

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

**VERIFIED REPLY IN SUPPORT
OF MOTION TO INTERVENE
BY MICHAEL CHAMNESS;
MEMORANDUM OF POINTS AND
AUTHORITIES**

[Arising from the denial of
Petitioner's 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 Intervenor-Applicant
Michael Chamness*

VERIFICATION

I, Gautam Dutta, declare:

I have filed the accompanying Reply Brief in Support of Motion to Intervene by Michael Chamness (the “Reply”) in the action captioned above. I have read the Reply 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 under the laws of the State of California that the foregoing is true and correct.

Executed on Jan. 27, 2011, in Fremont, California.

Signed: _____

Gautam Dutta

MEMORANDUM OF POINTS AND AUTHORITIES

An intervenor of right has by definition ... an interest at stake which the other parties will not fully protect, and which the intervenor can fully protect only by joining the litigation.

-- Justice Brennan¹

I. Introduction

It is now beyond dispute that Senate Bill 6 has forced State Senate candidate Michael Chamness to lie to voters. Although Mr. Chamness is registered with the Coffee Party, his ballot label falsely states that he has “No Party Preference”. As a result, the Secretary of State *has conceded that Mr. Chamness has standing* to bring an as-applied challenge against Senate Bill 6. Nevertheless, the Secretary of State opposes Mr. Chamness’ proactive efforts to intervene in this litigation. Disingenuously, she claims that Mr. Chamness’ participation will (1) “enlarge” the issues in this litigation and (2) enable Appellants to “improperly” introduce facts outside the record.

However, the U.S. Supreme Court has flatly contradicted the Secretary of State’s reading of the law. In fact, the High Court has not only urged courts to promptly hear as-applied challenges, but admonished them to *supplement the record* with how the statute at issue has been applied. Far from delaying this litigation, Mr. Chamness’ participation will help expedite a

¹ *Stringfellow v. Concerned Neighbors* (1987) 480 U.S. 370, 382 n.1 (concurring opinion) (emphases added) (*quoted by Siena Court Homeowners Ass’n v. Green Valley Corp.* (2008) 164 Cal.App.4th 1416, 1424).

prompt resolution. Accordingly, he has shown compelling grounds to intervene.

II. It Is Undisputed That SB 6 Has Foisted Mr. Chamness with a ballot label of “No Party Preference”

Tellingly, Respondents have conceded one critical fact. Despite his best efforts, SB 6 has foisted Mr. Chamness with the ballot label of “No Party Preference”. Although the special primary election in Senate District 28 (the “Special Election”) will be held on February 15, 2011, voters began casting vote-by-mail ballots *one week ago*, and will continue casting them until the day of the election.

Two conclusions directly follow from Mr. Chamness’ plight. First, SB 6 does impose a Party Preference Ban. That is, SB 6 forces minor-party candidates like Mr. Chamness to falsely state on the ballot that he has “No Party Preference”. Furthermore, by imposing its Party Preference Ban, SB 6 has deprived Mr. Chamness of his fundamental rights as a candidate.

Mr. Chamness had done his utmost to avert suffering irreparable harm. As an Intervenor-Applicant in the prior writ proceeding, he had asked the California Supreme Court to enjoin SB 6 from being implemented – and thus block it from being implemented in the Special Election. However, the High Court summarily denied Appellants’ writ petition and his Motion to Intervene. By intervening in this Court, Mr.

Chamness will enable the Court to promptly resolve one key legal issue: whether SB 6 imposes a Party Preference Ban.

IV. The High Court Has Admonished Courts to Supplement the Record with Evidence Showing How a Challenged Statute Has Been Applied

Simply put, this Court may properly admit evidence that shows how SB 6 has harmed Mr. Chamness' fundamental rights. Indeed, the U.S. Supreme Court has admonished courts to supplement the record with evidence showing how a law has been applied – even if that evidence had not been presented to the lower court before the case was appealed.

In *Roemer v. Board of Public Works of Maryland*,² the High Court held that a state statute on education funding did not violate the Establishment Clause. In so doing, the High Court took judicial notice of evidence on how that statute had been implemented: key evidence that had not been available to the lower court before the case was appealed. Similarly, the Ninth Circuit has also ruled that the record on appeal may be supplemented with relevant evidence that had not been presented to the lower court.³

In light of *Roemer*, both Mr. Chamness and Appellants have the right to introduce evidence on how SB 6 has harmed Mr. Chamness' fundamental rights as a candidate. Consequently, there is no factual or legal basis for the Secretary

² *Roemer v. Bd. of Public Works of Md.* (1976) 426 U.S. 736, 742 n.6.

³ *United States v. Camp* (9th Cir. 1984) 723 F.2d 741, 744 n.2.

of State or Intervenors to insinuate that Appellants are “improperly” using Mr. Chamness.⁴

IV. The High Court Permits Candidates and Voters to Intervene, Even While an Appeal Is Pending

Furthermore, the U.S. Supreme Court would favor Mr. Chamness’ involvement in this case. In *Storer v. Brown*, the High Court expressly admonished courts to promptly hear as-applied challenges to election laws. If he is allowed to intervene, Mr. Chamness’ participation would enable the Court to promptly resolve a critical issue on how SB 6 has been applied: namely, whether SB 6 imposes a Party Preference Ban.

To be sure, the Secretary of State claims that Mr. Chamness’ involvement would improperly “enlarge” the issues in this case. However, her claim is both legally and factually unsound. In *Cook v. Gralike*, the U.S. Supreme Court admonished courts to allow candidates and voters to intervene,

⁴ The authorities cited by Intervenors do not apply here for two reasons. First, *Johnson v. Tago* did not contemplate appellate intervenors like Mr. Chamness or as-applied constitutional challenges (as the U.S. Supreme Court did in *Gralike* and *Storer*). Compare *Cook v. Gralike*, 531 U.S. 510, 517 n.8 (candidate permitted to intervene during pendency of an appeal) and *Storer v. Brown*, 415 U.S. 724, 737 n.8 (admonishing courts to promptly hear as-applied challenges) with *Johnson v. Tago, Inc.* (1986) 188 Cal.App.3d 507, 513 n.1. What is more, both *Tago* and CRC 8.204(a)(2)(C) *would permit evidence* relating to Mr. Chamness’ as-applied challenge; because, under the High Court’s ruling in *Roemer*, the Court may take judicial notice of – and thereby *supplement the lower-court record* with – all relevant evidence relating to how a statute has been implemented and applied. *Roemer, supra*, 426 U.S. at 742 n.4.

even while an appeal is pending.⁵ In this light, an appellate court must necessarily take into account all relevant facts showing that a candidate has a right to intervene, even if those facts have not been presented to the lower court.

Here, three critical facts relating to this case are undisputed: (1) Mr. Chamness is a certified candidate for the February 15, 2011 Special Election,⁶ (2) the Secretary of State's *own website* states that Mr. Chamness has "No Party Preference",⁷ and (3) Respondent Dean Logan (the voter registrar of Los Angeles County) has affixed the ballot label of "No Party Preference" next to Mr. Chamness' name on the Special Election ballot.⁸

In this light, the Court will not be burdened with any factfinding whatsoever relating to Mr. Chamness' as-applied challenge to SB 6. Because Mr. Chamness' participation will enable the Court to promptly resolve a critical legal issue, the Court should allow him to intervene at this critical juncture.

⁵ *Gralike, supra*, 531 U.S. at 517 n.8.

⁶ Secretary of State's Certified List of Candidates in the Senate District 28 Special Primary Election, attached as Exhibit 2 to the Jan. 27, 2011 Request for Judicial Notice by Appellants and Intervenor-Applicant Michael Chamness.

⁷ *Id.*

⁸ Sample ballot for the Senate District 28 Special Primary Election, attached as Exhibit 1 to the Jan. 27, 2011 Request for Judicial Notice by Appellants and Intervenor-Applicant Michael Chamness. Significantly, Mr. Chamness' counsel obtained that sample ballot from Respondent Logan's counsel. Jan. 27, 2011 Declaration of Gautam Dutta, attached as Exhibit 3 to the Jan. 27, 2011 Request for Judicial Notice by Appellants and Intervenor-Applicant Michael Chamness ¶1.

IV. It Is Unrefuted That Mr. Chamness Qualifies for Mandatory and Permissive Intervention

Equally important, the Secretary of State and Intervenors have failed to refute Mr. Chamness' right to participate in this proceeding. Indeed, the Secretary of State *has expressly conceded that Mr. Chamness has standing* to bring an as-applied challenge to SB 6, in his capacity as a certified candidate for Senate District 28.⁹ Nevertheless, the Secretary of State proffers two dubious arguments: (1) Mr. Chamness allegedly has no "significantly protectable" interest in this proceeding, and (2) Mr. Chamness' interests allegedly can be adequately represented by Appellants. Neither argument has any merit.

First, Mr. Chamness has a right to mandatory intervention, for he has a "significantly protectable interest"¹⁰ in this proceeding that Appellants cannot fully protect.¹¹ Despite the Secretary of State's protestations, a "significantly protectable" interest in a legal proceeding does qualify for mandatory intervention. In *California Physicians' Service v. Superior Court*, the Court of Appeal came to

⁹ "If [Mr. Chamness] submit[s] papers to run for [Senate District 28], and qualify for the ballot, [he] may seek appropriate relief ... to challenge a party preference identification with which [he] disagree[s]." Secretary of State's Dec. 6, 2010 papers filed with the California Supreme Court, *attached as Exhibit 6 to Appellants' Jan. 10, 2011 Request for Judicial Notice at 2240.*

¹⁰ *Siena, supra*, 164 Cal.App.4th at 1423-24 (*citing Donaldson v. United States* (1971) 400 U.S. 517).

¹¹ *Stringfellow, supra*, 480 U.S. at 382 n.1 (Brennan, J.) (concurring opinion) (*quoted by Siena, supra*, 164 Cal.App.4th at 1424).

two relevant conclusions. Reciting from Black’s Law Dictionary, the Court held that an interest in a “proceeding” qualified as a “transaction” for purposes of mandatory intervention:

As to “transaction,” Black’s Law Dictionary defines the term as: “Act of transacting or conducting any business; negotiation, management; proceeding; that which is done; an affair. It may involve selling, leasing, borrowing, mortgaging or lending. Something which has taken place, whereby a cause of action has arisen.”¹²

The Court then ruled that the litigant – the creditor of a litigant in a tort case – had no right to intervene, because the litigant only had an interest in money damages, and not in any of the causes of action litigated in the proceeding.¹³

It is beyond dispute that Mr. Chamness has a “significantly protectable” – and “direct and immediate”¹⁴ – interest in this appellate proceeding. Equally important, Appellants *cannot fully represent Mr. Chamness’ interests*. If Appellants’ appeal is successful, Mr. Chamness’ fundamental rights as a candidate will be vindicated. But if their appeal does not succeed, Mr. Chamness’ ability to bring an as-applied challenge on his own will be impaired, for at least one appellate courts will have already ruled on the core legal issue of his as-

¹² *California Physicians’ Svc. v. Superior Court* (1980) 102 Cal.App.3d 91, 96 (emphasis added) (quoting Black’s Law Dictionary, p. 1341, col. 1).

¹³ *California Physicians’ Svc.*, *supra*, 102 Cal.App.3d at 97.

¹⁴ As a practical matter, because Mr. Chamness qualifies for mandatory intervention, he also qualifies for permissive intervention. See *Royal Indemnity Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th 194, 75 Cal.Rptr.3d 481, 487.

applied challenge: namely, whether SB 6’s Party Preference Ban is constitutional. Thus, because Appellants cannot fully represent his interests, Mr. Chamness is entitled to both mandatory and permissive intervention as a matter of law.

XI. Conclusion

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*¹⁵

State Senate candidate Michael Chamness has a right to both mandatory and permissive intervention *as a matter of law*, because Appellants cannot fully represent his vital stake in this proceeding. Far from delaying this litigation, Mr. Chamness’ as-applied challenge will enable the Court to promptly resolve a central question in this litigation: namely, does SB 6 impose a Party Preference Ban? By hearing Mr. Chamness’ as-applied challenge, the Court will heed the High Court’s admonishment in *Libertarian Party v. Eu*: that courts ensure the “orderly conduct of future elections” by providing “final resolution” to challenges to state-imposed party designations. Accordingly, Mr. Chamness respectfully renews his request for leave to intervene.

¹⁵ *Libertarian Party v. Eu* (1980) 28 Cal.3d 535, 540 (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 2,135 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 Jan. 27, 2011.

GAUTAM DUTTA

By: _____

Gautam Dutta

Attorney for Intervenor-Applicant

Michael Chamness

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 Jan. 27, 2011, I served the following document(s):

- (1) Verified Reply in Support of Motion To Intervene by Michael Chamness
- (2) Request for Judicial Notice by Appellants and Intervenor-Applicant Michael Chamness

on the following persons at the locations specified:

A. Mark Beckington, Esq., Office of the Attorney General, 300 South Spring St., Suite 1702, Los Angeles, CA 90013; 213.879.1096 (attorney 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 (attorney for Respondent Durazo).

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

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

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

G. Patrice J. Salseda, Esq., Office of Los Angeles County Counsel, 500 W. Temple St., Rm. 648, Los Angeles, CA 90012-2713; 213.974.1895 (attorney for Respondent Logan).

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

I. The Honorable Loretta Giorgi, Department 302, San Francisco County Superior Court, 400 McAllister St., San Francisco, CA 94102.

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 Jan. 27, 2011, in Fremont, California.

Gautam Dutta