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7
8 IN THE UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 MICHAEL CHAMNESS, DANIEL
FREDERICK, and RICH WILSON

CASE NO. 2:11-CV-01479 ODW
(FFMx)

12 *Plaintiffs,*

13 vs.

14 **PLAINTIFFS' RESPONSE TO
OBJECTIONS TO THEIR
REQUEST FOR JUDICIAL NOTICE**

15 DEBRA BOWEN, in only her
official capacity as California
Secretary of State; DEAN LOGAN,
16 in only his official capacity as
Registrar-Recorder / County Clerk
of the County of Los Angeles; and
17 DOES 1-10;

HEARING DATE: June 13, 2011
HEARING TIME: 1:30 pm
JUDGE: Hon. Otis D. Wright,

18 II
COURTROOM: 11_

19 *Defendants,*

20 ABEL MALDONADO, an
individual; CALIFORNIA
INDEPENDENT VOTER
21 PROJECT; and CALIFORNIANS
TO DEFEND THE OPEN
22 PRIMARY;

23 *Intervenors-
Defendants*

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26 Plaintiffs hereby respond to the objections raised to their May 6, 2011

27 Request for Judicial Notice:

28 Separate Statement Paragraph 8 (Declaration of Plaintiffs' counsel regarding

1 his May 3, 2011 conversation with Placer County Senior Elections Supervisor
2 Robin Bjerke):¹ In a sworn declaration, counsel for Plaintiffs recounted specific
3 details from a telephone conversation that he had with Placer County Senior
4 Elections Supervisor Robin Bjerke concerning SB 6's Vote Counting Ban.

5 Significantly, Secretary Bowen does not object to this evidence, and has even
6 admitted the fact stated in Paragraph 8: "On May 3, 2011, Plaintiff Wilson's vote
7 for Plaintiff Frederick was not counted." Without providing any specific details or
8 legal authority, Intervenors allege that part of a declaration made by Plaintiffs'
9 counsel is inadmissible hearsay. Because Intervenors have failed to provide any
10 legal foundation, their objection must be overruled.

11 Separate Statement Paragraphs 9, 18, 19, 21 (Feb. 19, 2009 *San Francisco*
12 *Chronicle* news article):² As a general rule, the Court may also take judicial notice
13 of the content of media articles.³ This news piece, objected to by Secretary Bowen
14 and Intervenors, recites a number of readily known, easily verifiable facts: (1)
15 Intervenor Maldonado cast the deciding vote to pass the state budget, which at the
16 time required a two-thirds majority, (2) Intervenor Maldonado demanded that the
17 Legislature pass his SB 6 and Proposition 14 bills in exchange for this vote on the
18 budget, and (3) Senate Bill 6 was passed between 3:40 am and 6:55 am on Feb. 19,
19 2009. Apart from citing one inapposite case,⁴ Secretary Bowen and Intervenors
20 claim that those three sets of facts are not readily known or easily verifiable.

21 Tellingly, Intervenor Maldonado *has himself admitted to the Court* that he
22 cast the deciding vote to pass the state budget, which at the time required a two-

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24 ¹ May 6, 2011 Declaration of Gautam Dutta ("Dutta Decl.") ¶¶2-4.

² Dutta Decl., Exh. J.

25 ³ See, e.g., *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th
26 Cir. 1997) (quoting news articles concerning legal challenge filed to block the implementation of
27 a state law); *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 (9th Cir. 1999) (taking
28 judicial notice of information contained in news articles); *Ieradi v. Mylan Laboratories, Inc.*, 230
F.3d 594, 597-98 (3rd Cir. 2000).

⁴ In *Twardowski*, a litigant cited to a news article not to enter a fact into evidence, but to
prove that a defendant violated its company policy. The Court thus declined to take judicial
notice of that article. Cf. *Twardowski v. American Airlines* 535 F.3d 952, 961 (9th Cir. 2008).

1 thirds majority.⁵ Furthermore, contrary to Secretary Bowen and Intervenors’
2 claims, a quick survey of the public available sources shows that those three sets of
3 facts are indeed readily known and easily verifiable.⁶ For instance, a Feb. 19, 2009
4 CapitolBasement.com news piece refers to all three sets of facts listed above.⁷

5 Consequently, the Court may take notice of the facts contained in *San*
6 *Francisco Chronicle* news piece, for they are readily known and easily verifiable.⁸

7 Separate Statement Paragraphs 10, 11 [Document (the “Document”)
8 containing two sets of official correspondence between the offices of Secretary
9 Bowen and Intervenor Maldonado, regarding Senate Bill 6]:⁹ According to
10 Secretary Bowen and Intervenors, the official correspondence between the offices
11 of two statewide elected officials is not admissible for three reasons: both sets of
12 correspondence (1) are allegedly not public records, (2) are not readily known or
13 easily verifiable, and (3) contain disputed facts.

14 First, the Court may take notice of both sets of correspondence, because they
15 are party admissions – which are admissible under the exception to the hearsay
16 rule.¹⁰ The statement made by Secretary of State Bowen’s legislative staff is
17 admissible and not subject to the hearsay rule, because (a) the staff member was
18 authorized by Secretary of State Bowen to make the statement on her behalf, and
19 (b) the staff member made the statement within the scope of her official duties.¹¹

20 Furthermore, both sets of correspondence are indisputably public records. As
21 a general rule, a court “may presume that public records are authentic and

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23 ⁵ Intervenors’ Mar. 25, 2011 Answer to First Amended Complaint ¶¶39, 40, 41, 42;
Intervenors’ May 23, 2011 Statement of Genuine Issues ¶18.

24 ⁶ See Federal Rules of Evidence §201(d).

25 ⁷ “Finally, a deal...”, *CapitolBasement.com*, Feb. 9, 2009, *attached as* Exh. 2 to the Dutta
Decl., *available at*
http://www.capitolbasement.com/cleanhtml.php?_c=zq7q5wl2olhtjh&id=xs2y7n6ho8tig0 (*last*
visited May 24, 2011).

26 ⁸ See Federal Rules of Evidence §201(d).

27 ⁹ Dutta Decl., Exh. 4.

28 ¹⁰ Federal Rules of Evidence §801(d)(2).

¹¹ *Id.* §801(d)(2)(C) (authorized-party exception to hearsay rule); *id.* §803(8) (public-records
exception to hearsay rule).

1 trustworthy.”¹² According to the California Public Records Act, a public record
2 consists of “*any writing containing information relating to the conduct of the*
3 *public’s business* prepared, owned, used, or retained by any state or local agency
4 regardless of physical form or characteristic.”¹³ Quoting an opinion from the
5 Attorney General, one Court of Appeal made it emphatically clear that *virtually*
6 *every* government record is a public record:

7 This definition [of public record] is intended to cover *every*
8 *conceivable kind of record* that is involved in the governmental
9 process and will pertain to any new form of record-keeping instrument
10 as it is developed. *Only purely personal information* unrelated to “the
11 conduct of the public’s business” *could be considered exempt* from this
12 definition, i.e., the shopping list phoned from home, the letter to a
13 public officer from a friend¹⁴ which is totally void of reference to
14 governmental activities.

15 If a party wishes to challenge the authenticity of public records, it must carry the
16 “burden” of producing “enough negative factors to persuade a court that a report
17 should not be permitted.”¹⁵

18 Here, it is beyond question that both sets of correspondence are public
19 documents, because they consist of government communications that are not
20 personal in nature. Furthermore, both sets of correspondence are readily available
21 to and easily verifiable by Secretary Bowen and Intervenor Maldonado, for they *do*
22 *not dispute* that one of Secretary Bowen’s aides sent that correspondence to one of
23 Intervenor Maldonado’s aides.¹⁶ Indeed, Secretary Bowen herself has “admit[ted]
24 that on August 3 and 11, 2010, *employees of the Secretary of State communicated*
25 *with employees* of then-Lieutenant Governor *Abel Maldonado regarding SB 6*, and
26 that copies of two emails from employees of the Secretary of State are attached to

27 ¹² *Gilbrook v. City of Westminster*, 177 F.3d 839, 858 (9th Cir. 1999).

28 ¹³ Gov’t Code 6252(e) (emphases added).

¹⁴ *San Gabriel Tribune v. Superior Court*, 192 Cal.Rptr. 415, 422, 143 Cal.App.3d 762, 774 (Cal.App.Ct. 1983) (emphases added).

¹⁵ *Gilbrook, supra*, 177 F.3d at 858 (quoting *Johnson v. City of Pleasanton*, 982 F.2d 350, 352 (9th Cir. 1992)).

¹⁶ Secretary Bowen’s Apr. 4, 2011 Answer to First Amended Complaint ¶¶19; Secretary Bowen’s May 23, 2011 Objections to Plaintiffs’ Request for Judicial Notice ¶¶10, 11; Intervenor Maldonado’s May 23, 2011 Objections to Evidence Cited in Support of Plaintiffs’ Motion for Summary Judgment ¶¶10, 11.

1 the [first amended] complaint as Exhibit 2.”¹⁷

2 Finally, the case cited by Secretary Bowen and Intervenors does not apply,
3 because *no facts are in dispute*.¹⁸ Here, it is undisputed that one of Secretary
4 Bowen’s top legislative aides, Nichole Becker, stated in the correspondence that (1)
5 SB 6’s Vote Counting Ban gives voters and candidates the “illusion” that write-in
6 candidacies would be allowed and write-in votes would be counted, and (2) SB 6’s
7 Party Preference Ban is not “permissible” because it bans candidates from using the
8 ballot label of “Independent”.¹⁹

9 Accordingly, the Court may take judicial notice of both sets of
10 correspondence between the offices of Secretary Bowen and Intervenor Maldonado.

11 Separate Statement Paragraph 14 (Congressional ballot showing that Orange
12 County candidate Cecilia Iglesias used the ballot label of “Independent” during the
13 Nov. 2, 2010 general election):²⁰ The facts in this election document are highly
14 relevant, for they refute Intervenors’ claim that the ballot label of “Independent”
15 would somehow “confuse” voters.²¹ As this congressional ballot shows, voters are
16 accustomed to seeing – and are not confused by – candidates who use the ballot
17 label of “Independent”.

18 Separate Statement Paragraph 15 (election data from national publication
19 *Ballot Access News*):²² Secretary Bowen and Intervenors claim that facts from
20 *Ballot Access News* are not reliable. However, in a case affirmed by the Second
21 Circuit, the Southern District of New York accepted into evidence the expert
22 testimony of Richard Winger, the Editor of *Ballot Access News*:

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24 ¹⁷ Secretary Bowen’s Apr. 4, 2011 Answer to First Amended Complaint ¶19 (emphases
added).

25 ¹⁸ *Cf. Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (court may not take
judicial notice of a fact “subject to reasonable dispute”) (*quoting* Federal Rule of Evidence
§201(b)).

26 ¹⁹ Plaintiffs’ May 6, 2011 Motion for Summary Judgment (“Moving Papers”), at 13:1-13:6
& 14:7-14:10.

27 ²⁰ Dutta Decl., Exh. M.

28 ²¹ *Cf. Intervenors’ May 23, 2011 Memorandum of Points and Authorities*, at 17:24-17:25.

²² Dutta Decl., Exh. O.

1 Winger, the editor of the Ballot Access News, a *monthly newsletter*
2 *that focuses on legal and political developments related to minor*
3 *political parties*, testified as an expert regarding voter enrollment
4 schemes in the United States and the particular burdens that New
5 York’s voter enrollment scheme imposes on the political rights of
6 minor parties and their members. *The essential facts established by*
7 *their testimony, which I credit in its entirety*, are set forth in the
8 foregoing sections.²³

9 In addition, the district court noted that Mr. Winger has testified as an expert
10 witness in thirty states.²⁴ In this light, the Court may take judicial notice of election
11 data from the *Ballot Access News* article, for the facts contained within it have been
12 vetted by Richard Winger, a national expert on minor political parties.

13 Separate Statement Paragraph 16 (Wikipedia article showing that candidate
14 Quentin Kopp won his race for the State Senate while using the ballot label of
15 “Independent”).²⁵ Secretary Bowen and Intervenors claim that courts may not take
16 judicial notice of facts from Wikipedia, presumably because Wikipedia is not a
17 reliable source of information. However, the Ninth Circuit (including Chief Judge
18 Alex Kozinski) has freely taken judicial notice of data obtained from Wikipedia.²⁶
19 Consequently, the Court may take judicial notice of election data contained in
20 Wikipedia.

21 Separate Statement Paragraph 24 (Mar. 10, 2010 Memorandum from Los
22 Angeles Registrar Dean Logan to the Los Angeles County Board of Supervisors):²⁷
23 Significantly, Secretary Bowen admits the fact stated in Paragraph 24: “The
24 California Association of Clerks and Elections Officials has stated that SB 6
25 mandates a ‘complex set of changes [that] *has not occurred in recent memory*[.]’”.

26 ²³ *Green Party v. N.Y. State Bd. of Elections*, 267 F.Supp.2d 342, 350 & n.9 (S.D.N.Y. 2003)
27 (emphases added), *aff’d*, 389 F.3d 411, 422 (2nd Cir. 2004). For the Court’s reference, the July 1,
28 2002 issue of *Ballot Access News* has been attached as Exhibit 1 to the May 27, 2011 Declaration
of Gautam Dutta (at p.3).

²⁴ *Green Party*, *supra*, 267 F.Supp.2d at 350 n.9.

²⁵ Dutta Decl., Exh. P.

²⁶ *E.g.*, *Rodriguez v. Maricopa County Community College Dist.*, 605 F.3d 703, 705 n.1 (9th
Cir. 2010) (Kozinski, J.) (taking judicial notice of Wikipedia article about Columbus Day); *U.S.*
v. Garcia-Jimenez, 623 F.3d 936, 938 n.1 (9th Cir. 2010) (taking judicial notice of Wikipedia
article about Homeboy Industries, a Los Angeles rehabilitation program).

²⁷ Dutta Decl., Exh. T.

1 Intervenor claim that Registrar Logan's March 10, 2010 Memorandum is not
2 admissible. However, because the Memorandum is a public record, it is admissible
3 under Federal Rules of Evidence §803(8). Accordingly, Intervenor's objection
4 must be overruled.

5 Separate Statement Paragraph 25 (Mar. 10, 2010 Memorandum from Los
6 Angeles Registrar Dean Logan to the Los Angeles County Board of Supervisors):²⁸
7 Significantly, Secretary Bowen admits the fact stated in Paragraph 24: "The
8 California Association of Clerks and Elections Officials has stated that SB 6 will
9 not only force counties to spend 'millions of dollars statewide in ballot production
10 and postage costs', but could force them to spend millions more in new voting
11 equipment." Intervenor claim that Registrar Logan's March 10, 2010
12 Memorandum is not admissible. However, because the Memorandum is a public
13 record, it is admissible under Federal Rules of Evidence §803(8). Accordingly,
14 Intervenor's objection must be overruled.

15 Separate Statement Paragraph 40 (*Ballot Access News* article showing that
16 write-in candidate Ron Packard won a seat in Congress in 1982; *Long Beach Post*
17 article reporting that write-in candidate Tonia Reyes Uranga finished second in the
18 Apr. 13, 2010 Long Beach City Council election):²⁹ Secretary Bowen and
19 Intervenor claim that the facts contained in both articles are not admissible.
20 However, as shown in Plaintiffs' response regarding Separate Statement Paragraph
21 15, the Court may take judicial notice of facts contained in *Ballot Access News*,
22 which is edited by a national expert on minor political parties.³⁰

23 Furthermore, the Court may also take judicial notice of the content of media
24 articles.³¹ This news piece, objected to by Secretary Bowen and Intervenor, recites

25 ²⁸ Dutta Decl., Exh. T.

26 ²⁹ Dutta Decl., Exh. O & Y.

27 ³⁰ See also *Green Party v. N.Y. State Bd. of Elections*, 267 F.Supp.2d 342, 350 & n.9
(S.D.N.Y. 2003) (emphases added), *aff'd*, 389 F.3d 411, 422 (2nd Cir. 2004). For the Court's
28 reference, the July 1, 2002 issue of *Ballot Access News* has been attached as Exhibit 1 to the May
27, 2011 Declaration of Gautam Dutta (at p.3).

³¹ See, e.g., *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th

1 a readily known, easily verifiable fact: Tonia Reyes Uranga finished second as a
2 write-in candidate in the April 13, 2010 Long Beach City Council election.
3 Contrary to Secretary Bowen and Intervenors' claims, a quick survey of the public
4 available sources shows that this election fact is indeed readily known and easily
5 verifiable.³² For instance, the City of Long Beach's election website states that Ms.
6 Reyes Uranga (whose write-in status is marked with a "W") received 30.63 percent
7 of the vote in City Council District 7, second to candidate James Johnson's 45.01
8 percent of the vote.³³ Consequently, the Court may take notice of the facts
9 contained in the *Long Beach Post* news article, for they are readily known and
10 easily verifiable.³⁴

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12 DATED: May 27, 2011

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14 By: /s/ GAUTAM DUTTA, ESQ.

15
16 Attorney for Plaintiffs

17 MICHAEL CHAMNESS, DANIEL
18 FREDERICK, and RICH WILSON

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25 Cir. 1997) (quoting news articles concerning legal challenge filed to block the implementation of
a state law); *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 (9th Cir. 1999) (taking
judicial notice of information contained in news articles); *Ieradi v. Mylan Laboratories, Inc.*, 230
F.3d 594, 597-98 (3rd Cir. 2000).

26 ³² See Federal Rules of Evidence §201(d).

27 ³³ City of Long Beach website, attached as Exhibit 3 to the May 27, 2011 Dutta Declaration
(at p.17), available at <http://www.longbeach.gov/civica/filebank/blobdload.asp?BlobID=27156>
(last visited May 25, 2011).

28 ³⁴ See Federal Rules of Evidence §201(d).