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CALIFORNIA SUPERIOR COURT

COUNTY OF SAN FRANCISCO

MONA FIELD, RICHARD WINGER, STEPHEN A. CHESSIN, JENNIFER WOZNIAK, JEFF MACKLER, and RODNEY MARTIN, *Plaintiffs*, vs. DEBRA BOWEN, in only her official capacity as California Secretary of State; JOHN ARNTZ, in only his official capacity as Director of Elections of the City and County of San Francisco; DAVE MACDONALD, in only his official capacity as Registrar of Voters of the County of Alameda; JESSE DURAZO, in only his official capacity as Registrar of Voters of the County of Santa Clara; DEAN LOGAN, in only his official capacity as Registrar-Recorder / County Clerk of the County of Los Angeles; NEAL KELLEY, in only his official capacity as Registrar of Voters of the County of Orange; RITA WOODARD, in only her official capacity as Registrar of Voters of the County of Tulare; and DOES 1-20; *Defendants*.	CASE NO. CGC-10-502018 **PLAINTIFFS' RESPONSE TO INTERVENORS' SURREPLY; WRITTEN OBJECTIONS TO PLAINTIFFS' EVIDENCE; AND EVIDENCE SUBMITTED TO CURE INCOMPLETENESS OF PLAINTIFFS' EVIDENCE** HEARING DATE: Sept. 14, 2010 HEARING TIME: 9:30 A.M. JUDGE: Hon. Charlotte Walter Woolard DEPARTMENT: 302 (Law & Motion)

1 **I. Introduction**

2 Having failed to defend SB 6's constitutionality in their opposition papers, Intervenors 3 now seek a "second bite at the apple". Plaintiffs' Motion for Preliminary Injunction has already 4 been fully briefed, and will be heard by this Court on Sept. 14, 2010. Yet, at the eleventh hour,[1] 5 Intervenors desperately – and falsely – claim that Plaintiffs have raised two new arguments in 6 their reply brief. 7

8 Citing such spurious grounds, Intervenors make arguments and evidentiary objections that 9 could have and should have been raised earlier – in their opposition papers. As a direct result of 10 Intervenors' overreaching, Plaintiffs have been forced to bring this response to protect 11 their rights – burdening this Court and hampering judicial economy. To ensure that Plaintiffs' 12 rights are not irreparably harmed, Intervenors' needless, reckless Surreply, "Written Objections to 13 Plaintiffs' Evidence", and "Evidence Submitted To Cure Incompleteness" (collectively, 14 "Untimely Documents") must be disregarded. 15

16 **II. The Court Must Disregard Intervenors' Written Objects to Plaintiffs' Evidence**

17 To begin with, the specious objections raised by Intervenors' Sur-Reply should be discarded 18 as both unauthorized and untimely. Astonishingly, Intervenors seek to wish (and wash) away 19 evidence[2] introduced by Plaintiffs' Verified First Amended Complaint, which had been filed two 20 weeks before Intervenors filed their own opposition papers.[3] 21

22

23 [1] Intervenors gave Plaintiffs no notice that they would file a Sur-Reply, and did not telephone Plaintiffs' counsel to notify him of their Sur-Reply. Plaintiffs' first learned that Intervenors had filed their Sur-Reply at 24 approximately 9 pm on September 9, 2010, via an email from Intervenors' Counsel that had apparently been sent at 5:51 pm that evening – after the close of business. Dutta Declaration .

25 [2] All but one of Intervenors' baseless "objections" seek to destroy evidence properly introduced by Plaintiffs' First Amended Complaint. Plaintiffs respond to Intervenors' evidentiary objections in a separate document that will 26 also be filed with the Court today, and reserve the right to supplement both this Response and their response to Intervenors' evidentiary objections..

27 [3] In their opposition papers, Intervenors asserted that Defendant Secretary of State Bowen's opinions were "entitled to great deference." Intervenors' Opposition, at 4:21-22 (emphases added). Rather than "deferring" to 28 Defendant Bowen, Intervenors now seek to remove one of her press releases drafted by Defendant Bowen's office. Intervenors' Written Objections to Plaintiffs' Evidence, at 1 (seeking to delete evidence introduced by Plaintiffs'

As a general rule, litigants are barred from raising arguments or introducing evidence they could have raised earlier, unless they can make an application "based upon sickness, inadvertence, or other excusable neglect":[4]

> If the practice were allowed without any substantial reason, it would lead to great irregularity and delay. In such event the respondent, of course, could justly demand the right to file an additional brief, and the course of the argument by brief would be radically changed."[5]

Here, Intervenors have given absolutely no reason for why their Aug. 30, 2010 opposition papers did not object to evidence introduced by Plaintiffs' Aug. 16, 2010 Complaint. What is more, Intervenors have brazenly misquoted Plaintiffs' papers.[6] Consequently, the Court must disregard the entirety of Intervenors' Written Objections to Plaintiffs' Evidence and Evidence To Cure Incompleteness.

III. Plaintiffs' Reply Brief Properly Rebutted Arguments Raised by Intervenors

Intervenors falsely claim that Plaintiffs introduced two new arguments in their Reply Brief. According to the Court of Appeal, a reply brief may provide an "elaboration of issues raised in [the] opening brief or rebuttals to [opposition] briefing."[7] Instead of introducing any new argument, Plaintiffs' Reply Brief rebutted three arguments made by Intervenors' opposition papers. First, Intervenors invoked *Libertarian Party v. Eu*[8] ("*Eu*") to argue that Party-Preference Plaintiffs' legal claims had no merit:

> Plaintiffs ignore the fact that the California Supreme Court held – in a case Plaintiffs inexplicably do not even cite – that this precise system [i.e., SB 6's election scheme] is constitutional. (*Libertarian Party v. Eu* (1980) 28 Cal.3d 535.)[9]

First Amended Complaint ¶33 n.19).

4 *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 765 (emphasis added).

5 *Id.* at 765 (*quoting Kahn v. Wilson* (1898) 120 Cal. 643, 644, 53 P.24) (emphases added).

6 Plaintiffs' Reply Brief states:

7 *Reichardt, supra* note 3, 52 Cal.App.4th at 764 (emphases added).

8 *Libertarian Party v. Eu* (1980) 28 Cal.3d 535.

9 Intervenors' Opposition, at 2:5-7 (emphases added).

1 Second, Intervenors argued that the *Eu / Rosen v. Brown*[10] line of cases "reject[ed] claims
2 *just like Plaintiffs'*[.]"[11] Towards that end, Intervenors invoked the following federal cases:[12]
3 *Schrader v. Blackwell*[13] (which re-affirmed *Rosen*), *Rubin v. City of Santa Monica*[14] (which
4 approvingly cited *Schrader*), and *Lightfoot v. Eu*[15] (*citing Eu*). Third, Intervenors argued that
5 Party-Preference Plaintiffs lacked standing, because they allegedly could not obtain a legal
6 remedy "under existing law"[16] – i.e., California's existing election regime that had been upheld
7 by *Eu*.
8
9 In response to Intervenors' misleading claims, Plaintiffs' Reply Brief made two rebuttals.
10 First, Plaintiffs rebutted that *Eu* "does not directly apply here, because it upheld California's
11 existing "qualified party" election system – which SB 6 seeks to dismantle."[17] Second, Plaintiffs
12 rebutted that
13
14 > [t]he *Eu / Rosen v. Brown* line of cases (liberally cited by SB 6 Defendants) stands
> for a core constitutional principle: at a bare minimum, non-qualified-party
15 > candidates have the right to identify themselves on the ballot as "Independent".[18]
16 Toward that end, Plaintiffs also cited the same cases that had originally been invoked by
17 Intervenors:[19] the federal cases of *Schrader*, *Rubin*, and *Lightfoot*.
18
Thus, as the record shows, Plaintiffs properly rebutted arguments raised by Intervenors'
19
opposition papers.[20] Since Intervenors had no lawful basis to file a sur-reply to Plaintiff's Reply
20
Brief, the Court must set aside Intervenors' Sur-Reply.
21

22 [10] *Rosen v. Brown* (6th Cir. 1992) 970 F.2d 169, 175 (candidates have a constitutional right to a party voting cue of "Independent" on the ballot).
23 [11] Intervenors' Opposition, at 10:11-12 (emphasis in original).
[12] *Id.* at 10:13-22.
24 [13] *Schrader v. Blackwell* (6th Cir. 2001) 241 F.3d 783, 788-89, *cert. denied* (2001) 534 U.S. 888.
[14] *Rubin v. City of Santa Monica* (9th Cir. 2002) 308 F.3d 1008
25 [15] *Lightfoot v. Eu* (9th Cir. 1992) 964 F.2d 865, 870, *cert. denied* (1993) 507 U.S. 919.
26 [16] *Id.* at 15:11-14 (emphasis added).
[17] *Plaintiffs' Reply Brief*, at 8:14-15 (emphasis in original).
27 [18] *Id.* at 9:12-15 (emphases in original, emphases added to the phrase "liberally cited by SB 6 Defendants").
[19] *Id.* at 9:15 n.36 (*citing Schrader, Rubin, and Lightfoot)*; *cf.* Intervenors' Opposition, at 10:13-22 (*citing Schrader, Rubin, and Lightfoot)*.
28 [20] *Reichardt*, *supra* note 3, 52 Cal.App.4th at 764

IV. Intervenors Fail to Prove That *Eu* Directly Applies To This Case

Since the Court has been barraged with enough paper already, Plaintiffs will limit themselves to rebutting two arguments that were improperly raised by Intervenors' Sur-Reply. First, *Eu* does not directly apply to this case. Contrary to Intervenors' claims, *Eu* had everything "to do with California's pre-existing system of qualified-party primary elections[.]"[21] In fact, the *Eu* Court expressly held that candidates from non-qualified parties were banned from appearing on the June "qualified primary" ballot.

Specifically, *Eu* held that "only qualified parties have been granted the right by the Legislature to nominate candidates for the ballot" by means of the June "qualified party" primary.[22] As Plaintiffs' Reply Brief showed, SB 6 seeks to dismantle California's existing "qualified party" elections – "the very basis for the holding in *Eu*."[23] Therefore, since it expressly contemplates "qualified party" elections, *Eu* does not directly apply to this case.

V. Intervenors Fail to Refute Party-Preference Plaintiffs' Right to the "Independent" Label

Intervenors fiercely deny that, to the extent that it applies, that the *Eu / Rosen v. Brown* line of cases gives non-qualified-party candidates the right to identify themselves on the ballot as "Independent".[24] Yet again, their claims fall flat. In *Rosen*[25], the Sixth Circuit ruled that non-qualified-party candidates had a constitutional right to be a party designation of "Independent" on the ballot. Subsequently, *Rosen*'s holding was adopted by *Schrader*[26] (invoked by Intervenors) and by the Ninth Circuit in *Rubin*[27] (also invoked by Intervenors). Here, it is undisputed that SB 6 denies non-qualified-party candidates their constitutional right to identify themselves as

[21] *Contra*, Intervenors' Sur-Reply, at 3:2-3 ("Contrary to Plaintiffs' representations concerning *Eu*, that case had nothing to do with California's pre-existing system of qualified-party primary elections[.]").
[22] *Eu, supra* note 7, 28 Cal.3d at 544 (emphases added).
[23] Plaintiffs' Reply Brief, at 9:3-4 (emphases in original).
[24] *Id.* at 9:12-15; *contra*, Intervenors' Sur-Reply, at 3:16-17.
[25] *Rosen, supra* note 9, 970 F.2d at 178.
[26] *Schrader, supra* note 12, 241 F.3d at 788-89.
[27] *Rubin, supra* note 13, 308 F.3d 1008.

"Independent". Therefore, SB 6 violates the constitutional rights guaranteed by the *Eu / Rosen* line of cases.

VI. Conclusion

In short, Intervenors' Untimely Documents threaten Plaintiffs with irreparable harm.[28] The hearing on Plaintiffs' Motion for Preliminary Injunction Motion is set for Sept. 14, 2010, and Plaintiffs simply do not have sufficient time to fully respond to the new arguments raised by Intervenors.[29] If Intervenors' Sur-Reply and evidentiary objections are permitted into the record, they will severely prejudice Plaintiffs' right to a fair hearing on their Motion for Preliminary Injunction.[30]

Accordingly, Plaintiffs respectfully ask this Court to set aside Intervenor's Surreply, Written Objections to Plaintiffs' Evidence, and Evidence Submitted To Cure Incompleteness.

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[28] Dutta Declaration ¶5.

[29] Dutta Declaration ¶6.

[30] Dutta Declaration ¶7.

DATED: September 10, 2010

Respectfully submitted,

By: GAUTAM DUTTA, ESQ.

Attorney for Plaintiffs

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