

In the California Court of Appeal, First District, Division 3

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

Appellants,

vs.

DEBRA BOWEN, et al.,

Respondents;

ABEL MALDONADO, et al.;

Intervenors-Respondents;

CASE NO. A129946

APPELLANTS' REPLY BRIEF

[Arising from the denial of
Appellants' Motion for Preliminary
Injunction on Oct. 5, 2010 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]

Gautam Dutta, Esq. (Bar No. 199326)
39270 Paseo Padre Pkwy # 206
Fremont, CA 94538
Telephone: 415.236.2048
Email: dutta@businessandelectionlaw.com
Fax: 213.405.2416

Attorney for Appellants

TABLE OF CONTENTS

TABLE OF
AUTHORITIES.....4
MEMORANDUM OF POINTS AND
AUTHORITIES.....6
INTRODUCTION.....6
I. Undisputed Facts.....7
II. It Is Beyond Question That Every Candidate Has
the Fundamental Right to a Ballot Label of
“Independent”8
III. It Is Undisputed that Section 325 of SB 6 Bans
Minor-Party Candidates from Using the Ballot
Label of Independent”10
IV. Secretary Bowen Has Conceded That SB 6’s Party
Preference Ban Is Facially Unconstitutional.....12
V. Section 325 is Facially Unconstitutional, Because
It Bans Every Minor-Party Candidate from Using
the Ballot Label of “Independent”15
VI. SB 6 Defendants Have Conceded That SB 6’s
Party Preference Ban Violates the Elections
Clause.....16
VII. It Is Beyond Doubt That SB 6’s Party Preference
Ban Violates California’s Equal Protection
Clause.....18
VIII. It Is Unrefuted that SB 6’s Party Preference Ban Is
Not Severable.....27

IX. It Is Undisputed That Proposition 14 Must Be
Suspended If SB 6 Is Struck Down.....28

X. SB 6’s Vote Counting Ban Is Unconstitutional on
its Face.....28

XI. It Is Beyond Question that Appellants Deserve a
Preliminary Injunction.....33

CONCLUSION.....41

TABLE OF AUTHORITIES

Cases

<i>Bachrach v. Commonwealth</i> (1981) 382 Mass. 268, 415 N.E.2d 832.....	9, 10
<i>Bd. of Supervisors v. Local Agency Comm’n</i> (1992) 3 Cal.4 th 903	19, 20
<i>Cartwright v. Barnes</i> (11 th Cir. 2002).....	17
<i>Coffman Specialties, Inc. v. Dep’t of Transportation</i> (2009) 176 Cal.App.4 th 1135. 12, 15, 23	
<i>Continental Baking Co. v. Katz</i> (1968) 68 Cal.2d 512	11, 14
<i>Cook v. Gralike</i> (2001) 531 U.S. 510 (Rehnquist, C.J., concurring).....	18, 22, 26
<i>Doe v. Reed</i> (2010) 561 U.S. ___, 130 S.Ct. 2088	7, 31
<i>Edelstein v. City and County of San Francisco</i> (2002) 29 Cal.4 th 164	21
<i>Gonzalez v. Arizona</i> (9 th Cir. 2010) 624 F.3d 1162	17
<i>Graves v. McElderry</i> (W.D. Okla. 1996) 946 F.Supp. 1569	22
<i>Guardianship of Ann S.</i> (2009) 45 Cal.4 th 1110	15
<i>Lake v. Reed</i> (1997) 16 Cal.4 th 448.....	12, 13
<i>Landau v. Superior Court</i> (1998) 81 Cal.App.4 th 191	20, 21
<i>Libertarian Party v. Eu</i> (1980) 28 Cal.3d 535.....	passim
<i>McLain v. Meier</i> (8 th Cir. 1980) 637 F.2d 1159.....	22
<i>Partnoy v. Shelley</i> (S.D. Cal. 2003) 277 F.Supp.2d 1064.....	17
<i>People v. Boyd</i> (1979) 24 Cal.3d 285	passim
<i>Professional Engineers v. Schwarzenegger</i> (2010) 50 Cal.4 th 989.....	13
<i>Raphael v. Bloomfield</i> (2003) 113 Cal.App. 4 th 617.....	14
<i>Riddell v. Nat’l Democratic Party</i> (5 th Cir. 1975) 508 F.2d 770	6
<i>Roemer v. Bd. of Public Works of Md.</i> (1976) 426 U.S. 736.....	12, 35
<i>Rosen v. Brown</i> (9 th Cir. 1992) 970 F.2d 169	6, 9, 26
<i>Rubin v. City of Santa Monica</i> (9 th Cir. 2002) 308 F.3d 1008	8, 9
<i>Sangmeister v. Woodard</i> (7 th Cir. 1977) 562 F.2d 460.....	22
<i>Shaw v. Johnson</i> (1976) 311 Minn. 237, 247 N.W.2d 921.....	9, 25
<i>Spiritual Psychic Science Church v. City of Azusa</i> (1985) 29 Cal.3d 501.....	19
<i>Utz v. Aureguy</i> (1952) 109 Cal.App.2d 803.....	11
<i>Wash. State Grange v. Wash. Republican Party</i> (2008) 552 U.S. 442.....	15, 26
<i>Wash. State Republican Party v. Wash. State Grange</i> (W.D. Wash. Jan. 11, 2011) 2011 U.S. Dist. LEXIS 2448	15
<i>Wells v. One2One Learning Fdn.</i> (2006) 39 Cal.4 th 1164	11
<i>Wesberry v. Sanders</i> (1964) 376 U.S. 1.....	20

Constitutional Provisions

Due Process Clause.....	6, 33, 34
Elections Clause.....	passim
Equal Protection Clause.....	passim
First Amendment	passim
Fourteenth Amendment	passim
Free Exercise Clause.....	6, 10, 33, 34
Vote Counting Guarantee (art. ii §2.5)	6, 20, 40

Statutes

Elections Code §325 6, 10
Former Political Code §1188 18
Gov’t Code §§1220, 1222 & 1280..... 12

Other Authorities

Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001
Sup.Ct.Rev. 299 22

MEMORANDUM OF POINTS AND AUTHORITIES

Once a State admits a particular subject to the ballot and commences to manipulate the content or to legislate what shall and shall not appear, it must take into account the provisions of the Federal and State Constitutions regarding freedom of speech and association[.]

-- Sixth Circuit, *Rosen v. Brown*¹

I. Introduction

Despite their best efforts, Secretary Bowen and Intervenors (“SB 6 Defendants”) have failed to refute four critical points:

1. On its face, SB 6’s Party Preference Ban (specifically, SB 6-amended Elections Code §325) violates (a) the U.S. Constitution’s First Amendment, Fourteenth Amendment, Elections Clause, and (b) the California Constitution’s Free Exercise Clause and Equal Protection Clause.
2. On its face, SB 6’s Vote Counting Ban violates (a) the U.S. Constitution’s First Amendment and Due Process Clause, and (b) the California Constitution’s Free Exercise Clause, Due Process Clause, and Vote Counting Guarantee (art. ii §2.5).
3. Secretary Bowen has admitted that (a) SB 6’s Party Preference Ban is not “permissible”, and (b) SB 6’s Vote Counting Ban will “give voters the illusion” that their write-in votes will be counted.
4. Because SB 6 must be struck down, Proposition 14 *must be suspended* until a new law has been passed to replace SB 6.

¹ *Rosen v. Brown* (9th Cir. 1992) 970 F.2d 169, 175 (emphases added) (citing *Riddell v. Nat’l Democratic Party* (5th Cir. 1975) 508 F.2d 770, 775-79).

As Appellants' Opening Brief made clear,² this Court owes no deference whatsoever to SB 6: a statute passed by the Legislature in the middle of the night, without any public debate or discussion. SB 6 brazenly violates a litany of provisions of the U.S. and California Constitutions. Accordingly, the Court must (1) strike down SB 6 in its entirety, and (2) declare Proposition 14 to be inoperative until a new law has been passed to replace SB 6.

II. Undisputed Facts

Several core facts have emerged from the briefing on this appeal:

1. Between Jan. 1, 2011 and May 17, 2011, SB 6 will have been implemented for four special state and federal elections.
2. Last summer, Secretary Bowen's own staff publicly stated that it is not "permissible" to force minor-party candidates to use the ballot label of "No Party Preference".
3. Also last summer, Secretary Bowen's staff publicly stated that SB 6 "will give voters the illusion" that their write-in votes will be counted.
4. For over a century, minor-party candidates were allowed to use the ballot label of "Independent".³ But SB

² Appellants' Opening Brief ("Opening Brief"), at 23-24 (*citing Doe v. Reed* (2010) 561 U.S. ___, 130 S.Ct. 2088, at 3 n.3 (concurring opinion of Breyer & Stevens, JJ.) & *Spiritual Psychic Science Church v. City of Azusa* (1985) 29 Cal.3d 501, 514).

³ Between 1891 and 2010, candidates were allowed to use the ballot label of "Independent". Opening Brief, at 42 n.96;

6 now forces them to use the ballot label of “No Party Preference” – while allowing major-party candidates like Secretary of State Debra Bowen⁴ to list their major party’s name on the ballot.

These compelling facts strongly support Appellants’ request for a preliminary injunction.

III. It Is Beyond Question That Every Candidate Has the Fundamental Right to a Ballot Label of “Independent”

Despite SB 6 Defendants’ denials, every candidate has the fundamental right to a ballot label of “Independent”. In a key case invoked by SB 6 Defendants (*Rubin v. City of Santa Monica*), the Ninth Circuit made it clear that state election laws must be struck down if they “impair access to the ballot, stifle *core political speech*, or dictate electoral outcomes.”⁵

Former Political Code §1188, *codified at* Ch. 130 Stats. 1891 (*amended by* Ch. 136 Stats. 1915, p. 274); Mar. 23, 2011 Declaration of Richard Winger ¶¶9, 11. In their Opposition, Intervenors objected to the admissibility (but not to the veracity) of Mr. Winger’s Dec. 9, 2010 Declaration. *See* Appellants’ Mar. 24, 2011 Response to the Objections to Request for Judicial Notice ¶5. Out of abundance of caution, Mr. Winger has filed a Mar. 23, 2011 Declaration, which contains the same information and exhibits as his Dec. 9, 2010 Declaration.

⁴ On Feb, 15, 2011, Secretary of State Debra Bowen announced her candidacy for the May 17, 2011 special election in Congressional District 36. Appellants’ Mar. 24, 2011 Request for Judicial Notice, Exh. 1.

⁵ *Rubin v. City of Santa Monica* (9th Cir. 2002) 308 F.3d 1008, 1015 (emphases added) (*citing, inter alia, Cook v. Gralike* (2001) 531 U.S. 510).

Joining the Sixth Circuit, *Rubin* made it clear, *as a matter of law*, that “prohibiting the designation ‘Independent’ was unconstitutional where the regulations allowed for other political party designations.”⁶ Specifically, a law that bans candidates from using the ballot label of “Independent” unconstitutionally deprives candidates of “core political speech”:

[I]n *Rosen v. Brown*, the Sixth Circuit invalidated a regulation *prohibiting the political party designation of “Independent” while permitting “Republican” or “Democrat” designations*, holding that party labels designate the views of party candidates and the regulations therefore hinder “core political speech.”⁷

Similarly, the Supreme Courts of Massachusetts and Minnesota have also held that candidates have a constitutional right to use

⁶ *Rubin*, *supra* note 5, 308 F.3d 1008, at 1015 (emphasis added) (*citing Rosen*, *supra* note 1, 970 F.2d 169). Because he has a right to the “Independent” ballot label *as a matter of law*, Appellants need not produce any evidence to prevail.

⁷ *Rubin*, *supra* note 5, 308 F.3d at 1015 (emphases added) (*citing Rosen*, *supra* note 1, 970 F.2d 169) (state law banning the ballot label “Independent” violated the First and Fourteenth Amendments). Because it expressly adopted the Sixth Circuit’s holding in *Rosen*, the Ninth Circuit (in *Rubin*) had no need to re-apply the U.S. Supreme Court’s “severe burden” balancing test with respect the right to use the ballot label of “Independent”. *Rubin*, *supra* note 5, 308 F.3d at 1014-15. Likewise, Appellants (and 2012 Congressional candidates) Mackler and Martin need not re-apply the “severe burden” test with respect to their fundamental right to use the ballot label of “Independent”.

the ballot label of “Independent”.⁸ Thus, it is beyond question that every candidate the right to a ballot label of “Independent” under the First Amendment, Fourteenth Amendment, and the California Constitution’s Free Exercise Clause.⁹

IV. It Is Undisputed That Section 325 of SB 6 Bans All Minor-Party Candidates from Using the Ballot Label of “Independent”

Tellingly, SB 6 Defendants concede two critical points made in the Opening Brief. First, SB 6-amended Elections Code §325 (hereinafter, “Section 325”) explicitly bans every minor-party¹⁰ candidate from using the ballot label of

⁸ Opening Brief, at 29 (*citing* *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). Finally, Secretary Bowen disingenuously claims that the terms “Independent” and “No Party Preference” are identical as a matter of law. However, the Massachusetts Supreme Court has expressly rejected precisely such an argument. In *Bachrach v. Commonwealth*, the Massachusetts High Court made it clear that every candidate has the constitutional right to the ballot label of “Independent”. In so doing, *Bachrach* held that it was unconstitutional to force candidates to use a ballot label of “Unenrolled” – a term identical in meaning to “No Party Preference”. *Bachrach, supra* note 8, 415 N.E.2d at 836.

⁹ 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 (emphases added).

¹⁰ As the Opening Brief noted, Appellants refer to qualified (state-recognized) parties as “major parties”; non-qualified

“Independent”.¹¹ Second, Section 325 forces those candidates to use the ballot label of “No Party Preference”.¹² Because SB 6 Defendants failed to dispute either point in their opposition papers, they have conceded both points.¹³

(non-state-recognized) parties, as “minor parties”. Opening Brief, at 12-13.

¹¹ SB 6-amended Elections Code §325 (hereinafter, “Section 325”) “requires that all candidates and voters ‘of independent [i.e., minor-party] status’ be listed as having ‘No Party Preference’”. Opening Brief, at 25 (*citing Libertarian Party v. Eu* (1980) 28 Cal.3d 535, 540 (defining an “independent” candidate as a candidate from a non-qualified (minor) party)). Section 325 states: “‘Independent status’ means a voter’s indication of ‘No Party Preference’”.

¹² *See supra* note 11. Because Section 325 bans minor-party candidates like Appellants Martin and Mackler from using the ballot labels of “Independent” and the name of their respective minor parties, the Court need not decide whether they have a right to state their respective party’s name on the ballot (i.e., Reform Party and Socialist Action).

¹³ *See, e.g., People v. Boyd* (1979) 24 Cal.3d 285, 294 n.6 (*citing Utz v. Aureguy* (1952) 109 Cal.App.2d 803, 807; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 533. Secretary Bowen concedes both points in her opposition papers. Nevertheless, Intervenors claim that SB 6 does not force minor-party candidates to use the ballot label of “No Party Preference”. However, their argument fails for at least four reasons.

First, as the Opening Brief shows, the doctrine of judicial estoppel bars Intervenors from contradicting a legal position they had taken in Superior Court. Opening Brief, at 46-49. Furthermore, as the Opening Papers show, Elections Code sections 338 and 5000 – which SB 6 did not amend – flatly contradict Intervenors’ new legal position. Opening Brief, at 49-52. Third, Section 325’s explicit ban on the ballot label of “Independent” trumps any other general provision of the Elections Code, because of all the parts of SB 6, it specifically

V. Secretary Bowen Has Conceded That SB 6’s Party Preference Ban Is Facially Unconstitutional

As the Opening Brief showed, Secretary Bowen has already made a *binding admission* that SB 6’s Party Preference Ban is facially unconstitutional. In an email sent one week after this lawsuit was filed, a key member of Secretary Bowen’s staff stated that Section 325 was not “permissible”,¹⁴ because it bans every minor-party candidate from using the ballot label of “Independent”.¹⁵ By authorizing her staff to make that public

and explicitly regulates what ballot labels that third-party candidates may use. *E.g.*, *Wells v. One2One Learning Fdn.* (2006) 39 Cal.4th 1164, 1208 (if two or more statutes conflict, the most specific and recent statute controls). Finally, SB 6’s Party Preference Ban *has already been applied* – and has banned at least one minor-party candidate from using the ballot label of “Independent”. In the Feb. 15, 2011 special primary election for Senate District 28, Coffee Party candidate Michael Chamness was banned from using the ballot label of “Independent”, and was instead forced to use the ballot label of “No Party Preference”. Appellants’ Jan. 27, 2011 Request for Judicial Notice, Exh. 1; *see also Roemer v. Bd. of Public Works of Md.* (1976) 426 U.S. 736, 742 n.4 (U.S. Supreme Court admonishes appellate courts to take judicial notice of how a statute has been applied).

¹⁴ Merriam Webster’s online dictionary lists the following words as antonyms of “permissible”: *banned, barred, forbidden, prohibited, verboten*. Merriam-Webster’s online dictionary, *available at* <http://www.merriam-webster.com/dictionary/permissible> (*last visited* Mar. 9, 2011).

¹⁵ Opening Brief, at 30-31. To cure that infirmity, Secretary Bowen’s staff urged that SB 6 be amended “prior to 2011”. Appellants’ Appendix (“App.”), at 1264.

statement, Secretary Bowen made a binding admission that Section 325 is facially unconstitutional.¹⁶

To be sure, Secretary Bowen now seeks to retroactively retract her admission regarding Section 325. However, California law absolutely bars her from doing so. As the Opening Brief noted, Secretary Bowen did not address her admission last December, *when Appellants raised it with the California Supreme Court*.¹⁷ Why did Secretary Bowen fail to

¹⁶ Opening Brief, at 31 & n.58 (applying Gov't Code §§1220, 1222 & 1280 & citing *Lake v. Reed* (1997) 16 Cal.4th 448, 461-62); see also *Coffman Specialties, Inc. v. Dep't of Transportation* (2009) 176 Cal.App.4th 1135, 1145 (listing requirements for a facial constitutional challenge). Tellingly, Secretary Bowen does not deny that her admission is binding under both the Government Code and the High Court case of *Lake v. Reed*. Instead, she implies that her staff's "policy clarifications" should not constitute an admission as a matter of law. However, she cites no legal authority that would immunize her from the evidentiary mandates of California law. Secretary Bowen's Opposition, at 14. Moreover, the case that she does invoke does not apply here. In *Professional Engineers*, the Governor issued a public letter that did not constitute an admission, because his letter did not expressly address the legal question at issue. *Professional Engineers v. Schwarzenegger* (2010) 50 Cal.4th 989, 1014. Unlike *Professional Engineers*, the emails from Secretary Bowen's staff provided a detailed legal analysis of 37 provisions of SB 6, including Section 325. App., at 1264-99. Furthermore, in her email of Aug. 11, 2011, Secretary Bowen's staff *explicitly referred to this litigation*. *Id.* at 1270 ("[T]here is a lawsuit on this issue that essentially states 'SB 6 says don't count the votes, so it's misleading to let people think they can write in a candidate's name and have it counted.'"). Consequently, *Professional Engineers* does not apply to this case.

¹⁷ Opening Brief, at 30 n.57.

contest this critical issue when this litigation stood before the State’s highest tribunal? Having deliberately waived the right to litigate her admission, she is now barred from re-litigating it at this late hour.¹⁸

As a last resort, Secretary Bowen admits that Section 325 is only “partially” unconstitutional. According to Secretary Bowen, Section 325 is not entirely illegal, because some candidates might actually prefer the ballot label of “No Party Preference” over “Independent”.¹⁹ However, that argument

¹⁸ *Id.* at 30 n.57 (citing *Boyd*, *supra* note 13, 24 Cal.3d at 294 n.6). Seeking to escape from her binding admission, Secretary argues (for the first time) that *Boyd* only prevents litigants from raising an argument for the first time at oral argument. However, *Boyd* – along with the earlier High Court case of *Continental Baking Co. v. Katz* – expressly ban a litigant from raising an argument for the first time in an appellate court, if it could have raised that argument at an earlier proceeding: “[A]ny point not appearing in a party’s brief will ordinarily be deemed waived.” *Boyd*, *supra* note 13, 24 Cal.3d at 294 n.6 (emphasis added); *see also Continental Baking Co.*, *supra* note 13, 68 Cal.2d at 533 (same).

Finally, the case invoked by Secretary Bowen (*Raphael v. Bloomfield*) does not apply here. According to *Raphael*, an appellate court may not consider arguments that could and should have been raised at an earlier proceeding, unless they raise an “issue of public policy not previously addressed by California case law”. *Raphael v. Bloomfield* (2003) 113 Cal.App. 4th 617, 621. Rather than raising novel issues of public policy, the arguments raised by Secretary Bowen pertain to a routine, straightforward issue: the admissibility of evidence. Consequently, *Raphael* does not apply to this case.

¹⁹ Secretary Bowen’s Opposition, at 14. In a footnote, Secretary Bowen claims – again, for the first time – that her staff’s email contains a “typographical error”. Because she

itself constitutes a binding admission – because it admits that every minor-party candidate who wishes to use the ballot label of “Independent” *will be banned from doing so*. As the following section shows, such a blanket ban is unconstitutional *on its face*.

VI. Section 325 Is Facially Unconstitutional, Because It Bans Every Minor-Party Candidate from Using the Ballot Label of “Independent”

Despite SB 6 Defendants’ vehement denials, Section 325 is unconstitutional on its face, for it bans every minor-party candidate from using the ballot label of “Independent”. “The California Supreme Court has not articulated a single test for determining the propriety of a facial challenge.”²⁰ At a minimum, a plaintiff must show that the statute violates constitutional guarantees “in the generality or great majority of cases.”²¹ At most, a plaintiff must show that the statute

could and should have raised this point earlier, Secretary Bowen is banned from raising it at this late hour. *Boyd, supra* note 13, 24 Cal.3d at 294 n.6; *see also Continental Baking Co., supra* note 13, 68 Cal.2d at 533.

²⁰ *Coffman, supra* note 15, 176 Cal.App.4th at 1145.

²¹ *Id.* at 1145 (emphasis added) (*quoting Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126). Contrary to SB 6 Defendants’ insinuations, current litigation concerning Washington State’s Top Two system is not relevant to the question of whether SB 6’s Party Preference Ban and Vote Counting Ban are constitutional. Unlike SB 6, Washington law (1) allows every candidate to use whatever party label he or she wishes, and (2) allows write-in votes to be cast *and counted* in the general election. Opening Brief, at 29-30; App., at 1490:15-1490:16; *cf. Wash. State Republican Party v. Wash.*

“inevitably poses a present total and fatal conflict with applicable constitutional prohibitions.”²²

Section 325 facially violates the fundamental rights of minor-party candidates under either constitutional yardstick. As Section III of this Reply Brief shows, every candidate has a fundamental right to use the ballot label of “Independent”. As Section IV shows, Section 325 explicitly bans all minor-party candidates *from using the ballot label of “Independent”* – forcing them to use the ballot label of “No Party Preference”. Thus, every minor-party candidate who wishes to exercise his or her constitutional right to use the ballot label of “Independent” will be banned from doing so – without any exception.

In this light, Section 325 not only violates “constitutional guarantees in the generality of cases”, but it “poses a present total and fatal conflict with applicable constitutional prohibitions”. Accordingly, the Court must rule that Section 325 facially violates the First Amendment, Fourteenth Amendment, and the California Constitution’s Equal Protection Clause and Free Exercise Clause.

VII. SB 6 Defendants Have Conceded That SB 6’s Party Preference Ban Violates the Elections Clause

State Grange (W.D. Wash. Jan. 11, 2011) 2011 U.S. Dist. LEXIS 2448 (examining constitutionality of Washington State’s Top Two Primary system); *Wash. State Grange v. Wash. Republican Party* (2008) 552 U.S. 442 (same).

²² *Coffman*, *supra* note 15, 176 Cal.App.4th at 1145 (quoting *Ann S.*, *supra* note 17, 45 Cal.4th at 1126).

Tellingly, SB 6 Defendants have conceded another core point raised by Appellants: SB 6’s Party Preference Ban (implemented by Section 325) violates the U.S. Constitution’s Elections Clause.²³ Specifically, while SB 6 allows major-party candidates to state their party’s name on the ballot, Section 325 forces every minor-party candidate to state that he or she has “No Party Preference”. In this manner, SB 6 unconstitutionally *aims to discriminate* against candidates who identify with the viewpoints of a minor party.²⁴

When briefing Appellants’ Motion for Preliminary Injunction at the trial court, SB 6 Defendants failed to cite any legal authority relating to the Elections Clause.²⁵ Even while

²³ Opening Brief, at 33-35 (*citing Gralike*, *supra* note 5, 531 U.S. 510).

²⁴ Opening Brief, at 33-35 (*citing Gralike*, *supra* note 5, 531 U.S. 510). When scrutinizing potential violations of the Elections Clause, the High Court solely looks to a law’s intent: its multi-prong test does not require any evidence of how a law has been applied. *Gralike*, *supra* note 5, 531 U.S. at 523.

²⁵ Opening Brief, at 35-36. Contrary to Intervenors’ claims, *Partnoy v. Shelley* does not apply here, because it did not involve any Elections Clause issue. *Partnoy v. Shelley* (S.D. Cal. 2003) 277 F.Supp.2d 1064, 1072.

Contrary to an argument belatedly made by Secretary Bowen, it is irrelevant whether any “Congressional legislation” could “override” SB 6. Instead, what the Court must decide is whether SB 6’s Party Preference Ban (implemented by Section 325) violates the Elections Clause. Moreover, the Elections Clause case belatedly invoked by Secretary Bowen (*Gonzalez v. Arizona*) does not apply here, because Appellants Mackler and Martin intend to run for Congressional office in the 2012 statewide election. Consequently, the Court need not decide whether the Elections Clause applies to elections for state

briefing this appeal, they did not contest that SB 6’s Party Preference Ban (1) aims to “disfavor” one class of candidates over another, by banning minor-party candidates from stating any party preference on the ballot; and (2) seeks to “dictate electoral outcomes”, by harming the political viability of minor-party candidates.²⁶ In so doing, they have conceded that SB 6’s Party Preference Ban violates the Elections Clause under *Gralike*.²⁷

VIII. It Is Beyond Doubt That SB 6’s Party Preference Ban Facially Violates California’s Equal Protection Clause

Furthermore, SB 6 Defendants have failed to refute another core argument made by Appellants: SB 6’s Party Preference Ban (implemented by Section 325) violates the California Constitution’s Equal Protection Clause on its face. Indeed, briefing by the parties has underscored three critical points. First, the Court should apply strict scrutiny to this case. Second, the broad doctrine established by *Stanson v. Mott*

offices. *Cf. Gonzalez v. Arizona* (9th Cir. 2010) 624 F.3d 1162, 1173 n.9; *contra*, Secretary Bowen’s Opposition, at 24 & n.11. Similarly, *Cartwright v. Barnes* (belatedly invoked by Intervenor) does not apply here, because the statute at issue treated all candidates equally once they received sufficient support to qualify for and appear on the ballot. *Cf. Cartwright v. Barnes* (11th Cir. 2002) 304 F.3d 1138, 1142 (2003) *cert. denied*, 538 U.S. 908; *contra*, Intervenor’s Opposition, at 42 n.35.

²⁶ Opening Brief, at 33-35 (*citing Gralike, supra* note 5, 531 U.S. at 523).

²⁷ *Boyd, supra* note 13, 24 Cal.3d at 294 n.6; *Continental Baking Co., supra* note 13, 68 Cal.2d at 533.

controls this case. Finally, *Libertarian Party v. Eu* does not provide the State with any interest to justify SB 6’s Party Preference Ban.

A. SB 6 Deserves Strict Scrutiny

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

– California Supreme Court, *Spiritual Psychic Science Church of Truth v. City of Azusa*²⁸

Despite their belated (if not foreclosed) efforts,²⁹ SB 6 Defendants have failed to refute that SB 6’s Party Preference Ban triggers strict scrutiny. It is beyond question that SB 6 targets and discriminates against minor-party candidates. Nevertheless, SB 6 Defendants now invite the Court to abandon California’s longstanding precedent of applying strict scrutiny to Equal Protection claims. The Court should decline their invitation.

Beginning with *Gould v. Grubb* and continuing with *Libertarian Party v. Eu* and *Board of Supervisors v. Local*

²⁸ *Spiritual Psychic Science Church, supra* note 2, 29 Cal.3d at 514 (emphasis added).

²⁹ In their Superior Court papers, both Secretary Bowen and Intervenors conceded that SB 6’s Party Preference Ban triggers strict scrutiny. See Secretary Bowen’s Opposition, App. at 1437:4-1437:8 (“compelling state interest” supports SB 6); Intervenors’ Opposition, App. at 1361:4-1361:6 (the State has a “compelling interest in regulating the method by which” to regulate the contents of the ballot).

Agency Formation Commission, the California Supreme Court has made it clear that strict scrutiny must be applied to claims involving fundamental rights, especially when brought under the California Constitution’s Equal Protection Clause.³⁰

When a law impinges on certain fundamental rights – and the *right to vote* may be the most fundamental of all – it will ordinarily be subject to strict judicial scrutiny.³¹

In *Gould*, a law enabled incumbents to be listed first on the ballot. In striking down that law, the California Supreme Court ruled that discrimination against political outsiders automatically triggered strict scrutiny:

[W]e think that the instant classification scheme, which substantially *dilutes the weight of votes* of those supporting non-incumbent candidates, must be subjected to “strict judicial scrutiny.” Under this standard, the charter provision can be upheld only if the government can demonstrate that the

³⁰ *E.g.*, *Gould v. Grubb* (1975) 14 Cal.3d 661, 671-72; *Eu*, *supra* note 11, 28 Cal.3d at 547; *Bd. of Supervisors v. Local Agency Comm’n* (1992) 3 Cal.4th 903, 914.

³¹ *Local Agency Comm’n*, *supra* note 30, 3 Cal.4th at 914 (emphases added) (*citing Wesberry v. Sanders* (1964) 376 U.S. 1, 17 & CAL.CONST. art. ii §2). Contrary to Secretary Bowen’s claims, the Court of Appeal in *Landau v. Superior Court* did not jettison California’s longstanding precedent of applying strict scrutiny in cases involving fundamental rights. *Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 207. In fact, *Landau* quoted extensively from the High Court’s ruling in *Local Agency Comm’n* – the same decision that re-affirmed strict scrutiny for Equal Protection claims brought under the California Constitution’s Equal Protection Clause. *Id.* at 207 (*quoting Local Agency Comm’n*, *supra* note 30, at 903, 913).

classifications drawn are necessary to achieve a *compelling governmental interest*.³²

Although Equal Protection claims brought under the federal Constitution do not automatically trigger strict scrutiny, the High Court has made it clear that strict scrutiny must apply to Equal Protection claims brought under the California Constitution. Apart from citing three inapposite cases,³³ SB 6 Defendants have provided no other reason to disregard the High Court's longstanding doctrine – especially with regard to an invidious law that Intervenor Maldonado rammed through the Legislature in the middle of the night.³⁴ Accordingly, the Court

³² *Gould*, *supra* note 30, 14 Cal.3d at 672 (quotations in original, citations omitted); *see also id.* at 674.

³³ *Lightfoot v. Eu* (which did apply strict scrutiny) does not apply here, for it did not adjudicate any claims brought under the California Constitution's Equal Protection Clause. *Lightfoot v. Eu* (9th Cir. 1992) 964 F.2d 865, 866 (1993) *cert. denied*, 507 U.S. 919. Similarly, the California Supreme Court's decision in *Edelstein v. San Francisco* did not adjudicate any claims brought under the California Constitution's Equal Protection Clause. *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164. *See also supra* note 31 for a discussion on why *Landau v. Superior Court* does not apply to this case.

³⁴ SB 6, authored by Intervenor Maldonado, was introduced and passed between 3:40 am and 6:55 am on February 9, 2009. App., at 1157 ¶3. Because some pages of the First Amended Complaint had been inadvertently omitted from the original Appendix, Appellants re-filed the complete document with the Court on January 21, 2011, as Exhibit 3 to the Jan. 21, 2011 Declaration of Gautam Dutta. Appellants hereby move that the re-filed First Amended Complaint be added to Appellants' Appendix, and be designated as pages 1600 through 1682.

should reject SB 6 Defendants’ desperate attempt to gut strict scrutiny with respect to a law that violates the fundamental rights of candidates and the voters who support them.

B. SB 6’s Party Preference Ban Facially Violates California’s Equal Protection Clause

[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].

– Supreme Court scholar Vicki Jackson³⁵

Having failed to do away with strict scrutiny, SB 6 Defendants fail to refute another of Appellants’ key claims: that SB 6’s Party Preference Ban violates the California Constitution’s Equal Protection Clause – which, as the California Supreme Court made clear in *Gould v. Grubb*, “requires all candidates, newcomers and incumbents alike, to be treated equally.”³⁶

Simply put, SB 6’s Party Preference Ban (implemented by Section 325) unlawfully censors political candidates on the basis of their political viewpoint. If a candidate claims to

³⁵ 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 v. Meier* (8th Cir. 1980) 637 F.2d 1159, 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 election officials’ practice of giving their own political party top ballot position).

³⁶ *Gould, supra* note 30, 14 Cal.3d at 674 (emphases added).

identify with a qualified party, he or she can state that party's name on the ballot – *even if that party publicly repudiates him or her*. In stark contrast, if a candidate identifies with a minor party, Section 325 will foist him or her with the ballot label of “No Party Preference” – without any exception.³⁷ In this manner, major-party candidates will win votes simply *because their party's name appears beside their name on the ballot*. Such viewpoint-based censorship does not pass muster under *Stanson v. Mott*'s “equal access” doctrine.³⁸

The *Stanson* doctrine, which had been foreshadowed by *Gould v. Grubb* and *Rees v. Layton*, bans ballots from favoring certain “political viewpoints” or a “particular partisan position”.³⁹ What is more, *Rees* struck down a law that, like SB 6, discriminated against political outsiders.⁴⁰ Specifically, that law allowed incumbents to be identified on the ballot as the

³⁷ Because it forces every minor-candidate to use the ballot label of “No Party Preference”, Section 325's Party Preference Ban constitutes a facial violation under either constitutional yardstick cited in *Coffman*. See discussion at Section VI of this Reply Brief.

³⁸ See Opening Brief, at 38-39; *Stanson v. Mott* (1976) 17 Cal.3d 206, 217.

³⁹ See, e.g., *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1422, 1433 (quoting *Stanson*, *supra* note 38, 17 Cal.3d at 219, and citing *Citizens for Responsible Gov't v. City of Albany* (1997) 56 Cal.App.4th 1199, 1228); see also *Rees v. Layton* (1970) 6 Cal.App.3d 815, 822-23.

⁴⁰ *Rees*, *supra* note 39, 6 Cal.App.3d at 822-23. Unlike Intervenors, Appellants do not regard *Rees*' seminal holding as “distinguishable”.

holder of that office, while banning their challengers from listing their occupation on the ballot.⁴¹ Similarly, SB 6 allows major-party candidates to list their party's name on the ballot, while banning minor-party candidates from doing so.

Tellingly, SB 6 Defendants do not even dispute that SB 6's Party Preference Ban violates the *Stanson* doctrine. Instead, Intervenors disingenuously try to argue that *Stanson* was somehow overruled by *Vargas v. City of Salinas* and *Libertarian Party v. Eu*.⁴² However, neither case overruled *Stanson*. Indeed, *Vargas* did not at all discuss whether the State may favor certain candidates or parties on the ballot.⁴³ Moreover, *Eu* did not need to apply *Stanson* for a simple reason: unlike SB 6, the law at issue in *Eu* guaranteed that minor-party candidates could use the party label of "Independent".⁴⁴ In this light, the *Stanson* doctrine remains good law – and stands ready to strike down SB 6's Party Preference Ban on its face.

C. SB 6 Defendants Have Failed to Give Any Compelling Reason to Justify SB 6's Party Preference Ban

⁴¹ *Id.* at 822-23.

⁴² *Eu*, *supra* note 11, 28 Cal.3d 535; *Vargas v. City of Salinas* (2009) 46 Cal.4th 1.

⁴³ Instead, *Vargas* adjudicated how public funds could be spent in connection with a specific ballot measure. *Vargas*, *supra* note 42, 46 Cal.4th 1.

⁴⁴ *Eu*, *supra* note 11, 28 Cal.3d at 537.

In a final effort to elude the *Stanson* doctrine, SB 6 Defendants argue that this Court’s holding in *Libertarian Party v. Eu* provides a compelling state interest to save SB 6. Yet as the Opening Papers showed, *Eu* provides no such rationale – because it upheld the constitutionality of the very election system that SB 6 seeks to dismantle.⁴⁵

Nevertheless, Intervenors argue that *Eu* would “bless” SB 6’s Party Preference Ban, because (1) voters would become “confused” if candidates could use the ballot labels of “Independent” or of their minor party, and (2) the advantages enjoyed by major parties would be “undermined”. Yet by that logic, voters have been “confused” and the major parties have been “undermined” *for over a century*: it is undisputed that California candidates have been able to use the “Independent” ballot label between 1891 and 2010.⁴⁶

Moreover, voters in the 24 states that currently allow minor-party labels would beg to differ, for they thereby gain valuable information about the candidates who are running for office.⁴⁷ As Chief Justice Roberts, former Chief Justice

⁴⁵ Opening Brief, at 43-46.

⁴⁶ *See supra* note 3. Furthermore, the Minnesota Supreme Court has also held that the “Independent” ballot label “fosters no confusion” *as a matter of law* – even though Minnesota had an “Independent-Republican” Party at the time of its decision. *Shaw, supra* note 8, 311 Minn. 237, 247 N.W. 2d at 923.

⁴⁷ Indeed, voters can get detailed information about any party and its political beliefs with a single click of the mouse. For example, detailed information about the Coffee Party may

Rehnquist, and Justice Alito have noted, “The ballot is the *last thing* the voter sees before he makes his choice.”⁴⁸ By allowing candidates to share information with voters on the ballot, candidates and voters alike can interact and “police themselves” in the marketplace of political ideas.⁴⁹

Ironically, SB 6’s new party-label rules could themselves mislead voters. Indeed, even if a candidate switches his party registration from “Tea Party” to “Democrat” on the day of the candidate filing deadline, SB 6 *would still allow him or her to use* the party label of “Democrat.”⁵⁰ Far from giving voters more meaningful choices, SB 6 would instead provide misleading information about both major and minor-party candidates. Accordingly, Intervenors’ “voter confusion”

be accessed at <http://www.coffeepartyusa.com/content/about-us> (*last visited* Mar. 18, 2011).

⁴⁸ *Wash. State Grange*, *supra* note 21, 552 U.S. at 460 (Roberts & Alito, JJ., concurring, emphases added) (*quoting Cook v. Gralike*, *supra* note 5, 531 U.S. at 532 (Rehnquist, C.J., concurring)). *Accord, Rosen*, *supra* note 1, 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*.”) (emphases added).

⁴⁹ *See Rees*, *supra* note 39, 6 Cal.App.3d at 823. In fact, in 1912 minor-party candidate William Kent (who ran as a “Progressive”, two years before the Progressive Party gained qualified status in California) was elected to the U.S. Congress (1st Congressional District). Mar. 23, 2011 Winger Declaration ¶10. In 1915, the Legislature repealed the right to choose a party label other than “Independent”. *Id.* ¶11; *see also supra* note 3.

⁵⁰ First Amended Complaint ¶46, *attached as* Exhibit 3 to the Jan. 21, 2011 Dutta Declaration; *see also supra* note 34.

argument fails to provide any state interest to salvage SB 6's Party Preference Ban.

IX. It Is Unrefuted that SB 6's Party Preference Ban Is Not Severable

Furthermore, SB 6 Defendants fail to refute that SB 6's Party Preference Ban cannot be severed. As the Opening Brief showed, SB 6's Party Preference Ban is not "volitionally" separable, because the Legislature would not have passed SB 6 without also passing its Party Preference Ban.⁵¹ Nevertheless, SB 6 Defendants insist that SB 6's Party Preference Ban must be volitionally separable, merely because SB 6 contains a severability clause. However, their argument fails for one simple reason: under California law, such "stereotyped" severability clauses are not "persuasive", because they are "routinely attached prior to the actual contingency ... *without foreknowledge* of its real character."⁵²

Indeed, according to a case quoted by Intervenors, if part of a statute is not volitionally severable, then "the whole will be invalid" – *even if* it contains a severability clause.⁵³ Here, it is undisputed that the Legislature intended for SB 6 to contain its Party Preference Ban. Therefore, SB 6's Party Preference

⁵¹ Opening Brief, at 52-54.

⁵² *Schenley Affiliated Brands Corp. v. Kirby* (Cal.App.Ct. 1971) 21 Cal.App.3d 177, 199 (emphases added).

⁵³ *Schenley*, *supra* note 52, 21 Cal.App.3d at 199 (emphases added) (*cited by* Intervenors' Opposition, at 49-50); *see also Sonoma County v. Superior Ct.* (Cal.Ct.App. 2009) 173 Cal.App.4th 322, 352; *Gerken v. FPPC* (1993) 863 P.2d 694, 698.

Ban is not volitionally separable – and “the whole” of SB 6 must be struck down as a matter of law.

X. It Is Undisputed that Proposition 14 Must Be Suspended If SB 6 Is Struck Down

Tellingly, SB 6 Defendants have not disputed, and thereby conceded,⁵⁴ another critical point made by Appellants. Namely, if the Court strikes down SB 6, it must also declare Proposition 14 inoperative until a new law has been passed to replace SB 6. The next regularly scheduled statewide election will be held in June 2012. Thus, not only would our lawmakers have ample time to fix SB 6, but Intervenors would have ample time to lobby them.⁵⁵

⁵⁴ *Boyd, supra* note 13, 24 Cal.3d at 294 n.6; *Continental Baking Co., supra* note 13, 68 Cal.2d at 533.

⁵⁵ Intervenors claim that the Legislature would take no action to fix SB 6’s infirmities if SB 6 is struck down. However, it is Intervenors who appear to have the Legislature’s ear. According to numerous press reports last fall, Intervenor California Independent Voter Project funded a Hawaii resort getaway for 22 state lawmakers. Opening Brief, at 54 n.136; *see also* “Nonprofit Group Funds Lawmakers’ Hawaii Junket”, Nov. 16, 2010, *The Nonprofit Quarterly*; “Some Calif. Lawmakers in Hawaii with lobbyists”, KABC News, Nov. 17, 2010; “Editorial: Maui junket is business as usual for Legislature”, *Sacramento Bee*, Nov. 18, 2010; “State lawmakers mix business, pleasure in Hawaii”, Nov. 17, 2010; “Evans cites value of legislator/lobbyist gathering in Hawaii”, Nov. 19, 2010, *SeekingAlpha.com*; “Sacramento Bee Scolds California Independent Voters Project for Providing Legislators with Paid Trip to Hawaii Resort, and Not Disclosing Source of Funds”, “Ballot Access News”, Nov. 18, 2010.

XI. SB 6’s Vote Counting Ban Is Unconstitutional on its Face

[I]t makes no sense to ... give voters the illusion that they can write in a candidate’s name and have it counted.

-- Secretary Bowen’s office, Aug. 11, 2010⁵⁶

Simply put, SB 6’s ban on counting write-in votes (the “Vote Counting Ban”) facially violates both the U.S. and California Constitutions. Despite SB 6 Defendants’ efforts to mislead the Court, the legal question is straightforward: Is it constitutional for the State to (1) allow voters to cast a write-in ballot, and then (2) refuse to count it? As Appellants have shown, the answer must be No.

A. Secretary Bowen Has Conceded That SB 6 Imposes a Vote Counting Ban

At the outset, Secretary Bowen, the State’s Chief Elections Officer, has conceded a critical point: the plain language of SB 6 imposes a Vote Counting Ban, but will trick voters into disenfranchising themselves. In so doing, she has conceded that the Superior Court misinterpreted SB 6’s Vote Counting Ban.

It is beyond dispute that SB 6-amended Elections Code expressly bans write-in votes from being counted:

A person whose name has been written on the ballot as a *write-in candidate* at the general election ... shall not be counted.⁵⁷

⁵⁶ App., at 1270 (emphases added).

⁵⁷ SB 6-amended Elections Code §8606 (emphases added).

As the Opening Brief showed, Secretary Bowen has already made a binding party admission that SB 6’s Vote Counting Ban is unconstitutional, because she has publicly admitted that SB 6’s Vote Counting Ban will trick voters into throwing away their votes.⁵⁸

Furthermore, as the Chief of Secretary Bowen’s Elections Division has explained, Section 8606 allows voters to cast a write-in ballot during the general election, but then *bans elections officials from counting those votes*:

[C]onsistent with [Elections Code] section 8606, any name that is written on the ballot as a write-in candidate at the general election ... shall not be counted.⁵⁹

As the Opening Brief noted, Secretary Bowen’s interpretation directly contradicts that of the Superior Court, which had mistakenly concluded that SB 6 banned all write-in votes from being cast.⁶⁰

B. It Is Beyond Dispute That SB 6’s Vote Counting Ban Is Facially Unconstitutional

⁵⁸ Opening Brief, at 60-61. For a further discussion of Secretary Bowen’s binding admissions, *see supra* note 17.

⁵⁹ Secretary Bowen’s Mar. 17, 2011 County Clerk / Registrar of Voters Memorandum # 11019, *attached as* Exhibit 2 to Appellants’ Mar. 24, 2011 Request for Judicial Notice (emphases added).

⁶⁰ Opening Brief, at 66-70. Tellingly, during oral argument before the Superior Court, Secretary Bowen’s counsel stated that “corrective legislation” needed to be passed to ensure that voters who seek to cast write-in votes will not be disenfranchised. Reporter’s Transcript on Appeal of Sept. 14, 2010 Superior Court hearing, Vol. 11, at 34:11.

[H]aving granted citizens the right to cast write-in votes, the [State] must confer the right in a manner consistent with the Constitution.

-- U.S. District Court, District of Columbia⁶¹

Contrary to SB 6 Defendants' claims, SB 6's Vote Counting Ban facially violates both the U.S. and California Constitutions, for it bans every write-in vote that has been cast at the general election from being counted. It is undisputed that the State need not give voters the right to cast write-in ballots.⁶² Yet as federal courts have made clear, once the State *has given* voters that right, it must comply with stringent constitutional requirements.⁶³

According to the Secretary of State, SB 6 gives voters the right to cast write-in ballots in any general election for state or federal office – but then bans elections officials from counting any of those votes. As the Opening Brief showed, this Vote Counting Ban automatically triggers *strict scrutiny*, for

⁶¹ *Libertarian Party v. District of Columbia Bd.* (D.D.C. Mar. 8, 2011) 2011 WL 782031, at *6 (emphases added, citations omitted).

⁶² Opening Brief, at 64 n.168.

⁶³ *See, e.g., District of Columbia Bd., supra* note 61, 2011 WL 782031, at *6; *see also Turner v. District of Columbia Bd.* (D.D.C. 1999) 77 F.Supp.2d 25, 30 & *Grant v. Meyer* (10th Cir. 1987) 828 F.2d 1446, 1456 (“Although the right to place a question on the ballot is not fundamental in Illinois, the legislature has seen fit to confer such right. Once Illinois decided to extend this forum, it became obligated to do so in a manner consistent with the Constitution.”) (*quoting Georges v. Carney* (N.D. Ill. 1982) 546 F.Supp. at 469, 476-77, *aff'd* (7th Cir. 1982) 691 F.2d 297).

California voters have an absolute right to have their votes counted in every election.⁶⁴ Therefore, the State must provide a compelling state interest to salvage SB 6’s Vote Counting Ban.⁶⁵

Significantly, none of the two interests proffered by Secretary Bowen constitutes a compelling state interest. First, Secretary Bowen argues that SB 6 bans all citizens from qualifying to run as a write-in candidate in the general election. However, SB 6 *did not ban write-in candidacies for any election*. Although it made nearly 60 amendments to the Elections Code,⁶⁶ SB 6 did not amend Elections Code Sections 8600 through 8605 – which give citizens the right to qualify as write-in candidates for every state and federal election.⁶⁷

⁶⁴ Opening Brief, at 61-63 (*citing Doe v. Reed, supra* note 2, No. 09-559, at 6; *U.S. v. Classic* (1941) 303 U.S. 299, 315; *Gould, supra* note 30, 14 Cal.3d 661, 671 n.10; and *Turner, supra* note 63, 77 F.Supp.2d at 31-34).

⁶⁵ See Opening Brief, at 63.

⁶⁶ See, e.g., *Estate of McDill* (1971) 14 Cal.3d 831, 837-38. If the Legislature passes amendments relating to a certain subject but does not amend other statutes pertaining to that same subject, the California Supreme Court assumes that the Legislature did not intend to amend those other statutes.

⁶⁷ Specifically, Elections Code §8600 lays out the requirement for “[e]very person who desires to be a write-in candidate and have his or her name as written on the ballot *counted for a particular office*” (emphases added). According to Secretary Bowen, legislative history purportedly shows that the Legislature intended to ban write-in candidacies in the general election. However, because such an interpretation contradicts the plain language of Section 8600, that legislative history must be disregarded. *In re Barry W.* (1993) 21

Consequently, SB 6 does not ban write-in candidacies in the general election.

Significantly, even if SB 6 did ban write-in candidacies in the general election, it would not survive strict scrutiny – because its Vote Counting Ban flatly violates the fundamental rights of voters. As Secretary Bowen’s own staff has admitted, SB 6’s Vote Counting Ban disenfranchises voters, because it “give[s] voters the illusion” that their write-in votes will count.⁶⁸ In other words, voters will not be told that if they cast a write-in vote, their vote will not be counted – a brazen violation of their inalienable right to vote.

Finally, Secretary Bowen claims that the State may ban write-in votes from being counted, in order to limit political competition in the general election.⁶⁹ Such a dubious rationale does not constitute a compelling (let alone legitimate) state interest. Because it tricks voters into casting votes that will not be counted, SB 6’s Vote Counting Ban facially violates the First Amendment, Due Process Clause, Elections Clause, and the Free Exercise Clause and Article II, Section 5 of the California Constitution.⁷⁰

Cal.App.4th 358, 26 Cal.Rptr.2d 161, 166; *Calif. Teachers’ Ass’n v. Governing Bd.* (1983) 141 Cal.App.3d 606, 614.

⁶⁸ App., at 1270 (emphasis added).

⁶⁹ Secretary Bowen’s Opposition, at 35.

⁷⁰ Opening Brief, at 56-72. As the Opening Brief noted, SB 6 Defendants have conceded that SB 6’s Vote Counting Ban violates the Elections Clause, and SB 6 Defendants did not respond to that point in their opposition papers. *Id.* at 71-72.

XII. It Is Beyond Question That Appellants Deserve a Preliminary Injunction

There can be no question that Appellants have a right to a preliminary injunction under California’s sliding-scale test for such relief.⁷¹ Indeed, Appellants have shown that (1) there is more than a “reasonable probability” that they will prevail on the merits, and (2) they have made a “sufficient” showing of imminent harm.

A. It Is Certain That Appellants Will Succeed on the Merits

First, Appellants have shown that there is more than a “reasonable probability” that they will succeed on the merits; in fact, it is a certainty. As they have compellingly shown, SB 6’s Party Preference Ban (implemented by Section 325) facially violates the First Amendment, Fourteenth Amendment, and Elections Clause of the U.S. Constitution, and the Free Exercise Clause and Equal Protection Clause of the California Constitution. Furthermore, SB 6’s Vote Counting Ban (implemented by Section 8606) facially violates the First Amendment, Due Process Clause, Elections Clause, and the Free Exercise Clause and Article II, Section 5 of the California

⁷¹ *E.g., O’Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1463 (quoting *Butt v. State of California* (1992) 4 Cal.4th 668).

Constitution. Thus, it is certain that Appellants will prevail on the merits.⁷²

B. Appellants Had Shown That Voters and Candidates Would Suffer Imminent Harm

Contrary to SB 6 Defendants' claims, Appellants had shown that, without injunctive relief, both candidates and voters would suffer imminent harm. As the Opening Brief showed, the Superior Court rejected Appellants' showing of imminent harm, because it believed that SB 6 would not be implemented for any election until 2012.⁷³ In so doing, the Superior Court

⁷² Because the Superior Court incorrectly concluded that Appellants would not prevail on the merits, the cases cited by Intervenors – every one of which affirmed the granting of a preliminary injunction in favor of the plaintiffs – do not apply here. *Cf. Citizens to Save California v. FPPC* (2006) 145 Cal.App.4th 736, 745-46 (affirming the granting of a preliminary injunction) (“In other words, if the trial court’s ruling regarding the regulation is correct, plaintiffs will be entitled to the requested relief as a matter of law.”) (emphasis added); *No. Coast Coalition v. Woods* (1980) 110 Cal.App.3d 800, 805 (same); *Hunter v. City of Whitter* (1989) 209 Cal.App.3d 588, 595-96 (same); *Ortiz v. Woods* (1982) 129 Cal.App.3d 672, 676 (same). Moreover, as the U.S. Supreme Court has cautioned, courts should not decide a statute’s constitutionality without taking judicial notice of how a law in question has been subsequently applied. *Roemer, supra* note 13, 426 U.S. at 742 n.4. Although Appellants have brought a facial challenge, they have provided critical evidence of how SB 6 has been subsequently applied – and even more evidence will become available as soon as SB 6 has been implemented for the looming May 17 special primary election in Congressional District 36.

⁷³ “This is going to come up in 2012. There is *plenty of time* to have this resolved in due course through the courts[.]”

disregarded the U.S. Supreme Court’s “capable of repetition, yet evading review” doctrine, which admonishes courts to swiftly resolve facial constitutional challenges “before an election is held.”⁷⁴

As the Opening Brief noted, it was foreseeable that at least one special election – if not more – would be held in 2011. California has historically grappled with nearly five special state and federal elections per year.⁷⁵ Significantly, if a special state or federal election is suddenly called in their district, Appellants *would only have a matter of days to bring a constitutional challenge* before the first ballots have been cast. In special federal primary elections, vote-by-mail ballots could be printed and mailed *11 days* after the election is called (i.e., 45 days before the date of the election).⁷⁶ In special state

Transcript, Vol. II., at 29:14-17 (emphases added) (*quoted by* Opening Brief, at 73).

⁷⁴ *Storer v. Brown* (1974) 415 U.S. 724, 737 n.8 (emphasis added) (*quoted by* Opening Brief, at 74).

⁷⁵ Opening Brief, at 73.

⁷⁶ The Military and Overseas Voter Empowerment Act (“MOVE Act”) requires that vote-by-mail ballots be mailed to military and overseas voters 45 days before the date of the election. 42 U.S.C. §1973ff-1. For state elections, vote-by-mail ballots must be mailed to all voters 25 days before the date of the election. Elections Code §10704(c). Under state law, a special primary election can be held as soon as 56 days after the date of the election has been set. Elections Code §10703(a) & 10704(a) (special general election must be held on a Tuesday within 112 to 126 days after the date on which the Governor has called the election, and the special primary election must be held on the *eighth Tuesday before* the date of the special general election).

elections, vote-by-mail ballots could be cast *31 days* after the election is called (i.e., 25 days before the date of the election).⁷⁷

Given such an abrupt time fuse, aggrieved candidates and voters would have scant time to retain counsel and file a constitutional challenge. At best, this stark reality will force courts to hastily resolve weighty issues within a matter of days. At worst, candidates and voters will suffer irreparable harm at the hands of SB 6's Party Preference Ban and Vote Counting Ban. Indeed, even if they had some notice of a looming special election, a number of voters and candidates may not have access to the financial resources to retain counsel. Therefore, because special elections are "capable of repetition, yet evade review", the Superior Court erred when it disregarded the U.S. Supreme Court's admonition to promptly hear facial constitutional challenges to election laws.⁷⁸

Equally troubling, the Superior Court *disregarded key record evidence* from Secretary Bowen's office: "If history is any guide, there *will be a special primary election* to fill a legislative or congressional vacancy *in 2011*."⁷⁹ It is undisputed that SB 6 will have been used in at least four special elections by the end of May 2011: in Senate District 28 (in which candidate Michael Chamness was forced to use the ballot label of "No Party Preference), Assembly District 4 (in which write-in votes will not be counted during its May 3, 2011

⁷⁷ See *supra* note 76.

⁷⁸ *Storer*, *supra* note 74, 415 U.S. at 737 n.8.

⁷⁹ App., at 1266 (emphases added).

special general election), Senate District 17, and Congressional District 36.⁸⁰

Against this backdrop, it is highly likely that at least one more special election will be called before June 2012. By showing that SB 6's new election rules would be implemented well before 2012, Appellants had made an abundant showing that both voters and candidates faced imminent harm – and the Superior Court erred in disregarding it.

In a last-ditch effort to stave off an injunction, Secretary Bowen claims that Appellants have not made a showing of imminent harm. Remarkably, she claims that Appellants are barred from defending the fundamental rights of other candidates and voters. Her argument is both brazen and disingenuous. After all, it was Secretary Bowen who (successfully) opposed Coffee Party candidate Michael Chamness' Motion to Intervene in this case. Moreover, her argument has no merit as a matter of law. As a matter of law, California courts allow a plaintiff to challenge the constitutionality of a statute on a third party's behalf, if the plaintiff is "vitaly interested in the validity" of that statute.⁸¹

⁸⁰ Appellants' Jan. 10, 2011 Request for Judicial Notice, Exh. 23 & 27; Appellants' Jan. 31, 2011 Request for Judicial Notice, Exh. 3 & 4; Appellants' Mar. 24, 2011 Request for Judicial Notice, Exh. 2 & 3; Appellants' Jan. 27, 2011, Exh. 1 & 2.

⁸¹ See, e.g., *Andal v. City of Stockton* (2006) 137 Cal.App.4th 86, 94-95; *Gowens v. City of Bakersfield* (1960) 179 Cal.App.2d 282, 285 (quoting *Quong Ham Wah Co. v. Industrial Accident Comm'n* (1920) 184 Cal. 26, 31 ("[A]

In *Andal v. City of Stockton*, several cell phone companies challenged the constitutionality of a statute that imposed a fee on their customers.⁸² As a defense, the government claimed that the cell phone companies lacked standing, because they were not responsible for paying that fee. Rejecting that argument, the Court of Appeal held that the cell phone companies had standing to sue – because they were “engaged in a competitive business that could be adversely affected by the tax on customers.”⁸³ Consequently, *Andal* held that the cell phone companies were “vitaly interested in the validity” of the statute.⁸⁴

Like the plaintiffs in *Andal*, Appellants are “vitaly interested in the validity” of SB 6. Indeed, Appellants have shown a stronger interest than the economic interests of the *Andal* plaintiffs. Namely, if Appellants’ lawsuit against SB 6 does not prevail, their fundamental right to vote and run for office will be irreparably harmed. Therefore, because they are “vitaly interested in the validity” of SB 6, Appellants may challenge SB 6’s constitutionality on behalf of voters and candidates who live outside of their districts. Accordingly,

discriminatory law is, equally with the other laws offensive to the constitution, *no law at all.*”) (emphases added)).

⁸² *Andal, supra* note 81, 137 Cal.App.4th at 94-95.

⁸³ *Id.* at 94 (citing *Gowens, supra* note 81, 179 Cal.App.2d at 285 (“A court *cannot sit in a vacuum* or refuse to recognize the generally known facts of competitive business life.”) (emphases added)).

⁸⁴ *Andal, supra* note 81, 137 Cal.App.4th at 94 (citing *Gowens, supra* note 81, 179 Cal.App.2d at 285).

Appellants have made a sufficient showing of imminent harm to qualify for a preliminary injunction.

C. It is Beyond Question That the Balance of Equities Tips Sharply in Appellants' Favor

It is beyond question that the balance of equities tips sharply in Appellants' favor. Tellingly, SB 6 Defendants do not deny a fundamental fact. Namely, while Secretary Bowen will have the freedom to use the "Democratic" ballot label in the May 17, 2011 special election in Congressional District 36, minor-party candidates like Appellants Mackler and Martin will be banned from stating their party's name on the ballot. Instead, they will be forced to lie to voters that they have "No Party Preference".

Equally critical, *not a single* voter will be disenfranchised if a preliminary injunction is granted. Contrary to Intervenors' claims, neither SB 6 nor Proposition 14 granted unaffiliated voters any new "rights". Instead, it is undisputed that (1) unaffiliated voters had been able to vote in the Democratic or Republican primaries *for the past decade*, and (2) Proposition 14 did not give unaffiliated voters the right to vote in the 2012 Presidential primaries.⁸⁵ Thus, SB 6 will strip candidates like Appellants Mackler and Martin of their fundamental rights, while giving unaffiliated voters *no say* on who will become the Republican and Democratic nominees for

⁸⁵ Opening Brief, at 75; CAL.CONST. art. ii §5(c).

the White House. Therefore, the balance of equities tips sharply in Appellants' favor.

D. It is Beyond Question That Injunctive Relief Will Benefit the Public Interest

Finally, it is beyond question that the public interest will strongly benefit if the Court orders injunctive relief. Only a preliminary injunction will stop SB 6 from violating the fundamental rights of Appellants. Furthermore, a preliminary injunction will not only stop millions of taxpayer dollars from being illegally spent, but will grant California elections officials a much needed reprieve from what the California Association of Clerks and Election Officials has called a “complex set of changes [that] has *not occurred in recent memory*.”⁸⁶ Therefore, granting a preliminary injunction will strongly promote the public interest.

E. Appellants Have Satisfied Every Requirement for a Preliminary Injunction

As the Opening Brief has shown, Appellants have compellingly met every element required to obtain injunctive relief against SB 6. First, there is more than a “reasonable probability” that Appellants will prevail on the merits: it is certain that their constitutional challenge against SB 6’s Party Preference Ban and Vote Counting Ban will prevail.

Second, Appellants have amply made a strong showing of imminent harm. Had the Superior Court granted an

⁸⁶ Opening Brief, Exh. 5, at 5.

injunction last summer, Coffee Party candidate Michael Chamness would not have suffered irreparable harm.⁸⁷ Finally, as California courts have noted, “the greater the plaintiff’s showing on one [factor], the less must be shown on the other [factor] to support an injunction.”⁸⁸ Here, it is not only certain that Appellants will prevail on the merits, but they have also made more than a “sufficient” showing of imminent harm. Accordingly, the Court should direct the Superior Court to grant them a preliminary injunction.

XIII. Conclusion

All animals are created equal. But some animals are more equal than others.

-- George Orwell, *Animal Farm*

In our democracy, no voter or candidate is “more equal” than another: no law can confer illicit privileges on a select few. As the U.S. Supreme Court made clear in *Reynolds v. Sims*, a court must “tak[e] appropriate action to insure that no further elections are conducted” under an illegal election law. In this important case, Debra Bowen – the State’s Chief Elections Officer and a candidate for Congress – has admitted

⁸⁷ Last winter, Mr. Chamness qualified for and appeared on the ballot in the Feb. 15, 2011 special primary election for Senate District 28. Appellants’ Jan. 27, 2011 Request for Judicial Notice, Exh. 1. On Jan. 31, 2011, this Court denied Mr. Chamness’ Motion to Intervene in this appeal.

⁸⁸ *O’Connell, supra* note 71, 141 Cal.App.4th at 1463.

that SB 6 disenfranchises voters and gives an impermissible advantage to established candidates *just like her*.⁸⁹

There can be no doubt that SB 6 has already inflicted irreparable harm on candidates and voters across California – and it is about to do so again. SB 6’s Party Preference Ban will have been implemented in four special elections. Moreover, in a matter of weeks, SB 6’s Vote Counting Ban will be implemented in the looming special election for Assembly District 4. Accordingly, the Court must direct the Superior Court to issue a preliminary injunction – and stop SB 6 from silencing the voices of outsider candidates and voters on the ballot.

⁸⁹ *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

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 6,583 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 Mar. 24, 2011.

GAUTAM DUTTA

By: _____

Gautam Dutta

Attorney for Appellants

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 Mar. 24, 2011, I served the following documents:

- (1) Appellants' Reply Brief
- (2) Appellants' Request for Judicial Notice
- (3) Appellants' Response to Objections to Appellants' Request for Judicial Notice
- (4) Declaration of Richard Winger

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 (counsel for Respondent Bowen).

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 (counsel for Respondent Durazo).

C. Raymond Lara, Esq., Office of Alameda County Counsel, 1221 Oak St., Ste. 450, Oakland, CA 94612; 510.272.6700 (counsel for Respondent Macdonald).

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 (counsel for Respondent Artnz).

E. Wendy J. Phillips, Esq., Office of Orange County Counsel, 333 W. Santa Ana Blvd., Ste. 407, Santa Ana, CA 92702; 714.834.6298 (counsel for Respondent Kelley).

F. Kathleen Taylor, Esq., Office of Tulare County Counsel, 2900 W. Burrel St., Visalia, CA 93291; 559.636.4950 (counsel for Respondent Woodard).

G. Brandi Moore, Esq., Office of Los Angeles County Counsel, 500 W. Temple St., Rm. 648, Los Angeles, CA 90012; 213.974.1895 (counsel for Respondent Logan).

H. Marguerite Mary Leoni, Esq., Nielsen Merksamer, 2350 Kerner Blvd., Ste. 250, San Rafael, CA 94901; 415.389.6800 (counsel for Intervenors-Respondents).

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

J. The Supreme Court of California, Office of the Clerk, 350 McAllister St., San Francisco, CA 94102 (only four copies of Appellants' Reply Brief served).

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 Mar. 24, 2011, in Fremont, California.

Gautam Dutta