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LAWOFFICEOFROBERTD.CONAWAY

760 256-0660

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Robert D. Conaway Bar No #119657
 LAW OFFICE of ROBERT D. CONAWAY
 222 East Main Street, Suite 212
 Mailing address: PO Box 865
 Barstow, CA 92312-0865
 Phone: (760) 256-0603
 Fax: (760) 256-0660
 rdconaway@gmail.com

Attorney for ELISE BROWN, Plaintiff

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

ELISE BROWN,

Plaintiff,

v.

DEBRA BOWEN, California
 Secretary of State

Defendant.

CASE No. CV 12-05547 PA (SPx)

Judge: Hon. Percy Anderson

FIRST AMENDED COMPLAINT FOR
 DECLARATORY & OTHER
 EQUITABLE RELIEF

[1st, 14th, 15th Amendments to United
 States Constitution; Article IV Sec. 2,
 Clause 1 of the USCA, 42 USC 1983;
 Section 2 of the Voting Rights Act, 42
 USC 1973 et seq]

I. THE NATURE OF THE CASE & JURISDICTION

1. This is an action that seeks to have declared unconstitutional California's Proposition 14 entitled the "Top Two Primaries Act" which took effect April 19, 2011 [that modified Article II, Section 5 of the California Constitution and Section 6 of Article II of the California Constitution] (hereafter "Prop 14"), as abridges any rights protected under First, Fourteenth and Fifteenth Amendments of the Constitution of the United States, Article IV Section 2 Clause

FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1 of the United States Constitution as enforceable by and through 42 USC 1983
2 and any and all other such enabling law, including but not limited to Section 2 of
3 the Voting Rights Act of 1965 ("VRA"), as amended in 1982 or more commonly
4 known of as 42 U.S.C. 1973 .
5

6
7 2. The plaintiff had sought preliminary injunctive relief in the initially filed
8 action and for purposes of the record, plaintiff continues to seek that equitable
9 relief at the appropriate future time so to minimize constitutional injury.
10

11 3. Plaintiff respectfully asks the court to decide if:

12 (a) Prop 14 is an state action that relates to the federal electoral process 42
13 U.S.C. § 1973aa-1a(c);
14

15 (b) Implicit in the granting of the franchise, is the right to cast an effective
16 ballot as was stated in Senate Report No. 94-295 (1975), at p. 32 [commenting on
17 the Voting Rights Act].
18

19 (c) Prop 14 creates an impermissible prior restraint on plaintiff's and all
20 other similarly situated African American voters' associational rights given the
21 modern historical partisan leaning of African American voters to overwhelmingly
22 vote for candidates in the democratic party in federal general elections;
23

24 (d) Prop 14 is and or creates a standard, practice, or procedure that adversely
25 affects the right to vote given the modern historical partisan leaning of African American
26 voters to vote for candidates in the democratic party under the Voting Rights Act, Section
27
28

1 2 in federal general elections;

2 (e) Prop 14 has an unlawful discriminatory effect on, based on the totality of
3 circumstances, due to the state's redistricting strategy that buries African American
4 voting strength by putting them in a district where the non-democratic vote is given a near
5 30% advantage:
6

7 (f) Prop 14 creates for African Americans in districts where there is no democratic
8 in the general election running for Congress, less opportunity than other members of the
9 electorate to effectively and meaningfully participate in the political process and to elect
10 representatives of their choice;
11

12 (g) If given the modern historical partisan leaning of African American
13 voters to candidates in the democratic party, if primary contests under Prop 14 that
14 result in no democrat left to stand for election in the federal general election, is an
15 unlawful abridgment of plaintiff's "natural right" privilege of her federal
16 citizenship under Article IV Section 2 Article 1 of the United States Constitution
17 and Clause 1 of the 14th Amendment, one of them being the right to vote in a
18 federal election for a party representative of their choice, a right held by plaintiff
19 as a federal citizen;
20

21 (h) Whether not having a democrat in the general election for African
22 Americans interferes with the sound public policy encouraging debate on
23 public issues that is uninhibited, robust, and wide-open;
24
25
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1 (i) Whether the 15th Amendment right of citizens of the United States to vote
2 is abridged by California's Prop 14 because of its voter dilution of African
3 American's effective and meaningful voting rights;

4
5 (j) The retained right to vote in a federal general election for a democrat, a
6 practice that has existed all of Plaintiff's adult life and since the first election after
7 California was admitted to the Union, is a substantive due process right that is
8 entitled to protection.
9
10

11 4. This action would have not been ripe for adjudication until such time the
12 election results were in and the resulting injury to the rights of African Americans
13 to participate in the general election in races where no democrat emerged from the
14 Prop 14 Primary, such as was the case with plaintiff's home district, the 8th
15 Congressional District.
16

17 II. PARTIES

18 5. Plaintiff Elise Brown is an African American adult citizen, a long time
19 member of the California Democratic Party, the San Bernardino County
20 Democratic Central Committee by election, the California State Democratic
21 Party's Central Committee, an officer of the Adelanto-Victorville Democratic
22 Club and proceeds in her own behalf and of those person similarly situated.
23
24

25 6. Plaintiff desires to effectively and meaningfully participate in the
26 electoral and political process for the House of Representatives and to have her
27
28

1 and all those similarly situated persons' votes counted on an equal basis with
2 white citizens of San Bernardino County by being able to vote for a Democratic
3 candidate in the general election.
4

5 7. Defendant Secretary of State, Deborah Bowen is sued in her official
6 capacity only to the extent of her issuing a certificate of nomination for
7 Congressional races pursuant to State Election Code Section 8147 pursuant to the
8 Top 2 Primary law. As Bowen is the Chief Election Officer of the State of
9 California and has responsibility for the general supervision and administration of
10 the election laws, plaintiff alleged Bowen and all future secretaries of state are
11 responsible to obtain and maintain uniformity in the application and
12 administration of the election laws and issue a certificates of nomination for
13 congress for each of the top voters for each party, and not just the top two vote
14 count candidates.
15
16
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19 8. At all relevant times set out herein, defendant was and have been
20 acting under color of the statutes, ordinances, regulations, customs and usages of
21 the State of California.
22

23 III. FACTS

24 9. Plaintiff as a democrat and an African American voter represents a group
25 that predominately votes for Democrats for federal offices in primary and general
26 elections and the election performance numbers bears that disparity out. Since
27
28

1 1964 when African Americans voted democratic 82% of the time, 92% of the time
2 in 1968 and with the exception of 1972, 1984 and the 1992 elections, African
3 Americans would continue to give at least 80% of African American's collective
4 votes to Democrats.
5

6
7 10. The 8th Congressional Districts break down as 8% African American,
8 35% Hispanic, 50% White.

9
10 11. California's Prop 14 effectively deprives African American voters of
11 the right to vote in that:

12 (a) Prohibits political parties which historically align with African
13 American voters from nominating candidates from every primary;
14

15 (b) Prohibits plaintiff and all those similarly situated from supporting a
16 federal candidate from their own political party of choice in the general election
17 by eliminating their candidate should he or she not be a top two vote getter in the
18 primary;
19

20 (c) Prohibits the highest Democratic vote getter from representing the
21 democratic party in the November 2012 general election for the first time in 160
22 years of California and United States history and risks repeating that outcome
23 for the balance of plaintiff's lifetime due to Prop 14;;
24

25 (d) Creates voter confusion when African Americans see only 2 republicans
26 to vote for, having come to the polls expecting to have a choice of voting for a
27
28

1 democratic candidate of their own choosing;

2 (e) Creates a severe restriction upon the exercise of their voting rights in
3 that for the first time, they will have to decide whether to vote at all for a non-
4 democratic candidate;
5

6 (f) Prohibits write in voters that are Democrats from seeking to participate
7 in the November 2012 election;
8

9 (g) Takes away a fundamental right to be able to vote for a party champion
10 in a federal race in the general election;
11

12 (h) By having only republicans in the general election for a federal office,
13 deprives plaintiff and all those similarly situated of the right to associate by
14 supporting and voting for a Democratic candidate in the general election for
15 Congress;
16

17 (i) By the Secretary of State upholding a law like Prop 14 which compels
18 the citizens to vote in a top two open primary in a district that has a substantial
19 advantage registration-wise for republicans as created by the so-called non-
20 partisan commission, the state is effectively empowers the Republican party by
21 declaring to plaintiff and all those similarly situated, that they no any longer have
22 a right to vote for a democratic candidate of their choice, in effect a state action
23 stripping political choice and are further stripping the people like plaintiff
24 and those similarly situation from having the back-up valve of being able to run a
25
26
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1 write-in candidate of their choice;

2 (j) By having a Prop 14 system in a republican registration advantage
3 district, plaintiff and all those similarly situation are coerced to associate with the
4 republican candidates selected, should they wish to exercise their right to vote, by
5 voting for persons that philosophically and politically are diametrically opposed to
6 their interests and views in violation of plaintiff's and those similarly situated's
7 right to NOT associate or not exercising the fundamental right to vote.
8
9
10

11 12. The political processes leading to the general election in 2012 and
12 every two years thereafter in San Bernardino County are not equally open to
13 participation by African-Americans, in that African-Americans have less
14 opportunity than other members of the electorate to participate in the political
15 process and to elect candidates of their choice because of the Prop 14 Primary.
16
17

18 13. African-Americans in San Bernardino County bear the effects of
19 discrimination in such areas as education, employment and health, which hinder
20 their ability to participate effectively in the political process.
21

22 14. In the entire history of San Bernardino County, no African-American
23 has ever been elected to any countywide office and with the Top Two primary,
24 with 8.9% of San Bernardino County being African American, .6% in Inyo County
25 and .3% in Mono County [county-wise numbers per the 2012 Census] and a
26 created 10% registration advantage of Republican over democrat and a nearly 20%
27
28

1 decline-to-state budge on top of that, African American voters will have added to
2 their burden the result of having to choose between two conservative republicans
3 that garnered only 30.8% of the total cast vote in the 2012 election cycle.

4 **IV. EQUITABLE RELIEF**

5
6
7 15. There is a real and actual controversy between the parties and the
8 issue is ripe for adjudication. Plaintiffs has no adequate remedy at law other
9 than this action for injunctive and declaratory relief and to deny relief herein,
10 due to the percentage to population of African Americans, will strip African
11 Americans of their associational and other related civil rights as set forth herein
12 for at least the next decade.
13
14

15 16. Plaintiff is and will continue to suffer irreparable injury as a result
16 of the acts of Defendant complained of herein and that injury will continue unless
17 Prop 14 is declared to be unlawful and enjoined by this Court.
18

19 17. Plaintiff seeks a declaration that Prop 14 is unconstitutional because of
20 the effect upon African American voters in those Districts where there will be no
21 democrat to vote for in the general election and for the Court's findings on those
22 issues raised in Paragraph 3 of this first amended complaint, incorporated by
23 reference herein as if fully set out again.
24
25

26 //

27 //

V. CAUSES OF ACTION
FIRST CLAIM FOR RELIEF

Fourteenth Amendment to the United States Constitution

18. Plaintiffs hereby reallege and incorporate by reference each of the 17 foregoing paragraphs.

19. Defendant, acting under color of state law, threatens to deprive Plaintiff of her effective and meaningful right to vote, an integral part of the fundamental right to vote, a natural right held by all law abiding citizens of the United and to that extent a privilege of federal citizenship protected under Clause 1 of the 14th Amendment and under the natural rights view of Article IV, Section 2, Clause 1 of the United States Constitution.

20. Prop 14 continued use and outcomes where African American voters have no democrats to vote for in any future federal general election, results in the denial or abridgment of plaintiff's fundamental right under the 14th Amendment, in that Prop 14 created an environment in which for the first time since California was admitted to the union, African Americans will not have in districts like the 8th Congressional District, where African Americans are a small minority of the eligible voters (by redistricting design) and who typically vote for democrats, will not have in that general election a partisan representative that African Americans typically align with and vote for, nor will they have a candidate that can debate their side of the issue spectrum in the months leading to the general election,

1 generally interfering with plaintiff's expectancies flowing from the 1st
2 Amendment Rights also protected by the same 14th Amendment.
3

4 21. Plaintiff had a reasonable expectancy that her federal right to vote for
5 such a person that aligned with her on partisan issues would not be interfered with
6 by arbitrary and capricious state action caused a special interest group with the
7 money to fund a statewide proposition.
8

9 23. Prop 14 did not meet its goals of encouraging higher turnouts (it was
10 the lowest turnout in a presidential primary since 1948), the lowest decline to state
11 turnout in years, an election format that all but knocked off minor parties from
12 participation in any future general election, abolished the write-in option as a
13 relief value for late filers and last but not least, created numerous districts in which
14 only one party's candidates survived to the November election, effectively
15 quashing the debate of issues.
16
17
18

19 24. Plaintiff contends she had a right to have the issues of the day
20 robustly debated between winners of each of the parties, a debate and dialogue
21 that will not be possible due to the candidates winning the Prop 14 primary, being
22 of virtually identical thought and political alignment in her District.
23
24

25 25. Plaintiff's constitutional expectancy of having a partisan candidate to
26 vote for that aligned with her beliefs and the majority of African Americans, has
27 been stripped away by Prop 14 for a policy shift caused by the backers of Prop
28

1 14 to focus on competitiveness rather than associational and free speech right.

2
3 26. Plaintiff is informed and believes, and thereon alleges that the policy set
4 out in the 14th Amendment itself ([w]hen the right to vote at any federal election...
5 is denied to any of the inhabitants of [a] State...[is] in any way abridged,...the
6 basis of representation therein shall be reduced." U.S. Const. XIV, § 20)
7 underscores the original intent that any abridgement will carry with it the most
8 serious of consequences to offending state's action(s).
9
10

11 27. Plaintiff believes Prop 14 is such an offending state action and the only people
12 that stand to benefit from such a result, would be the political party that stands to benefit
13 from weakening the size of the Congressional and Electoral College delegation, the very
14 party that does not typically align with the majority of African American voters in the 8th
15 Congressional District and other similarly situated minority-minority districts.
16

17 28. Defendant, acting under color of state law, threatens to violate
18 Plaintiffs' rights to equal protection, due process, and the privileges or immunities
19 of citizens of the United States guaranteed by the Fourteenth Amendment to the
20 United States Constitution in that for the next decade, plaintiff and those similarly
21 situated will not be able to exercise their associational rights by voting for a
22 candidate that shares their concerns and priorities.
23
24
25

26 29. Plaintiff contends that the court has the power has the power under 42
27 USC 1983 to enjoin enforcement of Prop 14 and should as an impermissible
28

1 chilling of plaintiff's rights as alleged above.

2 **SECOND CLAIM FOR RELIEF**

3 *Fifteenth Amendment to the United States Constitution*

4
5 30. Plaintiff hereby realleges and incorporate by reference each of the 29
6 foregoing paragraphs.

7
8 31. Section 1 of the 15th Amendment states that right of citizens of the
9 United States to vote shall not be denied or abridged by the United States or by
10 any State on account of race or color.

11
12 32. Plaintiff because she is an African American in a district, in which
13 African Americans are not only a statistical minority, but buried with a near 30%
14 disadvantage between republican and declined-to-state registrants, had her right to
15 effectively vote taken away when the district she resided in was created with
16 African Americans being at that decided disadvantage and by being forced to vote
17 under a Prop 14 format.

18
19
20 33. In such a scheme or device created under the facial claim of making
21 elections more competitive, a "policy" that effectively abridged the right of people
22 of color to effectively and meaningfully vote in a November general (and federal)

23
24 34. Plaintiff contends that the court has the power has the power under
25 42 USC 1983 to enjoin enforcement of Prop 14 as an impermissible
26 abridgement of plaintiff's right to be able to effectively vote for their champion
27
28

1 and have robust debate of the issues of the day possible in a minority-minority
2 8th Congressional district such as the one plaintiff has been redistricted into.
3

4 **THIRD CLAIM FOR RELIEF**

5 *Section 2 of the Voting Rights Act, 42 U.S.C. §1973*

6 35. Plaintiff hereby realleges and incorporate by reference each of the 34
7 foregoing paragraphs.
8

9 36. Section 2 of the Voting Rights Act, 42 U.S.C. §1973, prohibits voting
10 practices and procedures that result in the denial or abridgement of the right to
11 vote on account of race, color, or linguistic minority status.
12

13 37. Prop 14 has the effect of diluting, minimizing and canceling out
14 African-Americans right to effectively and meaningfully vote, in violation of the
15 Plaintiffs rights not only secured by the Fourteenth and Fifteenth Amendments
16 of the Constitution of the United States, but also Section 2 of the Voting Rights
17 Act of 1965, 42 U.S.C. 1973 because of the modern historical partisan alignment
18 between the Democratic Party and the vast majority of eligible African American
19 voters and the near 30% registration disadvantage between republican and
20 declined-to-state registrations.
21
22
23

24 38. Prop 14 in effect has become a voting practice and or procedure with
25 an adverse impact to a historically diluted minority group in the 8th Congressional
26 District.
27
28

1 39. Plaintiff contends that the court has the power has the power under 42
 2 USC 1973 to enjoin enforcement of Prop 14 as an impermissible device and
 3 or procedure acting to future dilute the voting strength of African Americans.
 4

5 **FOURTH CLAIM FOR RELIEF**

6 *Article IV, Clause 1, Section 2 of the USCA & Clause 1 of the 14th Amendment*

7 40. Plaintiff hereby realleges and incorporate by reference each of the 39
 8 foregoing paragraphs.
 9

10 41. The Citizens of each State shall be entitled to all Privileges and
 11 Immunities of Citizens in the several States.
 12

13 42. Certain fundamental and natural rights belong to citizens and which
 14 state government could not infringe upon, one of which being the right to
 15 effectively vote.
 16

17 43. Prop 14 denies that to plaintiff and all those similarly situated.

18 44. Plaintiff contends that the court has the power has the power under 42
 19 USC 1983 to enjoin enforcement of Prop 14 as an impermissible chilling of
 20 plaintiff's privilege and right to be able to effectively vote in a federal election by
 21 a state action, without regard to the history of the natural and fundamental right to
 22 be able to vote for a party champion and have robust debate of the issues of the
 23 day in minority-minority districts such as the one plaintiff has been redistricted
 24 into by the Prop 14 process, which took the redistricting power from the
 25
 26
 27
 28

1 legislature, which had superior understanding of the laws and rights to be
2 protected and even when faced with a minority population too small to be moved
3 into a minority-majority district, allowed the relief valve of allowing the party
4 the minority group typically favored and voted for, to stand for election for the
5 general election and be not just a person to vote for consistent with their beliefs
6 and values, but a voice to debate the important issues of the day leading up to the
7 general election.
8
9
10

11 45. The privilege and right to vote in a general election for a candidate from
12 the party of one's choice where a person comes from such a state, is chilled should
13 that African American voter move into California's 8th Congressional District, a
14 clearly impermissible abridgment by Prop 14 of the privileges and immunities
15 protected under Article IV, Section 2, Clause 1 and USCA 14th, Clause 1
16
17

18 PRAYER FOR RELIEF

19 WHEREFORE, PLAINTIFFS respectfully request that this Court enter
20 judgment in their favor and the following relief:
21

22 (1) For record preservation purposes, plaintiff prays that an appropriate
23 preliminary injunctive order and a mandatory injunction issue in advance of the
24 2012 November election requiring the top voter getters of each party be allowed to
25 stand for the general election in California;
26
27

28 Alternatively, PLAINTIFF requests that the Court

1 (2) Enter a declaratory judgment that ELISE BROWN's and all those
2 Democrats similarly situated's rights are violated by California's Proposition 14
3 entitled the "Top Two Primaries Act" [which took effect April 19, 2011] that
4 modified Article II, Section 5 of the California Constitution and Section 6 of
5 Article II of the California Constitution, violates rights under Section 2 of the
6 Voting Rights Act as amended in 1982;
7

8
9 (3) Enter a declaratory judgment that ELISE BROWN's and all those
10 Democrats similarly situated's first, fourteenth and fifteenth amendment right to
11 freedom of association & to effectively cast a vote rights are violated by
12 California's Proposition 14 entitled the "Top Two Primaries Act" [which took
13 effect April 19, 2011] that modified Article II, Section 5 of the California
14 Constitution and Section 6 of Article II of the California Constitution,
15
16

17 (4) Enter a declaratory judgment that ELISE BROWN's and all those
18 Democrats similarly situated's rights under the privileges and immunities clause,
19 including the fundamental right to effectively cast a vote rights are violated by
20 California's Proposition 14 entitled the "Top Two Primaries Act" [which took
21 effect April 19, 2011] that modified Article II, Section 5 of the California
22 Constitution and Section 6 of Article II of the California Constitution
23
24

25 (5) To make findings as requested under Paragraph 3 of this First Amended
26 Complaint to assist in any potential post trial court review;
27
28

1 (6) To restore the previous system that allowed the top vote getter from
2 each party to stand for election so to obtain and maintain constitutional
3 uniformity at the earliest possible time to avoid constitutional injury;
4

5 (7) To award Plaintiffs the costs and expense of this action together with
6 their reasonable attorneys' fees; and
7

8 (8) To retain jurisdiction of this action and grant to Plaintiff(s) any further
9 relief which may, in the discretion of this Court, be necessary and proper.
10

11 DATED: July 31, 2012

Respectfully submitted,

12
13
14 By: 

15 ROBERT D. CONAWAY
16 Attorneys for Plaintiff
17 ELISE BROWN
18
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28

1 PROOF OF SERVICE BY MAIL

2 STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO

3 I am employed in the above county, State of California. I am over the age
4 of 18 and not a party to the within action. My business address is as follows:
5 222 East Main Street, Suite 212, Barstow CA 92311 (mailing address is: Post
6 Office Box 865, Barstow, CA 92312).

7 On July 31, 2012, I served the foregoing document described as:

8 FIRST AMENDED COMPLAINT FOR DECLARATORY AND OTHER EQUITABLE RELIEF

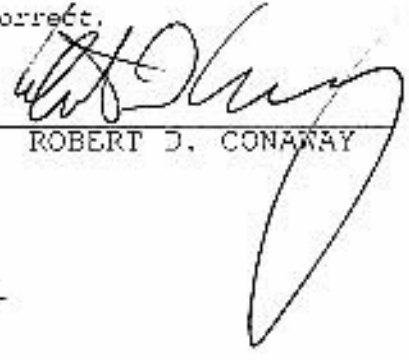
9 [PURSUANT TO FRCP 15(a)] on the interested parties at their last known
10 address in this action by placing a true and correct copy thereof in a sealed
11 envelope with postage thereon fully prepaid in the United States Mail at Barstow,
12 California, addressed as follows:

13 George M. Waters
14 CAAG - Office of the Attorney General
15 California Department of Justice
16 1300 I Street, Suite 125
17 PO Box 944255
18 Sacramento CA 94244-2550
19 Fax (916) 324-8835

20 Christopher E. Skinnell & Marguerite M. Leoni
21 Nielson, Merksamer, Parrinello, Gross & Leoni, LLP
22 2350 Kerner Blvd, Suite 250
23 San Rafael, CA 94901
24 Fax (415) 388-6874

25 I declare (1) that I am a member of the bar of this court making this
26 service and (2) under penalty of perjury under the laws of the United States of
27 America that the foregoing is true and correct.

28 Dated: July 31, 2012


ROBERT D. CONWAY