GAUTAM DUTTA, ESQ. (State Bar No. 199326)
39270 Paseo Padre Parkway # 206
Fremont, CA 94538
Telephone: 415.236.2048
Email: dutta@businessandelectionlaw.com
Fax: 213.405.2416

Attorney for Plaintiffs
MONA FIELD, RICHARD WINGER, STEPHEN A. CHESSIN, JENNIFER WOZNIAK, JEFF MACKLER, and RODNEY MARTIN

CALIFORNIA SUPERIOR COURT

COUNTY OF SAN FRANCISCO

MONA FIELD, RICHARD WINGER, STEPHEN A. CHESSIN, JENNIFER WOZNIAK, JEFF MACKLER, and RODNEY MARTIN,

Plaintiffs,

vs.

DEBRA BOWEN, in only her official capacity as California Secretary of State; JOHN ARNTZ, in only his official capacity as Director of Elections of the City and County of San Francisco; DAVE MACDONALD, in only his official capacity as Registrar of Voters of the County of Alameda; JESSE DURAZO, in only his official capacity as Registrar of Voters of the County of Santa Clara; DEAN LOGAN, in only his official capacity as Registrar-Recorder / County Clerk of the County of Los Angeles; NEAL KELLEY, in only his official capacity as Registrar of Voters of the County of Orange; RITA WOODARD, in only her official capacity as Registrar of Voters of the County of Tulare; and DOES 1-20;

Defendants.

CASE NO. CGC-10-502018

NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION; SUPPORTING DECLARATION OF GAUTAM DUTTA

HEARING DATE: Sept. 3, 2010
HEARING TIME: 9:30 am
JUDGE: Hon. _____
DEPARTMENT: 30__

[REQUEST FOR JUDICIAL NOTICE FILED CONCURRENTLY]

TABLE OF CONTENTS

Page

MEMORANDUM OF POINTS AND AUTHORITIES ……

I. Introduction ……..…….

II. Background ……

III. Legal Argument ..……

A. SB 6's Write-In Counting Ban Violates Section 2.5 of the California Constitution ……..

B. SB 6's Write-In Counting Ban Violates the First Amendment and the Free Speech Clause of the California Constitution ……..

C. SB 6 Violates the Due Process Clause..……

D. SB 6 Deprives Candidates of Their Political Preferences …….

E. SB 6 Violates the California Constitution's Equal Protection Clause ..

F. SB 6 Violates the United States Constitution's Election Clause ……

G. SB 6's Unconstitutional Provisions Are Not Severable …….

H. Prop 14 Is Inoperative As a Matter of Law ……..

I. Plaintiffs Are Entitled to a Preliminary Injunction …….

IV. Conclusion ……

TABLE OF AUTHORITIES

CASES

Bailey v. Superior Court, 19 Cal.3d 970, 568 P.2d 394 (Cal. 1977) 9
Bird v. Dennison, 7 Cal. 297 (Cal. 1857) 8, 9
Bonner v. City of Santa Ana, 45 Cal.App.4th 1465 (Cal.App.Ct. 1996) 7
City of Rancho Cucamonga v. Mackzum, 5 Cal. 3d 584, 228 Cal.App.3d 933 (Cal. 1991) 4
County of Sonoma v. Superior Court of Sonoma County, 173 Cal.App.4th 322 (Cal.App.Ct. 2009) 13
Delaney v. Superior Court, 50 Cal.3d 785 (Cal. 1990) 8
Denninger v. Recorder's Court, 145 Cal. 629, 79 P.360 (Cal. 1904) 14
Edelstein v. San Francisco, 29 Cal.4th 164, 56 P.3d 1029 (Cal. 1992) 6
Gould v. Grubb, 14 Cal.3d 661, 536 P.2d 1337 (Cal. 1975) 5, 9, 10
Huong Que, Inc. v. Luu, 150 Cal.App.4th 400, 58 Cal.Rptr 3d 527 (Cal.App.Ct. 2007) 14
Los Angeles Alliance for Survival v. City of Los Angeles, 22 Cal.4th 352, 993 P.2d 223 (Cal. 2000) 7
People v. Broussard, 5 Cal.4th 1067, 856 P.2d 1134 (Cal. 1993) 13
People v. Vega-Hernandez, 179 Cal.App.3d 1084 (Cal.App.Ct. 1986). 14
Rees v. Layton 6 Cal.App.3d 815 (Cal.App.Ct. 1970) 10
Stanson v. Mott, 17 Cal.3d 206, 551 P.2d 1, 130 Cal.Rptr. 697 (Cal. 1976) 9
Taylor v. Madigan, 53 Cal.App.3d 943 (Cal.App. 1975) 4

CONSTITUTIONAL PROVISIONS

CAL. CONST. art. I §28 4
CAL. CONST. art. II §2.5 4
CAL.CONST. Art. II §2.5 7
U.S. CONST. Art. I, §4, cl. 1 11

STATUTES

Elections Code §15340 ..... 4, 7
Elections Code §15341 4
Elections Code §15342 4
Elections Code §338 9
Elections Code §5100. 2

OTHER OUT OF STATE

Anderson v. Celebrezze, 460 U.S. 780 (1983) 12
Anderson v. Martin, 375 U.S. 399 (1964) 12
Bennett v. Yoshina, 140 F.3d 1218 (9th Cir. 1998) 7

Briscoe v. Kusper, 435 F.3d 1046 (7th Cir. 1971) 7
Burdick v. Takushi, 504 U.S. 428 (1986) 6
Clinton v. City of New York), 524 U.S. 417 (1998) 7
Cook v. Gralike, 531 U.S. 510 (2001) 11, 12, 13
Doe v. Reed, No. 09–559 (U.S. June 24, 2010) 6
Graves v. McElderry, 946 F.Supp. 1569 (W.D. Okla. 1996) 10
Griffin v. Burns, 570 F.2d 1065, 1074 (1st Cir. 1978) 8
Kramer v. Union Free School Dist., 395 U.S. 621 (1969) 5
Marijuana Policy Project v. District of Columbia Bd. of Elections and Ethics, 191 F.Supp.2d 196 (D.D.C. 2002) 5
McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 6
McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980) 10
Nolles v. State Cmte. for the Reorganization of School Dists., 524 F.3d 892 (8th Cir. 2008) 7
Reynolds v. Sims, 377 U.S. 533 (1964). 5
Sangmeister v. Woodard, 562 F.2d 460 (7th Cir. 1977) 10
Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) 11
Turner v. District of Columbia Bd. of Elections, 77 F.Supp.2d 25 (D.D.C. 1999) 5, 6, 7
U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) 13
United States v. Classic, 303 U.S. 299 (1941) 5

OTHER AUTHORITIES

SCA 4 (Maldonado), Res. Ch. 2, Stats. 2009 ..... 2, 1, 3, 8, 13, 14, 15
Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001 Sup.Ct.Rev. 299 10

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on September 3, 2010, 9:30 am (or as soon as this matter may be heard in an appropriate Department of the California Superior Court for the County of San Francisco), at 400 McAllister Street, San Francisco, California 94102, Plaintiffs will move this Court to issue a preliminary injunction enjoining Defendants, and all persons acting under their direction and control, from implementing Senate Bill 6 (Maldonado) for all future state and federal elections.

Plaintiffs' Motion is based on this Notice of Motion and Motion, along with the accompanying Memorandum of Points and Authorities, Request for Judicial Notice, supporting Declaration of Gautam Dutta, and attached exhibits.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

A few weeks ago, California voters were lured into an insidious trap. Eager to reform the way our elections are conducted, a slim majority of voters approved Proposition 14, which promised to "protect and preserve the right of every Californian to vote for the candidate of his or her choice."[1] However, many voters did not know that by voting for Proposition 14 ("Prop 14"), they were also approving SB 6 – a pernicious law that tramples on our fundamental right to vote and run for office:

- If SB 6 is implemented, any vote cast in for a write-in candidate in the general election will not be counted – and thousands of voters will be disenfranchised.
- If SB 6 is implemented, any candidate who chooses to identify with a "minor" party will be censored and discriminated against on the ballot.

Because SB 6 now threatens to disenfranchise voters and muzzle candidates, time is of the essence. Unless this Court swiftly issues a preliminary injunction, Plaintiffs and similarly situated voters and candidates will suffer imminent and irreparable harm. Therefore, the Court should (1) enjoin Defendants from implementing SB 6; (2) declare SB 6 to be unenforceable, because it violates both the United States and California Constitutions; and (3) declare Prop 14 to be inoperative, because no lawful statute has been passed to implement it.

II. Background

A. California's Qualified-Party Election System

If implemented, SB 6 will inflict a radical regulatory regime on our state and federal elections. Under existing law, California voters have filled all state and federal elected offices

[1] Proposition 14, Complaint Exh. 2 (referred to by the Legislature as "SCA 4" when it was placed on the ballot), RJN, *codified at* SCA 4 (Maldonado), Res. Ch. 2, Stats. 2009 (hereinafter "Prop 14").

through a "qualified party" election system.[2] Under this system, only "qualified parties" have had the right to hold qualified-party primaries.[3] Every even-numbered year, voters have had up to two opportunities to vote for state and federal candidates: (a) the qualified-party primary, and (b) the November general election.[4]

A political party or organization gains "qualified" status by satisfying stringent requirements.[5] During the qualified-party primary election, voters affiliated with each qualified party (and voters declining to state a party affiliation) would select that party's nominee.[6] The top votegetter from each qualified-party primary would then advance to the general election.[7] The top votegetter from the general election would win.[8]

B. Budgetary Cause, Electoral Effect

On February 19, 2009, then-State Senator Abel Maldonado cast the deciding vote to pass the state budget.[9] In exchange for his vote, Maldonado demanded a ballot measure that would eliminate the qualified-party primary system.[10] The Legislature obliged.[11]

Between 3:40 am and 6:55 am on February 19, 2009, without giving any public notice, the Legislature amended and passed Senate Bill 6 ("SB 6"), authored by Maldonado.[12] According to the Senate Rules Committee, SB 6 was intended to implement Prop 14, which Maldonado had

---

[2] Complaint ¶9.

[3] *Id.* ¶10.

[4] *Id.* ¶9. Since 2006, the qualified-party primary election has been held in June. In 2007, the Legislature passed legislation to move Presidential primaries to February. SB 113, *codified at* Ch. 2 Stats. 2007. *Id.* ¶9 n.5.

[5] *Id.* ¶11; Elections Code §5100.

[6] Complaint ¶13. Under existing law, each qualified party has the option to allow "decline to state" (unaffiliated) voters to vote in its party primary. *See* Elections Code §13102(b), *codified at* Ch. 98, Stats. 2000.

[7] Complaint ¶13. At the general election, voters could also vote for "independent" candidates (those who affiliated with no party or a non-qualified party) and write-in candidates.

[8] *Id.* ¶14.

[9] Complaint ¶16.

[10] *Id.* ¶17.

[11] *Id.*

[12] SB 6, Complaint Exh. 1, RJN, *codified at* Ch. 1, Stats. 2009. SB 6 had originally been introduced as a bill to address the disposal of hazardous waste.

also authored.[13] Prop 14 consisted of a proposed state constitutional amendment to eliminate qualified-party primaries.[14]

Between 3:40 am and 6:55 am on February 19, 2009, without giving any notice to the public, the Legislature voted to put Prop 14 on the statewide ballot.[15] The June 8, 2010 Official Voter Information Guide for Prop 14 did not provide either a summary or the text of SB 6, which had already been passed to implement Prop 14.[16] On June 8, 2010, a narrow majority of California voters approved Prop 14.[17]

C. Prop 14: An Overview

If both Prop 14 and SB 6 become operative on January 1, 2011, California will eliminate the qualified-party election system, and spawn an untested process to fill state and federal offices.[18] All candidates, irrespective of their party identification, would square off against one another during a first-round election.[19] The top two votegetters from that election would advance to the general election.[20] Under Prop 14, all candidates may state their "political party preference, or lack of political party preference" on the ballot, on the condition that they do so "in the manner provided by statute."[21] That "statute" is SB 6.

III. Legal Argument

A. SB 6's Write-In Counting Ban Violates Section 2.5 of the California Constitution

This issue is startlingly simple: SB 6's ban on counting write-in ballots flatly violates the plain language of the California Constitution, whose provisions are "mandatory and

---

13 Senate Rules Committee Analysis for SB 6, Feb. 19, 2009, RJN, Complaint Exh. 3.
14 Complaint ¶20.
15 *Id.* ¶¶22-23.
16 *Id.* ¶¶24-25, RJN Complaint Exh. 4-7.
17 *Id.* ¶26.
18 Complaint ¶28. Prop 14 expressly excludes qualified-party Presidential primaries. *Id.* ¶28 & n.14.
19 Complaint ¶30; Prop 14, *supra* note 2, Complaint Exh.2, at 4:27-30 (emphases added).
20 Complaint ¶30.
21 Complaint ¶32; Prop 14, *supra* note 2, Complaint Exh. 2, at 4:37-39 (emphases added).

prohibitory".[22] As a starting point, Article II, Section 2.5 orders elections officials to count every lawfully cast vote: "A voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted."[23] Furthermore, Elections Code Section 15340 – which SB 6 does not amend – gives voters the right to cast write-in votes in every election.[24] Finally, Elections Code Section 15342 – which SB 6 also does not amend – requires that all write-in votes cast for eligible candidates must be counted: "Any name written upon a ballot for a qualified write-in candidate … shall be counted for the office[.]"[25]

Yet rather than comply with constitutional norms, SB 6 bans all write-in ballots from being counted in the general election:[26]

> "A person whose name has been written on the ballot as a write-in candidate at the general election … shall not be counted."[27]

Equally startling, SB 6 induces voters to cast write-in votes, but does not even tell them that their write-in votes will not count. In fact, SB 6 compels elections officials to add a write-in section to all ballots:

> There shall be printed on the ballot … [t]he names of candidates with sufficient blank spaces to allow the voters to write in names not printed on the ballot.[28]

---

[22] *Taylor v. Madigan*, 53 Cal.App.3d 943, 951 (Cal.App. 1975) (*quoting* CAL. CONST. art. I §28). Statutes that implement constitutional provisions must themselves comply with all other constitutional provisions. *See, e.g., City of Rancho Cucamonga v. Mackzum*, 5 Cal. 3d 584, 228 Cal.App.3d 933, 943-44 (Cal. 1991) (examining whether implementing legislation for Proposition 13 complied with other provisions of the California Constitution).

[23] CAL. CONST. art. II §2.5 (emphases added), *available at* http://www.leginfo.ca.gov/.const/.article_2 (last visited July 18, 2010); Complaint ¶60.

[24] "Each voter is entitled to write the name of any public office … on the ballot of any election." Elections Code §15340 (emphases added).

[25] Elections Code §15342 (emphases added). Elections Code §15341 sets forth the requirements for a write-in candidate to be deemed "qualified".

[26] In Section 1, SB 6 disingenuously states that "[n]othing in this section shall be construed as preventing or prohibiting any qualified voter of this state from casting a ballot for any person by writing the name of that person on the ballot, or from having that ballot counted and tabulated, nor shall any provision of this section be construed as preventing or prohibiting any person from standing or campaigning for any elective office by means of a "write-in" campaign." (emphases added). SB 6, *supra* note 12, §1 Pt. 13(b).

[27] SB 6, *supra* note 12, §35 Pt. 8606 (emphases added).

[28] *Id.* §50 Pt. 13207(a)(2).

By refusing to count write-in votes after enabling voters to cast them, SB 6 will induce large numbers of voters to effectively throw away their votes.[29] Since SB 6 bans all lawfully cast write-in votes from being counted, it violates Article II, Section 2.5 of the California Constitution.

B. SB 6's Write-In Counting Ban Violates the First Amendment and the Free Speech Clause of the California Constitution

The United States Supreme Court has repeatedly admonished that the right to vote is a "fundamental right."[30] SB 6's ban on counting write-in votes flatly violates the First Amendment of the United States Constitution and the Free Speech Clause of the California Constitution; because it foists on voters an unlawful, content-based restriction on their right to core political speech. In *Turner v. District of Columbia Board of Elections*,[31] a federal judge quashed an attempt to prevent lawfully cast votes from being counted. There, the District of Columbia's elections board refused to count the votes cast in an election, because it believed that doing so would violate federal law. The Court emphatically disagreed: "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted."[32]

As the United States Supreme Court recently noted, "the expression of a political view implicates a First Amendment right."[33] *Turner* held that not counting lawfully cast votes automatically triggers strict scrutiny, because it burdens a number of protected rights. At the

---

[29] *See Griffin v. Burns*, 570 F.2d 1065, 1074 (1st Cir. 1978) (attached as Exhibit A) (state barred from changing vote-counting rules without giving fair and adequate notice to voters).

[30] *Marijuana Policy Project v. District of Columbia Bd. of Elections and Ethics*, 191 F.Supp.2d 196, 209 n.5 (D.D.C. 2002) (attached as Exhibit B)(*citing Kramer v. Union Free School Dist.*, 395 U.S. 621, 626 (1969) & *Reynolds v. Sims*, 377 U.S. 533, 555 (1964))(attached as Exhibits C and D, respectively).

[31] *Turner v. District of Columbia Bd. of Elections*, 77 F.Supp.2d 25 (D.D.C. 1999) (attached as Exhibit E).

[32] *Id.*, 77 F.Supp. 2d at 33 (emphasis in original) (*quoting United States v. Classic*, 303 U.S. 299, 315 (1941) (attached as Exhibit V); *accord*, *Gould v. Grubb*, 14 Cal.3d 661, 671 n.10, 536 P.2d 1337, 1343 (Cal. 1975) ("There is more to the right to vote than the right to mark a piece of paper and drop it in a box or a right to pull a lever in a voting booth. It also includes the right to have the vote counted at full value without dilution or discount.)(emphases added, citations and quotations omitted).

[33] *Doe v. Reed*, 561 U.S. ___, No. 09–559 (U.S. June 24, 2010)(emphases added)(attached as Exhibit F).

outset, the Court held that the very act of voting constitutes protected symbolic speech.[34] *Turner* then concluded that counting lawful votes and certifying the results constituted core political speech, because those actions comprised the "instrumentality used to bring about political and social change."[35] Furthermore, the *Turner* Court held that suppressing the counting of votes imposed a content-based restriction on speech, because "keeping a veil over the results" would "cut short public expression" about both issues and candidates.[36]

Finally, the Court concluded that refusing to count votes would impose a "severe" restriction on the vote: "To cast a lawful vote only to be told that the vote will not be counted or released is to rob the vote of any communicative meaning whatsoever."[37] After concluding that strict scrutiny should apply, the Court concluded that no compelling government interest could justify a ban on counting legally cast votes.

Turner's analysis applies here with equal vigor. As in *Turner*, California voters have an absolute constitutional right to have their votes counted in every election. Therefore, SB 6's write-in count ban automatically triggers strict scrutiny. Not to be deterred, Defendants may resort to a fanciful theory. That is, since the Legislature could lawfully ban voters from casting write-in votes,[38] it could somehow ban write-in votes from being counted. Citing Supreme Court precedent, the *Turner* Court dismissed such a defense: "Just because one end can be accomplished constitutionally does not suggest that any means possible to accomplish the desired end is constitutional."[39]

---

[34] *Turner*, *supra* note 31, 77 F.Supp.2d at 31.

[35] *Id.* at 32 (*citing McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995)(Exhibit G)(emphasis added).

[36] *Turner*, *supra* note 31, 77 F.Supp.2d at 33.

[37] *Id.* at 33 (emphases added).

[38] *See Burdick v. Takushi*, 504 U.S. 428 (1986)(no constitutional right to cast a vote for a write-in candidate) (attached as Exhibit H); *Edelstein v. San Francisco*, 29 Cal.4th 164, 56 P.3d 1029 (Cal. 1992) .

[39] *Turner*, *supra* note 31, 77 F.Supp.2d at 33-34 (emphasis added) (*citing Clinton v. City of New York*, 524 U.S. 417 (1998) (attached as Exhibit I)).

Because California law gives voters the right to cast votes for write-in candidates, all votes cast for eligible write-in candidates must be counted.[40] The Legislature could have banned write-in votes from being cast, but chose not to do so. Defendants cannot proffer any interest – "compelling" or otherwise – to disenfranchise voters by not counting their votes.[41] Consequently, SB 6 violates the First Amendment and the Free Speech Clause of the California Constitution.[42]

C. SB 6 Violates the Due Process Clause

Because it threatens to disenfranchise thousands of voters, SB 6 also violates the Due Process Clauses of the United States and California Constitutions (the "Due Process Clause").[43] Substantive due process is triggered when a state's voting system is "fundamentally unfair."[44] The Ninth Circuit and other Circuits have held that election laws and procedures are "unfair" if they disenfranchise or discriminate against a discrete group of voters.[45] As the Eighth Circuit recently reiterated, it violates substantive due process if a state "chang[es] voting rules without informing voters of new requirements for voting and then refus[es] to count their votes."[46]

Similarly, in *Griffin v. Burns*,[47] the Rhode Island Supreme Court had invalidated all absentee votes cast in an election. The First Circuit held that such a mass disenfranchisement violated the Due Process Clause, for the voters had been previously assured that all absentee ballots would be counted: "The state's action is said to amount in result, if not in design to a

---

[40] Elections Code §15340 (all voters have the right to cast write-in votes); CAL.CONST. Art. II §2.5 (all lawfully cast votes must be counted).

[41] Tellingly, none of the Legislature's analyses disclosed to the public that SB 6 would ban the counting of all write-in votes.

[42] "[T]he California liberty of speech clause is broader and more protective than the free speech clause of the First Amendment." *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal.4th 352, 366, 993 P.2d 223 (Cal. 2000) (citations omitted).

[43] The Due Process Clause of the California Constitution contains the same protections as that of the United States Constitution. *See Bonner v. City of Santa Ana*, 45 Cal.App.4th 1465, 1474 (Cal.App.Ct. 1996).

[44] *See, e.g.*, *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) (attached as Exhibit J); *Griffin* , *supra* note 29, 570 F.2d at 1067-68.

[45] *See, e.g.*, *Bennett*, *supra* note 44, 140 F.3d at 1226; *Griffin*, *supra* note 29, 570 F.2d at 1067-68; *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1971) (attached as Exhibit K).

[46] *Nolles v. State Cmte. for the Reorganization of School Dists.*, 524 F.3d 892, 899 (8th Cir. 2008) (attached as Exhibit L) (*citing Briscoe*, *supra* note 45, 435 F.2d at 1055).

[47] *Griffin*, *supra* note 29, 570 F.2d 1065.

fraud upon the absent voters, effectively stripping them of their vote[.]"[48] By inviting voters to cast write-in votes and then refusing to count them, SB 6 will disenfranchise thousands of California voters. Such a "fraud upon the voters" violates the Due Process Clause.

D. SB 6 Deprives Candidates of Their Political Preferences

Defendants may well agree with Plaintiffs on one key point: that SB 6 will ban candidates who identify with smaller parties from mentioning their chosen party on the ballot. For example, Plaintiff Martin will not be able to list his chosen party (Reform Party) under his name on the ballot. Instead, the ballot will misleadingly state that he has "No Party Preference."

Prop 14 purports to give every candidate the "choice to declare a political preference".[49] Under Prop 14, all candidates may state "their political preference, or lack of political preference" on the ballot, on the condition that they do so "in the manner provided by statute."[50] Yet where Prop 14 gives, its implementing statute (SB 6) takes away. Instead of allowing all candidates to state their "political preference", SB 6 bans a broad class of candidates from listing their party of choice on the ballot.

Under SB 6, the candidate must register to vote and identify a "political party" that he or she chooses to identify with.[51] Then comes the sleight of hand. The Elections Code – which SB 6 did not amend – defines "party" as "a political party or organization" that has qualified (i.e., state-recognized) status.[52] "It is bedrock law that if the law-maker gives us an express definition, we must take it as we find it[.]"[53] Because neither SB 6 nor Prop 14 amended[54] the definition of "party" in the Elections Code, candidates are only allowed to choose to identify with a state-

---

48 *Id.* at 1074 (emphases added).
49 Prop 14, *supra* note 1, at 4:37-39 (emphases added)
50 SB 6, *supra* note 12, §9 Pt. 2151(b)(2).
51 Elections Code §338.
52 *Id.*
53 *Delaney v. Superior Court*, 50 Cal.3d 785, 804 (Cal. 1990) (emphasis added) (*quoting Bird v. Dennison*, 7 Cal. 297, 307 (Cal. 1857).
54 "It is assumed that the Legislature has in mind existing laws when it passes a statute." *Bailey v. Superior Court*, 19 Cal.3d 970, 977 n.10, 568 P.2d 394 (Cal. 1977) (citations and internal quotations omitted).

recognized party. If they identify with a non-state-recognized party, "No Party Preference" will be entered under the candidate's name on the ballot.[55] The upshot: only candidates from state-recognized parties will be allowed to state their party of choice on the ballot.

E. SB 6 Violates the California Constitution's Equal Protection Clause

By banning candidates from stating their party choice on the ballot, SB 6 violates the Equal Protection Clause of the California Constitution. Because they are the "last thing the voter sees before he makes his choice,[56] "[b]allots … are hemmed in by the constitutional guarantees of equal protection and freedom of speech."[57] In the landmark case of *Stanson v. Mott*, the California Supreme Court laid down a core Equal Protection rule: the government may not favor incumbents, or "take sides" or otherwise "bestow an unfair advantage on one of several competing factions" in an election.[58]

Therefore, at a bare minimum, the wording and structure of a ballot cannot favor certain "political viewpoints" or a "particular partisan position".[59] What is more, the *Stanson* line of cases strongly implies that if a government does "take sides", it must provide "equal access" to "all competing factions."[60] Accordingly, California courts have struck down election rules that unlawfully favored incumbents or certain political viewpoints.[61] Likewise, courts from the Fifth, Seventh and Eighth Circuits have struck down ballots that favor major political parties.[62]

---

[55] SB 6, *supra* note 12, §11 Pt. 2154(b).

[56] *Cook v. Gralike*, 531 U.S. 510, 532 (2001) (Rehnquist, C.J., concurring) (attached as Exhibit M).

[57] *Huntington Beach City Council v. Superior Court*, 94 Cal.App.4th 1422, 1433 (Cal.App.Ct. 2002).

[58] *Stanson v. Mott*, 17 Cal.3d 206, 217, 551 P.2d 1, 130 Cal.Rptr. 697, 706 (Cal. 1976) (*citing Gould*, *supra* note 32, 14 Cal.3d 661, 536 P.2d 1337, 122 Cal.Rptr. 377.

[59] *See, e.g., Huntington Beach City Council*, *supra* note 57, 94 Cal.App.4th at 1433 (*quoting Stanson*, *supra* note 58, 17 Cal.3d at 219, 551 P.2d 1, 130 Cal. Rptr. 706 and *citing Citizens for Responsible Gov't v. City of Albany*, 56 Cal.App.4th 1199, 1228 (Cal.App.Ct. 1997).

[60] *Stanson*, *supra* note 58, 17 Cal.3d 206, 217, 551 P.2d 1, 130 Cal.Rptr. at 706; *Huntington Beach City Council*, *supra* note 56, 94 Cal.App.4th at1433; *Citizens for Responsible Gov't*, *supra* note 59, 56 Cal.App.4th at 1228.

[61] *Gould*, *supra* note 32, 14 Cal.3d 661, 536 P.2d 1337, 122 Cal.Rptr. 377 (incumbents cannot be listed first); *Ferrara v. Belanger*, 18 Cal.3d 253, 555 P.2d 1089 (Cal. 1976) (government cannot print its argument on ballot measure while refusing to publish the opposing argument); *Rees v. Layton*, 6 Cal.App.3d 815 (Cal.App.Ct. 1970) (government cannot ban non-incumbents from stating their profession on the ballot, while allowing incumbents to be

SB 6 brazenly "takes sides" in elections in favor of government-recognized parties. As shown earlier, SB 6 favors candidates who identify with a favored political viewpoint: that of a state-recognized party. Tellingly, those candidates need not even have been endorsed or nominated by their party of "choice".[63] In stark contrast, SB 6 discriminates against candidates who choose to identify with an unfavored political viewpoint: that of a non-state-recognized party. Those candidates will be banned from listing their party of choice on the ballot.

Nevertheless, Defendants might insist that the government has the power to censor what certain candidates can state on the ballot. Yet in *Rees v. Layton*,[64] the Court of Appeal struck down a prohibition that closely resembles that of SB 6. An election rule had allowed incumbents to be listed on the ballot as the holder of the office, while banning their challengers from listing their occupation on the ballot. The government claimed that its practice was necessary to prevent non-incumbents from "misleading the electorate." Dismissing that argument, the Court held that such government intervention was unlawful, for candidates could adequately police themselves.[65]

Rees's reasoning directly applies to this case: the government cannot "take sides" by favoring one class of candidates over another. Under SB 6, candidates like Plaintiffs Mackler or Martin who prefer the viewpoints of minority parties will face a Hobson's choice: (1) appear on the ballot without a party label, or (2) adopt the party label of a state-recognized party. Worse yet, voters may wrongly assume that those candidates choose not to identify with any political

---

listed as the holder of the office).

[62] "[O]nce a candidate is legally entitled to appear on the ballot there is substantial support in the lower courts to invalidate laws that favor incumbents, or nominees of preferred parties, by allocating them preferred places on the ballot." Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001 Sup.Ct.Rev. 299, 336 n.112 (emphases added)(attached as Exhibit N), *citing, inter alia, Gould*, *supra* note 32, 14 Cal.3d 661, 536 P.2d 1337, *McLain v. Meier*, 637 F.2d 1159, 1166-67 (8th Cir. 1980) (attached as Exhibit O)(a ballot may not "serve the convenience of those voters who support incumbents and major party candidates at the expense of other voters)(emphases added), *cited by Graves v. McElderry*, 946 F.Supp. 1569, 1573, 1579-82 (W.D. Okla. 1996)(attached as Exhibit P) (striking down state law that gave top ballot position to Democratic candidates); *Sangmeister v. Woodard*, 562 F.2d 460, 465-67 (7th Cir. 1977) (attached as Exhibit Q) (striking down election officials' practice of giving their own political party top ballot position).

[63] Complaint ¶46.

[64] *Rees*, *supra* note 60, 6 Cal.App.3d 815.

[65] *Id*.

party. By discriminating against and denying "equal access" to candidates of every political viewpoint, SB 6 violates the Equal Protection Clause of the California Constitution.

F. SB 6 Violates the United States Constitution's Election Clause

Equally troubling, SB 6's infirmities also violate the Elections Clause of the United States Constitution.[66] While the Election Clause grants states "broad power" to administer federal elections,[67] states may not invoke it as a pretext to abridge "fundamental rights".[68] The Supreme Court has warned that the Elections Clause imposes at least three limitations on the states:

> "[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.[69]

SB 6 overreaches a state's authority to administer federal elections, because it enables the state government to (1) favor one class of candidates over another, (2) dictate electoral outcomes, and (3) evade important constitutional restraints.

In an analogous case (*Cook v. Gralike*),[70] the United State Supreme Court struck down a state election rule that targeted a class of candidates: federal incumbents. There, if a Senator or Congressmember did not support term limits, the state law required the following candidate label to be printed beside their name: "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS." The high court held that the state law violated the Elections Clause for at least two reasons. First, the state law was "plainly designed to favor candidates who are willing to support"

---

[66] The Elections Clause states: "The Times, Places, and Manner of Elections for Senators and Representatives, shall be prescribed by each State by the Legislature thereof." U.S. CONST. Art. I, §4, cl. 1

[67] *Cook v. Gralike*, *supra* note 56, 531 U.S. at 523 (citations omitted).

[68] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995) (attached as Exhibit R) (*quoting Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (attached as Exhibit S).

[69] *Cook v. Gralike*, *supra* note 56, 531 U.S. at 523 (emphases added) (*quoting U.S. Term Limits*, *supra* note 68, 514 U.S. at 833-34).

[70] *Cook v. Gralike*, *supra* note 56, 531 U.S. at 514.

term limits and "to disfavor those who either oppose term limits entirely or would prefer a different proposal":[71]

> [I]t seems clear that the adverse labels handicap candidates "at the most crucial state in the election process – the instant before the vote is cast." At the same time, "by directing the citizen's attention to the single consideration of the candidates' fidelity to term limits, the labels imply that the issue "is an important – perhaps paramount – consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot" against candidates branded as unfaithful.[72]

The high court then concluded that the state law unlawfully tried to "dictate electoral outcomes," because "the labels surely place their targets at a political disadvantage to unmarked candidates for congressional office."[73]

SB 6 must be struck down for the same reasons stated in *Gralike*. As has been discussed, SB 6 explicitly invalidates all votes cast for write-in candidates. What is more, SB 6 grants a party label to candidates who identify with the viewpoint of a state-recognized party, while refusing to do so for all other candidates. Thus, SB 6 was "plainly designed to favor" candidates (1) whose names appear on the ballot and (2) who identify with the viewpoint of a state-recognized party; and it was designed to "disfavor" and "handicap" candidates who (a) receive write-in votes or (b) identify with the political viewpoint of smaller, non-state-recognized parties.[74] Because SB 6 places its political targets at a disadvantage, it impermissibly attempts to "dictate electoral outcomes."[75]

---

[71] *Id.* at 524 (*citing Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) (attached as Exhibit T).

[72] *Cook v. Gralike*, *supra* note 56, 531 U.S. at 524 (*quoting Anderson v. Martin*, 375 U.S. 399, 402 (1964) (emphases added) (attached as Exhibit U)).

[73] *Cook v. Gralike*, *supra* note 56, 531 U.S. at 525.

[74] *Id.* at 523-25.

[75] *Id.* at 525.

What is more, SB violates the Elections Clause because it seeks to "evade important constitutional restraints". In *U.S. Term Limits, Inc. v. Thornton*, the Supreme Court has held that such "evasion" occurs when if a state tries to foist constitutionally infirm rules onto federal elections.[76] By disenfranchising voters and silencing "unfavored" candidates, SB 6 baldly seeks to harm Plaintiffs' fundamental constitutional rights. Accordingly, the Elections Clause compels the Court to strike down SB 6.

G. SB 6's Unconstitutional Provisions Are Not Severable

The Court must declare the entirety of SB 6 unconstitutional, because none of its invalid parts are severable. To salvage a statute, its invalid part must, inter alia, be "volitionally" separable; that is, it must be "clear that the Legislature would have enacted the measure without" the offending provision.[77] Subsection 5(a) of Prop 14 called for a "statute" to implement the "manner" in which candidates could state their party preference on the ballot.[78] In response, the Legislature enacted SB 6's unlawful provision on how candidates could state their party preference.

When the Legislature enacts implementing legislation, it must be assumed that it actually intended to implement the constitutional provision in question.[79] Thus, it is "far from clear" – indeed, highly unlikely – that the Legislature would have passed SB 6 without its party-preference provision.[80] In this light, SB 6's unlawful party-preference provision is not volitionally severable. Accordingly, SB 6 must fail in its entirety.

H. Prop 14 Is Inoperative As A Matter of Law

---

[76] *See U.S. Term Limits, Inc.*, *supra* note 68, 514 U.S. at 829-30.

[77] *County of Sonoma v. Superior Court of Sonoma County*, 173 Cal.App.4th 322, 352 (Cal.App.Ct. 2009) (citation omitted, emphasis added).

[78] Complaint ¶32.

[79] *See, e.g., People v. Broussard*, 5 Cal.4th 1067, 856 P.2d 1134, 1137 (Cal. 1993).

[80] *County of Sonoma*, *supra* note 77, 173 Cal.App.4th at 352.

Because it lacks a lawful statute to implement it, Prop 14 is inoperative as a matter of law. As a general rule, a constitutional provision is not self-executing – and cannot become operative – if it needs a law to implement it.[81] In its Statement of Purpose, Prop 14 explicitly states that it needs implementing legislation: "This act, along with legislation already enacted by the Legislature to implement this act, are intended to implement an open primary system in California[.]"[82] Since its implementing statute (SB 6) is unenforceable, Prop 14 is inoperative as a matter of law[83] – and so it will remain until the legislature enacts a lawful statute to give it life.[84]

I. Plaintiffs Are Entitled to a Preliminary Injunction

Unless this Court enjoins Defendants from implementing SB 6, Plaintiffs and similarly situated voters and candidates face an imminent threat of irreparable harm. Plaintiffs have satisfied both elements needed to obtain a preliminary injunction: (1) they are "likely to suffer greater injury from a denial of the injunction than the defendants are likely to suffer from its grant," and (2) there is a "reasonable probability" that Plaintiffs will prevail on the merits.[85] As this Motion proves, there is more than a "reasonable probability" that Plaintiffs will prevail on the merits.

Without a preliminary injunction, Plaintiffs' fundamental rights to vote and run for office will be irreparably harmed in the next election they vote in – which could be called as early as January 1, 2011. This is no theoretical matter. For the past two decades, there has been at least one special election every year, except for 2002-04.[86] Just two days ago, the Governor called a special election to replace a State Senator who had died of cancer.[87] If that election had been

---

81 *See, e.g., People v. Vega-Hernandez*, 179 Cal.App.3d 1084, 1092 (Cal.App.Ct. 1986).

82 Complaint ¶39; Prop 14, Complaint Exh. 2, at 3:4-6.

83 *See, e.g., Borchers Bros. v. Buckeye Incubator Co.*, 59 Cal.2d 234, 238, 379 P.2d 1 (Cal. 1963).

84 *See, e.g., In re Redevelopment Plan for Bunker Hill*, 61 Cal.2d 21, 389 P.2d 538 (Cal. 1964); *Denninger v. Recorder's Court*, 145 Cal. 629, 635, 79 P.360 (Cal. 1904).

85 *Huong Que, Inc. v. Luu*, 150 Cal.App.4th 400, 58 Cal.Rptr 3d 527, 533 (Cal.App.Ct. 2007).

86 Complaint ¶33 n.19.

87 On July 26, 2010, the Governor called a special election to replace former State Senator Dave Cox. *Id.*

called after December 31, 2010, SB 6 would have (1) would have nullified all votes cast for write-in candidates, and (2) would have censored candidates like Plaintiffs Mackler and Martin from stating their party preference on the ballot.

Significantly, Defendants will not suffer any hardship if this Motion is granted. If the Court issues a preliminary injunction, Defendants will not suffer any inconvenience: they will simply continue administering election pursuant to existing law. What is more, by receiving guidance from this Court, Defendants will gain certainty on how they may fulfill their election-related duties in accordance with the United States and California Constitutions. Thus, Defendants will suffer no injury if this Motion is granted. But if this Motion is denied, Plaintiffs and similarly situated voters and candidates face the imminent threat of irreparable harm. Accordingly, the Court should swiftly issue a preliminary injunction against Defendants.

IV. Conclusion

Last month, California voters were duped. They had been told that Prop 14 would strengthen their ability to vote for a candidate of their choice. Instead, they unwittingly brought about the opposite result – because they had not been told about SB 6, a law that has literally never seen the light of day. SB 6 does violence to the most sacred right of a democracy: the right to a "fair and honest election"[88] in which every vote is counted. By striking down SB 6, this Court will not only vindicate the rights of voters and candidates, but give our lawmakers a rare opportunity to start over: to consult their constituents, engage in open discussion and debate, and enact laws that honor the best traditions of our democracy.

[88] *Gralike*, *supra* note 56, 51 U.S. at 524 (citation and internal quotation omitted).

DATED: July 28, 2010

Respectfully submitted,

By: _____
GAUTAM DUTTA, ESQ.

Attorney for Plaintiffs

MONA FIELD, RICHARD WINGER, STEPHEN A. CHESSIN, JENNIFER WOZNIAK, JEFF MACKLER, and RODNEY MARTIN