

1 KAMALA D. HARRIS
Attorney General of California
2 PETER A. KRAUSE
Supervising Deputy Attorney General
3 KARI KROGSENG
Deputy Attorney General
4 State Bar No. 215263
1300 I Street, Suite 125
5 P.O. Box 944255
Sacramento, CA 94244-2550
6 Telephone: (916) 322-1067
7 Fax: (916) 324-8835
E-mail: Kari.Krogseng@doj.ca.gov
8 *Attorneys for Defendant*
California Secretary of State Debra Bowen

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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
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14 **CALIFORNIA JUSTICE**
COMMITTEE, THE
15 **CONSTITUTION PARTY OF**
CALIFORNIA, JEFF NORMAN,
16 **CHARLES MICHEL DEEMER, and**
JOHN GABREE,
17
18 **v.** Plaintiffs,
19 **DEBRA BOWEN, California**
Secretary of State, in her official
20 **capacity,**
21 Defendant.

CV 12-3956 PA (AGRx)
THE SECRETARY OF STATE'S
RESPONSIVE TRIAL BRIEF
Date: October 16, 2012
Time: 9:00 a.m.
Courtroom: 15
Judge: The Honorable Percy
Anderson
Trial Date: October 16, 2012
Action Filed: May 7, 2012

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INTRODUCTION

Plaintiffs' trial brief offers no new evidence to support their claim for a permanent injunction; they merely repeat the arguments made to this Court to obtain the preliminary injunction that has prohibited the Secretary of State's enforcement of Elections Code section 5100's timing requirement against them since May 21, 2012. The facts in this case have evolved since then, however, because the Justice Party and the Constitution Party have had several additional months under the preliminary injunction to obtain sufficient voter registration affidavits to qualify as parties, and have failed to do so.

As of the recently released September 7, 2012 Report of Registration, which states the number of voters who have registered in support of each political body 60 days before the November 6, 2012 general election, the Constitution Party of California had 252 registrants and the Justice Party had 237. Supplemental Decl. of Jana M. Lean in Support of the Secretary of State's Responsive Trial Brief ("Suppl. Lean Decl.") ¶¶ 2, 3, Ex. E. These numbers are not materially different from the numbers the groups posted in January 2012, and demonstrate that Elections Code section 5100's timing requirement does not place an unconstitutional burden on their efforts to qualify as political parties. Decl. of Jana M. Lean in Support of the Secretary of State's Opening Trial Brief ("Lean Decl.") ¶¶ 3, 4. To the contrary, the facts demonstrate that plaintiffs' failings as potential political parties are the reason why they cannot, and possibly will never, qualify as political parties in the state of California, not the statutory timing requirement.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT SECTION 5100'S TIMING REQUIREMENT IMPOSES A SEVERE BURDEN

In order to find that a law governing the elections process is unconstitutional, a court must heavily favor the State's important regulatory interests when that law imposes only reasonable, nondiscriminatory restrictions on plaintiffs' constitutional

1 rights, and must determine whether the law is narrowly drawn to advance a
2 compelling state interest only if plaintiffs demonstrate that the law imposes a severe
3 burden or restriction on their constitutional rights. *Burdick v. Takushi*, 504 U.S.
4 428, 434, 1125 S. Ct. 2059, 119 L. Ed. 2d 245 (1992) (quoting *Anderson v.*
5 *Celebrezze*, 460 U.S. 780, 788, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983)).

6 As evidence that the timing requirement poses a severe burden, plaintiffs
7 submit only opinions as to the ways in which a deadline may generally impede the
8 qualification of a new party, peppered with political science theories and historical
9 anecdotes. Pls.' Trial Br. 6-8. But, as the Eighth Circuit recently held in a minor
10 party ballot access case, plaintiffs' evidence must be directed towards proving that
11 the challenged statute actually stands in the way of qualification: "the historical
12 absence of minor parties on ballots has not been shown to be directly attributable to
13 the [challenged] statute, because it could instead be from any one of the other
14 hurdles a party and candidate must overcome in [the state's] election scheme to be
15 placed on the general ballot." *Libertarian Party of N. Dakota v. Jaeger*, 659 F.3d
16 687, 696 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1932, 182 L. Ed. 2d 774 (2012).
17 Thus, in order to meet their burden of proof, plaintiffs cannot simply offer
18 speculation as to why aspiring political parties like the Justice Party and
19 Constitution Party may have difficulty garnering voter support as "evidence" that
20 their constitutional rights have been severely burdened, without accounting for the
21 actual facts in this case. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589
22 (6th Cir. 2006) (quoting *California Democratic Party v. Jones*, 530 U.S. 567, 578,
23 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000) (plaintiffs must show evidence that
24 challenged law "was a 'clear and present danger' [to their rights] and not merely the
25 product of speculation"); *compare New Alliance Party of Alabama v. Hand*,
26 933 F.2d 1568, 1574 (11th Cir. 1991) (emphasis added) ("the early deadline in
27 question placed a burden on the plaintiffs, given that they were unable to meet the
28

1 deadline imposed, *but were able to meet the signature requirement at a later*
2 *date*”).

3 The facts are these: only about 250 voters in a state with over 17,000,000
4 registered voters have chosen to affiliate with either the Justice Party or the
5 Constitution Party over the course of this year. Lean Decl. ¶¶ 2-7; Suppl. Lean
6 Decl. ¶¶ 2-4, Ex. E, F. The electorate has shown no interest in these political
7 groups despite plaintiffs’ efforts. Pls.’ Trial Br. 6. Voter support for the
8 Constitution Party is virtually nonexistent, despite the fact that it was founded in
9 1992, and reportedly has been attempting to obtain a place on the ballot since
10 August 2010. Pls.’ Trial Br. 5-6; Decl. of Charles Michel Deemer in Support of
11 Preliminary Inj. (“Deemer Decl.”) ¶¶ 5, 9-11. The Justice Party’s failure to qualify
12 may actually be easier to explain, given that the group, which was founded in late
13 2011, split into factions only months later. Lean Decl. ¶¶ 6, 8. Similar failure to
14 garner voter support, regardless of the deadline, explains why the other political
15 bodies that attempted to qualify as political parties in the 2011-2012 election cycle,
16 and indeed, any historical election cycle, also failed to qualify. Secretary of State’s
17 Opening Trial Br. 13.

18 Finally, plaintiffs cite the fact that California currently has a total of seven
19 parties qualified for the November 2012 ballot, including one, Americans Elect,
20 that qualified during the same cycle in which the Justice Party and the Constitution
21 Party were attempting to qualify, as evidence of section 5100’s constitutional
22 failings. Pls.’ Tr. Br. 7-8. But compared to other states, California routinely
23 qualifies a large number of political parties for the ballot. *See, e.g., Blackwell,*
24 *462 F.3d at 589* (large states average four minor political parties on the ballot each
25 year). California’s elections laws, and section 5100’s timing requirement in
26 particular, are thus demonstrably fair in allowing new parties access to the ballot.

1 **II. THE STATE'S IMPORTANT REGULATORY INTERESTS JUSTIFY SECTION**
2 **5100'S TIMING REQUIREMENT**

3 Given plaintiffs' failure to show their constitutional rights are severely
4 burdened by the timing requirement, strict scrutiny does not apply to this court's
5 constitutional analysis of section 5100. Accordingly, the Secretary of State must
6 only show that important state regulatory interests justify the timing requirement.
7 *Burdick*, 504 U.S. at 433 (quoting *Anderson*, 460 U.S. at 788). In doing so, the
8 State is not required to provide empirical evidence "to make a particularized
9 showing of the existence of [its articulated interests]" "as a predicate to the
10 imposition of reasonable ballot access restrictions." *Munro v. Socialist Workers*
11 *Party*, 479 U.S. 189, 194-95, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986). And
12 fundamentally, substantial regulation of state elections is necessary "if they are to
13 be fair and honest and if some sort of order, rather than chaos, is to accompany the
14 democratic processes." *Burdick*, 504 U.S. at 433 (internal quotations omitted).

15 The First Amendment guarantees the Constitution Party and the Justice Party
16 the right to associate to advance their political beliefs, and the opportunity to gain
17 access to state ballots so that voters may cast their votes effectively. *Anderson*,
18 460 U.S. at 787-88 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31, 89 S. Ct. 5,
19 21 L. Ed. 2d 24 (1968)). It does not, however, guarantee plaintiffs unlimited time
20 to qualify as parties, or special treatment different from all other political bodies
21 seeking access to the ballot. Nor does the First Amendment require the state to
22 make laws beneficial to political bodies in order to assist them in qualifying as
23 parties. "[T]he Constitution does not impose an affirmative duty upon the states to
24 give minor parties preferential treatment." *Council of Alternative Political Parties*
25 *v. Hooks*, 179 F.3d 64, 75, 76 (3d Cir. 1999) (citations omitted) ("Although minor
26 parties face many hurdles in entering the political arena, . . . states are under no
27 duty to alleviate those difficulties."); *Jaeger*, 659 F.3d at 700 (it is the minor party
28 candidate's burden to generate support and rally voters despite lower voter interest

1 in primary elections; “It is not the state’s obligation to find or create an easier forum
2 for establishing voter support.”); *see also Munro*, 479 U.S. at 198 (“States are not
3 burdened with a constitutional imperative to reduce voter apathy or to ‘handicap’ an
4 unpopular candidate to increase the likelihood that the candidate will gain access to
5 the general election ballot.”).

6 Political groups seeking a place on the ballot must be reasonably diligent in
7 their efforts, and must actually have a modicum of support to show for those
8 efforts. *Libertarian Party of Wash. v. Munro*, 31 F.3d 759, 762 (9th Cir. 1994);
9 *Jenness v. Fortson*, 403 U.S. 431, 442, 915 S. Ct. 1970, 20 L. Ed. 2d 554 (1971). It
10 is not unreasonable – or unconstitutional – for the State to require that aspiring
11 political parties demonstrate that they have obtained sufficient voter support by a
12 uniform deadline, in order to promote equal opportunities for all political bodies
13 seeking access to California ballots. Nor is it unconstitutional to allow elections
14 officials sufficient time to conduct the party qualification process in an orderly
15 manner. These important interests justify section 5100’s timing requirement.

16 **III. NO PERMANENT INJUNCTION SHOULD ISSUE**

17 Plaintiffs have failed to meet their burden to demonstrate that section 5100’s
18 timing requirement severely restricts their First and Fourteenth Amendment rights,
19 while the State has demonstrated that it has important regulatory interests in the
20 establishment of a uniform, fair deadline for the qualification of new parties that
21 will be able to participate in all California elections. Thus, plaintiffs have failed to
22 prove the threshold element required to obtain permanent injunctive relief: success
23 on the merits. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7,
24 295 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

25 Plaintiffs have also not met the other elements required before an injunction
26 may be ordered. The groups’ failure to obtain significant voter support for their
27 qualification efforts since the preliminary injunction was issued demonstrates that
28 the cause of any purported irreparable harm to their efforts lies within their own

1 organizations and platforms, not with the deadline. This case is therefore not
2 governed by *Elrod v. Burns*, 427 U.S. 347, 373 96 S. Ct. 2673, 49 L. Ed. 2d 547
3 (1976), in which a three-justice plurality found that, in a case in which government
4 employees sought a preliminary injunction because they were in danger of losing
5 their jobs because of their political party affiliation, there is irreparable injury when
6 “First Amendment interests were either threatened or in fact being impaired at the
7 time relief was sought.” *See also Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989)
8 (“the assertion of First Amendment rights does not automatically require a finding
9 of irreparable injury”). The threshold should be higher on a permanent injunction,
10 especially because, as demonstrated above, plaintiffs’ First Amendment rights were
11 never impaired as a result of the timing requirement – neither the Justice Party nor
12 the Constitution Party has come close to reaching a sufficient amount of voter
13 support for the timing requirement to have had an impact their efforts. *See Munro*,
14 479 U.S. at 193. The balance of equities and the public interest mandates that the
15 state’s legitimate and even-handed regulation of its elections be upheld.

16 CONCLUSION

17 In light of the Justice Party and the Constitution Party’s failure to obtain even
18 marginally more support among voters for their qualification in the months after the
19 Secretary of State was preliminarily enjoined from enforcing section 5100’s timing
20 requirement against them, it is evident that the timing requirement does not impede
21 their ability to qualify. Instead, their failure to gain any ground in their
22 qualification efforts is due to attributes of the groups themselves, not the state’s
23 process governing party qualification. In light of the factual circumstances
24 presented here, abstract theories are no substitute for evidence to support a finding
25 that the timing requirement is unconstitutional.

26 If, despite the deficiencies in plaintiffs’ case, however, this Court decides in
27 plaintiffs’ favor, it should note that plaintiffs have limited the relief they seek, and
28 have not asked this Court to legislate from the bench. In short, plaintiffs have not

1 asked the Court to create new qualification deadlines. The requested relief is
2 limited to enjoining the enforcement of section 5100's timing requirement against
3 political bodies that seek to qualify as political parties solely to place their
4 candidates for President and Vice President on the general election ballot in
5 Presidential election years.

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Dated: September 24, 2012

Respectfully submitted,
KAMALA D. HARRIS
Attorney General of California
PETER A. KRAUSE
Supervising Deputy Attorney General

/s/
KARI KROGSENG
Deputy Attorney General
*Attorneys for Defendant California
Secretary of State Debra Bowen*

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1 KAMALA D. HARRIS
Attorney General of California
2 PETER A. KRAUSE
Supervising Deputy Attorney General
3 KARI KROGSENG
Deputy Attorney General
4 State Bar No. 215263
1300 I Street, Suite 125
5 P.O. Box 944255
Sacramento, CA 94244-2550
6 Telephone: (916) 322-1067
Fax: (916) 324-8835
7 E-mail: Kari.Krogseng@doj.ca.gov
Attorneys for Defendant
8 *California Secretary of State Debra Bowen*

9 IN THE UNITED STATES DISTRICT COURT
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**CALIFORNIA JUSTICE
COMMITTEE, THE
CONSTITUTION PARTY OF
CALIFORNIA, JEFF NORMAN,
CHARLES MICHEL DEEMER, and
JOHN GABREE,**

Plaintiffs,

v.

**DEBRA BOWEN, California
Secretary of State, in her official
capacity,**

Defendant.

CV 12-3956 PA (AGRx)
**SUPPLEMENTAL
DECLARATION OF JANA M.
LEAN IN SUPPORT OF THE
SECRETARY OF STATE'S
RESPONSIVE TRIAL BRIEF**

Date: October 16, 2012
Time: 9:00 a.m.
Courtroom: 15
Judge: The Honorable Percy
Anderson
Trial Date: October 16, 2012
Action Filed: May 7, 2012

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SUPPLEMENTAL DECLARATION OF JANA M. LEAN

I, Jana M. Lean, declare as follows:

1. I am the Chief of the Elections Division, employed in the office of the California Secretary of State. I have served in that capacity since May 2010. Prior to assuming my current position, I served in various roles in the Elections Division for more than 12 years, and am familiar with all aspects of the Division’s work. In the course of my duties, I oversee the compilation and reporting of voter registration and party qualification statistics.

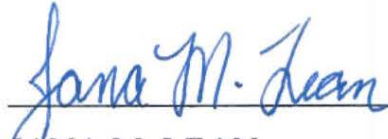
2. As of the September 7, 2012, Report of Registration (60 days before the November 6, 2012, General Election), the Constitution Party of California had 252 registrants in the State of California. Attached hereto, marked as “Exhibit E,” is a true and correct copy of the September 7, 2012, Report of Registration pertaining to Political Bodies Attempting to Qualify. This information may be accessed on the Secretary of State’s website at <http://www.sos.ca.gov/elections/ror/ror-pages/60day-general-12/nonqual1.pdf>.

3. As of the September 7, 2012, Report of Registration (60 days before the November 6, 2012, General Election), the Justice Party had 237 registrants in the State of California. *See* Exhibit E, attached.

4. As of the September 7, 2012, Report of Registration (60 days before the November 6, 2012, General Election), there were 17,259,680 registered voters in the State of California. Attached hereto, marked as “Exhibit F,” is a true and correct copy of the September 7, 2012, Report of Registration pertaining to Historical Voter Registration Statistics for 60-Day Close for Statewide Generals in

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1 Presidential Election Years. This information may be accessed on the Secretary of
2 State's website at [http://www.sos.ca.gov/elections/ror/ror-pages/60day-general-](http://www.sos.ca.gov/elections/ror/ror-pages/60day-general-12/hist-reg-stats1.pdf)
3 [12/hist-reg-stats1.pdf](http://www.sos.ca.gov/elections/ror/ror-pages/60day-general-12/hist-reg-stats1.pdf).

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7 LANA M. LEAN
8 Chief, Elections Division
9 Office of the California Secretary of State

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EXHIBIT E

**Report of Registration as of September 7, 2012
Political Bodies Attempting to Qualify**

County	Total	California Pirate Party	Constitution Party	Justice Party	Reform Party of California	We Like Women Political Party
Alameda	414	1	12	31	370	0
Alpine	1	0	0	0	1	0
Amador	25	0	6	0	19	0
Butte	119	0	7	32	80	0
Calaveras	41	1	2	3	35	0
Colusa	2	0	1	0	1	0
Contra Costa	571	4	9	7	550	1
Del Norte	14	0	0	0	14	0
El Dorado	135	0	6	5	124	0
Fresno	237	0	2	2	233	0
Glenn	5	0	0	0	5	0
Humboldt	317	0	0	15	301	1
Imperial	24	0	0	0	24	0
Inyo	3	0	2	0	1	0
Kern	258	0	2	0	256	0
Kings	33	0	0	0	33	0
Lake	45	0	3	3	39	0
Lassen	22	0	0	0	22	0
Los Angeles	4,625	0	42	18	4,532	33
Madera	26	0	0	0	26	0
Marin	251	0	0	6	245	0
Mariposa	0	0	0	0	0	0
Mendocino	109	0	3	7	99	0
Merced	0	0	0	0	0	0
Modoc	0	0	0	0	0	0
Mono	0	0	0	0	0	0
Monterey	124	2	0	0	122	0
Napa	58	0	0	0	58	0
Nevada	114	0	0	5	109	0
Orange	2,476	1	1	15	2,135	324
Placer	201	1	4	1	195	0
Plumas	0	0	0	0	0	0
Riverside	877	0	3	9	852	13
Sacramento	557	0	2	5	550	0
San Benito	103	0	0	0	103	0
San Bernardino	925	0	2	4	908	11
San Diego	2,598	0	35	13	2,549	1
San Francisco	310	0	2	12	288	8
San Joaquin	260	2	2	1	255	0
San Luis Obispo	166	3	4	5	154	0
San Mateo	340	0	2	12	326	0

**Report of Registration as of September 7, 2012
Political Bodies Attempting to Qualify**

County	Total	California Pirate Party	Constitution Party	Justice Party	Reform Party of California	We Like Women Political Party
Santa Barbara	263	0	1	5	257	0
Santa Clara	3,002	0	48	5	2,949	0
Santa Cruz	254	0	6	13	235	0
Shasta	86	0	17	0	69	0
Sierra	4	0	0	0	4	0
Siskiyou	19	0	2	3	14	0
Solano	239	0	1	1	237	0
Sonoma	350	0	3	14	333	0
Stanislaus	292	0	13	2	277	0
Sutter	20	0	0	0	20	0
Tehama	14	0	1	0	13	0
Trinity	0	0	0	0	0	0
Tulare	90	1	8	1	80	0
Tuolumne	57	1	2	0	54	0
Ventura	512	1	4	9	498	0
Yolo	72	1	3	2	66	0
Yuba	16	1	1	2	12	0
State Total	21,262	19	252	237	20,362	392

EXHIBIT F

60-DAY REPORT OF REGISTRATION
 September 7, 2012, for the November 6, 2012, General Election

**HISTORICAL VOTER REGISTRATION STATISTICS FOR 60-DAY
 CLOSE FOR STATEWIDE GENERALS IN PRESIDENTIAL ELECTION YEARS**

TOTAL VOTER REGISTRATION

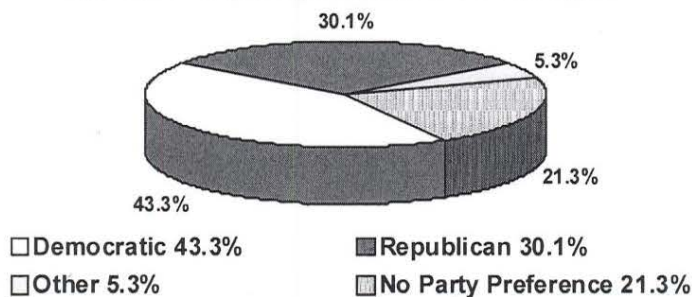
<u>Report Date</u>	<u>Eligible Voters¹</u>	<u>Registered Voters</u>	<u>Percent</u>
September 7, 2012	23,780,847	17,259,680	72.58%
September 5, 2008	23,171,364	16,171,772	69.79%
September 3, 2004	22,036,187	15,625,180	70.91%
September 8, 2000	21,430,179	15,126,262	70.58%
September 6, 1996	19,508,172	15,073,978	77.27%

¹The figures given are unofficial but are based on U.S. Census data, as adjusted by information from the California Department of Finance and the California Department of Corrections and Rehabilitation.

REGISTRATION BY POLITICAL PARTY

<u>Report Date</u>	<u>Dem</u>	<u>Rep</u>	<u>Other</u>	<u>No Party Preference</u>	<u>Counties with Majority of Dem</u>	<u>Counties with Majority of Rep</u>
September 7, 2012	43.3%	30.1%	5.3%	21.3%	27	31
September 5, 2008	43.9%	32.3%	4.3%	19.5%	25	33
September 3, 2004	43.2%	35.0%	4.7%	17.1%	21	37
September 8, 2000	45.5%	35.0%	5.3%	14.2%	27	31
September 6, 1996	46.9%	36.8%	5.1%	11.2%	34	24

Political Party Registration Percentages



60-DAY REPORT OF REGISTRATION
September 7, 2012, for the November 6, 2012, General Election

TRENDS

Since the last 60-Day Report of Registration in a presidential general election year (September 5, 2008):

- The total voter registration in the state increased from 16,171,772 to 17,259,680.
- The percentage of the total number of registered voters compared to the number of people who are eligible to register to vote increased from 69.8% to 72.6%.
- The percentage of voters who have no party preference increased from 19.5% to 21.3%.
- The percentage of people registered with a qualified political party decreased from 79.8% to 77.5%.
- The percentage of voters registered with the Democratic Party decreased from 43.9% to 43.3%.
- The percentage of voters registered with the Republican Party decreased from 32.3% to 30.1%.

POLITICAL PARTY REGISTRATION HIGHLIGHTS

The counties with the 10 highest percentages of Democratic Party, Republican Party, and No Party Preference registered voters are:

<u>Democratic Party</u>		<u>Republican Party</u>		<u>No Party Preference</u>	
Alameda	56.05%	Modoc	50.43%	San Francisco	30.98%
San Francisco	55.39%	Lassen	48.37%	Santa Clara	28.64%
Marin	54.40%	Placer	47.96%	Alpine	25.45%
Santa Cruz	53.89%	Shasta	46.97%	San Mateo	25.12%
Monterey	51.90%	Colusa	46.26%	San Diego	25.12%
Sonoma	51.41%	Kings	45.53%	Lake	24.57%
San Mateo	51.00%	Madera	45.52%	Mono	24.25%
Los Angeles	50.64%	Mariposa	45.48%	Humboldt	23.52%
Imperial	50.32%	Amador	45.47%	Yolo	22.74%
Contra Costa	49.15%	Glenn	45.44%	Trinity	22.65%

The counties with the three highest percentages of American Independent Party, Americans Elect Party, Green Party, Libertarian Party, and Peace and Freedom Party registered voters are:

<u>American Independent Party</u>		<u>Green Party</u>		<u>Peace and Freedom Party</u>	
Sierra	5.46%	Mendocino	3.86%	Mendocino	0.58%
Lassen	5.10%	Humboldt	3.74%	Los Angeles	0.51%
Tehama	4.92%	Santa Cruz	2.06%	Lake	0.44%

<u>Americans Elect Party</u>		<u>Libertarian Party</u>	
Los Angeles	0.06%	Sierra	1.24%
Orange	0.01%	Calaveras	1.13%
Calaveras	0.01%	Trinity	1.13%