CALIFORNIA SUPREME COURT

MONA FIELD, RICHARD WINGER, STEPHEN A. CHESSIN, JENNIFER WOZNIAK, JEFF MACKLER, and RODNEY MARTIN,

Petitioners,

vs.

SUPERIOR COURT FOR THE COUNTY OF SAN FRANCISCO,

Respondent;

DEBRA BOWEN, in only her official capacity as California Secretary of State; JOHN ARNTZ, in only his official capacity as Director of Elections of the City and County of San Francisco; DAVE MACDONALD, in only his official capacity as Registrar of Voters of the County of Alameda; JESSE DURAZO, in only his official capacity as Registrar of Voters of the County of Santa Clara; DEAN LOGAN, in only his official capacity as Registrar-Recorder / County Clerk of the County of Los Angeles; NEAL KELLEY, in only his official capacity as Registrar of Voters of the County of Orange; RITA WOODARD, in only her official capacity as

CASE NO.

VERIFIED PETITION FOR WRIT OF MANDATE;
MEMORANDUM OF POINTS AND AUTHORITIES; EXHIBITS

[Arising from the denial of Petitioner's Motion for Preliminary Injunction by Hon. Charlotte Walter Woolard, Dept. 302, Superior Court for the County of San Francisco (Civic Center), 400 McAllister St., San Francisco, CA 94102; 415.551.3723; Case No. CGC-10-502018]

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Registrar of Voters of the County of Tulare; and DOES 1-20;

Real Parties in Interest;

ABEL MALDONADO; YES ON 14 – CALIFORNIANS FOR AN OPEN PRIMARY; CALIFORNIA INDEPENDENT VOTER PROJECT;

Intervenors;

VERIFIED PETITION FOR WRIT OF MANDATE;
MEMORANDUM OF POINTS AND AUTHORITIES; EXHIBITS

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CALIFORNIA COURT OF APPEAL, FIRST DISTRICT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Petitioners hereby certify that they are not aware of any person or entity that must be listed under the provisions of California Rule of Court 8.208(e).

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

PRELIMINARY AND JURISDICTIONAL STATEMENT

1. Petitioners seek an Alternative Writ of Mandate that directs Respondent Superior Court to enjoin Real Parties in Interest from implementing and enforcing Senate Bill 6 ("SB 6") for all future state and federal elections. That Writ shall also direct Respondent to declare that Proposition 14 is inoperative, because its implementing legislation (SB 6) is unenforceable and unconstitutional.

2. This Verified Petition, brought in the public interest, seeks to enjoin Real Parties in Interest ("RPIs") from inflicting irreparable harm on minor-party candidates, starting with three looming special elections for state office: in Senate District 28, Senate District 17, and Assembly District 4.

3. The special election in Senate District 28, which was triggered by the death of the late Senator Jenny Oropeza, could be called as soon as December 6, 2010. Candidate nomination papers could be due as soon as December 20, 2010, and requests for vote-by-mail ballots may have to be processed as early as January 3, 2011.

4. Unless they are enjoined by the Court, RPI Secretary of State and RPI Logan (Los Angeles County's top election official) will inflict irreparable harm on Intervenor-Applicant Michael Chamness, by implementing SB 6 for the special election in Senate District 28. Specifically, SB 6 will force Mr. Chamness to misleadingly state that he has "No Party

Preference", when he in fact identifies with the Coffee Party, a minor party. Significantly, RPI Secretary of State has made a binding party admission that this Party Preference Ban is not "permissible".

5. Petitioners and Intervenor-Applicant Chamness respectfully invoke the jurisdiction of this Court pursuant to the California Constitution (Article VI, Section 10), the California Code of Civil Procedure (Section 1085), and California Rule of Court 8.490. As explained more fully in the Points and Authorities, the issues presented by this Petition are of great public importance and must be resolved within a matter of weeks. Moreover, this Petition does not present any questions of fact that the Court must resolve before issuing the relief sought. Therefore, the Court may properly exercise jurisdiction in this matter.

6. Intervenor-Applicant Chamness and other similarly situated candidates have no adequate remedy at law. No other proceeding is available to them to obtain a speedy and final resolution of this constitutional challenge to SB 6.

FACTS

7. On Feb. 19, 2009, the Legislature introduced and passed SB 6 in the middle of the night, without holding a single hearing and without giving the public any notice.

8. The Legislature passed SB 6 in order to implement Proposition 14's "Top Two" Primary, which was later approved by a narrow majority of voters on June 8, 2010.

9. The Election Code classifies political parties into

two categories: qualified parties (i.e., major parties) and non-qualified (i.e, minor parties). A political party gains "qualified" (state-recognized) status if it meets certain stringent criteria.[1]

10. Under existing law, California voters fill state and federal offices through a two-round "qualified party" election system: a primary (first-round) election in which each qualified party chooses its nominee for a given office, followed by a general election in which every qualified-party nominee squares off against minor-party and write-in candidates.

11. If both Prop 14 and SB 6 become operative, they will eliminate California's existing "qualified party" election system (except for Presidential elections).

12. Under SB 6's "Top Two" election system, all candidates for state and federal office square off against one another during a primary (first-round) election. The top two votegetters from the primary election automatically advance to a runoff (general) election, even if one candidate has received a majority (50 percent plus 1) of the vote.[2]

THE PARTIES

13. Intervenor-Applicant Chamness, an individual, is registered to vote in Los Angeles County. He intends to run in

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[1] Verified First Amended Complaint ("FAC"), Petition Exh. 4 ¶11; Election Code §5100.

[2] If a candidate receives a majority (50 percent plus 1) of the vote in a special primary election, he or she will be declared the winner outright, and no general (runoff) election will be held.

the special election for Senate District 28 as a candidate stating a preference for the Coffee Party, a non-qualified (minor) party.

14. Petitioner Martin, an individual, is registered to vote in Tulare County. In 2012, Petitioner Martin wishes to run for the U.S. House of Representatives as a candidate stating a preference for the Reform Party, a non-qualified party.

15. Petitioner Mackler, an individual, is registered to vote in Alameda County. In 2012, Petitioner Mackler wishes to run for the U.S. House of Representatives as a candidate stating a preference for Socialist Action, a non-qualified party.

16. Petitioner Field, an individual, lives and is registered to vote in Los Angeles County.

17. Petitioner Winger, an individual, lives and is registered to vote in San Francisco County.

18. Petitioner Chessin, an individual, lives and is registered to vote in Santa Clara County.

19. Petitioner Wozniak, an individual, lives and is registered to vote in Orange County.

20. Respondent California Superior Court for the County of San Francisco has the authority to grant injunctive and declaratory relief.

21. RPI Bowen serves as the State's chief elections officer.

22. RPI Logan serves as Los Angeles County's chief elections officer. RPI Logan will administer the looming special elections in Senate Districts 28 and 17.

23. RPI Arntz serves as San Francisco County's chief elections officer.

24. RPI Macdonald serves as Alameda County's chief elections officer.

25. RPI Durazo serves as Santa Clara County's chief elections officer.

26. RPI Kelley serves as Orange County's chief elections officer.

27. RPI Woodard serves as Tulare County's chief elections officer.

28. Intervenor Maldonado supported the Proposition 14 campaign and authored SB 6 in 2009.

29. Intervenor California Independent Voter Project supported the Proposition 14 campaign.

30. Intervenor Yes on 14 supported the Proposition 14 campaign.

CLAIMS ASSERTED

31. SB 6 unlawfully discriminates against minor-party candidates for state and federal office. Specifically, SB 6 bans minor-party candidates from stating any party preference – including "Independent" – on the ballot. In contrast, candidates who identify with the Democratic or Republican Party may freely state their party preference on the ballot.

32. By banning minor-party candidates from stating any party preference on the ballot, SB 6 violates the Elections Clause of the U.S. Constitution, the Equal Protection Clause

and Free Speech Clause of the California Constitution), and the First and Fourteenth Amendments of the U.S. Constitution.

33. Unless RPIs are enjoined from implementing SB 6, Intervenor-Applicant Chamness and other minor-party candidates will suffer irreparable harm in the looming special elections for Senate District 28, Senate District 17, and Assembly District 4.

34. Petitioners believe that there is no requirement to plead demand and refusal under the circumstances presented in this case. Without prejudice to that position, Petitioners allege that (a) their Motion for Preliminary Injunction demanded that RPIs act or refrain from taking action as described in this Petition, and (b) RPIs, by opposing or refusing to support Petitioners' Motion for Preliminary Injunction, refused to act or refrain from taking action as described in this Petition.

RELIEF SOUGHT

Plaintiffs seek the following relief:

1. That this Court issue an alternative writ of mandate that directs Respondent to enjoin RPIs from implementing or enforcing SB 6, or, in the alternative, to show cause before this Court at a specified time and place as to why RPIs have not done so;

2. That, upon RPIs' and Intervenors' return to the alternative writ, a hearing be held before this Court at the earliest practicable time so that the issues raised by this Petition may be promptly adjudicated;

3. That, following the hearing upon this Petition, the Court issue a peremptory writ that directs Respondent to enjoin RPIs from implementing or enforcing SB 6.

4. That Petitioners be awarded their reasonable costs and expenses, including attorney's fees, pursuant to California Code of Civil Procedure §1021.5 and 42 U.S.C. §1988(b); and

5. For all other relief that the Court deems just and equitable.

VERIFICATION

I, Gautam Dutta, declare:

I am an attorney for Petitioners in the action captioned above. I have read this Petition for Writ of Mandate and know its contents. I am informed, believe, and allege based upon my information and belief that the contents are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Nov. 24, 2010, in Fremont, California.

Signed: ______________________

Gautam Dutta

MEMORANDUM OF POINTS AND AUTHORITIES

Thus, when a law appears to have been adopted without reasoned consideration, for discriminatory purposes, or to entrench political majorities, we are less than willing to defer to the institutional strengths of the legislature.

-- Justices Breyer and Stevens[3]

The ballot is the last thing the voter sees before he makes his choice.

-- Chief Justice Roberts, former Chief Justice Rehnquist, and Justice Alito[4]

I. Introduction

Last year, the Legislature introduced and passed a law in the middle of night, without holding a single hearing and without giving the public any notice.[5] Today, that law – Senate Bill 6 – is poised to unlawfully target and discriminate against minor-party candidates. Specifically, minor-party candidates like Intervenor-Applicant Michael Chamness will be banned from stating any party preference (including "Independent") on the ballot.

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3 *Doe v. Reed* (June 24, 2010) 561 U.S. __, No. 09-559, concurring op., Stevens & Breyer, JJ., at 3 n.3 (emphases added).

4 *Wash. State Grange v. Wash. State Republican Party* (2008) 552 U.S. 442, 460 (Roberts & Alito, JJ., concurring) (*quoting Cook v. Gralike* (2001) 531 U.S. 510, 532 (Rehnquist, C.J., concurring)).

5 FAC, Petition Exh. 4 ¶¶2-4.

Time is of the utmost essence. Unless this Court swiftly intervenes, a broad class of candidates will be irreparably harmed in three looming special elections across a broad swath of California: Los Angeles, Sacramento, San Bernardino, Ventura, Kern, Alpine, El Dorado, and Placer Counties. Significantly, the candidate filing deadline for the first of those elections may be set for December 20, 2010, and requests for vote-by-mail ballots may have to be processed as early as January 3, 2011.

As this Petition will show, Senate Bill 6 ("SB 6") – which was passed by the Legislature in order to implement Proposition 14's "Top Two" Primary – brazenly violates both the U.S. and California Constitutions.[6] In fact, even the Secretary of State *has admitted that a critical part of SB 6 is not "permissible"*. Therefore, the Court should issue a writ that directs Respondent to (1) enjoin SB 6 from being implemented; (2) declare SB 6 unenforceable; and (3) declare Proposition 14 to be inoperative, because it currently lacks a lawful statute to implement it.

II. Jurisdiction

This Court may exercise jurisdiction in this case, for this Petition raises issues "of *great public importance* and should be resolved <u>promptly</u>."[7] This Petition – triggered by the

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[6] Proposition 14 was approved by a narrow majority of voters on June 8, 2010. *Id.* Exh. 4 ¶26.

[7] *Legislature v. Eu* (1991) 54 Cal.3d 492, 500 (*quoting Raven v. Deukmejian* (1990) 52 Cal.3d 336, 350) (emphases

implementation of SB 6 for a looming special election in Senate District 28 – amply satisfies that standard. First, it presents an issue of great public importance. Namely, are SB 6's new ground rules for California's state and federal elections constitutional? Put another way, can the State wield its power to censor candidates on the basis of their political viewpoints?

SB 6 effectively bans minor-party candidates from sharing their political viewpoints with voters. Unless the issues raised by the Petition are resolved promptly, Intervenor-Applicant Michael Chamness and other minor-party candidates will suffer irreparable harm in three looming special elections.

Furthermore, election officials across eight counties urgently need guidance from this Court, because they must rapidly overhaul their ballots and voting equipment in order to comply with SB 6's new requirements. In fact, Los Angeles County's top election official – who must soon administer two special elections under SB 6 – stated last spring that existing voting equipment *could not "accommodate" the June 2012 statewide election under SB 6's new rules.*[8]

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added); *see also Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241; *Amador Valley Jt. Union High Sch. Dist. v. BOE* (1978) 22 Cal.3d 208, 219.

[8] Mar. 20, 2010 memorandum from RPI Logan to the Los Angeles County Board of Supervisors (attaching Mar. 2, 2010 letter from California Association of Clerks and Election Officials to the State Assembly Elections Committee), attached as Exhibit C to this Petition (hereinafter "Registrar Logan Letter"), at 2.

Adjudication of this case cannot wait. Petitioners have already brought the issues raised here to the attention of Respondent Superior Court and the Court of Appeal.[9] By hearing this Petition, the Court will remove the imminent danger of irreparable harm, rule on important constitutional issues, and clarify the ground rules for our state and federal elections. Therefore, the Court may properly take jurisdiction over this Petition.

III. Background

A. Three Looming Special Elections

This Motion brings a matter of utmost urgency to the Court's attention, for SB 6 is poised to be implemented for

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[9] Respondent Superior Court entered a court order (attached as Exhibit A to this Petition) denying Petitioner's Motion for Preliminary Injunction on Oct. 5, 2010, after holding oral argument and issuing a tentative decision on Sept. 14, 2010.

On Sept. 29, 2010, Petitioners filed a Petition for Writ of Mandate (Case No. A129829, attached to this Petition as Exhibit 18) with the Court of Appeal (First District). On Oct. 14, 2010, before Petitioners had filed a reply brief (*see* Petition Exhibit E), the Court of Appeal issued an order denying that Petition (order attached as Exhibit D to this Petition).

The earlier Petition sought to defend the rights of write-in voters and candidates in the upcoming Jan. 4, 2011 general special election for Senate District 1. As this Petition explains below, that same election will soon trigger one of the special elections at issue here (namely, in Assembly District 4).

On Oct. 5, 2010, Petitioners filed a Notice of Appeal (attached as Exhibit B to this Petition). The briefing schedule for the direct appeal (First District Case No. A129946) will be set as soon as the Court of Appeal has received the Record on appeal.

three special elections that will be held within a matter of *weeks*. Special elections have been a mainstay in California politics, and 2011 will prove no different. As the Secretary of State recently noted, California has held an average of 4.8 special elections per year for state and federal office since 1990.[10] Last spring, the California Association of Clerks and Elections Officials presciently called attention to the difficulties of having to implement SB 6 in such a short timeframe:

> "Of *greater concern* is the possibility that the Governor *might proclaim a Special Vacancy Election* for an Assembly or Senate vacancy *as early as January 2011*."[11]

1. Senate District 28

On November 2, 2010, State Senator Jenny Oropeza was re-elected to Senate District 28, two weeks after she had unexpectedly died. Senate District 28 covers nearly 1 million residents from West Los Angeles to Torrance to the City of Carson.[12] Sen. Oropeza's seat will officially fall vacant on

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[10] Secretary of State's Apr. 12, 2010 News Release, Request for Judicial Notice by Intervenor-Applicant Michael Chamness ("RJN"), Exhibit I, at 1; Complaint in Intervention ¶28.

[11] Mar. 2, 2010 letter from California Association of Clerks and Elections Officials to the State Assembly Elections Committee, *attached to* Logan Letter, *supra* note 8, Attach. 1, at 2 (emphases added). .

[12] Complaint in Intervention of Intervenor-Applicant Michael Chamness ("Complaint in Intervention") ¶29.

December 6, 2010. The Governor must then call an election by December 20, 2010 (i.e., within 14 days of the vacancy).[13]

On November 5, 2010, the Secretary of State's office announced that SB 6 will be implemented for the Senate District 28 special election.[14] If the Governor calls the special election on December 6, 2010, the primary (first-round) election could be held as soon as February 1, 2011. Based on that schedule, candidate nomination papers will be due on December 20, 2010, and requests for vote-by-mail ballots must be processed beginning January 3, 2011.[15]

2. Senate District 17

Meanwhile, candidate nomination papers for a special election in Senate District 17 could be due as early as December 20, 2010. Between January 3 and 17, 2011, the Governor will call a special election for Senate District 17, which covers nearly 1 million residents from Ventura, Los Angeles, Kern, and San Bernardino Counties. On November 2, 2010, George Runner was elected to the State Board of Equalization, midway through his four-year term in Senate District 17.

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[13] Elections Code §10700.

[14] "Lieu Announces Bid for Oropeza's Seat," Long Beach *Press-Telegram*, Nov. 5, 2010, RJN, Exhibit A, at 3.

[15] Elections Code §10704(a) (nomination papers due within 43 days of the election date); *id.* §3001 (requests for vote-by-mail ballots must be processed beginning with the 29th day before the election date).

On November 5, 2010, Senator Runner announced that he will resign from the State Senate on January 3, 2011.[16] If the Governor calls the special election on January 3, 2011, the primary special election for Senate District 17 could be held as soon as March 1, 2011, and the general special election could be held as soon as April 26, 2011.[17] Based on that schedule, candidate nomination papers will be due on January 17, 2011, and requests for vote-by-mail ballots must be processed beginning January 31, 2011.[18]

3. Assembly District 4

Finally, candidate nomination papers could be due as soon as January 2011 for the likely special election in Assembly District 4, which stretches across Sacramento, Placer, El Dorado, and Alpine Counties. On November 2, 2010, State Assemblymember Ted Gaines won two elections. He not only was re-elected to State Assembly District 4, but finished first in a special primary (first-round) election to fill a vacancy in Senate District 1. In so doing, the Republican Gaines qualified for the January 4, 2011 special general (runoff) election in Senate District 1 – a "safely Republican" seat that Gaines is expected to win easily.[19]

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16 Complaint in Intervention ¶36.

17 Complaint in Intervention ¶37.

18 *Id.*

19 "[Gaines opponent Ken] Cooley faces an uphill battle on Jan. 4 because the GOP enjoys a 10-point voter registration advantage in a district considered safely Republican." (emphases added). Susan Ferris, "Gaines' Victory Propels Him

Once Gaines wins the January 4, 2011 special election for Senate District 1, he is expected to resign from his seat in Assembly District 4 – triggering another special election. Thus, the primary special election for Assembly District 4 could be held as early as March 2011, and the general special election could be held as early as May 2011. Based on that schedule, candidate nomination papers for Assembly District 4 will be due in early February 2011, and requests for vote-by-mail ballots must be processed beginning February 2011.

In short, SB 6 will be implemented for three special elections in a matter of weeks. Furthermore, candidate nomination papers for Senate District 28 may become due as soon as December 20, 2010. In this light, Mr. Chamness, who intends to run for Senate District 28, will be directly – and immediately – affected by *any* decision that this Court makes.

B. Denial of Preliminary Injunction

In denying Petitioners' Motion for Preliminary Injunction, Respondent Superior Court made three rulings. First, it held that Petitioners had standing to bring their all of their legal claims. Second, it held that Petitioners did not show a likelihood of success on the merits. Finally, it held that Petitioners' showing of imminent harm was "not sufficient."[20]

With regard to likelihood of success on the merits, Respondent made two key rulings. First, Respondent held that

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into Senate Runoff," Sacramento *Bee*, Nov. 4, 2010, RJN, Exhibit F.

[20] Order, Petition Exh. A, at 2.

SB 6 imposes a "party-preference ban" (hereinafter, the "Party Preference Ban"). That is, SB 6 bans candidates from non-qualified (i.e., minor) parties from stating a party preference on the ballot. For example, a Coffee Party candidate would be banned from listing the Coffee Party beside his or her name on the ballot.

In addition, Respondent upheld the constitutionality of SB 6's Party Preference Ban:

> *Insufficient evidence and case law* support the argument that the *party-preference ban* violates the Equal Protection Clause or the Elections Clause.
>
> The *state may require candidates* not affiliated with qualified [state-recognized] parties *to use the "independent" label*. (*See Libertarian Party v. Eu* (1980) 23 Cal.3d 535.)
>
> Several federal circuit courts have also held that a state is not constitutionally obligated to permit candidates to list their preferred party label on the ballot.[21]

However, Respondent did not rule on one of Petitioners' key arguments: that, at a bare minimum, minor-party candidates have the constitutional right to identify themselves on the ballot as "Independent".[22]

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[21] *Id.* (emphases added).

[22] Plaintiffs' Reply Brief, Petition Exh. 3, at 9:12-18. *See also Rosen v. Brown* (6th Cir. 1992) 970 F.2d 169, 175 (candidates have a constitutional right to a party voting cue of "Independent" on the ballot); *Schrader v. Blackwell* (6th Cir. 2001) 241 F.3d 783, 788-89 (*re-aff'g Rosen*) (2001) *cert.*

IV. The Court Should Apply De Novo Review

The Court should apply de novo review to Respondent Superior Court's ruling on Petitioners' likelihood of success. To obtain a preliminary injunction, Petitioners must satisfy two requirements:

> 1. They are "likely to suffer greater injury from a denial of the injunction than the defendants are likely to suffer from its grant" (i.e., imminent harm)
>
> 2. There is a "reasonable probability" that Plaintiffs will prevail on the merits (i.e., likelihood of success).[23]

Significantly, if a trial court bases its assessment of likelihood of success on legal (rather than factual) questions, the reviewing court should apply de novo review.[24] Here, Respondent concluded that SB 6 was lawful. Consequently, de novo review applies to its ruling on likelihood of success.

V. Likelihood of Success

Petitioners have shown more than a "reasonable probability" of prevailing on the merits.

A. The Court Owes No Deference to a Law Voters Did Not Approve

RPI Secretary of State and Intervenors ("SB 6 Defendants") try to drape SB 6 as a voter-approved measure, in

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denied, 534 U.S. 888; *Rubin v. City of Santa Monica* (9th Cir. 2002) 308 F.3d 1008 (*citing Schrader*).

[23] *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 58 Cal.Rptr.3d 527, 533 (citation omitted).

[24] *Id.* at 533-34.

hopes of coaxing the Court to give SB 6 a heavy dose of deference. Yet they cannot deny one plain fact: SB 6 was not passed by the voters. In fact, Intervenor Maldonado could have asked the Legislature to put both SB 6 and Proposition 14 on the ballot, but he *deliberately chose not to do so.*[25] Why did Intervenor Maldonado dodge the voters when it came to SB 6, a statute that fleshes out critical details of Proposition 14? And last summer, why did he solicit – and then publicly oppose – the Secretary of State's detailed proposal on how to cure the infirm provisions of SB 6?[26]

In any event, Plaintiffs are neither challenging the constitutionality of Proposition 14, nor bringing an as-applied challenge against SB 6. Rather, Petitioners are challenging the

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[25] Intervenors appear to have the Legislature's ear. Only last week, Intervenor California Independent Voter Project funded a Hawaii resort getaway for 22 lawmakers, where they met with "lobbyists and corporate officials who want to influence California's future policies." "Statehouse Insider: Lawmakers Confer with Lobbyists in Hawaii," The Desert *Sun*, Nov. 21, 2010, RJN, Exhibit L, at 1.

[26] On August 3 and 11, 2010, at Intervenor Maldonado's office request, the Secretary of State's office emailed Intervenor Maldonado's office a comprehensive list of amendments that would cure SB 6's infirmities. *See* Aug. 3 and 10, 2010 emails from Secretary of State Debra Bowen's office to Lieutenant Governor Abel Maldonado's office, *attached to* Declaration of Sean Welch (attached as RJN Exhibit K) (hereinafter "Secretary of State Emails") Exh. A, at 1 & Exh. B, at 1.

One month later, Intervenor Maldonado, the author of SB 6, publicly stated through his Chief of Staff that he opposed "tinkering with SB 6 … in any way." "AM Alert: Prop 14 Case in Court", Sacramento *Bee*, Sept. 14, 2010, RJN, Exhibit C at 1.

facial constitutionality of SB 6, an unjust law passed by the Legislature. This Court has made it clear that a statute that endangers one's fundamental rights does not deserve one iota of deference:

> [T]he ordinary deference a court owes to any legislative action vanishes when constitutionally protected rights are threatened.[27]

Here, SB 6 Defendants cannot deny that SB 6 was rammed through the Legislature, without a single hearing and without any public notice. In this manner, SB 6 evaded "the normal scrutiny that comes from extensive committee reviews and repeated readings in both houses of the Legislature in the course of normal bill passage."[28]

Significantly, Justices Breyer and Stevens recently warned that they would be "*less than willing to defer* to the institutional strengths of the legislature" – particularly "when a law appears to have been adopted *without reasoned consideration*, for *discriminatory purposes*, or to *entrench political majorities*[.]"[29]

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[27] *Spiritual Psychic Science Church of Truth v. City of Azusa* (1985) 29 Cal.3d 501, 514 (emphases added).

[28] "Retailers Push Sponsored Bill To Avoid Environmental Law", *Mercury News*, Aug, 31, 2010, attached to Petition Exhibit 3, at Exh. BB, at 2 (emphasis added).

[29] *Doe v. Reed*, *supra* note 3, 561 U.S. ___, No. 09-559, concurring op., Stevens & Breyer, JJ., at 3 n.3 (citations omitted, emphases added).

Needless to say, SB 6 would receive absolutely no deference under the Justices' standard. Indeed, SB 6 was passed by the Legislature:

> (1) Without "reasoned consideration". SB 6 was introduced and passed between 3:40 am and 6:55 am on February 19, 2009, without any public notice or committee hearings;[30]
>
> (2) For "discriminatory purposes". As this Petition will show, SB 6 was designed to inflict political harm on minor-party candidates; and
>
> (3) To "entrench political majorities". As this Petition will show, SB 6 brazenly favors candidates from major parties over those from minor parties.

Consequently, the Court owes no deference whatsoever to SB 6 – and must strike it down if it fails to pass constitutional muster.[31]

B. <u>SB 6 Defendants Have Conceded That SB 6 Censors Minor-Party Candidates</u>

Significantly, SB 6 Defendants have conceded that SB 6 bans minor-party candidates from stating any party preference (including "Independent") on the ballot. In 2009, Intervenor Maldonado authored SB 6 when he was a state lawmaker. As his counsel explained to Respondent Superior Court, SB 6

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[30] FAC, Petition Exh. 4 ¶3.

[31] *See, e.g., City of Rancho Cucamonga v. Mackzum* (1991) 228 Cal.App.3d 929, 946-47 (examining whether a Legislature-passed implementing statute complied with the Equal Protection Clause of the U.S. and California Constitutions); *Marin Hospital Dist. v. Rothman* (1983) 139 Cal.App.3d 495, 500-01 (same).

allows only candidates from “qualified” (state-established) political parties to state a party preference on the ballot:

> [A]ll candidates appear on the same primary election ballot, but *only* those registered with a *qualified* political party may indicate *a party preference* with the label of that party printed *on the ballot*.[32]

Furthermore, SB 6 forces all minor-party candidates to misleadingly state on the ballot that they have “No Party Preference”. In *Libertarian Party v. Eu*, this Court defined an “independent” candidate as a non-qualified (minor-party) candidate.[33] Here, Part 325 of SB 6 requires that all candidates and voters “of independent status” be listed as having “No Party Preference”.[34] Thus, while Republican and Democratic candidates can freely state their party preference, minor-party

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[32] Intervenors’ Sur-Reply Brief, Petition Exh. 12, at 3 (emphases added).

[33] *Libertarian Party v. Eu* (1980) 28 Cal.3d 535, 540 (hereinafter, “*Eu*”). *Eu* held that an independent candidate is one who is “independent of *qualified* political parties”) (emphasis added).

[34] Only registered voters can run for state and federal office. SB 6 Section 3 (Part 325) mandates that all voters “of independent status” be listed as having “No Party Preference”. SB 6, Petition Exh. 2, §3 (Pt. 325). Further, if a candidate’s voter registration card states that he or she has “No Party Preference”, his or her declaration of candidacy must also state that he or she has “No Party Preference.” *Id.* Exh. 2, §17 Pt. 8002.5(a). Finally, if a candidate’s declaration of candidacy states that he or she has “No Party Preference”, then “No Party Preference” must be printed beside his or her name on the ballot. *Id.* Exh. 2 §46 Pt. 13105(a).

candidates like Intervenor-Applicant Chamness will be forced to tell voters that they have "No Party Preference".

C. The Secretary of State Has Conceded that SB 6's Party Preference Ban Is Unlawful

Remarkably, even RPI Secretary of State has publicly admitted that SB 6's Party Preference Ban is not lawful. One week after Petitioners filed this action, the Secretary of State's office publicly stated that Part 325 of SB 6 *impermissibly* bans minor-party candidates from identifying themselves on the ballot as "Independent". According to the Secretary of State, SB 6's Party Preference Ban

> implies that a *candidate*, or a voter, actually has selected a party preference but *is not disclosing it*. That is *permissible* for candidates in certain circumstances [citing an example where a candidate chooses not to disclose his or her party preference], but *not in all instances.* What *the term should imply* is that the voter has not chosen, made, or stated a party preference and is therefore "*independent*."[35]

By publicly stating that SB 6's Party Preference Ban is not "permissible", RPI Secretary of State has made a binding party admission as to *all* of Petitioners' claims regarding SB 6's Party Preference Ban.[36]

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[35] Aug. 3, 2010 Secretary of State Email, *supra* note 26 (attached as RJN Exh. K) Exh. A, Attach.1, at 1 (emphases added).

[36] Party admissions are admissible under the exception to the hearsay rule. Govt. Code §1220. The statement made by Defendant Bowen's staff is admissible and not subject to the hearsay rule, because (a) the staff member was authorized by

D. Petitioners May Bring a Facial Challenge Against SB 6's Party-Preference Ban

In rejecting Petitioners' claims regarding SB 6's Party Preference Ban, Respondent ruled that "*[i]nsufficient evidence* and case law support the argument that the party-preference ban violates the Equal Protection Clause or the Elections Clause."[37] In so doing, Respondent appeared to adopt an argument raised by RPI Secretary of State: that Petitioners may only bring their party-preference claims under an as-applied challenge. Specifically, the Secretary of State has argued that, until SB 6's Party Preference Ban is *implemented*, Petitioners have "no basis" to assert their Equal Protection claims.[38] In other words, Petitioners must *wait until their rights have been violated* – an argument that the U.S. Supreme Court has repeatedly rejected.[39]

Further, this Court, several Courts of Appeal, and the U.S. Supreme Court have all ruled *in favor of* facial challenges to election rules, particularly under the U.S. Constitution's Elections Clause and the California Constitution's Equal

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Defendant Bowen to make the statement on her behalf, and (b) the staff member made the statement within the scope of her official duties. *Id.* §1222 (authorized-party exception to hearsay rule); *id.* §1280 (public-records exception to hearsay rule); *see also Lake v. Reed* (1997) 16 Cal.4th 448, 461-62.

[37] Order, Petition Exh. A, at 2 (emphases added).

[38] RPI Bowen's opposition papers, Petition Exh. 8, at 12:21.

[39] "One does not have to await the consummation of a threatened injury to obtain preventive relief." *Babbitt v. United Farm Workers* (1979) 442 U.S. 289, 299 (*quoting Pennsylvania v. West Virginia* (1923) 262 U.S. 553, 593).

Protection Clause.[40] For instance, the *Rees* Court did not require any factual evidence that a pro-incumbent election rule would harm non-incumbent candidates. Instead, *Rees* ruled that a pro-incumbent election rule violated the Equal Protection Clause as a matter of law.[41]

Similarly, Petitioners ask the Court to decide whether SB 6's Party Preference Ban facially violates the Elections Clause and the Equal Protection Clause. Since both issues may be decided as a matter of law, Respondent erred when it required Petitioners to produce evidence to support their facial constitutional challenge.

E. SB 6's Party Preference Ban Violates the Elections Clause

> *The designation of parties and candidates on the ballot is a matter of continuing public importance, and a challenge to the validity of a statute governing such designations demands final resolution to permit the orderly conduct of future elections.*
>
> -- California Supreme Court, *Libertarian Party v. Eu*[42]

Remarkably, SB 6 Defendants have conceded that SB 6's Party Preference Ban violates the U.S. Constitution's Elections

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[40] *See, e.g., Gralike, supra* note 4, 531 U.S. at 523 (state law held to facially violate the Elections Clause); *Ferrara v. Belanger* (1976) 18 Cal.3d 253; *Rees v. Layton* (1970) 6 Cal.App.3d 815, 822-23; *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1422.

[41] *Rees*, *supra* note 40, 6 Cal.App.3d at 822-23.

[42] *Eu*, *supra* note 33, 28 Cal.3d at 540 (emphases added).

Clause.[43] As the U.S. Supreme Court unanimously held in *Cook v. Gralike*, a state law violates the Elections Clause if it aims to (1) "favor or disfavor" one class of candidates over another, (2) "dictate electoral outcomes", or (3) "evade important constitutional restraints".[44]

In *Gralike*, the High Court struck down a state law that targeted federal candidates who did not support term limits. For example, if an incumbent did not support term limits, that law required the following candidate label to be printed on the ballot beside his or her name: "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS."[45]

In response, the High Court held that the state law violated the Elections Clause for at least two reasons. First, that law was "plainly designed to favor candidates who [were] willing to support" term limits and "to disfavor those who either oppose term limits entirely or would prefer a different proposal":[46]

> [I]t seems clear that the adverse labels *handicap candidates* "at the most crucial state in the election process – the instant before the vote is cast." At

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43 In their opposition papers and at oral argument, SB 6 Defendants failed to cite any legal authority relating to the Election Clause. *See* Plaintiffs' Reply Brief, Petition Exh. 3, at 8:3 n.30; Transcript, Petition Exh. 15, at 20:27-21:1 & 33:14-16.

44 *Gralike*, *supra* note 4, 531 U.S. at 523 (*quoting U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34).

45 *Gralike*, *supra* note 4, 531 U.S. at 510.

46 *Id.* at 510 (*citing Anderson v. Celebrezze* (1983) 460 U.S. 780, 788 n.9).

> the same time, "by directing the citizen's attention to the single consideration of the candidates' fidelity to term limits, the labels imply that the issue "is an important – perhaps paramount consideration in the citizen's choice, which *may decisively influence the citizen* to cast his ballot" against candidates branded as unfaithful.[47]

The High Court then concluded that the statute unlawfully aimed to "dictate electoral outcomes," because "the labels surely place their targets at a *political disadvantage*[.]"[48]

SB 6 must be struck down for the same reasons stated in *Gralike*. As the Secretary of State admits, SB 6 grants a party label to candidates who identify with the viewpoints of a major party, while refusing to do so for those identify with the viewpoints of a minor party (they are forced to state that they have "No Party Preference"). Thus, SB 6 was "plainly designed to favor" candidates who identify with the viewpoints of major party, and was designed to "disfavor" and "handicap" candidates who identify with the viewpoints of a minor party.[49] Furthermore, because it places disfavored candidates at a political disadvantage, SB 6 also aims to "dictate electoral outcomes". Therefore, SB 6's Party Preference Ban violates the Elections Clause.[50]

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[47] *Gralike, supra note* 4, 531 U.S. at 524 (*quoting Anderson v. Martin* (1964) 375 U.S. 399, 402) (emphases added).

[48] *Gralike, supra* note 4, 531 U.S. at 525 (emphases added).

[49] *Id.* at 523-25.

[50] *Id.* at 525.

1. SB 6 Defendants Concede Petitioners' Elections Clause Claim

Significantly, Respondent erred when it denied Petitioners' claim that SB 6's Party Preference Ban violated the Elections Clause. As this Court has made clear, "any point not appearing in a party's brief will ordinarily be deemed waived."[51] Earlier, SB 6 Defendants' opposition papers failed to cite any legal authority relating to the Elections Clause.[52] Thus, because SB 6 Defendants had waived[53] their opportunity to rebut Petitioners' Elections Clause claim, Respondent erred when it denied that claim.

F. SB 6's Party Preference Ban Violates the California Constitution's Equal Protection Clause

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[51] *People v. Boyd* (1979) 24 Cal.3d 285, 294 n.6 (emphasis added).

[52] *See* Petitioners' Reply Brief, Petition Exh. 3, at 7:22-8:4. In their opposition papers, Intervenors appear to claim that SB 6 does not violate the Elections Clause, because SB 6's Party Preference Ban purportedly does not violate any other constitutional provision. *Cf.* Intervenors' opposition papers, Petition Exh. 10, at 10:23-11:2. That argument fails for two reasons: (1) the Party Preference Ban does violate other constitutional provisions, including the California Constitution's Equal Protection Clause and the First and Fourteenth Amendments, and (2) a law can independently violate the Elections Clause without violating *any other* constitutional provision. *U.S. Term Limits*, *supra* note 44, 514 U.S. at 829-30.

[53] During oral argument, Intervenors stated that they did not "concede the Election Clause issue." Transcript, Exh. 15, at 33:14-16. Even then, Intervenors could cite no legal authority relating to the Elections Clause. *Id.*

[T]he state has chosen to serve the convenience of those voters who support incumbent and major-party candidates at the expense of other voters. Such favoritism burdens the fundamental right to vote possessed by supporters of the [unfavored] candidates.

-- The Eighth Circuit, *McLain v. Meier*[54]

By mandating that all ballots favor major-party candidates over minor-party candidates, SB 6 flatly violates the California Constitution's Equal Protection Clause. Significantly, the U.S. Supreme Court pays keen attention to how a state treats candidates who qualify to appear on the ballot.[55] As Chief Justice Roberts, former Chief Justice Rehnquist, and Justice Alito have observed, "[t]he ballot is the last thing the voter sees before he makes his choice".[56] Furthermore, as Justices Scalia and Kennedy have recognized, party labels play a critical role in helping candidates connect with voters who share their viewpoints and values:

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[54] *McLain v. Meier* (8th Cir. 1980) 637 F.2d 1159, 1167 (emphases added).

[55] *See, e.g., Gralike*, *supra* note 4, 531 U.S. 510 (High Court strikes down discriminatory party label); *U.S. Term Limits*, *supra* note 44, 514 U.S. 779 (same); *Anderson*, *supra* note 52, 375 U.S. 399 (same); *see also Wash. State Grange*, *supra* note 4, 552 U.S. 442 (High Court discusses importance of party labels).

[56] *Wash. State Grange*, *supra* note 4, 552 U.S. at 460 (Roberts & Alito, JJ., concurring) (*quoting Gralike*, *supra* note 4, 531 U.S. at 532 (Rehnquist, C.J., concurring)) (emphases added). *Accord*, *Rosen*, *supra* note 22, 970 F.2d at 175 ("An election ballot is a State-devised form through which candidates and voters are required to express themselves at the climactic moment of choice.").

> There can be no dispute that candidate acquisition of *party labels* on [the] ballot … is a *means of garnering the support* of those who trust and agree with the party.[57]

1. *Stanson v. Mott* Controls This Case

In the landmark case of *Stanson v. Mott*, this Court laid down a cornerstone Equal Protection rule: the government may not favor incumbents, "take sides", or otherwise "bestow an unfair advantage on one of several competing factions" in an election.[58] Furthermore, this Court has also ruled that the Equal Protection Clause "requires all candidates, newcomers and incumbents alike, to be treated *equally*."[59] Toward that end, this Court applies strict scrutiny to any law that gives a class of candidates an advantage on the ballot.[60]

Under the *Stanson* doctrine, the wording and structure of a ballot cannot favor certain "political viewpoints" or a "particular partisan position".[61] What is more, *Stanson* strongly implies that if a government does "take sides" on the ballot, it

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[57] *Wash. State Grange*, *supra* note 4, 552 U.S. at 466 (Scalia & Kennedy, JJ., dissenting) (emphases added).

[58] *Stanson v. Mott* (1976) 17 Cal.3d 206, 217 (*citing Gould v. Grubb* (1975) 14 Cal.3d 661).

[59] *Gould*, *supra* note 58, 14 Cal.3d at 674 (emphasis added) (citation omitted).

[60] *Id.* at 672; *Eu*, *supra* note 33, 28 Cal.3d at 546 ("compelling state interest" required to justify giving candidates from qualified parties preferential treatment on the ballot).

[61] *See, e.g., Huntington Beach City Council*, *supra* note 40, 94 Cal.App.4th at 1433 (*quoting Stanson*, *supra* note 58, 17 Cal.3d at 219, and *citing Citizens for Responsible Gov't v. City of Albany* (1997) 56 Cal.App.4th 1199, 1228).

must provide "equal access" to "all competing factions" – effectively creating a *limited public forum*.[62] Accordingly, this Court and Courts of Appeal have struck down ballots that favored incumbents or certain political viewpoints.[63] Furthermore, as Supreme Court scholar Vicki Jackson has noted, a number of federal courts have struck down ballots that favor major-party candidates:

> [O]nce a candidate is legally entitled to appear on the ballot there is *substantial support* in the lower courts *to invalidate laws that favor* incumbents, or nominees of *preferred parties*[.][64]

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[62] *Stanson*, *supra* note 58, 17 Cal.3d at 217; *Huntington Beach City Council*, *supra* note 40, 94 Cal.App.4th at 1433; *Citizens for Responsible Gov't*, *supra* note 61, 56 Cal.App.4th at 1228. At oral argument, Intervenors argued that the scope of *Stanson*'s holding was narrowed in *Vargas v. City of Salinas* (2009) 46 Cal. 4th 1. However, *Vargas* examined whether certain public funds could be spent in connection with a specific ballot measure, and did not discuss whether the State may ban candidates from stating any party preference on the ballot.

[63] *Gould*, *supra* note 58, 14 Cal.3d 661 (incumbents cannot be listed first); *Ferrara*, *supra* note 40, 18 Cal.3d 253 (government cannot print its argument on ballot measure while refusing to publish the opposing argument); *Rees*, *supra* note 40, 6 Cal.App.3d 815 (government cannot ban non-incumbents from stating their profession on the ballot, while allowing incumbents to be listed as the holder of the office).

[64] Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001 Sup.Ct.Rev. 299, 336 n.112 (emphases added), *citing, inter alia, McLain*, *supra* note 64, 637 F.2d at 1166-67; *Graves v. McElderry* (W.D. Okla. 1996) 946 F.Supp. 1569, 1573, 1579-82 (striking down state law that gave top ballot position to Democratic candidates); *Sangmeister v. Woodard* (7th Cir. 1977) 562 F.2d 460, 465-67 (striking down

2. *Rees* Applied the *Stanson* Doctrine in an Analogous Case

In *Rees v. Layton*,[65] the Court of Appeal struck down a discriminatory party label that closely resembles the one here. An election law had allowed incumbents to be listed on the ballot as the holder of that office, while banning their challengers from listing their occupation on the ballot. The government claimed that this practice was necessary to prevent non-incumbents from "misleading the electorate."[66]

Dismissing that argument, *Rees* reasoned that candidates could effectively police themselves. The Court noted that "a misleading occupation on the ballot would be fuel to an opponent's campaign."[67] *Rees* concluded that such government intervention violated the Equal Protection Clause.[68] This Court expressly re-affirmed *Rees*, in *Gould v. Grubb*.[69]

Rees directly applies to SB 6's Party Preference Ban. Under SB 6's scheme, a favored class of candidates (i.e., those who identify with the viewpoints of a major party) will be allowed to tell voters their party preference on the ballot; while a disfavored class of candidates (i.e., those who identify with the viewpoints of a minor party) will be banned from doing so.

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election officials' practice of giving their own political party top ballot position).

65 *Rees*, *supra* note 40, 6 Cal.App.3d 815.

66 *Id.* at 823.

67 *Id.* at 823.

68 *Id*. at 823.

69 *Gould*, *supra* note 58, 14 Cal.3d at 673 n.13.

In this manner, major-party candidates will win votes simply *because their party's name appears beside their name on the ballot.* To paraphrase Justices Scalia and Kennedy, those favored few will thereby "garner[] the support of those who trust and agree with [their] party.[70]

In contrast, minor-party candidates will be deprived of the ability to reach potential voters by way of the ballot. Under SB 6, minor-party candidates like Intervenor-Applicant Chamness, Petitioner Mackler, and Petitioner Martin will face a Hobson's choice: (1) appear on the ballot with the party label of "No Party Preference", or (2) out of dire political necessity, adopt the party label of a major party. Because it denies "equal access"[71] to candidates of every political viewpoint, SB 6's Party Preference Ban not only triggers strict scrutiny, but violates the Equal Protection Clause of the California Constitution.[72]

G. <u>SB 6 Defendants Have Given No Compelling State Interest to Justify SB 6's Party Preference Ban</u>

Tellingly, SB 6 Defendants have not disputed that SB 6's Party Preference Ban triggers strict scrutiny. Instead, they claim that the State has a "compelling interest" in <u>denying</u> equal access on the ballot to minor-party candidates.[73]

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[70] *Wash. State Grange*, *supra* note 4, 552 U.S. at 466.
[71] *Stanson*, *supra* note 58, 17 Cal.3d at 217.
[72] *Gould*, *supra* note 58, 14 Cal.3d at 672.
[73] Secretary of State's opposition papers, Petition Exh. 8, at 13:5-6 ("compelling state interest" supports SB 6); Intervenors' opposition papers, Petition Exh. 10, at 10:5-6 (the State has a

1. Giving minor-party candidates a party label will not confuse voters

During oral argument, Intervenors argued that it would "confuse" voters if minor-party candidates could state the name of their party on the ballot:

> What if somebody wants to put GOP or Republic Party? It could cause confusion and fraud on the voters."[74]

Two answers readily come to mind. First, giving candidates the freedom to use party labels has received a groundswell of national support. In fact, a whopping 24 states currently allow candidates to use party labels of their own choosing. Second, many right-of-center candidates would probably prefer to use the party label "Republican", as it would probably draw more support than the less familiar party labels "GOP" or "Republic Party".

Ironically, SB 6's new party labels could themselves confuse voters, because it gives a party label to every candidate who identifies with a state-recognized party – *even if that party publicly repudiates him or her.*[75] Indeed, if a candidate switches his party registration from Democrat to Republican, SB 6 *would allow him to use* the party label of "Republican." What is more, candidates can effectively police themselves in the marketplace of party labels. To paraphrase *Rees*, "a

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"compelling interest in regulating the method by which" to regulate the contents of the ballot).

[74] Transcript, Petition Exh. 15, at 26:26-27.

[75] FAC, Exh. 4 ¶46.

misleading [party label] on the ballot would be fuel to an opponent's campaign."[76] In this light, the "voter confusion" argument does not give the State any compelling interest to justify SB 6's Party Preference Ban.

2. *Libertarian Party v. Eu* Does Not Authorize SB 6's Party-Preference Ban

Trying to overcome strict scrutiny, SB 6 Defendants will argue that existing law on "qualified party" elections provides a compelling government interest to justify SB 6. Yet to the extent it applies, case law on "qualified party" elections[77] would also strike down SB 6 – because it gives minor-party candidates

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[76] *Rees*, *supra* note 40, 6 Cal.App.3d at 823.

[77] In a slew of sur-reply papers, Intervenors claimed that Petitioners' Reply Brief had raised new arguments relating to SB 6's Party Preference Ban. *See* Plaintiffs' Response to Intervenors' Sur-Reply, Petition Exh. 6, at 3:13-4:21. However, a reply brief may provide an "elaboration of issues raised in [the] opening brief or rebuttals to [opposition] briefing." *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 (emphases added). As Petitioners have documented, their Reply Brief merely responded to and rebutted arguments that Intervenors had themselves raised. *See* Petition Exh. 6, at 3:13-4:21. In any event, Respondent permitted Intervenors' to file their sur-reply papers, which responded to arguments raised in Petitioners' Reply and Opening Briefs. *See id.* Exh. 6, at 2:16-3:12. Moreover, during oral argument, Intervenors further expanded on the arguments that their sur-reply papers had raised. Transcript, Petition Exh. 15, at 26-27. *See People v. Miller* (2007) 146 Cal.App.4th 545, 52 Cal.Rptr.3d 894, 898 (reviewing court may adjudicate all issues "raised during argument, whether that argument has been oral or in writing.") (citation omitted).

the constitutional right to state on the ballot that they are "Independent".

In *Libertarian Party v. Eu*,[78] this Court held that, under the existing "qualified party" election system, the State could require all minor-party candidates to use the party label of "Independent". But even if it applies here, *Eu* does not allow minor-party candidates to be forced to state that they have "No Party Preference".

To begin with, *Eu* does not directly apply here, for it upheld California's existing "qualified party" election system – which SB 6 seeks to dismantle. In *Eu*, this Court ruled that the State could grant candidates from qualified parties certain advantages over candidates from non-qualified (minor) parties. Specifically, *Eu* held that, under the existing "qualified party" election system, the State had a "compelling state interest" to maintain the "distinction between qualified and non-qualified parties."[79]

Under *Eu*, only candidates from qualified parties may appear on the June qualified-primary ballot; the winner of each qualified party's respective primary then advances to the November general election, as that party's nominee. Thus, each qualified party can nominate *exactly one*[80] candidate for each state and federal office in the November general election.

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[78] *Eu*, *supra* note 33, 28 Cal.3d 535.

[79] *Id.* at 546.

[80] A candidate who loses in a qualified party's primary election is banned from appearing on the ballot in the general

Conversely, *Eu* allows the State to ban minor-party candidates from participating in the June qualified-primary election. Thus, minor (non-qualified) parties do not have the right to nominate any candidates for the November general election. Instead, minor-party candidates must qualify for the November election "independent of" the June qualified-party election.[81] Therefore, to avoid "confusion", *Eu* held that the State could require minor-party candidates to use the party label of "Independent" in the general election.[82]

3. *Libertarian Party v. Eu* Does Not Directly Apply to This Case

In a nutshell, SB 6 would (a) enable both qualified-party and minor-party candidates to participate in the June primary election, and (b) prevent minor-party candidates from stating any party preference on the ballot. For instance, a June primary election for Governor could feature two Republicans, two Democrats, and two minor-party candidates. The top two votegetters, irrespective of their party preference, would then appear on the November general-election ballot.[83] Thus, it would be possible for two Republicans or two Democrats to be the *only* two candidates for Governor in the November general election.

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election. Elections Code §8301. However, that candidate may run as a write-in candidate in the general election. *Id.* §8600.

[81] *Eu*, *supra* note 33, 28 Cal.3d at 544 (emphasis added).

[82] *Id.* at 546 (quotation omitted).

[83] SB 6, Petition Exh. 2 §27 Pt. 8141.5.

SB 6's regime thus makes a critical change to the way we elect our state and federal leaders.[84] Namely, qualified parties would *no longer be able to select their nominees* for the November general election. Thus, SB 6 eliminates the need to maintain the "distinction between qualified and non-qualified parties" – the *very basis* for the holding in *Eu*.[85] Accordingly, *Eu* does not provide any "compelling state interest" that would justify SB 6's Party Preference Ban.

H. To the Extent It Applies, "Qualified Party" Case Law Would Strike Down SB 6

Furthermore, SB 6's Party Preference Ban would also violate the First and Fourteenth Amendments. Indeed, the "qualified party" line of cases – which Respondent's ruling relies on – stands for a core constitutional principle. Namely, at a bare minimum, minor-party candidates have the *right* to identify themselves on the general-election ballot as "Independent".[86]

In *Rosen*, a state law banned a minor-party candidate from stating any party preference on the ballot.[87] Striking down

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[84] SB 6 excludes Presidential elections from its scope. *Id.* Exh. 2 §7, Pt. 359.5.

[85] *Eu*, *supra* note 33, 28 Cal.3d at 546.

[86] *See, e.g., Rosen*, *supra* note 22, 970 F.2d 169, 175; *Eu*, *supra* note 33, at 545; *Schrader*, *supra* note 22, 241 F.3d at 788-89; *Rubin*, *supra* note 22, 308 F.3d 1008 (*citing Schrader*); *see also Bachrach v. Commonwealth* (1981) 382 Mass. 268, 415 N.E.2d 832, 833; *Shaw v. Johnson* (1976) 311 Minn. 237, 247 N.W.2d 921, 923.

[87] *Rosen*, *supra* note 22, 970 F.2d 169.

that law, the Sixth Circuit held that the First and Fourteenth Amendments give minor-party candidates the right to a party label of "Independent".[88] Subsequently, that constitutional right was re-affirmed by the Sixth and Ninth Circuits in *Schrader* and *Rubin*, respectively.[89]

Yet instead of assigning them the party label of "Independent", SB 6 foists minor-party candidates with the party label of "No Party Preference" – a far cry from the party label of "Independent". Significantly, both the Massachusetts and Minnesota Supreme Courts have also struck down an analogous party-preference ban.[90] In *Bachrach*, the Massachusetts High Court ruled that it was unconstitutional to force minor-party candidates to use the party label of "Unenrolled" – a term identical in meaning to "No Party Preference":

> *Voters* who during the campaign might have been *favorably impressed with* the candidate as an *Independent*, would be confronted on the ballot with a candidate who was called Unenrolled. *Unenrolled is hardly a rallying cry*[.][91]

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[88] *Id.*

[89] *Id.* at 175; *Schrader*, *supra* note 22, 241 F.3d at 788-89; *Rubin*, *supra* note 22, 308 F.3d at 1008.

[90] *Bachrach*, *supra* note 86, 415 N.E.2d at 833; *Shaw*, *supra* note 86, 247 N.W.2d at 923.

[91] *Bachrach*, *supra* note 86415 N.E.2d 832, 836 (emphases added); *see also Shaw*, *supra* note 86, 247 N.W.2d at 923.

Tellingly, Washington State – touted by Intervenors as the model for SB 6's election system[92] – *did not even adopt the "No Party Preference" label* for its own elections. Unlike its SB 6 offshoot, Washington State's election system allows *every* candidate to use up to 16 characters to describe his or her party preference.[93] Therefore, to the extent that the "qualified party" line of cases applies, SB 6's Party Preference Ban violates not only the First and Fourteenth Amendments, but also the California Constitution's Free Speech Clause.[94]

I. Intervenors May Not Play "Fast and Loose" with the Courts

It seems patently wrong to allow a person to abuse the judicial process by first advocating one position, and later, if it becomes beneficial, to assert the opposite.

-- Court of Appeal, *Jackson v. Los Angeles County*[95]

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[92] According to Intervenor Yes on 14, "[l]egal experts have modeled [Prop 14] after Washington State's primary system." Plaintiffs' Reply Brief, Petition Exh. 3, at 7:14-15.

[93] WAC §434-215-120(1), attached as Exhibit B to Plaintiffs' Reply Brief, Petition Exh. 3.

[94] Because SB 6's Party Preference Ban violates the First Amendment, it also violates the California Constitution's Free Speech Clause. "[T]he California liberty of speech clause is broader and more protective than the free speech clause of the First Amendment." *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 366.

[95] *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 (1998) *review denied* (emphases added) (*quoting* Comment, The Judiciary Says, You Can't Have It Both Ways: Judicial Estoppel – A Doctrine Precluding Inconsistent Positions (1996) 30 Loyola L.A. L.Rev. 323, 327).

In a last-ditch effort to save SB 6, Intervenors may seek to contradict a position that they had taken in Superior Court. However, the doctrine of judicial estoppel absolutely bars them from "playing fast and loose with the courts."[96] Only a few weeks ago, Intervenors had strenuously defended SB 6's Party Preference Ban before Respondent Superior Court:

> …Plaintiffs also challenge SB 6's retention of the pre-existing system of *allowing **only** 'qualified' party labels* to appear *on the ballot* opposite a candidate's name. *[T]his precise system is constitutional.*[97]
>
> ****
>
> [A]ll candidates appear on the same primary election ballot, but *only* those registered with a *qualified* political party may indicate *a party preference* with the label of that party printed *on the ballot*.[98]

Startlingly, after convincing Respondent Superior Court to uphold SB 6's Party Preference Ban, Intervenors then sought to *deny its very existence* before the Court of Appeal:

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96 *Jackson*, *supra* note 95, 60 Cal.App.4th at 181 (*quoting Russell v. Rolfs* (9th Cir.1990) 893 F.2d 1033, 1037).

97 Intervenors' Opposition to Plaintiffs' Motion for Preliminary Injunction, Petition Exh. 10, at 2:4-5 (emphases added).

98 Intervenors' Sur-Reply Brief, Petition Exh. 12, at 3 (emphases added).

> SB 6 *does not "censor" minor-party candidates*, and Intervenors have not "conceded" that it does.[99]
>
> ****
>
> In particular, Intervenors *deny* that a candidate who has disclosed a preference for a *non-qualified party* … is *banned* from having that party preference *appear on the ballot*[.][100]

Under the doctrine of judicial estoppel, the Court must disregard Intervenors' shameless attempt to "abuse the judicial process."[101] Judicial estoppel should apply when:

1. The same party has taken two positions;
2. The positions were taken in judicial or quasi-judicial proceedings;
3. The party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true);
4. The two positions are totally inconsistent; and
5. The first position was not taken as a result of ignorance, fraud, or mistake.[102]

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[99] Intervenors' Oct. 8, 2010 opposition filed with the Court of Appeal (First District), attached as Exhibit 20 to this Petition, at 10 (emphases added).

[100] Petition Exh. 23 ¶52 (emphases added) (previously attached by Intervenors as Exhibit F to their Oct. 8, 2010 opposition filed with the Court of Appeal (First District).

[101] *Jackson*, *supra* note 95, 60 Cal.App.4th at 181 (citation omitted).

[102] *Id.* at 183 (citations omitted).

It is astonishing that Intervenor Maldonado – the *author* of SB 6 – apparently does not know what his brainchild says. Here, Intervenors took two "totally inconsistent" positions in two separate proceedings (requirements 1, 2 & 4), successfully convinced the Superior Court to adopt the first position (requirement 3),[103] and did not take their first position as a result of "ignorance, fraud, or mistake" (requirement 5). Consequently, the doctrine of judicial estoppel bars them from repudiating their prior position on SB 6's Party Preference Ban.

J. <u>There Is No Basis for Intervenors' Statutory Construction of the Elections Code</u>

Contrary to Intervenors' claims, SB 6's Party Preference Ban expressly bans minor-party candidates from stating their party's name on the ballot. Indeed, both Petitioners and the Secretary of State agree on one critical point. Namely, Part 325 of SB 6 expressly forces candidates of "independent status" – namely, minor-party candidates – to state that they have "No Party Preference".[104] However, Intervenors argue that SB 6 Part 8002.5(a) does allow minor-party candidates to state "the name of the political *party* that [they] prefer[]" on the ballot,

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[103] Indeed, Respondent's Order on this issue cited federal case law that was first invoked by Intervenors, and was <u>not</u> even cited by the Secretary of State. *Compare* Order, Petition Exh. A, at 2; *with* Intervenors' Opposition to Motion for Preliminary Injunction, Petition Exh. 10, at 10:13-21.

[104] *See* discussion at *supra* Sections V(B) and V(C).

because they may fill in the name of their minor party on their voter registration card.[105]

This issue boils down to whether SB 6's voter-registration-card provisions are exempt from the Elections Code's definition of the term "party" as "qualified party". Intervenors have tried to argue that Section 338's definition of "party" "clearly does not apply to [voter] registration cards."[106] However, their argument fails for at least two reasons.

First, this Court, Elections Code Section 338, and the Secretary of State have all defined the term "party" as a "qualified party".[107] Significantly, SB 6 *did not amend* the Elections Code's definition of "party". As this Court has repeatedly admonished, "[i]t is *bedrock law* that if the law-maker gives us an express definition, *we must take it as we find it*[.]"[108]

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[105] *Cf.* SB 6 §17 (Pt. 2151(a)), Petition Exh. 2 (emphasis added).

[106] Intervenors' opposition papers, Petition Exh. 20, at 11.

[107] "[T]he Legislature … defined 'party' as a political organization that has 'qualified for participation in any primary election.'" *Eu*, *supra* note 33, 28 Cal.3d at 540 (emphases added). As the Secretary of State's counsel noted, "[u]nder the Elections Code – *this is very important* – the term "party" has a *very specific definition*. It's defined under Elections Code 338 as *qualified party*." Transcript, Petition Exhibit 15, at 21:23-26 (emphases added).

[108] *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 804 (emphases added) (*quoting Bird v. Dennison* (1857) 7 Cal. 297, 307). This Court "assume[s] that the Legislature has in mind *existing* laws when it passes a statute." *Bailey v. Superior*

Equally important, the Elections Code does not exempt – and *expressly applies – Section 338's definition of "party" to voter registration cards*:

> For purposes of this division [i.e., Elections Code Division 5, which includes the voter-registration-card provisions of Sections 5002 and 5003], the *definition of "party" in Section 338 is applicable*.[109]

To be sure, the two provisions cited by Intervenors (i.e., Elections Code Sections 5002 and 5003) allow voters to write in a preference for a non-qualified party.[110] However, *neither section refers to non-qualified parties as "parties."* Instead, Section 5002 explicitly classifies non-qualified parties into two categories: "political bodies" and "miscellaneous" groups.[111]

Court (1977) 19 Cal.3d 970, 977 n.10 (emphasis added) (*quoting Estate of McDill* (1975) 14 Cal.3d 831, 837-8).

[109] Elections Code §5000. Because Section 338's definition of "party" controls here, Intervenors have absolutely no grounds to argue that Section 4 somehow exempts Sections 5002 and 5003 from Section 338's definition of "party". *Cf.* Elections Code §4 ("Unless the provision or the context otherwise requires, these general provisions, rules of construction, and *definitions* shall govern the construction of this code.") (emphasis added); *contra*, Intervenors' opposition papers, Petition Exh. 20, at 11.

[110] A sample voter registration form from San Francisco County has been attached as RJN Exhibit H. *Cf.* Intervenors' opposition papers, Petition Exh. 20, at 11.

[111] The Secretary of State is required to tabulate the number of voters declaring a preference for each political body. To be deemed a political body, a political group or organization must hold a convention, elect officers, and notify the Secretary of State that it intends to qualify as a qualified political party.

Thus, the Elections Code's voter-registration-card provisions are expressly controlled by Section 338's definition of "party". If a candidate does <u>not</u> identify a "party preference" for a *qualified* party on his or her registration card, SB 6 will "presume" that he or she has "No Party Preference"[112] – and will foist the label "No Party Preference" under *every* minor-party candidate's name on the ballot.[113] Therefore, *SB 6 bans minor-party candidates from stating any party preference on the ballot* – and no court may rewrite the statute in order to save it.[114]

K. <u>It is Beyond Dispute That SB 6's Party Preference Ban Is Not Severable</u>

Respondent should have declared the entirety of SB 6 unenforceable, for SB 6's party-preference ban is not severable. To be sure, SB 6 Defendants insist that SB 6's severability clause would allow its unlawful parts to be severed. However, this Court has repeatedly held that severability clauses are <u>not</u> conclusive.[115]

Otherwise, a political group will be deemed a "miscellaneous" group. Elections Code §5002.

[112] SB 6 §11 (Pt. 2154(b)), Petition Exh.2.

[113] SB 6 §17 (Pt. 8002.5(a)), Petition Exh. 2.

[114] *See, e.g., Metromedia v. City of San Diego* (1982) 32 Cal.3d 180, 187.

[115] "The final determination [on whether a severability clause is conclusive] *depends on whether the remainder* [of the statute] … *would have been adopted* by the legislative body had the latter *<u>foreseen</u>* the partial *invalidity* of the statute." *Gerken v. FPPC* (1993) 6 Cal.4th 707, 714 (emphases added) (*quoting Calfarm v. Deukmejian* (1989) 48 Cal.3d 805, 821); *see also*

To salvage a statute, its unlawful parts must be "volitionally" separable.[116] That is, it must be "clear that the Legislature would have enacted the measure without" the offending parts.[117] Here, it is undisputed that the Legislature passed SB 6's Party Preference Ban *in order to implement Proposition 14*.[118] Thus, since SB 6's Party Preference Ban is not "volitionally" separable, it is not severable as a matter of law. Therefore, the Court must direct Respondent (1) to declare that the entirety of SB 6 is unenforceable, and (2) to enjoin RPIs from implementing or enforcing any part of SB 6.

L. Since SB 6 Is Unenforceable, Prop 14 Is Inoperative As a Matter of Law

Equally important, SB 6 Defendants have cited no authority to refute yet another of Plaintiffs' core legal theories. Namely, if SB 6 is struck down, Proposition 14 must be declared inoperative. It is undisputed that Proposition 14 needs a lawful statute to implement it, because it is not a self-executing provision.[119] Thus, since SB 6 is unenforceable, the

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Santa Barbara Sch. Dist v. Superior Court (1975) 13 Cal.3d 315, 331.

[116] *E.g., Sonoma County v. Superior Ct.* (2009) 173 Cal.App.4th 322, 352.

[117] *Id.* at 352 (citation omitted, emphases added).

[118] Plaintiffs' Moving Papers for Preliminary Injunction, Petition Exh. 1, at 13:8-23.

[119] *E.g., People v. Vega-Hernandez* (1986) 179 Cal.App.3d 1084, 1092; *Borchers Bros. v. Buckeye Incubator Co.* (1963) 59 Cal.2d 234, 238. In its Statement of Purpose, Proposition 14 explicitly states that it needs implementing legislation: "This act, *along with legislation* already enacted by the Legislature *to*

Court must direct Respondent to declare that Proposition 14 is inoperative as a matter of law.[120]

M. Petitioners Have Shown Likelihood of Success on the Merits

Simply put, there is more than a "reasonable probability" that Petitioners will prevail on the merits in this case.[121] First, as this Petition has shown, SB 6's Party Preference Ban must be struck down; for it violates both the U.S. and California Constitutions. Second, because SB 6's Party Preference Ban is not severable, the entirety of SB 6 must be struck down as unconstitutional. Accordingly, Petitioners have compellingly shown a "reasonable probability of success."

VI. Petitioners Have Shown Imminent Harm

A. Intervenor-Applicant Chamness Will Suffer Imminent, Irreparable Harm

Respondent Superior Court erred when it held that Petitioners had not made a "sufficient" showing of imminent harm. Here, Respondent failed to consider both High Court

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implement this act [i.e., SB 6], are intended to implement an open primary system in California[.]" (emphases added). Proposition 14, RJN Exhibit M. *See also* Plaintiffs' Moving Papers re Motion for Preliminary Injunction, Petition Exh. 1, at 13:1-8.

[120] *E.g., In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, 75; *Denninger v. Recorder's Court* (1904) 145 Cal. 629, 635. *See also* Plaintiffs' Moving Papers re Motion for Preliminary Injunction, Petition Exh. 1, at 13:1-8.

[121] *Huong Que*, *supra* note 32, 150 Cal.App.4th 400, 58 Cal.Rptr.3d at 533 (citation omitted).

jurisprudence and "important record evidence".[122] Specifically, Respondent believed that SB 6's new election rules would not kick in until 2012:

> This is going to come up in *2012*. There is plenty of time to have this resolved in due course through the courts, and *I don't think that there has been a sufficient showing that something might happen beforehand*.[123]

However, record evidence did show that SB 6 would be implemented well before 2012. In fact, the Secretary of State's office predicted that exact scenario: "If history is any guide, *there will be a special* primary *election* to fill a legislative or congressional vacancy *in 2011*[.]"[124] Since 1990, California has held a whopping 96 special elections for state and federal vacancies.[125]

What is more, the U.S. Supreme Court has repeatedly admonished courts to swiftly resolve facial constitutional challenges before the election at issue is held:

> The "*capable of repetition, yet evading review*" doctrine, in the context of *election cases*, is appropriate when there are "as applied" challenges as well as in the more *typical case* involving only *facial attacks*. The construction of a statute … will

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122 *See, e.g., O'Connell*, *supra* note 33, 141 Cal.App.4th at 1471 (trial judge committed error by failing to consider "important record evidence").

123 Transcript, Petition Exh. 15, at 16:17-20.

124 Petition Exhibit 5, at Exh. A, Attach. 1, at 1 (emphases added).

125 Secretary of State's Apr. 12, 2010 News Release, RJN, Exhibit I, at 1.

> have the effect of simplifying future challenges, thus *increasing the likelihood that timely filed cases* can be *adjudicated before an election is held*.[126]

As the High Court has also made clear, litigants are entitled to immediate relief if there is a "realistic danger" that a law will harm their constitutional rights.[127]

In three looming special elections, Intervenor-Applicant Chamness and every other minor-party candidate will be forced to misleadingly state on the ballot that they have "No Party Preference". Therefore, Petitioners and Intervenor-Applicant Chamness have made a compelling showing that they will suffer imminent, irreparable harm.[128]

B. Issuing a Writ Will Benefit the Public Interest

Furthermore, the balance of equities heavily favors Intervenor-Applicant Chamness, for issuing a Writ will benefit the public interest. To show imminent harm, litigants must show that they are "likely to suffer greater injury from a denial of the injunction than the defendants are likely to suffer from its

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126 *Storer v. Brown* (1974) 415 U.S. 724, 737 n.8; *see also Gralike*, *supra* note 4, 531 U.S. at 517 n.8; *accord*, *Eu*, *supra* note 33, 28 Cal.3d at 540.

127 *Babbitt*, *supra* note 39, 442 U.S. at 299.

128 Even without the participation of Intervenor-Applicant Chamness, the U.S. Supreme Court's "capable of repetition, yet evading review" doctrine (*see supra* note 123) gives Petitioners standing to assert their legal claims with respect to the three looming special elections in Senate District 28, Senate District 17, and Assembly District 4.

grant".[129] In stark contrast to Mr. Chamness' plight, <u>not one</u> SB 6 Defendant will be deprived of the fundamental right to run for office if a Writ is issued.

Furthermore, by granting this Petition, the Court will not only give election officials much needed certainty, but ensure that counties do not illegally spend taxpayer dollars on costly changes that may not need to be made. According to the California Association of Clerks and Election Officials, SB 6 mandates a "complex set of changes [that] has not occurred in *recent memory*[.]"[130] Specifically, SB 6 will not only force counties to spend "*millions of dollars* statewide in ballot production and postage costs", but could force them to spend millions more in new voting equipment.[131] Thus, granting this Petition would greatly benefit the public interest.

VII. Petitioners Are Entitled to a Preliminary Injunction

Petitioners have painstakingly shown that Respondent erred when it denied them a preliminary injunction. To secure a preliminary injunction, one must show (1) there is a "reasonable probability" they will prevail on the merits, and (2) he or she faces the "realistic danger" of imminent, irreparable harm. Equally important, under California's sliding-scale analysis for injunctive relief, "the greater the plaintiff's

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[129] *Huong Que*, *supra* note 32, 150 Cal.App.4th 400, 58 Cal.Rptr.3d 527, 533 (citation omitted).

[130] Mar. 3, 2010 letter from California Association of Clerks and Election Officials to the Legislature, attached to Registrar Logan Letter, *supra* note 8, at 4 (emphases added).

[131] *Id.* (emphases added).

showing on one [factor], the less must be shown on the other [factor] to support an injunction."[132]

Here, Petitioners have shown that it is a certainty they will prevail on the merits. What is more, Petitioners have shown that SB 6 threatens Intervenor-Applicant Chamness with imminent, irreparable harm. Consequently, Respondent should direct Respondent to grant Petitioners' Motion for Preliminary Injunction.

VIII. Conclusion

In short, I see grave risks in legislation, enacted by incumbents of the major political parties, which distinctly disadvantages minor parties or independent candidates.

-- Former Chief Justice Burger, *Buckley v. Valeo*[133]

To no one will we sell, to no one will we deny or delay, right or justice.

-- Magna Carta[134]

In our democracy, we entrust our elected leaders with the power to pass fair and just laws. To be sure, the lawmaking process is far from tidy (Otto von Bismarck famously compared it to sausage-making). Yet at the same time, we must constantly guard against overreaching by entrenched political

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[132] *O'Connell*, *supra* note 33,141 Cal.App.4th at 1463 (*quoting Butt v. State of California* (1992) 4 Cal.4th 668).

[133] *Buckley v. Valeo* (1976) 424 U.S. 1, 251 (concurring in part, dissenting in part) (emphases added).

[134] Magna Carta, cl. 40, *available at* http://www.fordham.edu/halsall/source/magnacarta.html (*last visited* Oct. 23, 2010).

elites. As constitutional scholar John Hart Ely put it: “We cannot trust the ins to decide *who stays out*[.]”[135]

In 2009, Californians were never given the chance to vote on SB 6, an invidious bill that was rammed through the Legislature in the middle of the night. It now falls on this Court to protect not only the fundamental rights of political outsiders, but the very integrity of our State’s election system.

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[135] John Hart Ely, *Democracy and Distrust* 120 (Harvard 1980) (emphases added).

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately 1.5-spaced, 14-point Times New Roman typeface. According to the Word Count feature in my Microsoft Word for Windows software, this brief contains 8,387 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on Nov. 24, 2010.

GAUTAM DUTTA

By: ______________________

Gautam Dutta

Attorney for Petitioners

PROOF OF SERVICE

I, Gautam Dutta, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action.

On Nov. 24, 2010, I served the following documents:

(1) Petition for Writ of Mandate,

(2) Bound Writ of Mandate Exhibits

on the following persons at the locations specified:

A. Mark Beckington, Esq., Office of the Attorney General, 300 South Spring St., Ste. 1702, Los Angeles, CA 90013; 213.897.1096.

B. Steve Mitra, Esq., Office of Santa Clara County Counsel, 70 W. Hedding St., 9th Floor, East Wing, San Jose, CA 95110; 408.299.5916.

C. Raymond Lara, Esq., Office of Alameda County Counsel, 1221 Oak St., Ste. 450, Oakland, CA 94612; 510.272.6700.

D. Mollie Lee, Esq., Office of the San Francisco City Attorney, 1 Dr. Carlton B. Goodlet Place, Ste. 234, San Francisco, CA 94102; 415.554.4705.

E. Wendy J. Phillips, Esq., Office of Orange County Counsel, 333 W. Santa Ana Blvd., Ste. 407, Santa Ana, CA 92702; 714.834.6298.

F. Kathleen Taylor, Esq., Office of Tulare County Counsel, 2900 W. Burrel St., Visalia, CA 93291; 559.636.4950.

G. Patrice J. Salseda, Esq., Office of Los Angeles County Counsel, 500 W. Temple St., Rm. 648, Los Angeles, CA 90012; 213.974.1895.

H. Marguerite Mary Leoni, Esq., Nielsen Merksamer, 2350 Kerner Blvd., Ste. 250, San Rafael, CA 94901; 415.389.6800.

I. The Honorable Charlotte Walter Woolard, Superior Court for the County of San Francisco, Dept. 302, 400 McAllister St., San Francisco, CA 94102; 415.551.3723.

Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelopes and placed them, postage prepaid, for collection and mailing with the U.S. Postal Service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed Nov. 24, 2010, in Fremont, California.

____

Gautam Dutta