

1 SUPERIOR COURT OF CALIFORNIA
 2 COUNTY OF SAN FRANCISCO
 3 BEFORE THE HONORABLE CHARLOTTE WALTER WOOLARD, JUDGE PRESIDING
 4 DEPARTMENT NUMBER 302

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6 MONA FIELD, et al.,)
)
 7 Plaintiff,) Case No. CGC-10-502018
)
 8 vs.)
)
 9 DEBRA BOWEN, in her official)
 capacity as California)
 10 Secretary of State, et al.,)
)
 11 Defendants.)
 -----)

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14 Reporter's Transcript of Proceedings

15 Tuesday, September 14, 2010

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18 APPEARANCES OF COUNSEL:

19 For Plaintiff:

20 GAUTAM DUTTA, Attorney at Law

21 For Defendant Bowen:

22 MARK R. BECKINGTON, Deputy Attorney General

23 For Defendant San Francisco County:

24 MOLLIE LEE, Deputy City Attorney

25 For Defendant Alameda County:

26 FARAND C. KAN, Alameda County Counsel

27 For Defendant Santa Clara County:

28 SUSAN B. SWAIN, Santa Clara County Counsel

2

1 For Defendant Orange County:

2 WENDY PHILLIPS, Deputy County Counsel

3 For Defendant Los Angeles County:

4 PATRICE SALSEDA, Los Angeles County Counsel

5 For Intervenors:

6 MARGUERITE MARY LEONI, Attorney at Law
CHRISTOPHER E. SKINNELL, Attorney at Law

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3 Tuesday, September 14, 2010

10:06 o'clock a.m.

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5 THE COURT: Let's go to line number 5 which is Field versus
6 Debra Bowen in her official capacity as California Secretary of
7 State.

8 So, counsel, if we could have all of your appearances,
9 please.

10 MR. DUTTA: Good morning, Your Honor. Gautam Dutta, counsel
11 for plaintiff.

12 MS. LEONI: Good morning, Your Honor. Mark Beckington,

13 Deputy Attorney General, on behalf of the Secretary of State
14 Debra Bowen.

15 MS. SWAIN: Good morning, Your Honor. Susan Swain on behalf
16 of County of Santa Clara Registrar of Voters Jessy Durazo.

17 MS. PHILLIPS: Good morning, Your Honor. Wendy Phillips,
18 Deputy County Counsel, appearing on behalf of the Orange County
19 Registrar of Voters Neal Kelley.

20 MS. SALSEDA: Good morning, Your Honor. Patrice Salseda,
21 Los Angeles County Counsel, appearing for Judy Whitehurst on
22 behalf of Dean Logan, the Los Angeles County Registrar Recorder.

23 MS. LEONI: Good morning, Your Honor. Marguerite Leoni
24 appearing on behalf of intervenor defendants.

25 MR. SKINNELL: Good morning, Your Honor. Chris Skinnell
26 also appearing on behalf of intervenor defendants.

27 MS. LEE: Good morning, Your Honor. Mollie Lee, Deputy City
28 Attorney, appearing on behalf of San Francisco Director of

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1 Elections John Arntz.

2 MR. KAN: Good morning, Your Honor. Farand Kan with the
3 county counsel for County of Alameda Registrar of Voters.

4 THE COURT: Good morning to all of you. And we will need to
5 make certain we use the microphones so that the people on the
6 phone can hear us.

7 This is a motion for preliminary injunction, and the Court's
8 tentative ruling is to deny the motion. Plaintiffs have standing
9 to file their claims and bring this motion, *Storer versus Brown*,
10 1974, 415 U.S. 724, 737, Footnote 8. However plaintiffs fail to
11 show a likelihood of success on the merits. It is constitutional
12 to ban write-in voting under the U.S. and California Supreme
13 Court precedent. See *Burdick versus Takushi*, 1992, 504 U.S. 528,
14 *Edelstein versus City and County of San Francisco*, 2002, 29 Cal
15 4th 164.

16 When Election Code Sections 8141.5 and 8606 are read
17 together, it is apparent that the legislature intended to ban
18 write-ins in the general election. See also comments of the
19 Secretary of State and the Assembly Bill analysis. Insufficient
20 evidence and case law support the argument that the party
21 preference ban violates the equal protection clause or the
22 election clause. The State may require candidates not affiliated
23 with qualified parties to use the "independent" label. See
24 *Libertarian Party versus Eu*, 1980, 28 Cal 3d 535.

25 Several federal circuit courts have also held that a state
26 is not constitutionally obligated to permit candidates to list
27 their preferred party label on the ballot. See *Schrader versus*
28 *Blackwell*, 241 F. 3d 783, 6th Circuit 2001; *McLaughlin versus*

2 1995; Lightfoot versus Eu, 964 F. 2d 865, 9th Circuit 1992; Rubin
3 versus City of Santa Monica, 308 F. 3d 1008, 9th Circuit 2002.

4 And plaintiffs showing of imminent harm is not sufficient.

5 So I take it that plaintiff, of course, is contesting the
6 tentative ruling. So let me hear from you first, please.

7 MR. DUTTA: Thank you, Your Honor. And obviously we would
8 like to change your mind, but to the extent that we don't, we
9 would like to establish a record.

10 I first would like to address the issue of, just moving
11 backwards. One of the core issues of this case is whether this
12 law at-issue SB 6 bans write-in votes from being cast or whether
13 it allows voters to cast a write-in vote and then not have that
14 vote counted. So that is one core issue.

15 The law is rather clear there. I don't believe it is
16 terribly controversial. That is, if you allow a voter to cast a
17 vote, it must be counted, including write-in votes. But the
18 there is precedent that allows a jurisdiction, a government, to
19 ban voters from casting a vote. So that's just the up front
20 scenario there.

21 And where we would disagree with the Court on the first
22 issue is that this law, SB 6, it's plain language does allow
23 voters to cast a write-in vote and then a provision within it,
24 specifically 8606, then orders that that vote not be counted in
25 the general election. So that's what we are talking about over
26 here.

27 The two sections that were cited by the Court do not on
28 their face ban voters from casting write-in votes. Section 8606

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1 only says that a vote cast for write-in candidate shall not be
2 counted. In addition, Section 8141.5 basically says that only
3 the top two candidates who finish in the June primary shall
4 appear on the ballot. It does not speak anything about write-in
5 candidates. It only speaks about who is qualified to have their
6 name appear on the ballot.

7 And one thing I would like to share with the Court and with
8 the parties that are appearing, is just a brief handout that just
9 summarizes the plain language at issue. So if I may approach the
10 bench as well?

11 THE COURT: Counsel, have you seen this?

12 MS. LEONI: No, Your Honor, and I would object.

13 MR. DUTTA: Well, it's just recited to -- it doesn't matter
14 because it's basically reciting the law, so it's nothing that is
15 new to counsel.

16 THE COURT: Well, just include it into your argument.

17 MR. DUTTA: Okay. I will just include it into my argument.

18 THE COURT: It makes a better record anyway.

19 MR. DUTTA: Okay. That's no problem. I just wanted to have
20 it in front of their hands.

21 All right. So there are several provisions that expressly,
22 which Section -- which SB 6 did not amend that do allow for the
23 casting of write-in votes. So I will start with Elections Code
24 Section 15340. It says that each voter is entitled to write the
25 name of any public office on the ballot of any election.

26 Now, I will turn to SB 6's express language. In Section I,
27 Part 13, it says that nothing in this section shall be construed
28 as preventing or prohibiting any qualified voter of the State

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1 from casting a ballot for any purpose, for any person, by writing
2 the name of that person on the ballot or from having that ballot
3 counted and tabulated. Nor shall any provision of this section
4 be construed as preventing or prohibiting any person from
5 standing or campaigning for any elective office by means of a
6 write-in campaign.

7 In addition, according to SB 6, Section 50, Part
8 13207(a)(2), every ballot must give voters the option to vote for
9 write-in candidates. And here's the language. There shall be
10 printed on the ballot the names of candidates with sufficient
11 blank spaces to allow the voters to write in names not printed on
12 the ballot.

13 Now, the Secretary of State, after having looked at this
14 law, even agrees with the position that this law does not allow
15 write-in -- does allow write-in ballots to be cast, but does not

16 allow them to be counted. I am going to quote specifically from
17 the Secretary of State's Office. Here in an e-mail that was sent
18 to the Lieutenant Governor's Office, the Secretary of State's
19 Office said the following. And I paraphrasing it -- well, I am
20 actually quoting it, but it's as cited in the papers.

21 Since SB 6 precludes write-in votes from being counted, it
22 makes no sense to give voters the illusion that they can write in
23 a candidate's name and have it counted. Furthermore, in their
24 opposition papers, the Secretary of State stated that SB 6
25 precludes counting write-in votes cast in the general election.
26 Under *Yamaha versus Board of Elections*, which is a California
27 Supreme Court case, the court held there that the observations of
28 a government official such as the Secretary of State constitutes

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1 a body of experience and informed judgment to which courts and
2 litigants may properly resort so guidance.

3 And I might also note that intervenors in their opposition
4 papers expressly stated that the Secretary of State's abuse are
5 entitled to great deference.

6 Finally I will add one other note with regard to the issue
7 of whether SB 6 bans or allows write-in votes to be cast.

8 Intervenor Yes on 14 noted that the legal experts designed SB 6
9 based on the Washington State election model. And I am going to

10 quote from that election, from that model. So under Revised
11 Washington Code 29(A)-52-112, it states the following:

12 Based upon votes cast at the primary, the top two candidates
13 will be certified as qualified to appear on the general election
14 ballot unless only one candidate qualifies as provided in RCW
15 29(A).36.170. Essentially this basically states that the only --
16 there only be two, quote, "qualified" candidates to appear on the
17 ballot, but what is significant is that Washington State allows
18 for write-in votes to be both cast and counted. So having a
19 language here that says that only two people can appear on the
20 ballot does not at all, does not at all eliminate the ability of
21 write-in candidates to run and to gain votes.

22 So that's the first issue that is, that is certainly up for
23 discussion where we disagree with the Court. And perhaps I
24 should break here but I would like to turn to other issues or
25 should I continue? I would like to ask the Court.

26 THE COURT: Well, let me find out from counsel. Do you want
27 to go issue by issue or do you want to just wait patiently and
28 address the issues later?

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1 MR. BECKINGTON: Your Honor, Mark Beckington,
2 B-e-c-k-i-n-g-t-o-n, Deputy Attorney General representing the
3 Secretary of State.

4 I'll do whatever Your Honor's preference is.

5 THE COURT: Okay. Well, why don't we do the whole thing
6 because when I analyzed this --

7 MR. DUTTA: Okay.

8 THE COURT: -- I basically took it as a big picture, and I
9 think that the issues are very well set out in both the motion
10 and the opposition. So why don't you continue?

11 MR. DUTTA: Okay. I will, Your Honor. Okay. So that's --
12 just to recap, the summary is that our interpretation of SB 6 is
13 that it allows voters to cast write-in votes, but then requires
14 that those votes be discarded, and we believe that the plan
15 language requires that result. And that is unconstitutional.

16 Turning to our claims under the Equal Protection Clause,
17 that is something that the Court again did find, did not appear
18 to find merit. What is interesting here is that our claims were
19 in some sense virtually conceded by the Secretary of State and
20 intervenors. Namely, our core contention here is that SB 6
21 violates the requirement of the Supreme Court case, *Stanson v.*
22 *Mott*, which bans government from favoring an incumbents, taking
23 sides, or giving an unfair advantage to a competing faction in
24 elections. And it's not just the California supreme courts. In
25 fact, other courts in the Fifth, Seventh and Eighth Circuits have
26 also struck down election laws that favor the major parties over
27 minor parties.

28 And in this case SB 6 does just that. It favors candidates

1 from state recognized parties, otherwise known as qualified
2 parties over non-state recognized parties, also known as
3 non-qualified parties. What does it do? Well, as the Court by
4 now knows, if you are from a non-qualified party -- let's say tea
5 party or a reform party, what have you, you won't be able --
6 instead of saying I prefer to affiliate with the tea party, you
7 will instead only be allowed to say "no party preference." You
8 will not be able to state your party preference.

9 In contrast, if you are a part of a, if you have a
10 preference for a party that is state recognized or also known as
11 qualified, such as say you are a democrat or you are a
12 republican, then you will be allowed, permitted to say, I am a
13 member -- sorry, I prefer to affiliate with the democratic or
14 republican party.

15 Now, what is significant here is it doesn't even matter if
16 the party that you claim to have an affinity towards or belong
17 to, even supports you, even endorses you, or even has nominated
18 you. It's just a matter of what you are saying your preference
19 is. So that I think is rather important because it's not a
20 question of having the parties saying, this is our nominee and
21 they are entitled to use our name and say that they are from our
22 party. Instead, it's just whatever the candidate says they are.
23 That's it.

24 Now, in defense both the defendant Bowen as well as the
25 intervenors have invoked the California Supreme Court,
26 Libertarian Party versus Eu, which the Court mentioned, cites in
27 its tentative. That however is just a case of apples and oranges
28 because Eu specifically upheld the so-called qualified party

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1 primary system, which is the exact type of election that SB 6
2 seeks to dismantle.

3 Just to give a little bit of background on this. You know,
4 currently the way we run our elections is the so-called qualified
5 party system. So what happens is that in June of an even year,
6 which was earlier this year, for example, everybody runs, you
7 know, each party that is qualified that is State recognized, is
8 allowed to have a primary that is funded, of course, under tax
9 dollars. And what happens there is that everybody who wants to
10 be the nominee from that party runs in that primary. So you will
11 have someone running from the republican party, democratic party
12 and other state-established, state-recognized parties. And
13 whoever wins each respective primary, respective qualified party
14 primary, will then proceed and advance to the November general
15 election. So that's one pool of candidates.

16 There is a second pool of candidates. That is the people
17 who do not belong to a qualified party, or a state recognized
18 party. Let's say Tea Party, whatever have you. They are not

19 allowed to participate in the June primary. They are only
20 allowed to participate if they get enough signatures and meet
21 certain requirement in the November general election, and then at
22 that point they are called independent. Now, what is significant
23 here is that in the Eu case, in that Libertarian Party versus Eu
24 case, the Court expressly noted that when they say -- when a
25 voter see the word "independent," what it means to them is that a
26 candidate has not been vetted through the parties primary
27 process. That is, that candidate has qualified for the November
28 primary only and has not gone through the party primary process,

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1 that is, the June primary, and as a result is not entitled to use
2 the name of the party that he or she prefers to affiliate with
3 because they did not have a chance to run in June and voters did
4 not -- and they did not have a chance to get vetted. Now, let's
5 take a look at what the regime that SB 6 seeks to introduce.
6 Namely, it gets rid of the qualified party system. Instead, in
7 June, in June of an even year. So let's say June 2012, everybody
8 will run in one election in a free-for-all, regardless of what
9 party they are from. So, for example, in the election you could
10 have oh, two republicans, three democrats, one green, one tea
11 party, everybody could be -- everybody will all be running in one
12 election.

13 So it's no longer a case where everybody is in their --
14 parties are in their cubby hole shall we say like where democrats
15 flock to each other and republicans flock to each other. Instead
16 everybody's running against each other and then the top two,
17 irrespective of party, the top two finishers, irrespective of
18 party, then advance to November. Under that paradigm it makes Eu
19 simply does not directly apply because you no longer have a
20 system where your vetting candidates for by party. Instead
21 everybody is running as an individual, and the top two people,
22 candidates regardless of party, will qualify for the November
23 election.

24 As a result, anyone who appears, for example, in November,
25 let's say there are -- there is a democrat and there is a, for
26 good measure, a republican who finish first and second, whatever
27 order in the November primary, that does not mean that they have
28 been party endorsed. In fact, SB 6 specifically states that

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1 there is no party -- that the fact that someone has a certain --
2 adopts a certain label, that is, I prefer to affiliate with "x"
3 party does not mean that that party has either endorsed that
4 person or has nominated that person. So there is a very
5 significant difference here, and that's exactly why Eu does not
6 apply.

7 In fact, Eu specifically states that only qualified parties

8 have been granted the right by the legislature to nominate
9 candidates for the ballot, and that's by means of this qualified
10 party primarily. Now, Eu does not directly apply, and that's our
11 position here. But to the extent that it does apply, it severely
12 undercuts defendant -- intervener's stated position. For
13 example, the cases they cite all go back to a case called Rosen
14 v. Brown, and that basically was a case where a candidate was not
15 allowed to state his party preference on the ballot. It would
16 just list a blank. It would not list his party.

17 And what the court in the Sixth Circuit decided there was
18 that that was not constitutional. That candidate, even though he
19 was not part of a major party, had a right to be called
20 independent which is consistent with Eu because again he
21 qualifies for the ballot independent of the party nomination or
22 the qualified party nomination process. That holding carried
23 over to Schrader versus Blackwell which is liberally cited by
24 interveners, by defendants, and it also carried over to Ruben
25 versus Santa Monica which was a case that came out from the 9th
26 Circuit.

27 So basically, constitutionally speaking, a candidate is at a
28 minimum is entitled to state that they are independent. And

1 simply put, stating -- being forced to state that they have,

2 quote, "no party preference" does not cut it, does not meet
3 constitutional muster. So to the extent that the Eu versus
4 Libertarian Party and Rosen and Schrader line of cases apply
5 here, it certainly does not help intervenors or defendants. It
6 definitely would hurt the position of intervenors and defendants.
7 So that covers our Equal Protection Clause claim.

8 Now, turning to the Elections Clause, this is again quite
9 interesting because in a way it was again virtually conceded by
10 defendants and intervenors. Basically our theory is that SB 6
11 violates the Elections Clause of the United States Constitution
12 because, for three reasons. One, it favors one class of
13 candidates over another. That's under Cook v. Gralike.
14 Basically it favors candidates from state recognized parties who
15 are allowed to state the name of their party on the ballot over
16 non -- candidates from non-recognized state parties because they
17 are not -- they are not allowed to state their party of
18 preference on the ballot when they run. So that's the first
19 reason.

20 The second reason is that SB 6 seeks to dictate electoral
21 outcomes by again favoring one set of candidates, that is --
22 actually two -- one set of candidates -- in this case two sets of
23 candidates over another. The first set being candidates who are
24 from a qualified party, that is a state-established party, and
25 the other is write-in candidates who appear on the ballot and
26 over candidates who do not appear on the ballot, that is run on

27 write-ins.

28 And finally it violates the Election Clause because it

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1 invades important constitutional restraints. There's a case that
2 I would like to bring the Court's attention to that's in the
3 papers as well, called U.S. Term Limits v. Thornton. It's a U.S.
4 Supreme Court case, and it basically held that you can violate
5 the Election Clause without violating any other provision of any
6 other constitution -- of the constitution. And that actually
7 held to be the case in the landmark case Cook v. Gralike, a
8 nine-zero U.S. Supreme Court case in which the only violation
9 that the court found was that of the Elections Clause. So just
10 because, you know, even assuming arguendo there are no other
11 violations of the constitution of either state or federal
12 constitution here, there are -- you can still violate the
13 Elections Clause.

14 And what is significant is that no one has -- neither set of
15 opposition papers refute plaintiff's arguments here. Now,
16 intervenors says that Cook versus Gralike does not apply here
17 because it dealt with a derogatory treatment of candidates. But
18 the fact of the matter is that this dealt with -- this does deal
19 with disparaging treatment of candidates because here you're
20 treating one set of candidates, those who appear -- those who
21 come from qualified parties better than non-qualified candidates

22 who are not allowed to state their party preference.

23 But beyond that, but beyond that, there is another important
24 distinction here. And namely that -- let's see, I need to catch
25 my string of thought here. I ask for the Court's indulgence.

26 Oh -- so just one more moment, please. Okay.

27 So with regard to Cook, I mean the gist of the -- the
28 Supreme Court presence strongly holds the following: Any time

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1 that a state government intends to unequally treat or favor one
2 set of candidates over another, that intent in and of itself
3 without even having, without showing any electoral effect, that
4 very intent violates the Elections Clause. In other words, the
5 candidate doesn't have to lose an election and then come back to
6 court and say that, oh, this harmed me. What the Court said is
7 that if there is clear intent on the part of a state to harm a
8 certain type of candidate, that in and of itself suffices to
9 constitute a violation of the Elections Clause.

10 And there has been no case law that has been cited in the
11 opposition papers that refute plaintiff's contentions over the
12 Elections Clause. So that is basically our position that on the
13 Elections Clause.

14 And the final issue is one of imminent harm. And here I
15 would like to ask if the Court, if it could give some guidance on

16 the basis for that so I could adequately -- so I could respond.

17 THE COURT: This is going to come up in 2012. There is
18 plenty of time to have this resolved in due course through the
19 courts, and I don't think that there has been a sufficient
20 showing that something might happen beforehand.

21 MR. DUTTA: Okay. Thank you, Your Honor. There is a
22 special election, a special general election, that has been
23 scheduled in Senate District 1 on January 4th, 2011. And for
24 that election, it is unclear what rules are going to be apply
25 with regard to write-ins. Will the old rules apply, which allow
26 for voters to cast write-in votes and have them counted, or will
27 the new rules apply which have two possibilities.

28 According to the Court's interpretation in the tentative,

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1 they will band write-in votes from being cast, or according to
2 our interpretation of the plain language of SB 6, they will allow
3 write-in votes to be cast, but then band them from being counted.
4 Either way this would violate plaintiffs and Californian's rights
5 because -- and irreparably harm them because even if you go with
6 the Court's interpretation, it's our strong contention that
7 California law permits and actually compels the -- compels
8 allowing voters to cast write-in ballots. So there is an issue
9 of severe urgency here that we have discussed in the papers. So
10 that's the issue that we submit would constitute more than

11 compelling showing of imminent harm.

12 And just to wrap up, this is a facial challenge against a
13 law that was passed about the legislature in the middle of the
14 night in February of 2009. And it's one that the Supreme -- two
15 justices of the Supreme Court have indicated would deserve no
16 deference. It's also one that since it threatens to violate
17 fundamental Constitutional rights, would deserve no judicial
18 deference based on the California Supreme Court's cases holding
19 in, let's see, in the Azusa case which was cited in the papers.

20 So with that I think I will respectfully pause so that the
21 other side can respond.

22 THE COURT: All right. And I hope that opposing counsel
23 have divided up the issues and don't repeat each other.

24 MS. LEONI: Your Honor, we have. Marguerite Leoni on behalf
25 of the intervenors. And Mr. Beckington and I and the other
26 counsel have not consulted. However insofar as Beckington on
27 behalf of the Secretary of State, addresses an issue that I have
28 on my list, I will not repeat it.

18

1 MR. DUTTA: Counsel -- Your Honor, I just forgot -- should I
2 come in later? I just forgot to mention one last thing.

3 THE COURT: Well, why don't you go ahead and mention the one
4 last thing so that we don't forget it.

5 MR. DUTTA: Okay. Thank you, Your Honor. I appreciate it.

6 I just want to share one other -- one other -- two other
7 quotes that we believe are very relevant to this case when it
8 comes to -- because this is one, obviously a statutory
9 interpretation.

10 One is regarding plain language which was in the papers, but
11 I just wanted to put in the record. This is from the California
12 Supreme Court. When statutory language is thus clear and
13 unambiguous, there is no need for construction, and courts should
14 not indulge in it. We would submit that the issue of the ban on
15 write-in voting with regard to that, the plain language is very
16 clear that it permits voters to cast write-in ballots, and
17 therefore it is entitled to -- there is no need to go beyond the
18 plain language there.

19 And then with regard to the issue, the same issue. Since
20 there is, since other parts of the applicable part of the
21 Elections Code were not amended that specifically, expressly
22 allow write-in votes to be cast, there is another case that has
23 some relevance because basically the legislature had a chance to
24 fix up everything and to amend what was needed to be amended, but
25 they did not do so.

26 So to that end, the Estate of McDill, 1975, 14 Cal 3d 831,
27 838, states the failure of the legislature to change the law in a
28 particular respect when the subject is generally before it, and

1 changes in other respects are made, is indicative of an intent to
2 leave the law as it stands in the aspects not amended. So, in
3 other words, if the legislature had wanted to amend, make an
4 amendment, they would have done so. Since they didn't, we have
5 to take what they did at face value.

6 Thank you, Your Honor.

7 THE COURT: Thank you. I think I would also like to remind
8 counsel that your papers are all part of the record. You need
9 not repeat everything that is in your papers. It is all part of
10 the record. And if you want to reference something briefly, that
11 would be fine. But I don't think we need to reread what I have
12 already read. So with that --

13 MR. BECKINGTON: Thank you, Your Honor. I certainly will
14 not try to repeat anything that's already in our papers, and I
15 think our papers have, in fact, addressed many of the points that
16 Mr. Dutta has made. And just for the record again, I am Mark
17 Beckington on behalf of the Secretary of State.

18 I will say that I believe that it is important to perhaps
19 focus on the issue that we do face here which is that we are
20 asking whether a preliminary injunction should issue to restrain
21 not just the statute, but in effect a proposition that has not in
22 fact even gone into effect and which is being done on a challenge
23 that is in fact a facial challenge to that statute. Proposition
24 14 does not go into effect until January 1 of next year, and

25 Senate Bill 6 is the implementing legislation for that.

26 I think it would be most helpful if I turn first to this
27 issue of imminent harm. The only harm that Mr. Dutta has
28 identified here today is the special election for former Senator

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1 Cox's seat. The primarily election for that matter will in fact
2 take place during this year, when Proposition 14 goes into
3 effect. And under the rules governing Special Elections, it's
4 possible that that election will be concluded within that
5 primarily election. The person that receives a majority of the
6 votes, they would then succeed to that senate seat, and there
7 would be no election in 2011.

8 Now, the general election has been set for January 4, 2011,
9 and it would be the Secretary of State's position that that would
10 be the under current rules, not Proposition 14 rules because that
11 relates to the election which began in 2010. Now, there is to my
12 knowledge has been no one connected with that election who is in
13 this particular lawsuit. I don't know if the plaintiffs have any
14 connection with that lawsuit as a write-in candidates and none of
15 the participants in that election have filed any lawsuits. So
16 that particular election does not create any issue of imminent
17 harm.

18 And as Your Honor correctly noted, the next election that is

19 on schedule that would be subject to Senate Bill 6 and
20 Proposition 14, would not arise until at least the June 2012
21 primary election. So there is simply no -- if we look at the two
22 prongs of preliminary injunction law, balancing the likelihood of
23 success, you know, that the merits of the case versus the
24 imminence of the harm, there simply is no urgency here. There is
25 simply no need. And even if some issue comes up from a special
26 election in between now and 2012, that issue can be dealt with.

27 The second point I would want to make because I do want to
28 clarify the Secretary of State's position here on some of these

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1 issues, and this relates to the fact that this is a facial
2 challenge. It is always the case as elections come up, that the
3 Secretary of State, the other election officers who are parties
4 here or who are not parties here, have to deal with very specific
5 questions of how they apply these election laws. Those issues
6 are still under study by the Secretary of State for Proposition
7 14. Again they may not actually come up in an election for some
8 time.

9 The Secretary of State's Office has noted certain issues
10 that they have questions about this statute. They have been
11 identified. For example, this question of how do you deal with
12 the fact that the statute still provides for write-in lines under
13 the candidates' names. And therefore the Secretary of State has

14 proposed corrective legislature. That is certainly within her
15 capacity as the Chief Elections Officer to do that.

16 So as to the question of how these statutes will be applied
17 say in the year 2012, those are still issues that are under
18 study.

19 That's simply brings us then to the question of how do we
20 deal with this question of likelihood of success. And one issue
21 that has not been mentioned here is something that is standard
22 for how that is looked at. The question is the severity of the
23 harm versus the justification that the State has for implementing
24 that particular voting restriction or voting regulation.

25 And as Your Honor, and again I won't repeat our papers, but
26 Your Honor has obviously looked to both the Burdick and Edelstein
27 cases which I think speak for themselves. I would add that on
28 this issue of have the parties conceded the Elections Clause,

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1 clearly we have not. Both Burdick and Edelstein are quite broad
2 in their language. I think they cover both -- in fact I think if
3 one looks at Edelstein, it even notes that after Burdick, one
4 really can't make this write-in argument in the federal
5 constitution and the language in Edelstein is broad enough to
6 cover all of those clauses.

7 Then if we turn to the issue of the designation of the

8 parties, or the candidates on the ballot, again there are
9 questions practical as applied questions that have been raised
10 about how that will be done. Those really are not issues in this
11 case, and we are dealing with a facial question that is this
12 proposition and are these statutes constitutional. That's the
13 question.

14 But in terms of whether Legislature versus Eu, the reasoning
15 in that case applies. Again what Legislature versus Eu did, is
16 it looked at this question of, is there a validity and importance
17 to the distinction, and the statement became a distinction
18 between a qualified party candidate and a non-qualified party
19 candidate. And Eu identified a number of reasons why that is
20 very important, including insuring that the voters themselves are
21 not confused.

22 Those issues are still pertinent for this -- the new system
23 that has been adopted through Proposition 14. Under the
24 Elections Code, this is very important, the term "party" has a
25 very specific definition. It's defined under Election Code 338
26 as qualified party. And the distinctions between the qualified
27 party that has shown that it has raised a sufficient level of
28 support to be deemed as qualified party under California law,

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1 which still is an important distinction under the Elections Code,
2 even after Proposition 14, and a non-qualified political body,

3 not even a party under California law, are still important.

4 And so those are still important reasons to maintain that
5 distinction to enable the voters to know whether a person belongs
6 to a qualified party or does not belong to a qualified party is a
7 candidate. And there's simply been, it's premature at this point
8 to make the argument which really is an as applied argument for
9 which there is no showing here on the record, that this may lead
10 to voter confusion or other issues of that type.

11 So turning then again just to this issue that is before the
12 Court, we would agree that as to whether the showing has been
13 made here today on either of the two prongs for preliminary
14 injunction, that showing has not been made, and therefore we
15 would urge the Court to adopt it's tentative.

16 And if the Court has any questions, I would be more than
17 happy to address them.

18 THE COURT: I really don't have any questions.

19 MR. BECKINGTON: Thank you.

20 MS. LEONI: Your Honor, shall I proceed or would you like to
21 take the people on the phone who are the defendants before the
22 interveners.

23 THE COURT: I would really prefer to hear from the people
24 who wrote the briefs.

25 MS. LEONI: Okay. I am happy then to speak at this point.
26 Marguerite Leoni on behalf of the intervening defendants. And I
27 do -- I am not going to repeat the points made by the attorney

28 for the Secretary of State with whom I agree. I would like to

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1 point out some additional matters, and I hoped to avoid also the
2 items that have been briefed at length in our papers.

3 I do want to mention again that plaintiffs want the Court to
4 read a single statute in a vacuum, and instead what the Court is
5 required to do is read the law as an organic whole, and I think
6 there is very little doubt that the intent with regard to the ban
7 on write-in voting, is that it is a voting ban and not a counting
8 ban. I think Your Honor identified that. The assembly report
9 was crystal clear on that. And the Secretary of State under Kent
10 stands out to be the intent of the law. She is the chief
11 election officer, and her view of the intent is entitled great
12 weight. And consistent with that intent, she believed there
13 should be clarification, but it is consistent with the intent.

14 I think that insofar as these other statutes exist, they are
15 pertinent to all other elections and have a vitality and an
16 existence in the Election Code that remains.

17 As for the Washington law, I am not going to go into any
18 longer unless Your Honor has questions. We briefed it in our
19 brief.

20 THE COURT: I remember reading it.

21 MS. LEONI: Your Honor, I am prepared to cite additional

22 statutes, additional sections in SB 6 which supports that. One
23 of them is -- one of them is I think it 359 Sub A, which
24 expressly states the purpose is to end up with only two
25 candidates on the final ballot. But rather than go through that
26 whole organic law, the residents, I think, Your Honor, have a
27 collective view of SB 6.

28 With regard to Washington State's law, I want to point out

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1 number 2 -- number 1, that state does not have registration by
2 party. Registration is completely open. You don't state a party
3 preference. The fact that Washington allows write-in voting in
4 its top two primaries does not mean that California cannot ban it
5 if it wishes. It did. That's supported by Burdick and
6 Edelstein.

7 I want to move on to the equal protection arguments. I
8 think that's all I had to say on that. With regard to equal
9 protection, I wanted to address the Stanson case because it has
10 been brought up to Your Honor a number of times. Stanson v Mott
11 has a lot of very broad language in it that the Court, the
12 California Supreme Court, has recently re-addressed in a case
13 called Vargas versus the City of Salinas.

14 And what Stanson holds, if you look at the facts, is that
15 the State can't get engaged in a political campaign. And what
16 was happening in Stanson, the state officer I think was putting

17 out mailers on the taxpayers' dollars. And the Court said,
18 that's improper. And the language in Stanson and the
19 constitutional principles that it relies on, left a lot of loose
20 in dicta that the Court in Vargas then clarified. And Vargas
21 clarified that this case pertains to an authorized campaigning.

22 What we are dealing with here are statutes of the State of
23 California and by its voters, constitutional amendment by its
24 voters. We are not dealing with the situation of an unauthorized
25 expenditure of campaign dollars. I agree with the Secretary of
26 State's presentation of Libertarian Party. The issue in
27 Libertarian Party was not the State's system of qualified
28 political parties, but what you could say on the ballot. And I

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1 think that there is an aspect of -- in Libertarian Party that
2 hasn't been addressed here, and I want to point that out because
3 I think it is very important to the Court's analysis --

4 Libertarian Party confirmed that in most instances, except
5 for very limited instances, the courts engage in a balancing test
6 when it comes to an analysis of its state's election regulations.
7 It looks like the harm to the candidate or the voter and balances
8 that again the State's interests. And the exact interests that
9 have been brought before this Court have been determined in the
10 Libertarian Party court, that is, the interests of the candidates

11 and voters to be, quote, "insubstantial."

12 And I could be quoting on this point from the Libertarian
13 Party, but it applies here too. Number 1, on SB 6 denies ballot
14 access to no one. Actually what it does is it increases access.
15 Minor parties and independents now participate in the primary.
16 It limits them through that system who goes onto the general
17 election.

18 Number 2, as in the Libertarian Party, this regulation does
19 not harm the associational rights of the plaintiffs at all. They
20 are free to associate with whom they please, whether it be an
21 organized party or five people who agree with them politically.

22 Number 3, it does not limit their speech. You must remember
23 that what they want to do is have particular words on the ballot.
24 And what Libertarian Party and Rubin held is that the ballot is
25 not a public forum. It's the State's vehicle for getting people
26 elected, and the State can decide how that is presented.

27 Rubin and the Libertarian Party pointed out that there are
28 many other vehicles for speech, and in these cases the ballot

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1 designation plaintiffs are seeking to run for office, and that's
2 what they say in their verified complaint. They are entitled to
3 put a ballot statement about everything they believe in the
4 ballot pamphlet. The State just says, because of our interests,
5 we are only going to put the qualified -- the candidates

6 affiliated with qualified parties on the ballot.

7 And then I agree with what the Secretary of State says,
8 stated, is that the State has a strong interest still in its
9 qualified parties. They have shown a modicum of support and much
10 more for the -- from the voters of the State. They are the only
11 ones that are entitled to actually endorse candidates in the
12 ballot pamphlet at voter expense. The State is going to
13 distribute that out because of what, because of the State's
14 interests in supporting that party as a representative of a
15 significant number of voters.

16 The significance of the parties to the State Election
17 System, which also completely applies still at the presidential
18 level, would be frustrated if you just mix -- anybody could say
19 anything they wanted on the ballot. It's the State's ballot, not
20 the voters' ballot. It avoids confusion. What if somebody wants
21 to use the name "America's Independent Party?" How do you
22 distinguish that from the "American Independent Party?" The
23 Secretary of State can't do it because it doesn't keep election
24 records, registration records for "America's Independent Party."
25 So there is a risk of voter confusion and also a risk of fraud.

26 What if somebody wants to put GOP or Republic Party? It
27 could cause confusion and fraud on the voters. So the State's
28 interests remain extremely strong and the interests of the voters

1 and candidates are as the Court said in Libertarian Party
2 insubstantial. And the burden, the balancing test clearly in
3 this case goes in the favor of the State.

4 I do lastly want to mention that I am not -- I a little bit
5 confused, but I'm going to mention it so the record is very
6 clear. The complaint did not state that these plaintiffs wish to
7 use the term "independent." However, that seems to be a position
8 that was emerging out of the reply, and that's why we addressed
9 it.

10 One thing we did not say in sur-reply which we asked
11 permission to file, is that the use of the term "independent"
12 would actually be confusing because independent candidacies are
13 still available in California and the term "independent" says
14 that's how people get on the ballot. Well, it's still pertinent
15 for presidential elections, but not for the voter-nominated
16 elections. And to allow voter-nominated candidates to use that
17 would simply be inconsistent with California law, and it would
18 also be confusing.

19 Your Honor, I think I have hit my high points. One thing
20 about imminence, I agree with the Secretary of State. I do want
21 to point out a timing issue for Your Honor. And that is, if it
22 should come up that there needs to be a special election for a
23 voter-nominated office, that notice of election is a minimum of
24 112 days out and can be as much as 180 days. So there would be

25 plenty of time for a court to address these issues should that
26 very unique circumstance come up.

27 And I will rest at this point, Your Honor. Thank you.

28 THE COURT: Does anyone else in court want to address the

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1 issues? I am not seeing any takers.

2 Anyone on the phone wanting to address any of these issues,
3 and if you could identify yourselves again?

4 MS. SWAIN: This is Susan Swain. No, Your Honor.

5 MS. PHILLIPS: Wendy Phillips. No, Your Honor.

6 MS. SALSEDA: Patrice Salseda. No, Your Honor.

7 THE COURT: Okay. And I take it plaintiff has a few more
8 comments that he would like to make?

9 MR. DUTTA: That's correct, Your Honor.

10 THE COURT: What I am going to do is take a break because my
11 ex parte calendar is at 11:00 o'clock. It will probably take
12 about half an hour to get through them, and so after they're
13 finished, then we will conclude this.

14 (Recess taken from 10:58 a.m. to 11:32 a.m.)

15 THE COURT: So we will go back on the record, and the record
16 will reflect that all counsel are once again present. And,
17 counsel, are you still present on court call?

18 MS. SWAIN: Susan Swain. Yes, Your Honor.

19 MS. PHILLIPS: Wendy Phillips. Yes, Your Honor.

20 MS. SALSEDA: Patrice Salseda. Yes, Your Honor.

21 THE COURT: So we are ready. And plaintiff I know has his
22 rebuttal, and if we could please try not to repeat what is in the
23 papers.

24 MR. DUTTA: Yes, Your Honor.

25 THE COURT: Thank you.

26 MR. DUTTA: Advice well taken. I am just going to make some
27 choice responses to some of the points that have already been
28 discussed, and I will try to be as succinct as possible since the

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1 main part of the presentation is over.

2 I would like to first address the issue of urgency in this
3 case which, of course, relates to imminence and irreparable harm.
4 Both Secretary Bowen and the interveners have said that there is
5 no urgency in this case, that this can just wait until late in
6 2012. However, that isn't the case for a couple of reasons. For
7 one thing, this -- for one thing this General Election is
8 virtually certain to happen, but even if it is not, it is
9 pending. And it's a real possibility that it will occur.
10 There's a Ninth Circuit decision called Babbitt that basically
11 says that plaintiffs need not, need not show 100 percent
12 certainty that their rights will be irreparably harmed in an
13 election. It is sufficient to show a reasonable probability that

14 that harm would occur.

15 So even if, even if that election has not been officially
16 called yet, the very fact that this threat is there matters and
17 has a direct -- bears direct relevance to the issue of the
18 time-sensitive nature and urgent nature of this case and how in
19 the imminence of the harm that plaintiffs and voters at large
20 face. So that's one point.

21 THE COURT: What about the 120 days lead time?

22 MR. DUTTA: Well, again, what courts -- I won't belabor the
23 papers, but if you look at Storer, another Supreme Court
24 precedent, including actually Edelstein, courts basically have --
25 the high courts have stated a preference that cases be addressed
26 and the constitutional cases be looked at ahead of time before an
27 election is held. That is their stark, strong preference.

28 And so if the normal rules of standing basically do not

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1 apply here. They want to make sure that the constitutionality of
2 a case -- of a law has been examined ahead of time. I mean as my
3 papers mention, which I won't go into any detail, they said that,
4 you know, you can -- they've even approved of giving standing to
5 plaintiffs even after elections occur. So the very fact that
6 there is an imminent election here is extremely relevant. And I
7 would note that Your Honor has said that the plaintiffs have
8 standing in this case to bring their claim.

9 So does the Court -- does Your Honor have any questions on
10 this issue of imminence because again I respect the Court's time.

11 THE COURT: I really don't. I think we just disagree.

12 MR. DUTTA: Okay. Next I will go back to the issue of
13 whether or not SB 6 allows write-in votes to be cast. We just
14 had an interesting I would call it an admission from the
15 Secretary of State's counsel. Basically he said that, that there
16 may be corrective legislature that would be necessary to address
17 the fact that certain provisions of the Elections Code do require
18 space for write-ins. So I mean reasonable people can obviously
19 defer, but my interpretation of those remarks is that voters are
20 in fact allowed to cast write-in ballots, and that's why this
21 problems needs to be remedied.

22 And what is more, again I will not go back -- I am not going
23 to go back to rehash all the papers, but there is an explicit
24 e-mail from the Secretary of State's Office to the Lieutenant
25 Governor's Office that states that they believe that SB 6 does
26 allow voters to write in votes, and in fact it give them the
27 illusion that they can write in votes and have them counted. So
28 I will leave it at that, that the Secretary of State from their

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1 public -- from both their public statements and from statements
2 of counsel, including opposition papers, believe that voters are

3 allowed, indeed allowed, to cast write-in votes, that the plain
4 language of SB 6 does enable them to cast votes. So that
5 concludes the issue with respect to write-in ballots.

6 Turning to equal protection, our equal protection claim
7 under the California State Constitution, interveners, if I
8 recall, questioned whether Stanson versus Mott applies here to
9 this case. According to them, Vargas versus Salinas has limited
10 Stanson and that Stanson only applies to public expenditures and
11 campaigns. That is not what Stanson says. Stanson is much
12 broader than that. And I will -- to show that, I will show -- I
13 will cite a case that's actually in the papers, Rees versus
14 Layton which follows from Stanson.

15 Now, what happened there is that in the City of Los Angeles
16 candidates who were incumbent were allowed to say they were
17 incumbents, and candidates who were challengers, that is, who
18 were not incumbents, were not allowed to -- were not only not --
19 were not allowed to state their profession. So, in other words,
20 so challengers were not allowed to state their profession or
21 background. So it could be teacher or whatever have you. And
22 the Court of Appeal struck it down because it held that that
23 would violate the Equal Protection Clause because you are
24 treating, you are basically treating candidates unequally. You
25 are favoring incumbents over non-incumbents.

26 Here you have an analogous situation. SB 6 favors
27 candidates from qualified parties over non-qualified parties.

28 And, frankly, we -- I have yet to hear any compelling State

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1 reason to do this, especially in light of the fact that a
2 voter -- a candidate doesn't even have to have been supported or
3 endorsed or nominated by that party. Just to make that example
4 really concrete, you know, let's pretend that I'm a -- let's
5 pretend I am republican today. I could change my party's
6 registration tomorrow to democrat and then run the next election
7 as a democrat. So what purpose is this serving? I mean is this
8 quality control? It doesn't appear that way. If anything, the
9 ballot label provision, the party label provision of SB 6
10 would -- would in effect give voters -- is there, was designed to
11 provide information to the voters about what this candidate's
12 beliefs are. What else could it communicate?

13 And that to us would even, could even constitute a limited
14 public forum for candidates to tell, to communicate to voters
15 their beliefs. So we do not believe -- we do not see any reason
16 why there needs to, to justify such a distinction. So if you are
17 going to let a qualified party candidates, or people stating at
18 least they are from a qualified party, to give their party
19 affiliation, to state their party preference, candidates who are
20 not from qualified parties should equally be allowed to do so.
21 Otherwise, failing that, that would be a violation of the Equal
22 Protection Clause of the California Constitution. So that's the

23 issue -- so that's our rebuttal when it comes to equal protection
24 grounds.

25 Now, turning to the defense to our equal protection claim,
26 that is the Eu, Rosen and Schrader line of cases, one thing that
27 is really important here is that, you know, again we question how
28 much these cases are relevant here. But one important fact to

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1 note is that Rosen and Schrader stand for -- and even Rubin --
2 stand for a core principle. That is, voters are entitled and
3 candidates -- voters and candidates are entitled to a voting cue.
4 And this is explicitly stated in Rosen.

5 What it means is that if I am running from a non-qualified
6 party and I am in the general election, I have a right to be
7 called independent, to run as a, quote, "independent" because
8 that means I ran as everybody agrees, independent of the
9 qualified party process. That is a constitutional minimum. And
10 limiting candidates -- actually muzzling candidates to saying, to
11 just saying that they have no party preference if they are from a
12 non-qualified party, simply doesn't meet constitutional muster.

13 And, in fact, Rubin which is a 9th Circuit case, that as
14 intervenors know, concerns someone who wanted to be called a
15 quote, "peace activist." But what the case also mentioned is
16 that that candidate had a right to be called independent. That

17 was already a given. And that is a basic constitutional right.
18 So to the extent that this, the Eu, Rosen, Schrader line of cases
19 apply, they clearly support a plaintiff's contention that
20 limiting them and censoring their party views on the ballot
21 violates, violates the Equal Protection Clause of the California
22 Constitution and, and also as well, violates the Elections Clause
23 of the U.S. Constitution.

24 And one last note. There was mention made of the fact that
25 in our complaint we did not put in this, in our causes of action.
26 And here's the reason. This is an argument that was raised by
27 interveners and we responded and rebutted to it, and that's how
28 this argument came because again as our papers clearly state, we

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1 said that we don't think these cases apply. That's why we didn't
2 mention them. But now that they have been mentioned, you know,
3 to the extent that they do apply, they actually help us. So I
4 would like to put that into context of why they are not in our
5 papers.

6 And with that I think I will pause.

7 THE COURT: All right. So is the matter submitted?

8 MR. BECKINGTON: On behalf of the Secretary of State, Your
9 Honor, unless you have any questions, we will submit.

10 THE COURT: I really don't. And I think you do have a very,
11 very good record, both in your papers -- and I will say again

12 that I thought that it was very well briefed -- and certainly in
13 your oral argument. So is the matter submitted then?

14 MS. LEONI: Your Honor, I just want to make entirely clear
15 that there is no misconception that we concede the election
16 clause issue. We do not. And unless, Your Honor, has questions,
17 we will submit.

18 THE COURT: All right. I will take it then that the matter
19 is submitted. I am going to adopt the tentative ruling. I think
20 it is correct. But again, you do have I think a very good
21 record. So thank you very much for presenting this.

22 MR. DUTTA: Thank you.

23 MS. LEONI: Your Honor, we do have a form of order that we
24 have circulated to counsel.

25 MR. DUTTA: We do not consent to its current form, so we
26 will need to work that out.

27 MS. LEONI: Your Honor, the form tracks the tentative,
28 except that it corrects the typos.

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1 MR. DUTTA: That's not accurate actually. It adds substance
2 to the order.

3 MS. LEONI: Your Honor, we will discuss it outside. Thank
4 you.

5 THE COURT: All right. Thank you.

6 MR. BECKINGTON: Thank you very much, Your Honor.

7 MR. DUTTA: Thank you, Your Honor.

8 (Whereupon, the proceedings were concluded at 11:44 o'clock

9 a.m.)

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1 State of California)
2 County of San Francisco)

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5 I, Kent S. Gubbine, Official Reporter for the Superior Court
6 of California, County of San Francisco, do hereby certify:

7 That I was present at the time of the above proceedings;

8 That I took down in machine shorthand notes all proceedings
9 had and testimony given;

10 That I thereafter transcribed said shorthand notes with the
11 aid of a computer;

12 That the above and foregoing is a full, true, and correct
13 transcription of said shorthand notes, and a full, true and
14 correct transcript of all proceedings had and testimony taken;

15 That I am not a party to the action or related to a party or
16 counsel;

17 That I have no financial or other interest in the outcome of
18 the action.

19

20

21 Dated: September 22, 2010

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Kent S. Gubbine, CSR No. 5797

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