

No. 11-56303

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

**REPLY BRIEF IN SUPPORT OF APPELLANT JULIUS GALACKI'S
EMERGENCY MOTION FOR SUMMARY REVERSAL**

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MEMORANDUM OF POINTS AND AUTHORITIES

Due Process requires that any deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.

-- The Court, *Walls v. Central Contra Costa Transit Authority*¹

I. Introduction

Like ostriches burying their heads in the sand, Secretary Bowen and Intervenors-Defendants vainly shrink away from the inconvenient truth: the trial court's denial of Julius Galacki's Motion to Intervene must be summarily reversed. Tellingly, Secretary Bowen *does not even dispute the merits* of Mr. Galacki's right to intervene. Equally telling, Intervenors-Defendants resort to mimicking the trial court, by *refusing to even cite binding legal authority* from this Court and the Supreme Court – including *Bates v. Jones*, *Southwest Center for Biological Diversity v. Berg*, *Keith v. Volpe*, and *Washington State Grange v. Washington State Republican Party*.²

Against this backdrop, the Court must draw two critical conclusions.

First, Tea Party candidate Julius Galacki is absolutely entitled to intervene in

¹ *Walls v. Central Contra Costa Transit Auth.*, -- F.3d --, No. 10-15967, 2011 WL 3319442 at *3 (9th Cir. Aug. 3, 2011) (emphases added, quotation marks omitted) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

² *Bates v. Jones*, 127 F.3d 870 (9th Cir. 1997); *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001); *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988); *Wash. State Grange v. Wash. Republican Party*, 552 U.S. 442 (2008).

this litigation as of right and thus join this case as a party. Second, because he is entitled to join this case as a party, Mr. Galacki *will suffer irreparable harm* unless he is allowed to defend his fundamental rights in the looming trial-court hearing on Plaintiffs' Motion for Summary Judgment – which will decide *all but two* of Mr. Galacki's weighty constitutional claims. Indeed, Due Process requires that he be allowed to participate in that August 22, 2011 hearing – especially since the trial court has already issued a tentative ruling that has *deprived him of his fundamental rights*.³ Therefore, the Court must speedily grant Mr. Galacki's Emergency Motion for Summary Reversal before the trial court holds its hearing on Monday.

II. Undisputed Facts

Briefing on this Motion has distilled a number of undisputed facts, including:

1. On August 11, 2010, Secretary Bowen's office, told the then-Lieutenant Governor Abel Maldonado's office that SB 6's would (a) *trick candidates* into believing they could run as write-in candidates, and (b) *trick voters* into believing they could cast a write-in vote:

Since ... SB 6 precludes [write-in] votes from being counted, it *makes no sense* to give candidates the illusion

³ *Walls, supra*, 2011 WL 3319442, at *3 (*quoting Mullane, supra*, 339 U.S. at 313). See also *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); *Bates, supra*, 127 F.3d at 873-74; *Volpe, supra*, 858 F.2d at 473-76.

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*."⁴

2. On May 6, 2011, Plaintiffs filed their Motion for Summary Judgment in the trial court.⁵
3. Subsequently, Secretary Bowen asked the trial court to indefinitely delay the hearing on Plaintiffs' Motion for Summary Judgment ("Plaintiffs' MSJ").⁶
4. In response, the trial court postponed the hearing on Plaintiffs' MSJ by one week, from June 6, 2011 to June 13, 2011.⁷
5. On June 7, 2011, the trial court cancelled the hearing on Plaintiffs' MSJ.⁸
6. On June 13, 2011, Julius Galacki decided to run as a write-in candidate in the July 12, 2011 special general election for Congressional District 36 (the "General Election").⁹
7. The next day, Mr. Galacki requested nomination papers from Los Angeles Registrar Dean Logan in order to qualify and run as a write-in candidate in the General Election.¹⁰

⁴ Opening Brief, at 29 (emphases added). Mr. Galacki has asked the Court to take judicial notice of this public document, and no opposition has been filed against his request. Julius Galacki's Aug. 5, 2011 Request for Judicial Notice; Notice of Non-Opposition to Request for Judicial Notice (filed concurrently with this Reply Brief).

⁵ Julius Galacki's Aug. 5, 2011 Opening Brief ("Opening Brief"), at 22.

⁶ Opening Brief, at 22.

⁷ Opening Brief, at 22.

⁸ Opening Brief, at 22; July 14, 2011 Declaration of Gautam Dutta ¶5, *attached as Exhibit 56* to the Aug. 5, 2011 Declaration of Gautam Dutta.

⁹ Opening Brief, at 16.

¹⁰ Opening Brief, at 16.

8. Mr. Galacki then cast a write-in vote for himself in the General Election.¹¹
9. Subsequently, Registrar Logan barred Mr. Galacki from running as a write-in candidate in the General Election.¹²
10. On July 12, 2011, the write-in vote that Mr. Galacki cast for himself was not counted.¹³
11. On July 14, 2011, Mr. Galacki rushed to the trial court with an ex parte application and Motion to Intervene, which requested that Mr. Galacki be granted intervention of right.¹⁴
12. Later that day, the trial court issued a tentative ruling on Plaintiffs' MSJ – which raises *all but two* of Mr. Galacki's claims. Specifically, the tentative ruling granted judgment against Plaintiffs and in favor of the non-moving parties (i.e., Secretary Bowen and Intervenors-Defendants). The trial court also rescheduled the hearing on Plaintiffs' MSJ for August 22, 2011, 2:30 pm.¹⁵
13. In his Motion to Intervene, Mr. Galacki brought two unique constitutional claims that Plaintiffs have not raised and cannot raise.¹⁶
14. On July 22, 2011, the trial court denied Mr. Galacki's Motion to Intervene – prompting him to rush to this Court for relief.¹⁷
15. On August 8, 2011, a new law regarding write-in voting (AB 461, Bonilla) was enacted. By passing AB 461, the California

¹¹ Opening Brief, at 16.

¹² Opening Brief, at 17.

¹³ Opening Brief, at 18.

¹⁴ Opening Brief, at 22.

¹⁵ Opening Brief, at 22, 24-25; July 19, 2011 Reply Brief of Julius Galacki, at 2:23-3:3, *attached as* Exhibit 58 to the Aug. 5, 2011 Declaration of Gautam Dutta; July 14, 2011 trial court order, *attached as* Exhibit 49 to the Aug. 5, 2011 Declaration of Gautam Dutta.

¹⁶ Opening Brief, at 25.

¹⁷ Opening Brief, at 22.

Legislature made it clear that a write-in vote must be counted during a manual recount “if the intent of the voter can be determined, *regardless of whether the voter has complied with the voter instructions.*”¹⁸ Notably, the codified version of AB 461 does not refer to Senate Bill 6 (Maldonado), the Top Two Primary’s implementing statute that bans write-in votes from being counted in every federal and state general election.¹⁹

16. On August 15, 2011, the California Citizens Redistricting Commission finalized the decennial boundary lines for Congressional, California State Assembly, California State Senate, and California Board of Equalization Districts.²⁰
17. Mr. Galacki intends to run for Congress on June 5, 2012, as a Tea Party candidate. To have the onerous \$1,740.00 filing fee waived, he must gather at least 3,000 valid signatures from voters in his Congressional district beginning **Dec. 30, 2011.**²¹

III. Standard of Review

It is undisputed that summary reversal must be granted when a person has been clearly deprived of his or her constitutional rights

¹⁸ Newly enacted Elections Code §15342.5 (mandating that Elections Code §15342 be “liberally construed”) (emphases added), *enacted by* AB 461 (Bonilla), *accessible at* http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0451-0500/ab_461_bill_20110808_chaptered.pdf (last visited Aug. 16, 2011).

¹⁹ AB 461 (Bonilla), *accessible at* http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0451-0500/ab_461_bill_20110808_chaptered.pdf (last visited Aug. 16, 2011).

²⁰ Aug. 15, 2011 letter from California Citizens Redistricting Commission to Secretary of State Debra Bowen, *attached as* Exhibit 1 to Julius Galacki’s Request for Judicial Notice, filed concurrently with this Reply Brief, *available at* http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_1final_cover.pdf (last visited Aug. 17, 2011).

²¹ Opening Brief, at 15-16.

without a reasoned decision from the lower court.²² By flouting binding precedent and denying his Motion to Intervene, the trial court barred Mr. Galacki from defending and vindicating his fundamental rights (1) as a voter who was disenfranchised because he cast a write-in vote in a federal election, (2) as a candidate who was unlawfully disqualified from running for federal office because he sought to run as a write-in candidate, and (3) as a Tea Party candidate who will soon be forced to lie to voters that he has “No Party Preference”.

IV. Secretary Bowen Has Conceded That Mr. Galacki Is Entitled to Intervene

After opposing Mr. Galacki’s Motion to Intervene on the merits at the trial court,²³ Secretary Bowen has apparently had a change of heart: she has *waived her opposition* to Mr. Galacki’s Motion to Intervene *on the merits*. Remarkably, Secretary Bowen’s sparse, two-page pleading *does not even dispute* that Mr. Galacki is entitled to intervene as of right. By waiving her opposition on the merits, Secretary Bowen has conceded that Mr. Galacki is entitled to intervene as a matter of law.

²² *Sills v. Bureau of Prisons*, 76 F.2d 792, 795-96 (D.C. Cir. 1985) (Mikva, J.); *see also Joshua v. U.S.*, 17 F.3d 378, 380 (Fed. Cir. 1994); Circuit Rule 3-6(a) (summary disposition on appeal warranted when the trial court has committed “clear error”).

²³ Secretary Bowen’s July 15, 2011 opposition brief, at 2:1-2:19, *attached as Exhibit 50* to the Aug. 5, 2011 Declaration of Gautam Dutta.

V. Intervenors-Defendants Fail to Refute That Mr. Galacki Is Entitled to Intervene

Like Secretary Bowen, Intervenors-Defendants fail to refute that Mr. Galacki is entitled to intervene. Specifically, they argue that he should be barred from intervening for two reasons: (1) Plaintiffs will adequately represent Mr. Galacki's interests, and (2) Mr. Galacki allegedly did not rush to the Court with a timely Motion to Intervene. However, case law from this Court and the Supreme Court swiftly dispatches both arguments.

A. It Is Unrefuted That No Other Party Can Adequately Represent Mr. Galacki's Interests As a Matter of Law

Contrary to their Intervenors-Defendants' claims, Plaintiffs cannot adequately represent Mr. Galacki's interests as a matter of law. As this Court made clear in *Berg*, a party cannot adequately represent a prospective intervenor's interests as a matter of law, if the former is not "capable" of making all of the latter's arguments.²⁴ Here, it is undisputed that Plaintiffs have not and cannot raise two of Mr. Galacki's core claims under the Elections Clause: (1) SB 6 violated his fundamental right to run for federal office under *Cook v. Gralike*, and (2) SB 6 violated his fundamental right under *Cook v. Gralike* to cast a write-in vote in a federal election and have it

²⁴ *Berg, supra*, 268 F.3d at 822 (citations omitted).

counted.²⁵ Because Plaintiffs have not raised and cannot raise all of Mr. Galacki's legal claims, they cannot adequately represent his interests as a matter of law.

B. It Is Unrefuted That Mr. Galacki Rushed to the Court With a Timely Motion to Intervene

Furthermore, it is unrefuted that Mr. Galacki brought a timely Motion to Intervene as a matter of law. Significantly, Intervenors-Defendants do not argue that Mr. Galacki's intervention will prejudice their interests. Instead, they claim that Mr. Galacki should be barred from intervening, because he allegedly brought his Motion to Intervene two weeks too late.²⁶ Once again, binding legal authority contradicts their claim. As a starting point, the Supreme Court in *Washington State Grange* admonished voters and candidates to bring as-applied claims when challenging election laws.²⁷

²⁵ Opening Brief, at 39-40. As even Intervenors-Defendants concede, Mr. Galacki's two unique claims are integrally related to the claims raised in Plaintiffs' Motion for Summary Judgment. See Intervenors-Defendants' Aug. 16, 2011 opposition brief, at 8 ("All of Mr. Galacki's claims involve the same case law that the parties have already briefed at great length.") (emphasis in original). Therefore, Mr. Galacki may consolidate his claims alongside those of Plaintiffs' during the trial court's Aug. 22, 2011 hearing on Plaintiffs' Motion for Summary Judgment. *Volpe, supra*, 858 F.3d at 473-76 (party may supplement and add related claims to a pleading, if relevant events, transactions, or occurrences have happened after that pleading has been filed); *Bates, supra*, 127 F.3d at 872 (aggrieved voters and candidates permitted to intervene and raise their individual claims in election case *even on appeal*).

²⁶ Ironically, Intervenors-Defendants had waited two weeks before filing their Motion to Intervene in the trial court. Julius Galacki's Aug. 19, 2011 Reply Brief, at 4:10-4:11, *attached as Exhibit 58* to the Aug. 5, 2011 Declaration of Gautam Dutta.

²⁷ *Wash. State Grange, supra*, 552 U.S. at 449-50.

Furthermore, this Court in *Bates* 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.²⁸

Here, Intervenors-Defendants argue that Mr. Galacki should have filed his Motion to Intervene on June 28, 2011, when he was unlawfully barred from running as a write-in candidate in the General Election. In so doing, Intervenors-Defendants conveniently ignore one undisputed fact. Namely, had Mr. Galacki filed his Motion to Intervene before July 12, 2011, he would have been forced to abandon one of his core as-applied claims: that his write-in vote was not counted in the July 12, 2011 General Election. Needless to say, such an outcome would not have met the *Washington State Grange* High Court's approval.²⁹

Equally important, Mr. Galacki brings a facial claim in his capacity as a 2012 Tea Party candidate for Congress – enabling him to intervene under this Court's binding decision in *Bates*.³⁰ Namely, SB 6 will unlawfully (1) force him to falsely state on the June 5, 2012 ballot that he has “No Party Preference”, and (2) deprive him of his constitutional right to use the ballot

²⁸ *Bates, supra*, 127 F.3d at 872.

²⁹ *Wash. State Grange, supra*, 552 U.S. at 449-50.

³⁰ *Bates, supra*, 127 F.3d at 872. Contrary to Intervenors-Defendants' insinuations, Mr. Galacki filed his Motion to Intervene before the trial court had scheduled its Aug. 22, 2011 hearing on Plaintiffs' Motion for Summary Judgment. *See* this Reply Brief at p.5 *supra*. Moreover, Mr. Galacki rushed to this Court with his Emergency Motion on Aug. 5, 2011, nearly *three weeks* before the trial court's Aug. 22, 2011 hearing.

label of “Independent”.³¹ Because Mr. Galacki has brought both as-applied and facial challenges to SB 6’s constitutionality, he has a right to intervene under both *Washington State Grange* and *Bates*.³²

VI. Mr. Galacki Will Be Irreparably Harmed Unless He Is Allowed to Intervene Before the Aug. 22, 2011 Trial Court Hearing

Having conceded Mr. Galacki’s right to intervene,³³ Secretary Bowen resorts to a brazen claim. Without citing any case law, she disingenuously argues that Mr. Galacki’s Emergency Motion must be denied – *even though she has conceded that he qualifies for intervention of right*. Specifically, she argues that Mr. Galacki will not suffer any irreparable harm if he is barred from defending his fundamental rights during the August 22, 2011 trial-court hearing. However, barring Mr. Galacki from immediately intervening will inflict irreparable harm as a matter of law – because it would violate his constitutional right to Due Process.

As this Court recently re-affirmed, “[d]ue process requires that any deprivation of life, liberty, or property be preceded by notice and opportunity for hearing[.]”³⁴ Here, it is beyond dispute that Mr. Galacki must be allowed to join this litigation *as a party*, for even Secretary Bowen

³¹ Opening Brief, at 49.

³² *Bates, supra*, 127 F.3d at 872; *Wash. State Grange, supra*, 552 U.S. at 449-50.

³³ See discussion at Part IV of this Reply Brief *supra*.

³⁴ *Walls, supra*, 2011 WL 3319442 at *3 (emphases added, quotation marks omitted) (*quoting Mullane, supra*, 339 U.S. at 313).

concedes that he is entitled to intervene as a matter of law.³⁵ Furthermore, it is undisputed that the trial court (1) has already issued a tentative ruling that deprives Mr. Galacki of *all but two* of the liberty interests that he seeks to vindicate and defend,³⁶ and (2) is poised to finalize that ruling *without Mr. Galacki's participation* either during or shortly after its August 22, 2011 hearing.³⁷

Thus, because he must be allowed to join this litigation as a party and the trial court is poised to deprive him of all but two of his fundamental rights, due process requires that Mr. Galacki be immediately allowed to intervene so he can defend those grave liberty interests during next Monday's hearing.³⁸ Unless he is accorded such due process, he will suffer irreparable harm by being unlawfully barred from joining a hearing that is *poised to deprive him of his fundamental rights*. In this light, Secretary Bowen has asked the Court to violate Mr. Galacki's constitutionally enshrined right to due process. Consequently, the Court must dismiss her

³⁵ See discussion at Section IV of this Reply Brief *supra*.

³⁶ Among other things, the trial court will likely rule that it is lawful to force a minor-party candidate like Mr. Galacki to falsely state on the ballot that he has "No Party Preference". Opening Brief, at 44.

³⁷ Moreover, as Mr. Galacki's Opening Brief showed, it may prove difficult for Plaintiffs to expedite the appeal of this case without Mr. Galacki's participation. Opening Brief, at 41 (*citing Bates, supra*, 127 F.3d at 873 n.4).

³⁸ *Walls, supra*, 2011 WL 3319442 at *3; *Mullane, supra*, 339 U.S. at 313. See also *Kassbaum, supra*, 236 F.3d at 494; *Bates, supra*, 127 F.3d at 873-74; *Volpe, supra*, 858 F.2d at 473-76.

shameful, last-ditch attempt to stop Mr. Galacki from defending and vindicating his fundamental rights.

VII. Conclusion

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

-- Magna Carta³⁹

As an old, fundamental and too often neglected axiom has it, justice delayed is justice denied.

-- The Court, *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co.*⁴⁰

Julius Galacki – a disenfranchised voter, an illegally disqualified write-in candidate, and a Tea Party candidate for Congress who will soon be forced to lie to voters that he has “No Party Preference” – must be immediately granted this Emergency Motion for two main reasons. First, he has amply proven that the trial court abused its discretion, when it denied him relief even though he had been clearly deprived him of his constitutional rights.⁴¹ Second, because he has an undeniable right to intervene as of right and immediately join this litigation *as a party*, Mr. Galacki will suffer irreparable harm unless he is allowed to participate in and defend his

³⁹ Magna Carta, cl. 40, available at <http://www.fordham.edu/halsall/source/magnacarta.html> (last visited Aug. 18, 2011).

⁴⁰ *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co.*, 940 F.2d 550, 558 (9th Cir. 1991).

⁴¹ *Sills, supra*, 76 F.2d at 795-96.

fundamental rights at the trial court's August 22, 2011 hearing – which will likely deprive him of *all but two* of the fundamental rights he seeks to defend.

In barely 96 hours, the Top Two Primary Litigation Train will leave the station. By granting this Emergency Motion, the Court will ensure that Tea Party candidate Julius Galacki is not left behind.

DATED: Aug. 18, 2011

By: /s/ GAUTAM DUTTA, ESQ.

CERTIFICATE OF SERVICE

On Aug. 18, 2011, I served electronic copies of the following documents via ECF: (1) Reply Brief in Support of Appellant Julius Galacki's Emergency Motion for Summary Reversal, (2) Appellant Julius Galacki's Request for Judicial Notice, and (3) Declaration of Gautam Dutta in Support of Request for Judicial Notice.

/s/ _____

GAUTAM DUTTA