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& CALIFORNIANS TO DEFEND
THE OPEN PRIMARY

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MICHAEL CHAMNESS,

Plaintiff,

vs.

DEBRA BOWEN, California Secretary of
State, *et al.,*

Defendants,

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

Proposed Intervener-Defendants.

Case #11-cv-01479-ODW (FFMx)

**INTERVENERS'
OPPOSITION TO
PLAINTIFF'S MOTION
FOR PRELIMINARY
INJUNCTION**

JUDGE: Hon. Otis D. Wright II
COURTROOM: 11
HEARING DATE: March 21, 2011
HEARING TIME: 1:30 p.m.

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1 **I. INTRODUCTION.**

2 This lawsuit is a transparent ruse. Though Plaintiff purports to be concerned about the
3 impact of the party label provisions of SB 6—a very minor provision of very significant legislation
4 that amended dozens of Elections Code sections—the sweeping relief that Plaintiff requests
5 reveals this lawsuit for what it really is: a cynical attempt by the partisan opponents of Proposition
6 14 to give the Legislature—filled with other partisan opponents¹—another opportunity to try to
7 strangle the People’s reform in its cradle, and on the flimsiest of grounds.

8 In parallel state court proceedings, Plaintiff and his compatriots have attempted to argue
9 that they have a constitutional right to be identified on the ballot as preferring a particular political
10 party (*e.g.*, the so-called “Coffee Party”) that is not a “qualified” party under California law.² That
11 position has so far been rejected by every court to consider it, in light of the California Supreme
12 Court’s unanimous decision in *Libertarian Party of Cal. v. Eu*, 28 Cal. 3d 535 (1980)
13 (“*Libertarian Party*”).³ *Libertarian Party* held that it is constitutional for the State to limit party
14 labels on the ballot to qualified political parties, and to designate all other candidates by a single
15 label reflecting their lack of affiliation with a qualified party.

16 As a fall-back position, the state court plaintiffs and Plaintiff herein have argued that they

17
18 ¹ *See, e.g.*, Declaration of Abel Maldonado in Support of Intervention (Dkt. #27), ¶¶ 5-9
(hereafter “Maldonado Decl.”).

19 ² Plaintiff attempted to intervene in the California Supreme Court writ proceedings, but that
20 motion was denied when the court denied the writ; he also attempted to intervene in the state
21 appeal, but the Court of Appeal rejected his efforts to do so because he sought to expand the scope
22 of the appeal by introducing new evidence not presented to the superior court. The appeals court
23 invited Plaintiff to file an application to file an amicus brief. *See* Request for Judicial Notice In
Support of Intervention (Dkt. #26), Exhibit B. Interveners are not aware that Plaintiff has accepted
the Court of Appeals’ invitation.

24 ³ The Ninth Circuit came to essentially the same conclusion 12 years later, in *Lightfoot v.*
25 *Eu*, 964 F.2d 865, 871 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993), relying on *Libertarian*
26 *Party*. Plaintiff has not even cited *Lightfoot* in his moving papers, much less sought to distinguish
27 it. This omission is particularly astonishing in light of the facts that (1) interveners already
28 criticized the plaintiffs in the *Field* action (and counsel for Plaintiff herein) for a similar failure to
cite *Libertarian Party* in their preliminary injunction moving papers; and (2) interveners have
repeatedly briefed *Lightfoot* in the pending state court proceedings. In view of this latter fact,
Plaintiff’s omission of any reference to the Ninth Circuit opinion in *Lightfoot* must be viewed as
intentional.

1 have a constitutional “right” to be designated on the ballot as an “Independent.” This claim, too,
2 has gained no traction.

3 Having been unsuccessful thus far at all levels of the state courts, Plaintiff has apparently
4 decided to start over in a new forum, this Court, hoping for a more favorable outcome.

5 In this Court Plaintiff sensibly abandons his claimed constitutional right to express a
6 preference for the non-qualified “Coffee Party” on the ballot; he continues to insist, however, that
7 he be permitted to use the term “Independent” on the ballot. There is no legal basis for this
8 demand: The use of the term “Independent” was previously prescribed *by statute* (since amended)
9 for candidates unaffiliated with any qualified political party, who accessed the general election
10 ballot through the independent nomination process contained in Elections Code §§ 8300-8304.
11 The independent nomination process, however, no longer applies to “voter-nominated” offices,
12 including congressional seats under Proposition 14.

13 Nor is there any constitutional right to use the term “Independent.” Simply put, established
14 federal and state case law hold that candidates do not have an unfettered constitutional right to use
15 the party label of their choice on the ballot.

16 Nevertheless, based on this meritless claim, Plaintiff disingenuously asks this Court to
17 block implementation of Proposition 14 *in its entirety* until the Legislature enacts “corrective”
18 legislation—but the legislative opponents of Proposition 14 will naturally have no incentive to
19 enact such legislation. The trivial “defect” Plaintiff purports to identify could never warrant such
20 the sweeping relief.

21 Furthermore, Plaintiff’s motion should be denied, because the balance of harms tips
22 sharply against the granting of such relief. The harms Plaintiff claims have been characterized by
23 the courts as “slight”⁴ and “insubstantial.”⁵ The harms to the public interest of blocking the
24 People’s efforts to reform their dysfunctional government, by blocking Proposition 14, are severe.
25 So are the harms to the intended beneficiaries of Proposition 14—the voters and candidates who
26

27 _____
⁴ *Lightfoot*, 964 F.2d at 871.

28 ⁵ *Libertarian Party*, 28 Cal. 3d at 542 and 545.

1 are unaffiliated with any qualified political party (ironically, including Mr. Chamness himself),
2 who will once again be relegated to insignificant status if the pre-Proposition 14 party primary
3 system is reinstated.

4 Finally, the pendency of significant state law questions in the California Court of Appeal,
5 which may moot this action depending on how they are resolved, warrants abstention by this Court
6 under the doctrine of *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

7 **II. FACTUAL BACKGROUND.**

8 **A. Proposition 14 (The Top Two Candidate Open Primary Act) & Its**
9 **Implementing Legislation (SB 6).**

10 Proposition 14 is one of a series of reforms adopted by California voters in an effort to fix
11 their dysfunctional government, which is plagued with extreme partisanship. Not surprisingly,
12 virtually the entire political establishment—including the leadership of both parties in the
13 Legislature—opposed Proposition 14. *See* Maldonado Decl., *supra* note 1, ¶¶ 5-9. Nevertheless,
14 Californians voted on June 8, 2010, to adopt Proposition 14.

15 Proposition 14 amended the state Constitution to replace party primaries with a type of
16 open primary election known as “top two,” or “voter-nominated” primary election. Only
17 candidates and voters registered with a qualified political party could participate in the primary
18 elections under the prior system; DTS voters and those affiliated with non-qualified parties were
19 prohibited from participating in the primary elections.⁶ Likewise, candidates who were
20 unaffiliated with a qualified party were excluded from the primary, and were able to get their name
21 on the general election ballot only by complying with onerous signature-gathering requirements
22 prescribed by the “independent” nomination process found in Elections Code §§ 8300-8304.

23 Under Proposition 14, any candidate, regardless of whether he or she is affiliated with a
24 qualified party, may run in the primary for congressional or state elective office (now called
25 “voter-nominated” offices). There is no longer a separate process for “independent” nominations:
26

27 ⁶ Decline to State voters might be allowed to vote in a party’s primary under the former
28 system, but only if the party deigned to permit it. *See* Cal. Elec. Code § 2151. Other, minor party
voters could not participate at all.

1 such a process is no longer necessary.

2 In addition, any voter may vote at the primary election for any candidate without regard to
3 the political party preference of either the candidate or the voter. *See* CAL. CONST. art. II, § 5 (as
4 amended by Proposition 14); Cal. Elec. Code § 8002.5(b) (as amended by SB 6).⁷ The two
5 candidates receiving the highest vote totals for each office at the primary election, regardless of
6 party preference, will then compete for the office at the ensuing general election. *See* CAL. CONST.
7 art. II, § 5 (as amended by Proposition 14); Cal. Elec. Code §§ 8141.5 (added by SB 6) and 15452
8 (as amended by SB 6). This type of top-two primary system was upheld against facial
9 constitutional challenge by the U.S. Supreme Court in *Wash. State Grange v. Wash. Republican*
10 *Party*, 552 U.S. 442 (2008), and against an as-applied constitutional challenge in *Wash. State*
11 *Republican Party v. Wash. State Grange*, 2011 U.S. Dist. LEXIS 2448 (W.D. Wash. Jan. 11,
12 2011).

13 Like the Washington system, on which Proposition 14 was modeled in part, candidates for
14 voter-nominated office have the option of indicating their party “preference” on the ballot.⁸
15 California Elections Code § 8002.5(a) (added by SB 6) provides, “A candidate for a voter-
16 nominated office may indicate his or her party preference, or lack of party preference, *as disclosed*
17 *upon the candidate’s most recent statement of registration*, upon his or her declaration of
18 candidacy.” *Id.* (emphasis added). Voter registration cards in California contain a blank in which
19 voters can express their preference for a non-qualified political party.⁹

21 ⁷ New Elections Code § 359.5, added by SB 6, defines “Voter-nominated office” to
22 include: (1) Governor; (2) Lieutenant Governor; (3) Secretary of State; (4) State Treasurer; (5)
23 Controller; (6) State Insurance Commissioner; (7) Member of the Board of Equalization; (8)
24 Attorney General; (9) State Senator; (10) Member of the Assembly; (11) United States Senator;
25 (12) Member of the United States House of Representatives.

26 ⁸ California Elections Code § 8002.5(c) provides: “A candidate designating a party
27 preference pursuant to subdivision (a) shall not be deemed to be the official nominee of the party
28 designated as preferred by the candidate. A candidate’s designation of party preference shall not be
construed as an endorsement of that candidate by the party designated. The party preference
designated by the candidate is shown for the information of the voters only and may in no way
limit the options available to voters.”

⁹ *See* Interveners’ Request for Judicial Notice in Opposition to Preliminary Injunction, filed
herewith, Exhibit B (Marin County Registrar’s voter registration card).

1 Elections Code § 13105(a) provides that the party preference specified on the declaration
2 of candidacy is to appear on the ballot in “substantially the following form: ‘My party preference
3 is the _____ Party.’” A candidate who does not designate a party preference on his or her
4 statement of registration will be identified as having “No Party Preference.” *Id.* A candidate can
5 also choose not to disclose a party preference on the ballot, in which case “the space that would be
6 filled with a party preference designation shall be left blank.” *Id.*¹⁰

7 **B. Prior State Court Proceedings.**

8 This is not the first lawsuit to challenge the constitutionality of the provisions of SB 6
9 (Proposition 14’s implementing legislation) governing party labels on the ballot. Indeed, this is
10 now the *fourth* court to be presented with the same challenge. The other three courts—the
11 Superior Court in San Francisco County,¹¹ the California Court of Appeal for the 1st Appellate
12 District on an original writ,¹² and the California Supreme Court also on an original writ¹³—have
13 all (rightly) denied efforts to enjoin Proposition 14 and SB 6. The state court action is now
14 pending on appeal.¹⁴ Interveners herein California Independent Voter Project (“CAIVP”), Abel
15 Maldonado, and Californians to Defend the Open Primary (formerly known as Yes on 14-
16 Californians for an Open Primary) are parties to the state court proceedings, having been granted
17 intervention therein.¹⁵

18 On or about July 28, 2010, two congressional candidates (represented by counsel for
19 Plaintiff herein) brought constitutional challenges in California superior court against SB 6 and
20 Proposition 14, including that it is unconstitutional to limit candidates to stating a preference only
21

22 ¹⁰ Given this fact, the claim that Plaintiff is “forced to lie” about his party preference is
23 transparent hyperbole.

24 ¹¹ *Field v. Bowen*, Case No. 10-502018 (San Francisco Super. Ct.).

25 ¹² *Field v. Superior Court*, Case No. A129829 (Cal. Ct. App. 1st Dist.).

26 ¹³ *Field v. Superior Court*, Case No. S188436 (Cal.).

27 ¹⁴ *Field v. Bowen*, Case No. A129946 (Cal. Ct. App. 1st Dist.).

28 ¹⁵ Californians to Defend the Open Primary was granted intervention under the name “Yes
on 14 – Californians for an Open Primary,” the ballot measure campaign committee created and
maintained by Californians to Defend the Open Primary as the only committee primarily formed
and operated to support Proposition 14 at the ballot box. *See* Declaration of Allan Zarembeg
(Dkt. #29), ¶¶ 2 & 6.

1 for “qualified” political parties. *Field v. Bowen*, Case No. CGC-10-502018 (San Francisco Super.
2 Ct.). As here, the plaintiffs in *Field* sought a preliminary injunction against the enforcement of
3 Proposition 14 and SB 6 in their entirety. (Indeed, much of the preliminary injunction motion in
4 this case repeats verbatim the arguments made in the *Field* motion.) The trial court in *Field*
5 properly denied that injunction, holding that under the controlling California Supreme Court case
6 law it is constitutional for the State to limit party labels on the ballot to qualified parties.

7 The court, however, did not rule on a preliminary issue: whether, as a matter of statutory
8 construction, the language of SB 6 really does limit candidates to the use of only “qualified” party
9 labels on the ballot. This issue was not raised by the plaintiffs, but was instead tendered to the
10 court by Interveners herein. If SB 6 is ultimately construed to permit the use of “non-qualified”
11 party labels on the ballot, it would moot the constitutional claims raised by Plaintiff in the state
12 court action *and in this action as well*.

13 The California Court of Appeal and the California Supreme Court each denied separate
14 petitions for writs of mandate, seeking to overturn the trial court’s ruling denying a preliminary
15 injunction. *See Field v. Superior Court*, Case No. A129829 (Cal. Ct. App. 1st Dist.); *Field v.*
16 *Superior Court*, Case No. S188436 (Cal.).

17 A regular appeal of the trial court’s denial of a preliminary injunction currently remains
18 pending in the California Court of Appeal for the First District, in *Field v. Bowen*, Case No.
19 A129946. Most recently, Interveners filed an opposition brief in the California Court of Appeal
20 on February 12, 2011. That brief—like Interveners’ briefs in the Court of Appeal and Supreme
21 Court writ proceedings—vigorously defends the constitutionality of limiting political party labels
22 on the ballot to qualified parties, but also raises the foundational statutory construction question of
23 whether SB 6 contains such a limitation, and asks the California Court of Appeal to definitively
24 construe Elections Code §§ 8002.5 and 13105(a).

25 The final Respondent’s Answering Brief in the state court proceedings was filed on March
26 2, and the Appellants’ reply brief is due in approximately three weeks.

1 **III. PLAINTIFF’S CLAIM THAT DEFENDANT SECRETARY HAS “CONCEDED”**
2 **THE ILLEGALITY OF THE “NO PARTY PREFERENCE” LABEL IS FALSE.**

3 Plaintiff trumpets that Defendant Secretary of State has made a “binding party admission
4 that SB6’s Party Preference Ban” is “not permissible” and violates the Constitution. *See* Motion
5 for Preliminary Injunction (Dkt. #4), pp. 10-11. That is a bald misrepresentation, achieved by
6 putting words in Defendant’s mouth and deleting the words that Defendant actually did say.

7 In August 2010, the office of Defendant Secretary sent two e-mails to Intervener
8 Maldonado’s staff as a courtesy, to inform him of “technical changes/ clarifications to the
9 provisions of SB 6” that Defendant wished to propose “in an SB 6 cleanup bill.” To the e-mail
10 sent on August 3, Defendant attached an “SB 6 Cleanup Summary.” In that summary, Defendant
11 suggested changing the term, “No Party Preference Disclosed” to “No Party Preference Selected.”
12 Defendant wrote, in full:

13 ***Changing the term “No Party Preference Disclosed” to “No Party Preference***
14 ***Selected.” Using the term “disclosed” implies that a candidate, or a voter, actually***
15 ***has selected a party preference but is not disclosing it. That is permissible for***
16 ***candidates in certain circumstances (see Item 12 in this summary), but not in all***
17 ***instances. What the term should imply is that the voter has not chosen, made or***
state (sic) a party preference and is therefore “independent.” We think “selected”
achieves that goal much better than “disclosed.”

18 *See* Complaint, Exhibit 2, Pt. 1 (Dkt. #1-2), page 3 of 5 (italics added).

19 By deleting the bold, italicized language in this quote, Plaintiff hides from the Court that
20 Defendant only wanted to make a technical change, from the word “disclosed” to “selected,” in
21 advance of the implementation of SB 6 in 2011. Defendant never said that “No Party Preference
22 Disclosed” was “not permissible” in the sense of being “unlawful,” only that Defendant believed
23 the phrase “No Party Preference Selected” “achieves the goal much better.”

24 Moreover, Defendant did not suggest the clean-up legislation to address any substantive
25 legal concerns at all. Defendant expressly stated:

26 The changes proposed are technical or what we would call policy clarifications.
27 There is no attempt to make any policy changes . . . Please feel free to share the
28 document liberally. It’s not intended to be controversial. It’s simply intended to
ensure that Proposition 14 and SB 6 can be implemented clearly and easily—and be

1 implemented as the voters, the author the Legislature, and the Governor intended
2 when the measures were approved.

3 *See* Complaint, Exhibit 2, Pt. 1 (Dkt. #1-2), page 3 of 5.

4 Defendant further elaborated, in her e-mail of August 11 to Intervener Maldonado:

5 We don't believe there is anything controversial included. Please let me know if
6 you disagree. There are some clarifications—mainly dealing with how a person's
7 party preference is disclosed and how it's listed when they don't want to disclose
it—that people may want to word differently, but we don't believe there are any
policy changes.

8 *See* Complaint, Exhibit 2, Pt. 2 (Dkt. #1-3), page 2 of 5.

9 This is a far, far cry from an admission of unlawfulness or a concession that candidates
10 have a right to use the term “Independent.”¹⁶

11 **IV. STANDARD OF REVIEW.**

12 **A. Standard Governing Preliminary Injunctions.**

13 “An injunction is a matter of equitable discretion” and is “an extraordinary remedy that
14 may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v.*
15 *Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 376, 381 (2008). “The grant
16 of a preliminary injunction is the exercise of a very far reaching power never to be indulged in
17 except in a case clearly warranting it. . . . On application for preliminary injunction the court is not
18 bound to decide doubtful and difficult questions of law or disputed questions of fact.” *Mayview*
19 *Corp. v. Rodstein*, 480 F.2d 714, 719 (9th Cir. 1973) (quoting *Dymo Industries, Inc. v.*
20 *TapePrinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964) (per curiam)).

21 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on
22 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
23

24 ¹⁶ This fabricated “admission” and the effort to claim judicial estoppel against Interveners’
25 statutory construction argument are merely the latest demonstration of the propensity of Plaintiff’s
26 counsel to seek ways by which he can avoid meeting arguments on their merits. This propensity
27 has figured prominently in the state court proceedings, and in the papers Plaintiff has already filed.
28 *See generally* Plaintiff’s Motion for Preliminary Injunction (Dkt. #4) (three claims that opposing
party has “admitted” some point, and six claims that opposing party has “conceded” some key
point). It also meshes with his refusal to cite key cases, like *Lightfoot*, *see* note 3, *supra*.

1 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*, 555
2 U.S. 7, 129 S. Ct. at 374-75. Plaintiff falls short on every element of the test.

3 Consideration of the public interest is particularly important here, where an injunction
4 against the implementation of Proposition 14 and SB 6 would thwart the will of California’s
5 voters, strip millions of voters not affiliated with a political party of the right to participate in
6 primary elections, and frustrate the People’s efforts to reform the State’s dysfunctional political
7 culture. *Cf. Legislature v. Eu*, 54 Cal. 3d 492, 511-12 (1991), *cert. denied*, 503 U.S. 919 (1992)
8 (holding that to invalidate a voter-enacted legislative reform measure, term limits, threatened to
9 “insulate the Legislature from any severe reform measures directed at that branch...”).

10 **B. Substantive Standard Governing Election Law Challenges.**

11 Plaintiff’s motion does not address the applicable level of scrutiny governing his
12 constitutional challenge to SB 6, but the United States Supreme Court has held that “when a state
13 election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First
14 and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are
15 generally sufficient to justify’ the restrictions.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1991)
16 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Tashjian v. Republican Party of*
17 *Conn.*, 479 U.S. 208, 213-14 (1986)). Only election laws that impose a “severe” burden on voting
18 or associational rights warrant strict scrutiny. 504 U.S. at 434.¹⁷

19 SB 6’s provisions for the use of political party labels on the ballot does not impose a severe
20 burden on associational and voting rights.

21 In *Libertarian Party*, the California Supreme Court held that the burden imposed by the
22 statutes limiting ballot labels to qualified parties and denying candidates not affiliated with
23 qualified parties the ballot label of their choice was “insubstantial.” 28 Cal. 3d at 542 and 545. As
24 the Court noted, “The Libertarian Party is in no way restricted in its associational activities or in
25 its publication of the affiliation of its candidates. It is only proscribed, so long as it remains
26

27 _____
28 ¹⁷ *Burdick* further held that only election laws that impose a “severe” burden on voting or
associational rights warrant strict scrutiny. 504 U.S. at 434.

1 unqualified, from designating the affiliation on the ballot.” *Id.* at 545. Likewise here, Plaintiff is
2 not precluded from telling the voters of his preference for the “Coffee Party,” or his
3 “independence” from the qualified parties, in campaign mailings and other publicity, and in
4 candidate statements printed in the voter information pamphlet sent to each household at taxpayer
5 expense. *See* Cal. Elec. Code §§ 9084 and 13307.5; Cal. Gov’t Code § 85601; *Rubin v. City of*
6 *Santa Monica*, 308 F.3d 1008, 1016 (9th Cir. 2002), *cert. denied*, 540 U.S. 875 (2003) (ability of
7 candidate to publish statement in taxpayer-funded voter pamphlet “greatly decreases the burden
8 imposed by” prohibition on the use of the term “activist” as candidate’s occupation).

9 Following the lead of *Libertarian Party*, the Ninth Circuit in *Lightfoot v. Eu* held that the
10 burden of limiting the use of party labels on the ballot was “slight.” 964 F.2d at 871. This latter
11 characterization is especially significant, because in upholding Hawaii’s ban on write-in voting in
12 *Burdick*, the Supreme Court likewise held that the burden imposed by that ban was “slight,” 504
13 U.S. at 439, and that accordingly “the State need not establish a compelling interest to tip the
14 constitutional scales in its direction.” *Id.* (emphasis added).¹⁸

15 The State’s important regulatory interest more than justify the party label provisions of
16 Proposition 14. The courts have recognized that the State has important—indeed, compelling—
17 regulatory interests in establishing minimum qualifications for the parties to receive certain
18 benefits provided by the State.¹⁹ And that being the case, the courts have further held that the

19
20 ¹⁸ It is true that the *Libertarian Party* court used some of the language associated with strict
21 scrutiny—most notably that the party label restrictions served a “compelling state interest.” And,
22 initially, *Lightfoot* held explicitly that strict scrutiny applied. However, *Libertarian Party* was
23 decided 12 years before *Burdick* clarified the appropriate standard of review, and *Lightfoot* was
24 decided a month before. *Burdick* showed that the *Libertarian Party* and *Lightfoot* courts should
25 not have applied strict scrutiny, given their recognition of the minimal burdens that the challenged
26 party label provisions imposed. Indeed, following the decision in *Burdick* the Ninth Circuit
27 amended the *Lightfoot* opinion, to add a footnote recognizing its earlier application of strict
28 scrutiny was incorrect in light of *Burdick*. *Lightfoot v. Eu*, 92 Cal. Daily Op. Service 5941, 1992
U.S. App. LEXIS 15091, *10 n.2 (9th Cir. July 6, 1992) (amending the initial *Lightfoot* decision,
964 F.2d at 871). Tellingly, however, the party label restrictions were upheld in both *Libertarian*
Party and *Lightfoot*, even under that most stringent of standards, strict scrutiny.

¹⁹ *See, e.g., Libertarian Party*, 28 Cal. 3d at 545 (“It is settled . . . that the requirements a
party must meet to be qualified are constitutional and they are not challenged here.”); *Iowa*
Socialist Party v. Nelson, 909 F.2d 1175, 1179-80 (8th Cir. 1990) (rejecting minor party’s demand

1 State has a compelling interest in limiting party labels on the ballot to qualified parties.²⁰

2 **V. PLAINTIFF HAS FAILED TO SHOW ANY LIKELIHOOD OF SUCCESS ON THE**
3 **MERITS OF HIS CLAIMS.**

4 **A. The Party Ballot Label Provisions of SB 6 Are Constitutional.**

5 In the California Supreme Court and California Court of Appeal, Plaintiff Chamness
6 argued that he had a “right” to use the name of a nonqualified party—the “Coffee Party”—on the
7 ballot. See Motion for Preliminary Injunction (Dkt. #4), p. 7. Sensibly, he has now abandoned
8 that claim, which is squarely foreclosed by controlling California Supreme Court and Ninth Circuit
9 case law. See *Libertarian Party*, 28 Cal. 3d at 535 (no right to use name of non-qualified political
10 party); *Lightfoot v. Eu*, 964 F.2d at 865 (no right for write-in candidate to be designated on the
11 general election ballot as the Libertarian Party nominee when requirement of minimum vote at the
12 primary election was not met). In both *Libertarian Party* and *Lightfoot* the plaintiffs urged that
13 they had a constitutional right to be identified as a “Libertarian” candidate on the ballot; both
14 courts conclusively rejected that position.²¹

15 Plaintiff instead asserts a fall-back claim from the state court action: that as a candidate
16 preferring a non-qualified party he has a “fundamental” constitutional right to be identified as an
17 “Independent” on the ballot, rather than using the designation “No Party Preference.” This claim
18 is equally meritless. The reasoning of *Libertarian Party* and *Lightfoot* apply with just as much

19
20 that Iowa Secretary of State maintain voter rolls for the party).

²⁰ See, e.g., *Libertarian Party*, 28 Cal. 3d at 546:

21 As the United States Supreme Court explained in *Jenness*, “There is surely an
22 important state interest in requiring some preliminary showing of a *significant*
23 *modicum of support* before printing the name of a political organization’s candidate
24 on the ballot—the interest, if no other, in avoiding confusion, deception, and even
frustration of the democratic process at the general election.”

(Italics added; court’s italics removed) (citing *Jenness v. Fortson*, 403 U.S. 431 (1971); *Am. Party*
25 *of Texas v. White*, 415 U.S. 767, 781-788 (1974); *Christian Nationalist Party v. Jordan*, 49 Cal. 2d
26 448, 453 (1957)). See also *id.* at 545 (“[I]f each independent candidate could decide for himself
27 what nonqualified party he should be listed as affiliated with, the significance of qualified party
affiliation would be masked.”).

28 ²¹ Indeed, Plaintiff himself acknowledges that at least 26 states restrict the ability of
candidates to list non-qualified party labels on the ballot. See Complaint (Dkt. #1), ¶ 23.

1 force to a claimed right to be identified as “Independent” as they do to the claims in those cases—
2 that there was a right to be identified on the ballot as “Libertarian.” The word “Independent” has
3 no talismanic constitutional status that compels the State to permit its use on the ballot, any more
4 than a state is required to permit the use of non-qualified party labels.

5 As the Ninth Circuit has held, “‘ballots serve primarily to elect candidates, not as forums
6 for political expression.’ . . . A ballot is a ballot, not a bumper sticker. Cities and states have a
7 legitimate interest in assuring that the purpose of a ballot is not ‘transformed . . . from a means of
8 choosing candidates to a billboard for political advertising.’” *Rubin*, 308 F.3d at 1016 (quoting
9 *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 and 365 (1997)).

10 **1. It is accurate to say that Plaintiff has no “Party” preference.**

11 There is no merit to Plaintiff’s claim that using the label “No Party Preference” on the
12 ballot forces him to “lie” to the voters. That label is entirely accurate. Moreover, if he does not
13 like it he is not required to use it; he may choose to leave the party preference space blank instead.
14 Cal. Elec. Code § 13105(a). Section 13105(a) provides:

15 (a) In the case of candidates for a voter-nominated office in a primary election, a
16 general election, or a special election to fill a vacancy in the office of United States
17 Senator, Member of the United States House of Representatives, State Senator, or
18 Member of the Assembly, immediately to the right of and on the same line as the
19 name of the candidate, or immediately below the name if there is not sufficient space
20 to the right of the name, *there shall be identified in eight-point roman lowercase
21 type the name of the political party designated by the candidate pursuant to
22 Section 8002.5. The identification shall be in substantially the following form:
23 “My party preference is the _____ Party.” If the candidate designates no
24 political party, the phrase “No Party Preference” shall be printed instead of the
25 party preference identification.* If the candidate chooses not to have his or her party
26 preference listed on the ballot, the space that would be filled with a party preference
27 designation shall be left blank.

28 *Id.* (emphasis added).

If Elections Code § 13105(a) is read to limit ballot labels to “qualified parties” that is
because the term “party” has a specific statutory meaning, referring only to *qualified* parties. *See*
Cal. Elec. Code §§ 338 (“‘Party’ means a political party or organization that has qualified for
participation in any primary election.”). Indeed, this definition of “party” is essential to Plaintiff’s
claim: If “party” does *not* mean “qualified party,” then the “party preference ban” challenged by

1 Plaintiff would not actually exist. *See* Section V.B, *infra*.

2 Plaintiff apparently has no preference for any qualified political “party” as that term is
3 defined in California law—he instead prefers the “Coffee Party,” a non-qualified party.²² It is
4 therefore perfectly correct to say that he has “No Party Preference.”

5 **2. The Ninth Circuit and California Supreme Court have held, in**
6 ***Lightfoot v. Eu*, 964 F.2d 865 (9th Cir. 1992), *cert. denied*, 507 U.S. 919**
7 **(1993), and *Libertarian Party v. Eu*, 28 Cal. 3d 535 (1980), that there is**
8 **no constitutional right to use one’s party label of choice on the ballot.**

9 In this case Plaintiff objects to be designated as having “No Party Preference,” despite the
10 label’s accuracy, and demands to be designated as “Independent” instead. This claim is virtually
11 indistinguishable from the claims in *Libertarian Party*. In that case, two candidates who qualified
12 for the ballot by means of an independent candidacy petition objected to be designated as
13 “Independents,” and demanded to be designated as “Libertarian” candidates instead. They sued
14 the Secretary of State to force her to list their party preference as “Libertarian.” The California
15 Supreme Court unanimously rejected their claim, holding that candidates do not have a
16 constitutional right to demand the party label of their choosing.

17 In *Libertarian Party*, former Elections Code § 10210 (now § 13105) required that the name
18 of the “qualified” political party with which a candidate was affiliated be printed on the ballot.
19 Candidates who were not affiliated with a “qualified” political party were required to be
20 designated “Independent.” The Libertarian Party was not, at that time, a qualified political party
21 in California. As in this case, the plaintiffs in *Libertarian Party* claimed that, by denying them the
22 right to use their preferred party label, section 10210 violated the due process and equal protection
23 clauses. The California Supreme Court *unanimously* rejected the candidates’ challenge, holding
24 that the party

25 identification provision imposes an *insubstantial burden* on the rights to associate
26 and to vote and that the statute serves a *compelling state interest to protect the*

27 ²² Cal. Sec’y of State, *Qualified Political Parties for the November 2, 2010, General*
28 *Election*, available online at http://www.sos.ca.gov/elections/elections_f.htm (last visited Feb. 7, 2011) (the six “qualified” parties are Democratic, Republican, Libertarian, Green, Peace & Freedom and American Independent).

1 *integrity and stability of the electoral process in California.*

2 28 Cal. 3d at 542 (emphasis added).

3 Several other federal circuit courts have likewise rejected claims just like Plaintiff's—that
4 a State is constitutionally-obligated to permit candidates to list their preferred party label on the
5 ballot. *See Schrader v. Blackwell*, 241 F.3d 783 (6th Cir.), *cert. denied*, 534 U.S. 888 (2001);
6 *McLaughlin v. No. Carolina Bd. of Elec.*, 65 F.3d 1215 (4th Cir. 1995), *cert. denied*, 517 U.S.
7 1104 (1996); *Rainbow Coalition of Okla. v. Okla. State Elec. Bd.*, 844 F.2d 740 (10th Cir. 1988).
8 *See also Iowa Socialist Party*, 909 F.2d at 1175 (8th Cir. 1990); *Rubin*, 308 F.3d at 1008 (Ninth
9 Circuit relying on *Schrader* to uphold statute preventing candidate from using the ballot
10 designation "peace activist").

11 Most notably, in *Lightfoot v. Eu* the Ninth Circuit again rejected a candidate's demand to
12 be identified as the "Libertarian" candidate when the statutory requirements to be so identified
13 were not met. In so doing it explicitly relied upon *Libertarian Party*.²³

14 **3. The term "Independent" has no talismanic constitutional significance**
15 **that compels its use for candidates unaffiliated with a qualified political**
16 **party; the State is entitled to specify the use of "No Party Preference"**
instead.

17 Understandably, in view of *Libertarian Party* and *Lightfoot*, Plaintiff does not challenge
18 the State's ability to limit party labels to qualified political parties. Rather, out of all the many
19 words that the California Elections Code precludes candidates from using as a party label on the
20 ballot (*e.g.*, "Tea Party" or Mr. Chamness's preferred label—the "Coffee Party"), Plaintiff singles
21 out one word that he insists is constitutionally privileged: "Independent." There is no basis for this

22 _____
23 ²³ In *Lightfoot*, Eric Garris—the Republican nominee for Assembly in the 21st Assembly
24 District—wished to be cross-listed on the ballot as the Libertarian candidate as well, and the
25 Libertarian Party wished to have him so listed. (By that time the Libertarian Party had become a
26 "qualified" party in California.) Participating in the Libertarian Party primary as a write-in
27 candidate, Mr. Garris received the most Libertarian primary votes for the office. However,
28 California's Elections Code required that a write-in candidate wishing to appear on the general
election ballot as the nominee of a party must receive primary votes equal to at least 1% of the
votes cast in the prior general election for the office. Mr. Garris did not meet this requirement, and
the Secretary of State thus refused to list Mr. Garris as the Libertarian Party candidate. 964 F.2d at
870-71.

1 contention. Unless an “Independent Party” meets the requirements of a qualified political party,
2 the State may prohibit candidates from stating “My Party Preference is Independent Party” (*see*
3 Cal. Elec. Code § 13105(a)), just as it can restrict any other non-qualified-party label.
4 Constitutionally-speaking, “Independent” has no greater significance than “Libertarian” did in
5 *Lightfoot and Libertarian Party*.²⁴

6 Prior to Proposition 14, a candidate’s right to use the “Independent” designation was
7 granted *by statute*. In fact, it was *required*, and the California Supreme Court held that the
8 Constitution did not grant candidates the right to use a different label according to their taste. The
9 statutory requirement for use of the word “Independent” no longer exists, however, and the
10 Constitution does not supply an alternative basis for its use.

11 Indeed, in the context of Proposition 14 and SB 6, permitting the use of the term
12 “Independent” would be affirmatively misleading to voters. Prior to the enactment of Proposition
13 14 a candidate had three possible paths to the general election ballot: (1) as the nominee of a
14 qualified party; (2) as a write-in candidate pursuant to Elections Code §§ 8600-8605; and (3) by
15 means of an independent candidacy petition. As the *Libertarian Party* court noted, “Independent”
16 referred to “candidates who qualify for the ballot by the independent nomination method” 28
17 Cal. 3d at 544. Under Proposition 14, however, the separate qualified party and independent
18 nomination routes are abolished. All candidates (except write-in candidates) now qualify for the
19 ballot by means of a candidacy petition. *See* Interveners’ Request for Judicial Notice, *supra* note
20 9, Exhibit C (Jan. 26, 2011, letter from SOS Debra Bowen to all county elections officials,
21 describing this change). In other words, under Proposition 14 and SB 6, virtually all candidates
22 are “independent” within the meaning of the *Libertarian Party* court. Designating only some of
23

24 ²⁴ Incidentally, because it closely regulates the qualified political parties, the State can
25 place constraints on the names adopted by those parties to avoid confusion. *See* Cal. Elec. Code §
26 5001(a) (“The designated name [of a political body attempting to qualify as a party] shall not be so
27 similar to the name of an existing party so as to mislead the voters, and shall not conflict with that
28 of any existing party or political body that has previously filed notice pursuant to subdivision
(b).”). As there is already an “American Independent Party,” the use of the term “Independent
Party” may be precluded, though Interveners take no position on this issue.

1 with that label therefore risks confusing voters.

2 Moreover, even under Proposition 14, the pre-existing partisan primary process is
3 preserved with respect to candidacies for President and Vice President. In this context the term
4 “Independent” retains its old meaning, referring to presidential candidates seeking to access the
5 general election ballot by independent nominating petition. Allowing the use of the term
6 “Independent” for voter-nominated offices as well, even though the term has a different meaning,
7 would create confusion.

8 The lead case on which Plaintiff relies for his purported constitutional “right” to use the
9 term “Independent,” *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), struck down a law that
10 prohibited candidates who were unaffiliated with a qualified political party from using *any*
11 *designation at all* on the ballot, leaving the party-label portion the ballot for such candidates *blank*.
12 An unaffiliated candidate requested that the word “Independent” be used in his blank space, and
13 when his request was rejected he challenged the applicable Ohio statute. The Court granted his
14 request and held that the State must provide *some* designation for unaffiliated candidates on the
15 ballot; it did not hold, however, that the Constitution compels that designation to be
16 “Independent,” rather than some other appropriate label. “Independent” just happened to be the
17 alternative label that the candidate requested.

18 A subsequent case from the Sixth Circuit demonstrates the limits of *Rosen*. In *Schrader v.*
19 *Blackwell*, a Libertarian candidate challenged Ohio’s refusal to print “Libertarian” on the ballot,
20 relying on *Rosen*. 241 F.3d at 783. The Sixth Circuit rejected that challenge, and held that
21 candidates need not be permitted to place whatever label they wished on the ballot. *Id.* See also
22 *Rubin*, 308 F.3d at 1008 (Ninth Circuit relying on *Schrader* to uphold statute preventing candidate
23 from using the ballot designation “peace activist”).

24 Plaintiff also relies on two forty-year-old, pre-*Libertarian Party/Lightfoot* opinions from
25 other states’ courts: *Shaw v. Johnson*, 311 Minn. 237, 247 N.W.2d 921 (1976), and *Bachrach v.*
26 *Commonwealth*, 382 Mass. 268, 415 N.E.2d 832 (1981). Both are readily distinguishable.

27 *Shaw* most certainly does not support the conclusion that Plaintiff has a constitutional right
28 to be labeled “Independent.” Indeed, that case was not a constitutional ruling at all. Minnesota

1 allowed unaffiliated candidates to choose their designation, but denied one candidate the use of the
2 word “independent” to avoid confusion with the “Independent-Republicans.” The question in that
3 case was whether his use of the term was really confusing; the court held that it was not, and on
4 that basis—pursuant to Minnesota statute—it allowed the use of the “Independent” label on the
5 ballot. (Perhaps critically, the Independent-Republicans had no objection.)

6 While *Bachrach* did hold that Massachusetts candidates were entitled constitutionally
7 entitled to use the term “Independent,” rather than “Unenrolled,” that case is distinguishable. In
8 Massachusetts, candidates who were unaffiliated with any qualified political party were permitted
9 to place whatever label they wished on the ballot, up to three words long. The Massachusetts
10 legislature subsequently amended the statute to provide that one term—and one term only—could
11 not be used in the three-word designation chosen by the candidate: “Independent.” It also
12 provided that failure to designate a label resulted in the candidate being designated as
13 “Unenrolled.” *Bachrach*, 415 N.E.2d at 833.

14 The Massachusetts court acknowledged it was permissible to treat qualified party
15 candidates and non-qualified party candidates differently. *Id.* at 835. It took issue, however, with
16 the State’s decision to engage in “invidious discrimination” *amongst the non-qualified party*
17 *candidates*, who were all similarly situated to one another. *Id.* at 835-36. Some unaffiliated
18 candidates were permitted to use any label they wished, while other unaffiliated candidates—those
19 who wanted to use the term “Independent”—were not. The Court further held that the State’s
20 asserted rationales for banning the use of the word “Independent”—avoiding ambiguity and
21 confusion, and preventing a candidate from having an unmerited advantage based on the perceived
22 “positive aura” of the term “Independent”—applied equally to any number of other labels used by
23 non-affiliated candidates, and provided no basis for singling out the “Independent” label for
24 restriction. *Id.* at 837.²⁵ That is a far different case from the circumstances under Proposition 14,

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²⁵ Interveners also note that, while *Bachrach* was decided several weeks after the California Supreme Court decided *Libertarian Party*, *Bachrach* did not cite the California Supreme Court’s unanimous opinion and it in fact relied on the Court of Appeal decision that the Supreme Court unanimously overturned in *Libertarian Party*.

1 where all unaffiliated candidates are treated equally, and the only distinction is between qualified
2 and non-qualified parties, which the *Bachrach* court acknowledged to be a legitimate distinction,
3 and which Plaintiff has not even challenged in his Complaint.

4 *Libertarian Party* and *Lightfoot* each held that the State may impose reasonable restrictions
5 on the ability of candidates to identify their partisan affiliations on the ballot, limiting party
6 designations to qualified political parties and prescribing a single label for all other candidates.
7 The designation of “No Party Preference” is just such a designation. Plaintiff has no constitutional
8 right to insist on another label that is more to his taste.

9 **4. The party-preference provisions do not violate the Elections Clause, or**
10 **any other constitutional provision.**

11 Plaintiff also claims that the party label provision of SB 6 violate the Elections Clause of
12 the U.S. Constitution. This claim has no merit.

13 In the first place, the courts have recognized that challenges to election laws employ the
14 “same basic mode of analysis”—the *Burdick* standard, discussed above (*see* Section IV.B,
15 *supra*)—regardless of the constitutional provision that plaintiffs claim is violated. *See Partnoy v.*
16 *Shelley*, 277 F. Supp. 2d 1064, 1072 (S.D. Cal. 2003) (quoting *LaRouche v. Fowler*, 152 F.3d 974,
17 987-88 (D.C. Cir. 1998)).

18 Moreover, *Cook v. Gralike*, 531 U.S. 510 (2001), and *U.S. Term Limits v. Thornton*, 514
19 U.S. 779 (1995), the main Elections Clause cases on which Plaintiff relies, are readily
20 distinguishable; those cases do not concern qualified political party ballot designations for
21 candidates, which the State has a compelling interest in regulating. *U.S. Term Limits* struck down a
22 state’s effort to limit the number of terms that a Member of Congress could serve, holding that
23 such a limitation was outside of the State’s power to regulate the “time, place and manner” of
24 congressional elections. 514 U.S. at 779. *Cook* concerned a provision, enacted in the wake of
25 *U.S. Term Limits*, which tagged federal candidates who did not support a term limits amendment
26 to the U.S. Constitution with a “scarlet letter” label on the ballot. 531 U.S. at 525.²⁶

27
28 ²⁶ In *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002), *cert. denied* 538 U.S. 908

1 **B. The Party Ballot Label Provisions Are Susceptible To A Construction That**
2 **Would Avoid The Constitutional Question Presented By Plaintiff.**

3 It is constitutional to limit ballot labels only to expressing a preference for qualified parties
4 and prescribing the use of “No Party Preference” for all other candidates; however, there is a basis
5 on which this constitutional dispute can be avoided, as a matter of statutory construction. Indeed,
6 the proper interpretation of SB 6’s party label provisions is currently pending before the California
7 Court of Appeal, in *Field v. Bowen*, Case No. A129946 (Cal. Ct. App. 1st Dist.).

8 California Elections Code §§ 8002.5(a) and 13105 do not, by their terms, limit voters to
9 writing in the name of a qualified party on their voter registration cards. Indeed, those provisions
10 can be read as *permitting* candidates who prefer non-qualified political parties to state that
11 preference on their statement of registration, their nomination papers, and on the ballot.²⁷

12 Elections Code § 8002.5(a) (added by SB 6) actually provides, “A candidate for a voter-
13 nominated office may indicate his or her party preference, or lack of party preference, *as disclosed*
14 *upon the candidate’s most recent statement of registration*, upon his or her declaration of
15 candidacy.” *Id.* (emphasis added). That same section further provides, that “If a candidate
16 indicates his or her party preference on his or her declaration of candidacy, it shall appear on the
17 primary and general election ballot in conjunction with his or her name.” Section 13105 provides

18
19 (2003), several members of the Libertarian Party of Georgia (a non-qualified party in that State),
20 challenged Georgia’s requirement that candidates get signatures equal to 5% of the voters in the
21 last statewide election to appear on the ballot, *unless they were members of qualified parties*. The
22 *Cartwright* plaintiffs brought this challenge under the Elections Clause and Qualifications Clause,
23 because they challenged the application of that statute with respect to congressional elections.
24 Like Plaintiff here, the plaintiffs in *Cartwright* contended that restrictions on non-qualified party
25 candidates was unconstitutional under *Cook v. Gralike*. The Eleventh Circuit characterized that
26 argument as “frivolous.” *Id.* at 1142 n.4.

27 ²⁷ Plaintiff’s argument that Interveners are “judicially estopped” from raising this point is
28 misplaced. Interveners raised this statutory construction issue in their Answer, filed in the San
Francisco Superior Court, in the Court of Appeal proceedings and in the California Supreme
Court. Moreover, for judicial estoppel to apply, a party must take a position that “directly
contradicts” a position earlier taken. *United States v. Castillo-Basa*, 483 F.3d 890, 898-99 n.5 (9th
Cir. 2007). A legal position that it would be constitutional for SB 6 to limit ballot labels to
qualified parties does not “directly contradict” the conclusion that SB 6 does not do that, or vice
versa.

1 for the party preference disclosed on the candidacy declaration per § 8002.5(a) to be printed on the
2 ballot.

3 Pursuant to Elections Code §§ 2150(a)(8) and 2151, California’s voter registration cards
4 must allow the voter to declare the “political party” that he or she prefers. Those cards contain a
5 list of the qualified parties; *they also, however, contain a blank for registrants to write-in non-*
6 *qualified parties as well. See* Interveners’ Request for Judicial Notice, *supra* note 9, Exhibit B
7 (Marin County voter registration card).²⁸ Indeed, the Complaint appears to indicate that Plaintiff
8 Chamness is actually registered with the “Coffee Party.” But even if he is not currently so
9 registered, SB 6 repealed former Elections Code § 8550(f), which prevented a candidate from
10 changing his or her party preference in the 13 months prior to the election; SB 6 permits
11 candidates to change their party preference on their registration card right up until the day they file
12 their candidacy papers.²⁹

13 Interveners are aware that Defendant Secretary of State has interpreted these provisions to
14 permit only the designation of a qualified party on the ballot. As discussed above, Interveners
15 believe that such an interpretation is constitutional under *Lightfoot* and *Libertarian Party*.

16 **VI. THE BALANCE OF HARDSHIPS TIPS SHARPLY AGAINST AN INJUNCTION.**

17 While the “harms” with which Plaintiff is threatened are “slight”³⁰ and “insubstantial,”³¹
18 Interveners *and the public interest* face grave harm if a preliminary injunction issues, suspending
19 the Top Two Primary Act to let it languish in the Legislature hoping that its political opponents
20

21 ²⁸ Interveners anticipate that, as in the state court proceedings, Plaintiff will contend that
22 the term “party” must refer only to a “qualified” political party, citing Elections Code § 338
23 (“‘Party’ means a political party or organization that has qualified for participation in any primary
24 election.”). But Elections Code § 4 provides that the Elections Code’s general definitions do not
25 apply where “the context otherwise requires.”

26 ²⁹ One would expect, if Mr. Chamness’s real objective in this litigation were merely to
27 avoid being labeled as having “No Party Preference,” that he gladly accept an interpretation of SB
28 6 that permits him to use the label of the “party” he actually claims to prefer—the “Coffee
Party”—on the ballot. That he has not done so further demonstrates that the true motive
underlying this lawsuit is a broader disagreement with the open primary system established by
Proposition 14.

³⁰ *Lightfoot*, 964 F.2d at 871.

³¹ *Libertarian Party*, 28 Cal. 3d at 542 and 545.

1 will devise a “fix” to SB 6.

2 California’s voters adopted Proposition 14 for the purpose of reforming their dysfunctional
3 government, to:

- 4 • “Reduce gridlock by electing the best candidates to state office and Congress,
5 regardless of political party;
- 6 • “Give independent voters an equal voice in primary elections; and
- 7 • “Elect more practical individuals who can work together for the common good.”

8 *See* Complaint, Exhibit 14 (Dkt. #1-23) (Rebuttal To Argument Against Proposition 14), page 2.

9 An injunction against Proposition 14 will frustrate these purposes. Judicial restraint is
10 warranted here, where the Court is faced with a government reform measure and an injunction will
11 place in the hands of a hostile Legislature the power to decide whether Proposition 14 is ever
12 implemented. *See Legislature v. Eu*, 54 Cal. 3d at 511-12 (holding that to invalidate a voter-
13 enacted legislative reform measure, term limits, threatened to “insulate the Legislature from any
14 severe reform measures directed at that branch . . .”). As noted above, and detailed in Intervener
15 Maldonado’s declaration filed herein, Proposition 14 was opposed by nearly the entire political
16 class in Sacramento. *See* Maldonado Decl., *supra* note 1, ¶¶ 5-9. Granting an injunction would
17 leave future implementation of Proposition 14 entirely at the tender mercies of that political class,
18 effectively rendering the People’s reform dead letter.

19 Second, Proposition 14 gives unaffiliated/DTS voters new constitutional rights to
20 participate in primary elections. An injunction would deprive 3.4 million independent voters
21 (represented by Intervener CAIVP, and including Intervener Takashima) of their newly-won
22 constitutional rights. *See* Declaration of David Takashima (Dkt. #28), ¶¶ 2-3, 5-6 and 13-19.

23 Third, Proposition 14 gives many voters who *are* registered with the qualified parties new
24 rights as well. Under the pre-Proposition 14 system, in districts heavily dominated by one party
25 (*e.g.*, Democrats in San Francisco, Republicans in Orange County), voters of the other parties
26 often had no meaningful opportunity to participate in the electoral process; the election was
27 decided in the dominant party’s primary, in which voters registered with other parties could not
28 vote. *See* Cal. Elec. Code §§ 2151, 13102; Maldonado Decl., *supra* note 1, ¶ 14. Proposition 14

1 gives those voters the ability to cast a meaningful ballot in the primary, giving them the prospect
2 of actually affecting elections. Enjoining enforcement of Proposition 14 would again relegate
3 these voters to insignificant status.

4 And finally, an injunction against Proposition 14 would deprive candidates who are not
5 affiliated with qualified parties of the ability to participate in the primary election. If Proposition
6 14 were enjoined, and the State ordered to implement the pre-Proposition-14 Elections Code
7 provision instead, the only way for such candidates to have their name placed on the general
8 election ballot would be to proceed as an independent candidate, with signature and timing
9 requirements that are *far* more burdensome than the requirements of Proposition 14.³²

10 **VII. PLAINTIFF'S EXTREME REQUEST TO HAVE SB 6 ENJOINED IN ITS**
11 **ENTIRETY, AND PROPOSITION 14 DECLARED INOPERATIVE, IS WHOLLY**
12 **UNJUSTIFIED, EVEN IF THERE WERE MERIT TO HIS CLAIMS.**

13 Even if Plaintiff's interpretations were accepted, and his claims deemed to have merit, he
14 still would not be entitled to the extreme form of relief sought. Given the significant public
15 interests supporting enforcement of Proposition 14, the use of the finest judicial scalpel is
16 warranted; Plaintiff's requested relief is the judicial equivalent of a chainsaw.

17 "A preliminary injunction should be narrowly tailored to remedy the specific
18 harm alleged." *United States v. BNS, Inc.*, 858 F.2d 456, 464 (9th Cir. 1988). The scope of
19 available preliminary relief is necessarily limited by the scope of relief likely to be obtained at trial
20 on the merits, *Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983), and it "should be no more
21 burdensome to the defendants than necessary to provide complete relief to the plaintiffs." *Califano*
22 *v. Yamasaki*, 442 U.S. 682, 702 (1979). "An overbroad injunction is an abuse of discretion."
23 *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991).

24 Plaintiff challenges only one minor provision of SB 6, and he disclaims any challenge to
25 the constitutionality of Proposition 14 itself. Even in the highly unlikely event that Plaintiff were

26 ³² Compare former Cal. Elec. Code § 8062 (65 to 100 signatures required to seek
27 nomination of qualified party for statewide office) with Cal. Elec. Code § 8400 (1% of registered
28 voters statewide—currently 173,041 voters—must sign nomination papers for an independent
candidate to run statewide); see also Cal. Elec. Code § 8403(a)(1) (only 60 days to collect
signatures on independent nomination papers for statewide office).

1 ultimately to prevail on the merits of his claim concerning this collateral provision, the harms he
2 has alleged can be easily addressed without disrupting the overall enforcement of Proposition 14
3 or SB 6, including by severing the challenged restrictions.

4 Plaintiff's claim that the party label provisions are not severable from the remainder of SB
5 6 is just wrong. *See* Motion for Preliminary Injunction (Dkt. #4), pp. 15-17. Whether one portion
6 of a state statute is severable from others is a question of state law.³³ The California Supreme
7 Court has prescribed three criteria for severability: "the invalid provision must be grammatically,
8 functionally and volitionally separable." *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 821
9 (1989).

10 As to the volitional requirement, the intent of the enacting body is the touchstone of the
11 severance. *Schenley Affiliated Brands Corp. v. Kirby*, 21 Cal. App. 3d 177, 199 (1971). SB 6
12 contains an express severability clause:

13 If any provision of this measure, or part thereof, is for any reason held to be invalid
14 or unconstitutional, the remaining provisions shall not be affected, but shall remain
15 in full force and effect, and to this end the provisions of this measure are severable.
16 The Legislature declares that this measure, and each section, subdivision, sentence,
17 clause, phrase, part, or portion thereof, would have been passed irrespective of the
18 fact that any one or more sections, subdivisions, sentences, clauses, phrases, parts,
or portions is found to be invalid. If any provision of this measure is held invalid as
applied to any person or circumstance, such invalidity does not affect any
application of this measure that can be given effect without the invalid application.

19 (SB 6, § 65.) The courts have held that the presence of such a clause is "persuasive evidence of
20 the enacting body's intent to permit severance." *Schenley Affiliated Brands Corp.*, 21 Cal. App.
21 3d at 199. *See also Calfarm Ins. Co.*, 48 Cal. 3d at 821.

22 As to the grammatical and functional requirements, severability is also clear in this case;
23 the allegedly offensive party label provisions could easily be carved out of SB 6, leaving the
24 overall enforcement of Proposition 14 intact. Plaintiff has not even attempted to argue that the
25 "grammatical" and "functional" severability criteria are not met.

26
27 ³³ *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996); *Valley Outdoor, Inc. v. County of Riverside*,
28 337 F.3d 1111, 1114 (9th Cir. 2003) (applying California law to sever unconstitutional provisions
of a Riverside County ordinance).

1 **VIII. THIS COURT SHOULD ABSTAIN FROM FURTHER PROCEEDINGS PENDING**
2 **RESOLUTION OF STATUTORY CONSTRUCTION ISSUE BY CALIFORNIA'S**
3 **COURTS, UNDER THE DOCTRINE OF *RAILROAD COMM'N V. PULLMAN CO.***

4 The U.S. Supreme Court has made it clear that “federal courts should abstain from decision
5 when difficult and unsettled questions of state law must be resolved before a substantial federal
6 question can be decided.” *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984) (citing
7 *Pullman*). The Ninth Circuit has adopted a three-part test for deciding when *Pullman* abstention is
8 warranted: “First, the proper resolution of the state law question at issue must be uncertain.
9 Second, a definitive ruling on the state issue must potentially obviate the need for constitutional
10 adjudication by the federal court. Third, the complaint must touch upon ‘a sensitive area of social
11 policy upon which the federal courts ought not to enter unless no alternative to its adjudication is
12 open.’” *Burdick v. Takushi*, 846 F.2d 587, 588 (9th Cir. 1988) (quoting *Canton v. Spokane Sch.*
13 *Dist. No. 81*, 498 F.2d 840 (9th Cir. 1974)). In *Burdick*, the plaintiff challenged Hawaii’s ban on
14 write-in voting. The Ninth Circuit concluded, however, that it was unclear as a matter of state law
15 whether Hawaii law truly did ban write-in voting and accordingly ordered abstention until that
16 issue was tendered to, and resolved by, Hawaii’s state courts.³⁴

17 Applying the criteria discussed above compels the conclusion that *Pullman* abstention is
18 warranted here as well:

- 19 1. As discussed above, there is a hotly-debated question of statutory construction
20 pending in the California state courts³⁵: whether SB 6 actually provides that only
21 “qualified” party labels can appear on the ballot for voter-nominated offices.
- 22 2. If the state courts conclude that this limitation does not exist, and that candidates

23
24 ³⁴ *Pullman* abstention is not waivable by the parties, *Burdick*, 846 F.2d at 587 n.1, and can
25 be raised at any point during the pendency of a lawsuit. *Id.* It may even be raised *sua sponte* by
26 the Court. *Richardson v. Koshiba*, 693 F.2d 911, 915-18 (9th Cir. 1982) (ordering *Pullman*
27 abstention after raising issue *sua sponte* at oral argument).

28 ³⁵ *Pullman* abstention is appropriate even when the federal plaintiff is not already party to a
pending state action. *Columbia Basin Apt. Ass’n v. City of Pasco*, 268 F.3d 791 (9th Cir. 2001).
Indeed, there need not even be a pre-existing state court action pending. *Gilbertson v. Albright*,
381 F.3d 965, 971 n.6 (9th Cir. 2004).

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may use any party label they wish, it would entirely moot Plaintiff’s action—would “obviate the need for constitutional adjudication by [this] court.”

3. And finally, the Ninth Circuit in *Burdick* held that “[f]ederal courts should refrain from deciding the constitutionality of state election laws when reasonable alternatives to such adjudication are available[,]” 846 F.2d at 589, concluding that challenges to state elections laws “do[] touch upon ‘a sensitive area of social policy’ into which federal courts should intrude with great reluctance.” *Id.*

This Court should refrain from constitutional adjudication of Plaintiff’s claims until the state courts have resolved the predicate state law issues.

IX. CONCLUSION.

For the foregoing reasons, the motion for preliminary injunction should be denied.

Dated: March 4, 2011

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