No. 11-56303

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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MICHAEL CHAMNESS, DANIEL FREDERICK, and RICH WILSON

Plaintiffs,

JULIUS GALACKI

Intervenor-Applicant / Appellant,

-v.-

DEBRA BOWEN, in only her official capacity as California Secretary of State, and DEAN LOGAN, in only his official capacity as Registrar-Recorder / County Clerk of Los Angeles County,

Defendants / Appellees

ABEL MALDONADO, CALIFORNIA INDEPENDENT VOTER PROJECT, CALIFORNIANS TO DEFEND THE OPEN PRIMARY,

Intervenors-Defendants / Appellees

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ON APPEAL FROM A CENTRAL DISTRICT OF CALIFORNIA ORDER DENYING JULIUS GALACKI'S MOTION TO INTERVENE

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EMERGENCY MOTION FOR EXPEDITED APPEAL

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CIRCUIT RULE 27-3 CERTIFICATE

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2. Facts Showing the Existence and Nature of the Emergency

Unless the Court allows him to promptly intervene, Tea Party candidate Julius Galacki will suffer irreparable prejudice – because two courts would then decide all of his claims against the Top Two Primary's implementing law (Senate Bill 6) without him. Earlier, Mr. Galacki was unlawfully barred from taking out nomination papers to run as a write-in candidate in the July 12, 2011 special general election in Congressional District 36 (the "General Election"). Subsequently, the write-in vote that he cast for himself in the General Election was *not counted* – a brazen violation of his fundamental right to vote.

On August 22, 2011, the trial court will hear Plaintiffs' Motion for Summary Judgment, which will resolve all but two of Mr. Galacki's as-applied claims. Toward that end, the trial court has already issued a tentative ruling in favor of the non-moving parties – who have not cross-filed for summary judgment. On September 7, 2011, the California Court of Appeal (First District) could in effect rule on the preponderance of Mr. Galacki's claims, for it will hold oral argument on whether Senate Bill 6 is facially constitutional. Last winter, the Court of Appeal denied Plaintiff Michael Chamness' request to intervene in that same case – forcing him to

launch this lawsuit. Last week, the Court of Appeal set oral argument in its Senate Bill 6 case for September 7, 2011.

On July 14, 2011, two days after his write-in vote was not counted, Mr. Galacki rushed to the trial court with a Motion to Intervene.[1] In response, the district court entered an order denying his request. In so doing, the trial court disregarded binding precedent to the contrary.

To avert irreparable prejudice, Mr. Galacki asks the Court to (1) speedily hear his appeal, (2) grant his underlying Motion to Intervene, and (3) instruct the trial court to consolidate his claims with Plaintiffs' pending Motion for Summary Judgment. Furthermore, Mr. Galacki asks the Court to waive oral argument pursuant to FRAP 34 (a)(2)(B), for it has authoritatively decided the dispositive issues raised by this Motion.

3. When and How Counsel Notified

I notified counsel for Appellee Dean Logan by a phone call to his counsel Brandi Moore on August 2, 2011. During that call, I told her that Mr. Galacki would file an emergency motion for expedited appeal. In response, Ms. Moore stated that Appellee Logan takes no position and will abide by the Court's ruling with regard to this Motion.

[1] Later that afternoon, the trial court issued a tentative opinion granting summary judgment in favor of the non-moving parties, and set oral argument for August 22, 2011.

I notified counsel for Appellee Debra Bowen by a telephone call to her counsel George Waters on August 2, 2011. During that call, I told him that Mr. Galacki would file an emergency motion for expedited appeal. In response, Mr. Waters sent me an email in which he stated that his client opposed Mr. Galacki's Motion.

I notified counsel for Intervenors - Appellees by a telephone call to Marguerite Leoni on August 2, 2011. During that call, I told her that Mr. Galacki would file an emergency motion for expedited appeal. In response, her colleague Chris Skinnell sent me an email in which he stated his clients opposed Mr. Galacki's Motion.

Plaintiffs Michael Chamness, Daniel Frederick, and Rich Wilson, whom I also represent, do not oppose Mr. Galacki's Motion.

This Motion is being electronically filed; all counsel are registered with the Court's ECF Program.

4. Submission to the Trial Court

Appellant Chamness had asked the trial court for the full relief sought here, by way of his July 14, 2011 Ex Parte Application and Motion to Intervene. Specifically, his Ex Parte Application asked the trial court to shorten time for a hearing; his Motion to Intervene asked the trial court (1) to allow him to join the litigation, and (2) to consolidate his as-applied

claims alongside Plaintiffs' pending Motion for Summary Judgment. In an order entered on July 22, 2011, the trial court granted Mr. Galacki's Ex Parte Application, but denied his Motion to Intervene. Subsequently, Mr. Galacki filed his Notice of Appeal.

Dated: August 4, 2011

/s/_____

GAUTAM DUTTA

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The state … has repeatedly expressed its legitimate desire to avoid to the greatest extent possible any unnecessary inequities and delay in the upcoming election cycle. We agree. Unlike the state, however, we believe that the most effective way to achieve this objective is to allow as many parties as possible who seek to run for office contrary [to the challenged statute] to be bound by our decision.

-- The Court, *Bates v. Jones*[2]

I. Introduction and Summary

Unless the Court allows him to promptly intervene, Tea Party candidate Julius Galacki will suffer irreparable prejudice – because two courts would then decide all of his claims against the Top Two Primary's implementing law (Senate Bill 6) without him. Earlier, Mr. Galacki was unlawfully barred from taking out nomination papers to run as a write-in candidate in the July 12, 2011 special general election in Congressional District 36 (the "General Election"). Subsequently, the write-in vote that he cast for himself in the General Election was *not counted* – a brazen violation of his fundamental right to vote.

On August 22, 2011, the trial court will hear Plaintiffs' Motion for Summary Judgment, which will resolve all but two of Mr. Galacki's as-applied claims. Toward that end, the trial court has already issued a tentative ruling in favor of the non-moving parties – who have not cross-

[2] *Bates v. Jones*, 127 F.3d 870, 872 (9th Cir. 1997) (emphases added).

filed for summary judgment. On September 7, 2011, the California Court of Appeal (First District) could in effect rule on the preponderance of Mr. Galacki's claims, for it will hold oral argument on whether Senate Bill 6 is facially constitutional. Last winter, the Court of Appeal denied Plaintiff Michael Chamness' request to intervene in that same case – forcing him to launch this lawsuit. Last week, the Court of Appeal set oral argument in its Senate Bill 6 case for September 7, 2011.

On July 14, 2011, two days after his write-in vote was not counted, Mr. Galacki rushed to the trial court with a Motion to Intervene.[3] In response, the district court entered an order denying his request. In so doing, the trial court disregarded binding precedent to the contrary.

To avert irreparable prejudice, Mr. Galacki asks the Court to (1) speedily hear his appeal, (2) grant his underlying Motion to Intervene, and (3) instruct the trial court to consolidate his claims with Plaintiffs' pending Motion for Summary Judgment. Furthermore, Mr. Galacki asks the Court to waive oral argument pursuant to FRAP 34 (a)(2)(B), for it has authoritatively decided the dispositive issues raised by this Motion.

[3] Later that afternoon, the trial court issued a tentative opinion granting summary judgment in favor of the non-moving parties, and set oral argument for August 22, 2011. Aug. 4, 2011 Declaration of Gautam Dutta ("Aug. 4 Dutta Decl.") Exh. 49.

II. Issues Presented

A. Whether an individual who has been deprived of the fundamental right to have his vote counted is entitled to intervention of right.

B. Whether an individual who has been deprived of the fundamental right to run for federal office is entitled to intervention of right.

C. Whether a Tea Party candidate is entitled to intervention of right, because a state law (Senate Bill 6) will force him to falsely state on the 2012 ballot that he has "No Party Preference".

III. Statement: Legal Background

Last summer, California voters were lured into an insidious trap. Eager to reform the way our elections are conducted, a slim majority of voters approved Proposition 14, which promised to "protect and preserve the right of every Californian to vote for the candidate *of his or her choice*."[4] However, voters were not told one critical fact. Namely, by voting for Proposition 14, they would also be foisted with Senate Bill 6: an unjust law that has (1) disenfranchised Appellee Julius Galacki, (2) disqualified Mr. Galacki from running as a write-in candidate, and (3) is poised to deprive

[4] Senate Constitutional Amendment 4 (styled on the June 8, 2010 ballot as Proposition 14, *codified at* CAL.CONST. art. ii §5), Statement of Purpose §2(a), *codified at* Res. Ch. 2, Stat. 2009 (emphases added), *available at* http://voterguide.sos.ca.gov/past/2010/primary/pdf/english/text-proposed-laws.pdf#prop14 (*last visited* Aug. 4, 2011).

Mr. Galacki of his fundamental right to express his political views on the 2012 ballot.

Senate Bill 6 ("SB 6") has trampled on Mr. Galacki's fundamental right to vote and run for office in three egregious ways. First, SB 6 *throws away all votes cast for write-in candidates* in the general election. Specifically, SB 6's Vote Counting Ban allows voters to vote for write-in candidates in the general election, but then bans their votes from being counted.[5] As even Secretary Bowen has admitted, SB 6's Vote Counting Ban gives voters the "illusion that they can write in a candidate's name and have it counted."[6]

Second, Mr. Galacki was barred from running as a write-in candidate for Congressional office, because Los Angeles Registrar Logan claimed that SB 6 bans write-in candidacies in the general election. In so doing, Registrar Logan ignored Elections Code §15340, which expressly gives every voter the right to vote for a write-in candidate in "any" election. Tellingly, even Secretary Bowen has admitted that SB 6 "give[s] candidates the illusion that they can run as a write-in[.]"[7]

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[5] SB-6 amended Elections Code §13207 (requiring ballots to allow voters to cast write-in votes in every election); SB-6 amended Elections Code §8606 (banning write-in votes cast in the general election from being counted).

[6] Aug. 4 Dutta Decl. Exh. 72 (at p.36, emphases added).

[7] Aug. 4 Dutta Decl. Exh. 72 (at p.36, emphases added).

Finally, SB 6's Party Preference Ban bars candidates from using the ballot label of "Independent" – a ban that even the Secretary of State has admitted is *not "permissible"*.[8] Instead, SB 6's Party Preference Ban will force Tea Party candidate Julius Galacki to falsely state on the 2012 ballot that he has "No Party Preference".

As Plaintiffs' pending Motion for Summary Judgment shows, SB 6's Vote Counting Ban, Candidacy Ban, and Party Preference Ban violate the First Amendment, Fourteenth Amendment, Due Process Clause, and Elections Clause. Because Plaintiffs are entitled to summary judgment as a matter of law, they have asked the trial court for a judgment that (1) declares SB 6 unconstitutional and unenforceable, (2) and declares Proposition 14 inoperative until a new law has been passed to replace SB 6.

IV. Introduction to Appellant Julius Galacki

A Los Angeles resident, Julius Galacki is registered to vote in Congressional District 36, which recently elected its next Member of Congress in the July 12, 2011 General Election.[9] Mr. Galacki recently sought to run as a write-in candidate – and has changed his party affiliation *from the Democratic Party to the Tea Party* – in order to call attention to three troubling ways in which Proposition 14's Top Two Primary violates

[8] Aug. 4 Dutta Decl. Exh. 72 (at p. 32, emphasis added).

[9] Julius Galacki's July 14, 2011 Motion to Intervene, at 6, *attached as* Exhibit 53 to Aug. 4 Dutta Decl.

our fundamental rights.[10] First, Senate Bill 6 (which implements Proposition 14's Top Two Primary) has unlawfully banned write-in votes from being counted in every general election for federal and state office. Second, SB 6, as it has been applied by Secretary Bowen and Registrar Logan, has unlawfully banned individuals from running as write-in candidates in the general election for federal and state office.[11] Finally, SB 6 forces Tea Party and other minor-party candidates to lie to voters, by forcing them to falsely state on the ballot that they have "No Party Preference".[12]

Mr. Galacki seeks to intervene in this lawsuit in three capacities: (1) as a registered voter who was *barred from running for Congress* as a write-in candidate in the General Election, (2) as a registered voter whose write-in vote was not counted, and (3) as a *Tea Party candidate* running for Congress in the June 5, 2012 primary election.

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[10] Julius Galacki's July 14, 2011 Motion to Intervene, at 6, *attached as* Exhibit 53 to Aug. 4 Dutta Decl. Conversely, a candidate registered with the Tea Party may also change his or her party affiliation to "Democratic" when filing his or her nomination papers – *and then be listed as a Democrat*. SB 6-amended Elections Code 8002.5(a). Before SB 6 took effect, major-party candidates who wished to compete in their party's primary election had been required to belong to their party at least one year for regularly scheduled elections and at least three months for special elections. Elections Code §8001(a)(2) (which had previously applied to elections for state and federal office).

[11] Plaintiffs' May 6, 2011 Motion for Summary Judgment ("Pending MSJ"), *attached as* Exhibit 25 to the Aug. 4 Dutta Decl., at 16:4-19:11.

[12] *Id.* at 20:18-23:22. In the Nov. 2, 2011 general election, Tea Party candidates appeared on the ballot for federal or state office in Nevada, Florida, New Jersey, and New York. July 11, 2011 Declaration of Gautam Dutta Exhs. 2 & 3, *attached as* Exhibit 56 to the Aug. 4 Dutta Decl. In the Nevada election, six gubernatorial candidates and four U.S. Senate candidates used the ballot label of "Independent". July 11, 2011 Declaration of Gautam Dutta Exh. 3, *attached as* Exhibit 56 to the Aug. 4 Dutta Decl.

To qualify as a candidate for Member of the U.S. Congress, an individual must pay a filing fee of $1,740.00.[13] To have that onerous fee waived, Mr. Galacki must gather at least 3,000 valid signatures from voters in his Congressional district beginning **Dec. 30, 2011.**[14]

V. Statement: Undisputed Facts

Elections Code 15340 – which SB 6 did not amend – gives every voter the right to vote for a write-in candidate in "any" election. On June 13, 2011, Mr. Galacki decided to run as a write-in candidate in the General election.[15] The next day, his counsel asked Los Angeles County Registrar Logan to issue him nomination papers so that he could qualify and run as a write-in candidate.[16] Mr. Galacki subsequently cast a write-in vote for himself in the General Election, and mailed his vote-by-mail ballot to Registrar Logan's office.[17]

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[13] Elections Code §8103 (a)(2) (Congressional filing fee must be 1 percent of a Member of Congress' annual salary); Library of Congress website, available at http://thomas.loc.gov/home/faqlist.html (*last visited* Aug. 4, 2011) (Congressional annual salary currently set at $174,000).

[14] Elections Code §8061 (Congressional candidates seeking to waive the $1,740.00 filing fee may begin gathering signatures on the 158th day before a given election).

[15] July 14, 2011 Declaration of Julius Galacki ¶9, *attached as* Exhibit 55 to the Aug. 4 Dutta Decl.

[16] July 14, 2011 Declaration of Gautam Dutta ¶8 & Exh. 1, *attached as* Exhibit 56 to the Aug. 4 Dutta Decl.

[17] July 14, 2011 Declaration of Julius Galacki ¶10, *attached as* Exhibit 55 to the Aug. 4 Dutta Decl.

On June 28, 2011, the statutory deadline to file write-in nomination papers for the General Election passed.[18] Because no nomination papers had been issued to Mr. Galacki as of that date, he was barred from exercising his fundamental right to run for office.[19] On July 6, 2011, Registrar Logan stated that he was "unable to grant [counsel's] request to issue write-in nomination papers to Mr. Julius Galacki, or to count the write-in vote he cast for himself."[20]

According to Registrar Logan, Mr. Galacki could not run as a write-in candidate in the General Election for three reasons: (1) Mr. Galacki had allegedly "missed"[21] a May 3, 2011 deadline to file write-in nomination papers, (2) Secretary Bowen told him that Section 8605 of SB 6 bans write-

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[18] To qualify, write-in candidates must file their nomination papers at least 14 days before the date of the election (here, the July 12, 2011 General Election). Elections Code §8601.

[19] July 14, 2011 Declaration of Gautam Dutta ¶9, *attached as* Exhibit 56 to the Aug. 4 Dutta Decl.

[20] July 14, 2011 Declaration of Gautam Dutta ¶10 & Exh. 4, *attached as* Exhibit 56 to the Aug. 4 Dutta Decl.

[21] Contrary to Registrar Logan's claim, Mr. Galacki did not "miss" the May 3, 2011 "deadline" to file write-in nomination papers for the July 12, 2011 General Election. *Cf.* Registrar Logan's July 6, 2011 letter to Mr. Galacki's counsel, July 14, 2011 Declaration of Gautam Dutta, Exh. 4 (at p. 16), *attached as* Exhibit 56 to the Aug. 4 Dutta Decl. In fact, as Secretary Bowen's calendar for the May 17, 2011 special primary election in Congressional District 36 shows, May 3, 2011 was the deadline for the May 17, 2011 special primary election in Congressional District 36 (i.e., May 3, 2011 was 14 days before May 17, 2011), and not for the July 12, 2011 General Election. July 14, 2011 Declaration of Gautam Dutta, Exh. 7 (at p. 32 ¶23), *attached as* Exhibit 56 to the Aug. 4 Dutta Decl. Here, it is beyond dispute that Mr. Galacki requested write-in nomination papers from Registrar Logan two weeks before the June 28, 2011 statutory deadline for the July 12, 2011 General Election. July 14, 2011 Galacki Decl. ¶¶7, 9, *attached as* Exhibit 55 to the Aug. 4 Dutta Decl.; July 14, 2011Dutta Declaration ¶¶6, 8 & Exh. 1, *attached as* Exhibit 56 to the Aug. 4 Dutta Decl. Therefore, he had qualified to run as a write-in candidate in the General Election.

in candidacies in every general election (although she had told the lower court that Section 8606 of SB 6 bans write-in candidacies in every general election), and (3) the Secretary Bowen's official General Election calendar "contain[ed] no line item or line items regarding the write-in process."[22] In addition, Registrar Logan claimed that he could not count Mr. Galacki's write-in vote, because (1) Mr. Galacki had allegedly "missed"[23] a May 3, 2011 deadline to file his write-in nomination papers, and (2) SB 6-amended Election Code §8605 and §8606 banned Registrar Logan from counting any write-in votes.[24]

On July 12, 2011, the write-in vote that Mr. Galacki cast for himself in the General Election was not counted.[25] Two days later, Mr. Galacki rushed to the trial court with his Ex Parte Application and Motion to Intervene. In response, Plaintiffs Chamness, Frederick, and Wilson filed a Notice of Joinder; Registrar Logan took no position; and Secretary Bowen and Intervenors-Defendants filed oppositions.

V. Procedural History

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[22] Julius Galacki's July 14, 2011 Motion to Intervene, at 8:9-8:15, *attached as* Exhibit 53 to the Aug. 4 Dutta Decl.

[23] *See supra* note 21.

[24] Julius Galacki's July 14, 2011 Motion to Intervene, at 8:15-9:1, *attached as* Exhibit 53 to the Aug. 4 Dutta Decl.; *see also* note 93 *infra*.

[25] Julius Galacki's July 14, 2011 Motion to Intervene, at 9:2-9:6, *attached as* Exhibit 53 to the Aug. 4 Dutta Decl.

Ironically, this litigation began as a result of a failed intervention. Last November, SB 6 was poised to be implemented in three special elections: in Senate District 28, Senate District 17, and Assembly District 4.[26] Michael Chamness sought to run for the vacancy in Senate District 28, as a candidate affiliated with the Coffee Party, a minor (non-state-recognized) party.[27]

To prevent SB 6 from branding him with the ballot label of "No Party Preference", Mr. Chamness sought to intervene in a mandamus proceeding before the California Supreme Court.[28] In that proceeding – in which both Secretary Bowen and Registrar Logan were Real Parties in Interest – six plaintiffs ("State Court Plaintiffs") sought to enjoin SB 6 from being implemented.[29] While Registrar Logan (who administered the Senate District 28 Election) took no position regarding Mr. Chamness' request to intervene, the Secretary of State vigorously opposed it.[30] On December 15, 2010, the California Supreme Court denied both Mr. Chamness' request to intervene and the underlying mandamus petition.[31]

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[26] First Amended Complaint ¶¶ 68, 69, *attached as* Exhibit 20 to the Aug. 4 Dutta Decl.
[27] *Id.* ¶70.
[28] *Id.* ¶71.
[29] *Id.* ¶71.
[30] *Id.* ¶71.
[31] *Id.* ¶72.

Seeking to vindicate his fundamental rights as a candidate, Mr. Chamness first sought to bring his as-applied challenge to the California Court of Appeal (First District). Toward this end, he asked the Court of Appeal for permission to intervene in a pending proceeding against Secretary Bowen and Registrar Logan, where State Court Plaintiffs had appealed the Superior Court's denial of their request for a preliminary injunction against SB 6.[32] Again, Registrar Logan took no position with respect to Mr. Chamness' request to intervene, while Secretary Bowen opposed his request.[33] On January 31, 2011, the Court of Appeal denied Mr. Chamness' request to intervene.[34]

Subsequently, Placer County voter Linda Hall asked the Court of Appeal for permission to file an amicus letter.[35] Her amicus letter included the sample ballot for a state election conducted under SB 6's new rules.[36] Significantly, that ballot showed how SB 6 could trick voters into casting write-in votes *without knowing that those votes would not be counted*.[37] On April 18, 2011, the Court of Appeal denied Ms. Hall's request to file an amicus letter.[38]

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32 *Id.* ¶75.
33 *Id.* ¶75.
34 *Id.* ¶75 & Exh. 13 (at p.114).
35 Aug. 4 Dutta Decl., Exh. 71.
36 *Id.* Exh. 71
37 *Id.* Exh. 71.
38 Aug. 4 Dutta Decl., Exh. 69.

Subsequently, Mr. Chamness decided to run for Congress in the May 17, 2011 special primary election for Congressional District 36 (the "Primary Election"). To prevent being again branded with the ballot label of "No Party Preference", Mr. Chamness filed a Motion for Preliminary Injunction with the trial court on February 18, 2011.[39] On March 1, 2011, Abel Maldonado, California Independent Voter Project, and Californians to Defend the Open Primary ("Intervenors") filed an Ex Parte Application to Intervene, which was opposed by Mr. Chamness. Subsequently, Intervenors lodged an opposition brief on March 4, 2011.[40] On the evening of March 7, 2011 – four days before Mr. Chamness' reply brief was due – the District Court granted the Application to Intervene.[41]

On March 21, 2011, the District Court heard oral argument on Mr. Chamness' Motion for Preliminary Injunction. Two days later, Mr. Chamness notified the trial court that the first batch of ballots for the Primary Election was scheduled to be printed on March 30, 2011. Because the District Court had not ruled on the Motion for Preliminary Injunction as of the afternoon of March 28, 2011 (i.e., less than 48 hours before the printing deadline), Mr. Chamness filed a Petition for Writ of Mandamus with this Court that evening. The next day, this Court denied the Petition,

[39] Aug. 4 Dutta Decl., Exh. 64.
[40] Aug. 4 Dutta Decl., Exh. 66.
[41] Aug. 4 Dutta Decl., Exh. 67.

but asked the trial court to "act promptly on petitioner's motion for a preliminary injunction."[42]

On Mar. 30, 2011, the trial court denied Mr. Chamness' Motion for Preliminary Injunction, which he immediately appealed.[43] After this Court declined to enjoin SB 6 pending Mr. Chamness' appeal, Mr. Chamness voluntarily dismissed his appeal.[44] On May 6, 2011, Plaintiffs Chamness, Frederick, and Wilson filed a Motion for Summary Judgment ("Plaintiffs' MSJ").[45] In response, Secretary Bowen asked the trial court to indefinitely delay the hearing on Plaintiffs' MSJ.[46] On May 13, 2011, the trial court postponed the hearing on Plaintiffs' MSJ by one week, to June 13, 2011.[47] After first cancelling the hearing, the trial court then rescheduled it for August 22, 2011, 2:30 pm.[48]

The trial court denied Mr. Galacki's Motion to Intervene on July 22, 2011 – prompting him to rush to this Court for relief.[49]

VI. The Trial Court's Order

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42 Aug. 4 Dutta Decl., Exh. 21.
43 Aug. 4 Dutta Decl., Exh. 3.
44 Aug. 4 Dutta Decl., Exhs. 23 & 24.
45 Aug. 4 Dutta Decl., Exh. 25.
46 Aug. 4 Dutta Decl., Exh. 33.
47 Aug. 4 Dutta Decl., Exh. 38.
48 Aug. 4 Dutta Decl., Exhs. 48 & 49.
49 The trial court's order was filed on July 21, 2011 and was entered and electronically sent to all counsel on July 22, 2011. Aug. 4 Dutta Decl., Exhs. 68 & 2.

The trial court gave two reasons for denying Mr. Galacki's Motion to Intervene: (1) Plaintiffs would adequately represent Mr. Galacki's interests, and (2) his Motion was not timely.[50] First, the trial court ruled that Plaintiffs would adequately represent Mr. Galacki's interests, for it believed that Mr. Galacki's constitutional claims "mirror[ed] those of Frederick, Wilson, and Chamness in all material aspects".[51] According to the trial court, because both Mr. Galacki and Plaintiffs invoked the same High Court case (*Cook v. Gralike*, 530 U.S. 510), Mr. Galacki had not brought any unique, as-applied claims.[52]

In addition, the trial court ruled that Mr. Galacki's Motion to Intervene was not timely for three reasons. First, it ruled that it should not hear Mr. Galacki's claims, because the Court would soon grant summary judgment against Plaintiffs (and in favor of the non-moving parties) "in a matter of weeks."[53] Second, the trial court ruled that it would be

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[50] In a footnote, the district court stated that Mr. Galacki's Motion to Intervene was procedurally defective, because it did not include a Complaint in Intervention. Interestingly, the trial court had allowed Intervenors-Defendants to intervene even though they themselves had not filed a complaint in intervention. Aug. 4 Dutta Decl., Exh. 2, at 3:6 n.2. In any event, this Court does not require prospective intervenors to file a complaint in intervention, as long as their papers have "fully stated the legal and factual grounds for intervention." *Beckman Ind. v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992) (*citing, inter alia, Smith v. Pangalinan*, 651 F.2d 320, 1325-26 (9th Cir. 1981); *Shores v. Hendy Realization*, 133 F.2d 738, 742 (9th Cir. 1943)). Here, even the trial court conceded that "Mr. Galacki's Motion sets forth his claims in detail[.]" Therefore, Mr. Galacki's Motion to Intervene did not suffer from any procedural shortcomings.

[51] Aug. 4 Dutta Decl., Exh. 2, at 6:1-6:2.

[52] Aug. 4 Dutta Decl., Exh. 2. at 5:22-6:2.

[53] Aug. 4 Dutta Decl., Exh. 2, at 4:11 & Exh. 49 (issuing tentative opinion granting summary judgment in favor of non-moving parties).

"prejudicial" to Defendants if Mr. Galacki were allowed to intervene.[54] Finally, the trial court ruled that Mr. Galacki should have brought his Motion to Intervene before he had suffered any irreparable harm; that is, he should not have brought any as-applied constitutional claims.[55]

VI. Standard of Review

"This Court reviews de novo the denial of a motion to intervene as of right."[56] In so doing, the Court reviews the trial court's determination of timeliness (one part of the four-part test for intervention of right) for abuse of discretion.[57] "An abuse of discretion will be found if the district court based its decision on an erroneous legal standard or clearly erroneous findings of fact."[58] Toward that end, this Court "review[s] conclusions of law *de novo* and findings of fact for clear error."[59] Put another way, a ruling by a trial court will be reversed if it did not "g[e]t the law right".[60]

VII. Legal Analysis

A. Mr. Galacki's Legal Claims Against Senate Bill 6

Intervenor-Applicant Galacki brings three sets of claims against SB 6. First, SB 6 violated his rights under the Elections Clause, First Amendment,

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54 Aug. 4 Dutta Decl., Exh. 2, at 4:22.
55 Aug. 4 Dutta Decl., Exh. 2, at 4:24-5:2.
56 *U.S. v. State of Washington*, 86 F.3d 1499, 1503 (citation omitted).
57 *Id.* at 1503 (citations omitted).
58 *Alliance for the Wild Rockies v. Cottrell*, No. 09-35756, 2011 WL 208360 at *3 (Jan. 25, 2011).
59 *Id.* at *3.
60 *Id.* at *3.

and Due Process Clause, when it barred him from running as a write-in candidate in the General Election. Second, SB 6 violated Mr. Galacki's rights under the Elections Clause, First Amendment, Fourteenth Amendment, and the Due Process Clause, when it banned Registrar Logan from counting his write-in vote in the General Election. Finally, SB 6 is poised to violate Mr. Galacki's rights under the Elections Clause, First Amendment, and Fourteenth Amendment, for it will force him – a 2012 Tea Party candidate – to falsely state on the ballot that he has "No Party Preference". Because all but two of Mr. Galacki's claims have not been raised by Plaintiffs' pending Motion for Summary Judgment, this appeal will only focus on those two claims.

B. Mr. Galacki's Unique Elections Clause Claims

Mr. Galacki is entitled to immediately intervene, because Plaintiffs have not raised – and cannot raise – two of his core constitutional claims: namely, SB 6 violated Mr. Galacki's Elections Clause-protected right under *Cook v. Gralike* to (1) run as a write-in candidate for federal office,[61] and (2) cast a vote for a write-in candidate and have his vote counted in a

[61] Plaintiff Daniel Frederick, who was barred from running as a write-in candidate in the May 3, 2011 special general election for Assembly District 4, invoked the First Amendment, but not the Elections Clause. Plaintiffs' Motion for Summary Judgment, at 18:5-19:11, *attached as* Exhibit 25 to Aug. 4 Dutta Decl.

federal election.[62] As the Ninth Circuit has made clear, a party may supplement – and add related claims to – a pleading, if relevant events, transactions, or occurrences have happened after the given pleading has been filed:[63]

> Rule 15(d) is intended to give district courts broad discretion in allowing *supplemental pleadings*. FRCP 15, advisory committee's note. The rule is a tool of *judicial economy and convenience*. Its use is therefore favored.
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> The United States Supreme Court has stated that *new claims, new parties*, and events occurring after the original action are all *properly permitted* under FRCP 15(d).[64]

Significantly, both the U.S. Supreme Court and this Court have encouraged candidates and voters to intervene and bring their claims to election cases – *even on appeal*.[65] Because Mr. Galacki is entitled to intervene, the trial court could have consolidated – and still may consolidate – his as-applied

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[62] Plaintiff Rich Wilson, who cast a write-in vote in the May 3, 2011 special general election for Assembly District 4, did not invoke *Cook v. Gralike*, but instead brought a different Elections Clause claim: namely, a federal statute *enacted pursuant to the authority granted to Congress under the Elections Clause* protects his right as an "an eligible voter to cast a ballot and have that ballot counted." Plaintiffs' Motion for Summary Judgment, at 19:18-19:20, *attached as* Exhibit 25 to Aug. 4 Dutta Decl.

[63] *Keith v. Volpe*, 858 F.3d 467, 473-76 (9th Cir. 1988) (*citing* FRCP 15(d)); *see also Bates*, *supra*, 127 F.3d at 872 (aggrieved voters and candidates permitted to intervene in election case *even on appeal*).

[64] *Keith*, *supra*, 858 F.3d at 473, 475 (emphases added) (*quoting Griffin v. County School Bd.*, 377 U.S. 218, 226-27 (1964) (supplemental pleadings "are well within the basic aim of the rules to make pleadings a *means to achieve an orderly and fair administration of justice*.") (emphases added)).

[65] *See, e.g., Cook v. Gralike*, 531 U.S. 510, 517 n.8 (2001); *Bates*, *supra*, 127 F.3d at 872.

constitutional claims alongside Plaintiffs' pending Motion for Summary Judgment.

1. The Importance of Write-In Candidates

If the candidate who has represented an individual's interests and views is forced to withdraw from the campaign, alters his or her positions or is indicted for alleged felonies, that individual may feel compelled to become a candidate in order to fill the void. Rather than "doing violence" to the election process, the availability of a write-in candidacy provides the flexibility to deal with unforeseen political developments and may help ensure that the voters are given meaningful options on election day.

-- California Supreme Court, *Canaan v. Abdelnour*[66]

Write-in voting has played an important role in local, state, and national politics. Last November, U.S. Senator Lisa Murkowski (R-Alaska) was re-elected as a write-in candidate.[67] In 1982, Ron Packard (R-CA) won his write-in bid for Congress (43rd District) and was re-elected eight times before he retired.[68] Two decades later, write-in candidate Beverly O'Neill won her 2002 race for Long Beach Mayor.[69] In 2004, write-in candidate Donna Frye finished second in the San Diego mayoral election – and she would have won if her voters had not just written in her name, but also

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[66] *Canaan v. Abdelnour*, 710 P.2d 268, 277, 40 Cal.3d 703, 718-19 (Cal. 1985) (emphases added), subsequently overruled on other grounds, *Edelstein v. San Francisco*, 56 P.3d 1029, 29 Cal.4th 164 (Cal. 2002).

[67] *Miller v. Treadwell*, -- P.3d --, No. S-14112 (Alaska Dec. 22, 2010).

[68] Julius Galacki's July 14, 2011 Motion to Intervene, at 11:3-11:4, *attached as* Exhibit 55 to Aug. 4 Dutta Decl.

[69] Julius Galacki's July 14, 2011 Motion to Intervene, at 11:4-11:6, *attached as* Exhibit 55 to Aug. 4 Dutta Decl.

marked the "write in" oval on the ballot.[70] Two years earlier, Anthony Williams waged a successful write-in campaign for Washington, DC Mayor.[71] Other notable write-in candidates include Tonia Reyes Uranga (finished second in a 2010 race for Long Beach City Council) and now-Assemblymember Tom Ammiano (finished second in the 1999 San Francisco mayoral election).[72]

Ironically, by attacking write-in voting, SB 6 seeks to kill off a vital safety valve that would have made its election system stronger. Suppose that SB 6 had been used for last November's gubernatorial election, and that Democrat Jerry Brown and Republican Meg Whitman had been the only two candidates whose names appeared on the November 2010 ballot.

What if Whitman had suddenly suffered a stroke and became paralyzed a few weeks before the November general election? Under SB 6's new rules, Republican voters would face a double bind. First, SB 6 would ban the Republican Party from replacing Whitman.[73] Worse yet, if voters had written in the name of another Republican, SB 6 would force election officials like Registrar Logan to *throw away* their votes:

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[70] *McKinney v. Superior Court*, 21 Cal.Rptr.3d 773, 775 (Cal.Ct.App. 2004).

[71] "Anthony Williams Wins Big in D.C. Democratic Mayoral Primary", JET, Oct. 7, 2002, at 6.

[72] *Edelstein*, *supra*, 56 P.2d 1029, 29 Cal. 4th at 182; Julius Galacki's July 14, 2011 Motion to Intervene, at 11:10-11:12, *attached as* Exhibit 53 to Aug. 4 Dutta Decl.

[73] SB 6-amended Elections Code §8807.

> A person whose name has been written on the ballot as a *write-in candidate* at the general election … *shall not be counted*.[74]

In light of the critical role that write-in candidates have played in our elections, federal courts must scrutinize any attempt to disqualify write-in candidates or disenfranchise the voters who support them.[75]

2. The Fundamental Right to Run as a Write-In Candidate

The United States Supreme Court has repeatedly held that the individual's right to seek public office is inextricably intertwined with the public's fundamental right to vote, and may be limited only where necessary to achieve a compelling state purpose.

-- The Court, *Davies v. Grossmont Union High School District*[76]

Since … SB 6 precludes [write-in] votes from being counted, it *makes no sense* to give candidates the illusion that they can run as a write-in or give voters the illusion that they can write in a candidate's name and have it counted. Making these conforming changes is only controversial because *there 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*."

-- Secretary of State Debra Bowen's office[77]

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

75 "[H]aving granted citizens the right to cast write-in votes, the [State] *must confer the right* in a manner *consistent with the Constitution*." *Libertarian Party v. District of Columbia Bd. of Elections*, 2011 WL 782031, at *6 (D.D.C. Mar. 8, 2011) (emphases added); *see also Grant v. Meyer*, 828 F.2d 1446, 1456 (10th Cir. 1987); *Turner v. District of Columbia Bd. of Elections*, 77 F.Supp.2d 25, 30 (D.D.C. 1999).

76 *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1397 (9th Cir. 1991) (emphases added), *cert. denied*, 501 U.S. 1252 (1991) (*citing Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Lubin v. Parish*, 415 U.S. 709 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972); *Mancuso v. Taft*, 476 F.2d 187 (1st Cir. 1973)); *see also Leonard v. Clark*, 12 F.3d 885,890 (9th Cir. 1994).

77 Julius Galacki's July 14, 2011 Motion to Intervene, at 12:10-12:13, *attached as* Exhibit 53 to Aug. 4 Dutta Decl. Subsequently, Secretary Bowen told the trial court that SB 6 bans individuals like Mr. Galacki from running as write-in candidates in every general election. Secretary of State's May 10, 2011 Statement of Genuine Issues of Material Fact ¶41, *attached as* Exhibit 42 to Aug. 4 Dutta Decl.

Elections Code section 15340 gives every voter the right to cast a write-in vote in "any" election.[78] Furthermore, Sections 8600 and 8601 of the Elections Code expressly give individuals like Mr. Galacki the right to run as write-in candidates for every federal and state office, as long as they file their nomination papers within 14 days of the date of the election.[79] Thus, the statutory deadline to file write-in nomination papers for the General Election fell on **June 28, 2011** (i.e., 14 days before July 12, 2011).

3. Mr. Galacki's Unique Elections Clause Claims

[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 Columbia[80]

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[78] Elections Code §15340.

[79] *Id.* §8600 (specifying requirements to qualify as a write-in candidate; *id.* §8601 (write-in candidates must file their nomination papers within 14 days of the election). Because the Elections Code did not ban write-in votes from being cast, neither *Burdick v. Takushi* nor *Edelstein v. San Francisco* applies here. *Cf. Burdick v. Takushi*, 504 U.S. 428 (1992) (State may ban write-in votes from being cast under the U.S. Constitution); *Edelstein*, *supra*, 56 P.3d 1029, 29 Cal.4th at 169 (to ban write-in candidacies and voting in the general election, a State must first pass a statute that expressly bans write-in votes from being cast).

[80] *Libertarian Party v. District of Columbia Bd.*, 2011 WL 782031, at *6 (D.D.C. Mar. 8, 2011) (emphases added); *see also Grant v. Meyer*, 828 F.2d 1446, 1456 (10th Cir. 1987) ("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 [the State] decided to extend this forum, it *became obligated to do so in a manner consistent with the Constitution*.") (emphases added) (*quoting Georges v. Carney*, 546 F.Supp. 469, 476-77) (N.D. Ill.), *aff'd*, 691 F.2d 297 (7th Cir. 1982)); *Turner v. District of Columbia Bd. of Elections*, 77 F.Supp.2d 25, 30 (D.D.C. 1999).

In addition to the claims that have already been raised by Plaintiffs, Mr. Galacki brings two unique, as-applied Elections Clause claims against SB 6:[81] (1) it unlawfully banned him from running as a write-in candidate in the special general election for Congressional District 36, and (2) it unlawfully forced Registrar Logan not to count the write-in vote that he had cast for himself. As the High Court unanimously ruled in *Cook v. Gralike*, an election regulation 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".[82]

In *Gralike,* the High Court struck down a state statute that aimed to harm federal candidates who did not support term limits. For example, if an incumbent did not support term limits, that law required the following label to be printed beside his or her name on the ballot: "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS."[83] In response, the High Court held that the state statute violated the Elections Clause for at least two reasons. First, the statute was "plainly designed to favor candidates who

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[81] SB 6 implements Proposition 14's Top Two Primary system, which is modeled after Washington State's Top Two Primary system. Julius Galacki's July 14, 2011 Motion to Intervene, at 13:8 n.54, *attached as* Exhibit 53 to Aug. 4 Dutta Decl. In contrast to SB 6, Washington law allows write-in candidacies in the general election and does not ban lawfully cast write-in votes from being counted. RCW 29a.24.311.

[82] *Gralike*, *supra*, 531 U.S. at 523 (*quoting U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995)).

[83] *Gralike*, *supra*, 531 U.S. at 524

[were] willing to support" term limits and "to disfavor those who either oppose term limits entirely or would prefer a different proposal":[84]

> [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 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.[85]

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*[.]"[86]

By barring Mr. Galacki from running as a write-in candidate in the General Election, SB 6 "disfavored" write-in candidates like him and "dictated political outcomes".[87] Specifically, SB 6 unlawfully deprived him of his fundamental right to run as a write-in candidate – which Sections 8600 and 8601 of the Election Code guarantee. Thus, SB 6 was plainly designed to "disfavor" and "handicap" write-in candidates like Mr. Galacki, and designed to "favor" those candidates whose names appeared on the ballot.[88]

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84 *Id.* at 524 (*citing Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).
85 *Gralike, supra*, 531 U.S. at 524 (*quoting Anderson*, *supra*, 375 U.S. at 402) (emphases added).
86 *Gralike, supra*, 531 U.S. at 525 (emphases added).
87 *Id.* at 523.
88 *Id.* at 523-25.

Moreover, SB 6 "dictated political outcomes", for it put Mr. Galacki at a debilitating political disadvantage: it disqualified it from running for office.

Similarly, by forcing Defendant Logan not to count Mr. Galacki's write-in vote, SB 6 "disfavored" write-in voters like him and "dictated political outcomes". Specifically, SB 6 unlawfully deprived of his fundamental right to cast a write-in vote and have it counted in "any" election – a right which Section 15340 of the Election Code guarantees. Thus, SB 6 was plainly designed to "disfavor" and "handicap" voters like Mr. Galacki who cast ballots for write-in candidates, and designed to "favor" voters who cast ballots for candidates whose names appeared on the ballot.[89] Moreover, SB 6 "dictated political outcomes", for it put Mr. Galacki at a debilitating political disadvantage: it forced Registrar Logan to disenfranchise him.

4. Defendants Had No Lawful Authority to Disqualify and Disenfranchise Mr. Galacki

To be sure, Secretary Bowen may argue that they lawfully disqualified and disenfranchised Mr. Galacki, because the State has the authority to ban write-in votes from being cast.[90] However, the plain

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

[90] *Cf. Burdick*, *supra*, 504 U.S. 428 (State may ban write-in votes from being cast under the U.S. Constitution); *Edelstein*, *supra*, 56 P.3d 1029, 29 Cal.4th at 169 (to ban write-in candidacies and voting in the general election, a State must first pass a statute

language of the Elections Code torpedoes their argument. In fact, instead of banning him from casting write-in votes, the Elections Code *explicitly allowed* Mr. Galacki not only to cast write-in votes, but also to *run as a write-in candidate* in every general election. Specifically, Section 15340 of the Elections Code gave (and still gives) voters like Mr. Galacki the right to cast a write-in vote in "any" election. Furthermore, Sections 8600 and 8601 allowed (and still allow) individuals like Mr. Galacki to run as a write-in candidate in every election, as long as they have filed nomination papers at least 14 days before the date of the election. Because SB 6 did not repeal Sections 15340, 8600, or 8601, Secretary Bowen and Registrar Logan[91] had *no lawful authority* either to disqualify Mr. Galacki's write-in candidacy or to throw away lawfully cast his write-in vote.[92]

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that expressly bans write-in votes from being cast).

[91] Registrar Logan also claimed that he could not issue write-in nomination papers to Mr. Galacki, because Secretary Bowen forbade him from doing so: namely, Secretary Bowen's General Election Calendar "contain[ed] no line item or line items regarding the write-in process." Julius Galacki's July 14, 2011 Motion to Intervene, at 16:1 n.64, *attached as* Exhibit 53 to Aug. 4 Dutta Decl. However, California law gives elections officials like Registrar Logan independent authority to interpret and enforce elections laws. *See, e.g., Billig v. Voges*, 273 Cal.Rptr. 91, 96-97, 223 Cal.App.3d 962 (Cal.Ct.App. 1990) (elections official interprets and enforces Elections Code without consulting the Secretary of State); *Farley v. Healey*, 67 Cal.2d 325, 327 (Cal. 1997); *Alliance for a Better Downtown Millbrae v. Wade*, 108 Cal.App.4th 123, 132, 136 (Cal.Ct.App. 2003).

[92] "If there is no ambiguity in the language, we presume the Legislature meant what it said and the *plain meaning of the statute governs*." *Arterberry v. San Diego County*, 182 Cal.App.4th 1528, 1533 (Cal.App. 2010) (emphases added) (*quoting Diamond Multimedia Systems v. Superior Court*, 968 P.2d 539 (Cal. 1999)). Although it made nearly 60 amendments to the Elections Code, SB 6 did not repeal (1) the right to run as a write-in candidate, or (2) the right to cast a write-in vote for a write-in candidate. Consequently, California courts will assume that the Legislature did not intend to amend those other statutes. *See, e.g., Estate of McDill*, 537 P.2d 874, 878 (Cal. 1971).

For her part, Secretary Bowen may resort to two meritless arguments. First, she may claim that Part 8605 or 8606 of SB 6 banned Mr. Galacki from running as a write-in candidate in the General Election.[93] However, neither of those SB 6 provisions repealed Elections Code Sections 8600, 8601, or 15340. Thus, because SB 6 did not ban write-in candidacies, Registrar Logan had no legal authority to bar Mr. Galacki from running as a write-in candidate in the General Election.[94]

As a fallback, Secretary Bowen may insist that the State had the authority to disqualify and disenfranchise Mr. Galacki, because the State has the power to "prescribe the procedural mechanisms for holding congressional elections."[95] Yet contrary to her claims, the U.S. Supreme Court has banned the State's regulatory interest *from even being considered* in Elections Clause cases. In *Gralike*, the High Court made an emphatic,

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[93] SB 6 Parts 8605 and 8606, *codified at* Elections Code §§8605 & 8606. In her Chief Counsel's Mar. 2, 2011 letter to Plaintiffs' counsel, Secretary Bowen claimed that Elections Code Section 8605 banned individuals like Mr. Galacki from running as write-in candidates in the general election. Subsequently, Secretary Bowen reiterated her legal position in a Jan. 26, 2011 memorandum that she sent to Registrar Logan and all other county registrars. Julius Galacki's July 14, 2011 Motion to Intervene, at 16:5 n.66, *attached as* Exhibit 53 to Aug. 4 Dutta Decl. Nevertheless, Secretary Bowen has represented to the trial court that Section 8606, and not Section 8605, banned individuals from running as write-in candidates in the general election. *Id.*

[94] "An as-applied First Amendment challenge contends that a given statute or regulation is unconstitutional as it has been applied to a litigant's particular speech activity." *Legal Aid Services of Oregon v. Legal Services Corp.*, 587 F.3d 1006, 1018 (9th Cir. 2009) (emphasis added) (*citing Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 802-03 (1984)). Thus, instead of deciding whether SB 6 was correctly interpreted, the Court must decide whether Secretary Bowen and Registrar Logan's actual interpretation and enforcement of SB 6 violated Mr. Galacki's fundamental rights.

[95] *See Gralike, supra*, 531 U.S. at 523 (emphasis added) (citation omitted).

unanimous ruling: if a state's election rule violates the Elections Clause, no state interest can save it. Thus, the High Court made it clear that it will strike down any state "regulation" that singles out and targets a class of federal candidates:

> While the precise damage the labels may exact on candidates is disputed between the parties, the labels surely place their targets at a political disadvantage to unmarked candidates for congressional office. Thus, far from regulating the procedural mechanisms of elections, [the statute] attempts to "dictate electoral outcomes." Such "regulation" of congressional elections *simply is not authorized* by the Elections Clause.[96]

In short, the State "simply is not authorized" to politically harm write-in candidates and the voters who support them. Therefore, no state interest could justify disqualifying and disenfranchising Mr. Galacki.

VII. The Trial Court's Order Denying Mr. Galacki's Motion to Intervene Must Be Reversed

Mr. Galacki easily satisfies the requirements to intervene as of right. The Court requires that four criteria to qualify for intervention of right under FRCP 24(a)(2):

1. The applicant must have a "significantly protectable" interest relating to the property or transaction that is the subject of the transaction;

2. The disposition of the action may, as a practical matter, "impair

[96] *Id.* at 525-26 (emphases added) (*quoting U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995)).

or impede" the applicant's ability to protect that interest;

3. The application for intervention must be timely;

4. The applicant's interest "may not be" adequately represented by the existing parties in the lawsuit.[97]

As the Court has made clear, "Rule 24 traditionally receives liberal construction in favor of applicants for intervention."[98]

A. Mr. Galacki Has a "Significantly Protectable" Interest in this Lawsuit

As the trial court correctly ruled, Mr. Galacki has a "significantly protectable" interest in this lawsuit, for it will decide all but two of his legal claims. An applicant has such an interest if (1) "the interest asserted is protectable under some law," and (2) there is a "relationship between the legally protected interest and the claim at issue."[99] Here, Mr. Galacki seeks to defend and vindicate his fundamental right to run for office and cast a vote that is counted. Thus, his interest is protectable under the U.S. Constitution, and all of his claims are closely related to those raised by Plaintiffs. As the Court has made clear, any voter or candidate whose fundamental rights have been harmed (or are threatened with harm) has

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[97] *U.S. v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) (*quoting U.S. v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002)).

[98] *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003), *cert. denied sub. nom. Hoohuli v. Lingle*, 540 U.S. 1017 (2003) (emphases added).

[99] *Wilderness Soc'y v. U.S. Forest Service*, 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc).

shown a "significantly protectable" interest.[100] Accordingly, Mr. Galacki has satisfied the first requirement for intervention.

B. Disposition of This Case Will Impair and Impede Mr. Galacki's Ability To Protect His Legal Interest

Mr. Galacki also qualifies for intervention of right, because Plaintiffs' pending Motion for Summary Judgment will impair and impede his ability to protect his legal claims against SB 6. As discussed earlier, all but two of Mr. Galacki's legal claims have been raised by Plaintiffs. If the Court rules on Plaintiffs' Motion without hearing his claims, Mr. Galacki's will suffer "a practical impairment of his interests as a resulting of the pending litigation."[101] In this light, the Court has held that a voter and candidate like Mr. Galacki "has a significantly protectable interest that is subject to impairment."[102]

C. Mr. Galacki's Interests Cannot Be Adequately Represented by the Existing Parties

Contrary to the trial court's ruling, Mr. Galacki must be allowed to intervene, for the present parties cannot adequately represent his interests. The Court weighs three factors in deciding whether existing parties can adequately represent a prospective intervenor's interests: (1) whether the

100 *Bates*, *supra*, 127 F.3d at 873 n.4.
101 *Wilderness Soc'y*, *supra*, 630 F.3d at 1179.
102 *Bates*, *supra*, 127 F.3d at 873 n.4.

interest of an existing party "is such that it will undoubtedly make all the intervenor's arguments"; (2) whether the existing party is "capable and willing to make such arguments"; and (3) whether the prospective intervenor would "offer any necessary elements" to the litigation that other parties would "neglect".[103] Toward that end, a prospective intervenor has the "minimal" burden of making such a showing: he or she "need only show that representation of its interests by existing parties '*may be*' inadequate".[104]

Here, Mr. Galacki's interests will not be adequately represented for one simple reason. Namely, Plaintiffs have not and cannot raise two of his core claims under the Elections Clause: that SB 6 (1) violated his fundamental right to run for office under *Cook v. Gralike*, and (2) violated his fundamental right under to cast a write-in vote and have it counted under *Cook v. Gralike*.[105]

As the trial court noted, Plaintiffs Daniel Frederick and Rich Wilson, respectively, have also brought write-in claims stemming from the recent state election in Assembly District 4. But contrary to the trial court's ruling, *Gralike* only applies to elections involving federal candidates with respect to

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[103] *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (citations omitted).

[104] *Id.* at 823 (emphases added) (*quoting Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972)).

[105] 531 U.S. 510.

the Elections Clause.[106] Specifically, Plaintiff Daniel Frederick (who was barred from running as a write-in candidate in the May 3, 2011 special general election for Assembly District 4) invoked the First Amendment, but not the Elections Clause.[107]

For his part, Plaintiff Rich Wilson (who cast a write-in vote in the May 3, 2011 special general election for Assembly District 4) did not invoke *Gralike*, but instead brought a different Elections Clause claim: namely, a federal statute enacted pursuant to the authority granted to Congress under the Elections Clause protects his right as an "an eligible voter to cast a ballot and have that ballot counted."[108] Because Plaintiffs Frederick and Wilson did not and cannot raise Mr. Galacki's unique Elections Clause claims, they cannot adequately represent Mr. Galacki's interests.

Secretary Bowen may argue that Mr. Galacki should still be banned from intervening, because both he and Plaintiffs shares the same "ultimate objective": to strike down SB 6. To be sure, a "presumption of adequacy" arises if a prospective intervenor and an existing party share the same "the

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[106] *Gralike, supra*, 531 U.S. at 523 (examining when a state exceeds its power to "prescribe the procedural mechanisms for holding congressional elections") (emphasis added).

[107] Plaintiffs' May 6, 2011 Motion for Summary Judgment, at 18:5-19:11, *attached as* Exhibit 25 to the Aug. 4 Dutta Decl.

[108] Plaintiffs' May 6, 2011 Motion for Summary Judgment, at 19:18-19:20, *attached as* Exhibit 25 to the Aug. 4 Dutta Decl.

same ultimate objective."[109] However, prospective intervenors may rebut that presumption if they do not share "sufficiently congruent" interests.[110]

Here, the interests of Mr. Galacki and Plaintiffs diverge in one critical respect: unlike Mr. Galacki, Plaintiffs do not seek to run for Congressional office in the 2011-12 election cycle. Because none of them have standing as future candidates, it may prove difficult for Plaintiffs to expedite this case – and ensure that it is resolved before the Court of Appeal rules on the related state litigation.[111] As mentioned earlier, the Court of Appeal has set a Sept. 7, 2011 hearing to hear State Court Plaintiffs' claims against Senate Bill 6. There, State Court Plaintiffs have appealed the Superior Court's denial of their request for a preliminary injunction against SB 6. Because the Court of Appeal had earlier barred Plaintiff Chamness from intervening and bringing his as-applied claims,[112] it will only rule on State Court Plaintiffs' facial claims against SB 6.

Two significant risks emerge if the Court of Appeal issues a ruling before this Court does. First, there is a possibility that the Court of Appeal's ruling regarding SB 6's constitutionality may differ from that of this

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109 *Berg*, *supra*, 268 F.3d at 823.

110 *Id.* at 823; *see also Bates*, *supra*, 127 F.3d at 873 n.4.

111 *See Bates*, *supra*, 127 F.3d at 873 n.4 (voters and candidates allowed to intervene because their interests would not have been adequately represented by the existing parties).

112 Subsequently, the Court of Appeal also barred a voter's amicus letter that showed how SB 6 could trick voters into casting write-in votes without knowing that those votes would not be counted. Aug. 4 Dutta Decl., Exh. 69 .

Court.[113] Because Secretary Bowen and Registrar Logan are also parties to that litigation, there is a possibility that either of them[114] *may refuse to follow this Court's ruling* – especially given that Plaintiffs' Motion for Summary Judgment does not seek injunctive relief.[115] In such a scenario, Mr. Galacki would be forced to file a separate lawsuit to defend his rights as a 2012 Tea Party candidate – an outcome that this Court expressly disfavored in *Bates v. Jones*:

> Even *more important*, however, are the *rights of the voters*. It is not too late to ensure that *their interests in fairness and uniformity* are protected if all that is required is to permit candidates … to become bound by our decision. The state's electoral process would be subject to disruption if eligibility in each district has to be decided in a *separate lawsuit*. Surely all parties should want uniformity in the … election. Whatever the outcome of this case, intervention can only be a step in that direction.
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> Under these circumstances, and given the fundamental nature of the right at stake, *we find it both "imperative" and in the public interest that we allow these applicants to intervene*.[116]

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[113] To date, the California Supreme Court has not ruled on the merits of SB 6's constitutionality, whether facial or as-applied. *Cf. id.* at 873 & n.5 (California Supreme Court "has yet to disregard a directly applicable decision of this Court on a question of federal law.").

[114] California law gives elections officials like Registrar Logan independent authority to interpret and enforce elections laws. *See, e.g., Billig*, *supra*, 273 Cal.Rptr. 91, 96-97, 223 Cal.App.3d 962 (elections official interprets and enforces Elections Code without consulting the Secretary of State); *Farley*, *supra*, 67 Cal.2d at 327; *Alliance for a Better Downtown Millbrae*, *supra*, 108 Cal.App.4th at 132, 136.

[115] Elections officials have the authority to enforce a statute *even if* an appeals court has declared it unconstitutional and unenforceable. *Billig*, *supra*, 273 Cal.Rptr. at 96, 223 Cal.App.3d 962 (*citing* CAL.CONST. art. iii §3.5 (a) & (c)).

[116] *Bates*, *supra*, 127 F.3d at 873-74 (emphases added, quotations in original).

Simply put, Plaintiffs cannot adequately defend the fundamental rights of Mr. Galacki: a Tea Party candidate who must pull nomination papers beginning *December 30*, 2011 in order to waive the $1,740.00 Congressional filing fee. Because Plaintiffs do not share "sufficiently congruent" interests with Mr. Galacki, he must be granted intervention of right.[117]

D. Mr. Galacki's Motion to Intervene Was Timely

Finally, the trial court did not "get the law right" when it ruled that Mr. Galacki had not brought a timely Motion to Intervene.[118] Courts consider three factors in determining whether an applicant has brought a timely motion to intervene: (1) the "stage of the proceeding" when an applicant seeks to intervene, (2) the prejudice to other parties, and (3) "the reason for and length of the delay."[119] Here, Mr. Galacki filed his ex parte Application *two days* after he suffered irreparable harm, when his write-in vote was not counted. Furthermore, in *Bates v. Jones*, this Court admonished courts to permit voters and candidates to vindicate their rights in election cases – even after a case has been appealed.[120] Having rushed to

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117 *Berg*, *supra*, 268 F.3d at 823; *see also Bates*, *supra*, 127 F.3d at 873 n.4 (voters and candidates allowed to intervene because their interests would not have been adequately represented by the existing parties).

118 *See Cottrell*, *supra*, 2011 WL 208360 at *3.

119 *Alisal*, *supra*, 370 F.3d at 921.

120 *Bates*, *supra*, 127 F.3d at 873-74 (emphasis added, quotation marks omitted).

Court only hours after his write-in vote was not counted, Mr. Galacki has unquestionably brought a timely motion to intervene.

1. The Trial Court Disregarded the Legal Standard Laid Down by This Court in *Bates v. Jones* and *Keith v. Volpe*

The trial court did not "get the law right" when it ruled that Mr. Galacki's Motion to Intervene was not timely. First, the trial court barred Mr. Galacki from intervening, because it intends to rule against Plaintiffs' Motion for Summary Judgment – and rule in favor of the non-moving parties – "in a matter of weeks."[121] Because the Court intends to rule against the legal claims brought by Plaintiffs and Mr. Galacki, both case law the principle of fairness demands that Mr. Galacki be allowed to intervene – especially since the trial court previously gave Secretary Bowen *one extra week* to oppose Plaintiffs' Motion for Summary Judgment.[122]

More troubling, the trial court disregarded the clear legal standard laid down by this Court in *Keith v. Volpe* and *Bates v. Jones*. Under *Keith*, a party may supplement – and add related claims to – a pleading, if relevant

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[121] Trial court's July 22, 2011 order, at 4:11, attached as Exhibit 2 to the Aug. 4 Dutta Decl.

[122] *Kassbaum v. Steppenwolf Prods.*, 236 F.3d 487, 494 (9th Cir. 2000) (if a trial court seeks to grant summary judgment in favor of a non-moving party that has not cross-filed for summary judgment, it must give the moving party "an adequate opportunity" to present any material facts or legal grounds that would defeat summary judgment); *see also Bates*, 127 F.3d at 873-74; *Keith v. Volpe*, 858 F.3d 467, 473-76 (9th Cir. 1988).

events, transactions, or occurrences have happened after the given pleading has been filed:[123]

> Rule 15(d) is intended to give district courts broad discretion in allowing *supplemental pleadings*. FRCP 15, advisory committee's note. The rule is a tool of *judicial economy and convenience*. Its use is therefore favored.
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> ****
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> The United States Supreme Court has stated that *new claims, new parties*, and events occurring after the original action are all *properly permitted* under FRCP 15(d).[124]

Just as important, this Court has firmly rejected attempts to bar voters and candidates from intervening in election cases on the basis of "untimeliness". In fact, the *Bates* Court held that voters and candidates must even be allowed to intervene *on appeal*:[125]

> The state … has repeatedly expressed its legitimate desire to avoid to the greatest extent possible any unnecessary inequities and delay in the upcoming election cycle. We agree. Unlike the state, however, we believe that the *most effective* way to achieve this objective is to *allow as many parties as possible* who seek to run for office contrary [to the challenged statute] to be bound by our decision.[126]

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[123] *Keith*, 858 F.3d at 473-76 (*citing* FRCP 15(d)); *see also Bates*, *supra*, 127 F.3d at 872 (aggrieved voters and candidates permitted to intervene in election case *on appeal*).

[124] *Keith*, *supra*, 858 F.3d at 473, 475 (emphases added) (*quoting Griffin v. County School Bd.*, 377 U.S. 218, 226-27 (1964) (supplemental pleadings "are well within the basic aim of the rules to make pleadings a *means to achieve an orderly and fair administration of justice*.") (emphases added)).

[125] *Bates*, *supra*, 127 F.3d at 873.

[126] *Id.* at 872 (emphases added). Contrary to the trial court's ruling, *U.S. v. Alisal Water Corp.* did not bar Mr. Galacki from intervening. Indeed, as *Alisal* itself noted, intervention "has been granted after settlement agreements were reached". *U.S. v. Alisal*, 370 F.3d 915 (9th Cir. 2004) (emphasis added); *see also Bates*, *supra*, 127 F.3d at 873; *Forest Conservation Council v. U.S. Forest Svc.*, 66 F.3d 1489, 1499 (9th Cir. 1995).

Here, Mr. Galacki rushed to the trial court with his related claims against SB 6 in a timely manner: less than 48 hours after his write-in vote was not counted and *more than five weeks* before the hearing on Plaintiffs' Motion for Summary Judgment. Consequently, he met the requirements of timeliness under *Bates* and *Volpe*.

2. The Trial Court Mistakenly Ruled that Mr. Galacki's Intervention Would Prejudice the Opposing Parties

Second, the trial court did not "get the law right" when it ruled that allowing Mr. Galacki to intervene would prejudice the opposing parties. As shown earlier, the *Bates* Court has found it "both imperative and in the public interest" that aggrieved voters and candidates be allowed to intervene and vindicate their rights in cases involving the fundamental right to vote – even after a district court has resolved a case.[127] Furthermore, neither Secretary Bowen nor Intervenors-Defendants told the trial court that allowing Mr. Galacki to intervene would prejudice their interests.[128] Equally important, the Court held that the state could not be prejudiced if aggrieved candidates and voters like Mr. Galacki were allowed to intervene, for allowing them to do so would serve the public interest:

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127 *Bates*, *supra*, 127 F.3d at 873-74 (emphasis added, quotation marks omitted).

128 Aug. 4 Dutta Decl., Exhs. 50 & 52.

> [T]he state does not assert that it will be prejudiced by intervention, and *we find no reason to think otherwise*. In fact, the state, like the public, will benefit from the uniform applicability of its laws. We therefore deem the first motion timely and grant … intervention.[129]

Because the district court had not yet ruled on Plaintiffs' pending Motion for Summary Judgment, it should have allowed Mr. Galacki to intervene and incorporate his as-applied claims into Plaintiffs' Motion.

Moreover, the facts regarding Mr. Galacki's claims are straightforward and easily verifiable by the parties:

1. Mr. Galacki is registered to vote in Congressional District 36.[130]

2. On June 14, 2011, Mr. Galacki asked Registrar Logan to issue him nomination papers in order to run as a write-in candidate in the July 12, 2011 General Election for Congressional District 36.[131]

3. Mr. Galacki was barred from running as a write-in candidate in the General Election.[132]

4. Mr. Galacki cast a write-in ballot for himself in the General Election.[133]

5. Mr. Galacki's write-in vote was not counted on July 12, 2011.[134]

6. Mr. Galacki recently changed his party affiliation *from the Democratic Party to the Tea Party* in order to call attention to

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129 *Id.* at 874 (emphases added, citations omitted).
130 Galacki Decl. ¶1; Dutta Decl., Exh. 6.
131 Dutta Decl. ¶8 & Exh. 1.
132 Galacki Decl. ¶¶11, 12; Dutta Decl. ¶¶9, 10, 11 & Exh. 6.
133 Galacki Decl. ¶¶10, 12 & Exh 2; Dutta Decl. Exh. 6.
134 Galacki Decl. ¶¶12, 13; Dutta Decl. ¶12 & Exh. 6.

how the new rules of Proposition 14's Top Two Primary violate our fundamental rights.[135]

7. Finally, Mr. Galacki intends to run for Member of the U.S. Congress, as a candidate with the party affiliation of the Tea Party.[136]

Equally important, all of Mr. Galacki's claims – which Defendants have now had *three weeks* to review – involve the same case law that the parties have already briefed at great length. Specifically, Mr. Galacki bases his as-applied Elections Clause claims entirely on *Cook v. Gralike* (531 U.S. 510), an unanimous 2001 Supreme Court opinion that was first cited in Plaintiffs' Feb. 18, 2011 Motion for Preliminary Injunction.[137] In this light, the parties will be able to easily assess and respond to Mr. Galacki's claims.[138]

3. No Legal Authority Barred Mr. Galacki from Bringing As-Applied Claims Against SB 6

Finally, the trial court did not "get the law right" when it invented a new requirement for intervention: namely, a prospective intervenor must be kept out if he or she seeks to bring any as-applied constitutional claims. No appellate court has imposed such a requirement. In fact, the Supreme Court has admonished voters and candidates to bring as-applied claims when

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135 Galacki Decl. ¶¶2, 15 & Exh. 1.
136 Galacki Decl. ¶¶14, 19.
137 Aug. 4 Dutta Decl., Exh. 64, at p.14
138 Sufficient time remains for the parties to fully brief Mr. Galacki's two unique Elections Clause claims before the trial court holds its hearing on Plaintiffs' Motion for Summary Judgment.

challenging election laws.[139] Furthermore, this Court has made it clear that any voter or candidate may intervene in a case challenging an election law, if he or she brings a facial challenge to that law with respect to an upcoming election.[140]

In addition to his two as-applied claims under the Elections Clause, Mr. Galacki brings a facial claim as a Tea Party candidate for Congress: namely, SB 6 will unlawfully (1) force him to falsely state on the 2012 ballot that he has "No Party Preference", and (2) deprive him of this constitutional right to use the ballot label of "Independent"). Because Mr. Galacki has challenged SB 6's constitutionality with respect to the 2012 election, the trial court was required to allow him to intervene.

VIII. Conclusion

The controlling principle for our decision is the need for uniformity in the … election.

-- The Court, *Bates v. Jones*[141]

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[139] *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008).

[140] *Bates*, *supra*, 127 F.3d at 872. Contrary to the trial court's ruling, *Edelstein v. San Francisco* does not apply here. In a nutshell, the section cited by the trial court does not bar voters or candidates from bringing as-applied claims, but instead holds that the State has the authority to ban voters from casting write-in ballots in the general election. *Edelstein v. San Francisco*, 56 P.2d 1029, 29 Cal.4th 164, 178 (Cal. 2002). In contrast, SB 6 allows voters to cast write-in ballots in the general election, but bans those votes from being counted. SB-6 amended Elections Code §13207 (requiring ballots to allow voters to cast write-in votes in every election); SB-6 amended Elections Code §8606 (banning write-in votes cast in the general election from being counted).

[141] *Bates*, *supra*, 27 F.3d at 872 (emphases added).

Simply put, it is not too late to allow Mr. Galacki to defend and vindicate his fundamental rights. As this Motion has compellingly shown, Mr. Galacki must be allowed to intervene as a matter of law. It is not too late to re-affirm the directly applicable holding of *Bates v. Jones*, which the trial court wholly disregarded. It is not too late to brief and hear Mr. Galacki's claims alongside Plaintiffs' pending Motion for Summary Judgment. Finally, it is not too late to prevent a rash of separate state and federal lawsuits filed from "disrupti[ng]" the looming 2012 statewide election.[142] Therefore, this Court must speedily reverse the trial court's denial of Tea Party candidate Julius Galacki's Motion to Intervene.

Aug. 4, 2011

Respectfully submitted,

/s/_____

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142 *See id.* at 873.

CERTIFICATE OF SERVICE

On Aug. 5, 2011, I electronically served an electronic copy, via ECF, of this Emergency Motion for Expedited Appeal and the accompanying Declaration of Gautam Dutta in Support of Emergency Motion for Expedited Appeal, and Request for Judicial Notice in Support of Emergency Motion for Expedited Appeal.

/s/_____

GAUTAM DUTTA