**No. 16-55758**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

EMIDIO SOLTYSIK, *Plaintiff-Appellant*,

v.

ALEX PADILLA AND DEAN LOGAN, *Defendants-Appellees*,

and

CALIFORNIANS TO DEFEND THE OPEN PRIMARY, *Intervenor-Defendant-Appellee.*

Appeal from the United States District Court
for the Central District of California
Case No. 2:15-cv-07916-AB-GJS
The Honorable André Birotte, Jr.

# OPENING BRIEF OF PLAINTIFF-APPELLANT

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## JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction over this dispute under 28 U.S.C. § 1331, as all causes of action were brought under the U.S. Constitution and federal statute 42 U.S.C. § 1983.

On April 22, 2016, the district court issued an order granting Defendants' motion to dismiss without leave to amend (the "Order") (ER3-17). That Order is appealable on the basis of finality under 28 U.S.C. § 1291. On May 20, 2016, Soltysik timely filed a notice of appeal. (ER1-2); Fed. R. App. P. 4(a)(1).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the district court apply the wrong legal standard to Plaintiff's cause of action for violation of his rights to equal protection and freedom of association? In particular:

A. Did the district court commit reversible error by deciding only that California Elections Code §§ 8002.5(a) and 13105(a) (the "Statutes") did not impose a "severe" burden on Plaintiff, but failing to determine the actual degree of burden?

B. Did the district court commit reversible error when it accepted the State's post hoc justifications for the Statutes, even though those justifications may not have actually motivated the Statutes?

II. Did the district court improperly dismiss Plaintiff's cause of action for violation of his rights to equal protection and freedom of association? In particular:

A. Did the district court err in concluding that Plaintiff could not prove that the Statutes impose more than a slight burden, even though the degree of constitutional burden is an issue of fact?

B. Did the district court err in deciding that the State's justifications were sufficient as a matter of law?

III. Did the district court err by dismissing Plaintiff's cause of action for violation of the right to be free from compelled speech, where it held as a matter of

law that a candidate's party preference on the ballot is government speech?

IV. Did the district court err by dismissing Plaintiff's cause of action for violation of his right to be free from viewpoint discrimination? In particular:

A. Did the district court err by holding that public forum analysis does not apply to restrictions on speech on a ballot?

B. Did the district court err by holding that the Statutes did not discriminate on the basis of viewpoint?

## PERTINENT STATUTORY PROVISIONS AND RULES

See addendum.

## STATEMENT OF THE CASE

Proposition 14 radically changed California's electoral primary system for certain state and federal offices known as "voter-nominated offices." (ER76 ¶ 1.) Before Proposition 14, political parties nominated their candidates for the general election through primary elections. (ER80 ¶ 17.) In these primaries, only party members or independents (depending on party rules) could vote on the party's nominee. (*Id.*)

Proposition 14 abolished that system, replacing it with a "nonpartisan blanket primary," also known as a "top two" primary. (*Id.* ¶ 21.) Under the top two primary system, political parties no longer nominate candidates for the general election. (ER76 ¶ 1.) Instead, all candidates for voter-nominated offices appear on the same primary ballot. Any voter, regardless of the voter's party affiliation, can vote for any candidate. (*Id.*) The two candidates with the most votes advance to the general election. (*Id.*)

Although political parties no longer nominate candidates, California still allows *some* candidates to communicate their political party *preference* on the primary ballot "for the information of the voters." (*Id.* ¶ 2; ER81 ¶ 25; Cal. Elec. Code § 8002.5(d).) Candidates who prefer a "qualified" political party can state on the ballot "Party Preference: ____" and fill the blank with their political party preference. (ER82 ¶ 30.) Political parties have no control over which candidate(s)

claim to prefer or associate with them and cannot prevent a candidate from claiming a preference. (ER76 ¶ 1.) For candidates who (i) prefer a non-qualified political party, (ii) do not prefer a political party, or (iii) choose not to disclose a political party preference, the ballot will read "Party Preference: None." (ER82 ¶ 30.) Thus, candidates who would otherwise choose to state a preference for a non-qualified political party are barred from stating that party preference and instead are forced to communicate that they have no party preference. (ER77 ¶ 5.)

Plaintiff Emidio Soltysik, the National Male Co-Chair and California State Chair of the Socialist Party USA, challenges California Elections Code §§ 8002.5(a) and 13105(a) (the "Statutes"), the two provisions that prevent him from stating a preference for the Socialist Party USA on primary ballots and instead force him to state he has no party preference. (ER78-79 ¶ 13.) Plaintiff ran for State Assembly in California's 62nd District in 2014 and plans to run for State Assembly again. (*Id.*)

In his first cause of action, Plaintiff alleges that the Statutes severely burden his rights of association and equal protection by preventing him from stating his party preference on the ballot. (ER90 ¶¶ 67-69.) Plaintiff alleges that voters are unable to cast their votes effectively when denied this critical "voting cue." (*Id.* ¶ 68.) Instead, the "Party Preference: None" moniker next to Plaintiff's name confuses voters and causes them to draw negative inferences about him, *e.g.*, that

Plaintiff lacks an organized political philosophy or stands for nothing. (ER85 ¶¶ 44-45.)

In his second cause of action, Plaintiff alleges that the Statutes discriminate on the basis of viewpoint: although the State has created a limited public forum for candidates to inform voters of their political party preference on the ballot, candidates who prefer a non-qualified political party are restricted from expressing themselves in the forum on the basis of their viewpoint. (ER91 ¶¶ 71-73.)

In his third cause of action, Plaintiff alleges that the Statutes compel candidates who prefer a non-qualified party to state "Party Preference: None" on the ballot, even though they do not want to make that statement. (ER91 ¶ 74 - ER92 ¶ 76.) The district court erroneously dismissed all three causes of action for failure to state a claim.

## I. California Passed Proposition 14, Replacing California's Traditional Party Primary System With a "Nonpartisan Blanket Primary"

Throughout the vast majority of California's political history, political parties played a key role in the elections process. (ER80 ¶ 17.) Foremost, political parties nominated their candidates for the general election in State-facilitated primary elections. Under that system, the State had an interest in ensuring a political party had a modicum of support before investing esources in operating that party's primary. (*Id.* ¶ 18.) As such, only parties "qualified" under California Elections Code § 5100 were permitted to use the State ballot to conduct their

primaries. (*Id.*)[1]

In February 2009, the California Legislature passed SB 6, which introduced the "top two" primary system.[2] S.B. 6, 2009-2010 Reg. Sess. (Cal. 2009), *chaptered at* Cal. Stats. 2009, ch. 1 ("SB 6"), ER104-23. In June 2010 California voters approved SB 6 through Proposition 14, and the top two primary system went into effect on January 1, 2011. (ER76 ¶ 1.) Proposition 14 explicitly stated that "[a]t the time they file to run for public office, *all candidates* shall have the choice to declare a party preference." (ER82 ¶ 29 (quoting Proposition 14, subsection (d) (Open Candidate Disclosure) (emphasis added), available at:

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[1] By its terms, § 5100 (entitled "Parties Qualified to Participate in the Primary Election") provides three ways for a party to become qualified. However, the first option is impossible in the context of voter-nominated offices under the new top two primary system. Under § 5100(a), a party is considered qualified if, "[a]t the last preceding gubernatorial primary election, the sum of the votes cast for all of the candidates for an office voted on throughout the state who disclosed a preference for that party on the ballot was at least 2 percent of the entire vote of the state for that office." Cal. Elec. Code § 5100(a)(1). Thus, by definition, even if a candidate who prefers a non-qualified party receives more than two percent of the vote, that party will not qualify under section 5100 because the candidate is not permitted to "disclose a preference for that party on the ballot." *Id*.

A party may alternately qualify if: (1) the number of voters who declared a political preference for that party equals "at least 0.33 percent of the total number of voters registered on the 154th day before the primary election"; or (2) the party submits a petition containing signatures "equal in number to at least 10 percent" of the total state vote at the last gubernatorial election. Cal. Elec. Code § 5100(b)–(c).

[2] The top two system applies only to elections for "voter-nominated offices." Cal. Elec. Code § 359.5. It does not apply to presidential, party central committee, or nonpartisan elections.

http://vig.cdn.sos.ca.gov/2010/primary/pdf/english/text-proposed-laws.pdf#prop14.)

However, the top two primary "does not serve to determine the nominees of a political party but serves to winnow the candidates for the general election to the candidates receiving the highest or second highest number of votes cast at the primary election." Cal. Elec. Code § 359.5(a). Thus, "[n]otwithstanding the [party preference] designation made by the candidate . . . no candidate for a voter-nominated office shall be deemed to be the official nominee for that office of any political party." *Id.* § 8141.5.

Belonging to a qualified political party is not a prerequisite for participating in a primary under the top two system. Instead, the Elections Code requires candidates to pay a filing fee, submit a declaration of candidacy, and gather the signatures of 100 nominators before being placed on the ballot. *Id.* § 8020.

As initially implemented, SB 6 provided candidates three options for listing their party preference. First, a candidate could state, "[m]y party preference is the _____ Party," and fill in the blank with the party the candidate designated on the candidate's most recent statement of registration. SB 6 § 46, ER116-17 (amending Cal. Elec. Code § 13105). Second, "[i]f the candidate designates no political party [on his/her statement of registration], the phrase 'No Party Preference' shall be printed instead of the party preference identification." *Id.* Third, "[i]f the candidate chooses not to have his or her party preference listed on the ballot, the space that

would be filled with a party preference designation shall be left blank" (the "blank-space option"). *Id.*

"The party preference designated by the candidate is shown for the information of the voters only . . . ." Cal. Elec. Code § 8002.5(d). It serves no other purpose—and is wholly unrelated to any interest of the political parties themselves. In order to ensure the integrity and veracity of this information, a candidate's party preference designation is subject to several controls. First, in the Declaration of Candidacy, the candidate must certify his/her party preference, as shown on his/her current voter registration, as well as his/her voter registration and party affiliation/preference history for the 10 years prior. Cal. Elec. Code § 8040; *see also id.* § 8002.5(e). Second, when a candidate fills out the voter registration application himself/herself, he/she must certify its truthfulness and correctness—including the party preference stated therein—under penalty of perjury. *Id.* § 2150(b).

## II. The California Legislature Enacted AB 1413, Which Amended Sections 8002.5(a) and 13105(a) in Constitutionally Problematic Ways

In February 2012, the California Legislature passed Assembly Bill 1413 (ER140-60 ("AB 1413")). AB 1413 altered the Statutes in two ways that are relevant here.

First, AB 1413 amended § 8002.5 to explicitly state that only candidates who prefer qualified parties can state their party preference on the ballot. Thus,

AB 1413 amended § 8002.5(a) to read:

> (a) A candidate for a voter-nominated office shall indicate one of the following upon his or her declaration of candidacy, which shall be consistent with what appears on the candidate's most recent affidavit of registration:
>
> (1) "Party Preference: _____ (insert the name of the *qualified* political party as disclosed upon your affidavit of registration)."
>
> (2) "Party Preference: None (if you have declined to disclose a preference for a *qualified* political party upon your affidavit of registration)."[3]

AB 1413 § 12, ER145-46 (emphasis added).

Second, AB 1413 removed the blank-space option that was formerly available to candidates under SB 6. *Compare* Cal. Elec. Code § 8002.5(a), *with* SB 6 § 46, ER116-17. Thus, AB 1413 forced candidates who prefer non-qualified political parties to affirmatively state, "Party Preference: None."

AB 1413, as applied to the Statutes, was primarily intended to reduce purportedly onerous and costly ballot printing requirements by "shorten[ing] the manner in which party preference is displayed on the ballot." (ER89 ¶ 61; RJN, Ex. A ("AB 1413 Legislative History") at 36 (filed concurrently).) Indeed, the legislative history of AB 1413 contains numerous recitations of the following passage, which explains the motivation and State interests in amending the Statutes:

> Among other testimony, the committee heard from elections officials who indicated that certain aspects of SB 6 could significantly increase

[3] Section 13105, which governs how candidates appear on the ballot, incorporates by reference the candidates' political party designations from section 8002.5(a).

> the length of ballots at primary elections, thus increasing election costs. This bill shortens the format in which a candidate's party preference is displayed on the ballot . . . . These changes should help address some of the concerns raised by elections officials in this committee's oversight hearing.

AB 1413 Legislative History at 1; *see also id.* at 6, 15, 16, and 24. The only other purpose the legislature noted was a concern that the blank-space option would confuse voters as to whether the ballot was printed correctly. *Id.* at 27.

## SUMMARY OF THE ARGUMENT

The district court committed four errors in dismissing this case.

*First*, in ruling on State election law challenges, the district court should have applied a "flexible standard that weighs 'the character and the magnitude of the asserted injury' to plaintiff['s] constitutional rights against the 'legitimacy and strength' of the government's asserted interests and 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Matsumoto v. Pua*, 775 F.2d 1393, 1396-97 (9th Cir. 1985) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). This standard is not a binary decision between strict scrutiny and rational basis; rather, it "is a sliding scale test, where the more severe the burden, the more compelling the State's interest must be." *Ariz. Green Party v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016).

The district court applied the wrong standard by ending its analysis after concluding that the constitutional burden was not "severe." (ER at 9-11.) That analysis is not consistent with the sliding-scale *Anderson* test, which requires that a court affirmatively determine the degree of constitutional burden to determine whether it is justified by relevant and legitimate state interests. In addition, the district court's acceptance of the State's post hoc rationalizations without considering whether those rationales actually motivated the Statutes is error under *Anderson*.

*Second*, when deciding whether a state election law violates First and Fourteenth Amendment rights, "each case must be resolved on its own facts after due consideration is given to the practical effect of the election laws of a given state, viewed in their totality." *Arutunoff v. Okla. State Election Bd.*, 687 F.2d 1375, 1379 (10th Cir. 1982). The court must also "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789.

Here, the district court ignored Plaintiff's well-pled factual allegations that, once proven, will demonstrate that the Statutes significantly burden his First Amendment rights. Despite Plaintiff's numerous factual allegations describing the ways in which the Statutes burden his rights (ER76 ¶ 3; ER83 ¶¶ 32-33; ER84 ¶¶ 39, 41; ER85 ¶¶ 43-44), the district court relied on prior cases that *specifically cited a lack of evidence in the record* to determine as a matter of law that the burden on Plaintiff was only "slight." This approach was reversible error.

Additionally, the district court erred by crediting the State's purported interests. In fact, the asserted interests are either inapplicable as a matter of statute or well covered by other laws not challenged here.

*Third*, the district court erred in dismissing Plaintiff's compelled speech claim because it incorrectly considered the "accuracy" of the compelled speech. The Supreme Court has held that the "accuracy" of a compelled statement is

immaterial to whether compelling the speech violates the First Amendment. And, the district court failed to consider either the factors this Court or the Supreme Court apply to determine whether the speech at issue is government or private speech. This, too, was error.

*Fourth*, the district court erred in dismissing Plaintiff's viewpoint discrimination claim because it incorrectly held that the section of the ballot where candidates designate their party preference was not a limited public forum and because it incorrectly held that the Statutes do not discriminate on the basis of viewpoint.

The State created a limited public forum by allowing for candidates to indicate their party preference on the ballot. Limited public forums are created when "the government has intentionally opened [its property] to certain groups or to certain topics." *Flint v. Dennison*, 488 F.3d 816, 831 (9th Cir. 2007).

Moreover, the Statutes are facially viewpoint discriminatory because they provide for differing levels of ballot access based on a candidate's viewpoint; candidates whose viewpoints align with qualified political parties may designate the party of their choice, whereas candidates whose viewpoints align with non-qualified parties are forced to say "Party Preference: None." Viewpoint discriminatory regulations are subject to strict scrutiny even in the ballot context. *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002).

## STANDARD OF REVIEW

The Court reviews a dismissal under Rule 12(b)(6) for failure to state a claim de novo. *Pakootas v. Teck Cominco Metals, LTD.*, 830 F.3d 975, 980 (9th Cir. 2016). The Complaint's factual allegations are taken as true and construed in the light most favorable to the non-moving party. *See Whittaker Corp. v. United States*, 825 F.3d 1002, 1006 (9th Cir. 2016). "Dismissal is proper when the complaint does not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal theory." *Id.*

# ARGUMENT

## I. The District Court Improperly Dismissed Plaintiff's Cause of Action for Violation of His Equal Protection and Associational Rights

### A. The District Court Applied the Incorrect Legal Standard

The Supreme Court has long held that "Constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson*, 460 U.S. at 789. Rather, evaluating an election law challenge requires "a flexible standard that weighs 'the character and the magnitude of the asserted injury' to plaintiffs' constitutional rights against the 'legitimacy and strength' of the government's asserted interests and 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Matsumoto*, 775 F.2d at 1396-97 (quoting *Anderson*, 460 U.S. at 789). "Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Anderson*, 460 U.S. at 789.

Importantly, the test articulated by *Anderson* does not involve a binary choice between analyzing the challenged law under either strict scrutiny or rational basis review. Rather, "[t]his is a sliding scale test, where the more severe the burden, the more compelling the state's interest must be." *Ariz. Green Party*, 838 F.3d at 988; *see also Clements v. Fashing*, 457 U.S. 957, 963 (1982); *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016) (en banc)

(holding that Supreme Court precedent calls for "a balancing and means-end fit analysis," not "rational basis review [or] burden shifting"), *petition for cert. filed*, No. 16-730 (U.S. Nov. 30, 2016). "[E]vidence that the burden is severe, de minimis, *or something in between*, sets the stage for the analysis by determining how compelling the state's interest must be to justify the law in question." *Ariz. Green Party*, 838 F.3d at 985 (emphasis added).

Here, the district court applied the incorrect standard by: (1) concluding only that the alleged burdens imposed by the Statutes are not "severe," but failing to affirmatively determine the degree of burden actually imposed and, therefore, "how compelling the state's interest must be to justify the law in question," *id.*; and (2) accepting the State's post hoc justifications for the Statutes—a hallmark of rational basis review—rather than weighing the character and magnitude of the injury against the *actual* State interests that motivated the Statutes. *Anderson*, 460 U.S. at 789.

### 1. The District Court Incorrectly Applied a Binary Standard: A Burden That Is Not "Severe" Is Not Automatically "Slight"

The district court never determined the degree to which the Statutes burden Plaintiff's constitutional rights. It merely decided that the burden was not "severe" and ended the burden analysis there. (*See* ER9-11.)[4] Indeed, the district court

[4] The district court also appeared to rely on *Field v. Bowen*, 131 Cal. Rptr. 3d 721

concluded its section on constitutional burden with the following summation of its analysis: "Thus, that the ballot does not communicate to the voters Plaintiffs' preference for the Socialist Party USA is not, as a matter of law, a severe restriction. Therefore, strict scrutiny does not apply." (ER11.) The district court's incomplete analysis is insufficient under *Anderson*.

The *Anderson* test contemplates that "there may be 'instances where a burden is not severe enough to warrant strict scrutiny review but is serious enough to require an assessment of whether alternative methods would advance the proffered governmental interests.'" *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 732 n.11 (9th Cir. 2015) (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1114 n.27 (9th Cir. 2011)), *cert. denied*, 136 S. Ct. 823 (2016); *see also Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008) ("If the burden is minor, but non-trivial, *Burdick*'s balancing test is applied" (citing *Burdick v. Takushi*, 504 U.S. 428, 435 (1992))). Thus, even if a burden is not severe, courts must still determine the degree of burden the law imposes. That is because "the rigorousness of [the] inquiry . . . depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. In other words, a

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(Ct. App. 2011), and *Chamness v. Bowen*, 722 F.3d 1110 (9th Cir. 2013), to support this finding. (ER10.) However, as shown *infra* in Part I.B.1, the determinations in those cases that those Plaintiffs failed to establish a sufficient constitutional burden were based on lack of *proof* that the burden was severe and does not support the district court's determination *as a matter of law* at the motion to dismiss stage that the burdens at issue here are not severe or significant.

court cannot balance the constitutional burden against the State's interests and determine whether the State's interests justify the burden until the court affirmatively determines the degree of burden. *See Ariz. Green Party*, 838 F.3d at 985, 988; *Ariz. Libertarian Party*, 798 F.3d at 732 n.11; *accord Price*, 540 F.3d at 108.

Because the district court failed to determine the extent of the burden under the first part of the *Anderson* balancing test, it failed to apply the proper legal standard, which is grounds for reversal. *See Naffe v. Frey*, 789 F.3d 1030, 1039 (9th Cir. 2015); *Warren v. U.S. Dep't of Interior Bureau of Land Mgmt.*, 724 F.2d 776, 780 (9th Cir. 1984).

### 2. The District Court Accepted the State's Post Hoc Justifications for the Statutes, Which Is Not Permitted Under *Anderson*

After concluding that the Statutes do not impose a "severe" burden on Plaintiff's constitutional rights, the district court analyzed whether the State's asserted rationales for enacting the Statutes were sufficient to justify the non-severe burdens imposed. In so doing, however, the district court improperly allowed the State to rely on post hoc justifications for the Statutes, rather than the actual justifications that animated the legislation. The district court thus utilized an overly deferential approach characteristic of the rational basis test, not the applicable *Anderson* sliding scale test.

"[U]nder rational basis review, the plaintiff must 'negative every conceivable basis which might support' the challenged law, even if some of those bases have absolutely no foundation in the record." *Price*, 540 F.3d at 109 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). Under that test, "it is entirely irrelevant . . . whether the conceived reason for the challenged distinction actually motivated the legislature." *FCC*, 508 U.S. at 315 (citing *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980), and *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)).

In contrast, the *Anderson* test is less deferential. Even when the burden on a plaintiff is slight or de minimis, Supreme Court precedent "calls for neither rational basis review nor burden shifting." *Pub. Integrity All.*, 836 F.3d at 1025; *see also Price*, 540 F.3d at 108 ("The defendants assert that pure rational basis review should be utilized in this case in reviewing the constitutionality of Election Law § 7–122. They are incorrect.").

Accordingly, "consider[ing] hypothetical rationales for a state's election law" is "in tension with some of [the Ninth Circuit's] other cases and Supreme Court precedent." *Ariz. Libertarian Party*, 798 F.3d at 732 n.12, 734 (citing *Libertarian Party of Wash. v. Munro*, 31 F.3d 759 (9th Cir. 1994)). Indeed, in 2016, this Court, sitting en banc, clarified again that deference to the State is improper in election law challenges, and overruled a line of cases to the extent they

suggested otherwise. *Pub. Integrity All.*, 836 F.3d at 1025; *accord Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 654 (9th Cir. 2007) (stating, in a case involving campaign contribution limitations, "[w]e cannot hold that hypotheticals, accompanied by vague allusions to practical experience, demonstrate a sufficiently important state interest").

Here, although the district court recited the proper legal standard under *Anderson*, it actually employed the deferential and impermissible rational basis standard. In direct contravention of the Ninth Circuit's holding in *Public Integrity Alliance*, the district court accepted the post hoc rationalizations in the State's and Intervenor's briefs without considering whether those rationales actually motivated the State to enact the Statutes. Specifically, it relied on the State's argument, raised for the first time in the State's motion to dismiss, that the Statutes enable the State "to maintain minimum qualifications for political parties to participate in elections and appear on ballots" and prevent "unrestricted self-designation, that could engender confusing, fraudulent, or sloganeering designations." (ER12.) Although the legislature never invoked these rationales in actually enacting the Statutes,[5] the district court found them sufficient as a matter of law to justify the

[5] A review of more than one thousand pages of legislative history did not reveal a single mention of the justifications the State is now asserting in this litigation. Exhibit 1 to the Request for Judicial Notice, filed concurrently, contains those portions of the legislative history that Plaintiff believes are relevant. *See* AB 1413 Legislative History. If the Court would find it helpful, Plaintiff would be happy to

burdens alleged. In so doing, the district court erroneously overlooked the Complaint's well-pled allegations that, in fact, completely different—and much less lofty—justifications motivated the California legislature to enact the Statutes. (*See* ER89 ¶ 61 (noting that the actual motivations for the Statutes were "to fix purported voter confusion engendered by the blank-space option, reduce the purportedly onerous ballot printing requirements that 'significantly increase' elections costs, and to 'shorten[] the manner in which party preference is displayed on the ballot to help with formatting issues").)[6]

Because the district court's approach is inconsistent with *Anderson* and *Public Integrity Alliance*, the district court's dismissal of Plaintiff's first cause of action should be reversed. *See Naffe*, 789 F.3d at 1039; *Warren*, 724 F.2d at 780.

### B. Plaintiff Adequately Alleged That the Statutes at Issue Imposed a Significant Burden on His Associational Rights, and That No State Interest Justifies Those Burdens

The district court also erred when it concluded *as a matter of law* that (1) "[t]he [b]urdens on Plaintiffs' [r]ights are [n]ot [s]evere," and (2) the "[p]roffered [j]ustifications for the [r]estrictions are [s]ufficient." (ER9-11.)

First, the district court concluded that "as a matter of law . . . [the fact that] the ballot does not communicate to the voters Plaintiffs' preference for The

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submit the full one-thousand pages of legislative history.

[6] As discussed *infra* I.B.2, however, even the State's post hoc rationales do not justify the burdens imposed.

Socialist Party USA is not . . . a severe restriction." (ER11.) However, in reaching this result, the district court mostly relied on cases in which courts cited a failure of proof as the reason for finding minimal burden, not inadequate allegations. Those cases do not support the district court's ruling.

Second, the district court concluded that the purported interests of (1) preventing "frivolous or fraudulent candidacies"; (2) establishing "minimum qualifications for political parties to participate in the election"; and (3) avoiding "confusion, deception, and frustration of the democratic process" were "sufficiently weighty to justify the slight burden that the party designation restrictions . . . place on Plaintiffs' rights to association and equal protection." (ER11-13.) These erroneous conclusions disregarded the well-pled allegations in the Complaint.

### 1. The District Court Improperly Concluded Plaintiff Had Alleged Only a "Slight" Burden

#### (a) The Cases the District Court Relied on Do Not Support Its Finding That the Statutes Impose Only a Slight Burden as a Matter of Law

Instead of permitting Plaintiff to develop facts, so that it could give "due consideration . . . to the practical effect of the election laws," *Arutunoff*, 687 F.2d at 1379, and render a "hard judgment," the district court credited Intervenor's arguments that the burden on Plaintiff, as a matter of law, was slight, and justified by State interests. To reach this conclusion, the district court ruled that Plaintiff

*could not*, as a matter of law, prevail, based on authority holding that specific plaintiffs in those specific cases *did not* prevail on their claims. *See Chamness v. Bowen*, 722 F.3d 1110, 1117-18 (9th Cir. 2013); *Dart v. Brown*, 717 F.2d 1491, 1505 (5th Cir. 1983); *Field v. Bowen*, 131 Cal. Rptr. 3d 721, 735-36 (Ct. App. 2011). A plain reading of the cases that were decided in the context of an analogous top two system reveals that all of these cases *specifically cite the lack of evidence in the record* as a reason for finding only minimal burden, and ultimately upholding the challenged laws.

In *Chamness*, this Court noted that the plaintiff "failed to provide any evidence" supporting its allegations that the label scheme would "tend to affect the way the voters cast their votes." *Chamness*, 722 F.3d at 1117-18. The Court therefore concluded that the plaintiff did not adequately *prove* the burden it alleged, stating it could not "assume these facts in the absence of evidence." *Id. at 1118*. Similarly, in *Field*, the court noted that unlike the plaintiff "in *Rosen*[ *v. Brown*, 970 F.2d 169 (6th Cir. 1992)], plaintiffs have not presented, and state no intention to present, evidence to support their theory that 'No Party Preference' is a more disadvantageous ballot designation than 'Independent.'" 131 Cal. Rptr. 3d at 736. Finally, in *Dart*, the Court pointed out that there was "no evidence in this record" supporting the plaintiff's allegations. 717 F.2d at 1505. Thus, none of these cases, with their fact-dependent holdings, supports the district court's conclusion *as a*

*matter of law* that the burden on Plaintiff is only "slight."

Importantly, unlike the plaintiffs in *Chamness*, *Field*, and *Dart*, Plaintiff has repeatedly stated his intention to present evidence that the Statutes impose a significant burden on his constitutional rights. (*See* ER83 ¶¶ 32-34, 36; ER84 ¶¶ 37-39, 41; ER85 ¶¶ 42-43; ER246-47.) Plaintiff should not be denied the opportunity to prove his allegations simply because plaintiffs in prior cases failed to develop and present sufficient evidence.

**(b) Plaintiff Adequately Alleged That the Statutes at Issue Significantly Burdened His Associational Rights**

The "right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . . rank[s] among our most precious freedoms." *Anderson*, 460 U.S. at 787. "A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." *Id*. at 793. That is because such a statute "discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." *Id*. at 794. "Restricting the party label a candidate can use on an election ballot implicates the candidate's constitutional rights to freedom of speech, freedom of association, and equal protection." *Field*, 131 Cal. Rptr. 3d at 728-29. As the Supreme Court has explained, "[t]o the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the

identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 220 (1986). For that reason, this Court has determined that regulations governing party labels on a ballot "affect[] core political speech." *Rubin*, 308 F.3d at 1015.[7]

The Sixth Circuit applied the above framework to strike down a law that proscribed a candidate's ability to designate a party label. In *Rosen v. Brown*, the plaintiff (Rosen) alleged that a provision of the Ohio Code violated his freedoms of association and equal protection by prohibiting him from having the designation "Independent" or "Independent candidate" placed next to his name on the ballot. 970 F.2d 169, 171, 173-74 (6th Cir. 1992). In support of his motion for summary judgment, Rosen presented testimony from three experts. *Id.* at 172. One expert concluded that,

> [w]ithout a designation next to an Independent's name on the ballot, the voter has no clue as to what the candidate stands for. Thus, the state affords a crucial advantage to party candidates by allowing them to use a designation, while denying the Independent the crucial opportunity to communicate a designation of their candidacy.

*Id.* Another expert concluded that "the absence of a label for a candidate gives rise

[7] The district court cited *Rubin* as supporting dismissal here. However, *Rubin* concerned a prohibition on "status designations such as 'activist[,]'" which this Court explicitly *distinguished* from restrictions of party labels on the ballot, which the panel said "affects core political speech." 308 F.3d at 1015.

to mistrust and negative inferences." *Id.* at 173. It also prevents voters from "mak[ing] a connection between the candidate and his platform" and "creat[ing] an identification in the voter's mind." *Id.* The final expert stated that providing a "'voting cue' on the ballot in the form of a party label . . . is the most significant determinant of voting behavior." *Id.* at 172. In fact, the expert concluded, "this effect is so substantial that Ohio dooms Independent candidates to failure by its means of structuring the ballot." *Id.*

The Sixth Circuit affirmed summary judgment for Rosen and struck down the ballot restriction as unconstitutional. *Id.* at 178. In so concluding, the court found that "plaintiffs have established that Ohio Rev. Code § 3505.03 burdens the First and Fourteenth Amendment rights of the supporters of Independent candidates," and that "such evidence does appear in the record." *Id.* at 176. Specifically, the Sixth Circuit concluded that the expert "affidavits show that the State infringes upon the right of supporters of Independent candidates to meaningfully vote and meaningfully associate by providing a 'voting cue' to Democratic and Republican candidates." *Id.*

Just as in *Rosen*, Plaintiff has alleged facts that, once proven, will demonstrate that the Statutes significantly burden his First Amendment rights. The Complaint alleges that "the restrictions on only some candidates' ability to communicate their party preference constitutes a severe burden on Plaintiffs'

rights." (ER78 ¶ 8.) That is because a "candidate's party preference is the single largest predictor of voter choice and the primary factor informing how the vast majority of voters vote." (ER83 ¶ 32.) This burden is particularly severe "in low information elections, such as some elections for state offices and elections in off presidential years." (*Id.* ¶ 33.) It is also "especially true of candidates from minor parties." (ER84 ¶ 37.) For these candidates, "[a]lthough a voter may not recognize a candidate by name or be able to identify the candidate's stances on a particular issue, the voter will likely recognize the candidate's party label on the ballot." (ER83 ¶ 34.)

Thus, Plaintiff alleged that by "providing a critical voting cute to the voter in the voting booth at the moment the voter casts their ballot, the presence of party preference labels on the ballot facilitates voter choice, thereby reducing voter confusion." (ER84 ¶ 38.) In fact, plaintiffs allege that under the Statutes, "[v]oters for whom the Socialist Party USA's ideology resounds will not be able to identify a candidate on the ballot who shares their belief system" and may in fact view Plaintiff with "the mistrust and negative inferences drawn . . . from the no party preference label." (ER84 ¶ 41; ER85 ¶ 44.) Therefore, Plaintiff alleged—and the U.S. Supreme Court agrees—that "such labels convey a vast amount of information about a candidate to voters, including a sense of the candidate's ideology and policy platform." (ER83-84 ¶ 36 (citing *Tashjian*, 479 U.S. at 22).)

As a result, citizens are unable to cast their votes effectively when this information is withheld from voters. (ER84 ¶ 39.)

These allegations are more than sufficient to establish that the Statutes significantly burden Plaintiff's constitutional rights. Accepted as true, these allegations establish that (1) "party labels provide a shorthand designation of the views of party candidates on matters of public concern," *Tashjian*, 479 U.S. at 220; (2) the Statutes restrict "the party label a candidate can use on an election ballot," *Field*, 131 Cal. Rptr. 3d at 728-29; (3) the Statutes place a burden "unequally on new or small parties," *Anderson*, 460 U.S. at 793-94; and (4) the Statutes predominantly affect candidates "whose political preferences lie outside the existing political parties," *id.* Accordingly, the burden articulated in the Complaint is the *exact* burden that this Court has held "affects core political speech" and thus constitutes "severe speech restrictions." *Rubin*, 308 F.3d at 1015. The district court erred by failing to credit the alleged burdens.

### 2. The District Court Erred in Concluding as a Matter of Law That the Proffered State Interests Were Sufficient to Justify the Burden Imposed

The second step of the court's "hard judgment[ ]" is to "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789-90. "[T]he Court must not only determine the legitimacy and strength of each of those interests; it also

must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 789. Finally, and "[o]nly after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Id.*[8]

The district court articulated and credited three purported State interests that it deemed sufficient to justify the Statutes and their burdens on Plaintiff's rights. *First*, the district court articulated an interest in avoiding confusion, deception, and frustration. *Second*, the district court articulated an interest in preventing fraudulent candidacies. *Third*, the district court articulated an interest in establishing minimum qualifications for political parties. Each of these interests fails, however.[9]

**(a) The State's Purported Interest in Limiting Voter Confusion Is Pretext**

The district court ruled that concerns regarding "misrepresentation . . . confusion, deception, and frustration of the democratic process" are sufficient State interests to justify the burdens imposed on Plaintiff. (ER11-12.) The district court

[8] As explained *supra* Part I.A.2, the Ninth Circuit has explicitly foreclosed the State from relying on post hoc, "hypothetical rationales for a state's election law." *Ariz. Libertarian Party*, 798 F.3d at 732 n.12.

[9] As a preliminary matter, as discussed above, the State interest must justify the burden imposed by the Statutes. Therefore, the severity of the burden must be correctly determined before the court can conclude whether the proffered State interests are sufficient to justify the burden.

hypothesized two situations in which a candidate could attempt to cause confusion if candidates who prefer non-qualified political parties were allowed to state their true party preference on the ballot. First, a candidate could state that he prefers the "Replublican" party in a fraudulent effort to split the bona fide Republican vote. (ER12.) Second, a candidate could identify as preferring the "No New Taxes" party as a means of broadcasting a political message. (*Id.*) Neither of these examples can sustain the district court's decision.

First, a candidate who self-designates as a "Replublican" for the purposes of trying to splinter the bona fide Republican vote would be violating state law. In California, when candidates (or voters) fill out their voter registration application, they must declare under penalty of perjury that they understand it is a crime to intentionally provide incorrect information on the registration form. *See* California Online Voter Registration, http://registertovote.ca.gov/ (last visited 1/2/2017). Thus, in the district court's example, a candidate who declared a preference for the "Replublican" party to splinter the Republican vote would be committing perjury. And, if the candidate is willing to commit perjury to mislead voters, then there is no safeguard from that same potential voter confusion under the current system. For instance, Democrats who are willing to commit perjury could list "Republican" as their party preference, solely for the purpose of misleading and confusing voters, and trying to split the Republican vote. But if the penalty of perjury safeguard is

sufficient to protect against such candidate gamesmanship today, then it should likewise be sufficient under a system where candidates who prefer non-qualified political parties are allowed to state their true party preference on the ballot.

As for the second example, it is unclear how a candidate truthfully listing a preference for a "No New Taxes" party would lead to confusion. The Supreme Court has repeatedly cautioned that a "State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Anderson*, 460 U.S. at 798. Assuming (as one reasonably should) that the candidate is not committing perjury by stating a preference for either a party that does not exist or a party which he does not prefer, providing that information to voters would be clarifying and helpful, rather than confusing or misleading.

In fact, the Complaint alleges that allowing a candidate to express his true party preference would actually *decrease* confusion because, under the current system, voters assume that "Party Preference: None" means a candidate has no political preference. (*See* ER84 ¶ 40 ("By contrast, the label 'Party Preference: None' conveys misinformation to voters about candidates forced to identify in this way and is likely to confuse voters, who have no idea what the label means.").) Therefore, voters could mistakenly believe that a candidate with "Party Preference: None" has no political preference or beliefs, when in fact the candidate could have

deeply held political convictions, but prefers a non-qualified party. The Complaint alleges that giving voters more accurate information will actually decrease voter confusion, an interest advanced by the State to justify the challenged Statutes. The district court was not free to disregard this factual allegation, which, if proven, would wholly undermine the proffered justification for the Statutes.

**(b) The Purported State Interest in Preventing Fraudulent Candidacies on the Ballot Cannot Justify *Any* Constitutional Burden Because the Statutes Do Not Impact Candidate Ballot Access**

The district court ruled that a State's interest in preventing frivolous candidates from appearing on the ballot justifies the burden placed on Plaintiff. To the extent the district court meant the State has an interest in preventing frivolous or confusing *messaging*, as discussed above, the Statutes do not serve this interest. If, instead, the district court was discussing candidate access to the ballot, that interest is misplaced. Candidate access to the ballot in California is not governed by the Statutes at issue, and Plaintiff's challenge does not affect the State's ability to control which candidates appear on the ballot. Instead, Plaintiff seeks to change the language which appears next to some candidates' names on the ballot *once they have already properly qualified to appear on the ballot*. There is simply no connection between what Plaintiff seeks and a purported State interest in preventing "frivolous or fraudulent candidacies."

### (c) The Purported Interest in Requiring a Minimum Level of Support for Political Parties to "Participate" in the Election Fails

The district court also held that the State's interest in establishing "minimum qualification[s] for political parties to participate in the election" justifies the burden that the Statutes place on Plaintiff. (ER12.) However, political parties no longer participate in voter-nominated primaries. Under the new system, "[p]olitical parties are not entitled to formally nominate candidates for voter-nominated offices at the primary election. A candidate nominated for a voter-nominated office at the primary election is the nominee of the people and not the official nominee of any party at the general election." California Secretary of State, *Elections in California*, Nov. 8, 2016, http://voterguide.sos.ca.gov/en/voter-info/elections-in-california.htm; *see also* Cal. Elec. Code § 8002.5(d). Because political parties are no longer entitled to nominate candidates and a candidate's designation of a party preference does not indicate an endorsement by that party, "[t]he party preference designated by the candidate is shown for the information of the voters only," an important and constitutionally significant departure from the traditional primary system. Cal. Elec. Code § 8002.5(d). Put simply, there can be no State interest served in establishing minimum qualifications for political parties to participate, because political parties do not participate. *Chamness*, 722 F.3d at 1118 (holding that the State's "interest in maintaining the distinction between qualified political parties

and nonqualified political bodies" relies on "conditions that no longer obtain[.]")[10]

## II. The District Court Failed to Apply the Correct Legal Standard to Plaintiff's Compelled Speech Claim and Therefore Improperly Dismissed the Cause of Action

Plaintiff alleged that the Statutes compel him to state on the ballot (falsely, in Plaintiff's view) that he has "Party Preference: None." (ER83 ¶ 31; ER87 ¶¶ 51-52.) The district court dismissed this cause of action with prejudice. (ER15-17.) However, because the district court applied two incorrect legal standards in evaluating Plaintiff's compelled speech cause of action, its decision should be reversed. *See Naffe*, 789 F.3d at 1039.

### A. The District Court Improperly Dismissed Plaintiff's Compelled Speech Claim Based on Its Determination That the Speech Was Not False

The district court concluded that Plaintiff's compelled speech cause of action "fails insofar [as] it rests on the assertion that stating 'Party Preference: None' next to [Plaintiff's] name is false" because, according to the district court, that designation "is accurate." (ER14.) Whether the designation "Party Preference: None" is "false" or "accurate," however, is irrelevant to the compelled speech

[10] "Under the current system, in contrast, political parties do not choose candidates; the state does not run separate primaries for various parties; and multiple candidates can state that they prefer the same party. Given the substantial changes from the election system at issue in *Libertarian Party*[ *v. Eu*, 28 Cal. 3d 535, 545-46 (1980)] to the present one, the analysis in that case of the governmental interests supporting the 'qualified parties' distinction is not fully transferable to the present context." *Chamness*, 722 F.3d at 1118.

analysis.[11]

"[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Moreover, the "general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). Accordingly, the U.S. Supreme Court has held that an individual's freedom of speech is "infringed by a law compelling statements of fact," even where "the objectors could not, and did not profess to, disagree." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 488 (1997)

[11] The district court held that the assertion "Party Preference: None" is accurate "because the legislature has defined 'party' to mean 'a political party or organization that has qualified for participation in any primary or presidential general election'" and "Plaintiff's preference is not for a qualified party but for a non-qualified party." (ER14 (citing Cal. Elec. Code § 338).) The district court, however, did not cite any compelled speech case holding that the technical definition of a term trumps its common, ordinary usage, nor did it point to any evidence that Californians interpret the term "party" to mean "qualified party." In fact, even courts and the Elections Code itself use the term "party" to refer to non-qualified parties. *See, e.g.*, Cal. Elec. Code § 5100.5(a) ("A party that does not meet the standards for qualification set forth in Section 5100 . . . ."); *id.* at § 5100.5 ("A party seeking qualification under provisions of this section and subdivision (b) or (c) of Section 5100 shall file formal notice with the Secretary of State . . . ."); *Chamness*, 722 F.3d at 1116 n.4 ("[W]e express no view as to whether the removal of the blank space option compels speech by requiring candidates who prefer a non-qualified *party* to falsely state that they have no party preference" (emphasis added)).

(citing *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988)). Therefore, to the extent the district court dismissed Plaintiff's compelled speech cause of action because it determined the designation "Party Preference: None" is "accurate," that dismissal should be reversed because the "accuracy" of a compelled statement is immaterial to the constitutional question.

### B. The District Court Did Not Apply the Proper Standard to Determine Whether a Candidate's Party Preference Is Private Speech or Government Speech

The district court dismissed the compelled speech cause of action on the alternative ground that "ballots are not candidate speech." (ER13.) While the district court properly inquired whether the speech at issue is government speech or candidate speech, the district court did not apply the correct legal framework to reach its decision.

The Supreme Court has stated that a compelled speech cause of action can "form the basis for an as-applied challenge—if it were established, that is, that [the speech] were attributed to" private actors instead of the government. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 565 (2005); *accord Charter v. U.S. Dep't. of Agric.*, 412 F.3d 1017, 1020 (9th Cir. 2005) (vacating and remanding case for further proceedings "to determine, among other things, whether speech was attributed to appellants and, if so, whether such attribution can and does support a claim that the Act is unconstitutional as applied.").

Based on that Supreme Court pronouncement, in 2008 this Court adopted a "nonexhaustive list of four factors" to help "determin[e] whether [speech] constitutes government or private speech." *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 964-65 (9th Cir. 2008). Those factors are:

> (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking.

*Id.* at 964 (citation omitted). This "multi-factor test can be distilled (and simplified) by focusing on the following inquiry: *Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?*" *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) (emphasis added) (stating that one factor bearing on this analysis is "the degree to which the message originates with the government"); *see also Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009).

Since this Court adopted its four-factor approach in 2008, "the Supreme Court has not articulated a precise test for distinguishing government speech from private speech." *A.N.S.W.E.R. Coal. v. Jewell*, 153 F. Supp. 3d 395, 411 (D.D.C. 2016). However, it has "identified three relevant factors" to consider, which overlap with this Court's factors: "(1) the history of the speech at issue; (2) a

reasonable observer's perception of the speaker; and (3) control and final authority over the content of the message." *Id.* (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 470-73 (2009), and *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248-50 (2015)).[12] Similar to the Ninth Circuit in *Arizona Life Coalition*, the Supreme Court in *Summum* "placed considerable emphasis on whether, based on all the circumstances, a reasonable observer would have concluded that the government was the speaker." *United Veterans Mem'l & Patriotic Ass'n of the City of New Rochelle v. City of New Rochelle*, 72 F. Supp. 3d 468, 474 (S.D.N.Y. 2014), *aff'd*, 615 F. App'x 693 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1452 (2016).

Ultimately, "[w]hether speech is government speech is inevitably a context specific inquiry." *Mech*, 806 F.3d at 1075. "What matters is not the medium used but the communicative characteristics of the speech." *Newton v. LePage*, 789 F. Supp. 2d 172, 186 (D. Me. 2011); *Robb v. Hungerbeeler*, 370 F.3d 735, 745 (8th Cir. 2004) ("Although the [Adopt-A-Highway] signs are state owned, an adopter speaks through the signs by choosing to undertake the program's obligations in exchange for the signs' announcement to the community that it is a highway

[12] As both the Supreme Court and courts interpreting *Summum* and *Walker* have stated, "the factors identified in *Walker* and *Summum* are [not] exhaustive," nor "will [they] be relevant in every case." *Mech v. Sch. Bd. of Palm Beach Cty., Fla.*, 806 F.3d 1070, 1075 (11th Cir. 2015).

adopter."); *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty.*, 2008 WL 4965855, at *13 (W.D. Pa. Aug. 14, 2008) ("Although Port Authority and the co-sponsoring organization are identified as the literal speaker on the advertisement, the messages displayed are more closely identified with the organizations that created the original message.").

Here, the district court did not undertake any of the required analysis to determine whether "Party Preference: None" is candidate speech or government speech. The court did not consider the four factors identified by the Ninth Circuit in *Arizona Life Coalition*, or the three factors on which the Supreme Court relied in *Summum* and *Walker*. And even if a factor-by-factor analysis is not required, the court did not attempt to answer the question underlying both the Ninth Circuit and Supreme Court approaches: "Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?" *Choose Life Ill.*, 547 F.3d at 863.

Such an inquiry is particularly necessary here, where the speech at issue is the *candidate's* party preference. While Plaintiff contends that a "reasonable person," "[u]nder all circumstances," would consider a candidate's stated party preference to be the candidate's speech, it surely cannot be said *as a matter of law* that a reasonable person would consider a candidate's stated party preference to be government speech. Such an interpretation would mean that the government is

deciding what party a candidate prefers. *Accord Pittsburgh League of Young Voters Educ. Fund*, 2008 WL 4965855, at *13 ("Although Port Authority and the co-sponsoring organization are identified as the literal speaker on the advertisement, the messages displayed are more closely identified with the organizations that created the original message."). That conclusion is both illogical and contrary to the text of the Statute, which states that the candidate's party preference is "designated by the candidate." Cal. Elec. Code § 8002.5(d).

Eschewing this required inquiry, the district court instead based its ruling on selected quotations from two cases, neither of which concerned a ballot with candidate party preference language, and neither of which supports the court's holding as a matter of law that a candidate's party preference is government speech. First, the district court cited *Caruso v. Yamhill County* for the uncontroversial proposition that ballots, as a general matter, are "documents prepared, printed, and distributed by—and therefore attributed to—State and local governments." 422 F.3d 848, 858 (9th Cir. 2005). That case, however, did not involve party preference language on the ballot. More importantly, the parties to that litigation all agreed that the speech at issue was government speech. *Id.* Thus, *Caruso* provides no support for the district court's determination here that a candidate's party preference on a ballot is government speech as a matter of law. Second, the district court cited *Timmons* for the general rule that "[b]allots serve primarily to

elect candidates, not as a forum for political expression." 520 U.S. at 363. However, when the State alters the traditional ballot to include statements from a candidate (or, at the very least, statements that a reasonable observer would understand to be those of a candidate), the general rule does not apply. Thus, *Timmons* provides little guidance here, because that case did not involve party preference language on the ballot, nor any analysis about whether a reasonable observer would understand a candidate's party preference to be candidate speech or government speech.

Accordingly, because the district court failed to properly consider whether, under all circumstances, a reasonable person would consider a candidate's party preference on the ballot to be government speech or private speech, this Court should reverse the district court's dismissal of Plaintiff's compelled speech cause of action, and remand the case to the district court. It should be noted on remand that the required analysis is inherently fact-based, and thus Plaintiff should be allowed to develop evidence to support his position that reasonable observers would understand a candidate's party preference to be the candidate's speech. *See Johanns*, 544 U.S. at 565; *Charter*, 412 F.3d at 1019.

## III. The District Court Failed to Use the Correct Test, and Therefore Improperly Concluded That the Statutes Did Not Discriminate on the Basis of Viewpoint

The district court also erred in dismissing Appellant's viewpoint

discrimination claim under the First Amendment. The Statutes discriminate on the basis of viewpoint, severely burdening Plaintiff's rights. Only those candidates whose viewpoints align with those of qualified political parties may indicate their party preference on the ballot; those candidates whose viewpoints align with non-qualified political parties, such as Plaintiff, are instead forced to falsely state "Party Preference: None." Viewpoint discrimination is subject to strict scrutiny in any forum—whether public, designated, limited, or nonpublic. Because the Statutes are neither narrowly tailored, nor serve compelling government interests, they violate Plaintiff's First Amendment rights.

Alternatively, if the Court determines that the challenged restriction is not subject to the relevant forum test, but instead to the *Anderson* balancing test that is applied to election law challenges, it should still reverse the district court because the State's interest is insufficient to justify the severe burden that the viewpoint discrimination imposes on Plaintiff's rights.

### A. The State Has Created a Limited Public Forum on Its Ballots

The State of California has created a limited public forum on its ballot for candidates to tell voters the political party with which they affiliate.[13] The plain

[13] To be certain, Plaintiff does not argue that the entire ballot constitutes a limited public forum. Other portions, such as the California Secretary of State's description of the contents of a voter initiative, would almost certainly be government speech and not subject to forum analysis. *See, e.g.*, *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 478 (2009) (holding that the display of monuments in a

text of Proposition 14 states that "At the time they file to run for public office, *all candidates* shall have the choice to declare a party preference." Proposition 14, subsection (d) (Open Candidate Disclosure) (emphasis added). The Statutes also make clear that the candidates themselves indicate their party preference "for the information of the voters only." Cal Elec. Code §§ 13105 ("the designation made by the candidate"); 8002.5(a) ("A candidate for a voter-nominated office shall indicate one of the following upon his or her declaration of candidacy . . . ."); 8002.5(d) ("The party preference designated by the candidate is shown for the information of the voters only. . . .").

First Amendment jurisprudence dictates that all government property is subject to forum analysis except when government speech is at issue. *PMG Int'l Div. L.L.C. v. Rumsfeld*, 303 F.3d 1163, 1169 (9th Cir. 2002) ("Because we conclude that the Board's enforcement of the Act does not constitute government speech, traditional First Amendment forum analysis applies." (citing *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992))); *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

Limited public fora are "a sub-category of a designated public forum that

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public park constituted government speech, although the public park itself was a traditional public forum for expression by public speakers). Rather, Plaintiff argues that the specific portion of the ballot dedicated to candidates' expression of their political party preferences in voter-nominated elections is a limited forum because that particular section constitutes candidate speech.

refer[] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics." *Flint*, 488 F.3d at 831 (quoting *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001)). While the State may preserve the space "for certain groups or for the discussion of certain topics," *id*. at 831, the State must abide by the limitations it has created for itself and may not discriminate on the basis of viewpoint as the Statutes at issue here do. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995).

Here, the State has provided a limited forum for speech by a class of speakers—candidates for voter-nominated offices—on a particular topic—their political party preferences. As explained above, both Proposition 14 and the Statutes themselves indicate that the party preference included on the ballot for voter-nominated contests is the candidate's speech. Because candidates' indication of their political party preference is not government speech, this portion of the ballot is a limited public forum, and restrictions on speech in that forum are subject to traditional forum analysis. *PMG Int'l Div. L.L.C.*, 303 F.3d at 1169. [14]

Courts have found limited public fora in analogous contexts. In *Flint*, the court held that the University of Montana's student election was itself a limited

[14] However, even if this Court were to determine that the ballot is a nonpublic forum in this context, as with limited public fora, regulations in nonpublic fora must be viewpoint neutral and reasonable given the forum's purpose. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 131 (2001).

public forum because the university had "reserve[d] access to it for only certain groups or categories of speech." 488 F.3d at 832 (citation omitted); *id.* at 833 ("This forum exists solely to allow campaigns for ASUM student office and the election of student representatives."). Similarly, in *Kaplan v. County of Los Angeles*, this Court held that California had created a limited public forum in its voter information pamphlets, observing that "California created the pamphlets for the specific purpose of allowing a limited class of speakers, the candidates, to address a particular class of topics, statements concerning the personal background and qualifications of the candidate." 894 F.2d 1076, 1080 (9th Cir. 1990); *see also Gebert v. Patterson*, 186 Cal. App. 3d 868, 874 (1986); *Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003).

Although Defendants and the court below rely on dicta stating that, "[b]allots serve primarily to elect candidates, not as forums for political expression" (ER15 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997)), this case does not hold that ballots can never serve as forums for political expression. Indeed, the use of the word "primarily" in *Timmons* indicates that there *are* circumstances, like those present here, in which ballots may be forums for expression—"primarily" does not mean "exclusively."

Nor do the cases stand for the proposition that ballots—or portions thereof—that are opened up to at least some category of speakers on one or more subjects

are exempt from First Amendment protection. One of the defining characteristics of a nonpublic forum is that the government has *not* dedicated it "primarily" for expression. *See, e.g., United States v. Kokinda*, 497 U.S. 720, 727 (1990). The principal difference between a public and a nonpublic forum is that the nonpublic forum does not have as a "principal purpose . . . the free exchange of ideas." *Int'l Soc. for Krishna Consciousness*, 505 U.S. at 679 (quoting *Cornelius*, 473 U.S. at 800).

Moreover, *Timmons* certainly does not mean that viewpoint discrimination is permissible in a portion of the ballot in which the government has allowed individuals to engage in some expression. Even when the government does not designate its property primarily for expression, it still cannot discriminate among viewpoints within the specific topic of expression it allows, or the limited class of speakers it has permitted access. *See, e.g.*, *Cornelius*, 473 U.S. at 800. Nor does *Timmons* overrule the well-settled proposition set forth in *Rosenberger* and other Supreme Court cases, that when the government allows some speech activity on its property—thus creating a limited or nonpublic forum to speech activity, "the State must respect the lawful boundaries it has itself set," including where the principal purpose of the forum is not expression. *Rosenberger*, 515 U.S. at 829; *Kokinda*, 497 U.S at 727.

This proposition is no less true when the government takes what previously

may have been government speech on government property and opens the property to private expression. Prior to Proposition 14's passage, there was no non-government speech on the ballot because the state simply placed the names of the qualified political parties' candidates on the ballot. But now that the state has invited candidates to indicate their political party preferences, it must allow each candidate to do so regardless of his/her viewpoint. *Rosenberger*, 515 U.S. at 829.

Holding that this portion of the ballot is not a forum further leads to incongruous outcomes. First, it would create a previously unrecognized category of expression on government-controlled property that is neither government speech nor expression subject to the rules of forum analysis, despite this Court's ruling in *PMG Int'l Div. L.L.C.*, 303 F.3d at 1169 ("Because we conclude that the Board's enforcement of the Act does not constitute government speech, traditional First Amendment forum analysis applies.").

Second, a rule that a ballot can never be a forum of some sort or always constitutes government speech, when taken to its logical conclusion, leads to absurd results. For example, imagine a legislature passing a law designating a space for every candidate for office to list his/her favorite President of the United States except for Republicans or those who prefer Abraham Lincoln; the court, under such a rule, would have to conclude that the candidate's presidential preference was government speech or a new category of speech on government

property—a category that was somehow exempt from the fundamental principle that the government may not discriminate among speech on the basis for viewpoint. Concluding that the information was actually government speech would lead to the absurd conclusion that the government is picking which president the candidates prefer for them.

In sum, the restrictions apply to candidates' speech in a government-controlled forum, and thus the rules applicable to speech restrictions in a limited or nonpublic forum apply.

### B. The Statutes Discriminate on the Basis of Viewpoint

Simply put, "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (citation omitted). The prohibition against such discrimination is, in fact, so strong that the government is prohibited from discriminating on that basis even where the speech is otherwise not constitutionally protected. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

In assessing whether a statute that restricts speech is discriminatory, courts must follow a two-step process. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015). First, a court must determine whether the law discriminates on its face, based on the plain language of the statute. *Id.* If the statute is facially

discriminatory, the court must apply strict scrutiny. *Id*. ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." (citation omitted)). If the statute is facially neutral, however, the court applies strict scrutiny if the purpose and justification are discriminatory. *Id*.

Viewpoint discrimination exists where "otherwise includable" speech is excluded from a forum, s*ee, e.g.*, *Lamb's Chapel*, 508 U.S. at 394, which is the case here. An individual's preference for a political party is a quintessential expression of that person's viewpoint, encompassing his or her political ideology and policy preferences on a range of issues—a discussion of preferences necessarily entails a discussion of viewpoints. The Statutes discriminate on their face by dictating that some candidates who have access to the ballot may express themselves based solely on which party they prefer – that is, based on their political viewpoint – while other such candidates may not express their party preference. Democrats and Republicans, for example, are free to indicate that they affiliate with the Democratic and Republican parties respectively, but Plaintiff is prohibited from stating a preference for the Socialist Party USA.

"[V]iewpoint discrimination . . . is *presumed impermissible* when directed against speech otherwise within [a] forum's limitations." *Rosenberger*, 515 U.S. at

830 (emphasis added). For example, in a succession of cases, the Supreme Court struck down various restrictions on religious speech in schools after finding viewpoint discrimination. Critical in each decision was the determination that the school had excluded speech on topics from a religious viewpoint that was otherwise permissible under the school's policies. *Lamb's Chapel*, 508 U.S. at 394-96 (finding viewpoint discrimination when an elementary school excluded films on the teaching of "family values" from a Christian perspective because the films "no doubt dealt with a subject otherwise permissible" under the rule, which allowed use of the forum for "social, civic or recreational use"); *Rosenberger*, 515 U.S. at 820, 831 (holding that a school's refusal to provide funding to a student publication was viewpoint discriminatory when the University "d[id] not exclude religion as a subject matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints"); *Good News Club*, 533 U.S. at 108-10 (invalidating an elementary school's prohibition on a Christian organization that sought to teach morality through "live storytelling and prayer," where the school had opened its forum for "events pertaining to the welfare of the community," including the teaching of "morals and character development." (internal citations omitted)).

Here, the State has excluded a subset of candidates from expressing their party preference even though the expression of party preference clearly falls within

the scope of speech permitted in the forum, and the forum was created for candidates.

Defendants assert, and the district court concluded, that the restrictions are viewpoint neutral because they are predicated on whether the political party a candidate prefers has attained sufficient purportedly neutral and objective indicia of support to warrant ballot access. (ER14, 171, 190-91, 217-18.) That analysis is foreclosed by *Reed*, which holds that a statute that discriminates "on its face is subject to strict scrutiny regardless of the government's benign motive, content [or viewpoint]-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." 135 S. Ct. at 2228 (citation omitted). Because the Statutes discriminate on their face, it does not matter that the justification for the discrimination is the candidate's preference for a political party that failed to meet ostensibly objective criteria. And even articulated in this way, the State would still plainly provide differing levels of access to the ballot based on the candidate's viewpoint.

While the government may have an interest in restricting a candidate's access to the ballot based on a showing of popular support, it has no constitutionally permissible interest in then restricting which of those candidates who have qualified to appear on the ballot may express their party affiliation. Although it may have served a compelling interest in protecting ballot integrity to

require a showing of popular support for a political party before operating the *party's* primary, that interest "no longer obtain[s]" in the current voter-nominated system. *Chamness*, 722 F.3d at 1118 n.5. As this Court explained in *Chamness*, unlike the former system "in which only one endorsed candidate per party could appear on the final ballot . . . . Under the current system, . . . political parties do not choose candidates; the state does not run separate primaries for various parties; and multiple candidates can state that they prefer the same party." *Id.*

*Arkansas Education Television Commission v. Forbes*, 523 U.S. 666 (1998), is not to the contrary as Intervenor-Defendant CADOP argued below. (ER309.) *Forbes* merely holds that a candidate for office could be denied access to a debate held on public television based on the candidate's failure to demonstrate a sufficient showing of support. Here, by contrast, the State already restricts which *candidates* have demonstrated sufficient support to appear on the ballot—by requiring a certain number of signatures from electors. Prohibiting candidates like Plaintiff, who already qualify for ballot access, from sharing their political party preference in the space dedicated to it is tantamount to allowing Forbes onto the debate stage, but muting his mic or, more accurately, requiring him to lie when the moderator asks about his campaign platform or political ideology.

Contrary to Defendants' assertion and the district court's conclusion, the *Chamness* Court did not find these statutes to be viewpoint-neutral. (ER13-14, 190.)

The *Chamness* Court merely found that the specific term "No Party Preference," as applied to candidates who truly did not prefer *any* political party, was viewpoint neutral because "The restriction does not allow any candidates to term themselves 'Independents.'" 722 F.3d at 1118. By contrast, Plaintiff here challenges the Statutes on the basis that *some* candidates are allowed to list a party preference, while others are denied the same right because of their views.

In addition, Defendants' and the district court's reliance on *Rubin v. City of Santa Monica*, (ER13, 191), is misplaced, as in *Rubin* this Court actually indicated that restrictions such as these are viewpoint discriminatory. In *Rubin*, the Court considered a regulation that prohibited candidates from using "status designations," such as "activist," to describe themselves on the ballot. 308 F.3d 1008, 1015 (9th Cir. 2002). The Court held the restriction to be "viewpoint neutral" because the prohibition applied to "peace activists" and "defense activists," as well as "Right to Life" and "Pro-Choice Activists" alike. *Id*. In doing so, however, the court differentiated the case from *Rosen v. Brown*, "in which the Sixth Circuit held that prohibiting the designation 'Independent' was unconstitutional *where the regulations allowed for other political party designations*." *Id*. (emphasis added). The Statutes at issue here do practically the same thing by allowing for the designation of some political party designations, but not others.

That the Statutes discriminate against all candidates who prefer non-qualified political parties in the same way does not impact the viewpoint discrimination analysis as Defendants argued and the district court concluded. (ER10-11, 14, 191.) As the *Rosenberger* Court stated, "The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar . . . . The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong." 515 U.S. at 831-32.

### C. The Challenged Provisions Do Not Satisfy Either Strict Scrutiny or the *Anderson* Balancing Test

Even in a limited or nonpublic forum, speech restrictions that discriminate on the basis of viewpoint are subject to strict scrutiny. *See, e.g.*, *Lamb's Chapel*, 508 U.S. at 394-95; *Good News Club*, 533 U.S. at 131. Moreover, regardless of whether the Court uses a public forum analysis or the *Anderson* test, viewpoint discrimination severely burdens First Amendment rights and is, therefore, subject to strict scrutiny. *See, e.g.*, *Rubin*, 308 F.3d at 1015 (applying *Anderson* balancing test and first analyzing whether the restrictions were viewpoint discriminatory in assessing the burden on plaintiff's speech).

### D. Dismissal of the Viewpoint Discrimination Claim Is Inappropriate on a Motion to Dismiss

Even if this Court decides that the Statutes are viewpoint neutral on their

face, dismissal of the cause of action is inappropriate because discovery may reveal evidence that the Statutes were merely "a facade for viewpoint-based discrimination." *Cornelius*, 473 U.S. at 811. Restrictions on speech such as the challenged Statutes present a significant danger that hostility to viewpoint is the underlying motive for enacting them; the State may, for example, seek to suppress the views of candidates who prefer non-qualified parties because, on the whole, they are more radical or simply because they are unpopular.

Although the Supreme Court in *Cornelius* held the challenged regulations to be reasonable and facially neutral, it remanded the case to the lower court for a determination of whether viewpoint discrimination was actually afoot. 473 U.S. at 811-13 ("The existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination."). On remand, plaintiffs propounded discovery aimed at ascertaining the "underlying motive" for the restrictions, and the court denied defendant's motion to dismiss and granted a preliminary injunction. *NAACP Legal Def. & Educ. Fund v. Horner*, 636 F. Supp. 762, 764 (D.D.C. 1986) (vacated as moot by *NAACP Legal Def. & Educ. Fund v. Horner*, 1986 U.S. App. LEXIS 29480 (D.C. Cir. 1986).

In addition, even if this Court concludes the restrictions are viewpoint neutral, Plaintiff argues that the restrictions are not reasonable in light of the

purpose served by the forum. (ER86 ¶ 48.) Discovery would allow Plaintiff to probe the reasonableness of the challenged Statutes given the significant change to the State's electoral system effected by Proposition 14.

## CONCLUSION

This Court should reverse the district court's dismissal of all three causes of action and remand to the district court for further proceedings.

Dated: January 4, 2017

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)**

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief has been prepared in a proportionally spaced typeface of 14 points and contains 13,263 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Dated: January 4, 2017

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## STATEMENT OF RELATED CASES

(CIRCUIT RULE 28-2.6)

Counsel for Emidio Soltysik states that no other cases in this Court are related.

# ADDENDUM

# ADDENDUM
# NINTH CIRCUIT APPELLATE RULE 28-2.7

West's Annotated California Codes
Elections Code (Refs & Annos)
Division 0.5. Preliminary Provisions (Refs & Annos)
Chapter 4. Definitions

West's Ann.Cal.Elec.Code § 359.5

§ 359.5. Voter-nominated office

Effective: February 10, 2012
Currentness

(a) "Voter-nominated office" means a congressional or state elective office for which a candidate may choose to have his or her party preference or lack of party preference indicated upon the ballot. A political party or party central committee shall not nominate a candidate at a state-conducted primary election for a voter-nominated office. The primary conducted for a voter-nominated office does not serve to determine the nominees of a political party but serves to winnow the candidates for the general election to the candidates receiving the highest or second highest number of votes cast at the primary election. The following offices are voter-nominated offices:

(1) Governor.

(2) Lieutenant Governor.

(3) Secretary of State.

(4) Controller.

(5) Treasurer.

(6) Attorney General.

(7) Insurance Commissioner.

(8) Member of the State Board of Equalization.

(9) United States Senator.

(10) Member of the United States House of Representatives.

  

(11) State Senator.

(12) Member of the Assembly.

(b) This section does not prohibit a political party or party central committee from endorsing, supporting, or opposing a candidate for an office listed in subdivision (a).

**Credits**

(Added by Stats.2009, c. 1 (S.B.6), § 7, operative Jan. 1, 2011. Amended by Stats.2012, c. 3 (A.B.1413), § 4, eff. Feb. 10, 2012.)

Notes of Decisions (6)

West's Ann. Cal. Elec. Code § 359.5, CA ELEC § 359.5
Current with all 2016 Reg.Sess. laws, Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

**End of Document**

West's Annotated California Codes
Elections Code (Refs & Annos)
Division 2. Voters (Refs & Annos)
Chapter 2. Registration (Refs & Annos)
Article 4. Forms (Refs & Annos)

West's Ann.Cal.Elec.Code § 2150

§ 2150. Affidavit of registration; contents

Effective: January 1, 2016 to December 31, 2016
Currentness

<Section prior to amendment by Stats.2014, c. 619 (S.B.113), § 3, operative contingent upon certification that California has a statewide voter registration database compliant with the Help America Vote Act of 2002, 42 U.S.C.A. § 15301 et seq. See, also, section as amended by Stats.2014, c. 619 (S.B.113), § 3.>

(a) The affidavit of registration shall show:

(1) The facts necessary to establish the affiant as an elector.

(2) The affiant's name at length, including his or her given name, and a middle name or initial, or if the initial of the given name is customarily used, then the initial and middle name. The affiant's given name may be preceded, at the affiant's option, by the designation of “Miss,” “Ms.,” “Mrs.,” or “Mr.” A person shall not be denied the right to register because of his or her failure to mark a prefix to the given name and shall be so advised on the voter registration card. This subdivision shall not be construed as requiring the printing of prefixes on an affidavit of registration.

(3) The affiant's place of residence, residence telephone number, if furnished, and email address, if furnished. A person shall not be denied the right to register because of his or her failure to furnish a telephone number or email address, and shall be so advised on the voter registration card.

(4) The affiant's mailing address, if different from the place of residence.

(5) The affiant's date of birth to establish that he or she will be at least 18 years of age on or before the date of the next election.

(6) The state or country of the affiant's birth.

(7)(A) In the case of an affiant who has been issued a current and valid driver's license, the affiant's driver's license number.

  

(B) In the case of any other affiant, other than an affiant to whom subparagraph (C) applies, the last four digits of the affiant's social security number.

(C) If a voter registration affiant has not been issued a current and valid driver's license or a social security number, the state shall assign the applicant a number that will serve to identify the affiant for voter registration purposes. If the state has a computerized list in effect under this paragraph and the list assigns unique identifying numbers to registrants, the number assigned under this subparagraph shall be the unique identifying number assigned under the list.

(8) The affiant's political party preference.

(9) That the affiant is currently not imprisoned or on parole for the conviction of a felony.

(10) A prior registration portion indicating if the affiant has been registered at another address, under another name, or as preferring another party. If the affiant has been so registered, he or she shall give an additional statement giving that address, name, or party.

(b) The affiant shall certify the content of the affidavit of registration as to its truthfulness and correctness, under penalty of perjury, with the signature of his or her name and the date of signing. If the affiant is unable to write, he or she shall sign with a mark or cross. An affiant who is an individual with a disability may complete the affidavit with reasonable accommodations as needed.

(c) The affidavit of registration shall also contain a space that would enable the affiant to state his or her ethnicity or race, or both. An affiant may not be denied the ability to register because he or she declines to state his or her ethnicity or race.

(d) If a person assists the affiant in completing the affidavit of registration, that person shall sign and date the affidavit below the signature of the affiant.

(e) The affidavit of registration shall also contain a space to permit the affiant to apply for permanent vote by mail status.

(f) The Secretary of State may continue to supply existing affidavits of registration to county elections officials before printing new or revised forms that reflect the changes made to this section by Chapter 508 of the Statutes of 2007.

**Credits**

(Stats.1994, c. 920 (S.B.1547), § 2. Amended by Stats.1995, c. 912 (S.B.581), § 1, eff. Oct. 16, 1995; Stats.1995, c. 913 (A.B.1701), § 1, eff. Oct. 16, 1995; Stats.1999, c. 312 (S.B.1208), § 3; Stats.2000, c. 89 (A.B.2214), § 1; Stats.2003, c. 385 (A.B.587), § 1; Stats.2005, c. 726 (S.B.1016), § 1; Stats.2007, c. 508 (A.B.1243), § 4; Stats.2009, c. 1 (S.B.6), § 8, operative Jan. 1, 2011; Stats.2015, c. 728 (A.B.1020), § 27, eff. Jan. 1, 2016; Stats.2015, c. 736 (S.B.589), § 4.5, eff. Jan. 1, 2016.)

  

**Editors' Notes**

**OPERATIVE EFFECT**

<For operative effect of Stats.2009, c. 1 (S.B.6), see § 67 of that Act.>

Notes of Decisions (22)

West's Ann. Cal. Elec. Code § 2150, CA ELEC § 2150
Current with all 2016 Reg.Sess. laws, Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

**End of Document**

West's Annotated California Codes
Elections Code (Refs & Annos)
Division 5. Political Party Qualifications (Refs & Annos)
Chapter 2. Parties Qualified to Participate in the Primary Election (Refs & Annos)

West's Ann.Cal.Elec.Code § 5100

§ 5100. Qualified parties

Effective: June 27, 2016
Currentness

A party is qualified to participate in a primary election under any of the following conditions:

(a)(1) At the last preceding gubernatorial primary election, the sum of the votes cast for all of the candidates for an office voted on throughout the state who disclosed a preference for that party on the ballot was at least 2 percent of the entire vote of the state for that office.

(2) Notwithstanding paragraph (1), a party may inform the Secretary of State that it declines to have the votes cast for a candidate who has disclosed that party as his or her party preference on the ballot counted toward the 2-percent qualification threshold. If the party wishes to have votes for a candidate not counted in support of its qualification under paragraph (1), the party shall notify the secretary in writing of that candidate's name by the seventh day before the gubernatorial primary election.

(b)(1) On or before the 135th day before a primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their declared political preference transmitted to him or her by the county elections officials, that voters equal in number to at least 0.33 percent of the total number of voters registered on the 154th day before the primary election have declared their preference for that party.

(2) A person whose party preference is designated as "Unknown" pursuant to Section 2154 or 2265 shall not be counted for purposes of determining the total number of voters registered on the specified day preceding the election under paragraph (1).

(c) On or before the 135th day before a primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the state at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have participate in that primary election. This petition shall be circulated, signed, and verified, and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county elections officials substantially as provided for initiative petitions. Each page of the petition shall bear a caption in 18-point boldface type, which caption shall be the name of the proposed party followed by the words "Petition to participate in the primary election."

  

**Credits**

(Stats.1994, c. 920 (S.B.1547), § 2. Amended by Stats.1996, c. 724 (A.B.1700), § 5; Stats.2014, c. 903 (A.B.2351), § 1, eff. Jan. 1, 2015; Stats.2016, c. 32 (S.B.837), § 56, eff. June 27, 2016.)

Notes of Decisions (24)

West's Ann. Cal. Elec. Code § 5100, CA ELEC § 5100
Current with all 2016 Reg.Sess. laws, Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

**End of Document**

West's Annotated California Codes
Elections Code (Refs & Annos)
Division 8. Nominations (Refs & Annos)
Part 1. Primary Election Nominations (Refs & Annos)
Chapter 1. Direct Primary (Refs & Annos)
Article 1. General Provisions (Refs & Annos)

West's Ann.Cal.Elec.Code § 8002.5

§ 8002.5. Candidates for voter-nominated office; indication of party preference

Effective: February 10, 2012
Currentness

(a) A candidate for a voter-nominated office shall indicate one of the following upon his or her declaration of candidacy, which shall be consistent with what appears on the candidate's most recent affidavit of registration:

(1) "Party Preference: _____ (insert the name of the qualified political party as disclosed upon your affidavit of registration)."

(2) "Party Preference: None (if you have declined to disclose a preference for a qualified political party upon your affidavit of registration)."

(b) The selection made by a candidate pursuant to subdivision (a) shall appear on the primary and general election ballot in conjunction with his or her name, and shall not be changed between the primary and general election.

(c) Regardless of the party preference, or lack of party preference, of the candidate or the voter, any qualified voter may vote for any candidate for a voter-nominated office if the voter is otherwise entitled to vote for candidates for the office to be filled. Nothing in Section 2151, 3006, 3007.5, 3205, or 13102 shall be construed to limit the ability of a voter to cast a primary election ballot for any candidate for a voter- nominated office, regardless of the party preference, or lack of party preference, designated by the candidate for inclusion upon the ballot pursuant to this section, provided that the voter is otherwise qualified to cast a ballot for the office at issue.

(d) A candidate designating a party preference pursuant to subdivision (a) shall not be deemed to be the official nominee of the party designated as preferred by the candidate. A candidate's designation of party preference shall not be construed as an endorsement of that candidate by the party designated. The party preference designated by the candidate is shown for the information of the voters only and may in no way limit the options available to voters.

(e) All references to party preference or affiliation shall be omitted from all forms required to be filed by a voter-nominated candidate pursuant to this division in the same manner that such references are omitted from forms required to be filed by nonpartisan candidates pursuant to Section 8002, except that the declaration of candidacy required by Section 8040 shall include space for the candidate to list the party preference disclosed upon the candidate's most recent affidavit of registration, in accordance with subdivision (a).

  

**Credits**

(Added by Stats.2009, c. 1 (S.B.6), § 17, operative Jan. 1, 2011. Amended by Stats.2011, c. 296 (A.B.1023), § 84; Stats.2012, c. 3 (A.B.1413), § 12, eff. Feb. 10, 2012.)

Notes of Decisions (1)

West's Ann. Cal. Elec. Code § 8002.5, CA ELEC § 8002.5
Current with all 2016 Reg.Sess. laws, Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

**End of Document**

West's Annotated California Codes
Elections Code (Refs & Annos)
Division 8. Nominations (Refs & Annos)
Part 1. Primary Election Nominations (Refs & Annos)
Chapter 1. Direct Primary (Refs & Annos)
Article 1. General Provisions (Refs & Annos)

This section has been updated. Click here for the updated version.

West's Ann.Cal.Elec.Code § 8002.5

§ 8002.5. Candidates for voter-nominated office; indication of party preference

Effective: January 1, 2011 to December 31, 2011

(a) A candidate for a voter-nominated office may indicate his or her party preference, or lack of party preference, as disclosed upon the candidate's most recent statement of registration, upon his or her declaration of candidacy. If a candidate indicates his or her party preference on his or her declaration of candidacy, it shall appear on the primary and general election ballot in conjunction with his or her name. The candidate's designated party preference on the ballot shall not be changed between the primary and general election. 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.

(b) Regardless of the disclosed party preference of the candidate or the voter, any qualified voter may vote for any candidate for a voter-nominated office if the voter is otherwise entitled to vote for candidates for the office to be filled. Nothing in Section 2151, 3006, 3007.5, 3205, or 3102 shall be construed to limit the ability of a voter to cast a primary election ballot for any candidate for a voter-nominated office, regardless of the party preference, or lack of party preference, designated by the candidate for inclusion upon the ballot pursuant to this section, provided that the voter is otherwise qualified to cast a ballot for the office at issue.

(c) A candidate designating a party preference pursuant to subdivision (a) shall not be deemed to be the official nominee of the party designated as preferred by the candidate. A candidate's designation of party preference shall not be construed as an endorsement of that candidate by the party designated. The party preference designated by the candidate is shown for the information of the voters only and may in no way limit the options available to voters.

(d) All references to party preference or affiliation shall be omitted from all forms required to be filed by a voter-nominated candidate pursuant to this division in the same manner that such references are omitted from forms required to be filed by nonpartisan candidates pursuant to Section 8002, except that the declaration of candidacy required by Section 8040 shall include space for the candidate to list the party preference disclosed upon the candidate's most recent affidavit of registration, in accordance with subsection (a).

**Credits**
(Added by Stats.2009, c. 1 (S.B.6), § 17, operative Jan. 1, 2011.)

  

**Editors' Notes**

**OPERATIVE EFFECT**

<For operative effect of Stats.2009, c. 1 (S.B.6), see § 67 of that Act.>

West's Ann. Cal. Elec. Code § 8002.5, CA ELEC § 8002.5
Current with all 2016 Reg.Sess. laws, Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

**End of Document**

West's Annotated California Codes
Elections Code (Refs & Annos)
Division 8. Nominations (Refs & Annos)
Part 1. Primary Election Nominations (Refs & Annos)
Chapter 1. Direct Primary (Refs & Annos)
Article 1. General Provisions (Refs & Annos)

This section has been updated. Click here for the updated version.

West's Ann.Cal.Elec.Code § 8002.5

§ 8002.5. Candidates for voter-nominated office; indication of party preference

Effective: January 1, 2012 to February 9, 2012

(a) A candidate for a voter-nominated office may indicate his or her party preference, or lack of party preference, as disclosed upon the candidate's most recent statement of registration, upon his or her declaration of candidacy. If a candidate indicates his or her party preference on his or her declaration of candidacy, it shall appear on the primary and general election ballot in conjunction with his or her name. The candidate's designated party preference on the ballot shall not be changed between the primary and general election. 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.

(b) Regardless of the disclosed party preference of the candidate or the voter, any qualified voter may vote for any candidate for a voter-nominated office if the voter is otherwise entitled to vote for candidates for the office to be filled. Nothing in Section 2151, 3006, 3007.5, 3205, or 13102 shall be construed to limit the ability of a voter to cast a primary election ballot for any candidate for a voter-nominated office, regardless of the party preference, or lack of party preference, designated by the candidate for inclusion upon the ballot pursuant to this section, provided that the voter is otherwise qualified to cast a ballot for the office at issue.

(c) A candidate designating a party preference pursuant to subdivision (a) shall not be deemed to be the official nominee of the party designated as preferred by the candidate. A candidate's designation of party preference shall not be construed as an endorsement of that candidate by the party designated. The party preference designated by the candidate is shown for the information of the voters only and may in no way limit the options available to voters.

(d) All references to party preference or affiliation shall be omitted from all forms required to be filed by a voter-nominated candidate pursuant to this division in the same manner that such references are omitted from forms required to be filed by nonpartisan candidates pursuant to Section 8002, except that the declaration of candidacy required by Section 8040 shall include space for the candidate to list the party preference disclosed upon the candidate's most recent affidavit of registration, in accordance with subdivision (a).

**Credits**
(Added by Stats.2009, c. 1 (S.B.6), § 17, operative Jan. 1, 2011. Amended by Stats.2011, c. 296 (A.B.1023), § 84.)

West's Ann. Cal. Elec. Code § 8002.5, CA ELEC § 8002.5
Current with all 2016 Reg.Sess. laws, Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

  

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Chapter 1. Direct Primary (Refs & Annos)
Article 2. Nomination Documents (Refs & Annos)

West's Ann.Cal.Elec.Code § 8020

§ 8020. Nomination documents required

Effective: January 1, 2013
Currentness

(a) No candidate's name shall be printed on the ballot to be used at the direct primary unless the following nomination documents are delivered for filing to the county elections official:

(1) Declaration of candidacy pursuant to Section 8040.

(2) Nomination papers signed by signers pursuant to Section 8041.

(b) The forms shall first be available on the 113th day prior to the direct primary election, or on the 158th day prior to the primary election for a candidate for membership on a county central committee, and shall be delivered not later than 5 p.m. on the 88th day prior to the primary election. The forms may be delivered to the county elections official by a person other than the candidate.

(c) Upon the receipt of an executed nomination document, the county elections official shall give the person delivering the document a receipt, properly dated, indicating that the document was delivered to the county elections official.

(d) Notwithstanding Section 8028, upon request of a candidate, the county elections official shall provide the candidate with a declaration of candidacy. The county elections official shall not require a candidate to sign, file, or sign and file, a declaration of candidacy as a condition of receiving nomination papers.

**Credits**
(Formerly § 6490, added by Stats.1976, c. 1191, § 61. Amended by Stats.1978, c. 616, p. 2067, § 2; Stats.1986, c. 1447, § 1; Stats.1987, c. 993, § 6; Stats.1993, c. 1189 (S.B.165), § 3, eff. 0ct. 11, 1993; Stats.1994, c. 9 (S.B.843), § 3, eff. Feb. 23, 1994. Renumbered § 8020 and amended by Stats.1996, c. 1143 (S.B.1200), § 44, eff. Sept. 30, 1996. Amended by Stats.2004, c. 98 (A.B.2091), § 1. Amended by Stats.2012, c. 507 (S.B.1272), § 35.)

Notes of Decisions (16)

West's Ann. Cal. Elec. Code § 8020, CA ELEC § 8020

  

Current with all 2016 Reg.Sess. laws, Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

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Elections Code (Refs & Annos)
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Part 1. Primary Election Nominations (Refs & Annos)
Chapter 1. Direct Primary (Refs & Annos)
Article 3. Form of Nomination Documents (Refs & Annos)

West's Ann.Cal.Elec.Code § 8040

§ 8040. Declaration of candidacy

Effective: January 1, 2015
Currentness

(a) The declaration of candidacy by a candidate shall be substantially as follows:

DECLARATION OF CANDIDACY

I hereby declare myself a candidate for nomination to the office of _____ District Number _____ to be voted for at the primary election to be held _____, 20_____, and declare the following to be true:

My name is .....

I want my name and occupational designation to appear on the ballot as follows: .....

Addresses:

Residence .....

.....

Business .....

.....

Mailing .....

.....

Telephone numbers: Day _____ Evening _____

Web site: _____

I meet the statutory and constitutional qualifications for this office (including, but not limited to, citizenship, residency, and party preference, if required).

I am at present an incumbent of the following public office

(if any) _____.

If nominated, I will accept the nomination and not withdraw.

  

.....

Signature of candidate

A candidate for voter-nominated office shall also complete all of the following:

(1) I hereby certify that:

(a) At the time of presentation of this declaration, as shown by my current affidavit of registration, I have disclosed the following political party preference, if any: .....

(b) My complete voter registration and party affiliation/preference history, from [10 years prior to current year] through the date of signing this document, is as follows:

| Party Registration | County | Timeframe (by year) |
|---|---|---|
| ..... | ..... | ..... |
| ..... | ..... | ..... |
| ..... | ..... | ..... |

(2) Pursuant to Section 8002.5 of the Elections Code, select one of the following:

_____Party Preference: _____ (insert the name of the qualified political party as disclosed upon your affidavit of registration).

_____Party Preference: None (if you have declined to disclose a preference for a qualified political party upon your affidavit of registration).

Dated this _____ day of _____, 20_____.

_____

Signature of candidate

State of California )

County of ..... ) ss.

)

Subscribed and sworn to before me this _____ day of _____, 20_____.

.....

Notary Public (or other official)

Examined and certified by me this _____ day of _____, 20_____.

.....

County Elections Official

WARNING: Every person acting on behalf of a candidate is guilty of a misdemeanor who deliberately fails to file at the proper time and in the proper place any declaration of candidacy in his or her possession which is entitled to be filed under the provisions of the Elections Code Section 18202.

(b) At the discretion of the elections official,a [1] candidate for a judicial office, or a candidate for any office whose voter registration information is confidential under Section 2166, 2166.5, or 2166.7, may withhold his or her residence address from the declaration of candidacy. If a candidate does not state his or her residence address on the declaration of candidacy, the elections official shall verify whether the candidate's address is within the appropriate political subdivision and add the notation “verified” where appropriate on the declaration.

**Credits**

(Stats.1994, c. 920 (S.B.1547), § 2; Stats.1994, c. 503 (A.B.2217), § 2. Amended by Stats.1998, c. 932 (A.B.1094), § 29; Stats.2000, c. 135 (A.B.2539), § 55; Stats.2001, c. 159 (S.B.662), § 87; Stats.2002, c. 221 (S.B.1019), § 17; Stats.2003, c. 277 (A.B.277), § 4; Stats.2012, c. 3 (A.B.1413), § 14, eff. Feb. 10, 2012; Stats.2014, c. 130 (A.B.1768), § 1, eff. Jan. 1, 2015.)

Notes of Decisions (13)

Footnotes

1 So in chaptered copy.

West's Ann. Cal. Elec. Code § 8040, CA ELEC § 8040

Current with all 2016 Reg.Sess. laws, Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

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Chapter 1. Direct Primary (Refs & Annos)
Article 8. Nominated Candidates (Refs & Annos)

West's Ann.Cal.Elec.Code § 8141.5

§ 8141.5. Voter-nominated office; candidates at ensuing election

Effective: February 10, 2012
Currentness

Except as provided in subdivision (b) of Section 8142, only the candidates for a voter-nominated office who receive the highest or second highest number of votes cast at the primary election shall appear on the ballot as candidates for that office at the ensuing general election. More than one candidate with the same party preference designation may participate in the general election pursuant to this subdivision. Notwithstanding the designation made by the candidate pursuant to Section 8002.5, no candidate for a voter-nominated office shall be deemed to be the official nominee for that office of any political party, and no party is entitled to have a candidate with its party preference designation participate in the general election unless that candidate is one of the candidates receiving the highest or second highest number of votes cast at the primary election.

**Credits**
(Added by Stats.2009, c. 1 (S.B.6), § 27, operative Jan. 1, 2011. Amended by Stats.2012, c. 3 (A.B.1413), § 21, eff. Feb. 10, 2012.)

Notes of Decisions (7)

West's Ann. Cal. Elec. Code § 8141.5, CA ELEC § 8141.5
Current with all 2016 Reg.Sess. laws, Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

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West's Annotated California Codes
Elections Code (Refs & Annos)
Division 13. Ballots, Sample Ballots, and Voter Pamphlets (Refs & Annos)
Chapter 2. Forms of Ballots: Ballot Order (Refs & Annos)

West's Ann.Cal.Elec.Code § 13105

# § 13105. Voter-nominated offices; political party preference designation; independent candidates for President or Vice President of the United States

Effective: February 10, 2012
Currentness

(a) In the case of a candidate for a voter-nominated office in a primary election, a general election, or a special election to fill a vacancy in the office of United States Senator, Member of the United States House of Representatives, State Senator, or Member of the Assembly, immediately to the right of and on the same line as the name of the candidate, or immediately below the name if there is not sufficient space to the right of the name, there shall be identified, as specified by the Secretary of State, the designation made by the candidate pursuant to Section 8002.5. The identification shall be in substantially the following form:

(1) In the case of a candidate who designated a political party preference pursuant to Section 8002.5, "Party Preference: _____."

(2) In the case of a candidate who did not state a preference for a political party pursuant to Section 8002.5, "Party Preference: None."

(b) In the case of candidates for President and Vice President, the name of the party shall appear to the right of and equidistant from the pair of names of these candidates and on the same line as the name of the candidate for President, or immediately below the name of the vice presidential candidate if there is not sufficient space to the right of the name.

(c) If for a general election any candidate for President of the United States or Vice President of the United States has received the nomination of any additional party or parties, the name(s) shall be printed to the right of the name of the candidate's own party. Party names of a candidate shall be separated by commas. If a candidate has qualified for the ballot by virtue of an independent nomination, the word "Independent" shall be printed instead of the name of a political party in accordance with the above rules.

**Credits**
(Stats.1994, c. 920 (S.B.1547), § 2. Amended by Stats.2009, c. 1 (S.B.6), § 46, operative Jan. 1, 2011; Stats.2012, c. 3 (A.B.1413), § 35, eff. Feb. 10, 2012.)

Notes of Decisions (12)

West's Ann. Cal. Elec. Code § 13105, CA ELEC § 13105

  

Current with all 2016 Reg.Sess. laws, Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

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California LEGISLATIVE INFORMATION

**SB-6 Elections: primaries.** (2009-2010)

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Date Published:

# Senate Bill No. 6

## CHAPTER 1

An act to amend Sections 13, 334, 337, 2150, 2151, 2152, 2154, 8025, 8062, 8068, 8081, 8121, 8124, 8142, 8148, 8150, 8300, 8550, 8600, 8605, 8805, 8807, 10705, 10706, 12108, 13102, 13105, 13110, 13206, 13207, 13208, 13230, 13300, 13302, 13305, 15451, 15452, 15670, 15671, 19300, and 19301 of, to amend Part 1 of Division 7 of, to add Sections 300.5, 325, 332.5, 338.5, 359.5, 8002.5, 8005, 8141.5, 8606, 9083.5, 9084.5, 13109.5, and 14105.1 to, to add Chapter 0.5 (commencing with Section 6000) to Part 1 of Division 6 of, to amend and renumber Section 6000 of, to repeal and add Section 8125 of, to repeal Sections 8802 and 8806 of, the Elections Code, and to amend Section 88001 of the Government Code, relating to elections.

[ Approved by Governor February 20, 2009. Filed with Secretary of State February 20, 2009. ]

## LEGISLATIVE COUNSEL'S DIGEST

SB 6, Maldonado. Elections: primaries.

Existing provisions of the California Constitution require the Legislature to provide for primary elections for partisan offices, including an open presidential primary election, as specified. The California Constitution also provides that all judicial, school, county, and city offices are nonpartisan offices, and a political party or party central committee is prohibited from endorsing, supporting, or opposing a candidate for these offices.

This measure would permit a voter, at the time of registration, to choose whether or not to disclose a party preference. This measure would also provide that a voter may vote for the candidate of his or her choosing in the primary election, regardless of his or her disclosure or non-disclosure of party preference.

This measure would provide for a "voter-nominated primary election" for each state elective office and congressional office in California, in which a voter may vote at the primary election for any candidate for congressional or state elective office without regard to the political party preference disclosed by either the candidate or the voter. The 2 candidates receiving the 2 highest vote totals for each office at a primary election, regardless of party preference, would then compete for the office at the ensuing general election.

The measure would further provide that a candidate for a congressional or state elective office generally may choose whether to have his or her political party preference indicated upon the ballot for that office in the manner to be provided by statute.

This measure would not change existing law as it relates to presidential primaries.

Because this bill would change the duties of local elections officials, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

This bill would provide that it would become operative only if SCA 4 is approved by the voters.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

**SECTION 1.** Section 13 of the Elections Code is amended to read:

**13.** (a) No person shall be considered a legally qualified candidate for any office, for party nomination for a partisan office, or for nomination to participate in the general election for any voter-nominated office, under the laws of this state unless that person has filed a declaration of candidacy or statement of write-in candidacy with the proper official for the particular election or primary, or is entitled to have his or her name placed on a general election ballot by reason of having been nominated at a primary election, or having been selected to fill a vacancy on the general election ballot as provided in Section 8806, or having been selected as an independent candidate pursuant to Section 8304.

(b) Nothing 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 or 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. However, nothing in this section shall be construed as an exception to the requirements of Section 15341.

(c) It is the intent of the Legislature, in enacting this section, to enable the Federal Communications Commission to determine who is a "legally qualified candidate" in this state for the purposes of administering Section 315 of Title 47 of the United States Code.

**SEC. 2.** Section 300.5 is added to the Elections Code, to read:

**300.5.** "Affiliated with a political party" as used in reference to a voter or to a candidate for a voter-nominated office means the party preference that the voter or candidate has disclosed on his or her affidavit of registration.

**SEC. 3.** Section 325 is added to the Elections Code, to read:

**325.** "Independent status" means a voter's indication of "No Party Preference" as provided in Section 2151 and Section 2154.

**SEC. 4.** Section 332.5 is added to the Elections Code, to read:

**332.5.** "Nominate" means the selection, at a state-conducted primary election, of candidates who are entitled by law to participate in the general election for that office, but does not mean any other lawful mechanism that a political party may adopt for the purposes of choosing the candidate who is preferred by the party for a nonpartisan or voter nominated office.

**SEC. 5.** Section 334 of the Elections Code is amended to read:

**334.** "Nonpartisan office" means an office, except for a voter-nominated office, for which no party may nominate a candidate. Judicial, school, county, and municipal offices are nonpartisan offices.

**SEC. 6.** Section 337 of the Elections Code is amended to read:

**337.** "Partisan office" or "party nominated office" means any of the following offices:

(a) President of the United States, Vice President of the United States, and the delegates therefor.

(b) Elected member of a party committee.

**SEC. 7.** Section 359.5 is added to the Elections Code, to read:

**359.5.** (a) "Voter-nominated office" means a congressional or state elective office for which any candidate may choose to have his or her party preference or lack of party preference indicated upon the ballot. A political party

or party central committee shall not nominate a candidate at a state-conducted primary election for a voter-nominated office. The primary conducted for a voter-nominated office does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election. The following offices are voter-nominated offices:

(1) Governor.

(2) Lieutenant Governor.

(3) Secretary of State.

(4) State Treasurer.

(5) Controller.

(6) State Insurance Commissioner.

(7) Member of the Board of Equalization.

(8) Attorney General.

(9) State Senator.

(10) Member of the Assembly.

(11) United States Senator.

(12) Member of the United States House of Representatives.

(b) This section does not prohibit a political party or party central committee from endorsing, supporting, or opposing a candidate for a candidate listed in subdivision (a).

**SEC. 8.** Section 2150 of the Elections Code is amended to read:

**2150.** (a) The affidavit of registration shall show:

(1) The facts necessary to establish the affiant as an elector.

(2) The affiant's name at length, including his or her given name, and a middle name or initial, or if the initial of the given name is customarily used, then the initial and middle name. The affiant's given name may be preceded, at affiant's option, by the designation of Miss, Ms., Mrs., or Mr. A person shall not be denied the right to register because of his or her failure to mark a prefix to the given name and shall be so advised on the voter registration card. This subdivision shall not be construed as requiring the printing of prefixes on an affidavit of registration.

(3) The affiant's place of residence, residence telephone number, if furnished, and e-mail address, if furnished. No person shall be denied the right to register because of his or her failure to furnish a telephone number or e-mail address, and shall be so advised on the voter registration card.

(4) The affiant's mailing address, if different from the place of residence.

(5) The affiant's date of birth to establish that he or she will be at least 18 years of age on or before the date of the next election.

(6) The state or country of the affiant's birth.

(7) (A) In the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number.

(B) In the case of any other applicant, other than an applicant to whom subparagraph (C) applies, the last four digits of the applicant's social security number.

(C) If an applicant for voter registration has not been issued a current and valid driver's license or a social security number, the state shall assign the applicant a number that will serve to identify the applicant for voter registration purposes. To the extent that the state has a computerized list in effect under this subdivision and the list assigns unique identifying numbers to registrants, the number assigned under this subparagraph shall be the unique identifying number assigned under the list.

(8) The affiant's political party preference.

(9) That the affiant is currently not imprisoned or on parole for the conviction of a felony.

(10) A prior registration portion indicating whether the affiant has been registered at another address, under another name, or as preferring another party. If the affiant has been so registered, he or she shall give an additional statement giving that address, name, or party.

(b) The affiant shall certify the content of the affidavit as to its truth and correctness, under penalty of perjury, with the signature of his or her name and the date of signing. If the affiant is unable to write he or she shall sign with a mark or cross.

(c) The affidavit of registration shall also contain a space that would enable the affiant to state his or her ethnicity or race, or both. An affiant may not be denied the ability to register because he or she declines to state his or her ethnicity or race.

(d) If any person, including a deputy registrar, assists the affiant in completing the affidavit, that person shall sign and date the affidavit below the signature of the affiant.

(e) The affidavit of registration shall also contain a space to permit the affiant to apply for permanent vote by mail status.

(f) The Secretary of State may continue to supply existing affidavits of registration to county elections officials prior to printing new or revised forms that reflect the changes made to this section by the act that added this subdivision.

**SEC. 9.** Section 2151 of the Elections Code is amended to read:

**2151.** (a) At the time of registering and of transferring registration, each elector may disclose the name of the political party that he or she prefers. The name of that political party shall be stated in the affidavit of registration and the index.

(b) (1) The voter registration card shall inform the affiant that any elector may decline to state a political party reference, but no person shall be entitled to vote the ballot of any political party at any primary election for President of the United States or for a party committee unless he or she has disclosed the name of the party that he or she prefers or unless he or she has declined to disclose a party preference and the political party, by party rule duly noticed to the Secretary of State, authorizes a person who has declined to disclose a party preference to vote the ballot of that political party. The voter registration card shall further inform the affiant that any registered voter may vote for any candidate at a primary election for state elective office or congressional office, regardless of the disclosed party preference of the registrant or the candidate seeking that office or the refusal of the registrant or candidate to disclose a party preference. This notice shall be printed in 12 point Times New Roman font.

(2) The voter registration card shall include a listing of all qualified political parties. The voter registration card shall include a listing of all qualified political parties. As part of that listing, the voter registration card shall also contain an option designated "No Party Preference." This option shall be placed at the beginning of the listing of qualified political parties.

(c) No person shall be permitted to vote the ballot of any party or for any delegates to the convention of any party other than the party disclosed as preferred in his or her registration, except as provided by Section 2152 or unless he or she has declined to disclose a party preference and the party, by party rule duly noticed to the Secretary of State, authorizes a person who has declined to state a party affiliation to vote the party ballot or for delegates to the party convention.

(d) As of the effective date of the statute that added this subdivision, any voter who previously stated a political party affiliation when registering to vote shall be deemed to have disclosed that same party as his or her a political party preference unless the voter files a new affidavit of registration disclosing a different political party preference or no political party preference. Any voter who previously declined to state a party affiliation shall be deemed to have chosen the "No Party Preference" option unless the voter files a new affidavit of registration disclosing a different political party preference.

**SEC. 10.** Section 2152 of the Elections Code is amended to read:

**2152.** Whenever any voter has declined to disclose or has changed his or her party preference prior to the close of registration for an election, he or she may either so disclose or have a change recorded by executing a new affidavit of registration and completing the prior registration portion of the affidavit.

**SEC. 11.** Section 2154 of the Elections Code is amended to read:

**2154.** In the event that the county elections official receives an affidavit of registration that does not include portions of the information for which space is provided, the county elections official voters shall apply the following rebuttable presumptions:

(a) If no middle name or initial is shown, it shall be presumed that none exists.

(b) If no party preference is shown, it shall be presumed that the affiant has chosen the "No Party Preference" designation.

(c) If no execution date is shown, it shall be presumed that the affidavit was executed on or before the 15th day prior to the election, provided that (1) the affidavit is received by the county elections official on or before the 15th day prior to the election, or (2) the affidavit is postmarked on or before the 15th day prior to the election and received by mail by the county elections official.

(d) If the affiant fails to identify his or her state of birth within the United States, it shall be presumed that the affiant was born in a state or territory of the United States if the birthplace of the affiant is shown as "United States," "U.S.A.," or other recognizable term designating the United States.

**SEC. 12.** Section 6000 of the Elections Code is amended and renumbered to read:

**6000a.** This chapter shall be known and may be cited as the "Alquist Open Presidential Primary Act."

**SEC. 13.** Chapter 0.5 (commencing with Section 6000) is added to Part 1 of Division 6 of the Elections Code, to read:

**CHAPTER 0.5. General Provisions**

**6000.** All references to a voter's or candidate's party "registration" or "affiliation" in this part shall refer to the party preference or lack of party preference disclosed by the voter or candidate in accordance with Sections 2151 and 2152 and subdivision (b) of Section 2154.

**SEC. 14.** The heading of Part 1 (commencing with Section 7000) of Division 7 of the Elections Code is amended to read:

**PART 1. GENERAL PROVISIONS**

**SEC. 15.** Chapter 1 (commencing with Section 7000) of Part 1 of Division 7 of the Elections Code is repealed.

**SEC. 16.** Section 7000 is added to the Elections Code, to read:

**7000.** All references to a voter's or candidate's party "registration" or "affiliation" in this division shall refer to the party preference or lack of party preference disclosed by the voter or candidate in accordance with Sections 2151 and 2152 and subdivision (b) of Section 2154.

**SEC. 17.** Section 8002.5 is added to the Elections Code, to read:

**8002.5.** (a) A candidate for a voter-nominated office may indicate his or her party preference, or lack of party preference, as disclosed upon the candidate's most recent statement of registration, upon his or her declaration of candidacy. If a candidate indicates his or her party preference on his or her declaration of candidacy, it shall appear on the primary and general election ballot in conjunction with his or her name. The candidate's designated party preference on the ballot shall not be changed between the primary and general election. 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.

(b) Regardless of the disclosed party preference of the candidate or the voter, any qualified voter may vote for any candidate for a voter-nominated office if the voter is otherwise entitled to vote for candidates for the office to be filled. Nothing in Section 2151, 3006, 3007.5, 3205, or 3102 shall be construed to limit the ability of a voter to cast a primary election ballot for any candidate for a voter-nominated office, regardless of the party preference, or lack of party preference, designated by the candidate for inclusion upon the ballot pursuant to this section, provided that the voter is otherwise qualified to cast a ballot for the office at issue.

(c) A candidate designating a party preference pursuant to subdivision (a) shall not be deemed to be the official nominee of the party designated as preferred by the candidate. A candidate's designation of party preference

shall not be construed as an endorsement of that candidate by the party designated. The party preference designated by the candidate is shown for the information of the voters only and may in no way limit the options available to voters.

(d) All references to party preference or affiliation shall be omitted from all forms required to be filed by a voter-nominated candidate pursuant to this division in the same manner that such references are omitted from forms required to be filed by nonpartisan candidates pursuant to Section 8002, except that the declaration of candidacy required by Section 8040 shall include space for the candidate to list the party preference disclosed upon the candidate's most recent affidavit of registration, in accordance with subsection (a).

**SEC. 18.** Section 8005 is added to the Elections Code, to read:

**8005.** In addition to satisfying the requirements of Sections 9083.5, 9084.5, and 14105.1, the Secretary of State shall conduct public voter education campaigns, using existing resources, for the purpose of publicly disseminating information regarding the roles of the parties in primary elections for party-nominated offices, voter-nominated offices, and nonpartisan offices.

**SEC. 19.** Section 8025 of the Elections Code is amended to read:

**8025.** If only one candidate has declared a candidacy for a partisan nomination at the direct primary election for a party qualified to participate at that election, or for nomination at the direct primary for a voter-nominated office, and that candidate dies after the last day prescribed for the delivery of nomination documents to the elections official, as provided in Section 8020, but not less than 83 days before the election, any person qualified under the provisions of Section 8001 may circulate and deliver nomination documents for the office to the elections official up to 5 p.m. on the 74th day prior to the election. In that case, the elections official shall, immediately after receipt of those nomination documents, certify and transmit them to the Secretary of State in the manner specified in this article.

**SEC. 20.** Section 8062 of the Elections Code is amended to read:

**8062.** (a) The number of registered voters required to sign a nomination paper for the respective offices are as follows:

(1) State office or United States Senate, not less than 65 nor more than 100.

(2) House of Representatives in Congress, State Senate or Assembly, Board of Equalization, or any office voted for in more than one county, and not statewide, not less than 40 nor more than 60.

(3) Candidacy in a single county or any political subdivision of a county, other than State Senate or Assembly, not less than 20 nor more than 40.

(4) With respect to a candidate for a political party committee, any political party has less than 50 voters in the state or in the county or district in which the election is to be held, one-tenth the number of voters of the party.

(5) When there are less than 150 voters in the county or district in which the election is to be held, not less than 10 nor more than 20.

(b) The provisions of this section are mandatory, not directory, and no nomination paper shall be deemed sufficient that does not comply with this section. However, this subdivision shall not be construed to prohibit withdrawal of signatures pursuant to Section 8067. This subdivision also shall not be construed to prohibit a court from validating a signature which was previously rejected upon showing of proof that the voter whose signature is in question is otherwise qualified to sign the nomination paper.

**SEC. 21.** Section 8068 of the Elections Code is amended to read:

**8068.** Signers shall be voters in the district or political subdivision in which the candidate is to be voted on. With respect to any candidacy for partisan office, signers shall be affiliated registered voters who disclosed a preference, pursuant to Section 2151, for the party, if any, in which the nomination is proposed. Signers need not be registered voters who disclosed a preference for any party when signing candidacy papers for a candidate seeking nomination to a voter-nominated office.

**SEC. 22.** Section 8081 of the Elections Code is amended to read:

**8081.** Before any nomination document is filed in the office of the county elections official or forwarded for filing in the office of the Secretary of State, the county elections official shall verify the signatures and the political preferences, if required, of the signers on the nomination paper with the registration affidavits on file in the office of the county elections official. The county elections official shall mark "not sufficient" any signature that does not appear in the same handwriting as appears on the affidavit of registration in his or her office, or that is accompanied by a declaration of party preference that is not in accordance with the declaration of party preference in the affidavit of registration. The county elections official may cease to verify signatures once the minimum requisite number of signatures has been verified.

**SEC. 23.** Section 8121 of the Elections Code is amended to read:

**8121.** (a) Not less than five days before he or she transmits the certified list of candidates to the county elections officials, as provided in Section 8120, the Secretary of State shall notify each candidate for partisan office and voter-nominated office of the names, addresses, offices, occupations, and party preferences of all other persons who have filed for the same office.

(b) (1) Beginning not less than five days before he or she transmits the certified list of candidates to the county elections officials, as required by Section 8120, the Secretary of State shall post, in a conspicuous place on his or her Internet Web site, the party preference history of each candidate for voter-nominated office for the preceding 10 years. The candidates' party preference history shall be continuously posted until such time as the official canvass is completed for the general or special election at which a candidate is elected to the voter-nominated office sought, except that, in the case of a candidate who participated in the primary election and who was not nominated to participate in the general election, the candidate's party preference history need not continue to be posted following the completion of the official canvass for the primary election in question.

(2) For purposes of this subdivision, the phrase "party preference history" also refers to the candidate's history of party registration during the 10 years preceding the effective date of this section.

(3) The Secretary of State shall also conspicuously post on the same web page as that containing the candidates' party preference history the notice specified by of subdivision (b) of Section 9083.5.

**SEC. 24.** Section 8124 of the Elections Code is amended to read:

**8124.** The certified list of candidates sent to each county elections official by the Secretary of State shall show all of the following:

(a) The name of each candidate.

(b) The office for which each person is a candidate.

(c) With respect to candidates for partisan offices, the party each person represents.

(d) With respect to candidates for voter-nominated offices, the party preference designation specified in accordance with Section 8002.5.

**SEC. 25.** Section 8125 of the Elections Code is repealed.

**SEC. 26.** Section 8125 is added to the Elections Code, to read:

**8125.** The certified list of candidates sent to each county elections official by the Secretary of State shall be in a form prescribed by the Secretary of State.

**SEC. 27.** Section 8141.5 is added to the Elections Code, to read:

**8141.5.** Only the two candidates for a voter-nominated office who receive the highest and second-highest numbers of votes cast at the primary shall appear on the ballot as candidates for that office at the ensuing general election. More than one candidate with the same party preference designation may participate in the general election pursuant to this subdivision. Notwithstanding the designation made by the candidate pursuant to Section 8002.5, no candidate for a voter-nominated office shall be deemed to be the official nominee for that office of any political party, and no party is entitled to have a candidate with its party preference designation participate in the general election unless such candidate is one of the two candidates receiving the highest or second-highest numbers of votes cast at the primary election.

**SEC. 28.** Section 8142 of the Elections Code is amended to read:

**8142.** (a) In the case of a tie vote, nonpartisan candidates receiving the same number of votes shall be candidates at the ensuing general election if they qualify pursuant to Section 8141 whether or not there are more candidates at the general election than prescribed by this article. In no case shall the candidates determine the tie by lot.

(b) In the case of a tie vote among candidates at a primary election for a voter-nominated office, the following applies:

(1) All candidates receiving the highest number of votes cast for any candidate shall be candidates at the ensuing general election whether or not there are more candidates at the general election than prescribed by this article.

(2) Notwithstanding Section 8141.5, if a tie vote among candidates results in more than one primary candidate qualifying for the general election pursuant to subdivision (a), candidates receiving fewer votes shall not be candidates at the general election, even if they receive the second highest number of votes cast.

(3) If only one candidate receives the highest number of votes cast but there is a tie vote among two or more candidates receiving the second highest number of votes cast, each of those second-place candidates shall be a candidate at the ensuing general election along with the candidate receiving the highest number of votes cast, regardless of whether there are more candidates at the general election than prescribed by this article.

(4) In no case shall the candidates determine the tie by lot.

**SEC. 29.** Section 8148 of the Elections Code is amended to read:

**8148.** Not less than 68 days before the general election, the Secretary of State shall deliver to the appropriate county elections official a certificate showing:

(a) The name of every person entitled to receive votes within that county at the general election who has received the nomination as a candidate for public office pursuant to this chapter, and the designation of the public office for which he or she has been nominated.

(b) For each nominee for a partisan office, the name of the party that has nominated him or her.

(c) For each nominee for a voter-nominated office, the name of the party preference, or lack of party preference, as designated by the candidate in accordance with Section 8002.5.

**SEC. 30.** Section 8150 of the Elections Code is amended to read:

**8150.** The certificate of the Secretary of State showing candidates nominated or selected at a primary election, and justices of the Supreme Court and courts of appeal to appear on the general elections ballot, shall be in a form prescribed by the Secretary of State.

**SEC. 31.** Section 8300 of the Elections Code is amended to read:

**8300.** A candidate for any public office, including that of presidential elector, for which no nonpartisan candidate or candidate for voter-nominated office has been nominated or elected at any primary election, may be nominated subsequent to or in lieu of a primary election pursuant to this chapter.

**SEC. 32.** Section 8550 of the Elections Code is amended to read:

**8550.** At least 88 days prior to the election, each candidate shall leave with the officer with whom his or her nomination papers are required to be left, a declaration of candidacy which states all of the following:

(a) The candidate's residence, with street and number, if any.

(b) That the candidate is a voter in the precinct in which he or she resides.

(c) The name of the office for which he or she is a candidate.

(d) That the candidate will not withdraw as a candidate before the election.

(e) That, if elected, the candidate will qualify for the office.

The name of a candidate shall not be placed on the ballot unless the declaration of candidacy provided for in this section has been properly filed.

**SEC. 33.** Section 8600 of the Elections Code is amended to read:

**8600.** Every person who desires to be a write-in candidate and have his or her name as written on the ballot of an election counted for a particular office shall file:

(a) A statement of write-in candidacy that contains the following information:

(1) Candidate's name.

(2) Residence address.

(3) A declaration stating that he or she is a write-in candidate.

(4) The title of the office for which he or she is running.

(5) The party nomination which he or she seeks, if running in a partisan primary election.

(6) The date of the election.

(b) The requisite number of signatures on the nomination papers, if any, required pursuant to Sections 8062, 10220, 10510 or, in the case of a special district not subject to the Uniform District Election Law (Part 4 (commencing with Section 10500) of Division 10), the number of signatures required by the principal act of the district.

**SEC. 34.** Section 8605 of the Elections Code is amended to read:

**8605.** No person whose name has been written in upon a ballot for an office at the direct primary may have his or her name placed upon the ballot as a candidate for that office for the ensuing general election unless one of the following is applicable:

(a) At that direct primary he or she received for a partisan office votes equal in number to 1 percent of all votes cast for the office at the last preceding general election at which the office was filled. In the case of an office that has not appeared on the ballot since its creation, the requisite number of votes shall equal 1 percent of the number of all votes cast for the office that had the least number of votes in the most recent general election in the jurisdiction in which the write-in candidate is seeking office.

(b) He or she is an independent nominee for a partisan office pursuant to Part 2 (commencing with Section 8300).

(c) At that direct primary he or she received for a voter-nominated office the highest number of votes cast for that office or the second highest number of votes cast for that office, except as provided by subdivision (b) of Section 8142 or Section 8807.

**SEC. 35.** Section 8606 is added to the Elections Code, to read:

**8606.** A person whose name has been written on the ballot as a write-in candidate at the general election for a voter-nominated office shall not be counted.

**SEC. 36.** Section 8802 of the Elections Code is repealed.

**SEC. 37.** Section 8805 of the Elections Code is amended to read:

**8805.** Whenever a candidate for nomination for a nonpartisan or voter-nominated office at a primary election dies on or before the day of the election, and a sufficient number of ballots are marked as being voted for him or her to entitle him or her to nomination if he or she had lived until after the election, a vacancy exists on the general election ballot, which shall be filled in the manner provided in Section 8807 for filling a vacancy caused by the death of a candidate.

**SEC. 38.** Section 8806 of the Elections Code is repealed.

**SEC. 39.** Section 8807 of the Elections Code is amended to read:

**8807.** If the vacancy occurs among candidates chosen at the direct primary to go on the ballot for the succeeding general election for a nonpartisan or voter-nominated office, the name of that candidate receiving at the primary election the next highest number of votes shall go upon the ballot to fill the vacancy.

**SEC. 40.** Section 9083.5 is added to the Elections Code, to read:

**9083.5.** (a) If a candidate for nomination or election to a partisan office will appear on the ballot, the Secretary of State shall include in the state ballot pamphlet a written explanation of the electoral procedure for such offices, as follows:

PARTY-NOMINATED/PARTISAN OFFICES

Under the California Constitution, political parties may formally nominate candidates for party-nominated/partisan offices at the primary election. A candidate so nominated will then represent that party as its official candidate for the office in question at the ensuing general election and the ballot will reflect an official designation to that effect. The top vote-getter for each party at the primary election is entitled to participate in the general election. Parties also elect officers of official party committees at a partisan primary.

No voter may vote the ballot of any political party at any primary election unless he or she has disclosed a preference for that party upon registering to vote or unless he or she has declined to disclose a party preference and the political party, by party rule duly noticed to the Secretary of State, authorizes a person who has declined to disclose a party preference to vote the ballot of that political party.

(b) If any candidate for nomination or election to a voter-nominated office will appear on the ballot, the Secretary of State shall include in the state ballot pamphlet a written explanation of the electoral procedure for such offices, as follows:

VOTER-NOMINATED OFFICES

Under the California Constitution, political parties are not entitled to formally nominate candidates for voter-nominated offices at the primary election, and a candidate nominated for a voter-nominated office at the primary election is not the official nominee of any party for the office in question at the ensuing general election. A candidate for nomination or election to a voter-nominated office may, however, designate his or her party preference, or lack of party preference, and have that designation reflected on the primary and general election ballot, but the party designation so indicated is selected solely by the candidate and is shown for the information of the voters only. It does not constitute or imply an endorsement of the candidate by the party designated, and no candidate nominated by the qualified voters for any voter-nominated office shall be deemed to be the officially nominated candidate of any political party. The parties may have a list of candidates for voter-nominated offices, who have received the official endorsement of the party, printed in the sample ballot.

All voters, regardless of the party for which they have expressed a preference upon registering, or of their refusal to disclose a party preference, may vote for any candidate for a voter-nominated office, provided they meet the other qualifications required to vote for that office. The top two vote-getters at the primary election advance to the general election for the voter-nominated office, and both candidates may have specified the same party preference designation. No party is entitled to have a candidate with its party preference designation participate in the general election unless such candidate is one of the two highest vote-getters at the primary election.

(c) If any candidate for nomination or election to a nonpartisan office, other than judicial office, shall appear on the ballot, the Secretary of State shall include in the state ballot pamphlet a written explanation of the electoral procedure for such offices, as follows:

NONPARTISAN OFFICES

Under the California Constitution, political parties are not entitled to nominate candidates for nonpartisan offices at the primary election, and a candidate nominated for a nonpartisan office at the primary election is not the official nominee of any party for the office in question at the ensuing general election. A candidate for nomination or election to a nonpartisan office may NOT designate his or her party preference, or lack of party preference, on the primary and general election ballot. The top two vote-getters at the primary election advance to the general election for the nonpartisan office.

(d) Posters or other printed materials containing the notices specified in subdivisions (a) to (c), inclusive, shall be included in the precinct supplies pursuant to Section 14105.

**SEC. 41.** Section 9084.5 is added to the Elections Code, to read:

**9084.5.** In addition to the materials specified in Section 9084, the ballot pamphlet shall contain a written explanation of the appropriate election procedures for party-nominated, voter-nominated, and nonpartisan offices as required by Section 9083.5.

**SEC. 42.** Section 10705 of the Elections Code is amended to read:

**10705.** (a) All candidates shall be listed on one ballot and, except as provided in subdivision (b), if any candidate receives a majority of all votes cast, he or she shall be declared elected, and no special general election shall be held.

(b) If only one candidate qualifies to have his or her name printed on the special general election ballot, that candidate shall be declared elected, and no special general election shall be held.

**SEC. 43.** Section 10706 of the Elections Code is amended to read:

**10706.** If no candidate receives a majority of votes cast, the names of the two candidates who receive the highest and second highest number of votes cast at the special primary election shall be placed on the special general election ballot.

**SEC. 44.** Section 12108 of the Elections Code is amended to read:

**12108.** In any case where this chapter requires the posting or distribution of a list of the names of precinct board members, or a portion of the list, the officers charged with the duty of posting shall ascertain the name of the political party, if any, for which each precinct board member has expressed a preference, as shown in the affidavit of registration of that person. When the list is posted or distributed, there shall be printed the name of the board member's party preference or an abbreviation of the name to the right of the name, or immediately below the name, of each precinct board member. If a precinct board member has not expressed a preference for a political party, the words " "No Party Preference" shall be printed in place of the party name.

**SEC. 45.** Section 13102 of the Elections Code is amended to read:

**13102.** (a) All voting shall be by ballot. There shall be provided, at each polling place, at each election at which public officers are to be voted for, but one form of ballot for all candidates for public office, except that, for partisan primary elections, one form of ballot shall be provided for each qualified political party as well as one form of nonpartisan ballot, in accordance with subdivision (b).

(b) At partisan primary elections, each voter not registered disclosing a preference with any one of the political parties participating in the election shall be furnished only a nonpartisan ballot, unless he or she requests a ballot of a political party and that political party, by party rule duly noticed to the Secretary of State, authorizes a person who has declined to disclose a party preference to vote the ballot of that political party. The nonpartisan ballot shall contain only the names of all candidates for nonpartisan offices, voter-nominated offices, and measures to be voted for at the primary election. Each voter registered as preferring a political party participating in the election shall be furnished only a ballot for which he or she disclosed a party preference in accordance with Section 2151 or 2152 and the nonpartisan ballot, both of which shall be printed together as one ballot in the form prescribed by Section 13207.

(c) A political party may adopt a party rule in accordance with subdivision (b) that authorizes a person who has declined to disclose a party preference to vote the ballot of that political party at the next ensuing partisan primary election. The political party shall notify the party chair immediately upon adoption of that party rule. The party chair shall provide written notice of the adoption of that rule to the Secretary of State not later than the 135th day prior to the partisan primary election at which the vote is authorized.

(d) The county elections official shall maintain a record of which political party's ballot was requested pursuant to subdivision (b), or whether a nonpartisan ballot was requested, by each person who declined to disclose a party preference. The record shall be made available to any person or committee who is authorized to receive copies of the printed indexes of registration for primary and general elections pursuant to Section 2184. A record produced pursuant to this subdivision shall be made available in either a printed or electronic format, as requested by the authorized person or committee.

**SEC. 46.** Section 13105 of the Elections Code is amended to read:

**13105.** (a) In the case of candidates for a voter-nominated office in a primary election, a general election, or a special election to fill a vacancy in the office of United States Senator, Member of the United States House of Representatives, State Senator, or Member of the Assembly, immediately to the right of and on the same line as the name of the candidate, or immediately below the name if there is not sufficient space to the right of the name, there shall be identified in eight-point roman lowercase type the name of the political party designated by the candidate pursuant to Section 8002.5. The identification shall be in substantially the following form: "My party preference is the _____ Party." If the candidate designates no political party, the phrase "No Party

Preference" shall be printed instead of the party preference identification. If the candidate chooses not to have his or her party preference listed on the ballot, the space that would be filled with a party preference designation shall be left blank.

(b) In the case of candidates for President and Vice President, the name of the party shall appear to the right of and equidistant from the pair of names of these candidates.

(c) If for a general election any candidate for President of the United States or Vice President of the United States has received the nomination of any additional party or parties, the name(s) shall be printed to the right of the name of the candidate's own party. Party names of a candidate shall be separated by commas. If a candidate has qualified for the ballot by virtue of an independent nomination, the word "Independent" shall be printed instead of the name of a political party in accordance with the above rules.

**SEC. 47.** Section 13109.5 is added to the Elections Code, to read:

**13109.5.** Notwithstanding anything in Section 13109 to the contrary, and to facilitate compliance with Section 13206, the elections official may list the offices specified in subdivision (h) of Section 13109 directly after the offices specified in subdivisions (a) and (b) of Section 13109, when the offices specified in those subsections are on the ballot, or at the end of the ballot in elections at which the offices specified in subdivisions (a) and (b) of Section 13109 are not listed on the ballot.

**SEC. 48.** Section 13110 of the Elections Code is amended to read:

**13110.** The group of names of candidates for any partisan office, voter-nominated office, or nonpartisan office shall be the same on the ballots of all voters entitled to vote for candidates for that office, except that in partisan primary elections, the names of candidates for nomination to partisan office shall appear only on the ballots of the political party, the nomination of which they seek, and candidates for election to a political party committee shall appear only on the ballots of the political party for which the candidate seeks election.

**SEC. 49.** Section 13206 of the Elections Code is amended to read:

**13206.** (a) On the partisan ballot used in a direct primary election, immediately below the instructions to voters, there shall be a box not less than one-half inch high enclosed by a heavy-ruled line the same as the borderline. This box shall be as long as there are columns for the partisan ballot and shall be set directly above these columns. Within the box shall be printed in 24-point boldface gothic capital type the words "Party-Nominated Offices." Immediately below that phrase within the same box shall be printed, in 8-point boldface gothic type, the following: "Only voters who disclosed a preference upon registering to vote for the same party as the candidate seeking the nomination of any party for the Presidency or election to a party committee may vote for that candidate at the primary election, unless the party has adopted a rule to permit non-party voters to vote in its primary elections."

(b) The same style of box described in subdivision (a) shall also appear over the columns of the nonpartisan part of the ballot and within the box in the same style and point size of type shall be printed "Voter-Nominated and Nonpartisan Offices." Immediately below that phrase within the same box shall be printed, in 8-point boldface gothic type, the following:

"All voters, regardless of the party preference they disclosed upon registration, or refusal to disclose a party preference, may vote for any candidate for a voter-nominated or nonpartisan office.

Voter-Nominated Offices. The party preference, if any, designated by a candidate for a voter-nominated office is selected by the candidate and is shown for the information of the voters only.

It does not constitute or imply an endorsement of the candidate by the party indicated, and no candidate nominated by the qualified voters for any voter-nominated office shall be deemed to be the officially nominated candidate of any political party.

"Nonpartisan Offices. A candidate for a nonpartisan office may not designate a party reference on the ballot."

**SEC. 50.** Section 13207 of the Elections Code is amended to read:

**13207.** (a) There shall be printed on the ballot in parallel columns all of the following:

(1) The respective offices.

(2) The names of candidates with sufficient blank spaces to allow the voters to write in names not printed on the ballot.

(3) Whatever measures have been submitted to the voters.

(b) In the case of a ballot which is intended for use in a party primary and which carries both partisan offices, voter-nominated offices, and nonpartisan offices, a vertical solid black line shall divide the columns containing partisan offices, on the left, from the columns containing nonpartisan offices and voter-nominated offices, on the right.

(c) The standard width of columns containing partisan offices, nonpartisan offices, and voter-nominated offices, shall be three inches, but a elections official may vary the width of these columns up to 10 percent more or less than the three-inch standard. However, the column containing presidential and vice presidential candidates may be as wide as four inches.

(d) Any measures that are to be submitted to the voters shall be printed in one or more parallel columns to the right of the columns containing the names of candidates and shall be of sufficient width to contain the title and summary of each measure. To the right of each title and summary shall be printed, on separate lines, the words "Yes" and "No."

**SEC. 51.** Section 13208 of the Elections Code is amended to read:

**13208.** (a) In the right-hand margin of each column light vertical lines shall be printed in such a way as to create a voting square after the name of each candidate for partisan office, voter-nominated office, nonpartisan office (except for justice of the Supreme Court or court of appeal), or for chairman of a group of candidates for delegate to a national convention who express no preference for a presidential candidate. In the case of Supreme Court or appellate justices and in the case of measures submitted to the voters, the lines shall be printed so as to create voting squares to the right of the words "Yes" and "No." The voting squares shall be used by the voters to express their choices as provided for in the instruction to voters.

(b) The standard voting square shall be at least three-eighths of an inch square but may be up to one-half inch square. Voting squares for measures may be as tall as is required by the space occupied by the title and summary.

**SEC. 52.** Section 13230 of the Elections Code is amended to read:

**13230.** (a) If the county elections official determines that, due to the number of candidates and measures that must be printed on the ballot, the ballot will be larger than may be conveniently handled, the county elections official may provide that a nonpartisan ballot shall be given to each partisan voter, together with his or her partisan ballot, and that the material appearing under the heading "Voter Nominated and Nonpartisan Offices" on partisan ballots, as well as the heading itself, shall be omitted from the partisan ballots.

(b) If the county elections official so provides, the procedure prescribed for the handling and canvassing of ballots shall be modified to the extent necessary to permit the use of two ballots by partisan voters. The county elections official may, in this case, order the second ballot to be printed on paper of a different tint, and assign to those ballots numbers higher than those assigned to the ballots containing partisan offices.

(c) "Partisan voters," for purposes of this section, includes both persons who have disclosed a party preference pursuant to Section 2151 or 2152 and persons who have declined to disclose a party preference, but who have chosen to vote the ballot of a political party as authorized by that party's rules duly noticed to the Secretary of State.

**SEC. 53.** Section 13300 of the Elections Code is amended to read:

**13300.** (a) By at least 29 days before the primary, each county elections official shall prepare separate sample ballots for each political party and a separate sample nonpartisan ballot, placing thereon in each case in the order provided in Chapter 2 (commencing with Section 13100), and under the appropriate title of each office, the names of all candidates for whom nomination papers have been duly filed with him or her or have been certified to him or her by the Secretary of State to be voted for in his or her county at the primary election.

(b) The sample ballot shall be identical to the official ballots, except as otherwise provided by law. The sample ballots shall be printed on paper of a different texture from the paper to be used for the official ballot.

(c) One sample ballot of the party for which the voter has disclosed a preference, as evidenced by his or her registration, shall be mailed to each voter entitled to vote at the primary who registered at least 29 days prior to the election not more than 40 nor less than 10 days before the election. A nonpartisan sample ballot shall be so mailed to each voter who is not registered as preferring with any of the parties participating in the primary election, provided that on election day any person may, upon request, vote the ballot of a political party if authorized by the party's rules, duly noticed to the Secretary of State.

**SEC. 54.** Section 13302 of the Elections Code is amended to read:

**13302.** (a) The county elections official shall forthwith submit the sample ballot of each political party to the chairperson of the county central committee of that party, and shall mail a copy to each candidate for whom nomination papers have been filed in his or her office or whose name has been certified to him or her by the Secretary of State, to the post office address as given in the nomination paper or certification. The county elections official shall post a copy of each sample ballot in a conspicuous place in his or her office.

(b) In connection with any election at which a candidate for a voter-nominated office will appear on the ballot, any qualified political party may submit to the county elections official a list of all candidates for voter-nominated office who will appear on any ballot in the county in question, and who have been endorsed by the party by whatever lawful mechanism the party adopts for endorsing candidates for voter-nominated office. The county elections official shall print any such list that is timely received in the sample ballot. The party chair shall provide a written copy of the list of candidates endorsed or nominated by the party not later than 83 days prior to the election at which the candidate for a voter-nominated office will appear on the ballot.

**SEC. 55.** Section 13305 of the Elections Code is amended to read:

**13305.** (a) In each county, the county central committee of each qualified political party may supply to its county elections official, not less than 83 days prior to the direct primary election, a party contributor envelope or a one-page letter, in which both sides may be utilized, to be included in the mailing of the sample ballot to each of the registered voters in the county who have disclosed a preference for that same party on the voter's affidavit of registration. In lieu of supplying the elections official with a sufficient number of copies of the one-page letter, a county central committee may supply the elections official, not less than 83 days before the direct primary election, with the text of the letter and request the elections official to print, or cause to be printed, a sufficient number of copies of the letter to accommodate the mailing. The elections official shall notify the respective county committee of, and the committee shall reimburse the county for, any actual costs incurred by the inclusion or printing, or both. The elections official may, prior to acting pursuant to this subdivision, require the county committee to post a bond to ensure the reimbursement.

(b) Each envelope or letter shall contain a space for the name and address of the contributor, and shall contain language which informs the contributor of the manner in which the money received shall be spent. The language on the envelope or letter shall not contain words critical of any other political party.

(c) All funds received by the return of the party contributor envelopes or in response to the letters shall be kept separate from all other funds and shall be kept in a fund (account) to be established in each county. Any funds which are prohibited under federal law from being used for candidates for federal office shall be further segregated and any portion allocated to candidates shall be disbursed only to candidates for state office.

**SEC. 56.** Section 14105.1 is added to the Elections Code, to read:

**14105.1.** In addition to the materials identified in Section 14105, the elections official shall furnish to the precinct officers printed copies of the notices specified in Section 9083.5, as supplied by the Secretary of State. The notices shall be conspicuously posted both inside and outside every polling place.

**SEC. 57.** Section 15451 of the Elections Code is amended to read:

**15451.** The nominees for a voter-nominated office shall be determined in accordance with Section 8141.5 and subdivision (b) of Section 8142.

**SEC. 58.** Section 15452 of the Elections Code is amended to read:

**15452.** The person who receives a plurality of the votes cast for any office is elected or nominated to that office in any election, except:

(a) An election for which different provision is made by any city or county charter.

(b) A municipal election for which different provision is made by the laws under which the city is organized.

(c) The election of local officials in primary elections as specified in Article 8 (commencing with Section 8140) of Part 1 of Division 8.

(d) The nomination of candidates for voter-nominated office at the primary election to participate in the general election for that office as specified in Article 8 (commencing with Section 8140) of Part 1 of Division 8.

**SEC. 59.** Section 15670 of the Elections Code is amended to read:

**15670.** This article applies only to:

(a) Candidates for delegates to a national convention for the nomination of party candidates for President and Vice President of the United States.

(b) Candidates for nomination at the direct primary to offices other than nonpartisan offices or voter-nominated offices.

**SEC. 60.** Section 15671 of the Elections Code is amended to read:

**15671.** In case of a tie vote for member of a county central committee, where the office is to be voted for wholly within one county, the election board shall forthwith summon the candidates who have received tie votes to appear before it, at a time and place to be designated by the board, and the board shall at that time and place determine the tie by lot.

**SEC. 61.** Section 19300 of the Elections Code is amended to read:

**19300.** A voting machine shall, except at a direct primary election or any election at which a candidate for voter-nominated office is to appear on the ballot, permit the voter to vote for all the candidates of one party or in part for the candidates of one party and in part for the candidates of one or more other parties.

**SEC. 62.** Section 19301 of the Elections Code is amended to read:

**19301.** (a) A voting machine shall provide in the general election for grouping under the name of the office to be voted on, all the candidates for the office with the designation of the parties, if any, by which they were respectively nominated or which they designated pursuant to Section 8002.5.

(b) With respect to party-nominated offices, the designation may be by usual or reasonable abbreviation of party names. With respect to voter-nominated offices, the voting machine shall conform to the format specified in subdivision (b) of Section 13105.

**SEC. 63.** Section 88001 of the Government Code is amended to read:

**88001.** The ballot pamphlet shall contain all of the following:

(a) A complete copy of each state measure.

(b) A copy of the specific constitutional or statutory provision, if any, that would be repealed or revised by each state measure.

(c) A copy of the arguments and rebuttals for and against each state measure.

(d) A copy of the analysis of each state measure.

(e) Tables of contents, indexes, art work, graphics and other materials that the Secretary of State determines will make the ballot pamphlet easier to understand or more useful for the average voter.

(f) A notice, conspicuously printed on the cover of the ballot pamphlet, indicating that additional copies of the ballot pamphlet will be mailed by the county elections official upon request.

(g) A written explanation of the judicial retention procedure as required by Section 9083 of the Elections Code.

(h) The Voter Bill of Rights pursuant to Section 2300 of the Elections Code.

(i) If the ballot contains an election for the office of United States Senator, information on candidates for United States Senator. A candidate for United States Senator may purchase the space to place a statement in the state ballot pamphlet that does not exceed 250 words. The statement may not make any reference to any opponent of the candidate. The statement shall be submitted in accordance with timeframes and procedures set forth by the Secretary of State for the preparation of the state ballot pamphlet.

(j) If the ballot contains a question as to the confirmation or retention of a justice of the Supreme Court, information on justices of the Supreme Court who are subject to confirmation or retention.

(k) If the ballot contains an election for the offices of President and Vice President of the United States, a notice that refers voters to the Secretary of State's Internet Web site for information about candidates for the offices of President and Vice President of the United States.

(l) A written explanation of the appropriate election procedures for party-nominated, voter-nominated, and nonpartisan offices as required by Section 9083.5 of the Elections Code.

**SEC. 64.** This measure shall be interpreted so as to be consistent with all federal and state laws, rules, and regulations. This measure shall be broadly construed in order to achieve the purposes of the measure above. It is the intent of the Legislature that the provisions of this measure be interpreted or implemented in a manner that facilitates the purposes set forth in this measure.

**SEC. 65.** If any provision of this measure, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining provisions shall not be affected, but shall remain in full force and effect, and to this end the provisions of this measure are severable. The Legislature declares that this measure, and each section, subdivision, sentence, clause, phrase, part, or portion thereof, would have been passed irrespective of the fact that any one or more sections, subdivisions, sentences, clauses, phrases, parts, or portions is found to be invalid. If any provision of this measure is held invalid as applied to any person or circumstance, such invalidity does not affect any application of this measure that can be given effect without the invalid application.

**SEC. 66.** If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

**SEC. 67.** This measure shall become operative only if SCA 4 is approved by the voters.

**No. 16-55758**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

EMIDIO SOLTYSIK, *Plaintiff-Appellant*,

v.

ALEX PADILLA AND DEAN LOGAN, *Defendants-Appellees*,

and

CALIFORNIANS TO DEFEND THE OPEN PRIMARY, *Intervenor-Defendant-Appellee.*

Appeal from the United States District Court
for the Central District of California
Case No. 2:15-cv-07916-AB-GJS
The Honorable André Birotte, Jr.

# PLAINTIFF-APPELLANT EMIDIO SOLTYSIK'S REQUEST FOR JUDICIAL NOTICE

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ZACHARY FAIGEN (SBN 294716)
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*Attorneys for Appellant Emidio Soltysik*

**PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE**

Plaintiff EMIDIO SOLTYSIK ("Soltysik or Plaintiff") respectfully requests that, under Fed. R. Evid. 201, Fed. R. App. Procedure 27, and Ninth Circuit Rule 27-1, the Court take judicial notice of, and supplement the record with, the legislative history to AB 1413 (Attachment A hereto). In support of this Request, Soltysik states as follows:

1. This is an appeal from an order granting a Motion to Dismiss in *Emidio Soltysik et al. v. Alex Padilla et al.*, Case No. *2:15-cv-07916-AB-GJS* (C.D. Cal.) pending before the Honorable André Birotte, Jr. in the U.S. District Court for the Central District of California.

2. Under Fed. R. Evid. 201, the court "shall" take judicial notice of facts "not subject to reasonable dispute" because they are (1) generally known, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See EEOC v. Ratliff,* 906 F.2d 1314, 1318 & n.6 (9th Cir. 1990).

3. Plaintiff respectfully requests that the Court take judicial notice of Exhibit 1 to the Declaration of Kevin J. Minnick, which includes a true and correct copy of excerpts from the legislative history materials relating to AB 1413. *Arce v. Douglas*, 793 F.3d 968, 978 n.4 (9th Cir. 2015) ("We take judicial notice of legislative history materials pursuant to Federal Rules of Evidence Rule 201(b).");

*Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) ("Legislative history is properly a subject of judicial notice."); *Zephyr v. Saxon Mortg. Servs. Inc.*, 873 F. Supp. 2d 1223, 1226 (E.D. Cal. 2012) ("The Court 'may take judicial notice of matters of public record . . . .'" (citation omitted)).

Respectfully submitted,

Dated: January 4, 2017

By: */s/ Kevin J. Minnick*

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Attorneys for Emidio Soltysik

**No. 16-55758**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

EMIDIO SOLTYSIK, *Plaintiff-Appellant*,

v.

ALEX PADILLA AND DEAN LOGAN, *Defendants-Appellees*,

and

CALIFORNIANS TO DEFEND THE OPEN PRIMARY, *Intervenor-Defendant-Appellee*.

Appeal from the United States District Court
for the Central District of California
Case No. 2:15-cv-07916-AB-GJS
The Honorable André Birotte, Jr.

# DECLARATION OF KEVIN J. MINNICK IN SUPPORT OF PLAINTIFF-APPELLANT EMIDIO SOLTYSIK'S OPENING BRIEF

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*Attorneys for Appellant Emidio Soltysik*

# DECLARATION OF KEVIN J. MINNICK

1. I am an attorney admitted to practice before the courts of the State of California and this Court. I am counsel for Plaintiff-Appellant, Emidio Soltysik. I submit this declaration in support of Plaintiff-Appellant's Opening Brief. I have personal knowledge of the facts stated herein, and, if called as a witness, I would testify competently hereto.

2. Attached as "**Exhibit 1**" is a true and correct copy of excerpts of the legislative history of AB 1413. This legislative history is publicly available.

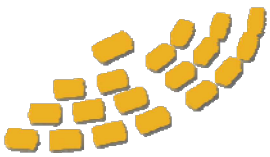
3. I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed on January 4, 2017 at Los Angeles, California.

By: /s/Kevin J. Minnick

Kevin J. Minnick

# EXHIBIT 1



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**DECLARATION OF MARIA A. SANDERS**

I, Maria A. Sanders, declare:

I am an attorney licensed to practice in California, State Bar No. 092900, and am employed by Legislative Intent Service, Inc., a company specializing in researching the history and intent of legislation.

Under my direction and the direction of other attorneys on staff, the research staff of Legislative Intent Service, Inc. undertook to locate and obtain all documents relevant to the enactment of Assembly Bill 1413 of 2012. Assembly Bill 1413 was approved by the Legislature and was enacted as Chapter 3 of the Statutes of 2012.

The following list identifies all documents obtained by the staff of Legislative Intent Service, Inc. on Assembly Bill 1413 of 2012. All listed documents have been forwarded with this Declaration except as otherwise noted in this Declaration. All documents gathered by Legislative Intent Service, Inc. and all copies forwarded with this Declaration are true and correct copies of the originals located by Legislative Intent Service, Inc. In compiling this collection, the staff of Legislative Intent Service, Inc. operated under directions to locate and obtain all available material on the bill.

**ASSEMBLY BILL 1413 OF 2012**:

1. All versions of Assembly Bill 1413 (Fong-2012);
2. Procedural history of Assembly Bill 1413 from the November 30, 2012 *Assembly Weekly History*;
3. Two analysis of Assembly Bill 1413 prepared for the Assembly Committee on Elections and Redistricting;
4. Material from the legislative bill file of the Assembly Committee on Elections and Redistricting on Assembly Bill 1413;
5. Analysis of Assembly Bill 1413 prepared for the Assembly Committee on Appropriations;
6. Material from the legislative bill file of the Assembly Republican Caucus on Assembly Bill 1413;

7. Three analyses of Assembly Bill 1413 prepared for the Senate Committee on Elections and Constitutional Amendments;
8. Material from the legislative bill file of the Senate Committee on Elections and Constitutional Amendments on Assembly Bill 1413;
9. Consent analysis and six Third Reading analyses of Assembly Bill 1413 prepared by the Office of Senate Floor Analyses;
10. Material from the legislative bill file of the Office of Senate Floor Analyses on Assembly Bill 1413;
11. Material from the legislative bill file of the Senate Republican Office of Policy on Assembly Bill 1413;
12. Material from the legislative bill file of the Senate Republican Fiscal Office on Assembly Bill 1413;
13. Two concurrence in Senate Amendments analyses of Assembly Bill 1413 prepared by the Assembly Committee on Elections and Redistricting;
14. Post-enrollment documents regarding Assembly Bill 1413; - (Governor Brown's legislative files are under restricted access and are not available to the public.);
15. Press Release issued by the Office of the Governor on February 10, 2012 to announce that Assembly Bill 1413 had been signed;
16. Excerpt regarding Assembly Bill 1413 from the *Digest of Significant Legislation*, prepared by the Office of Senate Floor Analyses, 2012;
17. Analysis of Assembly Bill 1413 prepared for the Department of Finance;
18. Excerpt regarding Assembly Bill 1413 from the 2012 *Summary of Legislation* prepared by the Assembly Committee on Elections and Redistricting.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 12th day of December, 2014 at Woodland, California.

MARIA A. SANDERS

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fixes that will help implement the top two primary system in a more effective manner. This bill reflects much of that work, and makes a number of technical and substantive changes to assist elections officials in carrying out their responsibilities. In addition, this bill addresses a few other substantive and technical issues with the implementation of the top two primary election system.

2) Top Two Primary & Ballot Formatting Issues: In February 2009, the Legislature approved SCA 4 (Maldonado), Res. Chapter 2, Statutes of 2009, which was enacted by the voters as Proposition 14 on the June 2010 statewide primary election ballot. Proposition 14 implemented a top two primary election system in California for most elective state and federal offices. At primary elections, voters are able to vote for any candidate, regardless of party, and the two candidates who receive the most votes, regardless of party, advance to the general election.

At the same time that it passed SCA 4, the Legislature also approved and Governor Schwarzenegger signed SB 6 (Maldonado), Chapter 1, Statutes of 2009. SB 6 made various changes to state statute that became effective upon the approval of Proposition 14 by the voters. While many of the changes to state law made by SB 6 were merely conforming changes to provide for a top two primary system, some of the changes were more substantive. For instance, for offices that are subject to the top two primary, SB 6 prohibited write-in votes from being counted at the November general election and required Independent candidates to appear on the ballot at the primary election (under the law prior to the adoption of SB 6, Independent candidates only appeared on the ballot at the general election). Additionally, SB 6 required the state voter registration form to be redesigned and required certain new information to be printed on the ballot at elections for state and federal office.

In March 2010, this committee held an oversight hearing on the impacts of the top two primary election system and SB 6 on election costs and administration. Among other testimony, the committee heard from elections officials who indicated that certain aspects of SB 6 could significantly increase the length of ballots at primary elections, thus increasing election costs. Specifically, elections officials expressed concern with the format in which a candidate's party preference was to appear on the ballot, with the length of language that will be printed on the ballot to explain the top two primary process, and with certain type size and typeface requirements for language that must be included on the ballot.

This bill makes various modifications to the language that will appear on the ballot to address these formatting concerns. This bill shortens the format in which a candidate's party preference is displayed on the ballot, shortens and clarifies the ballot instructions that appear on the ballot, and eliminates certain type size and typeface requirements to give county election officials greater flexibility to format their ballots. These changes should help address some of the concerns raised by elections officials in this committee's oversight hearing.

3) Death of a Candidate: Under the provisions of SB 6, if a candidate for voter-nominated office at the general election dies, depending on when that candidate dies, he or she may be replaced on the ballot by the next highest vote-getter from the primary election. This could lead to some unusual, and potentially undesirable, situations. For instance, in a district where voters strongly prefer one political party, if that party's only candidate dies, he or she could

**SUPPORT:** (Verified 1/17/11)

California Association of Clerks and Election Officials Legislative Committee
Californians to Defend an Open Primary (however, in their letter they indicate that they are opposed to the provision deleting the law allowing candidates unassociated with major parties to be silent or unidentified on ballot with regard to party preference)
Secretary of State

**OPPOSITION:** (Verified 1/17/11)

Asian American Action Fund
Coalition for Free and Open Elections

**ARGUMENTS IN SUPPORT:** The California Association of Clerks and Elections Legislative Committee states: "AB 1413 focuses on critical challenges associated with the implementation language for Proposition 14 provided in Senate Bill 6 (SB 6, Chapter 1, 2009). Mandates in SB 6 require additional text and formatting associated with listing of candidates that, unless amended, will stress – and in some cases exceed – the capability of certain voting systems currently used in California. AB 1413 reduces the risk of exceeding system capacity and provides necessary technical changes to allow for a more practical implementation of the new Top Two Primary election system. California election officials are tasked with implementing newly adopted policies, educating voters and poll workers, and providing quality election services. Adoption of the significant technical amendments listed in AB 1413 addresses the limitations of California's existing voting systems and will result in a more efficient implementation of Propositon1 4 and assist in maintaining the integrity and transparency of California's elections."

Californians to Defend an Open Primary state: "During the Interim, we participated in a series of meetings and conversations regarding AB 1413 with interested parties, including the Secretary of State and local election officials. Progress has been made. Provisions harmful to Proposition 14 that would have generated additional litigation have been removed. Although, we do not endorse every provisions of AB 1413 …, on balance, the bill will promote a fair and efficient election in June, 2012 and thereafter. We object to AB 1413's deletion of existing provisions of law that allow candidates unassociated with major parties to be silent (or unidentified) on

CONTINUED

ballots with regard to party preference. We believe that candidates unassociated with qualified parties have the right to leave the ballot space reserved for party preference blank. This was an issue in the recently-decided Field v. Bowen, 199 Cal. App. 4th 346 (2011), and in the early proceedings of a parallel federal action, Chamness v. Bowen, Case No. 11-cv-01479-ODW (C.D. Cal.). AB 1413 may precipitate a similar lawsuit as candidates assert their constitutional right to 'silence' on the issue of party preference."

**ARGUMENTS IN OPPOSITION:** The Asian American Action Fund states: "For over a century, write-in voting has provided Californians with an important safety valve. If a candidate suddenly withdraws, becomes incapacitated or is charged with a crime, it is often too late to remove his or her name from the ballot – depriving the voters of the critical opportunity to vote for their second choice. Toward that end, write-in voting gives voters the ability to choose the candidate of their choice. In November 2010, a write-in candidate (Lisa Murkowski) was elected to the U.S. Senate. Over the past century, California has elected one write-in candidate for the U.S. Senate and two write-in candidates for the U.S. Congress. Significantly, even the State of Washington – which recently adopted the 'Top Two' primary system – allows voters to cast write-in votes in the general election."

DLW:mw 1/23/12 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

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January 6, 2012

Honorable Lou Correa
Chairperson, Senate Committee on Elections
and Constitutional Amendments
Room 2203, State Capitol
Sacramento, CA 95814

Re: AB 1413 (Fong) – SUPPORT

Dear Chairperson Correa:

This letter is written on behalf of our client, Californians to Defend an Open Primary ("Californians"), to inform you of its position on AB 1413, as amended January 5, 2012. With one exception, noted below, "Californians" supports AB 1413 and requests an "Aye" vote.

Proposition 14, which enacted California's Open Primary system, was adopted in 2010. "Californians" was the leading supporter of the measure during the campaign, and since enactment, "Californians" has actively and successfully litigated in defense of Proposition 14. We opposed previous versions of AB 1413 because it contained provisions inimical to Proposition 14.

During the Interim, we participated in a series of meetings and conversations regarding AB 1413 with interested parties, including the Secretary of State and local election officials. Progress has been made. Provisions harmful to Proposition 14 that would have generated additional litigation have been removed. Although, we do not endorse every provision of AB 1413 (see below), on balance, the bill will promote a fair and efficient election in June, 2012 and thereafter.

We object to AB 1413's deletion of existing provisions of law that allow candidates unassociated with major parties to be silent (or unidentified) on ballots with regard to party preference. We believe that candidates unassociated with qualified parties have the right to leave the ballot space reserved for party



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preference blank. This was an issue in the recently-decided *Field v. Bowen*, 199 Cal. App. 4th 346 (2011), and in the early proceedings of a parallel federal action, *Chamness v. Bowen*, Case No. 11-cv-01479-ODW (C.D. Cal.). AB 1413 may precipitate a similar lawsuit as candidates assert their constitutional right to "silence" on the issue of party preference.

Notwithstanding our concern with the ballot designation issue described above, we appreciate the opportunity to participate in negotiations on AB 1413 and acknowledge the collaboration and professionalism exhibited by all parties, including Mr. Wagaman. We look forward to participating in future legislation relating to matters embodied in Proposition 14.

Respectfully, we request your "aye" vote on AB 1413, as amended January 5, 2012.

Cordially,

Gene Erbin

GFE/ns

cc: Senate Committee on Elections and Constitutional Amendments
Assembly Member Paul Fong

California State Association of Counties

1100 K Street
Suite 101
Sacramento
California
95814

Telephone
916.327.7500
Facsimile
916.441.5507

January 30, 2012

FAXED 01/30/12

JAN 30 2012

The Honorable Edmund G. "Jerry" Brown
Governor, State of California
State Capitol
Sacramento, CA 95814

Re: **AB 1413 (Fong) – Elections**
**Request for Signature**

Dear Governor Brown:

On behalf of the California State Association of Counties (CSAC), I write to respectfully request your signature on AB 1413, by Assembly Member Paul Fong, which would fix several issues related to the statutory implementation of Proposition 14. In doing so it would make future election procedures clearer for voters and less expensive for counties and, in turn, the state.

The bill that implemented the statutory provisions of Proposition 14, SB 6, went beyond the constitutional requirements by also requiring particular language to be printed on every ballot and next to each candidate's name. The required verbiage is wordier than necessary and at times specifies extraordinary font sizes. Ballot real estate is valuable, and these provisions will result in significant costs to counties. Because these costs are mandated by the state, the state would end up being responsible for reimbursing counties.

AB 1413 makes a number of changes that will significantly reduce these increased expenses. In particular, shortening the party preference language next to each candidate's name and removing font size requirements for instructions printed on the ballot will save money without noticeably affecting a voter's experience.

With the millions of dollars of recent state funding cuts for elections, this relief is particularly welcome. The urgency of this bill is clear, this being an election year.

For all these reasons, we respectfully request your signature on AB 1413 when it comes to you for consideration and action. Should you have any questions about the position, please contact me at (916) 327-7500, ext. 515, or jhurst@counties.org.

Respectfully,

Jean Kinney Hurst
Legislative Representative

cc: The Honorable Paul Fong, California State Assembly

# CALIFORNIA ASSOCIATION OF CLERKS AND ELECTION OFFICIALS

**GAIL L. PELLERIN, PRESIDENT**
Santa Cruz County Clerk
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Website: www.caceo58.org

January 23, 2012

The Honorable Jerry Brown
Governor, State of California
State Capitol
Sacramento, CA 95814

RE: **AB 1413 (Fong)** Top Two Primary Clean Up

Dear Governor Brown:

The California Association of Clerks and Election Officials Elections Legislative Committee urges your approval of **AB 1413 (Fong)**, which addresses essential technical changes to the new Top Two Primary election system. Our Committee supports the adoption of these technical amendments to the California Elections Code.

More specifically, AB 1413 focuses on critical challenges associated with the implementation language for Proposition 14 provided in Senate Bill 6 (SB 6, Chapter 1, 2009). Mandates in SB 6 require additional text and formatting associated with listing of candidates that, unless amended, will stress – and in some cases exceed – the capability of certain voting systems currently used in California. AB 1413 reduces the risk of exceeding system capacity and provides necessary technical changes to allow for a more practical implementation of the new Top Two Primary election system.

California election officials are tasked with implementing newly adopted policies, educating voters and poll workers, and providing quality election services. Adoption of the significant technical amendments listed in AB 1413 addresses the limitations of California's existing voting systems and will result in a more efficient implementation of Proposition 14 and assist in maintaining the integrity and transparency of California's elections. Signing AB 1413 into law will help to ensure that counties have the capacity to conduct the 2012 State Primary Election and future state primaries using today's voting systems and in a manner consistent with the adoption of Proposition 14.

Please consider our support upon your review and consideration of signing AB 1413 into law. If you or your staff have any questions or concerns please do not hesitate to contact me at the Monterey County Elections Department at (831) 796-1499.

Very truly yours,

Linda Tulett
Correspondence Secretary
California Association of Clerks and Election Officials

c: Assembly Member Paul Fong, Author
Deborah Seiler, Co-Chair, CACEO Elections Legislative Committee
Jill Lavine, Co-Chair, CACEO Elections Legislative Committee
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FAXED 01-30

January 30, 2012

Honorable Edmund J. Brown
Governor, State of California
Office of the Governor, State Capitol
Sacramento, CA 95814

Re: AB 1413 (Fong) – Request for Signature

This is written on behalf of our client, Californians to Defend an Open Primary ("Californians"), to inform you of its position on AB 1413, as amended January 5, 2012. With one exception, noted below, "Californians" supports AB 1413 and requests your signature.

Proposition 14, which enacted California's Open Primary system, was adopted in 2010. "Californians" was the leading supporter of the measure during the campaign, and since enactment, "Californians" has actively and successfully litigated in defense of Proposition 14. We opposed previous versions of AB 1413 because it contained provisions inimical to Proposition 14.

During the Interim, we participated in a series of meetings and conversations regarding AB 1413 with interested parties, including the Secretary of State and local election officials. Progress has been made. Provisions harmful to Proposition 14 that would have generated additional litigation have been removed. Although, we do not endorse every provision of AB 1413 (see below), on balance, the bill will promote a fair and efficient election in June, 2012 and thereafter.

We object to AB 1413's deletion of existing provisions of law that allow candidates unassociated with major parties to be silent (or unidentified) on ballots with regard to party preference. We believe that candidates unassociated with qualified parties have the right to leave the ballot space reserved for party preference blank. This was an issue in the recently-decided *Field v. Bowen*, 199 Cal. App. 4th 346 (2011), and in the early proceedings of a parallel federal action, *Chamness v. Bowen*, Case No. 11-cv-01479-ODW (C.D. Cal.). AB 1413 may precipitate a similar lawsuit as candidates assert their constitutional right to "silence" on the issue of party preference.

Notwithstanding our concern with the ballot designation issue described above, we appreciate the opportunity to participate in negotiations on AB 1413 and acknowledge the collaboration and professionalism exhibited by all parties. We look forward to participating in future legislation relating to matters embodied in Proposition 14.

Respectfully, we request your signature on AB 1413, as amended January 5, 2012.

Cordially,

Gene Erbin

cc: Assembly Member Paul Fong

Date of Hearing: May 11, 2011

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Felipe Fuentes, Chair

AB 1413 (Committee on Elections and Redistricting) – As Introduced: March 14, 2011

Policy Committee: Elections Vote: 7-0

Urgency: No State Mandated Local Program: Yes Reimbursable: No

SUMMARY

This committee bill makes minor and technical changes to the Political Reform Act of 1974 (PRA), including correcting two erroneous cross-references and conforming to recent legislation that eliminated the requirement for paper copies of certain campaign reports regarding statewide candidates and measures be filed with Los Angeles and San Francisco Counties.

FISCAL EFFECT

Negligible fiscal impact.

COMMENTS

Purpose. This is one of the Assembly Elections and Redistricting Committee's annual omnibus bills, specifically containing technical changes to the PRA.

Analysis Prepared by: Chuck Nicol / APPR. / (916) 319-2081

New (1/4/12)

Section-by-section explanations of top two cleanup provisions:

1) Section 13 of Elections Code – Various technical, non-substantive changes, and conforming language regarding write-in votes at the general election in light of the Court of Appeals decision in *Field v. Bowen*.

2) Section 325 of Elections Code – Repeals definition of "Independent status" because that term is never used in code or in the Constitution.

3) Section 332.5 of Elections Code – Technical change to make language consistent by adding hyphen to "voter-nominated."

4) Section 334 of Elections Code – Change requested by elections officials to clarify that Superintendent of Public Instruction is a nonpartisan office, and to track the language in Article II, Section 6 of the State Constitution.

5) Section 337 of Elections Code – Technical change to make language consistent by adding hyphen to "party-nominated."

6) Section 359.5 of Elections Code – Rearranges the order of offices to track the order in which offices appear on the ballot. Makes a technical change from "a candidate" to "an office."

7) Section 2151 of the Elections Code – Gives the Secretary of State (SOS) flexibility in developing the voter registration card by deleting a requirement that certain language on the voter registration form be printed in a specified type face and size. Requires the option for a voter to decline to disclose a party preference to be placed at the end of the list of political parties, rather than at the beginning. Makes various technical and conforming changes. Allows the SOS to exhaust the existing supply of voter registration cards before making any changes required by this bill.

8) Section 2154 of the Elections Code – Makes a technical correction and makes a conforming change.

New 9) Section 2155 of the Elections Code – Makes various conforming changes from party "affiliation" to party "preference," and clarifies and simplifies the language on the voter notification card.

10) Section 3006 of the Elections Code – Makes conforming changes from party "affiliation" to party "preference." Technical changes requested by SOS to avoid potential litigation over voters who are registered as preferring non-qualified political parties and to clarify that the procedure for requesting a partisan ballot applies only at partisan elections.

11) Section 3007.5 of the Elections Code – Makes conforming changes from party "affiliation" to party "preference." Technical changes requested by SOS to avoid potential litigation over voters who are registered as preferring non-qualified political

parties and to clarify that the procedure for requesting a partisan ballot applies only at partisan elections.

12) Section 3205 of the Elections Code – Makes conforming changes from party "affiliation" to party "preference." Technical changes requested by SOS to avoid potential litigation over voters who are registered as preferring non-qualified political parties and to clarify that the procedure for requesting a partisan ballot applies only at partisan elections.

13) Section 7100 of the Elections Code – Changes the procedure the Democratic Party uses to choose presidential electors to conform to the top two primary format, and establishes a procedure for electors to be appointed when candidates fail to do so.

14) Section 8002.5 of the Elections Code – Specifies the manner in which a candidate's party preference will be listed on the ballot, and makes clarifying changes.

15) Section 8025 of the Elections Code – Allows for candidate filing to reopen if any candidate for voter-nominated office dies between the deadline for filing for office and the 83rd day prior to the election, instead of allowing candidate filing to reopen only in the circumstance where there is only one candidate who has filed, and that candidate dies. Repeals language regarding filing reopening for partisan nomination at the primary election, because this language is obsolete.

16) Section 8040 of the Elections Code – Modifies the format of the declaration of candidacy to include information that must be obtained from candidates for voter-nominated office.

17) Section 8041 of the Elections Code – Modifies the format of nomination papers in light of the fact that individuals signing nomination papers for candidates for voter-nominated office do not need to be registered as preferring any particular political party.

18) Section 8062 of the Elections Code – Corrects a technical error (adding the word "if" in paragraph (4) of subdivision (a)).

19) Section 8068 of the Elections Code – Clarifies ambiguity in the bill language (by removing the phrase "affiliated registered") and makes other clarifying changes.

20) Section 8106 of the Elections Code – Repeals language that became obsolete in light of the top two primary format (the only partisan offices that remain are central committee and President, neither of which require a candidate to pay filing fees, so a statutory provision governing signatures in lieu of filing fees for partisan office is obsolete).

21) Section 8121 of the Elections Code – Clarifies that party preference history only includes history while a registered voter in the state.

22) Section 8124 of the Elections Code – Requires the certified list of candidates to include the ballot designation of each candidate. Makes a conforming change.

23) Section 8141.5 of the Elections Code – Cross-references Section 8142 in recognition of the fact that more than two candidates can end up on the ballot at the general election if there is a tie, and makes a technical change.

24) Section 8142 of the Elections Code – Makes two technical corrections.

25) Section 8148 of the Elections Code – Requires the candidate list for the general election that is transmitted by the SOS to the county elections official to include the ballot designations for candidates, and makes technical changes.

26) Section 8300 of the Elections Code – Clarifies the language governing Independent Candidates, making it clear that a person can run using the Independent Candidate procedure for a voter-nominated office only if nobody ran in the primary election for the office.

27) Section 8600 of the Elections Code – Requires a write-in candidate for voter-nominated office to include his or her 10-year party preference history on the statement of write-in candidacy, so that this information can be made available to voters consistent with the top two procedures. Clarifies that an individual cannot run as a candidate for voter-nominated office at a general election, consistent with the Court of Appeals decision in *Field v. Bowen*.

28) Section 8606 of the Elections Code – Clarifies that an individual cannot run as a candidate for voter-nominated office at a general election consistent with the Court of Appeals decision in *Field v. Bowen*.

29) Section 8803 of the Elections Code – Provides that if a candidate for voter-nominated office who is to appear on the ballot at the general election dies, that candidate shall remain on the ballot, rather than having that person replaced by another candidate from the primary election.

30) Section 8805 of the Elections Code – Provides that if a candidate for voter-nominated office dies on or before the day of the primary election, and that candidate is one of the two top vote getters in the primary election, that the name of the deceased candidate will appear on the ballot at the general election.

31) Section 8807 of the Elections Code – Corresponding change to provide that a candidate for voter-nominated office will not be replaced on the ballot if that candidate dies.

32) Section 9083.5 of the Elections Code – Shortens and clarifies language that will appear in the state ballot pamphlet to explain the election procedure for partisan, voter-nominated, and non-partisan offices.

33) Section 9084.5 of the Elections Code – Repealed, because this language is unnecessary as this explanation is already required to appear in the ballot pamphlet pursuant to Section

9083.5.

34) Section 10704 of the Elections Code – Requires the election procedure for voter-nominated office to appear on the ballot and in the sample ballot at special elections.

35) Section 10706 of the Elections Code – Adds a cross-reference to clarify how ties are resolved between candidates for voter-nominated office in a special primary election.

36) Section 12108 of the Elections Code – Conforming change to reflect the manner in which voters are described if they do not disclose a party preference when registering to vote.

37) Section 13105 of the Elections Code – Shortens the manner in which party preference is displayed on the ballot to help with formatting issues. Also gives counties flexibility in ballot formatting for the party affiliation of Presidential candidates, per request from Orange County.

38) Section 13107 of the Elections Code – Corresponding change suggested by elections officials to clarify the placement of a candidate's ballot designation on the ballot.

39) Section 13206 of the Elections Code – Gives counties flexibility in type size and font for certain disclosures required on the ballot to help with formatting issues and re-writes language that will appear on the ballot so that it is shorter and clearer.

40) Section 13206.5 of the Elections Code – New section of law that establishes the information that will appear on the ballot at the general election.

41) Section 13207 of the Elections Code – Technical change to correct a grammatical error created by SB 6 (deleting the word "both"), and clarifies that write-in spaces are not printed on the ballot for voter-nominated office at a general election consistent with the Court of Appeals decision in *Field v. Bowen*. Various other non-substantive changes.

42) Section 13212 of the Elections Code – Consistent with the Court of Appeals decision in *Field v. Bowen*, specifies that write-in spaces won't be printed on the ballot at the general election for a voter-nominated office, since write-in votes will not be counted in these circumstances per SB 6.

43) Section 13230 of the Elections Code – Fixes a technical error (adds the hyphen to "Voter-nominated").

44) Section 13300 of the Elections Code – Clarifies that a separate sample ballot only needs to be prepared for partisan primary elections (since all voters receive the same ballot in elections where there is no partisan office on the ballot). Various other non-substantive changes.

45) Section 13302 of the Elections Code – Various minor and nonsubstantive changes to the procedure for political parties to submit lists of endorsed candidates for voter-nominated

# SENATE ELECTIONS AND CONSTITUTIONAL AMENDMENTS COMMITTEE
# BACKGROUND INFORMATION REQUEST

**MEASURE NO.** AB 1413

**NOTE:** Measures will not be set for hearing until background is received by Committee, so please return this form to Diana Ramirez in Room 2203 by **ASAP**. Our committee rules require that amendments to bills **(8 copies)** be delivered to the committee **5 days prior to the hearing**. A failure to adhere to the committee's rules may result in your measure being pulled from calendar.

**1. Who is the source or sponsor of the bill? What person, organization, or governmental entity requested introduction?**

Author-sponsored bill, though the Secretary of State and the California Association of Clerks and Election Officials requested many of the changes contained within this bill.A

**2. What is the problem or deficiency in present law which this bill seeks to remedy?**

In 2009, as part of a budget deal, a measure was placed on the ballot for the voters to consider authorizing a "top two" primary election system. At the same time that measure was approved, the Legislature also approved a series of changes to the Elections Code to implement a top two primary election system.

Unfortunately, due to the nature in which those statutory changes were adopted, they created a number of problems for the effective and efficient operation of elections. Last year, the Assembly Elections and Redistricting Committee held an oversight hearing to hear from elections officials about some of the problems with those statutory changes. Among other problems, county elections officials testified that certain ballot printing requirements created an unnecessary burden, and could significantly increase election costs.

Since that time, state and county elections officials have been working diligently to develop fixes that will help implement the top two primary system in a more effective manner. This bill reflects much of that work, and makes a number of technical and substantive changes to assist elections officials in carrying out their responsibilities. In addition, this bill addresses a few other substantive and technical issues with the implementation of the top two primary election system.

Finally, AB 1413 also provides important clarification to a provision of state law that governs residency determinations for members of the Legislature and Congress. An appellate court recently read that provision of law in a manner that is inconsistent with the Legislative history.

**3. Please attach copies of any additional background material in explanation or support of the bill, or state where such material is available for reference by the committee.**

See attached.

**4. Has a similar bill been before either this session or a previous session of the legislature? If so, please identify the session, bill number, and disposition of the bill.**

Last updated: September 3, 2011

# Background Sheet
# AB 1413 (Fong): Top Two Primary Clean-up

## SUMMARY

AB 1413 makes numerous technical and substantive changes to the Elections Code to provide for more effective and efficient implementation of California's "top two" primary election system. AB 1413 also clarifies a provision of law that governs residency determinations for members of the Legislature and Congress.

## BACKGROUND

In February 2009, the Legislature approved SCA 4 (Maldonado), Res. Chapter 2, Statutes of 2009, which was enacted by the voters as Proposition 14 on the June 2010 statewide primary election ballot. Proposition 14 implemented a "top two" primary election system in California for most elective state and federal offices. At primary elections, voters are able to vote for any candidate, regardless of party, and the two candidates who receive the most votes, regardless of party, advance to the General Election.

At the same time that it passed SCA 4, the Legislature also approved and the Governor signed SB 6 (Maldonado), Chapter 1, Statutes of 2009. SB 6 made various changes to state statute that became effective upon the approval of Proposition 14 by the voters. While many of the changes to state law made by SB 6 were merely conforming changes to provide for a "top two" primary system, some of the changes were more substantive. For instance, for offices that are subject to the top two primary, SB 6 prohibits write-in votes from being counted at the November general election. Additionally, SB 6 required the state voter registration form to be redesigned and required certain new information to be printed on the ballot at elections for state and federal office.

In March 2010, the Assembly Elections & Redistricting Committee held an oversight hearing on the impacts of the top two primary and SB 6 on election costs and administration. Among other testimony, the committee heard from elections officials who indicated that certain aspects of SB 6 could significantly increase the length of ballots at primary elections, thus increasing election costs.

Existing law provides that the domicile of a Member of the Legislature or a Representative in the Congress of the United States is conclusively presumed to be at the residence address indicated on that person's currently filed affidavit of registration. However, a recent Court of Appeals decision construed this conclusive presumption in a manner that is inconsistent with the Legislative intent.

## AB 1413

AB 1413 makes numerous technical and substantive changes to the Elections Code to improve the implementation of the top two primary election system. AB 1413 modifies the language that will appear on the ballot to address formatting concerns, shortens the format in which a candidate's party preference is displayed on the ballot, shortens and clarifies the instructions that appear on the ballot, and eliminates certain type size and typeface requirements to give county elections officials greater flexibility to format ballots.

AB 1413 also provides that voters will be given the option of affiliating with a political party on the voter registration form, rather than stating a party preference. This bill provides that when a candidate for voter nominated office dies, the name of that candidate nonetheless remains on the ballot. Additionally, AB 1413 makes various other substantive and technical changes to the top two primary law.

Finally, AB 1413 provides important clarification to a provision of state law that governs residency determinations for members of the Legislature and Congress.

## CONTACT

Ethan Jones in Assembly Elections & Redistricting Committee at (916) 319-2094.

Section-by-section explanations of AB 1413 provisions:

1) Section 13 of Elections Code – Various technical, non-substantive changes.

2) Section 300.5 of Elections Code – Clarifying changes suggested by Legislative Counsel.

3) Section 325 of Elections Code – Repeals definition of "Independent status" because that term is never used in code or in the Constitution.

4) Section 332.5 of Elections Code – Technical change to make language consistent by adding hyphen to "voter-nominated."

5) Section 334 of Elections Code – Change requested by elections officials to clarify that Superintendent of Public Instruction is a nonpartisan office, and to track the language in Article II, Section 6 of the State Constitution.

6) Section 337 of Elections Code – Technical change to make language consistent by adding hyphen to "party-nominated."

7) Section 359.5 of Elections Code – Deletes unnecessary explanatory language that has no legal effect. Rearranges the order of offices to track the order in which offices appear on the ballot. Rearranges other parts of the section for clarity. Makes a technical change from "a candidate" to "an office."

8) Section 2026 of the Elections Code – Clarifies a provision of state law that governs residency determinations for members of the Legislature and Congress. An appellate court recently read that provision of law in a manner that is inconsistent with the Legislative history, and that makes the law essentially meaningless.

9) Section 2150 of the Elections Code, as amended by Section 8 of Chapter 1 of the Statutes of 2009 – Changes party "preference" back to party "affiliation" on the voter registration form to clarify that a person becomes a member of a political party when they choose that party when registering to vote.

10) Section 2150 of the Elections Code, as amended by Section 4.5 of Chapter 364 of the Statutes of 2009 – Changes party "preference" back to party "affiliation" on the voter registration form to clarify that a person becomes a member of a political party when they choose that party when registering to vote.

11) Section 2151 of the Elections Code – Changes party "preference" back to party "affiliation" on the voter registration form. Gives the Secretary of State (SOS) flexibility in developing the voter registration card by deleting a requirement for certain language to be printed on the voter registration form. Changes the terminology used on the voter registration form back from "No Party Preference" to declining to affiliate with a political party, and requires this option to be placed at the end of the list of political parties, rather than at the beginning. Allows the SOS to exhaust the existing supply of voter registration

cards before making any changes required by this bill.

12) Section 2152 of the Elections Code – Changes party "preference" back to party "affiliation."

13) Section 2154 of the Elections Code – Changes party "preference" back to party "affiliation." Makes a technical correction.

14) Section 3006 of the Elections Code – Technical changes requested by SOS to avoid potential litigation over voters who are affiliated with non-qualified political parties and to clarify that the procedure for requesting a partisan ballot applies only at partisan elections.

15) Section 3007.5 of the Elections Code – Technical changes requested by SOS to avoid potential litigation over voters who are affiliated with non-qualified political parties and to clarify that the procedure for requesting a partisan ballot applies only at partisan elections.

16) Section 3205 of the Elections Code – Technical changes requested by SOS to avoid potential litigation over voters who are affiliated with non-qualified political parties and to clarify that the procedure for requesting a partisan ballot applies only at partisan elections.

17) Section 6000a of the Elections Code – Undoes a renumbering of this code section that is unnecessary in light of the repeal of Section 6000.

18) Chapter 0.5 (commencing with Section 6000) of Part 1 of Division 6 of the Elections Code – Repeals language that becomes unnecessary when changing party "preference" back to party "affiliation."

19) Section 7000 of the Elections Code – Repeals language that becomes unnecessary when changing party "preference" back to party "affiliation."

20) Section 7100 of the Elections Code – Changes the procedure the Democratic Party uses to choose presidential electors to conform to the top two primary format.

21) Section 8002.5 of the Elections Code – Changes party "preference" back to party "affiliation," and repeals unnecessary language that has no legal effect.

22) Section 8025 of the Elections Code – Allows for candidate filing to reopen if there is only one candidate with a specific political party affiliation, and that candidate dies between the deadline for filing for office and the 83rd day prior to the election.

23) Section 8040 of the Elections Code – Modifies the format of the declaration of candidacy to include information that must be obtained from candidates for voter-nominated office.

24) Section 8041 of the Elections Code – Modifies the format of nomination papers in light of the fact that individuals signing nomination papers for candidates for voter-nominated office do not need to be registered any particular political party.

25) Section 8062 of the Elections Code – Corrects a technical error (adding the word "if" in paragraph (4) of subdivision (a)).

26) Section 8068 of the Elections Code – Changes party "preference" back to party "affiliation."

27) Section 8081 of the Elections Code – Changes party "preference" back to party "affiliation."

28) Section 8106 of the Elections Code – Repeals language that became obsolete in light of the top two primary format (the only partisan offices that remain are central committee and President, neither of which require a candidate to pay filing fees, so a statutory provision governing signatures in lieu of filing fees for partisan office is obsolete).

29) Section 8121 of the Elections Code – Clarifies that party affiliation history only includes history while a registered voter in the state, and changes party "preference" back to party "affiliation."

30) Section 8124 of the Elections Code – Changes party "preference" back to party "affiliation," and requires the certified list of candidates to include the ballot designation of each candidate at the request of elections officials.

31) Section 8141.5 of the Elections Code – Repeals unnecessary language that has no legal effect.

32) Section 8148 of the Elections Code – Requires the candidate list for the general election that is transmitted by the SOS to the county elections official to include the ballot designations for candidates, and makes technical changes.

33) Section 8300 of the Elections Code – Clarifies the language governing Independent Candidates, making it clear that a person can run using the Independent Candidate procedure for a voter-nominated office only if nobody ran in the primary election for the office.

34) Section 8600 of the Elections Code – Requires a write-in candidate for voter-nominated office to include his or her 10-year party affiliation history on the statement of write-in candidacy, so that this information can be made available to voters consistent with the top two procedures.

Also appears as Section 34.5 of the bill -- Technical language needed to avoid chaptering-out changes proposed by AB 362 (Lowenthal).

35) Section 8606 of the Elections Code – Clarifies that an individual cannot run as a candidate for voter-nominated office at a general election.

36) Section 8803 of the Elections Code – Provides that if a candidate for voter-nominated office who is to appear on the ballot at the general election dies, that candidate shall remain on the ballot, rather than having that person replaced by another candidate from the primary election.

37) Section 8805 of the Elections Code – Provides that if a candidate for voter-nominated office dies on or before the day of the primary election, and that candidate is one of the two top vote getters in the primary election, that the name of the deceased candidate will appear on the ballot at the general election.

38) Section 8807 of the Elections Code – Corresponding change to provide that a candidate for voter-nominated office will not be replaced on the ballot if that candidate dies.

39) Section 9083.5 of the Elections Code – Gives the SOS flexibility to write the explanation of electoral procedure that will appear in the ballot pamphlet, rather than requiring the inclusion of text that is duplicative, lengthy, and unclear. Also clarifies that the SOS does not need to include the explanation of electoral procedure for any type of office (voter-nominated, partisan, or non-partisan) that will not appear on the ballot.

40) Section 9084.5 of the Elections Code – Repealed, because this language is unnecessary in light of the language in 9083.5.

41) Section 10704 of the Elections Code – Requires the electoral procedure for voter-nominated office to appear on the ballot and in the sample ballot at special elections.

42) Section 10706 of the Elections Code – Adds a cross-reference to clarify how ties are resolved between candidates for voter-nominated office in a special primary election.

43) Section 12104 of the Elections Code – Technical change made necessary by the repeal of Elections Code Section 7000.

44) Section 12108 of the Elections Code – Changes party "preference" back to party "affiliation."

45) Section 13102 of the Elections Code – Changes party "preference" back to party "affiliation."

46) Section 13105 of the Elections Code – Shortens the manner in which party affiliation is displayed on the ballot to help with formatting issues, and clarifies how the ballot will appear for candidates who choose not to have a party affiliation displayed on the ballot (will read as "Preference: Withheld by candidate"). Also gives counties flexibility in ballot formatting for the party affiliation of Presidential candidates, per request from

Orange County.

47) Section 13107 of the Elections Code – Corresponding change suggested by elections officials to clarify the placement of a candidate's ballot designation on the ballot.

48) Section 13206 of the Elections Code – Gives counties flexibility in type size and font for certain disclosures required on the ballot to help with formatting issues and re-writes language that will appear on the ballot so that it is shorter and clearer. Changes party "preference" back to party "affiliation."

49) Section 13207 of the Elections Code – Technical change to correct a grammatical error created by SB 6 (deleting the word "both"), and clarifies that write-in spaces are not printed on the ballot for voter-nominated office at a general election.

50) Section 13212 of the Elections Code – Specifies that write-in spaces won't be printed on the ballot at the general election for a voter-nominated office, since write-in votes will not be counted in these circumstances per SB 6.

51) Section 13230 of the Elections Code – Fixes a technical error (adds the hyphen to "Voter-nominated") and changes party "preference" back to party "affiliation."

52) Section 13300 of the Elections Code – Changes party "preference" back to party "affiliation," and clarifies that a separate sample ballot only needs to be prepared for partisan primary elections (since all voters receive the same ballot in elections where there is no partisan office on the ballot).

53) Section 13302 of the Elections Code – Various minor and nonsubstantive changes to the procedure for political parties to submit lists of endorsed candidates for voter-nominated office to be included in the sample ballot.

54) Section 15340 of the Elections Code – Specifies that voters cannot write-in the name of a candidate at a general election for voter-nominated office, since SB 6 prohibits those votes from being counted.

55) Section 15402 of the Elections Code – Provides that if a candidate for voter-nominated office dies, the votes for that candidate will be counted regardless of when he or she died. Provides that if a deceased candidate receives the most votes at a general election for a voter-nominated office, that candidate shall be considered elected regardless of when the candidate died.

56) Section 15451 of the Elections Code – Repeals unnecessary language that has no legal effect.

57) Section 15560 of the Elections Code – Technical change made necessary by the repeal of Elections Code Section 7000.

58) Section 19301 of the Elections Code – Changes party "designation" back to party "affiliation" and corrects an erroneous cross-reference.

59) Technical language needed to avoid chaptering-out changes proposed by AB 362 (Lowenthal).

Last updated: January 5, 2012

# Background Sheet
# AB 1413 (Fong): Top Two Primary Clean-up

## SUMMARY

AB 1413 makes numerous technical and substantive changes to the Elections Code to provide for more effective and efficient implementation of California's "top two" primary election system.

## BACKGROUND

In February 2009, the Legislature approved SCA 4 (Maldonado), Res. Chapter 2, Statutes of 2009, which was enacted by the voters as Proposition 14 on the June 2010 statewide primary election ballot. Proposition 14 implemented a "top two" primary election system in California for most elective state and federal offices. At primary elections, voters are able to vote for any candidate, regardless of party, and the two candidates who receive the most votes, regardless of party, advance to the General Election.

At the same time that it passed SCA 4, the Legislature also approved and the Governor signed SB 6 (Maldonado), Chapter 1, Statutes of 2009. SB 6 made various changes to state statute that became effective upon the approval of Proposition 14 by the voters. While many of the changes to state law made by SB 6 were merely conforming changes to provide for a "top two" primary system, some of the changes were more substantive. For instance, for offices that are subject to the top two primary, SB 6 prohibits write-in votes from being counted at the November general election. Additionally, SB 6 required the state voter registration form to be redesigned and required certain new information to be printed on the ballot at elections for state and federal office.

In March 2010, the Assembly Elections & Redistricting Committee held an oversight hearing on the impacts of the top two primary and SB 6 on election costs and administration. Among other testimony, the committee heard from elections officials who indicated that certain aspects of SB 6 could significantly increase the length of ballots at primary elections, thus increasing election costs.

## AB 1413

AB 1413 makes numerous technical and substantive changes to the Elections Code to improve the implementation of the top two primary election system. AB 1413 modifies the language that will appear on the ballot to address formatting concerns, shortens the format in which a candidate's party preference is displayed on the ballot, shortens and clarifies the instructions that appear on the ballot, and eliminates certain type size and typeface requirements to give county elections officials greater flexibility to format ballots.

AB 1413 also provides that when a candidate for voter nominated office dies, the name of that candidate nonetheless remains on the ballot. Additionally, AB 1413 makes various other substantive and technical changes to the top two primary law.

## CONTACT

Ethan Jones in Assembly Elections & Redistricting Committee at (916) 319-2094.

# AB 1413 (Fong): Top Two Primary Cleanup
## Senate Floor
## Talking Points

Mr. President and Members:

- In 2009, as part of a budget deal, a measure was placed on the ballot for the voters to consider authorizing a "top two" primary election system.

- At the same time that measure was approved, the Legislature also approved a series of changes to the Elections Code to implement the "top two" system.

- Unfortunately, those changes created a number of problems for the effective and efficient operation of elections.

- Among other problems, county elections officials identified certain ballot printing requirements that create an unnecessary burden, and could significantly increase local election costs.

- And the Los Angeles County Registrar of Voters has indicated that the county's voting system is unable to accommodate the existing requirements for conducting the primary election under the "top two" system.

- AB 1413 makes numerous technical and substantive changes to the Elections Code to provide for more effective and efficient implementation of California's "top two" primary election system.

- AB 1413 is supported by the Secretary of State, county elections officials, and by the proponents of the "top two" system.

- I ask for your "aye" vote.

**AB 1413 (Fong): Top Two Primary Cleanup**
**Senate Floor**
**Additional Talking Points on Write-In Issue**

- Contrary to what you may have heard, AB 1413 does not eliminate write-in votes at the general election.

- It was SB 6, the implementing bill for the "top two" primary system, that got rid of write-ins at the general election for certain offices.

- However, SB 6 did not amend another code section – a section that requires write-in spaces to be printed on the ballot.

- After SB 6 passed, voters filed a lawsuit against the Secretary of State, arguing that it was confusing for write-in lines to be printed on the ballot if write-in votes weren't going to be counted.

- A California appellate court agreed that it was confusing. The court then ordered that write-in spaces not be printed on general election ballots.

- As a result, the *status quo* is that write-in votes won't be counted, and that write-in lines won't appear on the ballot.

- So AB 1413 simply conforms the statute to the court's ruling.

- There are some groups and individuals that would like us to reinstate the ability of candidates to run as write-ins at the general election.

- That is a legitimate policy debate to have.

- But this bill seeks to ensure that we make the changes that elections officials need in order to run June's primary election.

- And because this bill needs a 2/3rds vote, it cannot include provisions that do not have broad support.

- Reinstating write-in votes would be a much more significant policy change than conforming the code to the court's decision…

- …And it's a policy change that the proponents of the "top two" system have made it clear they would oppose.

- So that is why the author chose not to revisit the policy decision that was made in SB 6 on write-in votes in this bill.

- But that does not prevent the Legislature from continuing the discussion about whether write-in votes should be allowed at the general election…

- …And it doesn't prevent the Legislature from changing the policy at any future point.

AB 1413 (Top Two Cleanup)
Q&A regarding the "top two" provisions

**Q: SB 6 allows candidates to choose to have a blank space on the ballot, rather than having a party preference listed. The proponents of the "top two" system think this is an important provision. Why does AB 1413 eliminate it?**

A: The main reason is that elections officials believe that leaving a blank space on the ballot will confuse voters. If there are blank spaces for certain candidates, and not others, voters may think there was a problem with the printing of the ballot. It makes much more sense to be consistent, and have this information appear for every candidate.

**Q: Isn't eliminating the option of allowing candidates to choose to have a blank space on the ballot legally problematic, and couldn't it jeopardize the "top two" system?**

A: No. First of all, Washington state's "top two" system, which was upheld by the US Supreme Court, does not allow candidates to have a blank space in place of their party preference.

Second, we had counsel look at this issue, and they indicated that they did not believe it was necessary to provide this option.

Third, Proposition 14, which was approved by the voters, included language that said that the party preference chosen by a candidate "shall accompany" the candidate's name on the ballot, so this is consistent with the voter-approved measure.

Finally, out of an abundance of caution, this bill includes a severability clause. So even if a court decided that it was a problem to prohibit candidates from having the option of a blank space on the ballot in place of a party preference, such a decision wouldn't threaten

the rest of this bill or the "top two" system generally.

**Q: Why does this bill move the "decline to state" or "independent" option to the end of the list of political parties on the voter registration card, instead of leaving it at the beginning?**

A: It is important for voters to see all of their options before making a decision.

Before voters decide that they don't want to state a preference for any political party, they should be made aware of the options that are available. It's also important to note that this change simply reverts back to how the voter registration card has been formatted for years.

**Q: This bill gets rid of the write-in spaces on the ballot. Why are you doing away with write-ins?**

A: AB 1413 actually doesn't do away with write-ins – SB 6 – the companion bill to the "top two" constitutional amendment did that.

AB 1413 simply gets rid of the lines on the ballot for write-in candidates. If we aren't going to count votes for write-in candidates at the general election, then we shouldn't be formatting the ballot in such a manner that could confuse voters into believing that write-in votes would be counted.

In fact, as a practical matter, AB 1413 simply conforms the Elections Code to existing practice. Last September, the Court of Appeal for the First Appellate District ordered elections officials not to print write-in spaces on the ballot at the general election for offices that are subject to the "top two" primary system.

So in practice, the write-in provisions of AB 1413 don't change the law at all. AB 1413 just ensures that the statute is consistent with the court's ruling.

**Q: Why not allow write-in votes to be counted?**

A: For better or worse, a policy decision was made with SB 6, in the context of the "top two" primary, that write-in votes should not be counted at the general election for voter-nominated offices. This bill seeks to ensure that the "top two" primary law can be implemented effectively.

Allowing write-in votes to be counted at the general election would undo a significant policy change that the proponents of the "top two" system felt was an important part of that system, which is beyond the scope of what the author is trying to do with this bill.

Furthermore, the proponents of the "top two" system have made it clear that they believe that reinstating write-ins to the general election ballot could undermine the "top two" system.

**Q: Why doesn't AB 1413 allow someone to run as an Independent? Or as a member of a non-qualified political party?**

A: This isn't something that AB 1413 does – this was a change made by SB 6, the companion bill to the "top two" constitutional amendment. All AB 1413 does is change the manner in which a candidate's party preference is formatted on the ballot. Those formatting changes are essential to making sure that county elections officials can implement the "top two" primary system without significant increases in ballot printing costs.

Again, the intent of this legislation is not to make significant policy changes to the "top two" primary system – regardless of how you feel about that system, the voters approved it, and it makes sense to see how it works in practice before making significant substantive changes to the system.

**Q: Why doesn't AB 1413 change the standard for political party qualification, to ensure that minor parties don't lose their status as qualified political parties?**

A: This bill is an urgency measure, intended to ensure that the "top two" system can be effectively implemented in June. As a result, this bill has been limited to issues for which there was an urgency in resolving the issue and for which there was broad policy agreement.

In the case of a qualification standard for political parties, neither of those standards applies. Because party qualification is based (in part) on election results from gubernatorial elections, no political party is going to lose its status as a qualified party until after the 2014 general election, at the earliest.

Furthermore, it's not clear that there is broad agreement as to what the new standard should be. A number of different solutions have been proposed, from lowering the number of registrants needed to be a qualified political party, to allowing a party to maintain its status as a qualified political party based on primary election results.

Clearly this is an issue that needs to be addressed. However, without that policy agreement, other important changes proposed by this bill would be jeopardized.

In any case, a bill will be introduced in the next few weeks that will seek to address the party qualification issue.

**Q: Why doesn't AB 1413 lower the numbers of signatures-in-lieu of a filing fee that minor party candidates need to run for office?**

A: That policy proposal is inconsistent with the "top two" system.

Under the "top two" system, candidates no longer run as nominees of a political party – or to represent a political party on the general

election ballot.

As a result, candidates are free to collect signatures on nomination papers and on signatures-in-lieu petitions from any voter, not just from voters who share the same party preference or affiliation.

But that means that everyone needs to be held to the *same* standard. And lowering the standard for all candidates just isn't feasible given the state's current fiscal situation.

**Q: Why are you changing the law governing what happens when a candidate dies?**

A: Under current law, if a candidate for voter nominated office dies, that candidate can be replaced on the ballot by a candidate who has a different party preference than the deceased candidate.

For instance, if a popular incumbent Republican runs for reelection in a strongly Republican district against a Democrat and a Green Party member, finishes first in the primary election, then dies before the general election, the ballot at the general election in this heavily Republican area could feature a Democrat and a Green Party candidate, but no Republican. That's not fair to the voters of the district – they shouldn't be forced to choose between two candidates who are entirely unrepresentative of the policy preferences of a majority of voters in the district.

In light of that, it makes much more sense to allow deceased candidates to remain on the ballot, and to hold a special election if necessary. This may lead to a few more special elections, but it's better for democracy to have elected officials that reflect the preferences of the electorate.

**Q: How would a candidate's party preference appear on the ballot under AB 1413?**

A: In the case of a candidate who has declared a preference for a qualified political party on his or her most recent affidavit of registration, the candidate's party preference would appear as:

"Party Preference: _____ (name of party)".

In the case of a candidate who has not declared a preference for a qualified political party on his or her most recent affidavit of registration, the candidate's party preference would appear as:

"Party Preference: None".

**Q: What can a candidate do if that candidate doesn't want his or her party preference to appear on the ballot? Or if the candidate wants a different party preference to appear on the ballot?**

A: The party preference that appears on the ballot is based on the candidate's most recently filed affidavit of registration. So if a candidate doesn't want his or her party preference to appear on the ballot, that candidate can always file a new affidavit of registration in which he or she does not declare a party preference.

A candidate's party preference that appears on the ballot cannot, however, change between the primary election and the general election.

Section-by-section explanations of top two cleanup provisions:

1) Section 13 of Elections Code – Various technical, non-substantive changes, and conforming language regarding write-in votes at the general election in light of the Court of Appeals decision in *Field v. Bowen.* FIRST

2) Section 325 of Elections Code – Repeals definition of "Independent status" because that term is never used in code or in the Constitution.

3) Section 334 of Elections Code – Change requested by elections officials to clarify that Superintendent of Public Instruction is a nonpartisan office, and to track the language in Article II, Section 6 of the State Constitution.

4) Section 359.5 of Elections Code – Rearranges the order of offices to track the order in which offices appear on the ballot. Makes a technical change from "a candidate" to "an office." Makes a technical change to reflect that, in certain situations (where there is a tie at the primary election), there may be more than 2 candidates on the ballot at the general election.

5) Section 2151 of the Elections Code – Gives the Secretary of State (SOS) flexibility in developing the voter registration card by deleting a requirement that certain language on the voter registration form be printed in a specified type face and size. Requires the option for a voter to decline to disclose a party preference to be placed at the end of the list of political parties, rather than at the beginning. Makes various technical and conforming changes. Allows the SOS to exhaust the existing supply of voter registration cards before making any changes required by this bill. ADD

6) Section 2154 of the Elections Code – Makes a technical correction and makes a conforming change.

7) Section 2155 of the Elections Code – Makes various conforming changes from party "affiliation" to party "preference," and clarifies and simplifies the language on the voter notification card.

8) Section 3006 of the Elections Code – Makes conforming changes from party "affiliation" to party "preference." Technical changes requested by SOS to avoid potential litigation over voters who are registered as preferring non-qualified political parties and to clarify that the procedure for requesting a partisan ballot applies only at partisan elections.

9) Section 3007.5 of the Elections Code – Makes conforming changes from party "affiliation" to party "preference." Technical changes requested by SOS to avoid potential litigation over voters who are registered as preferring non-qualified political parties and to clarify that the procedure for requesting a partisan ballot applies only at partisan elections.

10) Section 3205 of the Elections Code – Makes conforming changes from party "affiliation" to party "preference." Technical changes requested by SOS to avoid potential litigation over voters who are registered as preferring non-qualified political parties and to clarify that the procedure for requesting a partisan ballot applies only at partisan elections.

11) Section 7100 of the Elections Code – Changes the procedure the Democratic Party uses to choose presidential electors to conform to the top two primary format, and establishes a procedure for electors to be appointed when candidates fail to do so.

12) Section 8002.5 of the Elections Code – Specifies the manner in which a candidate's party preference will be listed on the ballot, and makes clarifying changes.

13) Section 8025 of the Elections Code – Allows for candidate filing to reopen if any candidate for voter-nominated office dies between the deadline for filing for office and the 83rd day prior to the election, instead of allowing candidate filing to reopen only in the circumstance where there is only one candidate who has filed, and that candidate dies. Repeals language regarding filing reopening for partisan nomination at the primary election, because this language is obsolete.

14) Section 8040 of the Elections Code – Modifies the format of the declaration of candidacy to include information that must be obtained from candidates for voter-nominated office.

15) Section 8041 of the Elections Code – Modifies the format of nomination papers in light of the fact that individuals signing nomination papers for candidates for voter-nominated office do not need to be registered as preferring any particular political party.

16) Section 8062 of the Elections Code – Corrects a technical error (adding the word "if" in paragraph (4) of subdivision (a)).

17) Section 8068 of the Elections Code – Clarifies ambiguity in the bill language (by removing the phrase "affiliated registered") and makes other clarifying changes.

18) Section 8106 of the Elections Code – Repeals language that became obsolete in light of the top two primary format (the only partisan offices that remain are central committee and President, neither of which require a candidate to pay filing fees, so a statutory provision governing signatures in lieu of filing fees for partisan office is obsolete).

19) Section 8121 of the Elections Code – Clarifies that party preference history only includes history while a registered voter in the state, because there is no way to verify party preference history from outside the state.

20) Section 8124 of the Elections Code – Requires the certified list of candidates to include the ballot designation of each candidate. Makes a conforming change.

21) Section 8141.5 of the Elections Code – Cross-references Section 8142 in recognition of the fact that more than two candidates can end up on the ballot at the general election if

there is a tie, and makes a technical change.

22) Section 8142 of the Elections Code – Makes two technical corrections.

23) Section 8148 of the Elections Code – Requires the candidate list for the general election that is transmitted by the SOS to the county elections official to include the ballot designations for candidates, and makes technical changes.

24) Section 8300 of the Elections Code – Clarifies the language governing Independent Candidates, making it clear that a person can run using the Independent Candidate procedure for a voter-nominated office only if nobody ran in the primary election for the office.

25) Section 8600 of the Elections Code – Requires a write-in candidate for voter-nominated office to include his or her 10-year party preference history on the statement of write-in candidacy, so that this information can be made available to voters consistent with the top two procedures. Clarifies that an individual cannot run as a candidate for voter-nominated office at a general election, consistent with the Court of Appeals decision in *Field v. Bowen*.

26) Section 8606 of the Elections Code – Clarifies that an individual cannot run as a candidate for voter-nominated office at a general election consistent with the Court of Appeals decision in *Field v. Bowen*.

27) Section 8803 of the Elections Code – Provides that if a candidate for voter-nominated office who is to appear on the ballot at the general election dies, that candidate shall remain on the ballot, rather than having that person replaced by another candidate from the primary election.

28) Section 8805 of the Elections Code – Provides that if a candidate for voter-nominated office dies on or before the day of the primary election, and that candidate is one of the two top vote getters in the primary election, that the name of the deceased candidate will appear on the ballot at the general election.

29) Section 8807 of the Elections Code – Corresponding change to provide that a candidate for voter-nominated office will not be replaced on the ballot if that candidate dies.

30) Section 9083.5 of the Elections Code – Shortens and clarifies language that will appear in the state ballot pamphlet to explain the election procedure for partisan, voter-nominated, and non-partisan offices.

31) Section 9084.5 of the Elections Code – Repealed, because this language is unnecessary as this explanation is already required to appear in the ballot pamphlet pursuant to Section 9083.5.

32) Section 10704 of the Elections Code – Requires the election procedure for voter-nominated office to appear on the ballot and in the sample ballot at special elections.

33) Section 10706 of the Elections Code – Adds a cross-reference to clarify how ties are resolved between candidates for voter-nominated office in a special primary election.

34) Section 12108 of the Elections Code – Conforming change to reflect the manner in which poll workers are described if they do not disclose a party preference when registering to vote.

35) Section 13105 of the Elections Code – Shortens the manner in which party preference is displayed on the ballot to help with formatting issues. Also gives counties flexibility in ballot formatting for the party affiliation of Presidential candidates, per request from Orange County.

36) Section 13107 of the Elections Code – Corresponding change suggested by elections officials to clarify the placement of a candidate's ballot designation on the ballot.

37) Section 13206 of the Elections Code – Gives counties flexibility in type size and font for certain disclosures required on the ballot to help with formatting issues and re-writes language that will appear on the ballot so that it is shorter and clearer.

38) Section 13206.5 of the Elections Code – New section of law that establishes the information that will appear on the ballot at the general election.

39) Section 13207 of the Elections Code – Clarifies that write-in spaces are not printed on the ballot for voter-nominated office at a general election consistent with the Court of Appeals decision in *Field v. Bowen*. Various other non-substantive changes.

40) Section 13212 of the Elections Code – Consistent with the Court of Appeals decision in *Field v. Bowen,* specifies that write-in spaces won't be printed on the ballot at the general election for a voter-nominated office, since write-in votes will not be counted in these circumstances per SB 6.

41) Section 13230 of the Elections Code – Fixes a technical error (adds the hyphen to "Voter-nominated").

42) Section 13300 of the Elections Code – Clarifies that a separate sample ballot only needs to be prepared for partisan primary elections (since all voters receive the same ballot in elections where there is no partisan office on the ballot). Various other non-substantive changes.

43) Section 13302 of the Elections Code – Various minor and nonsubstantive changes to the procedure for political parties to submit lists of endorsed candidates for voter-nominated office to be included in the sample ballot.

44) Section 15340 of the Elections Code – Consistent with the Court of Appeals decision in *Field v. Bowen*, specifies that voters cannot write-in the name of a candidate at a general election for voter-nominated office, since SB 6 prohibits those votes from being counted.

45) Section 15402 of the Elections Code – Provides that if a candidate for voter-nominated office dies, the votes for that candidate will be counted regardless of when he or she died. Provides that if a deceased candidate receives the most votes at a general election for a voter-nominated office, that candidate shall be considered elected regardless of when the candidate died.

46) Section 19301 of the Elections Code – Corrects an erroneous cross-reference and makes technical changes.

47) Section 85312 of the Government Code – Establishes that the change from party "affiliation" to party "preference" did not affect the rights of a political party to communicate with an individual who chose that party on the voter registration affidavit when registering to vote.

48) Section 85703 of the Government Code – Establishes that the change from party "affiliation" to party "preference" did not affect the rights of a political party to communicate with an individual who chose that party on the voter registration affidavit when registering to vote.

49) Broad construction language similar to language that was in SB 6.

50) Severability language similar to language that was in SB 6.

51) Boilerplate language that appears in bills amending the Political Reform Act.

52) Urgency clause to allow the bill to take effect in time for the 2012 elections.

CONCURRENCE IN SENATE AMENDMENTS
AB 1413 (Fong)
As Amended January 5, 2012
2/3 vote. Urgency

ASSEMBLY: (May 19, 2011) SENATE: 36-0 (January 19, 2012)
(vote not relevant)

COMMITTEE VOTE: 7-0 (January 26, 2012) RECOMMENDATION: concur

Original Committee Reference: E. & R.

SUMMARY: Makes numerous substantive and technical changes to state election law to implement the top two primary election system.

The Senate amendments delete the Assembly version of this bill, and instead:

1) Conform the procedure for presidential electors to be chosen by the Democratic Party to the top two primary system. Establish a procedure for the chairperson of the Democratic Party to appoint an elector if the candidate who is entitled to appoint that elector fails to do so.

2) Require that the option for a voter to decline to disclose a party preference be placed at the end of the listing of qualified political parties on the voter registration card. Permit the Secretary of State (SOS) to exhaust the existing supply of voter registration cards.

3) Permit candidate filing for a voter-nominated office to re-open if any candidate who filed nomination papers at the primary election for that office dies after the deadline for delivery of nomination documents, but not less than 83 days before the election.

4) Modify the format of nomination documents to conform to the top two primary system. Require a candidate for voter-nominated office to include a certification of his or her party preference history for the previous 10 years on his or her nomination papers.

5) Provide that if a candidate for voter-nominated office dies prior to the primary election, and that deceased candidate is one of the top two vote getters in the primary election, the name of that deceased candidate shall appear on the ballot at the general election. Provide that if a candidate for voter-nominated office who is entitled to appear on the general election ballot dies, the name of that candidate nonetheless shall appear on the general election ballot.

6) Provide that if a candidate for voter-nominated office who is deceased receives a majority of votes cast for the office at the general election, a vacancy shall exist in the office to which he or she was elected. Provide that this vacancy shall be filled in the same manner as if the candidate had died subsequent to taking office.

7) Shorten and clarify the explanation of the election procedure for partisan office, voter-nominated office, and nonpartisan office that appears in the state ballot pamphlet. Require an explanation of the election procedure for voter-nominated office to be included in the sample ballot at any

special election held to fill a vacancy in the Legislature or in Congress.

8) Modify the manner in which the party preference designation for a candidate for voter-nominated office will appear on the ballot, pursuant to the following:

   a) If the candidate has declared a preference for a qualified political party on his or her most recently filed affidavit of registration, the designation appears in the following manner: "Party Preference: _____ (name of the qualified political party)."

   b) If the candidate has not declared a preference for a qualified political party on his or her most recently filed affidavit of registration, the designation appears in the following manner: "Party Preference: None."

9) Provide flexibility to counties in the placement on the ballot of the party affiliation of Presidential candidates. Eliminate type-size and typeface requirements for instructions that must be printed on the ballot. Clarify and shorten the instructions that appear on the ballot, and require specified instructions to be printed on the ballot at general elections.

10) Provide that spaces for write-in votes will not be printed on the ballot for voter-nominated offices at the general election.

11) Conform provisions of the Political Reform Act (PRA) that regulate payments made by a political party for communications with its members to the top two primary election process.

12) Make various technical and non-substantive changes.

13) Add an urgency clause, allowing this bill to take effect immediately upon enactment.

AS PASSED BY THE ASSEMBLY, this bill made minor and technical changes to the PRA.

FISCAL EFFECT: According to the Senate Appropriations Committee, pursuant to Senate Rule 28.8, negligible state costs.

COMMENTS: In February 2009, the Legislature approved SCA 4 (Maldonado), Res. Chapter 2, Statutes of 2009, which was enacted by the voters as Proposition 14 on the June 2010 statewide primary election ballot. Proposition 14 implemented a top two primary election system in California for most elective state and federal offices. At primary elections, voters are able to vote for any candidate, regardless of party, and the candidates receiving the two highest vote totals, regardless of party, advance to the general election.

At the same time that it passed SCA 4, the Legislature also approved and the Governor signed SB 6 (Maldonado), Chapter 1, Statutes of 2009. SB 6 made various changes to state statute that became effective upon the approval of Proposition 14 by the voters. This bill makes numerous technical and substantive changes to the Elections Code to provide for more effective and efficient implementation of California's top two primary election system.

This bill was substantially amended in the Senate and the Assembly-approved provisions of this bill were deleted. As a result, this bill was re-referred to the Assembly Elections & Redistricting

Committee pursuant to Assembly Rule 77.2, and the committee subsequently recommended that the Assembly concur in the Senate amendments to this bill.

Please see the policy committee analysis for a full discussion of this bill.

Analysis Prepared by: Ethan Jones / E. & R. / (916) 319-2094

FN: 0003093

| SECTION (AB 1413) | CODE SECTION CHANGED | AB 1413 LANGUAGE | COMMENT | SOS LANGUAGE | INCLUDE IN 12/4/11 DRAFT? |
|---|---|---|---|---|---|
| 1 | EC 13 | OK | Stylistic changes, not appropriate for urgency legislation | YES | YES, SOS LANGUAGE |
| 2 | EC 300.5 | NO | Affiliation/preference issue | NO | NO |
| 3 | EC 325 | OK | Stylistic changes | N/A | NO |
| 4 | EC 332.5 | OK | Stylistic changes | OK | NO |
| 5 | EC 334 | OK | Already provided by existing law | OK | NO |
| 6 | EC 337 | OK | Stylistic changes | OK | NO |
| 7 | EC 359.5 | NO | Correcting typo in subd. (c) appropriate; the rest are purely stylistic changes | YES | YES, SOS LANGUAGE |
| 8 | EC 2026 | NO | No position on the policy, but not appropriate for a Prop 14 clean-up bill | N/A | NO |
| 9 | EC 2150 | NO | Affiliation/preference issue | NO | NO |
| 10 | EC 2150, AS AMENDED | NO | Affiliation/preference issue | NO | NO |
| 11 | EC 2151 | NO | Opposed to all of these changes (affiliation/ preference, blank, removal of notices, etc.) - Alternative proposed | ONLY AFFIL TO PREF | AFFILIATION TO PREFERENCE & SHRINK NOTICE |
| 12 | EC 2152 | NO | Affiliation/preference issue | NO | NO |
| 13 | EC 2154 | NO | Affiliation/preference issue | OK | YES, CORRECT TYPO IN (A) |
| | EC 2155 | N/A | N/A | YES | YES, SOS LANGUAGE |
| 14 | EC 3006 | NO | See alternative | OK | YES - AFFILIATION TO PREFERENCE |
| 15 | EC 3007.5 | NO | See alternative | OK | YES - AFFILIATION TO PREFERENCE |
| 16 | EC 3205 | NO | See alternative | OK | YES - AFFILIATION TO PREFERENCE |
| 17 | EC 6000a | NO | Section 6000 should not be deleted | N/A | NO |
| 18 | EC 6000 | NO | This should be retained | NO | NO |
| 19 | EC 7000 | NO | Section 7000 should not be deleted | NO | NO |
| 20 | EC 7100 | OK | Affiliation/preference, but otherwise we have no position on this | N/A | NO |
| 21 | EC 8002.5 | NO | Opposed to all of these changes (affiliation/ preference, blank, removal of notices, etc.) - Alternative proposed | NO | YES |
| 22 | EC 8025 | NO | The re-opening, if provided for, shouldn't be tied to the party preference of the deceased candidate - see proposed alternative | N/A | YES |
| 23 | EC 8040 | OK | Preferred alternative proposed | OK | YES |
| 24 | EC 8041 | NO | Basically stylistic in view of EC 8002.5(d); and isn't it appropriate to keep the party spaces for partisan candidacies? | NO | NO |
| 25 | EC 8062 | OK | Stylistic changes | OK | NO |
| 26 | EC 8068 | NO | Affiliation/preference issue, remainder is merely stylistic | OK | NO |
| 27 | EC 8081 | NO | Affiliation/preference issue, remainder is merely stylistic | N/A | NO |
| 28 | EC 8106 | OK | Not necessary, but not objectionable | OK | NO |
| 29 | EC 8121 | NO | Affiliation/preference issue, otherwise SOS version preferable | OK | NO |
| 30 | EC 8124 | NO | Affiliation/preference issue, remainder is merely stylistic | OK | NO |
| 31 | EC 8141.5 | NO | Stricken language should be retained | OK | NO |
| | EC 8142 | N/A | N/A | NO | NO |
| 32 | EC 8148 | OK | Stylistic changes | NO | NO |

| | | | | | |
|---|---|---|---|---|---|
| 33 | EC 8300 | OK | Entirely stylistic | N/A | NO |
| 34 | EC 8600 | NOT NECESSARY - MOOT | AB 362 WAS ENACTED, SO SECTION 34.5 APPLIES | N/A | NEW VERSION OF 8600 AMENDED |
| 34.5 | EC 8600, AS AMENDED | OK | SOS version preferable | YES | YES |
| 35 | EC 8606 | YES | | OK | YES |
| 36 | EC 8803 | OK | Policy acceptable - alternative language proposed | N/A | YES |
| 37 | EC 8805 | OK | Policy acceptable - alternative language proposed | N/A | YES |
| 38 | EC 8807 | OK | Policy acceptable - alternative language proposed | N/A | YES |
| 39 | EC 9083.5 | NO | SOS requested only minor wordsmithing changes--not complete deletion of these notices, which we view as important in light of *Washington State Grange* | NO | YES |
| 40 | EC 9084.5 | NO | These notices are important and should be retained | N/A | NO |
| 41 | EC 10704 | OK, EXCEPT "AFFILIATION" | Alternative language proposed | NO | YES |
| 42 | EC 10706 | OK | Unnecessary stylistic change | NO | NO |
| 43 | EC 12104 | NO | Implements deletion of section 7000 | N/A | NO |
| 44 | EC 12108 | NO | Affiliation/preference issue | NO | NO |
| 45 | EC 13102 | NO | Affiliation/preference issue | OK | NO |
| 46 | EC 13105 | NO | "Withheld by candidate" is perjorative; alternative language proposed | NO | YES, IMPLEMENTING "BIFURCATION" |
| 47 | EC 13107 | OK | Not necessary, but not objectionable | OK | NO |
| 48 | EC 13206 | NO | Affilation/preference issue - alternative language proposed | OK | YES, TO ADDRESS GENERAL ELECTION BALLOTS |
| 49 | EC 13207 | OK | Write-in issue good, remainder is stylistic | YES | YES |
| 50 | EC 13212 | YES | | OK | YES |
| 51 | EC 13230 | NO | Stylistic changes | NO | NO |
| 52 | EC 13300 | NO | Affiliation/preference, otherwise purely stylistic | NO | NO |
| 53 | EC 13302 | OK | SOS version preferable | YES | YES |
| | EC 13305 | N/A | N/A | NO | NO |
| 54 | EC 15340 | YES | | YES | YES |
| 55 | EC 15402 | OK | Alternative language proposed | N/A | YES |
| 56 | EC 15451 | NO | Should be retained | N/A | NO |
| 57 | EC 15560 | NO | Implements deletion of section 7000 | N/A | NO |
| 58 | EC 19301 | NO | Affiliation/preference issue | N/A | NO |
| 59 | EC 8600 IF AB 362 PASSES | NOT NECESSARY - MOOT | AB 362 has already taken effect | N/A | NEW VERSION OF 8600 AMENDED |
| | GC 85312 | OK, WITH REVISIONS | Alternative language proposed | N/A | YES |
| | GC 85703 | OK, WITH REVISIONS | Alternative language proposed | N/A | YES |
| | LIBERAL CONSTRUCT | N/A | | N/A | YES |
| | SEVERABILITY | N/A | | N/A | YES |
| | STATE MANDATES | N/A | | N/A | YES |

9th Circuit Case Number(s) 16-55758

**NOTE:** To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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## CERTIFICATE OF SERVICE
## When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) January 4, 2017 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/ Kevin J. Minnick

**********

## CERTIFICATE OF SERVICE
## When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)