No. 11-55534

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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MICHAEL CHAMNESS,

Plaintiff / 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

_____

ON APPEAL FROM A CENTRAL DISTRICT OF CALIFORNIA ORDER DENYING MICHAEL CHAMNESS' MOTION FOR PRELIMINARY INJUNCTION

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EMERGENCY MOTION FOR EXPEDITED HEARING AND INJUNCTION PENDING APPEAL

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GAUTAM DUTTA
Attorney for Appellant Michael Chamness
Gautam Dutta, Attorney-at-Law
39270 Paseo Padre Pkwy # 206
Fremont, CA 94538
415.236.2048
213.405.2416 fax
Dutta@BusinessandElectionLaw.com

CIRCUIT RULE 27-3 CERTIFICATE

1. Telephone numbers and addresses of counsel for the parties

a. Counsel for Plaintiff and Appellant Michael Chamness

Gautam Dutta (Dutta@BusinessandElectionLaw.com)
415.236.2048
Gautam Dutta, Attorney-at-Law
39270 Paseo Padre Pkwy # 206
Fremont, CA 94538

b. Counsel for Defendant and Appellee Debra Bowen

George Waters (George.Waters@doj.ca.gov)
916.323.8050
Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

c. Counsel for Defendant and Appellee Dean Logan

Brandi Moore (BMoore@counsel.lacounty.gov)
213.974.1832
Kenneth Hahn Hall of Administration
500 W. Temple St., Room 648
Los Angeles, CA 90012

d. Counsel for Intervenors-Defendants and Appellees

Marguerite Leoni (mleoni@nmgovlaw.com)
Chris Skinnell (cskinnell@nmgovlaw.com)
415.389.6800
Nielsen Merksamer Parrinello Gross & Leoni LLP
2350 Kerner Blvd., Ste. 250
San Rafael, CA 94901

2. Facts Showing the Existence and Nature of the Emergency

Unless he secures immediate, injunctive relief by tomorrow (April 1, 2011), Appellant Michael Chamness' fundamental right to run for office will be irreparably harmed. In 48 hours, vote-by-mail ballots (the "Congressional Ballots") for the May 17, 2011 election in Congressional District 36 are scheduled be mailed to overseas and military voters.

Unless this Court intercedes, Coffee Party candidate Michael Chamness, whose name will appear on the ballot in that election, will be unlawfully banned from using the ballot label of "Independent", and will instead be forced to use the ballot label of "No Party Preference". In stark contrast, major-party candidates in that election – including Secretary of State Debra Bowen, who is defending the election law at issue – *will be allowed to list their party's name* on the ballot.

On Saturday (Apr. 2, 2011), the first batch of the Congressional Ballots is scheduled to be mailed to overseas and military voters, who comprise *0.75 percent* of the registered voters in Congressional District 36. The remaining – and larger – batch of Congressional Ballots must be made available to all vote-by-mail voters (i.e., not just overseas and military voters) *three weeks later*, on April 23, 2011.

Yesterday, the District Court denied Appellant Chamness' Motion for Preliminary Injunction, which was filed on February 18, 2011 and heard on March 21, 2011. Because he will suffer irreparable harm *as soon as the first Congressional Ballot has been mailed*, Appellant Chamness urges the Court to immediately enjoin Appellee Dean Logan from mailing the Congressional ballots this Saturday. In this manner, the Court will maintain the status quo while it considers the merits of Mr. Chamness' *as-applied* constitutional challenge.[1]

3. When and How Counsel Notified

I notified counsel for Appellee Dean Logan by a phone call to his counsel Brandi Moore at 2:58 pm yesterday. During that call, I told her that my client would seek emergency relief from the Ninth Circuit today. Specifically, I told her that my client would file an emergency motion for expedited hearing and injunction pending 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] According to counsel for Appellee Dean Logan, all vote-by-mail ballots (not just the overseas and military ballots) are scheduled to be printed on April 13, 2011. *See* Mar. 31, 2011 Declaration of Gautam Dutta ¶5. According to Secretary Bowen's election calendar, those ballots must then be made available to voters on April 23, 2011. ER 95 ¶20. For this reason, Appellant Chamness respectfully requests the Court to rule on his appeal by April 13, 2011.

I notified counsel for Appellee Debra Bowen by a telephone call to her counsel George Waters at 4:50 pm yesterday. During that call, I told him that my client would seek emergency relief from the Ninth Circuit today. Specifically, I told him that my client would file an emergency motion for expedited hearing and injunction pending appeal.

I notified counsel for Intervenors - Appellees by a telephone call to Marguerite Leoni at approximately 4:54 pm yesterday. Because she was in the office but not available, I left her a detailed voicemail, in which I told her that my client would seek emergency relief from the Ninth Circuit today. Specifically, I told her that my client would file an emergency motion for expedited hearing and injunction pending appeal

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

4. Submission to the District Court

Appellant Chamness had asked the trial court for the full relief sought here, by way of a Motion for Preliminary Injunction filed on February 18, 2011 (the "PI Motion"). Specifically, his PI Motion asked that Appellees Debra Bowen and Dean Logan be enjoined from using California's new election rules for the looming election in Congressional District 36. The trial court heard oral argument on the PI Motion on March 21, 2011. On

March 23, 2011, Appellant Chamness notified the trial court that the first batch of Congressional Ballots was scheduled to be printed on March 30, 2011.

Because the District Court had not ruled on the PI Motion as of the afternoon of March 28, 2011 (i.e., less than 48 hours before the Congressional Ballots were scheduled to be printed), Appellant filed a Petition for Writ of Mandamus with this Court at 4:50 pm that evening. The next day, this Court denied the Petition, but asked the trial court to "act promptly on petitioner's motion for a preliminary injunction."[2] Yesterday (Mar. 30, 2011), the trial court issued an order denying Appellant's PI Motion. Shortly thereafter, Appellant filed his Notice of Appeal.

Dated: Mar. 31, 2011

/s/_____

GAUTAM DUTTA

[2] ER 49-50.

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> *The ballot is the last thing the voter sees before he makes his choice.*
>
> -- Chief Justice Roberts, former Chief Justice Rehnquist, and Justice Alito[3]

> *All animals are equal. But some animals are more equal than others.*
>
> -- George Orwell, *Animal Farm*

I. Introduction and Summary

Unless this Court takes action by tomorrow (March 31, 2011), Congressional candidate Michael Chamness' fundamental right to run for office will be irreparably harmed. If this Motion is not granted, Appellant Chamness, who is affiliated with the Coffee Party, will be unlawfully banned from using the ballot label of "Independent". Instead, he will be forced to falsely state on the ballot that he has "No Party Preference". In stark contrast, major-party candidates in this election – including Secretary of State Debra Bowen, who is defending the election law at issue – *will be allowed to state their party's name* on the ballot.[4]

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

[4] Yesterday, Secretary Bowen released the certified list of candidates whose names will appear on the ballot in the special primary election in Congressional District 36. Mar. 31, 2011 Declaration of Gautam Dutta, Exh. 1. While Secretary Bowen was allowed to use the ballot label of "Democratic", Mr. Chamness was assigned the ballot

In *48 hours*, the first batch of ballots (the "Congressional Ballots") are scheduled to be mailed to overseas and military voters, who comprise *0.75 percent* of the registered voters in Congressional District 36.[5] The remaining – and larger – batch of Congressional Ballots must be made available to all vote-by-mail voters (i.e., not just overseas and military voters) *three weeks later*, on April 23, 2011.[6]

Two years ago, the Legislature stealthily passed Senate Bill 6, an invidious law that even Secretary of State Debra Bowen has conceded is not "permissible". In a radical departure, Senate Bill 6 ("SB 6") allows major-party candidates to list their party's name on the ballot, while forcing minor-party candidates to use the ballot label of "No Party Preference". By banning minor-party candidates like Appellant Chamness from using the party label of "Independent", SB 6 not only disregarded a *century-old practice* in California, but flouted critical precedent from both this Court and the U.S. Supreme Court.

Unless he secures immediate, injunctive relief, Coffee Party candidate Michael Chamness, whose name will appear on the ballot in that election, will be unlawfully banned from using the ballot label of "Independent", and

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label of "No Party Preference". *Id.* Exh. 1, at 2 & 4.

[5] ER 94, 97-98.

[6] Apr. 23, 2011 is the first day on which every voter (not just overseas and military voters) may cast vote-by-mail ballots. ER 95.

will instead be forced to use the ballot label of "No Party Preference". In stark contrast, major-party candidates in that election – including Secretary of State Debra Bowen, who is defending the election law at issue – *will be allowed to list their party's name* on the ballot.

On Saturday (Apr. 2, 2011), the first batch of the Congressional Ballots is scheduled to be mailed to overseas and military voters, who constitute *0.75 percent* of the registered voters in Congressional District 36. The remaining – and larger – batch of Congressional Ballots must be made available to all vote-by-mail voters (i.e., not just overseas and military voters) *three weeks later*, on April 23, 2011.

Yesterday, the District Court denied Appellant Chamness' Motion for Preliminary Injunction, which was filed on February 18, 2011 and heard on March 21, 2011. Appellant Chamness will suffer irreparable harm *as soon as the first Congressional Ballot has been mailed*. Thus, because Appellant's underlying Motion for Preliminary Injunction will become moot[7] in a matter of hours, the Court must review the "serious questions" raised by his Motion.[8] Accordingly, Appellant Chamness urges the Court to

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[7] *See Matsumoto v. Pua*, 775 F.2d 1393, 1395 (9th Cir. 1985); *Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 847 F.2d 1389, 1391 (9th Cir. 1988).

[8] *See also Alliance for the Wild Rockies v. Cottrell*, 2011 WL 208360, at *4 (9th Cir. Jan. 25, 2011) (it is appropriate to grant preliminary injunction if the plaintiff raises "serious questions" on the merits and the balance of equities sharply tilts in his or her favor).

immediately enjoin Appellee Dean Logan from mailing the Congressional ballots on Saturday. In this manner, the Court will maintain the status quo while it fully considers the merits of Mr. Chamness' *as-applied* constitutional challenge.[9]

II. Issues Presented

A. Whether a Legislature-passed state statute, as applied, stifles core political speech under *Rubin v. City of Santa Monica* and *Rosen v. Brown*,[10] by banning minor-party[11] candidates from using the ballot label of "Independent".

B. Whether a Legislature-passed state statute that has already been applied violates the U.S. Constitution's Elections Clause[12] under *Cook v. Gralike*;[13] because it forces minor-party federal candidates to use the ballot

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[9] According to counsel for Appellee Dean Logan, all vote-by-mail ballots (not just the overseas and military ballots) are scheduled to be printed on April 13, 2011. *See* Mar. 31, 2011 Declaration of Gautam Dutta ¶5. According to Secretary Bowen's election calendar, those ballots must then be made available to voters on April 23, 2011. ER 95 ¶20. For this reason, Appellant Chamness respectfully requests the Court to rule on his appeal by April 13, 2011.

[10] *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002) (*citing with approval Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992)).

[11] As defined below, a "minor-party" candidate is not affiliated with a "major", or state-recognized, party (e.g., the Republican Party or the Democratic Party).

[12] U.S. CONST. art. i §4 cl.1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.").

[13] *Gralike*, *supra,* 531 U.S. 510 .

label of "No Party Preference", while allowing their major-party competitors to list their party's name on the ballot.

C. Whether a preliminary injunction should be granted, where a Legislature-passed state statute that has already been applied threatens to irreparably harm a minor-party candidate's fundamental rights under the First Amendment, Fourteenth Amendment, and the Elections Clause.[14]

III. Statement: Legal Background

A. Party Labels under the Former "Qualified Party" Election System

Had the election to replace former Congressmember Jane Harman been held before January 1, 2011, Appellant Chamness *could have stated on the ballot that he is "Independent"* – as candidates had been allowed to do between 1891 and December 31, 2010.[15] Moreover, 24 states currently allow minor-party candidates to state their party's name on the ballot.[16] Under the former "qualified party" election system, political parties were

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[14] *See Rosen, supra*, 970 F.2d 169 (core political speech protected by the First and Fourteenth Amendments); *Rubin v. City of Santa Monica*, *supra*, 308 F.3d at 1015 (agreeing with *Rosen*'s analysis of core political speech); *Gralike*, *supra*, 531 U.S. 510 (Elections Clause bans the State from discriminating against candidates on the basis of their political viewpoints).

[15] ER 257:15-257:16 & n.2. Between 1891 and 1915, California law permitted minor-party candidates to state their party's name on the ballot. In 1912, a minor-party candidate (William Kent of the Progressive Party) was elected by California's 1st Congressional District. *Id.*

[16] ER 111-12.

classified into two categories: qualified ("major" or state-recognized) parties and non-qualified ("minor" or non-state-recognized) parties. Only qualified parties were entitled to hold party primaries.[17]

Every even-numbered year, voters had at least two chances to vote for state and federal candidates: (1) the qualified-party primary election, where candidates from each qualified party would vie for their party's nomination;[18] and (2) the November general election, where the nominees (top votegetters) from each qualified party would all face off against (a) minor-party candidates like Appellant Chamness, and (b) write-in candidates.

In special elections, voters had up to two chances to vote: (1) the "all party" primary election, where all candidates squared off regardless of party. If a candidate won a majority (50 percent plus 1), he or she would win outright. Otherwise, the top votegetter from each qualified party would advance to the general election, where they would all square off against minor-party candidates and write-in candidates.

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[17] *Libertarian Party v. Eu*, 620 P.2d 612, 28 Cal.3d 535, 540 (Cal. 1980) ("[T]he Legislature … defined 'party' as a political organization that has '*qualified for participation in any primary election*.'") (emphases added).

[18] Since 2001, unaffiliated voters (i.e., those who "decline to state" a party preference) have been allowed to vote in every Democratic and Republican primary for state and federal office (excluding Presidential primaries). *See* Elections Code §13102(b) (giving qualified parties the option of allowing "decline to state" voters to vote in their primaries).

Under the "qualified party" election system, qualified-party candidates could state their party's name on the ballot. In addition, all minor-party candidates – who are deemed by the California Supreme Court to have "independent" (i.e., minor-party) status[19] – could state on the ballot that they were "Independent".[20] Thus, if Mr. Chamness had run in a special election under the "qualified party" election system, he could have stated on the ballot that he is "Independent".

B. Budgetary Cause, Electoral Effect

Two years ago, then-State Senator Abel Maldonado cast the deciding vote to pass the state budget.[21] In exchange for his vote, Maldonado demanded a ballot measure that would eliminate the qualified-party election system.[22] The Legislature obliged by (1) putting Proposition 14 on the June 8, 2010 ballot, and (2) passing SB 6, which implemented the provisions of Proposition 14.[23] Both SB 6 and Proposition 14 were authored by Maldonado.[24]

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19 *Eu. supra*, 620 P.2d 612, 28 Cal.3d at 540 (defining "independent" candidates as those who "are independent of qualified political parties") (emphasis added).

20 Elections Code §13105(c) [before it was amended on January 1, 2011 by SB 6].

21 ER 113.

22 ER 113.

23 ER 113-14.

24 ER 114.

Between 3:40 am and 6:55 am on February 19, 2009, the Legislature passed SB 6, without holding a single hearing or giving the public any notice.[25] Simultaneously, the Legislature voted to put Proposition 14 on the June 8, 2010 ballot.[26] Subsequently, the Secretary of State's June 8, 2010 Voter Information Guide for Proposition 14 *did not provide either a summary or the text of SB 6*, which fleshes out *critical details* of Proposition 14.[27] On June 8, 2010, a narrow majority of voters approved Proposition 14.[28]

C. SB 6 and Proposition 14's "Top Two" Primary

On January 1, 2011, SB 6 and Proposition 14 abolished the "qualified party" election system, and spawned an untested process for electing our federal and state officials. Under SB 6's new rules, all candidates, irrespective of their party identification, square off against one another in a primary (first-round) election. Except for special elections,[29] the top two votegetters from the primary election will automatically advance to the

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25 ER 114.

26 ER 114.

27 ER 114.

28 ER 114.

29 In special elections, if a candidate receives a majority in the "all-party" primary election, he or she will win the election outright, and no general election will be held. Elections Code §10705(a).

general (runoff) election – even if one candidate has received a majority of the vote.

According to the California Association of Clerks and Election Officials, SB 6 mandates a "complex set of changes [that] *has not occurred in recent memory*[.]"[30] Specifically, SB 6 will not only force counties to spend "*millions of dollars* statewide in ballot production and postage costs", but could force them to spend millions more in new voting equipment.[31] Furthermore, Los Angeles County Registrar Dean Logan publicly stated last year that the changes required by SB 6 would have

> *overwhelmed the capacity of our ballot*. If the proposed open primary process were in place back in 2006 *our voting system would not have been able to accommodate* all of the contests and measures on the ballot.[32]

D. Party Labels under SB 6's New Rules

Proposition 14 purports to give all candidates the right to state their "political party preference, or lack of political party preference" on the ballot, "in the manner provided by statute."[33] However, that "statute" – SB

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30 ER 187 (emphases added).

31 ER 187 (emphases added).

32 ER 184 (emphases added).

33 CAL.CONST. art. ii §5 (b) (emphasis added).

6 – fails to give minor-party candidates the right to state their "political party preference".

To be sure, SB 6 allows candidates who claim to identify with a qualified party (e.g., Democratic or Republican) to state their party's name on the ballot. However, if a candidate identifies with a minor party, SB 6-amended Elections Code §325 forces him or her to use the party label of "No Party Preference" (hereinafter, the "Party Preference Ban").[34] Because Appellant Chamness identifies with a minor party (the Coffee Party), SB 6 forces him to falsely state on the ballot that he has "No Party Preference".

E. Appellant Chamness' As-Applied Claim (Senate District 28 Special Election)

As a result, Appellant Chamness suffered irreparable harm in the recent special primary election for Senate District 28 (the Feb. 15, 2011 "SD 28 Election"). Earlier this year, Appellant Chamness qualified for and appeared on the SD 28 Primary ballot.[35] On January 5, 2011, the Secretary

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[34] Only registered voters can run for state and federal office. In *Libertarian Party v. Eu*, the California Supreme Court defined an "independent" candidate as a non-qualified (minor-party) candidate. *Eu. supra*, 620 P.2d 612, 28 Cal.3d at 540.

SB 6-amended Elections Code §325 mandates that all voters "of independent status" be listed as having "No Party Preference". Further, if a candidate's voter registration card states that he or she has "No Party Preference", his or her declaration of candidacy must also state that he or she has "No Party Preference." SB 6-amended Elections Code §8002.5(a). Finally, if a candidate's declaration of candidacy states that he or she has "No Party Preference", then "No Party Preference" must be printed beside his or her name on the ballot. SB 6-amended Elections Code §13105(a).

[35] ER 262.

of State published a List of Certified Candidates for the SD 28 Primary; that list falsely stated that Appellant Chamness had "No Party Preference".[36] Subsequently, Registrar Logan published vote-by-mail and election-day ballots that falsely stated that Appellant Chamness had "No Party Preference".[37] By forcing Appellant Chamness to falsely state that he had "No Party Preference", Real Parties in Interest Bowen and Logan *inflicted irreparable harm* on his fundamental rights between January 21, 2011 (the first day voters could cast vote-by-mail ballots) and February 15, 2011 (the day of the SD 28 Primary).[38]

F. Appellant Chamness' Threatened Harm (Special Election in Congressional District 36

Appellant Chamness faces imminent, irreparable harm in the looming Congressional election *within 48 hours*. As shown earlier, SB 6 will unlawfully ban Appellant Chamness from using the ballot label of "Independent", and instead force him to use the ballot label of "No Party Preference". Yesterday, vote-by-mail Ballots for overseas and military voters began being printed:[39] the Ballots will falsely state that Appellant

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36 ER 262.

37 ER 262. A copy of the SD 28 ballot may be found at ER 181.

38 ER 262.

39 ER 97.

Chamness has "No Party Preference". This Saturday (Apr. 2, 2011), the Ballots are scheduled to be mailed to overseas and military voters.[40] As soon as the first Ballot is deposited in the mail, Appellant Chamness *will suffer irreparable harm*.

IV. Statement: Undisputed Facts

A. The 36th District Special Congressional Election

Although the special election for Congressional District 36 (the "Election") has been scheduled for May 17, 2011, the Election will effectively begin this Saturday (Apr. 2, 2011) – when vote-by-mail Congressional Ballots for overseas and military voters will be mailed.[41] According to Los Angeles Registrar Dean Logan, overseas and military voters constitute 0.75 percent of the registered voters in Congressional District 36.[42] On Saturday (Apr. 2, 2011), the vote-by-mail ballots are scheduled to be mailed. Significantly, the remaining – and larger – batch of ballots must be made available to all vote-by-mail voters (i.e., not just overseas and military voters) *three weeks later*, on April 23, 2011.[43]

B. Core Facts About SB 6 and Proposition 14

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40 ER 94.

41 ER 94.

42 ER 97.

43 Apr. 23, 2011 is the first day on which every voter (not just military and overseas voters) may cast vote-by-mail ballots. ER 95.

Equally important, four undisputed facts about SB 6 and Proposition 14 have already emerged from this litigation:

1. SB 6 was stealthily passed by the Legislature in the middle of the night, without any public debate or discussion.[44]

2. Last summer, Secretary Bowen's own staff publicly stated that it is not "permissible" to force candidates to state on the ballot that they have "No Party Preference".[45]

3. Proposition 14 did not confer any new rights on politically independent voters. In fact, unaffiliated voters have been allowed to vote in Democratic and Republican primaries *for the past decade*.[46]

4. For over a century, minor-party candidates like Coffee Party member Michael Chamness were allowed to use the ballot label of "Independent". But SB 6 now forces them to use the ballot label of "No Party Preference" – while allowing candidates like Secretary Debra Bowen to list their major party's name on the ballot.[47]

These compelling facts strongly support granting a preliminary injunction to Appellant Chamness.

V. Procedural History

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[44] ER 155:1-155:2.

[45] ER 155:7-155:2.

[46] Between 2001 and 2010, unaffiliated ("decline to state") voters were allowed to vote in every Democratic or Republican primary for state and federal (non-Presidential) office. ER 156:1 n.4; CAL.CONST. art. ii §5 (c).

[47] Between 1891 and 2010, candidates were allowed to use the ballot label of "Independent". ER 156:2-156:4. Just as one example, Cecilia Iglesias ran as an Independent candidate in the 47th Congressional District on Nov. 2, 2010. The sample ballot from that election may be found at ER 180.

Although he has already sought relief from three different courts, *not one* tribunal – including the California Supreme Court and the California Court of Appeal – has ruled on the merits of his case to date. Last November, SB 6 was poised to be implemented in three special elections: in Senate District 28, Senate District 17, and Assembly District 4.[48] Appellant Chamness sought to run for the vacancy in Senate District 28, as a candidate affiliated with the Coffee Party.[49]

To prevent SB 6 from branding him with the ballot label of "No Party Preference", Appellant Chamness sought to intervene in a mandamus proceeding before the California Supreme Court.[50] 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. While Registrar Logan (who administered the SD 28 Election) took no position regarding Appellant Chamness' request to intervene, the Secretary of State *vigorously opposed it*.[51] On December 15, 2010, the California Supreme Court denied both Mr. Chamness' request to intervene and the underlying mandamus petition.[52]

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48 ER 261.

49 ER 261.

50 ER 245-46.

51 ER 245-46.

52 ER 246.

Seeking to vindicate his fundamental rights as a candidate, Appellant Chamness first sought to bring his as-applied challenge to the California Court of Appeal (First District).[53] Toward this end, he asked the Court of Appeal for permission to intervene in a pending proceeding that had been brought by State Court Plaintiffs against Secretary Bowen and Registrar Logan.[54] Again, Registrar Logan (who administered the SD 28 Election and will administer the Congressional Election) took no position with respect to Appellant Chamness' request to intervene, while Secretary Bowen opposed his request.[55] On January 31, 2011, the Court of Appeal denied Appellant Chamness' request to intervene.[56]

Appellant Chamness filed his Motion for Preliminary Injunction with the District Court on February 18, 2011.[57] 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; Appellant Chamness filed an opposition on the same day. Subsequently, Intervenors lodged an opposition brief on March 4, 2011, the

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53 ER 246.

54 ER 246.

55 ER 246.

56 ER 246.

57 ER 250.

date on which opposition briefs were due.[58] On the evening of March 7, 2011 – four days before Appellant Chamness' reply brief was due – the District Court granted the Application to Intervene.[59]

On March 21, 2011, the District Court heard oral argument on Appellant Chamness' Motion for Preliminary Injunction. Two days later, Appellant Chamness notified the trial court that the first batch of Congressional Ballots was scheduled to be printed on March 30, 2011. Because the District Court had not ruled on the PI Motion as of the afternoon of March 28, 2011 (i.e., less than 48 hours before the printing deadline), Appellant filed a Petition for Writ of Mandamus with this Court at 4:50 pm that evening. The next day, this Court denied the Petition, but asked the trial court to "act promptly on petitioner's motion for a preliminary injunction."[60] Yesterday (Mar. 30, 2011), the trial court issued an order denying Appellant's PI Motion. Shortly thereafter, Appellant filed his Notice of Appeal.

VI. The Trial Court's Order

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58 ER 211.

59 ER 65 ¶43.

60 ER 49-50.

In a nutshell, the trial court ruled that Appellant Chamness did not deserve a preliminary injunction, because it concluded that (1) he was unlikely to prevail on the merits and (2) he did not show irreparable harm.

First, the trial court held that Appellant did not have a constitutional right to the ballot label of "Independent" under the First and Fourteenth Amendments. In the trial court's view, Appellant Chamness would not suffer severe harm if he were deprived of the "Independent" ballot label. According to the trial court, Appellant Chamness had "*alternate means other than the ballot* itself to advertise or otherwise explain his party affiliation to voters." Namely, the trial court stated that Appellant could have paid for a candidate statement in the official voter guide for his last election – even though it would have cost Appellant $15,600 to $62,400 to do so.[61]

Second, the trial court held that Secretary Bowen did not make a binding admission that it was not "permissible" to ban candidates from using the ballot label of "Independent". First, it held that the document in question (which was sent from the Office of the Secretary Bowen to the Office of then-Lieutenant Governor Abel Maldonado) was not a public

[61] ER 153; ER 19 & n.3.

record.[62] The trial court also held that document was not authenticated, and should not be judicially noticed because it contained a disputed "fact": "whether Defendant Bowen admitted that SB 6 violates the First and Fourteenth Amendments."[63]

The trial court also held that forcing minor-party candidates to use the ballot label of "No Party Preference" did not violate the Elections Clause. According to the trial court, the State had a legitimate interest in banning minor-party candidates from using the ballot label of "Independent".[64]

> Supreme Court, Ninth Circuit, and California case law suggests that refusing to allow Plaintiff to state the term 'Independent' on the ballot is not a severe burden on his rights.[65]

Turning to the balance of equities, the trial court held that only the State, and not Appellant Chamness or Intervenors, had made a showing of harm.[66] Finally, the trial court concluded that Appellant had "offered no credible evidence" that millions of taxpayer dollars would be spent if SB 6 were not enjoined.[67] In so doing, the trial court disregarded important

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62 ER 57; ER 14.

63 ER 14.

64 ER 22.

65 ER 17.

66 ER 23.

67 ER 24.

evidence from the Los Angeles Registrar and the California Association of Clerks and Election Officials.

VI. Standard of Review

This Court reviews a trial court's denial of preliminary injunction for abuse of discretion.[68] "An abuse of discretion will be found if the district court based its decision on an erroneous legal standard of clearly erroneous findings of fact."[69] This Court "review[s] conclusions of law *de novo* and findings of fact for clear error."[70] Put another way, a ruling by a trial court will be reversed if it did not "g[e]t the law right".[71]

VII. Legal Analysis

A. The Trial Court abused Its Discretion When It Denied Appellant's Motion for Preliminary Injunction

The Court should immediately reverse the trial court, because Appellant Chamness' constitutional claims against SB 6 abundantly satisfy four essential requirements: (1) he is "likely" to succeed on the merits, (2) he is "likely" to suffer irreparable harm without a preliminary injunction, (3) the balance of equities "tips in his favor", and (4) an injunction "is in the

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68 *Cottrell*, *supra*, 2011 WL 208360 at *3.

69 *Id.* at *3.

70 *Id.* at *3.

71 *Id.* at *3.

public interest".[72] This Court employs a sliding-scale analysis when examining a plaintiff's likelihood of success on the merits. Namely, a preliminary injunction is "appropriate" if (1) the balance of hardships tips "sharply" in the plaintiff's favor, and (2) the plaintiff raises "*serious questions* going to the merits".[73]

B. The Trial Court Erred When It Ruled That Appellant Had No Constitutional Right to the Ballot Label of "Independent"

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

-- Sixth Circuit, *Rosen v. Brown*[74]

At the outset, the trial court erred when it concluded that Appellant Chamness did not have a constitutional right to the ballot label of "Independent", because he could have paid for a candidate statement in the official voter guide. However, it is undisputed that it would have cost Appellant Chamness *between $15,600 and $62,400* to publish a candidate statement in the official voter guide for his previous election (in his last

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72 *Winter v. NRDC*, 129 S.Ct. 365, 374 (2008) (*quoted by Cottrell*, *supra*, at *3).

73 *Cottrell*, *supra*, at *7 (emphases added).

74 *Rosen*, *supra*, 970 F.2d at 175 (emphases added) (*citing Riddell v. Nat'l Democratic Party*, 508 F.2d 770, 775-79 (5th Cir. 1975).

election for Senate District 28).[75] More disturbing, the trial court disregarded critical precedent that establishes the constitutional right to the ballot label of "Independent".

In *Rubin v. City of Santa Monica*, this Court signaled its agreement with the seminal Sixth Circuit case of *Rosen v. Brown*. In *Rosen,* a state law banned minor-party candidates from using the ballot label of "Independent", and instead forced them to have a blank space next to their name on the ballot.[76] Striking down that law, the Sixth Circuit held that "prohibiting the designation 'Independent' [is] unconstitutional where the regulations allowed for other political party designations."[77] Specifically, the Sixth Circuit held that a State's regulatory interest "may not extend to the effective *exclusion of Independent* and new party candidacies."[78]

In distinguishing *Rubin*, the trial court held that this Court would not recognize the constitutional right to the ballot label of "Independent", as the Sixth Circuit had in *Rosen*. However, it was mistaken. Citing *Rosen* with approval, this Court has made it clear that state election laws must be struck down if they "impair access to the ballot, stifle *core political speech*, or

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75 ER 153.

76 *Rosen*, *supra,* 970 F.2d at 171.

77 *Rubin*, *supra*, 308 F.3d at 1015 (emphasis added) (*citing Rosen*, *supra*, 970 F.2d 169).

78 *Rosen*, *supra*, 970 F.2d at 177 (emphasis added).

dictate electoral outcomes."[79] When examining ballot labels, this Court has made two principles clear. First, ballot labels "affect[] core political speech", because they "provide a *shorthand designation of the views of* party *candidates* on matters of public concern."[80] Furthermore, this Court *has signaled its agreement* with the Sixth Circuit that banning the ballot label of "Independent" would unconstitutionally stifle "core political speech":

> [I]n *Rosen v. Brown*, the Sixth Circuit invalidated a regulation *prohibiting the political party designation of "Independent" while permitting "Republican" or "Democrat" designations*, holding that party labels designate the views of party candidates and the regulations therefore hinder "core political speech."[81]

Significantly, because this Court has signaled its agreement with the Sixth Circuit's holding in *Rosen*, this Court (in *Rubin*) had no need to re-apply the U.S. Supreme Court's "severe burden" balancing test with respect to the constitutional right to use the ballot label of "Independent".[82] Therefore, contrary to the trial court's ruling, Appellant Chamness need not produce any evidence to prevail, apart from election documents (e.g., the

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79 *Rubin*, *supra*, 308 F.3d at 1015 (emphases added) (*citing Gralike*, *supra*, 531 U.S. at 514-15).

80 *Rubin*, *supra*, 308 F.3d at 1015 (emphases added) (*quoting Schrader v. Blackwell*, 241 F.3d 783, 789 (6th Cir. 2001).

81 *Rubin*, *supra*, 308 F.3d at 1015 (emphases added) (*citing Rosen*, *supra*, 970 F.2d 169) (state law banning the ballot label "Independent" violated the First and Fourteenth Amendments).

82 *Cf. Rubin*, *supra*, 308 F.3d at 1014-15 (*citing to* the High Court's "severe burden" test articulated in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 385).

SD 28 ballot or the Certified List of Candidates in his Congressional Election) that show that he has been forced to use the ballot label of "No Party Preference".[83]

Furthermore, both the Massachusetts and Minnesota Supreme Courts have also held that it is unconstitutional to ban the ballot label of "Independent".[84] In *Bachrach*, a state law banned minor-party candidates from stating that they were "Independent". Instead, those candidates were forced to state that they were "Unenrolled" – a term identical in meaning to "No Party Preference". Striking down that law, the Massachusetts High Court ruled that it was unconstitutional to ban minor-party candidates from using the party label of "Independent":

> Voters who during the campaign might have been favorably impressed with the candidate as an Independent, would be confronted on the ballot with a candidate who was called Unenrolled. *Unenrolled is hardly a rallying cry*[.][85]

Finally, the trial court ruled that the ballot label of "Independent" would somehow "confuse" voters. Yet by that logic, voters have been "confused" and the major parties have been "undermined" for over a

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[83] *See* ER 181 (SD 28 ballot) and Mar. 31, 2011 Dutta Declaration Exh. 1 (Secretary Bowen's List of Certified Congressional Candidates).

[84] *Bachrach*, 415 N.E.2d at 833; *Shaw*, 247 N.W.2d at 923.

[85] *Bachrach*, 415 N.E.2d 832, 836 (emphases added); *see also Shaw*, 247 N.W.2d at 923.

century: it is undisputed that California candidates had been able to use the "Independent" ballot label *between 1891 and 2010*.[86]

Within the last two decades, Quentin Kopp and Lucy Killea were both elected the State Senate as Independent candidates.[87] Moreover, the Minnesota Supreme Court has expressly ruled that the "Independent" ballot label "fosters no confusion" *as a matter of law* – even though Minnesota had an "Independent-Republican" Party at the time of its decision. *Shaw v. Johnson*, 247 N.W. 2d 921, 923 (Minn. 1976). Thus, far from confusing voters, "independent" candidates have had a long tradition of running for office in California history. Accordingly, the trial court erred when it concluded that there is no constitutional right to use the ballot label of "Independent".

C. The Trial Court Erred When It Disregarded Secretary Bowen's Binding Admission of Liability

Furthermore, the trial court erred when it disregarded the Secretary Bowen's binding admission of liability. Last summer, in an email to the Office of the Lieutenant Governor, her office stated that SB 6-amended

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[86] ER 257:15-257:16 & n.2. Between 1891 and 1915, California law permitted minor-party candidates to state their party's name on the ballot. In 1912, a minor-party candidate (William Kent of the Progressive Party) was elected by California's 1st Congressional District. *Id.*

[87] ER 182 ¶30.

Elections Code §325 is not "permissible", because it *bans minor-party candidates from using the ballot label of "Independent"*. According to a public statement made by Secretary Bowen's own staff, SB 6's Party Preference Ban

> implies that a candidate … actually has selected a party preference but is not disclosing it. That is ***permissible*** for candidates in certain circumstances [citing an example where a candidate chooses not to disclose his or her party preference], but ***not in all instances.*** What *the term should imply* is that the voter has not chosen, made, or stated a party preference and is therefore "***independent***."[88]

Thus, the Secretary of State has publicly conceded that SB 6's Party Preference Ban is not "permissible", because it deprives minor-party candidates of the ballot label of "Independent". In so doing, the Secretary of State has made a binding party admission[89] that SB 6's Party Preference Ban stifles core political speech under *Rosen* and *Rubin*.

During oral argument, the trial court refused to consider Secretary Bowen's admission: "You give greater weight to the opinions of elected

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[88] ER 114 (emphases added).

[89] Party admissions are admissible under the exception to the hearsay rule. Federal Rule of Evidence §801(d)(2). The statement made by Secretary of State Bowen's staff is admissible and not subject to the hearsay rule, because (a) the staff member was authorized by Secretary of State Bowen to make the statement on her behalf, and (b) the staff member made the statement within the scope of her official duties. *Id.* §801(d)(2)(C) (authorized-party exception to hearsay rule); *id.* §803(8) (public-records exception to hearsay rule).

officials than the Court does."[90] In its ruling, the trial court proffered three reasons for refusing to take judicial notice of this critical evidence. First, it held that the document in question (which was sent from the Office of the Secretary Bowen to the Office of then-Lieutenant Governor Abel Maldonado) was not a public record.[91] However, that ruling erred as a matter of law. According to the California Public Records Act, a public record consists of "*any writing containing information relating to the conduct of the public's business* prepared owned, used, or retained by any state or local agency regardless of physical form or characteristic."[92] Because the document at issue consisted of communication between two public offices, it unquestionably is a public document.

The trial court also held that document was not authenticated. However, Appellant's counsel did authenticate that document in a sworn declaration.[93] Essentially, Appellant's counsel had received that document by way of a sworn statement from counsel for Intervenor Maldonado – whose office had received the document from Secretary Bowen's office.[94] Therefore, the document's authenticity is beyond question.

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90 ER 59.

91 ER 57; ER 14.

92 Cal. Gov't Code §6252(e) (emphases added).

93 ER 172.

94 ER 172.

Finally, the trial court held that the document should not be judicially noticed because it contained a disputed "fact": "whether Defendant Bowen admitted that SB 6 violates the First and Fourteenth Amendments."[95] In so doing, the trial erred. Indeed, it is an undisputed – and judicially noticeable – fact that the Secretary of State's office send the document regarding the "permissibility" of SB 6's Party Preference Ban. The only matter that the parties dispute is whether it constitutes a legal admission under the Federal Rules of Evidence. Accordingly, the trial court erred when it refused to take notice of the Secretary of State's statement regarding SB 6.

Thus, the trial court disregarded a critical admission of liability without giving any legal justification. Because Secretary Bowen has admitted that SB 6's Party Preference Ban is not "permissible", the Court must hold that SB 6's Party Preference Ban violates the First and Fourteenth Amendments under *Rosen*, *Rubin*, *Bachrach*, and *Shaw*.

D. The Trial Court Erred in Implicitly Rejecting Appellant Chamness' As-Applied Claim

By rejecting Appellant Chamness' right to a ballot label of "Independent", the trial court implicitly rejected his as-applied[96] claim.

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95 ER 14.

96 "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

Namely, Secretary Bowen and Registrar Logan unlawfully banned Appellant Chamness from using the ballot label of "Independent" in the Feb. 15, 2011 special election for Senate District 28.[97] While minor-party candidate Chamness was foisted with the ballot label of "No Party Preference", his major-party competitors were allowed to use the ballot labels of "Democrat" and "Republican".[98] As the Ninth Circuit signaled in *Rubin*, that exact practice "hinder[s] core political speech".[99] Therefore, it is beyond dispute that SB 6's Party Preference Ban is unconstitutional as applied, for it inflicted irreparable harm on Appellant Chamness' fundamental rights in the SD 28 Election.

E. The Trial Court Erred in Rejecting Appellant Chamness' Elections Clause Claim

> *[O]nce a candidate is legally entitled to appear on the ballot there is substantial support in the lower courts to invalidate laws that favor incumbents, or nominees of preferred parties[.]*
>
> -- Supreme Court scholar Vicki Jackson[100]

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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)).

97 ER 263 (showing that Secretary Bowen and Registrar Logan applied SB 6-amended Elections Code §§325, 8002.5, & 13105(a) on Appellant Chamness).

98 ER 181 (SD 28 ballot).

99 *Rubin*, *supra*, 308 F.3d at 1015.

100 Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001

Equally important, the trial court also erred when it implicitly rejected Appellant Chamness' Elections Clause claim. In a nutshell, SB 6 violates the Elections Clause, because its Party Preference Ban singles out and discriminates against Appellant Chamness and other minor-party candidates for federal office. Earlier, in *Anderson v. Martin*, the High Court invoked the Elections Clause to strike down a state statute that forced candidates to list their race on the ballot, because it held that such a statute aimed to politically harm African American candidates.[101]

As the U.S. Supreme Court recently (and unanimously) ruled in *Cook v. Gralike*, a state law violates the Elections Clause if it aims to (1) "favor or disfavor" one class of candidates over another, (2) "dictate electoral outcomes", or (3) "evade important constitutional restraints".[102] In *Gralike*, the High Court struck down a state statute that targeted federal candidates who did not support term limits. For example, if an incumbent did not

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Sup.Ct.Rev. 299, 336 n.112 (emphases added), *citing, inter alia, McLain v. Meier*, *supra*, 637 F.2d at 1166-67; *Graves v. McElderry*, 946 F.Supp. 1569, 1573, 1579-82 (W.D. Okla. 1996) (striking down state law that gave top ballot position to Democratic candidates); *Sangmeister v. Woodard*, 562 F.2d 460, 465-67 (7th Cir. 1977) (striking down election officials' practice of giving their own political party the top position on the ballot).

101 *Anderson v. Martin*, 375 U.S. 399, 402 (1964).

102 *Gralike*, *supra*, 531 U.S. at 523 (*quoting U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995); *see also* U.S. CONST. art. i §4 cl. 1 (Elections Clause). The High Court encourages plaintiffs to bring facial claims under the Elections Clause. *Gralike*, *supra*, 531 U.S. at 517 n.8 (permitting a candidate to intervene while an appeal was pending in order to preserve the original plaintiff's facial Elections Clause claim).

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."[103]

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 [were] willing to support" term limits and "to disfavor those who either oppose term limits entirely or would prefer a different proposal":[104]

> [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.[105]

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*[.]"[106]

SB 6's Party Preference Ban must be struck down for the same reasons stated in *Gralike*. As the trial court conceded, SB 6 grants a party

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103 *Gralike*, *supra*, 531 U.S at 510.

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

105 *Gralike, supra*, 531 U.S. at 524 (*quoting Anderson*, *supra*, 375 U.S. at 402) (emphases added).

106 *Gralike, supra*, 531 U.S. at 525 (emphases added).

label to candidates (like herself) who identify with the viewpoints of a major party, while forcing candidates (like Appellant Chamness) who identify with the viewpoints of a minor party to falsely state that they have "No Party Preference".

Thus, SB 6 was "plainly designed to favor" candidates who identify with the viewpoints of major party, and was designed to "disfavor" and "handicap" candidates who identify with the viewpoints of a minor party.[107] Furthermore, because it places disfavored candidates at a political disadvantage, SB 6 also aims to "dictate electoral outcomes".

The trial court erred when it held that the State has a regulatory interest in favoring major-party candidates, and discriminating against minor-party candidates. However, its analysis ignores two key facts. First, California's unlike California's previous "qualified party" system, minor-party candidates were allowed to use the ballot label of "Independent". Equally important, SB 6 has now deprived voters of "party quality control". Under SB 6, voters can no longer be certain from the ballot how long a candidate has been affiliated with a party – because candidates can change their party affiliation *the minute before they register to run for office*.[108] On the last day of registration, a person affiliated with the Tea Party could

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107 *Id.* at 523-25.

108 Elections Code 8002.5(c).

change his affiliation to "Democratic" – *and be listed as a Democrat*. Ironically, in addition to silencing the voices of candidates, SB 6 may cause misleading information to be provided to voters. Therefore, the trial court erred when it held that SB 6 does not violate the Elections Clause.[109]

F. The Court Erred By Implicitly Treating SB 6 as a Voter-Passed Measure

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

-- Justices Breyer and Stevens[110]

In addition, the trial court erred when it implicitly treated SB 6 as a voter-passed measure. Simply put, SB 6 deserves no heightened deference from this or any Court, because it was not passed by the voters. The Legislature could have put both SB 6 and Proposition 14 on the ballot, but it *deliberately chose not to do so.* Why did Intervenor Maldonado, the author of both SB 6 and Proposition 14, dodge the voters when it came to SB 6, a Legislature-passed statute that *fleshes out* critical details of Proposition 14's new election rules?

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[109] *Id.* at 525.

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

In any event, Appellant Chamness is not challenging the constitutionality of Proposition 14. Rather, he is challenging the constitutionality of SB 6, an unjust law rammed through the Legislature without any public hearing or debate.

Significantly, Justices Breyer and Stevens recently warned that they would be "*less than willing to defer* to the institutional strengths of the legislature" – particularly "when a law appears to have been adopted *without reasoned consideration*, for *discriminatory purposes*, or to *entrench political majorities*[.]"[111]

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

> (1) Without "reasoned consideration". SB 6 was introduced and passed between 3:40 am and 6:55 am on February 19, 2009, without any public notice or committee hearings;
>
> (2) For "discriminatory purposes". As Appellant's analysis of the Elections Clause shows, SB 6 was designed to inflict political harm on minor-party candidates; and
>
> (3) To "entrench political majorities". As Appellant's analysis of the Elections Clause also shows, SB 6 brazenly favors candidates from major parties over those from minor parties.

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

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

G. The Trial Court Did Not Dispute That Party Preference Ban Is Not Severable

Significantly, the trial court did not dispute that SB 6's Party Preference Ban is not severable; that is, it is not possible to save SB 6 by "cutting out" its unlawful Party Preference Ban. To be severable, the unlawful part of a statute must be functionally, grammatically, and volitionally separable.[112]

To be sure, the Secretary of State may argue that the Party Preference Ban is severable, because SB 6 has a severability clause. However, the California Supreme Court has repeatedly held that severability clauses are not conclusive – particularly when the unlawful part of a statute is not "volitionally" separable. Suppose the Legislature had been able to foresee that part of a statute that it was about to pass would later be declared unconstitutional. If it is "clear" that the Legislature would have still passed that statute without its unlawful part, then that part would be "volitionally" separable, and the statute's remaining parts could be saved.[113]

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[112] *Gerken v. FPPC*, 863 P.2d 694, 698 (Cal. 1993).

[113] *Sonoma County v. Superior Ct.*, 173 Cal.App.4th 322, 352 (Cal.Ct.App. 2009); *accord*, *Gerken*, *supra*, 863 P.2d at 698 ("The final determination [on whether a severability clause is conclusive] *depends on whether the remainder* [of the statute] … *would have been adopted* by the legislative body had the latter *foreseen* the partial *invalidity* of the statute.") (*quoting Calfarm*, 771 P.2d 1247, 48 Cal.3d 805, 821 (Cal. 1989)).

Here, it is undisputed that when the Legislature passed SB 6's Party Preference Ban, it did so because *it intended to implement Proposition 14*.[114] Specifically, Subsection V(b) of Proposition 14 called for a "statute" to implement the "manner" in which candidates could state their party preference on the ballot.[115] In response, the Legislature enacted SB 6's Party Preference Ban, which regulated the "manner" in which candidates may (or may not) state their party preference on the ballot.

Thus, it is crystal "clear" the Legislature would not have passed SB 6 without the Party Preference Ban – because without the Party Preference Ban, the lawmakers *could not have implemented Subsection V(b) of Proposition 14*.[116] Therefore, SB 6's Party Preference Ban is not "volitionally" separable, and SB 6 as a whole *cannot be saved as a matter of law*.[117] Therefore, because the entirety of SB 6 is unenforceable, the Court must block it from being implemented and enforced.

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[114] In its Statement of Purpose, Proposition 14 explicitly states that it needs implementing legislation. ER 137 ¶63. When the Legislature enacts implementing legislation, it must be assumed that it actually intended to implement the constitutional provision in question. *See, e.g., People v. Broussard*, 856 P.2d 1134, 1137 (Cal. 1993).

[115] ER 137 n.64.

[116] *Sonoma County*, *supra*, 173 Cal.App.4th at 352.

[117] *Id.* at 352; *Gerken*, *supra*, 863 P.2d 694, 6 Cal.4th at 714.

H. The Trial Court Did Not Dispute That Proposition 14 Must Be Declared Inoperative If SB 6 Is Struck Down

Finally, the trial court did not dispute that Proposition 14 *must be declared inoperative* if SB 6 is struck down. It is undisputed that (1) SB 6 was passed in order to implement Proposition 14, and (2) Proposition 14 needs a lawful statute to implement it, because it is not a self-executing provision.[118] Thus, because SB 6 is unenforceable in its entirety, Proposition 14 lacks a lawful statute to implement it. Consequently, Proposition 14 must be declared inoperative until the Legislature has passed a new law to implement it.[119]

I. It Is *Certain* That Appellant Chamness Will Succeed on the Merits

It is more than "likely" that Appellant Chamness will succeed on the merits.[120] First, as this brief has shown, SB 6's Party Preference Ban must be struck down, for it violates the First Amendment, Fourteenth Amendment, and the Elections Clause. (Tellingly, even the Secretary of

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[118] *E.g., People v. Vega-Hernandez*, 179 Cal.App.3d 1084, 1092 (Cal.Ct.App. 1986); *Borchers Bros. v. Buckeye Incubator Co.*, 379 P.2d 1, 59 Cal.2d 234, 238 (Cal. 1963). In its Statement of Purpose, Proposition 14 explicitly states that it needs implementing legislation: "This act, *along with legislation* already enacted by the Legislature *to implement this act* [i.e., SB 6], are intended to implement an open primary system in California[.]" (emphases added). ER 138 n.67.

[119] See, e.g., *In re Redevelopment Plan for Bunker Hill*, 389 P.2d 538, 61 Cal.2d 21, 75 (Cal. 1964); *Denninger v. Recorder's Court*, 79 P. 360, 145 Cal. 629, 635 (Cal. 1904).

[120] *Winter*, *supra*, 129 S.Ct. at 374 (*quoted by Cottrell*, *supra*, at 8).

State has conceded that SB 6 violates the First and Fourteenth Amendments.) Second, because SB 6's Party Preference Ban is not severable, the entirety of SB 6 must be declared unenforceable. Finally, Proposition 14 must be declared inoperative, because SB 6 is both unconstitutional and unenforceable. Accordingly, it is certain that Appellant Chamness has not only raised "serious questions", but will succeed on the merits altogether.

K. Appellant Chamness Faces Imminent, Irreparable Harm

Furthermore, it is certain that Appellant Chamness will suffer imminent, irreparable harm unless he is granted a preliminary injunction. As the U.S. Supreme Court has made clear, a political candidate like Appellant Chamness need not wait until his rights have been grievously harmed. Instead, he is entitled to immediate relief if it is "likely" that a law will harm his fundamental rights.[121]

Here, Appellant Chamness has qualified as a candidate in an imminent Congressional election. Had he run before SB 6 had taken effect, he would have been permitted to use the ballot label of "Independent". But in a matter of weeks, SB 6 will force him to falsely state that he has "No

[121] *Winter*, *supra*, 129 S.Ct. at 374 (*quoted by Cottrell*, *supra*, at 8).

Party Preference" – and *lie to voters about his political beliefs*.[122] Against this threatening backdrop, it a certainty that Appellant Chamness will suffer irreparable harm if SB 6 is allowed to be implemented for the CD 36 Primary.

Moreover, injunctive relief is particularly appropriate under the U.S. Supreme Court's "capable of repetition, yet evading review" doctrine. Namely, because no one can predict when the next special election will strike, the U.S. Supreme Court urges courts to swiftly resolve constitutional challenges before voting begins in an election:

> The "*capable of repetition, yet evading review*" doctrine, in the context of *election cases*, is appropriate when there are "as applied" challenges as well as in the more *typical case* involving only *facial attacks*. The construction of a statute … will have the effect of simplifying future challenges, thus *increasing the likelihood that timely filed cases* can be *adjudicated before an election is held*.[123]

Far from being an aberration, special elections have been a mainstay in California politics. Since 1990, the Golden State has held nearly five federal and state elections per year.[124] In fact, five special elections will

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[122] The trial court stated that Mr. Chamness could choose a "blank" ballot label instead of "No Party Preference." However, forcing a minor-party candidate to use a "blank" ballot label violates the First and Fourteenth Amendments under *Rosen v. Brown*. *See supra* note 76.

[123] *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (*cited by Gralike*, *supra*, 531 U.S. at 517 n.8).

[124] ER 140.

have already been held in the first half of 2011 alone.[125] In the looming CD 36 Primary, it is beyond question that Appellant Chamness faces imminent, irreparable harm. By granting him injunctive relief, the Court will stop SB 6 from harming more candidates in the immediate future.

L. It Is Beyond Question That the Balance of Hardships Tips Sharply in Appellant Chamness' Favor

It is beyond question that the balance of equities tips sharply[126] in Appellant Chamness' favor. Tellingly, Secretary Bowen concedes a fundamental fact: while she will have the freedom to state on the ballot that she is a Democrat, Appellant Chamness will be banned from using the ballot label of "Independent". Instead, he will be forced to lie to voters that he has "No Party Preference".

Equally critical, not one voter will be disenfranchised if a preliminary injunction is granted. In fact, neither SB 6 nor Proposition 14 granted unaffiliated voters any new "rights". Instead, it is undisputed that (1) unaffiliated voters had been able to vote in the Democratic or Republican primaries *for the past decade*, and (2) Proposition 14 did not give

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125 ER 140.

126 *Cottrell*, *supra*, at 8. Under the Ninth Circuit's sliding-scale analysis, a preliminary injunction is "appropriate" if (1) the balance of hardships tips "sharply" in the plaintiff's favor, and (2) the plaintiff raises "serious questions" going to the merits. *Id.* at 15. Because he has unquestionably satisfied both criteria, Appellant Chamness is absolutely entitled to a preliminary injunction.

unaffiliated voters the right to vote in the 2012 Presidential primaries.[127] Thus, SB 6 will strip candidates like Michael Chamness of their fundamental rights, while giving unaffiliated voters *no say* on who will become the Republican and Democratic nominees for the White House. Therefore, the balance of equities tips sharply in Appellant Chamness' favor.

D. It Is Beyond Question that the Public Interest Will Benefit from Injunctive Relief

Finally, it is beyond question that the public interest will strongly benefit if the Court orders injunctive relief.[128] Only a preliminary injunction will protect the fundamental rights of Michael Chamness and the voters who support him in the looming Congressional special election. Furthermore, a preliminary injunction will not only stop millions of taxpayer dollars from being illegally spent, but will grant California elections officials a much needed reprieve from what the California Association of Clerks and Election Officials has called a "complex set of changes [that] has *not occurred in recent memory*."[129] Therefore, granting a preliminary injunction will strongly promote the public interest.

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127 ER 124:22 n.4; CAL.CONST. art. ii §5(c).

128 *Cottrell*, *supra*, No. 09-35756, at 8.

129 ER 140:19-20:6; ER 162.

VIII. Conclusion

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

-- The Eighth Circuit, *McLain v. Meier*[130]

This case is not one of those unusual cases in which [the Court] would be justified in standing by and allowing constitutional violations to go unremedied.

-- *Johnson v. Miller*[131]

Unless this Court by tomorrow, Congressional candidate Michael Chamness will be irreparably harmed by an unjust law: one that, according to fellow candidate Debra Bowen, gives an impermissible advantage to major-party Congressional candidates *just like her*.

By enjoining Registrar Logan from mailing ballots to overseas and military voters – who make up *0.75 percent of the district's registered voters* – the Court will gain *two weeks* to fully consider the merits of Appellant Chamness' plea for injunctive relief until the next round of ballots must be mailed. It now falls on this Court to issue a preliminary injunction against

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

131 *Johnson v. Miller*, 929 F.Supp. 1529, 1562 (S.D. Ga. 1996), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997) (emphasis added) (granting preliminary injunction against illegal redistricting plan).

SB 6 – and thereby ensure that the voices of Michael Chamness and other grassroots candidates are not silenced on the ballot.

March 31, 2011

Respectfully submitted,

/s/_____

GAUTAM DUTTA
Attorney for Appellant Michael Chamness
Gautam Dutta, Attorney-at-Law
39270 Paseo Padre Pkwy # 206
Fremont, CA 94538
415.236.2048
213.405.2416 fax
Dutta@BusinessandElectionLaw.com

CERTIFICATE OF SERVICE

On March 31, 2011, I electronically served an electronic copy of this Petition via ECF. Tomorrow morning, I will personally serve the Excerpts of Record on the Court, electronically serve the Excerpts of Record on all counsel, and served a copy of the Excerpts of Record by FedEx overnight upon the U.S. District Court for the Central District of California at:

The Honorable Otis D. Wright II
U.S District Court
312 N. Spring St., Courtroom 11
Los Angeles, CA 90012

/s/_____

GAUTAM DUTTA