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JULIUS GALACKI

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL CHAMNESS, DANIEL FREDERICK, and RICH WILSON,

Plaintiffs,

vs.

DEBRA BOWEN, in only her official capacity as California Secretary of State; DEAN LOGAN, in only his official capacity as Registrar-Recorder / County Clerk of the County of Los Angeles; and DOES 1-10;

Defendants

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

NOTICE OF [PROPOSED] MOTION AND [PROPOSED] MOTION TO INTERVENE

HEARING DATE: ~~N/A (See Mar. 7, 2011 Standing Order Regarding Newly Assigned Cases ¶10)~~ August 15, 2011 1:30 P.M.
JUDGE: Hon. Otis D. Wright II
COURTROOM: 11

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that, on July 14, 2011, Intervenor-Applicant Julius Galacki filed an ex parte Application with Judge Otis D. Wright II, Courtroom 11, U.S. District Court for the Central District of California, 312 North Spring Street, Los Angeles, California 90012. In his Application, Mr. Galacki asked the Court to (1) grant this FRCP 24(a) Motion to Intervene on shortened time, and (2) incorporate by reference Mr. Galacki's as-applied constitutional claims (stemming from the July 12, 2011 special general election in Congressional District 36) into Plaintiffs' pending Motion for Summary Judgment. "The Court considers ex parte applications on the papers and does not usually set these matters for hearing. If a hearing is necessary, the parties will be notified."[1] Opposition papers must be filed within 24 hours after Mr. Galacki has served this Application and this Motion.[2]

Mr. Galacki's Motion to Intervene is based on this Notice of Motion and Motion to Intervene, along with the accompanying Points and Authorities, Declaration of Julius Galacki, Declaration of Gautam Dutta, Request for Judicial Notice, all the other papers, documents, or exhibits on file or to be filed in this action, and any oral argument (if held) on this Motion.

[1] Judge Otis D. Wright II's Mar. 7, 2011 Standing Order Regarding Newly Assigned Cases ¶10.

[2] *Id.*

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MEMORANDUM OF POINTS AND AUTHORITIES

> *The state ... has repeatedly expressed its legitimate desire to avoid to the greatest extent possible any unnecessary inequities and delay in the upcoming election cycle. We agree. Unlike the state, however, we believe that the most effective way to achieve this objective is to allow as many parties as possible who seek to run for office contrary [to the challenged statute] to be bound by our decision.*
>
> -- Ninth Circuit, *Bates v. Jones*[3]

I. Introduction

Unless he is allowed to intervene in this lawsuit, former write-in candidate and declared Tea Party candidate **Julius Galacki** will be deprived of a critical opportunity to vindicate his fundamental rights. Two days ago, the write-in vote that he cast in a Congressional special election was not counted. Two weeks earlier, the Los Angeles County Registrar refused to issue Mr. Galacki any nomination papers to run as a write-in candidate. As a direct result, Mr. Galacki was barred from exercising his fundamental right to run for federal office and vote for the candidate of his choice.

The interests of justice and judicial economy require that the Court grant this Motion. In this manner, the Court will gain critical insight into the core legal question raised by Plaintiffs' Motion for Summary Judgment: namely, do the Top Two Primary's new rules for write-in candidates violate the U.S. Constitution's Elections Clause? Equally important, Mr. Galacki will be spared from having to file a separate, duplicative lawsuit – an outcome disfavored by the Ninth Circuit:

> The state's electoral process would be subject to disruption if [the fundamental right at stake] has to be decided in a separate lawsuit. Surely all parties would want uniformity in the ... election. Whatever the ultimate outcome of this case, intervention can only be a step in that direction.[4]

By allowing him to join this litigation, the Court will not only follow Ninth Circuit precedent, but prevent harmful "inequities and delay"[5] from disrupting the 2011-12

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[3] *Bates v. Jones*, 127 F.3d 870, 872 (9th Cir. 1997) (emphases added).
[4] *Id.* at 873 (emphases added).
[5] *Id.* at 872 (emphasis added).

election cycle.

II. Introduction to Intervenor-Applicant Julius Galacki

A Los Angeles resident, Julius Galacki is registered to vote in Congressional District 36, which recently elected its next Member of Congress in the July 12, 2011 special general election (the "General Election").[6] Mr. Galacki recently sought to run as a write-in candidate – and has changed his party affiliation *from the Democratic Party to the Tea Party* – in order to call attention to two troubling ways in which Proposition 14's Top Two Primary violates our fundamental rights.[7] First, Senate Bill 6 (which implements Proposition 14) unlawfully bans individuals from running as write-in candidates in every general election for federal and state office.[8] Second, Senate Bill 6 (SB 6) forces Tea Party and other minor-party candidates to lie to voters, by forcing them to falsely state on the ballot that they have "No Party Preference".[9]

Mr. Galacki seeks to intervene in this lawsuit in three capacities: (1) as a registered voter who was *barred from running for Congress* as a write-in candidate in the General Election,[10] (2) as a registered voter whose write-in vote was not counted,[11] and (3) as a *Tea Party candidate* running for Congress in the June 5, 2012 primary election.[12]

To qualify as a candidate for Member of the U.S. Congress, an individual

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6 Declaration of Julius Galacki ("Galacki Decl.") ¶1.

7 *Id.* ¶2. Conversely, a candidate registered with the Tea Party may also change his or her party affiliation to "Democratic" when filing his or her nomination papers – *and then be listed as a Democrat*. SB 6-amended Elections Code 8002.5(a). Before SB 6 took effect, major-party candidates who wished to compete in their party's primary election had been required to belong to their party at least one year for regularly scheduled elections and at least three months for special elections. Elections Code §8001(a)(2).

8 Plaintiffs' May 6, 2011 Motion for Summary Judgment ("Pending MSJ"), at 16:4-19:11.

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

10 Galacki Decl. ¶¶9, 11, 12; Dutta Decl. Exhs. 1 & 4.

11 Galacki Decl. ¶¶12, 13.

12 Galacki Decl. ¶¶14, 15, 19, 20.

1 must pay a filing fee of $1,740.00.[13] To have that onerous fee waived, Mr. Galacki
2 must gather at least 3,000 valid signatures from 36th Congressional District voters
3 beginning on **Dec. 30, 2011.**[14]

4 **III. Relevant Procedural History**

5 Plaintiffs Chamness, Frederick, and Wilson filed their First Amended
6 Complaint on March 10, 2011, four months before the July 12, 2011 General
7 Election.[15] On May 6, 2011, Plaintiffs filed the Memorandum of Points and
8 Authorities to their Notice of Motion and Motion for Summary Judgment.[16] In
9 response, Intervenors-Defendants asked the Court to grant them judgment under
10 FRCP 56(f).[17] On June 7, 2011, the Court cancelled the hearing on the Motion for
11 Summary Judgment, and took the matter under submission.[18] As of this morning,
12 the Court had not issued a ruling on the Motion for Summary Judgment.[19]

13 This case – which will resolve *all but two* of Mr. Galacki's constitutional
14 claims – will likely land in the Ninth Circuit. Thus, Mr. Galacki will suffer
15 irreparable prejudice if the Court resolves this case without his immediate
16 participation, for he would in effect be deprived of the opportunity to litigate his
17 claims before the Ninth Circuit.

18 **IV. Mr. Galacki's Timely Attempt to Defend His Fundamental Rights**

19 On June 13, 2011, Mr. Galacki decided to run as a write-in candidate in the
20 General election.[20] The next day, his counsel asked Los Angeles County Registrar
21 Dean Logan to issue him nomination papers so that he could qualify and run as a
22

23 [13] Elections Code §8103(a)(2) (Congressional filing fee must be 1 percent of a Member of Congress' annual salary); Library of Congress website, available at
24 http://thomas.loc.gov/home/faqlist.html (*last visited* July 13, 2011) (Congressional annual salary currently set at $174,000).
25 [14] Elections Code §8061 (Congressional candidates seeking to waive the $1,740.00 filing fee may begin gathering signatures on the 158th day before a given election).
26 [15] Dutta Decl. ¶2.
[16] *Id.* ¶3.
27 [17] *Id.* ¶4.
[18] *Id.* ¶5.
[19] *Id.* ¶5.
28 [20] Galacki Decl. ¶9.

1 write-in candidate.[21] Mr. Galacki subsequently cast a write-in vote for himself in
2 the General Election, and mailed his vote-by-mail ballot to Registrar Logan's
3 office.[22] On June 28, 2011, the statutory deadline to file write-in nomination
4 papers for the General Election passed.[23] Because no nomination papers had been
5 issued to Mr. Galacki as of that date, he was barred from exercising his
6 fundamental right to run for office.[24] On July 6, 2011, Registrar Logan stated that
7 he was "unable to grant [counsel's] request to issue write-in nomination papers to
8 Mr. Julius Galacki, or to count the write-in vote he cast for himself."[25]
9 According to Registrar Logan, Mr. Galacki could not run as a write-in
10 candidate in the General Election for three reasons: (1) Mr. Galacki had allegedly
11 "missed"[26] a May 3, 2011 deadline to file write-in nomination papers, (2) Secretary
12 Bowen has claimed that SB 6-amended Elections Code §8605 bans write-in
13 candidacies in every general election, (3) the Secretary Bowen's official General
14 Election calendar "contain[ed] no line item or line items regarding the write-in
15 process."[27] In addition, Registrar Logan claimed that he could not count Mr.
16 Galacki's write-in vote, because (1) Mr. Galacki had allegedly "missed" a May 3,
17 2011 deadline to file his write-in nomination papers, and (2) SB 6-amended
18 Election Code §8605 and §8606 banned Registrar Logan from counting any write-
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21 [21] Dutta Decl. ¶8 & Exh. 1.
22 [22] Galacki Decl. ¶10.
23 [23] Dutta Decl. ¶9.
24 [24] Dutta Decl. ¶9.
25 [25] Dutta Decl. ¶10 & Exh. 4.
26 [26] Contrary to Registrar Logan's claim, Mr. Galacki did not "miss" the May 3, 2011 "deadline" to file write-in nomination papers for the July 12, 2011 General Election. *Cf.* Registrar Logan's July 6, 2011 letter to Mr. Galacki's counsel, Dutta Decl., Exh. 4 (at p. 16). In fact, as Secretary Bowen's calendar for the May 17, 2011 special primary election in Congressional District 36 shows, May 3, 2011 was the deadline for the May 17, 2011 special <u>primary</u> election in Congressional District 36 (i.e., May 3, 2011 was 14 days before May 17, 2011), and <u>not</u> for the July 12, 2011 General Election. Dutta Decl., Exh. 7 (at p. 32 ¶23). Here, it is beyond dispute that Mr. Galacki requested write-in nomination papers from Registrar Logan <u>two weeks</u> before the June 28, 2011 statutory deadline for the July 12, 2011 General Election. Galacki Decl. ¶¶7, 9; Dutta Decl. ¶¶6, 8 & Exh. 1. Therefore, he had qualified to run as a write-in candidate in the General Election.
27 [27] *Id.* ¶10 & Exhs. 4 & 8.
28

in votes.[28]

On July 12, 2011, the write-in vote that Mr. Galacki cast for himself in the General Election was not counted.[29] According to the Special Election Calendar provided by Registrar Logan, he must certify the results of the General Election to Secretary Bowen by July 22, 2011.[30] Secretary Bowen must then certify the results and winner of the General Election by August 19, 2011.[31]

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

Intervenor-Applicant Galacki brings three sets of claims against SB 6. First, SB 6 violated his rights under the Elections Clause, First Amendment, and Due Process Clause, when it barred him from running as a write-in candidate in the General Election.[32] Second, SB 6 violated Mr. Galacki's rights under the Elections Clause, First Amendment, Fourteenth Amendment, and the Due Process Clause, when it banned Registrar Logan from counting his write-in vote.[33] Finally, SB 6 is poised to violate Mr. Galacki's rights under the Elections Clause, First Amendment, and Fourteenth Amendment, for it will force him – a 2011-12 Tea Party candidate – to falsely state on the ballot that he has "No Party Preference".[34] Because two of Mr. Galacki's Elections Clause claims have not been raised by the parties, this Motion will only focus on them.

VI. Mr. Galacki's Unique Elections Clause Claims

Mr. Galacki is entitled to immediately intervene, because Plaintiffs have not raised – and cannot raise – two of his core constitutional claims: namely, SB 6 violated his Elections Clause-protected right to (1) run for federal office as a write-

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[28] *Id.* ¶10 & Exh. 4; *see* note 26 *supra*.
[29] Dutta Decl. ¶12 & Exh. 4; Galacki Decl. ¶13.
[30] Dutta Decl. ¶13 & Exhs. 4 & 8.
[31] *Id.* ¶13 & Exh. 4.
[32] Mr. Galacki incorporates by reference Plaintiffs' legal theories with respect to his claims brought under the First Amendment and the Due Process Clause. *See* Pending MSJ at 16:4-19:11.
[33] Mr. Galacki incorporates by reference Plaintiffs' legal theories with respect to those claims. *See* Pending MSJ at 16:4-18:4 & 19:12-20:17.
[34] Mr. Galacki incorporates by reference Plaintiffs' legal theories with respect to those claims. *See* Pending MSJ at 20:18-27:13.

1 in candidate and (2) cast a vote for a write-in candidate and have his vote counted.
2 As the Ninth Circuit has made clear, a party may supplement – and add related
3 claims to – a pleading, if relevant events, transactions, or occurrences have
4 happened after the given pleading has been filed:[35]
5
6 > Rule 15(d) is intended to give district courts broad discretion in allowing *supplemental pleadings*. FRCP 15, advisory committee's note. The rule is a tool of *judicial economy and convenience*. Its use is therefore favored.
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8 > ****
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10 > The United States Supreme Court has stated that *new claims, new parties*, and events occurring after the original action are all *properly permitted* under FRCP 15(d).[36]

11 Significantly, both the U.S. Supreme Court and Ninth Circuit have allowed
12 candidates and voters to intervene and bring their claims to election cases – *even*
13 *on appeal*.[37] Because Mr. Galacki is entitled to intervene, the Court may
14 incorporate by reference his as-applied constitutional claims (stemming from the
15 July 12, 2011 General Election) into Plaintiffs' pending Motion for Summary
16 Judgment.

17 A. The Importance of Write-In Candidates

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

22 -- California Supreme Court, *Canaan v. Abdelnour*[38]

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24 [35] *Keith v. Volpe*, 858 F.3d 467, 473-76 (9th Cir. 1988) (*citing* FRCP 15(d)); *see also Bates, supra*, 127 F.3d at 872 (aggrieved voters and candidates permitted to intervene in election case *on appeal*).

25 [36] *Keith, supra*, 858 F.3d at 473, 475 (emphases added) (*quoting Griffin v. County School Bd.*, 377 U.S. 218, 226-27 (1964) (supplemental pleadings "are well within the basic aim of the
26 rules to make pleadings a *means to achieve an orderly and fair administration of justice*.") (emphases added)).

27 [37] *See, e.g., Cook v. Gralike*, 531 U.S. 510, 517 n.8 (2001); *Bates, supra*, 127 F.3d at 872.
[38] *Canaan v. Abdelnour*, 710 P.2d 268, 277, 40 Cal.3d 703, 718-19 (Cal. 1985)
28 (emphases added), subsequently overruled on other grounds, *Edelstein v. San Francisco*, 56 P.3d 1029, 29 Cal.4th 164 (Cal. 2002).

Write-in voting has played an important role in local, state, and national politics. Last November, U.S. Senator Lisa Murkowski (R-Alaska) was re-elected as a write-in candidate.[39] In 1982, Ron Packard (R-CA) won his write-in bid for Congress (43rd District) and was re-elected eight times before he retired.[40] Two decades later, write-in candidate Beverly O'Neill won the 2002 race for Long Beach Mayor.[41] In 2004, write-in candidate Donna Frye finished second in the San Diego mayoral election – and she would have won if her voters had not just written in her name, but also marked the "write in" oval on the ballot.[42] Two years earlier, Anthony Williams waged a successful write-in campaign for Washington, DC Mayor.[43] Other notable write-in candidates include Tonia Reyes Uranga (finished second in a 2010 race for Long Beach City Council) and now-Assemblymember Tom Ammiano (finished second in the 1999 San Francisco mayoral election).[44]

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

What if Whitman had suddenly suffered a stroke and became paralyzed a few weeks before the November general election? Under SB 6's new rules, Republican voters would face a double bind. First, SB 6 would ban the Republican Party from replacing Whitman.[45] Worse yet, if voters had written in the name of another Republican, SB 6 would force election officials like Registrar Logan to *throw away* their votes:

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39 *Miller v. Treadwell*, -- P.3d --, No. S-14112 (Alaska Dec. 22, 2010).
40 Pending MSJ at 15:18-15:19.
41 *Id.* at 10.
42 *McKinney v. Superior Court*, 21 Cal.Rptr.3d 773, 775 (Cal.Ct.App. 2004).
43 "Anthony Williams Wins Big in D.C. Democratic Mayoral Primary", JET, Oct. 7, 2002, at 6.
44 *Edelstein, supra*, 56 P.2d 1029, 29 Cal. 4th at 182; Pending MSJ at 15:22-16:2.
45 SB 6-amended Elections Code §8807.

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> A person whose name has been written on the ballot as a *write-in candidate* at the general election ... *shall not be counted.*[46]

In light of the critical role that write-in candidates have played in our elections, federal courts must scrutinize any attempt to disqualify write-in candidates or disenfranchise the voters who support them.[47]

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

> *The United States Supreme Court has repeatedly held that the individual's right to seek public office is inextricably intertwined with the public's fundamental right to vote, and may be limited only where necessary to achieve a compelling state purpose.*
>
> -- Ninth Circuit, *Davies v. Grossmont Union High School District*[48]

> Since ... SB 6 precludes [write-in] votes from being counted, it *makes no sense* to give candidates the illusion that they can run as a write-in or give voters the illusion that they can write in a candidate's name and have it counted. Making these conforming changes is only controversial because *there is a lawsuit on this issue* that essentially states "SB 6 says don't count the votes, so it's *misleading to let people think they can write in a candidate's name and have it counted.*"
>
> -- Secretary of State Debra Bowen's office[49]

Elections Code section 15340 gives every voter the right to cast a write-in vote in "any" election.[50] Furthermore, Sections 8600 and 8601 of the Elections Code expressly give individuals like Mr. Galacki the right to run as write-in candidates for every federal and state office, as long as they file their nomination

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[46] SB 6-amended Elections Code §8606 (emphases added).

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

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

[49] Pending MSJ at 13:3-13:6 (emphases added). Intervenor-Applicant Galacki incorporates by reference Exhibit 4 of Plaintiffs' May 6, 2011 Request for Judicial Notice. Subsequently, Secretary of State Bowen told the Court that SB 6 bans individuals like Mr. Galacki from running as write-in candidates in every general election. Secretary of State's May 10, 2011 Statement of Genuine Issues of Material Fact ¶41.

[50] Elections Code §15340.

papers within 14 days of the date of the election.[51] Thus, the statutory deadline to file write-in nomination papers for the General Election fell on **June 28, 2011** (i.e., 14 days before July 12, 2011).

C. Mr. Galacki's Unique Elections Clause Claims

[H]aving granted citizens the right to cast write-in votes, the [State] must confer the right in a manner consistent with the Constitution.

-- U.S. District Court, District of Columbia[52]

In addition to the claims that have already been raised by Plaintiffs, Mr. Galacki brings two unique,[53] as-applied Elections Clause claims against SB 6:[54] (1) it unlawfully banned him from running as a write-in candidate in the special general election for Congressional District 36, and (2) it unlawfully forced Defendant Logan not to count the write-in vote that he had cast for himself. As the High Court unanimously ruled in *Cook v. Gralike*, an election regulation such as SB 6 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".[55]

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

[52] *Libertarian Party v. District of Columbia Bd.*, 2011 WL 782031, at *6 (D.D.C. Mar. 8, 2011) (emphases added); *see also Grant v. Meyer*, 828 F.2d 1446, 1456 (10th Cir. 1987) ("Although the right to place a question on the ballot is not fundamental in Illinois, the legislature has seen fit to confer such right. Once [the State] decided to extend this forum, it *became obligated to do so in a manner consistent with the Constitution.*") (emphases added) (*quoting Georges v. Carney*, 546 F.Supp. 469, 476-77) (N.D. Ill.), *aff'd*, 691 F.2d 297 (7th Cir. 1982)); *Turner v. District of Columbia Bd. of Elections*, 77 F.Supp.2d 25, 30 (D.D.C. 1999).

[53] Plaintiff Rich Wilson, who cast a write-in vote in a state election (i.e., for Assembly District 4), brings a different Elections Clause claim (which Mr. Galacki has incorporated by reference): namely, federal law enacted pursuant to the Elections Clause protects "the right of an eligible voter to cast a ballot and have that ballot counted." Pending MSJ at 19:18-19:20.

[54] SB 6 implements Proposition 14's Top Two Primary system, which is modeled after Washington State's Top Two Primary system. Pending MSJ at 2:19 n.2. In contrast to SB 6, Washington law allows write-in candidacies in the general election and does not ban lawfully cast write-in votes from being counted. RCW 29a.24.311.

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

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 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."[56] 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":[57]

> [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.[58]

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*[.]"[59]

By barring Mr. Galacki from running as a write-in candidate in the General Election, SB 6 "disfavored" write-in candidates like him and "dictated political outcomes".[60] Specifically, SB 6 unlawfully deprived him of his fundamental right to run as a write-in candidate – which Sections 8600 and 8601 of the Election Code guarantee. Thus, SB 6 was plainly designed to "disfavor" and "handicap" write-in candidates like Mr. Galacki, and designed to "favor" those candidates whose names appeared on the ballot.[61] Moreover, SB 6 "dictated political outcomes", for it put Mr. Galacki at a debilitating political disadvantage: it disqualified it from running

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56 *Gralike, supra*, 531 U.S. at 524
57 *Id.* at 524 (*citing Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).
58 *Gralike, supra*, 531 U.S. at 524 (*quoting Anderson, supra*, 375 U.S. at 402) (emphases added).
59 *Gralike, supra*, 531 U.S. at 525 (emphases added).
60 *Id.* at 523.
61 *Id.* at 523-25.

for office.

Similarly, by forcing Defendant Logan not to count Mr. Galacki's write-in vote, SB 6 "disfavored" write-in voters like him and "dictated political outcomes". Specifically, SB 6 unlawfully deprived of his fundamental right to cast a write-in vote and have it counted in "any" election – a right which Section 15340 of the Election Code guarantees. Thus, SB 6 was plainly designed to "disfavor" and "handicap" voters like Mr. Galacki who cast ballots for write-in candidates, and designed to "favor" voters who cast ballots for candidates whose names appeared on the ballot.[62] Moreover, SB 6 "dictated political outcomes", for it put Mr. Galacki at a debilitating political disadvantage: it forced Registrar Logan to disenfranchise him.

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

To be sure, Secretary Bowen and Registrar Logan may argue that they lawfully disqualified and disenfranchised Mr. Galacki, because the State has the authority to ban write-in votes from being cast.[63] However, the plain language of the Elections Code flatly contradicts such a claim. In fact, instead of banning him from casting write-in votes, the Elections Code *explicitly allowed* Mr. Galacki not only to cast write-in votes, but also to *run as a write-in candidate* in every general election. Specifically, Section 15340 of the Elections Code gave (and still gives) voters like Mr. Galacki the right to cast a write-in vote in "every" election. Furthermore, Sections 8600 and 8601 allowed (and still allow) individuals like Mr. Galacki to run as a write-in candidate in every election, as long as they have filed nomination papers at least 14 days before the date of the election. Because SB 6 did not repeal Sections 15340, 8600, or 8601, Secretary Bowen and Registrar

[62] *Id.* at 523-25.
[63] *Cf. Burdick, supra*, 504 U.S. 428 (State may ban write-in votes from being cast under the U.S. Constitution); *Edelstein, supra*, 56 P.3d 1029, 29 Cal.4th at 169 (to ban write-in candidacies and voting in the general election, a State must first pass a statute that expressly bans write-in votes from being cast).

Logan[64] had *no lawful authority* either to disqualify Mr. Galacki's write-in candidacy or to throw away lawfully cast his write-in vote.[65]

For her part, Secretary Bowen may resort to two meritless arguments. First, she may claim that Part 8605 or 8606 of SB 6 banned Mr. Galacki from running as a write-in candidate in the General Election.[66] However, neither of those SB 6 provisions repealed Elections Code Sections 8600, 8601, or 15340. Thus, because SB 6 did not ban write-in candidacies, Registrar Logan had no legal authority to bar Mr. Galacki from running as a write-in candidate in the General Election.[67]

As a fallback, Secretary Bowen may insist that the State had the authority to disqualify and disenfranchise Mr. Galacki, because the State has the power to

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[64] Registrar Logan also claimed that he could not issue write-in nomination papers to Mr. Galacki, because Secretary Bowen forbade him from doing so: namely, Secretary Bowen's General Election Calendar "contain[ed] no line item or line items regarding the write-in process." Registrar Logan's July 6, 2011 letter to Mr. Galacki's counsel, Dutta Decl., Exh. 4 (at p. 16). However, California law gives elections officials like Registrar Logan independent authority to interpret and enforce elections laws. *See, e.g., Billig v. Voges*, 273 Cal.Rptr. 91, 96-97, 223 Cal.App.3d 962 (Cal.Ct.App. 1990) (elections official interprets and enforces Elections Code without consulting the Secretary of State); *Farley v. Healey*, 67 Cal.2d 325, 327 (Cal. 1997); *Alliance for a Better Downtown Millbrae v. Wade*, 108 Cal.App.4th 123, 132, 136 (Cal.Ct.App. 2003).

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

[66] SB 6 Parts 8605 and 8606, *codified at* Elections Code §§8605 & 8606. In her Chief Counsel's Mar. 2, 2011 letter to Plaintiffs' counsel, Secretary Bowen claimed that Elections Code Section 8605 banned individuals like Mr. Galacki from running as write-in candidates in the general election. Pending MSJ, Dutta Decl., Exh. X (p. 109). Subsequently, Secretary Bowen reiterated her legal position in a Jan. 26, 2011 memorandum that she sent to Registrar Logan and all other county registrars. Dutta Decl., Exh. 4 (at p. 16) & Exh. 6 (at p. 27). Nevertheless, Secretary Bowen has represented to this Court that Section 8606, and not Section 8606, banned individuals from running as write-in candidates in the general election. Secretary Bowen's May 23, 2011 Statement of Genuine Issues of Material Fact ¶41.

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

1 "prescribe the procedural mechanisms for holding congressional elections."[68] Yet
2 contrary to her claims, the U.S. Supreme Court has banned the State's regulatory
3 interest *from even being considered* in Elections Clause cases. In *Gralike*, the High
4 Court made an emphatic, unanimous ruling: if a state's election rule violates the
5 Elections Clause, no state interest can save it. Thus, the High Court made it clear
6 that it will strike down any state "regulation" that singles out and targets a class of
7 federal candidates:

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> While the precise damage the labels may exact on candidates is disputed between the parties, the labels surely place their targets at a political disadvantage to unmarked candidates for congressional office. Thus, far from regulating the procedural mechanisms of elections, [the statute] attempts to "dictate electoral outcomes." Such "regulation" of congressional elections *simply is not authorized* by the Elections Clause.[69]

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

15 E. No Party Would Be Prejudiced If Mr. Galacki Joins This Case

16 No party will be prejudiced if Mr. Galacki brings his claims to this case.
17 Indeed, Mr. Galacki will abide by all deadlines that have already been set by the
18 Court's Scheduling and Case Management Order. Significantly, the Ninth Circuit
19 has found it "both imperative and in the public interest" that aggrieved voters and
20 candidates be allowed to intervene and vindicate their rights in cases involving the
21 fundamental right to vote – even after a district court has resolved a case.[70]
22 Because the Court has not yet ruled on Plaintiffs' pending Motion for Summary
23 Judgment, it should allow Mr. Galacki to intervene and incorporate his as-applied
24 claims into Plaintiffs' Motion.

25 Moreover, the facts regarding Mr. Galacki's claims are straightforward and
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27 [68] *See Gralike*, *supra*, 531 U.S. at 523 (emphasis added) (citation omitted).
[69] *Id.* at 525-26 (emphases added) (*quoting U.S. Term Limits v. Thornton*, 514 U.S. 779,
28 833-34 (1995)).
[70] *Bates*, *supra*, 127 F.3d at 873-74 (emphasis added, quotation marks omitted).

easily verifiable:

1. Mr. Galacki is registered to vote in Congressional District 36.[71]
2. On June 14, 2011, Mr. Galacki asked Registrar Logan to issue him nomination papers in order to run as a write-in candidate in the July 12, 2011 General Election for Congressional District 36.[72]
3. Mr. Galacki was barred from running as a write-in candidate in the General Election.[73]
4. Mr. Galacki cast a write-in ballot for himself in the General Election.[74]
5. Mr. Galacki's write-in vote was not counted on July 12, 2011.[75]
6. Mr. Galacki recently changed his party affiliation *from the Democratic Party to the Tea Party* in order to call attention to how the new rules of Proposition 14's Top Two Primary violate our fundamental rights.[76]
7. Finally, Mr. Galacki intends to run for Member of the U.S. Congress, as a candidate with the party affiliation of the Tea Party.[77]

Equally important, all of Mr. Galacki's claims involve the <u>same</u> case law that the parties have already briefed at great length.[78] In this light, the parties will be able to easily assess and respond to Mr. Galacki's claims.

VII. Mr. Galacki Qualifies for Intervention of Right

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

1. The applicant must have a "significantly protectable" interest relating to the property or transaction that is the subject of the transaction
2. The disposition of the action may, as a practical matter, "impair or impede" the applicant's ability to protect that interest
3. The application for intervention must be timely;

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[71] Galacki Decl. ¶1; Dutta Decl., Exh. 6.
[72] Dutta Decl. ¶8 & Exh. 1.
[73] Galacki Decl. ¶¶11, 12; Dutta Decl. ¶¶9, 10, 11 & Exh. 6.
[74] Galacki Decl. ¶¶10, 12 & Exh 2; Dutta Decl. Exh. 6.
[75] Galacki Decl. ¶¶12, 13; Dutta Decl. ¶12 & Exh. 6.
[76] Galacki Decl. ¶¶2, 15 & Exh. 1.
[77] Galacki Decl. ¶¶14, 19.
[78] For example, Mr. Galacki bases his as-applied Elections Clause claims (discussed in Section V.C *supra*) on *Cook v. Gralike* (531 U.S. 510), a seminal Supreme Court case first cited in Plaintiffs' Feb. 18, 2011 Motion for Preliminary Injunction.

4. The applicant's interest "may not be" adequately represented by the existing parties in the lawsuit.[79]

As the Ninth Circuit has noted, "Rule 24 traditionally receives liberal construction in favor of applicants for intervention."[80]

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

As a starting point, Mr. Galacki has a "significantly protectable" interest in this lawsuit, for it will decide all but two of his legal claims. An applicant has such an interest if (1) "the interest asserted is protectable under some law," and (2) there is a "relationship between the legally protected interest and the claim at issue."[81] Here, Mr. Galacki seeks to defend and vindicate his fundamental right to run for office and cast a vote that is counted. Thus, his interest is protectable under the U.S. Constitution, and all of his claims are closely related to those raised by Plaintiffs. As the Ninth Circuit has made clear, any voter or candidate whose fundamental rights have been harmed (or are threatened with harm) has shown a "significantly protectable" interest.[82] Accordingly, Mr. Galacki has satisfied the first requirement for intervention.

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

Mr. Galacki also qualifies for intervention of right, because Plaintiffs' pending Motion for Summary Judgment will impair and impede his ability to protect his legal claims against SB 6. As discussed earlier, all but two of Mr. Galacki's legal claims have been raised by Plaintiffs. If the Court rules on Plaintiffs' Motion without hearing his claims, Mr. Galacki's will suffer "a practical impairment of his interests as a resulting of the pending litigation."[83] In this light,

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

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

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

[82] *Bates, supra*, 127 F.3d at 873 n.4.

[83] *Wilderness Soc'y, supra*, 630 F.3d at 1179.

1 the Ninth Circuit has held that a voter and candidate like Mr. Galacki "has a
2 significantly protectable interest that is subject to impairment."[84]
3 C. Mr. Galacki's Application Was Timely
4 By bringing a timely application, Mr. Galacki further qualifies for
5 intervention of right. Courts consider three facts in determining whether an
6 applicant has brought a timely motion to intervene: (1) the "stage of the
7 proceeding" when an applicant seeks to intervene, (2) the prejudice to other parties,
8 and (3) "the reason for and length of the delay."[85] Here, Mr. Galacki filed his ex
9 parte Application *two days* after he suffered irreparable harm, when his write-in
10 vote was not counted. Furthermore, as shown earlier in Section VI.E, both the
11 Ninth Circuit has admonished courts to permit voters and candidates to vindicate
12 their rights in election cases – even after a case has been appealed.[86] Having rushed
13 to Court only hours after his write-in vote was not counted, Mr. Galacki has
14 unquestionably brought a timely motion to intervene.
15 D. Mr. Galacki's Interests Cannot Be Adequately Represented by the
16 Existing Parties
17 Finally, Mr. Galacki must be permitted to intervene, for the present parties
18 cannot adequately represent his interests. Courts weigh three factors in deciding
19 whether existing parties can adequately a prospective intervenor's interests: (1)
20 whether the interest of an existing party "is such that it will undoubtedly make all
21 the intervenor's arguments"; (2) whether the existing party is "capable and willing
22 to make such arguments"; and (3) whether the prospective intervenor would "offer
23 any necessary elements" to the litigation that other parties would "neglect".[87]
24 Toward that end, a prospective intervenor has the "minimal" burden of making such
25 a showing: he or she "need only show that representation of its interests by existing
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[84] *Bates, supra*, 127 F.3d at 873 n.4.
[85] *Alisal, supra*, 370 F.3d at 921.
[86] *Bates, supra*, 127 F.3d at 873-74 (emphasis added, quotation marks omitted).
[87] *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (citations omitted).

1 parties '*may be*' inadequate".[88]

2 Here, Mr. Galacki's interests will not be adequately represented for one
3 simple reason: Plaintiffs have not and cannot raise two of his core claims under the
4 Elections Clause: that SB 6 (1) violated his fundamental right to run for office
5 under *Cook v. Gralike*, and (2) violated his fundamental right under to cast a write-
6 in vote and have it counted under *Cook v. Gralike*.[89] To be sure, Plaintiffs Daniel
7 Frederick and Rich Wilson, respectively, have also brought write-in claims
8 stemming from the recent state election in Assembly District 4. However, with
9 respect to the Elections Clause, *Gralike* only applies to elections involving federal
10 candidates.[90] Because Plaintiffs Frederick and Wilson did not and cannot raise Mr.
11 Galacki's Elections Clause claims, they cannot adequately represent Mr. Galacki's
12 interests.

13 Secretary Bowen may insist that Mr. Galacki should be banned from
14 intervening, because both he and Plaintiffs shares the same "ultimate objective": to
15 strike down SB 6. To be sure, a "presumption of adequacy" arises if a prospective
16 intervenor and an existing share the same "the same ultimate objective."[91]
17 However, prospective intervenors may rebut that presumption if they do not share
18 "sufficiently congruent" interests.[92] Here, the interests of Mr. Galacki and
19 Plaintiffs diverge in one critical way: unlike Mr. Galacki, Plaintiffs do not seek to
20 run for Congressional office in the 2011-12 election cycle. Because none of them
21 have standing as future candidates, it may prove difficult for Plaintiffs to expedite
22 this case.[93] Consequently, Plaintiffs cannot adequately defend Mr. Galacki's rights
23 as a Tea Party candidate who urgently needs this litigation to be resolved.

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25 [88] *Id.* at 823 (emphases added) (*quoting Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972)).
[89] 531 U.S. 510.
26 [90] *Gralike, supra*, 531 U.S. at 523 (examining when a state exceeds its power to "prescribe the procedural mechanisms for holding congressional elections") (emphasis added).
27 [91] *Berg, supra*, 268 F.3d at 823.
[92] *Id.* at 823; *see also Bates, supra*, 127 F.3d at 873 n.4.
28 [93] *See Bates, supra*, 127 F.3d at 873 n.4 (voters and candidates allowed to intervene because their interests would not have been adequately represented by the existing parties).

VIII. Conclusion

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

-- Justice Brennan[94]

Julius Galacki has earned the right to join this lawsuit for one simple reason: no other party can safeguard his interests in this litigation. By allowing him to intervene, the Court will uphold the "elementary principles of fairness that govern California's elections."[95]

DATED: July 14, 2011

Respectfully submitted,

By:

GAUTAM DUTTA, ESQ.

Attorney for Intervenor-Applicant

JULIUS GALACKI

[94] *Stringfellow v. Concerned Neighbors*, 480 U.S. 370, 382 n.1 (concurring opinion, emphases added) (1987).

[95] *Bates*, *supra*, 127 F.3d at 873 (*citing Storer v. Brown*, 415 U.S. 724, 736 (1974); *Legislature v. Deukmejian*, 669 P.2d 17 (Cal. 1983)).