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

15 **MICHAEL CHAMNESS,**
 16
 Plaintiff,
 17
 v.
 18 **DEBRA BOWEN, in only her official**
 19 **capacity as California Secretary of**
 20 **State; DEAN LOGAN, in only his**
 21 **official capacity as Registrar-**
 22 **Recorder / County Clerk of the**
 23 **County of Los Angeles; and DOES 1-**
 24 **20,**
 Defendants.

2:11-CV-01479 ODW (FFMx)

**OPPOSITION OF CALIFORNIA
 SECRETARY OF STATE DEBRA
 BOWEN TO PLAINTIFF'S
 MOTION FOR PRELIMINARY
 INJUNCTION**

Date: March 21, 2011
 Time: 1:30 p.m.
 Courtroom: 11
 Judge The Honorable Otis D.
 Wright, II
 Trial Date N/A
 Action Filed: February 17, 2011

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INTRODUCTION

1
2 Plaintiff Michael Chamness states that he plans to run in an upcoming special
3 election in California’s 36th Congressional District. Mr. Chamness is not affiliated
4 with any ballot-qualified political party. Therefore California law requires that he
5 appear on the ballot with the term “No Party Preference” under his name.

6 Plaintiff objects to the term “No Party Preference.” He would prefer to use the
7 term “Independent.” He sees a profound constitutional distinction between these
8 two terms, so profound that he seeks a preliminary injunction not only changing his
9 ballot description, but also enjoining approximately 60 election statutes for the
10 upcoming 36th Congressional District race and *for all future federal and state*
11 *legislative races.*

12 Plaintiff offers no justification for the radical injunction he seeks. While the
13 numerous inadequacies in plaintiff’s motion will be discussed in detail below, there
14 is one deficiency that permeates the entire motion: Plaintiff has produced no
15 evidence to support his claims. Plaintiff offers no evidence that there is any
16 significant difference between the terms “No Party Preference” and “Independent,”
17 and he offers no evidence that the use of either term will gain or lose him even one
18 vote. And he does not even describe the 60 statutes (58 of which have nothing to
19 do with the No Party Preference/Independent issue) that he seeks to invalidate.

20 A preliminary injunction is “an extraordinary and drastic remedy, one that
21 should not be granted unless the movant, *by a clear showing*, carries the burden of
22 persuasion.”” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997), quoting 11A C.
23 Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948, 129-30 (2d
24 ed.1995) (emphasis in original). Rhetoric is no substitute for evidence. Plaintiff
25 has offered no evidence in support of his motion and the motion therefore must be
26 denied.

27 ///

28 ///

1 **FACTUAL STATEMENT**

2 **I. TREATMENT OF POLITICAL PARTIES UNDER CALIFORNIA LAW.**

3 In his motion, plaintiff refers to himself as a “minor party candidate” who will
4 appear on the ballot for the upcoming 36th Congressional District special election
5 as having no party preference. (Plaintiff’s Memorandum at p. 2, ll. 17-18.)
6 However, this terminology has no basis in California law. The Elections Code does
7 not distinguish between “major” and “minor” parties. Instead, California
8 recognizes political parties that have qualified to participate in primary elections
9 and political bodies seeking to qualify for political party status.

10 As defined in the Elections Code, the term “party” means “a political party or
11 organization that has qualified for participation in any primary election.” (§ 338.¹)
12 A party becomes qualified to participate in a primary election by meeting at least
13 one of three statutory tests. (§ 5100.) These involve polling sufficient votes at the
14 preceding gubernatorial election, having sufficient voters affiliate with the party, or
15 petitioning for qualification. (*Ibid.*)

16 On the other hand, the term “political body” is used to refer to a “group of
17 electors desir[ing] to qualify a new political party meeting the requirements of
18 Section 5100.” (§ 5001.) A group may qualify as a political body by electing
19 temporary officers at a caucus or convention, selecting a party name, and filing a
20 formal notice with the Secretary of State. (*Ibid.*)

21 Qualification of a political party under California law is not onerous.
22 Presently there are six qualified political parties: American Independent,
23 Democratic, Green, Libertarian, Peace and Freedom, and Republican. As of
24 January 2011, there were 12 political bodies attempting to qualify as political
25 parties.²

26 ¹ Unless otherwise noted, all statutory references are to the California
Elections Code.

27 ² See http://www.sos.ca.gov/elections/elections_f_non.htm.

1 Throughout this brief, the Secretary of State will follow the statutory
2 definitions when referring to political parties and political bodies.

3 **II. CALIFORNIA PARTISAN ELECTIONS BEFORE THE ADOPTION OF**
4 **PROPOSITION 14**

5 Before the adoption of Proposition 14, California conducted closed primary
6 elections for partisan offices.³ Each party chose its nominees on a primary election
7 ballot that listed only that party's candidates. The candidates that a party chose at
8 the primary election "[became] its official nominees at the general election . . . and
9 [were] identified by their party affiliation on the general election ballot."

10 *Libertarian Party v. Eu*, 28 Cal.3d 535, 541 (1980) [170 Cal.Rptr. 25]. Under this
11 system, a political party could not be denied "the ability to place on the general
12 election ballot the candidate who received, at the primary election, the highest vote
13 among that party's candidates." Cal. Const., art. II, § 5, former subd. (b).

14 In addition to party nominees, a candidate could appear on the general election
15 ballot through the process of independent nomination by petition. (§ 8300, et. seq.;
16 see *Libertarian Party v. Eu*, *supra*, 28 Cal.3d at p. 541.) For a statewide office, the
17 nomination papers of an independent candidate had to be signed by voters equal to
18 at least one percent of the number of registered voters in the entire state for the
19 preceding general election; for other offices, the required percentage was three
20 percent of registered voters in the area for the preceding general election. (§ 8400.)
21 If a candidate qualified for the general election by means of an independent
22 nomination, the word "Independent" would be printed on the ballot after the
23 candidate's name instead of a party designation. (Former § 13105, subd. (a); see
24 *Libertarian Party v. Eu*, *supra*, 28 Cal.3d at p. 542.)

25
26 _____
27 ³ Generally speaking, partisan offices were all offices other than judicial,
28 school, county, and municipal offices. See former §§ 337, 334.

1 **III. CALIFORNIA’S ADOPTION OF PROPOSITION 14 AND ITS “TOP TWO”**
2 **PRIMARY SYSTEM.**

3 In June 2010, California voters approved Proposition 14, the “Top Two
4 Candidates Open Primary Act.” More than five million votes were cast on the
5 measure. It was adopted by a margin of 53.8 to 46.2 percent.⁴ Proposition 14
6 applies to elections held after January 1, 2011. (Exh. A-10 to Waters Decl.
7 [Proposition 14, 5th Clause].)

8 Proposition 14 amended the California Constitution to do away with partisan
9 primaries for state and congressional offices. It created a “top two” primary system
10 where all candidates for a particular office appear on the same primary ballot and
11 only the top two, regardless of political affiliation, go on to the general election.⁵
12 (On the following page is a one-page graphic used by the California Legislative
13 Analyst in the June 2010 ballot pamphlet to describe the effect of Proposition 14.)⁶
14
15
16
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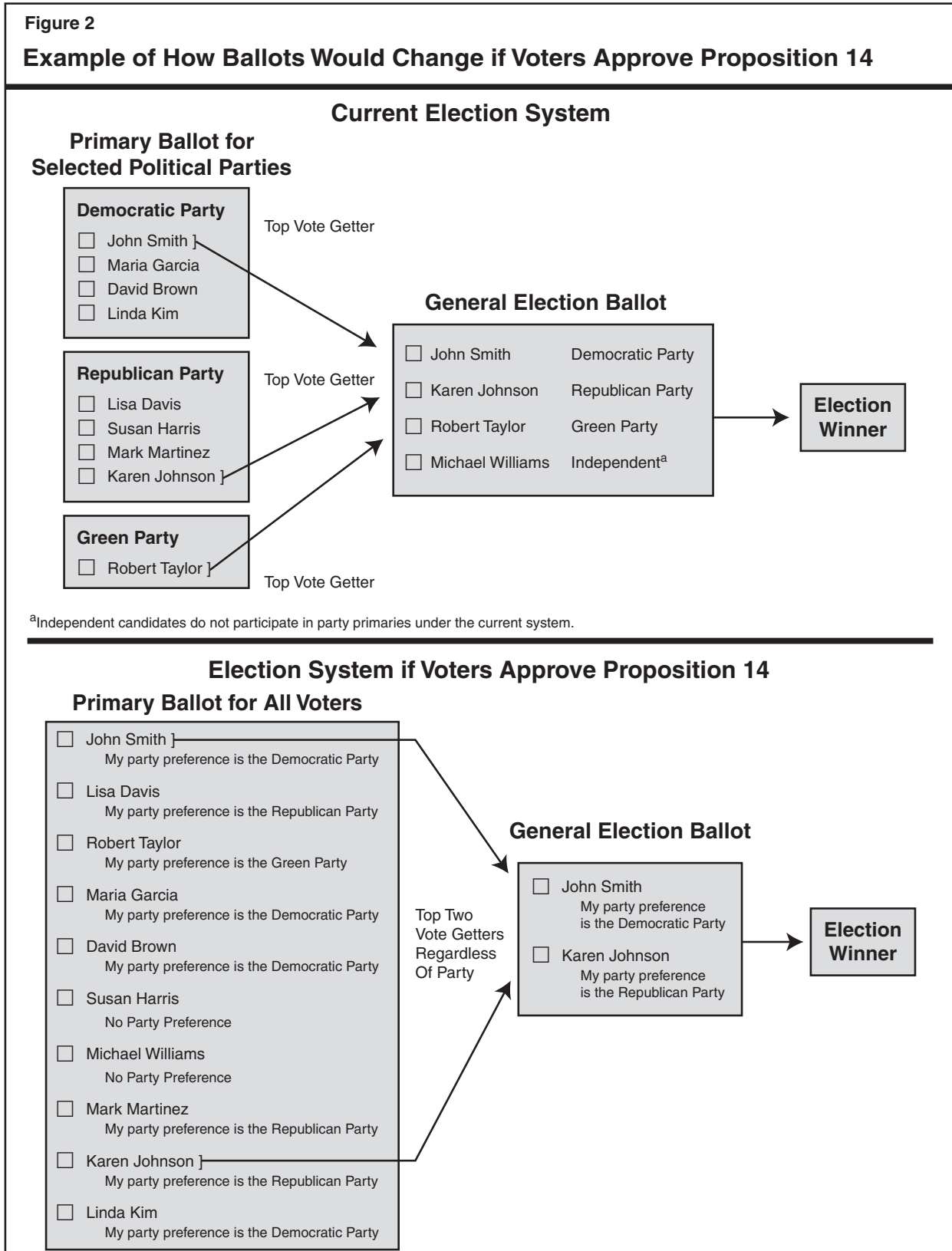
19 _____
20 ⁴ See <http://www.sos.ca.gov/elections/sov/2010-primary/>.

21 ⁵ Cal.Const. Art. II, § 5(a):

22 All voters may vote at a voter-nominated primary election for any
23 candidate for congressional and state elective office without regard
24 to the political party preference disclosed by the candidate or the
25 voter, provided that the voter is otherwise qualified to vote for
26 candidates for the office in question. The candidates who are the top
two vote-getters at a voter-nominated primary election for a
congressional or state elective office shall, regardless of party
preference, compete in the ensuing general election.

27 ⁶ The entire ballot pamphlet concerning Proposition 14 is attached to the
28 Waters Declaration as Exhibit A.

Figure 2 illustrates how a ballot for an office might appear if voters approve this measure and shows how this is different from the current system.



1 Proposition 14 allows a congressional or state candidate for a partisan office to
2 have “his or her political party preference, or lack of political party preference,
3 indicated upon the ballot for the office in the manner provided by statute.” Cal.
4 Const., art. II, § 5(b). But in contrast to prior law, a political party “shall not have
5 the right to have its preferred candidate participate in the general election for a
6 voter-nominated office other than a candidate who is one of the two highest vote-
7 getters at the primary election[.]” *Ibid.* In other words, candidates may state a
8 party preference on the ballot, but candidates do not run as party nominees.

9 **IV. SB 6 – THE LEGISLATION ADOPTED TO IMPLEMENT PROPOSITION 14.**

10 The operative provisions of Proposition 14 are only six paragraphs long. To
11 implement Proposition 14, the Legislature enacted Senate Bill 6 (SB 6), a 21-page
12 bill that adds, amends, or repeals approximately 60 sections of the Elections and
13 Government Codes. (Stats. 2009, Ch. 1; Exh. 3 to Complaint.) SB 6 was to
14 become operative only if Proposition 14 was approved by the voters. (*Id.* § 67.)

15 As to the party preference issue presented by plaintiff’s motion for preliminary
16 injunction, SB 6 added section 8002.5 to the Elections Code, which provides, in
17 part:

18 A candidate for a voter-nominated office may indicate his or her
19 party preference, or lack of party preference, as disclosed upon the
20 candidate’s most recent statement of registration, upon his or her
21 declaration of candidacy. If a candidate indicates his or her party
22 preference on his or her declaration of candidacy, it shall appear on
23 the primary and general election ballot in conjunction with his or
24 her name. . . . A candidate for voter-nominated office may also
choose not to have the party preference disclosed upon the
candidate’s most recent affidavit of registration indicated upon the
ballot.

25 (§ 8002.5(a).)

26 Additionally, SB 6 amended section 13105 to provide that a candidate’s party
27 preference may be designated on the ballot in one of three ways. First, next
28

1 to or below the name shall be identified the “name of the political party
2 designated by the candidate pursuant to Section 8002.5.” (§ 13105(a).) This
3 designation shall be in the form, “My party preference is the _____
4 Party.” (*Ibid.*) Second, “[i]f the candidate designates no political party, the
5 phrase ‘No Party Preference’ shall be printed instead of the party preference
6 identification.” (*Ibid.*) Finally, a candidate may choose not to have his or
7 her party preference listed on the ballot. In that case, “the space that would
8 be filled with a party preference designation shall be left blank.” (*Ibid.*)

9 **V. ELECTIONS THAT HAVE BEEN CONDUCTED, OR ARE PRESENTLY BEING**
10 **CONDUCTED, UNDER THE “TOP TWO” SYSTEM.**

11 Proposition 14 and SB 6 took effect January 1, 2011. Since then, two special
12 elections have been conducted under the new “top two” system, and two are
13 presently being conducted under that system.

14 On February 15, 2011, special primary elections were held in California
15 Senate Districts 17 and 28. In both races a candidate got more than 50% of the vote,
16 making a runoff unnecessary.⁷ Plaintiff Chamness was a candidate in the Senate
17 District 28 election. He appeared on the ballot as:

18
19 **MICHAEL CHAMNESS**
20 No Party Preference
21 Non-Profit Organization Consultant

22 (Exh. B-5 to Waters Decl.)

23 He received 0.55% of the vote.⁸ A special primary election for California
24 Assembly District 4 will be held March 8, 2011.⁹

25 ⁷ The special elections results are on the Secretary of State’s website at <http://www.Sos.ca.gov/>.

26 ⁸ See election results at <http://www.sos.ca.gov/>.

27 ⁹ See the Secretary of State’s web page for the AD 14 special primary at
28 <http://sos.ca.gov/elections/Special/ad04/>.

1 A special primary election will be held in California Congressional District 36
2 some time in April, May, or June of 2011. Incumbent Jane Harman resigned
3 effective February 28, 2011. The Governor has fourteen days, until March 14, to
4 call a special general election. (§ 10700.) A special general election must be held
5 112-126 days following the proclamation, unless the special general election or
6 special primary election can be consolidated with a statewide election occurring
7 within 180 days after the proclamation. (§ 10703(a).) In the normal course of
8 events, a special primary must be held on the eighth Tuesday preceding the special
9 general. (§ 10704(a).) While there are a number of uncertainties about the
10 schedule, it is likely that a special primary election in the 36th Congressional
11 District will be held May 3, May 17, or a Tuesday early in June.

12 **VI. OTHER LITIGATION INVOLVING PLAINTIFF CHAMNESS AND HIS**
13 **ATTORNEY RAISING THE SAME ISSUES RAISED HERE.**

14 The present action is the fourth action challenging the party preference
15 provisions of SB 6. The first three actions were filed in state court. Gautam Dutta,
16 counsel for plaintiff Michael Chamness, was plaintiffs' counsel in all these
17 proceedings.

18 *Field v. Bowen*, San Francisco Superior Court No. CGC-10-502018, was filed
19 July 28, 2010. (Exh. C-1 to Waters Decl. [Docket Sheet].) An order denying
20 plaintiffs' motion for preliminary injunction was entered on October 5, 2010. (Exh.
21 D to Waters Decl.) Plaintiffs appealed from that order and the appeal is being
22 briefed. (Exh. E to Waters Decl. [Docket Sheet for *Field v. Bowen*, 1st District
23 Court of Appeal No. A129946].) On January 31, 2011, plaintiff Michael
24 Chamness's motion to intervene in that appeal was denied. (Exh. E-3.)

25 A petition for writ of mandate was filed in California's First Appellate District
26 seeking immediate review of the denial of the preliminary injunction motion in the
27 San Francisco Superior Court proceeding. On October 14, 2010, the Court of
28

1 Appeal entered an order denying the writ petition. (Waters Decl., Exh. F-1 [Docket
2 Sheet for *Field v. Superior Court*, 1st District Court of Appeal No. A129829].)

3 A second petition for writ of mandate was then filed in the California Supreme
4 Court concerning the denial of the preliminary injunction motion in the San
5 Francisco Superior Court proceeding. (Waters Decl., Exh. G [Docket Sheet for
6 *Field v. Superior Court*, California Supreme Court No. S188436].) Plaintiff
7 Michael Chamness moved to intervene in that action. (Exh. G-1.) The Court
8 requested written opposition. (Exh. G-1.) On December 15, 2011, the petition for
9 writ of mandate and motion to intervene were denied. (*Exh. G-3.*)

10 STANDARD FOR ISSUING PRELIMINARY INJUNCTION

11 “[A] preliminary injunction is an extraordinary and drastic remedy, one that
12 should not be granted unless the movant, *by a clear showing*, carries the burden of
13 persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997), quoting 11A C.
14 Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948, 129-30 (2d
15 ed.1995) (emphasis in original). “A plaintiff seeking a preliminary injunction must
16 establish that he is likely to succeed on the merits, that he is likely to suffer
17 irreparable harm in the absence of preliminary relief, that the balance of equities
18 tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural*
19 *Resources Defense Council, Inc.*, 555 U.S. 7, ___, 129 S.Ct. 365, 374 (2008).

20 A plaintiffs’ evidentiary burden in seeking provisional relief in advance of trial
21 is more rigorous when the plaintiff seeks to enjoin governmental action taken in the
22 public interest pursuant to statutory provisions. *Midgett v. Tri-County Metropolitan*
23 *Transp. Dist. of Oregon*, 254 F.3d 846, 851 (9th Cir. 2001); *see also Thomas v.*
24 *County of Los Angeles*, 978 F.2d 504, 508 (9th Cir. 1992). Thus, “[a] strong factual
25 record is therefore necessary before a federal district court may enjoin a State
26 agency.” *Cupolo v. Bay Area Rapid Transit*, 5 F.Supp.2d 1078, 1085 (N.D.Cal.
27 1997), citing *Thomas*, 978 F.3d at 508. Moreover, “it is clear that a state suffers
28 irreparable injury whenever an enactment of its people or their representatives is

1 enjoined.” *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir.
2 1997). Thus, “a federal court must exercise restraint when a plaintiff seeks to
3 enjoin any non-federal government agency, be it local or state.” *Midgett*, 254 F.3d
4 at 851.

5 ARGUMENT

6 I. PLAINTIFF HAS NOT ESTABLISHED THAT HE IS LIKELY TO SUCCEED 7 ON THE MERITS.

8 A. Plaintiff Is Unlikely To Succeed On His First And Fourteenth 9 Amendment Claims.

10 The Constitution grants to the States “a broad power to prescribe the ‘Times,
11 Places and Manner of holding Elections for Senators and Representatives,’ Art. I, §
12 4, cl. 1, which power is matched by state control over the election process for state
13 offices.” *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217, 107
14 S.Ct. 544, 550 (1986). As a practical matter, elections cannot be conducted in the
15 absence of extensive State regulation of the election process: “Common sense, as
16 well as constitutional law, compels the conclusion that government must play an
17 active role in structuring elections; ‘as a practical matter, there must be a substantial
18 regulation of elections if they are to be fair and honest and if some sort of order,
19 rather than chaos, is to accompany the democratic processes.’” *Burdick v. Takushi*
20 (1992) 504 U.S. 428, 433 [112 S.Ct. 2059], quoting *Storer v. Brown* (1974) 415
21 U.S. 724, 730 [94 S.Ct. 1274]; accord, *Timmons v. Twin Cities Area New Party*
22 (1997) 520 U.S. 351, 358 [117 S.Ct. 351] (hereinafter *Timmons*) [“States may, and
23 inevitably must, enact reasonable regulations of parties, elections, and ballots to
24 reduce election- and campaign-related disorder”].

25 In election cases, the Supreme Court has developed a balancing test to
26 accommodate both a candidate’s speech rights and a State’s interest in preserving
27 fair and impartial elections. First, a court must “weigh the character and magnitude
28 of the burden the State’s rule imposes on those rights against the interests the State

1 contends justify that burden, and consider the extent to which the State's concerns
2 make the burden necessary.” *Timmons v. Twin Cities Area New Party*, 520 U.S.
3 351, 358, 117 S.Ct. 1364, 1370 (1997) (citations and internal quotations omitted).

4 Regulations imposing severe burdens on plaintiffs' rights must be
5 narrowly tailored and advance a compelling state interest. Lesser
6 burdens, however, trigger less exacting review, and a State's
7 important regulatory interests will usually be enough to justify
8 reasonable, nondiscriminatory restrictions. . . . No bright line
separates permissible election-related regulation from
unconstitutional infringements on First Amendment freedoms.

9 *Timmons, supra*, 520 U.S. at 358-359, 117 S.Ct. at 1370 (citations and internal
10 quotations omitted).

11 Application of this balancing test is demonstrated by *Washington State*
12 *Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184
13 (2008), which upheld Washington’s top-two primary against a facial First-
14 Amendment challenge. In the *Grange* case, Washington’s top-two primary system
15 – which allows candidates to state on the ballot a party preference – was challenged
16 on the ground that it would lead voters to falsely assume that candidates were
17 endorsed or approved by the named political party. *Id.* at 454, 128 S.Ct. at 1193.
18 The Supreme Court rejected this assertion as “sheer speculation,” noting that
19 “[b]ecause respondents brought their suit as a facial challenge, we have no
20 evidentiary record against which to assess their assertions that voters will be
21 confused.” *Id.* at 454-455, 128 S.Ct. at 1193-1194. The Court stressed its
22 reluctance to “invalidate a popularly enacted election process that has never been
23 carried out.” *Id.* at 458, 128 S.Ct. at 1195.

24 Plaintiff’s motion for preliminary injunction likewise is based on “sheer
25 speculation.” Although plaintiff claims to have filed an as-applied challenge, he is
26 mistaken. Plaintiff seeks a preliminary injunction prohibiting the Secretary of State
27 “from implementing and enforcing SB 6 for the CD 36 Primary and all future
28 federal and state legislative elections[.]” ([Proposed] Order [Tab 7] p. 2, ll. 6-7.)

1 He further seeks a declaration that “Proposition 14 is inoperative, because its
2 implementing statute (SB 6) has been declared unenforceable.” ([Proposed] Order
3 [Tab 7] p. 2, ll. 16-17.) Plaintiff’s challenge is in fact a facial challenge.

4 Regardless of what plaintiff calls his motion, the fact remains that plaintiff
5 presents no evidentiary record to support his conclusion that voters will be confused
6 or put off by putting the words “No Party Preference” after his name on the ballot.
7 Notably, plaintiff presents no survey evidence that voters find the statement “No
8 Party Preference” to be inaccurate or pejorative.

9 Rather, in light of the overall structure of California’s system of regulating
10 elections and ballots, there is good reason to believe that voters will interpret the
11 phrase “No Party Preference” to mean exactly what it is intended to mean: The
12 candidate does not prefer any of the ballot-qualified parties. As set out in the
13 Factual Statement above, the California Elections Code has long defined the term
14 “party” to refer to a party that has qualified to participate in primary elections.
15 (§ 338.) At present there are six ballot-qualified parties: Green, American
16 Independent, Libertarian, Peace & Freedom, Republican, and Democratic.
17 California voters are accustomed to seeing these names, and no other party names,
18 on the ballot. Plaintiff presents no evidence to suggest that voters will interpret the
19 term “no party preference” to refer to something other than no preference for the
20 qualified parties.

21 Plaintiff also ignores other provisions of the Elections Code that allow a
22 candidate to explain himself to the voter. *See Washington State Grange, supra*, 552
23 U.S. at 456, 128 S.Ct. at 1194: “Additionally, the State could decide to educate the
24 public about the new primary ballots through advertising or explanatory materials
25 mailed to voters along with their ballots.” Section 13307.5 gives a Congressional
26 candidate the opportunity to place a 250-word statement in the sample ballot.
27 There is no restriction on the content of that statement save that it cannot make
28 reference to an opposing candidate. A candidate can use this statement to explain

1 the nature of his affiliations, whatever they may be. (See Waters, Decl., Exh. B-9
2 [Candidate Statement of candidate in recent Senate District 28 special primary]: “I
3 am not partisan. I belong to no party. I simply represent the average person who
4 has to work and struggle just to scrape by in this world, who simply wants to help
5 create a better, safer, more just world for us all to live in.”)

6 In light of the above, there is no credible argument that the designation “No
7 Party Preference” imposes a severe burden on the First Amendment rights of
8 candidates who do not prefer one of the six political parties. *See Rubin v. City of*
9 *Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002) [prohibition on ballot labels
10 such as “activist” does not severely burden candidate's First Amendment rights];
11 *Timmons, supra*, 520 U.S. at p. 364 [statute prohibiting candidates from appearing
12 on ballot as candidate of more than one party does not impose severe burden on
13 First Amendment rights]; *Schrader v. Blackwell*, 241 F.3d 783, 787 (6th Cir 2001)
14 [statute denying party labels on the general election ballot to candidates of
15 unqualified political parties does not impose severe burden on First Amendment
16 rights].) Thus important regulatory interests will suffice to justify the restriction.
17 *Timmons, supra*, 520 U.S. at 358-359, 117 S.Ct. at 1370 (citations and internal
18 quotations omitted).

19 Here California has at least two important interests in using “No Party
20 Preference” to describe unaffiliated candidates. First, there is a legitimate interest
21 in maintaining the distinction between qualified political parties and non-qualified
22 political organizations. *See Libertarian Party v. Eu, supra*, 28 Cal.3d at p. 546
23 [“The maintenance of the integrity of the distinction between qualified and
24 nonqualified parties serves a compelling state interest”]. Second, the State has an
25 important interest in avoiding confusing or misleading party preference ballot
26 designations. *See Norman v. Reed, supra*, 502 U.S. at p. 290 [to prevent
27 “misrepresentation and electoral confusion,” a state may prevent candidates from
28 using party label if they are not affiliated with that party].

1 The inescapable fact is that if California is going to maintain its distinction
2 between qualified political parties and non-qualified political organizations, some
3 terminology will have to be used to describe candidates who do not prefer one of
4 the qualified political parties. Plaintiff would prefer the term “Independent,” but no
5 doubt there are others who would prefer the term “No Party Preference.”
6 “Independent” is probably not a good choice in term of avoiding confusion because
7 the term could be confused with “American Independent,” which is one of the six
8 qualified political parties. Otherwise, there does not appear to be any significant
9 difference between the two. *See, e.g., the Wikipedia* [“In politics, an independent or
10 non-party politician is an individual not affiliated to any political party”].¹⁰ There
11 is no evidence in the record to suggest that either term is preferable to the other.
12 There is certainly no evidence in the record to suggest that there is a constitutional
13 distinction between the two terms.

14 No doubt aware of the complete lack of evidence supporting his motion,
15 plaintiff asserts that “Minor-Party Candidates Have a Fundamental Right to a Ballot
16 Label of ‘Independent.’” (Plaintiff’s Memorandum at p. 10, ll. 5-6.) But none of
17 the authorities cited by plaintiff support that proposition.

18 *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), concerned an Ohio statute that
19 prohibited unaffiliated candidates from using any ballot label, including the term
20 “Independent.” *Id.* at p. 174. The case was decided on summary judgment after
21 plaintiff had presented three experts who testified in detail about the Ohio election
22 system and concluded that “Ohio’s ballot scheme is the equivalent of putting an
23 unlabeled product on a shelf next to brand name products in a supermarket.” *Id.* at
24 p. 172. The district court granted summary judgment in favor of plaintiff and the
25 Sixth Circuit affirmed, observing that the *evidence* showed that the lack of any
26 ballot label “makes it virtually impossible for Independent candidates to prevail in

27 ¹⁰ [http://wikipedia.org/wiki/Independent_\(politician\)](http://wikipedia.org/wiki/Independent_(politician)).

1 the general election.” *Id.* at p. 176. The court was also influenced by the fact that
2 the Supreme Court had earlier invalidated a series of Ohio election laws that made
3 it “virtually impossible” for unaffiliated candidates to appear on the ballot. *Id.* at p.
4 177. *Rosen* was a fact-intensive decision that invalidated a state law that prevented
5 unaffiliated candidates from using *any* ballot label. *Rosen* did not create a free-
6 hanging fundamental right to use the ballot designation “Independent.”¹¹

7 Finally, plaintiff asserts that an unauthenticated email from an employee of
8 the Secretary of State’s staff contains a “binding admission” that “SB 6’s Party
9 Preference Ban Is Not ‘Permissible’”. (Plaintiff’s Memorandum at p. 11, ll. 7-8.
10 This is nonsense. The email is unauthenticated and inadmissible. Even if it were
11 admitted, the document makes no admissions and simply shows that members of
12 the Secretary of State’s staff are doing their job of reviewing and commenting on
13 new election laws.

14 **B. Plaintiff Is Unlikely To Succeed On His Elections Clause Claim.**

15 In passing, plaintiff argues that section 13105 violates the Election Clause of
16 the federal constitution. (Plaintiff’s Memorandum at pp. 14-15.) Again plaintiff
17 offers no evidence to support that assertion.

18 The Elections Clause (U.S. Const., art. I, § 4, cl. 1.) provides:

19 The Times, Places and Manner of holding Elections for Senators
20 and Representatives, shall be prescribed in each State by the
21 Legislature thereof; but the Congress may at any time by Law make
22 or alter such Regulations, except as to the Places of chusing
23 Senators.

24 ¹¹ Nor did any of the other authorities cited for this proposition on page 10 of
25 plaintiff’s memorandum. *Schrader v. Blackwell*, 241 F.3d 783, 791 (6th Cir. 2001)
26 upheld an Ohio law that prohibited members of unqualified parties from using a
27 party label on the ballot. It had nothing to do with unaffiliated candidates. *Rubin v.*
28 *City of Santa Monica*, 308 F.3d 1008, 1019 (9th Cir. 2002) upheld a Santa Monica
regulation that prevented a candidate from appearing on the ballot as “Peace
Activist.”

1 “[T]he Elections Clause grants to the States ‘broad power’ to prescribe the
2 procedural mechanisms for holding congressional elections.” *Cook v. Gralike*
3 (2001) 531 U.S. 510, 523 [121 S.Ct. 1029].

4 Plaintiff makes no credible argument that the party preference provisions of
5 section 13105 are beyond California’s “broad power” to prescribe rules for
6 Congressional elections. His reliance on *Cook v. Gralike* is misplaced. *Cook*
7 concerned a provision of the Missouri Constitution that *instructed* members of the
8 Missouri congressional delegation to “to use all of his or her delegated powers to
9 pass the Congressional Term Limits Amendment” set forth therein. *Id.* at 514.
10 Those who disobeyed were to have the statement “DISREGARDED VOTERS’
11 INSTRUCTION ON TERM LIMITS” printed next to their name on the ballot.
12 Similarly, congressional candidates who did not pledge in writing to support the
13 term limits provision were to have the statement “DECLINED TO PLEDGE TO
14 SUPPORT TERM LIMITS” printed next to their name on the ballot. *Id.* at pp. 514-
15 515. Unsurprisingly, the Court concluded that these pejorative statements were an
16 attempt to give binding instructions to Missouri’s congressional delegation, and that
17 the Elections Clause does not permit such binding instructions. *Id.* at pp. 525-526.

18 *Cook* has no relevance here because section 13105 does not impose binding
19 instructions on any candidate.

20 **II. PLAINTIFF HAS NOT ESTABLISHED THAT HE IS LIKELY TO SUFFER**
21 **IRREPARABLE HARM.**

22 Plaintiff seeks to use the term “Independent” on the ballot, but objects to the
23 term “No Party Preference.” But there is nothing in the record to suggest that there
24 is any significant difference between the two terms, and there is nothing in the
25 record to suggest that there is a constitutional difference between the two terms.
26 Plaintiff offers no evidence that either term will win him or lose him even one vote.

27 To warrant a preliminary injunction, plaintiff’s showing of harm must “be
28 actual and not theoretical.” *Emily’s List v. Federal Election Com’n*, 362 F.Supp.2d

1 43, 57 (D.D.C. 2005). The one page that plaintiff devotes to this issue is pure
2 rhetoric. (Plaintiff’s Memorandum at p. 18.) Plaintiff has made no showing of
3 irreparable harm.

4 **III. PLAINTIFF HAS NOT ESTABLISHED THAT THE BALANCE OF EQUITIES**
5 **TIPS IN HIS FAVOR.**

6 Plaintiff devotes one paragraph of his memorandum to the balance of equities.
7 His argument consists of the assertion that without a preliminary injunction “he will
8 be forced to lie to voters about his political beliefs on the ballot.” (Plaintiff’s
9 Memorandum at p. 19, ll. 8-18.)

10 Again this is pure rhetoric. Plaintiff offers no evidence to support the
11 conclusion that there is any meaningful difference between the term “No Party
12 Preference” and the term “Independent,” or that either term constitutes a “lie.”
13 Plaintiff has made no showing that the balance of equities tips in his favor.

14 **IV. PLAINTIFF HAS NOT ESTABLISHED THAT AN INJUNCTION IS IN THE**
15 **PUBLIC INTEREST.**

16 Plaintiff devotes one paragraph of his memorandum to the public interest. He
17 asserts that by granting injunctive relief, “the Court will deliver much needed
18 certainty to the local officials who administer our elections.” (Plaintiff’s
19 Memorandum at p. 20, ll. 4-5.)

20 Again plaintiff offers no evidence in support of this assertion. He attaches no
21 declaration from an elections official. To the contrary, common sense dictates that
22 elections are very complicated affairs, and that changing the rules in mid-stream is
23 likely to increase uncertainty, not decrease it. To grant the relief plaintiff seeks
24 here – invalidation of SB 6 and Proposition 14 in their entirety – would create
25 chaos.

26 Plaintiff has made no showing that an injunction is in the public interest.

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CONCLUSION

For the reasons set forth above, the motion for preliminary injunction should be DENIED.

Dated: March 4, 2011

Respectfully submitted,
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