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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RON DUDUM, MATTHEW SHERIDAN, ELIZABETH MURPHY, KATHERINE WEBSTER, MARINA FRANCO & DENNIS FLYNN,

Plaintiffs,

vs.

JOHN ARNTZ, Director of Elections of the City and County of San Francisco; the CITY & COUNTY OF SAN FRANCISCO, a municipal corporation; the SAN FRANCISCO DEPARTMENT OF ELECTIONS; the SAN FRANCISCO ELECTIONS COMMISSION; and DOES 1-20,

Defendants.

Case No. 10-CV-00504-SI

PLAINTIFFS' OPPOSITION TO MOTION OF NEW AMERICA FOUNDATION TO FILE A BRIEF AS *AMICUS CURIAE*

JUDGE: Hon. Susan Illston
COURTROOM: 10

1 The motion of New America Foundation ("NAF') for leave to file a brief as
2 *amicus curiae* should be denied.
3 The hearing on Plaintiffs' motion for a preliminary injunction is set for April
4 2, 2010. That is the same day that NAF will ask this Court to decide whether to
5 even consider the amicus brief. In other words, NAF is effectively asking the Court
6 to permit the filing of its brief after this matter has been fully briefed, argued, and
7 submitted to the Court. This is improper, as it does not give Plaintiffs an
8 opportunity to respond to the *amicus* brief in advance of the hearing.
9 Nor would it be sufficient to permit Plaintiffs to respond to the NAF brief
10 following the hearing. Time is of the essence in this case. Defendant is already
11 opposing the motion for preliminary injunction on the (spurious) ground that it
12 will interfere with the November 2010 election. Plaintiffs originally noticed their
13 motion for March 12 and it has already been delayed three weeks—once at the
14 request of Defendants for an extra week to submit opposition papers, and again
15 per court order. Permitting NAF to further delay resolution of this motion
16 threatens significant prejudice to Plaintiffs' constitutional rights.
17 And finally, the motion for leave to file an *amicus* brief should be denied
18 because even a cursory review shows NAF's proposed *amicus* papers are improper.
19 NAF seeks permission not just to file an *amicus* brief, but also three declaration
20 and 13 exhibits which, *inter alia*, purport to counter evidence submitted by
21 plaintiffs. That would essentially confer party status on NAF and is well beyond
22 the proper scope of *amicus*. *See, e.g., Metcalf v. Daley*, 214 F.3d 1135, 1141 n.1 (9th
23 Cir. 2000) ("The Humane Society of the United States made a motion for leave to
24 file an amicus brief, which we granted. However, we also granted appellees' joint
25 motion to strike the extra-record documents that the Humane Society submitted
26 with its amicus brief."); *High Sierra Hikers Ass'n v. Powell*, 150 F. Supp. 2d 1023,
27 1045 (N.D. Cal. 2001) (court *sua sponte* excluded extra-record evidence submitted
28 by amici). Further, it is not a sufficient answer to allow the filing of NAF's

1 proposed *amicus* brief but not the declarations and exhibits, as the brief is
2 intertwined with and repeatedly references them.[1]
3 For the foregoing reasons, NAF's motion for leave to file a brief as *amicus*
4 *curiae* should be denied. Again, NAF is free to renew its request for *amicus* status
5 at a later date, and on timely notice that does not prejudice the parties or the
6 orderly litigation process.
7 If the Court does determine to grant NAF's motion, Plaintiffs ask that they
8 be given a reasonable time to review NAF's amicus papers and respond
9 appropriately.
10 Respectfully submitted,
11 Dated: March 12, 2010 NIELSEN, MERKSAMER, PARRINELLO,
MUELLER & NAYLOR, LLP
12
13 By:/s/James R. Parrinello
James R. Parrinello
14
15 By:/s/Christopher E. Skinnell
Christopher E. Skinnell
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17 *Attorneys for Plaintiffs*
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19 [1] We note that even cursory review of NAF's papers reveals they are riddled with serious legal and factual errors. As a glaring example, NAF's papers claim that the
20 Massachusetts Supreme Court opinion in *McSweeney v. City of Cambridge*, 665 N.E.2d 11 (Mass. 1996), is directly on point, because "like San Francisco, Cambridge also limits
21 the number of candidates that voters may rank in its multiple-seat form of IRV." (NAF's Proposed Amicus Brief, p. 10:10-11.) This is flat out false. First, *McSweeney* addressed
22 the constitutionality of the electoral system of the *City Council of* Cambridge. The "sample ballot" NAF submits in support of its claim, however (which is unauthenticated
23 and therefore inadmissible) is from *school board* elections in Cambridge, which were not
24 addressed by *McSweeney* at all. With respect to the municipal elections that were at issue, each voter "may mark as many choices as he pleases." *Moore v. Elec. Comm'rs of*
25 *Cambridge*, 35 N.E.2d 222, 228 (Mass. 1941). See also *McSweeney,* 665 N.E.2d at 649
26 n.2 (citing Moore for its detailed description of the Cambridge system). Moreover, that sample ballot—even if admissible—does not even establish that voters are limited in the
27 votes they can cast in school board elections; to the contrary, the ballot expressly states, "You may fill in as many choices as you please." Dutta Declaration, Exhibit 10 (Dkt. #32-
28 5, p. 41). Other equally glaring defects are also evident.