

1 GAUTAM DUTTA, ESQ. (State Bar No. 199326)  
2 39270 Paseo Padre Parkway # 206  
3 Fremont, CA 94538  
4 Telephone: 415.236.2048  
5 Email: [dutta@businessandelectionlaw.com](mailto:dutta@businessandelectionlaw.com)  
6 Fax: 213.405.2416

7 Attorney for Plaintiffs

8 MICHAEL CHAMNESS, DANIEL FREDERICK,  
9 and RICH WILSON

10  
11 IN THE UNITED STATES DISTRICT COURT  
12 CENTRAL DISTRICT OF CALIFORNIA

13 MICHAEL CHAMNESS, DANIEL  
14 FREDERICK, RICH WILSON,

15 *Plaintiffs,*

16 vs.

17 DEBRA BOWEN, in only her  
18 official capacity as California  
19 Secretary of State; DEAN LOGAN,  
20 in only his official capacity as  
21 Registrar-Recorder / County Clerk  
22 of the County of Los Angeles; and  
23 DOES 1-10;  
24 *Defendants.*

25 *Defendants,*

26 ABEL MALDONADO, an  
27 individual; CALIFORNIA  
28 INDEPENDENT VOTER  
PROJECT; and CALIFORNIANS  
TO DEFEND THE OPEN  
PRIMARY;

*Intervenors-  
Defendants*

CASE NO. 2:11-CV-01479 ODW  
(FFMx)

**REPLY BRIEF IN SUPPORT OF  
PLAINTIFF MICHAEL  
CHAMNESS' MOTION FOR  
PRELIMINARY INJUNCTION;  
MEMORANDUM OF POINTS AND  
AUTHORITIES; REQUEST FOR  
JUDICIAL NOTICE BY PLAINTIFF  
MICHAEL CHAMNESS;  
DECLARATION OF GAUTAM  
DUTTA IN SUPPORT OF REQUEST  
FOR JUDICIAL NOTICE**

HEARING DATE: Mar. 21, 2011  
HEARING TIME: 1:30 pm  
JUDGE: Hon. Otis D. Wright II  
COURTROOM: 11

150

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

MEMORANDUM OF POINTS AND AUTHORITIES

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

-- Sixth Circuit, *Rosen v. Brown*<sup>1</sup>

**I. Introduction**

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

1. SB 6’s Party Preference Ban violates the First Amendment, Fourteenth Amendment, and Elections Clause of the U.S. Constitution.
2. Secretary Bowen Debra Bowen has admitted that SB 6’s Party Preference Ban is unconstitutional.
3. If SB 6 is struck down, then Proposition 14 must be suspended until a new law has been passed to replace SB 6.

Last month, SB 6 illegally forced Coffee Party candidate Michael Chamness to lie to voters that he had “No Party Preference” in the special election for Senate District 28. Unless this Court comes to his aid, history will repeat itself in the looming election for Congressional District 36 (the “CD 38 Election”).

**II. The Crux of the Case**

Briefing by the parties has only underscored four core facts:

1. SB 6 was stealthily passed by the Legislature in the middle of the night, without any public debate or discussion.<sup>2</sup>
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”.<sup>3</sup>
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*

<sup>1</sup> *Rosen v. Brown*, 970 F.2d 169, 175 (6<sup>th</sup> Cir. 1992) (emphases added) (citing *Riddell v. Nat’l Democratic Party*, 508 F.2d 770, 775-79 (5<sup>th</sup> Cir. 1975).

<sup>2</sup> Plaintiff Chamness’ Motion for Preliminary Injunction (“Moving Papers”), at 5:1-2.

<sup>3</sup> *Id.* at 11:7-12:2.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*past decade.*<sup>4</sup>

- 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 Bowen to list their major party’s name on the ballot.<sup>5</sup>

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

Furthermore, as his Moving Papers describe, Plaintiff Chamness brings three vital questions of constitutional law:

- 1. *As-applied constitutional violation.* Did SB 6 violate Coffee Party candidate Michael Chamness’ fundamental rights, when it banned him from using the “Independent” ballot label in the recent special election for Senate District 28?
- 2. *Imminent constitutional violation.* Will SB 6 violate Plaintiff Chamness’ fundamental rights in the looming election for Congressional District 36, because it will ban him from using the “Independent” ballot label?
- 3. *Imminent constitutional violation.* Will SB 6 violate Plaintiff Chamness’ fundamental rights in the looming election for Congressional District 36, because it will force him to use the ballot label of “No Party Preference”?

The answer to all three questions is an unqualified Yes.

**III. It is Beyond Dispute That SB 6 Has Already Violated Mr. Chamness’ Fundamental Rights**

First, it is beyond dispute that SB 6 has already violated Plaintiff Chamness’ fundamental rights, because it forced him to falsely state that he had “No Party Preference” in the special election for Senate District 28 (the “SD 28 Election”).

**A. Every Candidate Has the Right to a Ballot Label of “Independent”**

Despite SB 6 Defendants’ denials, the Ninth Circuit has squarely held that

<sup>4</sup> 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. *Id.* at 3:22 n.4; CAL.CONST. art. ii §5(c).

<sup>5</sup> Between 1891 and 2010, candidates were allowed to use the ballot label of “Independent”. Complaint ¶¶22-23. Just as one example, Cecilia Iglesias ran as an Independent candidate in the 47<sup>th</sup> Congressional District on Nov. 2, 2010. Mar. 11, 2011 Dutta Declaration, at 12.

152

1 every candidate has the right to a ballot label of “Independent”.<sup>6</sup> In a key case  
2 invoked by SB 6 Defendants (*Rubin v. City of Santa Monica*), the Ninth Circuit  
3 made it clear that state election laws must be struck down if they “impair access to  
4 the ballot, stifle *core political speech*, or dictate electoral outcomes.”<sup>7</sup>  
5 Significantly, the Ninth Circuit held, *as a matter of law*, that “prohibiting the  
6 designation ‘Independent’ was unconstitutional where the regulations allowed for  
7 other political party designations.”<sup>8</sup> Specifically, banning the “Independent” ballot  
8 label unconstitutionally deprives candidates of “core political speech”:

9 [I]n *Rosen v. Brown*, the Sixth Circuit invalidated a regulation  
10 *prohibiting the political party designation of “Independent” while*  
11 *permitting “Republican” or “Democrat” designations*, holding that  
12 party labels designate the views of party candidates and the regulations  
13 therefore hinder “core political speech.”<sup>9</sup>

12 B. As Applied, SB 6’s Party Preference Ban Is Unconstitutional

13 Plaintiff Chamness brings a simple, as-applied<sup>10</sup> claim from the February 15,

14  
15 <sup>6</sup> Moving Papers, at 10:5-11:6. Because SB 6’s Party Preference Ban bars him from using  
16 both the “Independent” and “Coffee Party” ballot labels, the Court need not decide whether he  
17 has a constitutional right to use the ballot label of “Coffee Party”.

18 <sup>7</sup> *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1015 (9<sup>th</sup> Cir. 2002) (emphases added).

19 <sup>8</sup> *Id.* at 1015 (emphases added) (citing *Rosen, supra* note 1, 970 F.2d 169). A copy of the  
20 Senate District 28 ballot has been attached as Exhibit 1 to the Mar. 11, 2011 Dutta Declaration.  
21 Because he has a right to the “Independent” ballot label *as a matter of law*, Plaintiff Chamness  
22 need not produce any evidence (apart from the ballot used in the special election for Senate  
23 District 28) to prevail. *Rubin, supra* note 7, 308 F.3d at 1015; *contra*, Secretary Bowen’s  
24 Opposition, at 1:15-1:18. Moreover, contrary to SB 6 Defendants’ claims, neither *Libertarian*  
25 *Party v. Eu* nor *Lightfoot v. Eu* applies here, because the election laws challenged in both cases  
26 allowed candidates to use the ballot label of “Independent”. *Libertarian Party v. Eu*, 620 P.2d  
27 612, 614 (Cal. 1980); *Lightfoot v. Eu*, 964 F.2d 865, 870 (9<sup>th</sup> Cir. 1992).

28 <sup>9</sup> *Rubin, supra* note 7, 308 F.3d at 1015 (emphases added) (citing *Rosen, supra* note 1, 970  
F.2d 169) (state law banning the ballot label “Independent” violated the First and Fourteenth  
Amendments). Because it expressly adopted the Sixth Circuit’s holding in *Rosen*, the Ninth  
Circuit (in *Rubin*) had no need to re-apply the U.S. Supreme Court’s “severe burden” balancing  
test with respect the right to use the ballot label of “Independent”. *Rubin, supra* note 7, 308 F.3d  
at 1014-15. Likewise, Plaintiff Chamness need not re-apply the “severe burden” test with respect  
to his fundamental right to use the ballot label of “Independent”. *Contra*, Secretary Bowen’s  
Opposition, at 10:10-14:17; Intervenors’ Opposition, at 9:10-11:1.

<sup>10</sup> “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 (9<sup>th</sup> Cir. 2009) (emphasis  
added) (citing *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 802-03 (1984)).