

No. 11-56449

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL CHAMNESS, DANIEL FREDERICK, and RICH WILSON

Plaintiffs / Appellants,

JULIUS GALACKI

Intervenor-Applicant-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 CENTRAL DISTRICT OF CALIFORNIA ORDERS (1) DENYING
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY
JUDGMENT IN FAVOR ON NON-MOVING PARTIES, AND (2) GRANTING
INTERVENORS-DEFENDANTS' MOTION TO INTERVENE*

CORRECTED MOTION FOR RECONSIDERATION

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[F]undamental constitutional rights of many persons would be jeopardized, if not lost, if this Court routinely calendared this case for briefing and argument in the regular course.

– Fifth Circuit, *U.S. v. Hinds County School Board*¹

I. Introduction

Plaintiffs ask the Court to reconsider its decision not to expedite this appeal, for the Court did not consider one critical fact. Namely, if the Court does not rule on this appeal before **March 9, 2012**, *minor-party candidates and the voters who support them could suffer irreparable harm* in the 2012 statewide election. To ensure a “fair and honest” election in which no candidate or voter “would suffer a serious injustice”,² the Court *must* rule on the merits of Plaintiffs’ appeal no later than March 9, 2012.³

II. Defendants Deliberately Misled the Court

Defendants oppose expediting Plaintiffs’ appeal because they deny that it is time-sensitive. They claim that under the current briefing schedule, the Court could rule on the merits of this appeal without disrupting the statewide election and without inflicting any irreparable harm on any candidates or voters. In so doing, Defendants have *deliberately misled the Court*, for the current briefing schedule could cause candidates and the voters who support them to suffer irreparable harm. Plaintiffs had intended to refute Defendants’ disinformation by filing a timely reply brief.

¹ *U.S. v. Hinds County School Bd.*, 417 F.2d 852, 857 (5th Cir. 1969) (italics added).

² *Cook v. Gralike*, 531 U.S. 510, 524 (2001); *Bates v. Jones*, 127 F.3d 870, 872 (9th Cir. 1997).

³ The Court has the inherent authority to give preference to cases of public importance. 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §2351 (3d ed. 2010); *see also Perry v. Schwarzenegger*, 2010 WL 3212786, at *1 (9th Cir. Aug. 16, 2010) (Court *sua sponte* expedites briefing and hearing of Proposition 8 appeal).

Plaintiffs stand by their *unrefuted* claims that minor-party candidates and the voters who support them could *also* suffer irreparable harm (1) in *any* special election that could be called *in a matter of days*, or (2) beginning **December 30, 2011**, when candidates who seek to waive onerous filing fees (\$1,740.00 in the case of Intervenor-Applicant Julius Galacki) must begin collecting signatures from voters. Plaintiffs’ Sept. 21, 2011 Opening Brief, Docket No. 10 (“Opening Brief”), at 17-18.

However, the Court denied Plaintiffs' Motion to Expedite before Plaintiffs had filed a reply brief.

III. The Party-Primary System Will Likely Be Reinstated If Plaintiffs Prevail

If Plaintiffs prevail, California's previous party-primary system – which Proposition 14 and Senate Bill 6 had eliminated – will likely be *reinstated* for the 2012 statewide election.

Under the party-primary system, major-party candidates could qualify for the general election by finishing first in their own party's primary. However, under Proposition 14 and SB 6, they must now finish first or second *against all other candidates* (including minor-party candidates) on June 5, 2012, the statewide primary election.⁴ The top two finishers will then advance to the November 6, 2012 general election.

In their appeal, Plaintiffs will ask the Court to declare that Proposition 14 is unenforceable, for its implementing law (SB 6) is unconstitutional.⁵ Toward that end, Plaintiffs will show that SB 6 must be declared unconstitutional *in its entirety*, because one of its core parts is unconstitutional. Specifically, SB 6's Party Preference Ban (1) forces minor-party (e.g., Coffee Party, Tea Party, Reform Party) candidates to *falsely* state on the ballot that they have "No Party Preference", and (2) bans minor-party candidates from using the ballot label of "Independent"⁶ –

⁴ Opening Brief, at 8-9.

⁵ Proposition 14, which is not self-executing, must be declared inoperative and unenforceable if its implementing law is declared unconstitutional. *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).

⁶ Opening Brief, at 8. In *Rubin v. City of Santa Monica*, this Court signaled that banning the ballot label of "Independent" would trigger *strict scrutiny*. *Rubin*, 308 F.3d 1008, 1015 (9th Cir. 2002) (*quoting Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992)). On Aug. 18, 2011, this Court took judicial notice of Secretary Bowen's statement that Senate Bill 6's Party Preference Ban was not "permissible". Opening Brief, at 7 n.17.

Senate Bill 6 must be declared unconstitutional *in its entirety* if its Party Preference Ban is declared unconstitutional, because Senate Bill 6 *is not severable*. It is undisputed that the Legislature

which California candidates had been able to use *for over a century*.⁷ Not only does the Party Preference Ban *run afoul of this Court's precedent*, but Secretary Bowen has herself admitted (in a statement of which this Court *has taken judicial notice*) that such a ban is *not "permissible"*.⁸

Although Plaintiffs do not seek injunctive relief, Secretary Bowen has told the Court that she will abide by this Court's ruling. In her counsel's words, "[T]here is *no reason to suspect* that the Secretary of State would 'refuse' to follow a federal court order."⁹ Plaintiffs take Secretary Bowen at her word. Thus, if the Court declares that Proposition 14 is unenforceable, it can assume that Secretary Bowen *will stop enforcing Proposition 14*, and *will reinstate the party-primary system* – a *major* change in how the 2012 statewide election will be administered.

IV. A Critical Election Date Not Considered by the Court

In their opposition papers, Defendants chose not to inform the Court of one critical election date: **March 9, 2012** (i.e., one week *before* briefing on Plaintiffs' appeal is currently scheduled to be completed).¹⁰ After March 9, *no candidate's ballot label* ("party preference") for the 2012 statewide election *may be changed*.¹¹ Thus, if the Court grants Plaintiffs declaratory relief *after* March 9, the *deadline to change* ballot labels *will have passed*. Because their ballot labels would not be changed from "No Party

enacted the Party Preference Ban to implement Subsection V(b) of Proposition 14, which called for a "statute" to implement the "manner" in which candidates could state their party preference on the ballot. Proposition 14, *codified at* CAL.CONST. art. ii §5(b). Because the Legislature would not have passed Senate Bill 6 *without* its Party Preference Ban, Senate Bill 6 is not severable. *Gerken v. FPPC*, 863 P.2d 694, 698 (Cal. 1993); *see also People v. Broussard*, 856 P.2d 1134, 1137 (Cal. 1993). And because Senate Bill 6 is not severable, the Court must declare Senate Bill 6 unconstitutional *in its entirety* if it declares that the Party Preference Ban is unconstitutional. *Gerken, supra*, 863 P.2d at 698.

⁷ Sept. 15, 2011 Dutta Decl., Docket No. 5-2, Exh. 6, at 10:16-11:2.

⁸ *See supra* note 6.

⁹ Secretary Bowen's Opp'n, Docket No. 12, at 5 (quotations in original, italics added).

¹⁰ Under the current briefing schedule, Plaintiffs' reply brief will be due Mar. 15, 2012. Court's Aug. 25, 2011 Order, Docket No. 1-3, at 3.

¹¹ Orange County 2012 Election Calendar, RJN Exh. 1, at 3-4; *see also* Elections Code §8002.5(a).

Preference” to “*Independent*”, minor-party candidates would *still* be inflicted with irreparable harm in the 2012 statewide election.

V. Conclusion

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[.]

– The Court, *Davies v. Grossmont Union High School Dist.*¹²

Unless the Court expedites this appeal, candidates and the voters who support them could suffer irreparable harm in the looming statewide election.¹³ If the Court does not issue a timely ruling, minor-party candidates across the state could still be forced to *falsely* state on the ballot that they have “No Party Preference”, and voters could be deprived of critical information that they *need* in order to make an informed decision on how to vote.¹⁴ Accordingly, Plaintiffs respectfully ask the Court to reconsider its order, expedite their appeal, and resolve it on the merits *no later than* March 9, 2012. In so doing, the Court will not only ensure that no candidate will be forced to *lie to voters* about their political beliefs, but it will give elections officials the *certainty* that they need to conduct a “fair and honest” election.¹⁵

¹² *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1397 (9th Cir. 1991) (italics 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).

¹³ “Even more important, however, are the *rights of the voters*. It is not too late to ensure that their interests in fairness and uniformity are protected[.]” *Bates, supra*, 127 F.3d at 873 (italics added). *Accord, Cardona v. Oakland Unified Sch. Dist.*, 785 F.Supp. 837, 840 (N.D. Cal. 1992) (violation of right to vote constitutes irreparable harm); *Montano v. Suffolk County Legislature*, 268 F.Supp.2d 243, 260 (E.D.N.Y. 2003) (same); *Fla. Dem. Party v. Hood*, 342 F.Supp.2d 1073, 1082 (N.D. Fla. 2004) (same); *see also* Circuit Rule 27-12 (motion to expedite must be granted if irreparable harm could otherwise result).

¹⁴ “The ballot is the *last thing* the voter sees before he makes his choice.” *Wash. Grange v. Wash. Republican Party*, 552 U.S. 442, 460 (2008) (italics added) (quoting *Gralike, supra*, 531 U.S. at 532).

¹⁵ Presumably in response to this litigation, the Orange County Registrar has told candidates and voters that Proposition 14’s “changes *may not be final*.” RJN Exh. 1, at 1 (italics added). *See also Gralike, supra*, 531 U.S. at 524; *Bates, supra*, 127 F.3d at 872 (“The state ... has repeatedly expressed its legitimate

DATED: Oct. 12, 2011

By: /s/

GAUTAM DUTTA, ESQ.

desire to avoid to the greatest extent possible any unnecessary inequities and delay in the upcoming election cycle. We agree.”) (italics added).

FRAP 27(d)(2) CERTIFICATE OF COMPLIANCE

I certify that the accompanying Motion does not exceed 20 pages.

/s/ _____

GAUTAM DUTTA

CERTIFICATE OF SERVICE

On Oct. 12, 2011, I served, via ECF, an electronic copy of this
Corrected Motion to Reconsider.

/s/ _____

GAUTAM DUTTA