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9

10 IN THE UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

12 CV12-3956PA (ABK)

13 CALIFORNIA JUSTICE COMMITTEE,
THE CONSTITUTION PARTY OF
14 CALIFORNIA, JEFF NORMAN, CHARLES
MICHEL DEEMER, and JOHN GABREE,
15 Plaintiffs,
16 vs.
17 DEBRA BOWEN, California Secretary of
State, in her official capacity,
18 Defendant.
19

Case No. }
NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
INJUNCTION;
MEMORANDUM OF POINTS
AND AUTHORITIES
Date: May 21, 2012
Time: 10 a.m.
Room: TBD

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1 **TO ALL DEFENDANTS AND THEIR COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE THAT on May 21, 2012 at 10 a.m., or as soon
3 thereafter as this matter may be heard before the Honorable _____,
4 pursuant to Federal Rule of Civil Procedure 65 and Local Rule 65-1, Plaintiffs the
5 California Justice Committee, the Constitution Party of California, Jeff Norman,
6 Charles Michel Deemer, and John Gabree will and hereby do move this Court for a
7 preliminary injunction enjoining all Defendants from enforcing California Election
8 Code §5100 (b) & (c), with respect to political bodies seeking to become qualified
9 political parties in order to place their candidates for President and Vice President on
10 California's November Presidential ballot with the party designation next to the
11 candidates' names.

12 This motion is made following the conference of counsel pursuant to Local
13 Rule 7-3, which took place during telephone calls on April 18 and April 20, 2012, and
14 via email correspondence on May 4, 2012. The parties were not able to reach an
15 agreement that would have addressed the issues giving rise to this motion.

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1 **I. INTRODUCTION**

2 Courts have consistently recognized that state ballot-access restrictions
3 implicate two First Amendment guarantees, the right of individuals to associate for the
4 advancement of political beliefs and the right of qualified voters, regardless of their
5 political persuasion, to cast their votes effectively, ““which rank among our most
6 precious freedoms.”” *Anderson v. Celebrezze*, 460 U.S. 780, 787-88, 103 S. Ct. 1564,
7 75 L. Ed. 2d 547 (1983) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31, 89 S. Ct. 5,
8 10, 21 L. Ed. 2d 24 (1968)).

9 In California, groups seeking recognition as political parties (known as
10 “political bodies”) are prohibited from placing their candidates for President and Vice
11 President on the November Presidential Election ballot with the party’s designation
12 unless they satisfy California’s onerous statutory requirements for formal recognition
13 as a political party. *See* CAL. ELEC. CODE § 5100. These requirements include
14 accumulating more than 103,000 voter registration affidavits indicating each voter’s
15 intent to affiliate with the political body or submitting more than 1,030,000 petition
16 signatures in support of recognition of the political body. CAL. ELEC. CODE §5100(b)
17 & (c). Furthermore, the deadline for meeting these high numeric thresholds is in early
18 January, nearly one full year ahead of the November election, making California’s
19 party-qualification deadline among the earliest in the Nation.

20 Plaintiffs in this action include the California Justice Committee, a general
21 purpose committee under California law that was formed to support the efforts of the
22 Justice Party, a political body, to qualify as a recognized political party in California;
23 the Constitution Party of California, a political body seeking to qualify as a recognized
24 political party; Jeff Norman and Charles Michel Deemer, each of whom are registered
25 California voters and officers of the California Justice Committee and the Constitution
26 Party of California, respectively; and John Gabree, a registered California voter and
27 member of the Justice Party who wishes to support and vote for the duly nominated
28 candidates of the political group that comes nearest to “reflecting his policy

1 preferences on contemporary issues.” *Anderson*, 460 U.S. at 787 (internal quotation
2 marks omitted). Plaintiffs move for an immediate order enjoining Defendant Debra
3 Bowen, in her official capacity as the California Secretary of State, from enforcing the
4 January party-qualification deadline on political bodies seeking to qualify as
5 recognized political parties so that these bodies may place their candidates for
6 President and Vice President on California’s November Presidential ballot with their
7 party affiliations listed.

8 California’s early party-qualification deadline violates the First and Fourteenth
9 Amendments under any applicable standard. First, this case is squarely controlled by
10 *Anderson*, in which the Supreme Court struck down Ohio’s early-qualification
11 deadline for a Presidential election, which was later in the year than California’s
12 party-qualification at issue here. Second, California’s early party-qualification
13 deadline is unconstitutional under the balancing test laid out by the Supreme Court in
14 *Anderson* and clarified in *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L.
15 Ed. 2d 245 (1992). Courts applying the balancing test weigh “the character and
16 magnitude of the asserted injury to the rights” against “the precise interests put
17 forward by the State as justifications for the burden imposed by its rule,” considering
18 “the extent to which those interests make it necessary to burden the plaintiff’s rights.”
19 *Anderson*, 460 U.S. at 789. If the combined effect of a State’s laws places “severe”
20 restrictions upon these rights, then courts apply strict scrutiny, but if the laws impose
21 only “reasonable, nondiscriminatory restrictions” then courts apply rational basis
22 review. *Burdick*, 504 U.S. at 434 (internal quotation marks omitted).

23 The combined effect of California’s extremely early registration deadline and
24 the high numeric threshold creates a severe burden on Plaintiffs’ First Amendment
25 rights. The Supreme Court has recognized both the importance of minor parties to the
26 political process, as well as the historical reality that minor parties often arise as a
27 challenge to the policies of the major parties. “In election campaigns, particularly
28 those which are national in scope, the candidates and the issues simply do not remain

1 static over time.” *Anderson*, 460 U.S. at 790-91. The policy positions or likely
2 nominees of established parties are not fully expressed to the California electorate in
3 January, nearly ten months before the November general election, which is precisely
4 when California expects minor parties to have garnered sufficient voter support to
5 qualify for formal recognition. This early in the Presidential election cycle,
6 “[v]olunteers are more difficult to recruit and retain, media publicity and campaign
7 contributions are more difficult to secure, and voters are less interested in the
8 campaign.” *Id.* at 792. The historical record confirms the severity of the burden that
9 California’s very early party-qualification deadline places on voters’ First Amendment
10 rights: only one new party, which was extremely well-funded, has qualified under this
11 statutory scheme since 1995, and only seven new political parties have satisfied
12 California’s party-qualification requirements in the almost 60 years since California
13 set the party qualification deadline 135 days before the primary. *See* Declaration of
14 Richard Winger ¶ 4.

15 Given the severity of the burden on voters’ rights, California’s party-
16 qualification scheme is subject to strict scrutiny. California does not have a
17 compelling interest in such an early deadline, and, in fact, it lacks even a legitimate
18 interest in setting the party-qualification deadline a full ten months before the
19 November Presidential election. Whatever interest California might have in such an
20 early deadline is further diminished because of its impact on the Presidential election,
21 which implicates a “uniquely important national interest.” *Anderson*, 460 U.S. at 794-
22 95. A state’s insistence on stringent ballot access laws, “including early filing
23 deadlines, has an impact beyond its own borders” in Presidential elections. *Id.* at 795.
24 California’s early party-qualification deadline, which is among the earliest in the
25 nation, therefore “places a significant state-imposed restriction on a nationwide
26 electoral process.” *Id.*

27 There is an urgent need for injunctive relief. The clock is ticking toward the
28 November Presidential election, and California’s early qualification deadline has

1 undercut the ability of political bodies seeking to qualify as recognized political
2 parties for the November Presidential election to engage with voters during the heart
3 of the election cycle, when voters are most interested and when the platforms and
4 positions of established parties and their candidates are developing. Currently,
5 supporters of the Justice Party and the Constitution Party of California cannot promote
6 the goal of qualifying as a recognized political party that can place its candidates on
7 California's 2012 Presidential ballot when they engage with voters and attempt to
8 meet the voter registration threshold. They cannot claim relevance to the upcoming
9 election at the time of year when voters are most likely to be politically active.

10 The constitutional defect in California's statutory scheme has caused, and will
11 continue to cause, irreparable harm to these political bodies and to the voters seeking
12 to cast their votes effectively, because they cannot "make up" for the time lost in
13 building support during the point in a four-year electoral cycle when voters are
14 typically most engaged and aware of political issues. The severe burden on voters'
15 First Amendment rights wrought by California's early-party qualification deadline
16 cannot be undone: the ability of political bodies to engage meaningfully with the
17 electorate, build membership and organizational capacity, and educate voters during
18 the heart of the Presidential campaign cycle will continue to be impaired in the
19 absence of interim relief. Moreover, the loss of First Amendment freedoms "for even
20 minimal periods of time, unquestionably constitutes irreparable injury" because "[t]he
21 timeliness of political speech is particularly important." *Elrod v. Burns*, 427 U.S. 347,
22 373, 374 n.29, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); *see also Thalheimer v. City of*
23 *San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011) ("[H]arm is particularly irreparable
24 where, as here, a plaintiff seeks to engage in political speech, as timing is of the
25 essence in politics and a delay of even a day or two may be intolerable." (internal
26 quotation marks and alterations omitted)). Conversely, enjoining the January party-
27 qualification deadline will not meaningfully burden the State. California law allows
28 independent Presidential candidates and the Presidential candidates of established

1 parties to be determined in August and September, yet California election officials are
2 still able to place those candidates on the ballot, which demonstrates that the burden of
3 certifying parties closer to the presidential election is minimal. Given this state of
4 affairs and the looming November national election, swift action by this Court is
5 needed in order to prevent irreparable injury to Plaintiffs' fundamental First
6 Amendment rights.

7 **II. BACKGROUND**

8 **A. California's Party Qualification Scheme**

9 Under California law, only political bodies that fulfill California's qualification
10 requirements are entitled to place their nominees for President and Vice President on
11 the November Presidential ballot with their party affiliations. CAL. ELEC. CODE §§
12 6901, 13105; *Field v. Bowen*, 199 Cal. App. 4th 346, 350, 131 Cal. Rptr. 3d 721
13 (2011). Political bodies may qualify as recognized political parties in California by:
14 (1) receiving 2 percent of the statewide vote in the preceding gubernatorial election;
15 (2) having 1 percent of the vote from the last gubernatorial election declare their intent
16 to affiliate with the party by registering with the party; or (3) collecting signatures of
17 voters supporting recognition of the political body as a political party equal to 10
18 percent of the vote from the last gubernatorial election. CAL. ELEC. CODE § 5100.
19 The first option, by its own terms, is available only to already recognized political
20 parties. Accordingly, the second option (voter registration) and third option (petition)
21 are the only avenues through which political bodies may qualify as recognized
22 political parties.

23 Political bodies seeking to qualify for the 2012 November Presidential Election
24 under the second and third options must do so by 135 days before the June 5 primary,
25 or this year by January 23, 2012,¹ which falls 288 days before the general election.
26 See CAL. ELEC. CODE § 5100(b) & (c); see also RJN, Ex. 2, pp. 1 & 3; Ex. 3, pp. 6-2 &
27

28 ¹ The 135-day deadline fell on January 22, but this was a Sunday. Under California law, the 135-day deadline therefore fell on January 23. See RJN, Ex. 3, pp. 6-2 & 2.

1 2. Depending on the method of qualification, however, the effective deadline by
2 which parties must satisfy California's qualification requirements are even earlier.
3 For political bodies seeking to qualify under the voter registration, voter affidavits
4 must have been received by the county registrar 19 days earlier to count, which this
5 year was January 3, 2012, 154 days before the primary election and 308 days before
6 the general election). *See* CAL. ELEC. CODE § 2187(d)(1); *see also* RJN, Ex. 2, p. 1,
7 Ex. 3, pp. 6-2 & 1. Political bodies seeking to qualify under the petition method must
8 submit their petition packets no later than November 10, 2011, which is 208 days
9 before the primary and 362 days before the November Presidential election. *See* CAL.
10 ELEC. CODE §§ 5100(c), 9030, 9031; *see also* RJN, Ex. 2, p. 2. Thus, the effective
11 deadline for political bodies seeking to qualify as political parties for the current
12 election cycle was January 3, 2012, if they opted for the voter registration method
13 (and its one-percent numeric threshold), and no later than November 10, 2011, if they
14 opted for the petition method (and its ten-percent numeric threshold).

15 Under Proposition 14, candidates for the general Presidential election do not
16 need to participate in the primaries. *See* CAL. CONST., art. 2, § 5(a-b); CAL. ELEC.
17 CODE § 359.5 (each codifying Proposition 14); *see also* RJN, Ex 5 (California
18 Secretary of State memorandum stating that the Americans Elect Party had qualified
19 as a political party but would not participate in the primary). Nonetheless, the current
20 scheme requires that political bodies qualify as recognized political parties for
21 California's primary election, even if they have no intention of participating in the
22 California primary. CAL. ELEC. CODE § 338 (limiting definition of "party" in
23 Elections Code to a "political party or organization that has qualified for participation
24 in any primary election"). As a result, the effective deadline by which political bodies
25 must qualify as recognized political parties falls a full *ten months* before the
26 November Presidential election, which is among the earliest deadlines in the nation.
27 *See* Winger Decl., Ex. B, *Ballot Access News* (April 1, 2012), at p. 5 (listing party-
28 qualification deadlines in all 50 states).

1 **B. Plaintiffs' Efforts to Qualify as Recognized Political Parties**

2 The Justice Party and Plaintiff Constitution Party of California are political
3 bodies attempting to qualify for the 2012 general election and desire to list their
4 nominees for President and Vice President with their party affiliations on the
5 California Presidential Election ballot. Declaration of Jeff Norman ¶¶ 2, 11, 15;
6 Declaration of Charles Michel Deemer ¶¶ 11-12, 17. Plaintiff California Justice
7 Committee is a general purpose committee under California law formed to support the
8 efforts of the Justice Party to qualify as a recognized political party in California.
9 Norman Decl. ¶ 2. Plaintiffs Jeff Norman, Charles Michel Deemer, and John Gabree
10 (“Individual Plaintiffs”), registered voters with either the Justice Party or the
11 Constitution Party of California, wish to vote for their parties' candidates and the
12 parties with which they align. Norman Decl. ¶¶ 6, 11; Deemer Decl. ¶¶ 12, 15;
13 Declaration of John Gabree ¶¶ 3, 6.

14 **1. The Justice Party**

15 On or about November 30, 2011, Rocky Anderson announced the formation of
16 the Justice Party and his intention to seek its nomination for President for the 2012
17 Presidential Election, and, on or about December 15, 2011, a group of California
18 voters submitted to the California Secretary of State's office a notice of intent to
19 qualify the Justice Party as an official political party in California. Norman Decl. ¶¶
20 4-5. Plaintiff Jeff Norman learned about the formation of the national Justice Party,
21 researched its platform, decided that he wished to join the party and assist in the effort
22 to qualify the Justice Party as a recognized party in California, contacted one of the
23 individuals who submitted the notice of intent to qualify, and was invited to join the
24 steering committee of the Justice Party of California. Norman Decl. ¶¶ 5-7. He
25 subsequently helped form the California Justice Committee and serves as its assistant
26 treasurer. Norman Decl. ¶ 2. Plaintiff John Gabree learned about the Justice Party
27 from Mr. Norman and decided to join the party and support its efforts to qualify as a
28

1 recognized political party in California. Gabree Decl. ¶ 3. He serves as the treasurer
2 of the California Justice Committee. Gabree Decl. ¶ 2.

3 Because the Justice Party has limited funds, its supporters elected to pursue the
4 voter registration option for qualifying as a political party in California. Norman
5 Decl. ¶ 10. Since its inception in California, the Justice Party has worked to foster
6 voter education and publicize its platform through promotional websites and other
7 fund-raising and social networking sites, as well as by conducting public conference
8 calls and communicating with its members through an email list-serve and word-of-
9 mouth. Norman Decl. ¶ 12.

10 **2. *The Constitution Party of California***

11 The Constitution Party was founded by Howard Phillips as a national political
12 party in 1992. Deemer Decl. ¶ 5. Since its first Presidential campaign in 1992, the
13 Constitution Party has placed its candidates for President and Vice President on the
14 November ballot in no less than 35 states, such that its Presidential candidates have
15 been theoretically capable of winning a majority of the electoral college in each
16 election. Deemer Decl. ¶ 6. In 1992, the American Independent Party (AIP), which
17 has been continuously recognized as a political party by California since 1968,
18 formally affiliated with the Constitution Party, so the Constitution Party's nominees
19 for President and Vice President in 1992 appeared on California's November
20 Presidential ballot as AIP's candidate. Deemer Decl. ¶¶ 3, 8. Until 2008, AIP
21 continued to formally affiliate with the Constitution Party, so the Constitution Party's
22 nominee for President automatically qualified for California's November Presidential
23 ballot as AIP's candidate. Deemer Decl. ¶ 8.

24 In 2008, a faction within the AIP that did not support the Constitution Party's
25 nominee for President took control of the party at the statewide convention and
26 decided to disaffiliate from the Constitution Party and instead affiliate AIP with a
27 party that supported a different candidate for President. Deemer Decl. ¶¶ 9-10. When
28 the faction within the AIP maintained control of the party and again did not affiliate

1 with the Constitution Party in 2010, supporters of the Constitution Party who resided
2 in California filed, on or about August 9, 2010, a notice of intent to qualify the
3 Constitution Party of California as a political party. Deemer Decl. ¶ 11.

4 Plaintiff Charles Deemer filed a California voter affidavit affiliating with AIP in
5 1981 and has supported the national Constitution Party since AIP first formally
6 affiliated with the national Constitution Party in 1992. Deemer Decl. ¶¶ 4, 7. He filed
7 a voter affidavit changing his affiliation from AIP to the Constitution Party of
8 California on February 29, 2012, because his beliefs are in line with the platform of
9 the national Constitution Party, and he serves as the Treasurer of the Constitution
10 Party of California. Deemer Decl. ¶¶ 2, 12.

11 Because the Constitution Party of California has limited funds, its supporters
12 elected to pursue the voter registration option for qualifying as a political party in
13 California. Deemer Decl. ¶ 14. Since 2010, the Constitution Party of California has
14 used the internet to foster voter education, publicize its platform, and explain how
15 supporters can formally affiliate with the Constitution Party of California by filing
16 voter registration affidavits, in addition to collecting emails of interested voters
17 through the national Constitution Party website. Deemer Decl. ¶ 17.

18 **C. California's Early Party-Qualification Deadline Is Substantially**
19 **Undermining the Ability of the Justice Party and Constitution Party**
20 **of California to Qualify as Recognized Political Parties**

21 On or about January 31, 2012, Defendant Debra Bowen, California's Secretary
22 of State, announced that the Justice Party and Constitution Party of California had
23 failed to qualify as recognized political parties. RJN, Ex. 1. The Justice Party and
24 Constitution Party of California continue their efforts to fundraise, educate voters, and
25 register supporters through the internet, conferences, and grassroots campaigning.
26 Norman Decl. ¶ 12; Deemer Decl. ¶ 17. The Secretary of State's determination that
27 the Justice Party and Constitution Party of California failed to qualify by the January
28 cutoff, however, has severely hampered all campaign activity. Norman Decl. ¶ 12;
Deemer Decl. ¶¶ 17, 18. Specifically, they cannot promote the goal of qualifying as a

1 recognized political party in order to place their candidates on California's 2012
2 Presidential ballot, which removes a critical organizing tool for engaging voters
3 during the heart of the election process: they cannot tell voters that registering with
4 them will have any meaningful impact on the upcoming Presidential election, which is
5 often the aspect of the electoral cycle about which voters are most aware. Norman
6 Decl. ¶ 12; Deemer Decl. ¶ 17.

7 Court decisions and social science research have confirmed that early party-
8 qualification deadlines disadvantage minor parties. Winger Decl. ¶¶ 12-14. First,
9 events that occur during the spring of election years are sometimes completely
10 unexpected, and of great importance, but early deadlines prevent minor parties from
11 responding to and capitalizing on these developments. Winger Decl. ¶ 13. Second,
12 early qualification deadlines that require political bodies to organize in the year
13 preceding the election hamper organizing efforts because new parties seldom have
14 enough public support that early in the election season to comply with the requirement
15 and there is seldom as much interest in politics that far before the heart of the election
16 cycle in the summer and fall. Winger Decl. ¶ 14. This is particularly true of new
17 parties, like the Justice Party (which formed in December 2011), which not only have
18 to organize but also make the public familiar with their platform. Winger Decl. ¶ 14.

19 Plaintiffs' experiences are consistent with the historical reality that California's
20 early party-qualification scheme has effectively excluded new parties from
21 participating meaningfully in the electoral process. Although the date of California's
22 primary has changed throughout the years, the requirement that new parties qualify by
23 135 days before the primary has been substantially the same since 1953. Winger
24 Decl. ¶ 16. Under that scheme, only seven parties have gained access to and equal
25 participation in the political process in California during the nearly 60 years the
26 scheme has been in place. Winger Decl. ¶¶ 16-22. In fact, in December 2011, the
27 Americans Elect Party (AEP) became the first new political party to qualify in
28 California since 1995. Winger Decl. ¶¶ 21-22; RJN, Ex. 1. Unlike most newly

1 formed political bodies, however, AEP was launched and backed by a group of
2 individuals who committed millions of dollars to the party's effort to qualify for the
3 Presidential election across the country. Winger Decl. ¶ 21; RJN, Ex. 6. AEP was
4 therefore able to hire professional petition circulators and build an organized and well-
5 funded party-qualification effort in California well in advance of the early petition
6 deadline, allowing it to qualify through the petition method (and its 10 percent
7 numeric threshold).

8 **III. The Court Should Grant A Preliminary Injunction Barring Enforcement** 9 **Of The Early Party-Qualification Deadline in Cal. Elec. Code §5100 (b) & (c)**

10 A plaintiff seeking a preliminary injunction must establish that: (1) the plaintiff
11 is likely to succeed on the merits; (2) the plaintiff is likely to suffer irreparable harm in
12 the absence of preliminary relief; (3) the balance of equities tips in the plaintiff's
13 favor, and (4) an injunction is in the public interest. *Alliance for the Wild Rockies v.*
14 *Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Here, Plaintiffs readily meet this
15 standard because California's early party-qualification deadline, combined with its
16 high numeric thresholds, is unconstitutional under any applicable standard. Moreover,
17 the loss of First Amendment freedoms irreparably harms Plaintiffs, and an injunction
18 prohibiting Defendant Bowen from enforcing the early party-qualification deadline
19 will not harm Defendant Bowen or the State of California in any meaningful way. A
20 later, constitutionally compliant deadline would more than adequately protect
21 whatever legitimate interests the State may have in regulating ballot access. Further, it
22 is in the national public interest to issue a preliminary injunction here because of the
23 impact that California's qualification scheme has on the 2012 Presidential election.

24 **A. Plaintiffs Are Likely To Succeed On The Merits**

25 Plaintiffs are likely to succeed on the merits, because California's party-
26 qualification deadline is among the earliest in the nation and is much earlier, when
27 viewed in comparison with the November Presidential election, than numerous early
28 deadlines that courts have struck down over the past four decades. In fact, the
deadline at issue here is even earlier than the deadline that the United States Supreme

1 Court struck down in *Anderson*, which, like this case, involved a Presidential election.
2 *See Anderson*, 460 U.S. at 794-95.

3 Denying California voters and their political bodies meaningful access to the
4 2012 Presidential Election ballot infringes multiple First Amendment guarantees,
5 including the right of individuals to associate for the advancement of political beliefs
6 and the right of qualified voters, regardless of their political persuasion, to cast their
7 votes effectively, “all of which rank among our most precious freedoms.” *Id.* at 787-
8 88 (quoting *Williams*, 393 U.S. at 30-31). The Supreme Court has “consistently noted
9 the fundamental interest of citizens to create and develop new political parties.”
10 *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 588 (6th Cir. 2006). “When a
11 candidate wishes to appear as one party’s standard-bearer and voters want to exercise
12 their constitutional right to cast a ballot for this candidate, the Court has viewed state-
13 imposed restrictions on this fundamental process with great skepticism.” *Id.* Severe
14 infringements on these fundamental rights are subject to strict scrutiny. *See, e.g.*,
15 *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 788-895; *Nader v. Brewer*, 531 F.3d
16 1028, 1039 (9th Cir. 2008); *Blackwell*, 462 F.3d at 593.

17 Because, as demonstrated below, the burden on voters’ rights is severe,
18 California must demonstrate not only a compelling interest in the early deadline but
19 also that the statute at bar is narrowly tailored to further that compelling interest. *See*
20 *Nader*, 531 F.3d at 1040. If there are any less restrictive alternatives, then the State
21 has failed to meet its burden. *Id.* “Reliance on suppositions and speculative interests
22 is not sufficient to justify a severe burden on First Amendment rights. . . . To
23 determine if these interests are compelling, [courts] examine each in the circumstances
24 of the case.” *Blackwell*, 462 F.3d at 593 (internal quotation marks omitted). The State
25 cannot sustain that showing here.

26 **1. *California’s Early Party-Qualification Deadline Imposes a***
27 ***Severe Burden on Plaintiffs’ First Amendment Rights***

28 As courts have repeatedly recognized, early qualification deadlines can burden
First Amendment rights in three distinct ways. First, when the primary is remote, and

1 the general election is even more remote, it is difficult for political bodies to organize:
2 recruiting and retaining volunteers is more difficult, media interest is harder to
3 generate, contributions are more difficult to secure, and voters are generally less
4 interested in the campaign. *See Anderson*, 460 U.S. at 792; *see also Blackwell*, 462
5 F.3d at 586 (holding that early deadlines encumber minor parties by requiring them
6 “to recruit supporters at a time when the major party candidates are not known and
7 when the populace is not politically energized”); Winger Decl. ¶ 14. Second, early
8 qualification deadlines prevent political bodies from responding to developments late
9 in the election cycle, so they cannot be as flexible as the established political parties
10 and are at a competitive disadvantage for engaging with voters and building support.
11 *See Anderson*, 460 U.S. at 790-91; *see also Blackwell*, 462 F.3d at 586 (holding that
12 early deadlines burden minor parties by “ensuring that any contentious issues raised in
13 the same year as an election cannot be responded to by the formation of a new
14 political party”); Winger Decl. ¶ 13. Two historical examples underscore the
15 importance of flexibility: both the Republican Party in 1854 and the Progressive Party
16 in 1912 formed late in the election cycle in response to developments and ultimately
17 garnered substantial support and won several important races, but an early
18 qualification deadline like California’s would have prevented either party from
19 achieving that level of support. Winger Decl. ¶ 13. Third, new parties often gain
20 attention and galvanize support in response to the positions taken or candidates
21 nominated by the existing parties, and early party-qualification deadlines prevent
22 political bodies from reacting to decisions made by the established parties in their
23 nominating processes. *See Anderson*, 460 U.S. at 791-92; Winger Decl. ¶ 13.

24 In light of these considerations, California’s scheme, which excludes political
25 parties from placing their candidates for President and Vice President on California’s
26 November Presidential ballot with the party label unless the new party satisfies the
27 party-qualification requirements more than 10 months before the November
28 Presidential election, places severe burdens on Plaintiffs’ First Amendment rights and

1 is unconstitutional under both Supreme Court and Ninth Circuit precedent.

2 This case is squarely controlled by *Anderson*, in which the Supreme Court
3 struck down Ohio's early qualification deadline for independent Presidential
4 candidates, which was 75 days before the primary election and 229 days before the
5 general election, and which required gathering 5,000 signatures. *See* 460 U.S. at 782-
6 84 & n.1. California's effective deadline for qualifying by voter registration (which is
7 the later of the two options) is 154 days before the primary, 308 days before the
8 general election, and requires registering 103,004 voters. Thus, California's party-
9 qualification scheme requires political bodies to meet the numeric threshold *almost 80*
10 *days earlier* than the scheme struck down in *Anderson* and imposes a numeric
11 threshold *more than 20 times greater* than the scheme at issue in *Anderson*.

12 Moreover, like Ohio's scheme in *Anderson*, the aspect of California's scheme that
13 Plaintiffs challenge here directly impacts the Presidential election, which means the
14 state's interest in regulating access to the ballot is at its weakest. *See Anderson*, 460
15 U.S. at 795 (“[T]he State has a less important interest in regulating Presidential
16 elections than statewide or local elections, because the outcome of the former will be
17 largely determined by voters beyond the State's boundaries.”). Thus, California's
18 early party-qualification deadline is plainly unconstitutional, because it imposes more
19 severe burdens on the First Amendment rights of voters and political bodies seeking to
20 qualify as political parties than the scheme struck down in *Anderson*. *See Council of*
21 *Alternative Political Parties v. Hooks*, 179 F.3d 64, 72 (3rd Cir. 1999); *Libertarian*
22 *Party of Wash. v. Munro*, 31 F.3d 759, 762-63 (9th Cir. 1994) (both beginning legal
23 analysis by comparing challenged qualification deadline to scheme at issue in
24 *Anderson*).

25 Additionally, under the balancing test laid out in *Anderson* and clarified in
26 *Burdick*, California's scheme is unconstitutional. Under the balancing test, “the
27 character and magnitude of the asserted injury to the rights” is weighed against “the
28 precise interests put forward by the State as justifications for the burden imposed by

1 its rule,” considering “the extent to which those interests make it necessary to burden
2 the plaintiff’s rights.” *Anderson*, 460 U.S. at 789. If the combined effect of a State’s
3 laws places “severe” restrictions upon these rights, then courts apply strict scrutiny,
4 but if the laws impose only “reasonable, nondiscriminatory restrictions” then courts
5 apply rational basis review. *Burdick*, 504 U.S. at 434 (internal quotation marks
6 omitted).

7 Using this balancing test, numerous courts have struck down early-qualification
8 deadlines that are much later than California’s deadline. For example, in *Nader*, the
9 Ninth Circuit applied strict scrutiny to Arizona’s early filing deadline, which fell 90
10 days before the primary and 146 days before the general election, *see* 531 F.3d at
11 1031, and held it was unconstitutional because the “burdens [on First Amendment
12 rights] are serious and the restrictions are not sufficiently narrowly tailored to serve
13 the state’s compelling interests,” *id.* at 1040. Similarly, in *Blackwell*, 462 F.3d at 582,
14 the Sixth Circuit held that an Ohio law requiring minor parties to submit petition
15 signatures 120 days before the primary election, in which all parties were required to
16 participate, imposed a severe burden. In fact, California’s deadline, as it relates to
17 political bodies seeking to place their candidates on the November Presidential ballot,
18 is “earlier than almost every early qualification deadline that has been struck down by
19 courts,” and “[o]nly two deadlines [that have been struck down] were earlier in the
20 calendar year: the Arkansas deadline struck down in 1996 (January 2) and the Ohio
21 deadline struck down [in *Blackwell*] in 2006 (November 3 of the year preceding the
22 election).” Winger Decl. ¶¶ 27-28 & Ex. B, p. 4.

23 Plaintiffs’ experiences confirm that California’s scheme severely burdens First
24 Amendment rights. The Justice Party and Constitution Party of California could not
25 meet California’s registration threshold by the early January deadline, despite their
26 efforts to raise awareness through the internet, conferences and grassroots
27 campaigning. Norman Decl. ¶ 12; Deemer Decl. ¶ 17. Additionally, Defendant
28 Bowen’s determination in late January 2012 that they failed to qualify has severely

1 hampered all campaign activity. Plaintiffs cannot tell voters that registering with them
2 will have any meaningful impact on the upcoming Presidential election, because even
3 if they attain 103,000 voter registrations by some date prior to the November general
4 election, they would still be prohibited from placing their nominees for President and
5 Vice President on California's Presidential Election ballot under the party name.

6 Norman Decl. ¶ 12; Deemer Decl. ¶ 17. Even though political bodies can continue to
7 gather voter registration affidavits and those affidavits will count toward their efforts
8 to qualify for the 2014 election cycle, that is a hollow hope, because voters are even
9 less likely to be engaged with an eye toward the 2014 cycle now than they were in
10 2011 with an eye toward the 2012 Presidential election. Simply put, the recognized
11 political parties can engage with voters and recruit new members now by talking
12 about their candidates for the November Presidential race, the contest about which
13 voters are most likely to be engaged and informed, and they can seek donations and
14 media attention to influence that upcoming election. Plaintiffs cannot.

15 Not only is the severe burden that California's scheme imposes on Plaintiffs
16 apparent from judicial decisions, practical experience, and Plaintiffs' specific
17 circumstances, but it is borne out by the historical record. *See Blackwell*, 462 F.3d at
18 587 (holding evidence of the real impact the restriction has on the process informs the
19 magnitude of the burden imposed by a state's election laws). Only seven new
20 political parties have satisfied California's party qualification scheme in the nearly 60
21 years since the legislature set the filing deadline 135 days before the primary. Winger
22 Decl. ¶ 22. The party to qualify most recently, AEP, was able to collect the large
23 number of signatures necessary due to its ability to spend millions of dollars on
24 professional petition circulators in California, which is an unusual amount of financial
25 support for new political parties. Winger Decl. ¶ 21; RJN, Ex. 6. The historical
26 struggle that political bodies have faced to qualify under California's early
27 qualification deadline confirms the severity of the burden on fundamental First
28 Amendment rights.

1 In sum, it is highly likely Plaintiffs will succeed on the merits of their claim
2 because the statutes at issue are excessively burdensome and overbroad, and impose a
3 severe burden on fundamental rights.

4 **2. California Has No Compelling Interest, Nor Even a Legitimate**
5 **Interest, in Setting the Party Qualification Deadline Nearly**
6 **One Year Before the General Election**

7 States typically cite administrative need or voter education as the purported
8 interest justifying early deadlines, but not once has that been sufficient to justify an
9 early deadline where, as here, it operates to effectively deny access to the Presidential
10 ballot. *See, e.g., Nader*, 531 F.3d at 1039-1040 (rejecting State's administrative needs
11 as a compelling interest where deadline fell 90 days before election). Further, a
12 State's interests are diminished when a Presidential election, rather than an election
13 for state or local office, is involved. *See Anderson*, 460 U.S. at 794-95; *see also*
14 *Deemer Decl.* ¶ 16 ("Because California is such a populous state, it is essential for any
15 serious Presidential candidate to be on the California ballot. Excluding ... candidates
16 for President and Vice President from California's ballot will therefore significantly
17 impact the national campaign of [these] candidates, including the likelihood of success
18 outside California."). Here, the State does not even have a legitimate interest in
19 forcing political bodies to comply with California's party qualification requirements
20 by January of an election year in order to be certified as recognized political parties
21 and thereby qualify to run their duly nominated candidates for President and Vice
22 President in the November general election.

23 The January 3, 2012 cutoff for submitting voter registration affidavits is not
24 plausibly justified by the administrative needs of preparing and printing the ballot for
25 the November 2012 general election (which falls on November 6, 2012, *see RJN*, Ex.
26 4, p. 9-1). Neither the Secretary of State nor the other public entities involved in
27 staging the November 2012 general election require more than 10 months to tabulate
28 whether political bodies have satisfied the numeric threshold requirements to qualify
as recognized political parties and then prepare and distribute the ballots with these

1 party candidates listed. For example, CAL. ELEC. CODE § 2187(b) requires that the
2 Secretary of State compute the total number of voters, by party affiliation, within 30
3 days of receiving summary statements of the voters registered in each county;
4 counting registrants and comparing the total state-wide number for each party against
5 the numeric threshold takes, at most, 30 days. CAL. ELEC. CODE § 2187(d)(1) requires
6 that county registrars tabulate the summary statements of voters registered in each
7 county, including how many voters in each county are affiliated with each recognized
8 political party and each political body, within 19 days of the 154-day deadline. Thus,
9 the relevant statutory scheme provides, at most 49 days, for processing and tabulating
10 voter registration affidavits for each political party and political body after the 154-
11 day deadline.

12 Moreover, the Secretary of State's ability to include Democratic and
13 Republican candidates for President and Vice President, whose identities are not
14 known until August or September, on the November ballot demonstrates that the 154-
15 day deadline is not justified by California's administrative needs. RJN, Ex. 7 (stating
16 Republican National Convention will take place from August 27, 2012 until August
17 30, 2012); Ex. 8 (stating Democratic National Convention will take place the week of
18 September 3, 2012). The deadline for independent candidates for President and Vice
19 President to qualify for the November 2012 ballot in California is 88 days before the
20 November general election (which this year falls on August 10). *See* CAL. ELEC.
21 CODE §§ 8303, 8304, 8403; RJN, Ex. 4, pp. 9-2 & 1-3.² The Secretary of State is able
22

23 ² The possibility that the Justice Party and Constitution Party of California could
24 qualify their candidates for President and Vice President for the California ballot using
25 the later independent candidate deadline is irrelevant to the inquiry regarding the
26 party-qualification deadline, because "[a] candidate's appearance without party
27 affiliation is not a substitute for appearing under a party name." *Blackwell*, 462 F.3d
28 at 592. Moreover, the independent candidate option is not, in practical terms, as
desirable as qualifying as a party, because the independent candidate qualification is
possible only through petition signatures and the numeric threshold, 175,000, is higher
than the 103,000 threshold for party-qualification through voter affidavits. Deemer
Decl. ¶ 18.

1 to include independent candidates for President and the nominees of the Republican
2 and Democratic Parties on the November 2012 ballot under these timeframes.

3 Finally, the additional cost to the State of California of recognizing parties and
4 listing their duly nominated candidates for President and Vice President on the
5 November ballot is negligible, because adding one name to the slate of candidates for
6 President or Vice President does not appreciably add to the cost of printing the
7 November ballots. Winger Decl. ¶ 30. In fact, “the cost of keeping a minor party
8 Presidential candidate off the ballot can actually exceed the cost of putting its
9 candidate on the ballot,” because “California law lets such candidates file as declared
10 write-in candidates, and then election officials must tally write-ins for that candidate,”
11 which “costs more money” than “count[ing] a vote for a candidate listed on the
12 ballot.” Winger Decl. ¶ 31.

13 Because California has no compelling interest in preventing citizens from
14 forming recognized political parties that are able to participate in and field candidates
15 for the November Presidential election unless they are able to reach the party
16 qualification requirements at least 10 months before the Presidential election,
17 Plaintiffs will likely succeed on the merits of their claim.

18 **B. PLAINTIFFS WILL SUFFER IRREPARABLE HARM**

19 The loss of First Amendment freedoms “for even minimal periods of time,
20 unquestionably constitutes irreparable injury” since “[t]he timeliness of political
21 speech is particularly important.” *Elrod*, 427 U.S. at 373; *see also Thalheimer*, 645
22 F.3d at 1128. The infringement of Plaintiffs’ fundamental rights is irreversible
23 because the clock is ticking toward the November Presidential election. Should this
24 motion for a preliminary injunction be denied, Plaintiffs will suffer irreparable harm
25 in several respects: Plaintiffs will not be able to continue to accrue voter registrations
26 in order to place their candidates on the ballot for the 2012 Presidential Election;
27 Plaintiffs’ ability to raise funds and garner further support will be stifled; and voters
28 will not be able to cast their votes effectively because they will not be able to vote for

1 the duly nominated candidates of the political bodies that reflect voters' views. *See*
2 *Anderson*, 460 U.S. at 787. Moreover, regardless of whether either the Justice Party
3 or the Constitution Party of California meet the 103,000 numeric threshold for voter
4 registrations for this current election cycle if the early deadline is enjoined, they are
5 unquestionably unable to engage with voters on equal terms with the established
6 parties during the heart of the election cycle, when voters are most engaged and when
7 the platforms and positions of established parties and their candidates are developing.
8 Norman Decl ¶ 12; Deemer Decl ¶ 20; Gabree Decl ¶ 7. This undermines their efforts
9 to build support over time. Further, California's actions will irreparably harm the
10 national interest by inhibiting robust debate on issues of national importance.
11 *Anderson*, 460 U.S. at 790-91. Thus, immediate injunctive relief is required.

12 **C. THE BALANCE OF HARDSHIPS TIPS SHARPLY IN**
13 **PLAINTIFFS' FAVOR**

14 The burden on Plaintiffs' First Amendment rights, especially due to the timing
15 of the impending November general election, greatly outweighs the minimal injury
16 that the State will sustain if injunctive relief is granted. *See, e.g., Hooks*, 121 F.3d at
17 884 ("In the absence of legitimate, countervailing concerns, the public interest clearly
18 favors the protection of constitutional rights, including the voting and associational
19 rights of alternative political parties, their candidates, and their potential supporters.").

20 The State will still have ample time to identify the candidates and prepare and
21 distribute ballots for the general election. As noted above, California's statutory
22 scheme confirms that state and local agencies need at most 49 days to count voter
23 registration affidavits, and allows independent candidates and major parties to declare
24 their nominees in August and September. *See supra*, Section III(A)(2). Plaintiffs
25 desire to forego participating in the primary election, so there will be no impact on
26 primary election ballots. Deemer Decl. ¶ 20, Norman Decl. ¶ 16. The cost of placing
27 additional candidates on the November Presidential ballot is negligible and doing so
28 may actually decrease the cost to the State by reducing the likelihood that political
bodies will pursue write-in efforts, which are often more costly to process. Winger

1 Decl. ¶¶ 30-31.

2 Moreover, the Justice Party and the Constitution Party of California are *bona*
3 *fide* political bodies. Winger Decl. ¶ 23. Despite the fact that the national Justice
4 Party formed recently, in late 2011, it has already qualified as a recognized political
5 party in three states, and its candidate for President is the former Mayor of Salt Lake
6 City. Winger Decl. ¶ 23; Norman Decl. ¶ 5. The national Constitution Party has won
7 partisan elections in three states, including the election of its candidate for the
8 Montana state legislature in 2006, and its candidate is a former Congressman from
9 Virginia. Winger Decl. ¶ 23; Deemer Decl. ¶ 13. Thus, granting injunctive relief will
10 not compromise the integrity of the political process or the 2012 Presidential Election.

11 The relief requested is only provisional, until the Court has an opportunity to
12 assess Plaintiffs' claims fully on the merits. The burden on the State will be minimal
13 in the interim between the Court's granting injunctive relief and deciding the merits of
14 the claim. The benefit to the Plaintiffs, however, will be great. Injunctive relief will
15 allow the political bodies to continue seeking supporters and raising funds and
16 otherwise participating in the national political process.

17 **D. INJUNCTIVE RELIEF SERVES THE PUBLIC INTEREST**

18 "The ability of a political party to appear on the general election ballot affects
19 not only the party's rights, but also the First Amendment right of voters." *Blackwell*,
20 462 F.3d at 588.

21 "By limiting the opportunities of independent-minded voters to associate
22 in the electoral arena to enhance their political effectiveness as a group,
23 such restrictions threaten to reduce diversity and competition in the
24 marketplace of ideas. Historically, political figures outside the two major
25 parties have been fertile sources of new ideas and new programs; many
26 of their challenges to the *status quo* have, in time, made their way into
27 the political mainstream."

28 *Anderson*, 460 U.S. at 794. In short, the primary values protected by the First

1 Amendment are “served when election campaigns are not monopolized by the existing
2 political parties.” *Id.* An order prohibiting Defendants from denying Plaintiffs the
3 opportunity to participate meaningfully in the 2012 Presidential Election cycle by
4 attempting to qualify for the November Presidential ballot greatly benefits the public,
5 by enriching the political process and protecting the constitutional rights of the
6 electorate. Therefore, injunctive relief should be granted.

7 **IV. CONCLUSION**

8 For the foregoing reasons, Plaintiffs respectfully request that Defendants be
9 enjoined from enforcing California Election Code §5100 (b) & (c), with respect to
10 political bodies seeking to become qualified political parties in order to place their
11 candidates for President and Vice President on California’s November Presidential
12 ballot with the party designation next to the candidates’ names, pending final
13 resolution of Plaintiffs’ claims.

14
15 Respectfully Submitted,

16
17 Dated: May 6, 2012

By: 
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