those conferred by the
3 Federal Constitution." *PruneYard Shopping Center v. Robbins* (1980) 447 U.S. 74, 81.
4 Furthermore, when the California Constitution provides a basis for decision, federal
5 constitutional issues should be avoided. *Carpenter v. City and County of San Francisco*
6 (9th Cir. 1996) 93 F.3d 627, 629.

8 The recent line of cases establishing the expansive reach of the California
9 Constitution began with the dissenting opinion of Justice Mosk in *Diamond v. Bland*
10 (1974) 11 Cal.3d 331, overruled by *Robins, supra*, 23 Cal.3d 899. Justice Mosk wrote:

12 I deem the 27 sections in article I of the California Constitution, comprising our
13 declaration of rights, to be arguably more embrasive than the first 10
14 amendments, plus the Fourteenth, of the United States Constitution." *Diamond,*
supra, 11 Cal.3d at 337 (MOSK, J., dissenting).

15 In *Gerawan* the California Supreme Court illuminated Justice Mosk's position:

16 [A]rticle I's right to freedom of speech, unlike the First Amendment's, is
17 unbounded in range. It runs against the world, including private parties as well
18 as government actors. *Gerawan, supra*, 24 Cal.4th at 492.

19 [A]rticle I's right to freedom of speech, unlike the First Amendment's, is
20 unlimited in scope. Whereas the First Amendment does not embrace all subjects,
21 article I does indeed do so *Id.* at 493 (quotation marks omitted).

22 Perhaps most importantly to the present action, the *Gerawan* Court wrote, "Within its
23 unlimited scope, which expressly embraces all subjects, article I's right to freedom of
24 speech protects political speech and ideological speech." *Id.* (citations omitted).

25 At least four sections of the California Constitution, article I, bear on this action:

- 26 • §2(a): Every person may freely speak, write and publish his or her sentiments on
all subjects A law may not restrain or abridge liberty of speech or press.
- 27 • §3(a): The people have the right to instruct their representatives, petition
28 government for redress of grievances, and assemble freely to consult for the
common good.

- 1 • §7(b): A citizens or class of citizens may not be granted privileges or immunities
2 not granted on the same terms to all citizens. Privileges or immunities granted
3 by the Legislature may be altered or revoked.
- 4 • §24: Rights guaranteed by this Constitution are not dependent on those
5 guaranteed by the United States Constitution.

6 **Freedom of Speech**

7 “The preservation of free expression is of particular urgency in the political
8 arena.” *Beilenson v. Superior Court* (App. 2 Dist. 1996) 44 Cal.App.4th 944, 956. Here,
9 Proposition 14 has deprived plaintiff minor party candidates of the opportunity to
10 communicate with general election voters. Plaintiff minor parties have been denied the
11 opportunity to communicate their party’s choice of candidate. And finally, plaintiff
12 voters have been denied the opportunity to hear minor party positions at the most
13 important moment of the political process, the general election. As the *Gerawan* Court
14 described, freedom of speech under the California Constitution extends “not only to one
15 who speaks but also to those who listen.” *Gerawan, supra*, 24 Cal.4th at 485 (also
16 noting that “freedom of speech does not restrict itself depending on the identity of the
17 speaker, whether corporation, association, union, or individual”). Because Proposition
18 14 burdens plaintiffs’ free speech rights under the California Constitution without
19 furthering a compelling government interest, this Court should grant injunctive relief.
20
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22 **Right to Petition Government**

23 The right of petition refers generally to “the right of the people to inform their
24 representatives in government of their desires with respect to the passage or
25 enforcement of laws.” *Zhao v. Wong* (App. 1 Dist. 1996) 48 Cal.App.4th 1114, 1122.
26

27 As a guarantee of the ability of the people to make their wishes known to their
28 representatives, the petition clause overlaps a broad area also protected by the
right of freedom of speech; it includes acts designed to influence public opinion
concerning an issue before a legislative or administrative body, and it has been

1 described as an assurance of a particular freedom of expression. *Zhao, supra*, 48
2 Cal.App.4th at 1122 (citations omitted).

3 Voting is also protected by the right to petition. *Shroeder v. Irvine City Council* (App. 4
4 Dist. 2002) 97 Cal.App.4th 174, 183. Here, Proposition 14 has burdened plaintiffs'
5 rights as voters to effectively petition the government by precluding minor party
6 candidates from the general election ballot, thus impermissibly narrowing the range of
7 issues upon which voters may base their decision.

9 Privileges and Immunities

10 The right to serve in a public office is a fundamental right of citizenship. *Pope v.*
11 *Superior Court* (App. 2 Dist. 2006) 136 Cal.App.4th 871, 876. As long ago as 1900,
12 when the California Supreme Court considered one of the first innovations to the
13 primary election law, the Court counseled that electoral regulations must be
14 implemented "without discrimination, and with equal consideration and benefit to all."
15 *Britton v. Board of Election Com'rs of City and County of San Francisco* (1900) 129 Cal
16 337, 341. In *Britton* the Court overruled the election law at issue, finding:
17

18 [T]he effect of [the] act here . . . is not only to discriminate between political
19 parties and the members thereof, but absolutely to work the disenfranchisement
20 of voters, or to compel them, if they vote at all, to vote for representatives of
21 political parties other than that to which they belong. The deprivation of the
right of selection is a deprivation of the right of franchise. *Id.* at 344.

22 Here, Proposition 14 has worked an identical disenfranchisement of plaintiff minor
23 party voters. Because California does not countenance such an inequitable allocation of
24 rights and privileges, this Court should enjoin implementation of Proposition 14.

25 Dated: February 14, 2012

SIEGEL & YEE

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28 By 

Michael Siegel
Attorneys for Plaintiffs

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PROOF OF SERVICE

I, MICHAEL SIEGEL, declare as follows:

I am over eighteen years of age and a citizen of the State of California. I am not a party to the within action. My business address is 499 14th Street, Suite 220, Oakland, CA 94612.

On February 14, 2012, I served copies of the following documents:


1. PLAINTIFFS' RESPONSE TO SURREPLY OF INTERVENER-DEFENDANTS

on the parties to this action by mailing the documents by U.S. Mail to the offices of the attorneys for defendant and the defendant-interveners:

Mark R. Beckington
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Christopher Skinnell
Nielsen Merksamer Parrinello Gross & Leoni
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San Rafael, CA 94901

I declare under penalty of perjury that the foregoing is true and correct. Executed February 14, 2012, at Oakland, California.


Michael Siegel