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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

INDEPENDENT PARTY, and WILLIAM LUSSENHEIDE) Case No. 2:16-cv-00316-WBS-CKD
) Filed: February 16, 2016
Plaintiffs,) Assigned to: Hon. William B. Shubb
) Trial Date: None
v.)
ALEJANDRO "ALEX" PADILLA, in his official capacity as Secretary of State of California) PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
Defendant.)
) DATE: May 2, 2016
) TIME: 1:30 p.m.
) COURTROOM: 5
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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Defendant Secretary of State's ("Defendant's") Opposition to Plaintiffs' Motion for Preliminary Injunction (the "Opposition") attempts to discount the severe burden placed on the Plaintiffs' First and Fourteenth Amendment rights by the Defendant's wrongful application of California Election Code Section 5001, exaggerates any potential confusion that could come from allowing the Independent Party (the "Party") to register as a political body with the name of their choosing, and mischaracterizes the Party's motivations for choosing the name "Independent Party."

1 First, the Plaintiffs have a high likelihood of success on the merits because under the balancing
2 test established in *Anderson*, the Defendant's interest in avoiding electoral confusion and ensuring
3 efficiency of the ballots does not outweigh the severe burden placed on the Plaintiffs' First and
4 Fourteenth Amendment rights by the outright denial of their ability to associate and register as a
5 political body under the name of their choosing.

6 Second, the Plaintiffs have a high likelihood of success on the merits because the Defendant's
7 actions not only severely burden the Party's First and Fourteenth Amendment rights to association for
8 the advancement of its political beliefs and to equal protection under the law, but also those of its
9 supporters in California, such as William Lussenheide, and those across the nation. A presidential
10 election campaign is both a method of obtaining political office and a means of disseminating ideas. By
11 denying the Party the ability to associate under its name of choice, the Defendant is severely limiting
12 both it and its supporters' ability to express their political preferences.

13 Lastly, the balance of hardships tips strongly in the Plaintiffs' favor because they will
14 undoubtedly suffer irreparable injury should injunctive relief not be granted, and the Defendant has
15 failed to show any real hardship that would fall on the State by allowing the Plaintiffs to associate as an
16 official political body under the name of their choosing. In fact, all of the potential problems Defendant
17 alleges will result from the Party being placed on the ballot are easily remedied by means that do not
18 involve the violation of the Plaintiffs' constitutional rights.

19 LEGAL STANDARD

20 A preliminary injunction should be granted if Plaintiffs show "(1) a strong likelihood of success
21 on the merits, (2) the possibility of irreparable injury to plaintiffs if preliminary relief is not granted, (3)
22 a balance of hardships favoring the plaintiffs, and (4) advancement of the public interest (in certain
23 cases)." *Rodde v. Bonta*, 375 F.3d 988, 994 (9th. Cir. 2004). Alternately, the Court should grant
24 injunctive relief wherever Plaintiffs demonstrate "a combination of probable success on the merits and
25 the possibility of irreparable injury" or "that serious questions are raised and the balance of hardships
26 tips sharply in their favor." *Id.*

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I. PLAINTIFFS HAVE A HIGH LIKELIHOOD OF SUCCESS ON THE MERITS, AS THE GOVERNMENTAL INTERESTS CLAIMED BY THE STATE DO NOT JUSTIFY THE INJURIES TO PLAINTIFFS' FIRST AND FOURTEENTH AMENDMENT RIGHTS.

The constitutional right of United States citizens to create and develop new political parties is derived from the First and Fourteenth Amendments and advances the constitutional interests of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences. *Norman v. Reed*, 502 U.S. 279, 288 (1992) (quoting *Anderson v. Celebrezze* 460 U.S. 780, (1983)).

In *Anderson*, the United States Supreme Court set forth a balancing test that weighs “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments” against “the precise interests put forth by the State as justifications for the burden imposed,” and the court evaluates “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Anderson*, 460 U.S. at 789. The balancing standard in *Anderson* requires the Court to review the interests the government cites as justification for limiting access to the ballot, and to assess whether the interests cited are actual potential problems. *Id.* The *Anderson* test also requires courts to review the burden placed on candidates and their voters. “Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.” *Id.* at 789.

In the present case, the *Anderson* balancing test weighs in the Plaintiffs' favor because the Defendant's refusal to allow the Plaintiffs to associate as a political body under the name of their choosing constitutes a severe injury to their First and Fourteenth Amendment rights, and the Defendant has failed to demonstrate a compelling governmental interest to justify said injury.

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1 **II. PLAINTIFFS’ FIRST AND FOURTEENTH AMENDMENT RIGHTS ARE**
2 **SEVERELY BURDENED BY DEFENDANT’S REFUSAL TO REGISTER THE**
3 **PARTY AS A QUALIFIED POLITICAL BODY UNDER THE NAME OF ITS**
4 **CHOOSING.**

5 The regulation of ballot access involves fundamental First Amendment rights. *See Anderson*,
6 460 U.S. at 786, fn. 7. Restrictions by state officials are particularly suspect “in the context of a
7 Presidential election” where “state imposed restrictions implicate a uniquely important national
8 interest.” *Anderson* at 781. A regulation imposes a severe speech restriction if it “significantly impair[s]
9 access to the ballot, stifle[s] core political speech, or dictate[s] electoral outcomes.” *Rubin v. City of*
10 *Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002). As the Supreme Court has clearly stated, “[t]he
11 loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes
12 irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (citing *New York Times Co. v. United*
13 *States*, 403 U.S. 713 (1971)).

14 **A. The Party’s Rights To Freedom Of Speech and Freedom Of Association, And Plaintiff**
15 **William Lussenheide’s Right To Vote, Are Severely Burdened As Defendant’s Refusal**
16 **To Register The Party As A Qualified Political Body Under The Name Of Its Choosing**
17 **Significantly Limits The Party’s Speech And Impairs Its Access To The Ballot.**

18 Enshrined in the First and Fourteenth Amendments is the right of one to associate with like-
19 minded individuals for the advancement of their shared beliefs. In his Opposition, the Defendant
20 attempts to sideline these important constitutional concepts by claiming that the Plaintiffs have “no
21 particular political ideology.” (*See* Opposition, 8:18-20.) Contrary to the Defendant’s baseless and
22 nonsensical assertion, the Plaintiffs are attempting to associate as an official political body under the
23 name “Independent Party” precisely because they believe this name most accurately represents their
24 closely held political beliefs. By refusing to allow the Party to register as a qualified political body
25 under the name of its choosing, Defendant is acting in direct contravention of the Plaintiffs’
26 constitutionally protected rights. “Freedom of association would be an empty guarantee if associations
27 could not limit control over their decisions to share the interests and persuasions that underlie the
28 association’s being.” *California Democratic Party v. Jones*, 530 U.S. 567 (2000). Restrictions on

1 access to the ballot burden two distinct and fundamental rights: “The right of individuals to associate
2 for the advancement of political beliefs” and “the right of qualified voters, regardless of their political
3 persuasion, to cast their votes effectively.” *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) Access
4 restrictions also implicate the right to vote because absent recourse to referendums, “voters can assert
5 their preferences only through candidates or parties or both.” *Lubin v. Panish*, 415 U.S. 709, 716
6 (1974).

7 “There can no longer be any doubt that freedom to associate with others for the common
8 advancement of political beliefs and ideas is a form of orderly group activity protected by the First and
9 Fourteenth Amendments. The right to associate with the political party of one’s choice is an integral
10 part of this basic constitutional freedom.” *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). “Any
11 interference with the freedom of a party is simultaneously an interference with the freedom of its
12 adherents.” *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981).

13 By limiting the choices available to voters, the State impairs the voters' ability to express their
14 political preferences. As the Supreme Court previously held in another case concerning a state law
15 preventing a third party’s access to the ballot, “an election campaign is a means of disseminating ideas
16 as well as attaining political office.” *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173,
17 186 (1979). When such vital individual rights are at stake, a state must establish that its classification is
18 necessary to serve a compelling interest. *See Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008). Thus,
19 “even when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict
20 constitutionally protected liberty.” *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973).

21 Here, the Defendant’s wrongful application of California Elections Code 5001 and denial of the
22 Party’s application for political body status under the name of its choosing for the purposes of placing
23 its name on the ballot for the upcoming presidential election violates not only the Party’s First
24 Amendment right to associate for the advancement of its closely held political beliefs, but also denies
25 its supporters, such as Mr. Lussenheide, their right to cast their supporting votes effectively in the
26 upcoming Presidential election.

27 Furthermore, Defendant attempts to analogize the facts of *Chamness v. Bowen* to the facts of
28 this case to support his proposition that the Plaintiffs’ burden was held by the Ninth Circuit to be

1 “slight” and that the prohibition against a primary election candidate designating himself as
2 “Independent” was held to be viewpoint neutral. Opposition, 8:24-9:7. However, *Chamness* involved a
3 completely different factual situation than that present in the instant matter. In *Chamness*, a political
4 candidate challenged the constitutionality of California Senate Bill 6, arguing that the State violated his
5 First Amendment rights by prohibiting him from using the ballot label “Independent” and forcing him
6 to choose between a preferred party designation, “No Party Preference,” or a blank space on the ballot.
7 *Chamness v. Bowen*, 722 F.3d 1110, 1116 (9th Cir. 2013). The Court found that the candidate who
8 sought to run for office tried to use the ballot to promote a political message and that he failed to show
9 that the statute he challenged severely burdened his First Amendment Rights. *Id.* at 1117.

10 Here, Plaintiffs are not attempting to use the ballot as a means to promote a political message;
11 they merely seek to have the Party recognized as a qualified political body under the name of their
12 choosing. This, in turn, allows for counties to tally the Party’s registered voters to determine whether it
13 has enough registered voters to become a qualified political party. As noted in *Chamness*, that case was
14 not a discussion of qualified political parties. *Id.* at fn 5. Without qualified political body status,
15 counties will not tally the Party’s registered voters, which in turn, will not even afford the Party a
16 chance to see if it has the requisite support to become a qualified political party. Therefore, due to
17 Defendant’s decision to deny the Independent Party qualified political body status under the name of its
18 choosing, Plaintiffs will be forced to falsely state on the ballot that they have no party preference, thus
19 further violating their First Amendment rights.

20 **B. Plaintiffs’ Equal Protection Rights Are Being Violated As Defendant’s Denial Of The**
21 **Use Of The Name “Independent Party” Amounts To Unlawful Discrimination**
22 **Protected By The Constitution.**

23 The Equal Protection Clause of the Fourteenth Amendments reads in relevant part: “No State
24 shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United
25 States; nor shall any State deprive any person of life, liberty, or property, without due process of law;
26 nor deny any person within its jurisdiction equal protection of the laws.”

27 Equal protection protects against the unlawful administration by state officers of a state statute
28 that is fair on its face, resulting in unequal application to those who are entitled to be treated alike. To

1 be a “class of one,” a plaintiff alleging an equal protection violation must establish: (1) he was
2 intentionally treated differently from others similarly situated; and (2) there was no rational basis for
3 any such difference. When insular minorities are the targets of exclusion from political participation,
4 this decreases the stability and legitimacy of our political system. When unnecessary restrictions on the
5 field of candidates thus limit the voter's freedom of choice, the effectiveness of a right to vote is
6 substantially impaired.

7 The Supreme Court noted that a “burden that falls unequally on new or small political parties or
8 on independent candidates impinges, by its very nature, on associational choices protected by the First
9 Amendment. It discriminates against those candidates and – of particular importance – against those
10 voters whose political preferences lie outside the existing political parties.” *Anderson*, 460 U.S. at 794-
11 795. Such restrictions are particularly suspect “in the context of a Presidential election” where “state
12 imposed restrictions implicate a uniquely important national interest.” *Id.* at 781. The voters outside the
13 state’s borders have a heightened interest, impacting their rights to vote and expressive association,
14 while the state enjoys a “less important interest” than would be the case in elections limited to within its
15 borders. *Id.* Any such restriction “places a significant state-imposed restriction on a nationwide
16 electoral process.” *Id.* at 795. The combination of an independent candidate – unlikely protected and
17 most likely discriminated against by major party provincialism in state politics – and a national election
18 for the country’s only national office renders the state interest “minimal” and the voter’s interest in
19 freedom of choice and association “unquestionably” more important. *Id.* at 806.

20 In the present case, the decades of precedent in both California and nationwide, along with the
21 decision of the previous California Secretary of State regarding the Americans Elect Party, show
22 conclusively that the Independent Party was treated differently from others similarly situated and that
23 there was no rational basis for the difference. *See Craig v. Brown*, 114 Cal. 480 (1896) (finding that the
24 National Democratic Party may be on the ballot while the Democratic Party was on the ballot); *Riddell*
25 *v. National Democratic Party*, 508 F.2d 770 (5th Cir. 1975); *Scofield v. Kiffmeyer*, 620 N.W.2d 24
26 (2000); *Freedom Socialist Party v. Bradbury*, 48 P.3d 199 (2002); Declaration of Richard Winger, Dkt.
27 No. 11, at ¶ 15. Denying the Independent Party qualified political body status under the name of its
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1 choosing is a direct example of such discrimination against minor political parties in a way that
2 diminishes its ability to effectively compete in the political process.

3 **III. THE BALANCE OF HARDSHIPS TIPS STRONGLY IN THE PLAINTIFFS’**
4 **FAVOR BECAUSE THEY WILL SUFFER IRREPARABLE INJURY WITHOUT**
5 **INJUNCTIVE RELIEF AND THE DEFENDANT HAS FAILED TO**
6 **DEMONSTRATE THAT ANY HARM WOULD FLOW TO THE STATE AS A**
7 **RESULT OF INJUNCTIVE RELIEF**

8 **A. Plaintiffs Will Suffer Irreparable Injury If Not Granted Injunctive Relief.**

9 The third prong of the test to determine whether a preliminary injunction should be granted is
10 easily satisfied in this case. The challenged decision of Defendant, if allowed to remain in effect during
11 this period, will cause significant harm to the Plaintiffs’ First Amendment rights that cannot be
12 adequately remedied afterwards, and the government has failed to demonstrate any real harm that could
13 come to the State as a result of the Plaintiffs being granted injunctive relief. *Anderson* at 787
14 (recognizing harm to voters’ First Amendment rights of association when they are unable to vote for
15 the candidates they support).

16 Contrary to the Defendant’s erroneous assertion, the Independent Party is attempting to qualify
17 as an official political body, under the name of its choosing, with all of the rights and privileges that
18 come with that designation. The ability to place its candidates on the ballot in the upcoming
19 presidential election with the party label “Independent” is but one of the benefits of official party
20 recognition. Other benefits include greater recognition amongst voters, increased ability to recruit
21 volunteers, and an enhanced ability to raise funds. If the Independent Party does not obtain political
22 body status in time for the May 24, 2016 tally deadline, it will effectively be handicapped because it
23 would have no way of knowing how many current voter registrations it has, and how many more it
24 would need to obtain, if any, by the registration deadline of July 8, 2016, to qualify as a political party
25 to get on the ballot for the presidential election. Declaration of Richard Winger, Dkt. No. 6, at ¶ 3, 4.
26 Likewise, Plaintiff William Lussenheide, and any other supporter of the Independent Party, would
27 effectively be precluded from supporting the Independent Party during the presidential election if the
28 Independent Party is not allowed to even determine how many registered voters it has for the purpose

1 of qualifying for the presidential election. *Id* at ¶ 4. These harms to Plaintiffs constitute irreparable
2 harm that can only be remedied by the grant of a preliminary injunction.

3 **B. The Defendant Has Failed To Demonstrate That Any Real Harm Would Flow To The**
4 **State As A Result Of Plaintiffs’ Requested Relief.**

5 The Defendant has failed to demonstrate that any real harm would flow to the State as a result
6 of the Plaintiffs requested injunctive relief. In lieu of a showing of harm, the Defendant offers two
7 hypothetical situations wherein allowing the Party to use the name “Independent Party” could create
8 confusion at the polling place. In his first hypothetical, the Defendant asserts that allowing a political
9 party named “Independent Party” to be on the ballot would cause voters to confuse the party with the
10 currently used ballot label “independent” for presidential candidates nominated by petition. Yet despite
11 this assertion, there is no law to date preventing a party that uses the word “independent” in its name
12 from registering as an official political body. Similarly, Defendant has offered no evidence that this
13 problem has already occurred in relation to the currently registered “American Independent Party.” In
14 reality, the Defendant could easily remedy this potential issue by simply changing the label designating
15 presidential candidates nominated by petition to read “independent candidate.” Declaration of Richard
16 Winger, Dkt. No. 11, at ¶ 17. Alternatively, the State is free to change the label designating presidential
17 candidates nominated by petition from “independent” to one of the numerous labels used by other
18 states such as, “no party”, “non-partisan”, “by petition”, or “unaffiliated.” “Independent” as a label for
19 presidential candidates nominated by petition is not even an accurate label to begin with, as many of
20 these candidates are actually nominees of various unqualified parties, and therefore would prefer the
21 label “by petition” as opposed to “independent” and the various connotations that accompany it. *Id*.

22 Likewise, Defendant’s claim that the name “Independent Party” is too similar to that of the
23 already existing “American Independent Party” as to run afoul of California Elections Code Section
24 5001 is unsupported by election history in both California and nationwide. In fact, at least 44 states,
25 including California, have in the past had two parties on the ballot for the same election, when both of
26 those parties shared a common word in their names as shown on the ballot. *Id* at ¶ 15. For example, the
27 American Independent Party has been on the ballot in California since January 1968, yet the following
28 political bodies have been officially recognized by the Secretary of State in the time since:

1 Constitutional American (*see* Report of Registration, January 1978); American National Socialist
2 (January 1980); American Nationalist (January 1982); American Christian (October 1995); Real
3 American (October 1995); American Eagle (September 2007); American Centrist (January 2010);
4 American Resurrection (January 2010); American Third Position (January 2010 and January 2012);
5 American Concerned (January 2012); and Independent California (currently). *Id* at ¶ 16. Clearly there
6 was no significant confusion caused by any of the aforementioned parties being officially recognized,
7 despite their shared use of the words “American” and “independent.”

8 Further, the Defendant claims that if the Party were allowed to use its name of choice, then a
9 voter seeing the word “Independent” next to a candidate’s name could be misled into believing the
10 candidate rejects all political parties, when in fact the candidate is indicating a preference for the
11 “Independent Party.” Opposition at p. 14. In reality, the Defendant’s actions in limiting the use of the
12 word “Independent” in the names of registered political parties has already caused massive voter
13 confusion. A recent LA Times investigation found that 73% of polled “supporters” of the American
14 Independent Party, a conservative right-wing party, were actually independent voters who wished to
15 remain unaffiliated, but were led to erroneously check the box for American Independent Party on their
16 voter registration forms because the State provided no option for independent voters, and thus these
17 voters were falsely led to believe they were registered as “independent.” As a result, these voters who
18 erroneously registered with the American Independent Party will be barred from voting for the
19 Democratic or Republican candidates during the presidential primaries if they do not realize and change
20 their voter registration in time. Were the Defendant to allow more parties who use the word
21 “independent” in their names to appear on the ballot, voters would be more inclined to realize they
22 were selecting from multiple different political parties and actually research to discover that the
23 American Independent Party is far from the connotation of “independent” in the political context, as
24 opposed to erroneously selecting the first and only use of the word “independent” on the ballot.

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1 **CONCLUSION**

2 For the foregoing reasons, Plaintiffs respectfully request this Court to grant their Motion for
3 Preliminary Injunction.

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5 DATED: April 25, 2016

Respectfully submitted,

6 BARNES LAW

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10 /s/ Robert E. Barnes
11 Robert E. Barnes, Esq.
12 Attorney for Plaintiffs
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, ROBERT BARNES, am a citizen of the United States and am at least 18 years of age. My business address is 601 South Figueroa Street, Suite 4050, Los Angeles, California 90017.

I am not a party to the above titled action. I have caused service of this Reply on the following parties by electronically filing the foregoing using the Court's CM/ECF system:

Peter H. Chang
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I declare under penalty of perjury that the foregoing is true and correct.

DATED: April 25, 2016

Respectfully submitted,
BARNES LAW

/s/ Robert E. Barnes
Robert E. Barnes, Esq.
Attorney for Plaintiff