

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*

**MOTION FOR SUMMARY REVERSAL AND
CONSOLIDATION OF RELATED CASES**

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FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

FRAP 26.1 does not apply here, for Appellant Julius Galacki is a natural person.

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.

-- The Court, *Bates v. Jones*¹

I. Introduction and Summary

The Court must grant Tea Party candidate Julius Galacki's Motion for one core reason: he has been denied his fundamental rights without a reasoned decision from the lower court. By flouting binding precedent and refusing to allow him to intervene in the underlying Top Two Primary litigation, the trial court improperly banned Mr. Galacki from defending and vindicating his fundamental rights (1) as a voter who was *disenfranchised* because he cast a write-in vote, (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". By granting this Motion, the Court will ensure that Mr. Galacki's grievances are heard *at the same time* it hears Plaintiffs' pending Top Two Primary appeal – which will resolve *all but two* of Mr. Galacki's claims.²

¹ *Bates v. Jones*, 127 F.3d 870, 872 (9th Cir. 1997) (emphases added).

² *Michael Chamness v. Debra Bowen*, No. 11-56449. Plaintiffs have concurrently filed a Motion to Expedite Appeal with the Court.

II. Issues Presented

A. Whether an individual who has been deprived of the fundamental right to have his vote counted is entitled to intervene as of right.

B. Whether an individual who has been deprived of the fundamental right to run for federal office is entitled to intervene as of right.

C. Whether a Tea Party candidate is entitled to intervene as of right, because a state law (Senate Bill 6) will soon force him to falsely state on the ballot that he has “No Party Preference”.

III. Overview

A resident of the City of Los Angeles, Julius Galacki is registered to vote in Congressional District 36, which recently elected a new Member of Congress in the July 12, 2011 General Election (the “General Election”).³

Senate Bill 6 (“SB 6”), which implements the Top Two Primary, has trampled on Mr. Galacki’s fundamental right to vote and run for office in three egregious ways. First, SB 6 *throws away all votes cast for write-in candidates* in the general election. Specifically, SB 6’s Vote Counting Ban has created what one constitutional scholar would call a “trap for the unwary”.⁴ Namely, SB 6 allows voters to cast votes for write-in candidates

³ Julius Galacki’s July 14, 2011 Motion to Intervene, at 6, *attached as* Exh. 53 to the Aug. 5, 2011 Declaration of Gautam Dutta (hereinafter, “Dutta Decl.”).

⁴ Joseph Fishkin, *Voting as a Positive Right: A Reply to Flanders*, 28 ALASKA L.R. 29, 31 (June 1, 2011).

in the general election, but then *bans their votes from being counted*.⁵ As even Secretary Bowen has admitted, SB 6’s Vote Counting Ban gives voters the “illusion that they can write in a candidate’s name and have it counted.”⁶

Second, Mr. Galacki was barred from running as a write-in candidate for Congressional office, because Los Angeles County Registrar Logan claimed that SB 6 bans write-in candidacies in the general election. In so doing, Registrar Logan ignored Elections Code §15340, which expressly gives every voter the right to vote for a write-in candidate in “any” election:

Each voter is entitled to *write the name of any candidate for any public office*, including that of President and Vice President, *on the ballot of any election*.⁷

Tellingly, even Secretary Bowen has admitted that SB 6’s Candidacy Ban “give[s] candidates the illusion that they can run as a write-in[.]”⁸

Finally, SB 6’s Party Preference Ban bars candidates from using the ballot label of “Independent” – a ban that even Secretary Bowen has *admitted is not “permissible”*.⁹ Instead, SB 6’s Party Preference Ban will

⁵ SB 6-amended Elections Code §13207 (mandating that voters be given the right to cast write-in votes in every election); SB 6-amended Elections Code §8606 (banning all write-in votes that are cast in the general election from being counted).

⁶ Dutta Decl. Exh. 72 (at Exh. B, p.1, emphases added). On Aug. 18, 2011, the Court took judicial notice of Secretary Bowen’s public statements regarding SB 6. Court’s Aug. 18, 2011 Order, Docket No. 14, *attached as* Exhibit 75 to the Dutta Decl. (*granting* Mr. Galacki’s Aug. 5, 2011 Request for Judicial Notice, Docket No. 4-1, at 2).

⁷ Elections Code §15340 (emphases added).

⁸ Dutta Decl. Exh. 72 (at Exh. B, p.1, emphases added). *See supra* note 6.

⁹ Dutta Decl. Exh. 72 (at Exh. A, Attach. 1, p.1, emphasis added). *See supra* note 6.

force Tea Party candidate Julius Galacki to falsely state on the ballot – and *lie to voters* – that he has “No Party Preference”.

To qualify as a candidate for Member of the U.S. Congress, an individual must pay a filing fee of \$1,740.00.¹⁰ To have that onerous fee waived, Mr. Galacki must file candidacy papers and gather at least 3,000 valid signatures from voters beginning **Dec. 30, 2011**.¹¹

IV. Undisputed Facts

On May 6, 2011, Plaintiffs Chamness, Frederick, and Wilson filed a Motion for Summary Judgment (“Plaintiffs’ MSJ”) in the underlying litigation.¹² At Secretary Bowen’s request, the trial court postponed the hearing by one week, from June 6, 2011 to June 13, 2011; the trial court later cancelled that hearing.¹³ On July 14, 2011, the trial court issued a tentative ruling granting summary judgment in favor of the non-moving parties (i.e., Secretary Bowen and Intervenors-Defendants), and reset the MSJ hearing for August 22, 2011.¹⁴ Subsequently, the trial court denied

¹⁰ Emergency Motion for Summary Reversal, Docket 3-1, at 16 & n.13 (“Emergency Motion”). This Motion was originally named “Emergency Motion for Expedited Appeal”. *See* Julius Galacki’s Aug. 6, 2011 Notice of Renaming, Docket No. 5.

¹¹ Elections Code §8061 [candidates seeking to waive filing fees may begin gathering signatures on the 158th day before a given election (here, June 5, 2011)].

¹² Dutta Decl. Exh. 25.

¹³ Dutta Decl. Exhs. 38, 33, 48.

¹⁴ Dutta Decl. Exh. 49.

Plaintiffs' MSJ, and granted summary judgment in favor of the non-moving parties.¹⁵ Plaintiffs promptly appealed.¹⁶

Meanwhile, Mr. Galacki decided to run as a write-in candidate in the July 12, 2011 general election in Congressional District 36 (the "General Election").¹⁷ On June 14, 2011, he asked Registrar Logan to issue him nomination papers so that he could qualify and run as a write-in candidate.¹⁸ Mr. Galacki subsequently cast a write-in vote for himself in the General Election, and mailed his vote-by-mail ballot to Registrar Logan's office.¹⁹

On June 28, 2011, the statutory deadline to file write-in nomination papers for the General Election passed.²⁰ Because no nomination papers had been issued to Mr. Galacki as of that date, he was barred from exercising his fundamental right to run for office.²¹ On July 12, 2011, the write-in vote that Mr. Galacki cast for himself in the General Election was not counted.²² Two days later, Mr. Galacki rushed to the trial court with his Ex Parte Application and Motion to Intervene.²³ In response, Secretary

¹⁵ Sept. 12, 2011 Declaration of Gautam Dutta ("Sept. 12, 2011 Dutta Decl."), Exh. 6.

¹⁶ Sept. 12, 2011 Dutta Decl. Exh. 3 (Amended Notice of Appeal).

¹⁷ July 14, 2011 Declaration of Julius Galacki ¶9, *attached as* Exhibit 55 to the Dutta Decl.

¹⁸ July 14, 2011 Declaration of Gautam Dutta ¶8 & Exh. 1, *attached as* Exhibit 56 to the Dutta Decl.

¹⁹ July 14, 2011 Declaration of Julius Galacki ¶10, *attached as* Exhibit 55 to the Dutta Decl.

²⁰ To qualify, write-in candidates had to file their nomination papers at least 14 days before the date of the election (here, the July 12, 2011 General Election). Elections Code §8601.

²¹ July 14, 2011 Declaration of Gautam Dutta ¶9, *attached as* Exhibit 56 to the Dutta Decl.

²² Julius Galacki's July 14, 2011 Motion to Intervene, at 9:2-9:6, *attached as* Exhibit 53 to the Dutta Decl.

²³ Julius Galacki's July 14, 2011 Motion to Intervene and Ex Parte Application, *attached as*

Bowen filed a sparse, two-paragraph opposition, while Intervenor-Defendants filed a four-paragraph opposition.²⁴ Mr. Galacki then filed a reply brief to respond to both oppositions.²⁵

On July 22, 2011, the trial court cancelled the hearing for Mr. Galacki's Motion to Intervene, and denied Mr. Galacki's Motion outright.²⁶ In response, Mr. Galacki filed an Emergency Motion for Summary Reversal with this Court.²⁷ On August 18, 2011, the Court declined to grant emergency relief, but granted Mr. Galacki's requests for judicial notice.²⁸

V. The Trial Court's Order

The trial court gave two reasons for banning Mr. Galacki from intervening as of right: (1) Plaintiffs would adequately represent Mr. Galacki's interests, and (2) his Motion was not timely.²⁹ First, the trial court ruled that Plaintiffs would adequately represent Mr. Galacki's

Exhibits 53 and 54, respectively, to the Dutta Decl.

²⁴ Dutta Decl. Exhs. 50 & 52.

²⁵ Dutta Decl. Exh. 58.

²⁶ Emergency Motion, at 22 n.49; Sept. 12, 2011 Dutta Decl. Exh. 2.

²⁷ Emergency Motion, *supra* note 10.

²⁸ Court's Aug. 18, 2011 Order, Docket No. 14, *attached as* Exhibit 75 to the Dutta Decl. (*granting* Mr. Galacki's Aug. 5, 2011 Request for Judicial Notice, Docket No. 4-1, at 2 *and granting* Mr. Galacki's Aug. 18, 2011 Request for Judicial Notice, Docket No. 12-2, at 2).

²⁹ In a footnote, the district court opined that Mr. Galacki's Motion to Intervene was procedurally defective, because it did not include a complaint in intervention. Sept. 12, 2011 Dutta Decl. Exh. 2 at 3:6 n.2. Interestingly, the trial court had allowed Intervenor-Defendants to intervene even though they themselves had not filed a complaint in intervention. Emergency Motion, at 23 n.50; Sept. 12, 2011 Dutta Decl. Exh. 4. In any event, prospective intervenors need not file a complaint in intervention, as long as their papers have "fully stated the legal and factual grounds for intervention." *Beckman Ind. v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992) (*citing, inter alia, Smith v. Pangalinan*, 651 F.2d 320, 1325-26 (9th Cir. 1981); *Shores v. Hendy Realiz.*, 133 F.2d 738, 742 (9th Cir. 1943)). Here, even the trial court conceded that "Mr. Galacki's Motion sets forth his claims in detail[.]" Sept. 12, 2011 Dutta Decl. Exh. 2, at 3:6 n.2. Therefore, Mr. Galacki's Motion to Intervene did not suffer from any procedural shortcomings.

interests. According to the trial court, because both Mr. Galacki and Plaintiffs invoked the same High Court case (*Cook v. Gralike*), Mr. Galacki had not brought any unique claims.³⁰

In addition, the trial court ruled that Mr. Galacki's Motion to Intervene was not timely for three reasons. First, it ruled that it should not hear Mr. Galacki's claims, because it was about to grant summary judgment against Plaintiffs.³¹ Second, the trial court ruled that it would be "prejudicial" to Defendants if Mr. Galacki were allowed to intervene.³² Finally, the trial court ruled that Mr. Galacki should have brought his Motion to Intervene before he had suffered any irreparable harm; that is, he should not have brought any as-applied constitutional claims.³³

VI. Standard of Review

Summary reversal must be granted when a person has been clearly deprived of his constitutional rights without a reasoned decision from the lower court.³⁴ Summary reversal is especially warranted if time is of the essence and one party's position is clearly correct as a matter of law.³⁵ This

³⁰ *Cook v. Gralike*, 531 U.S. 510 (2001); Sept. 12, 2011 Dutta Decl. Exh. 2. at 5:22-6:2.

³¹ Sept. 12, 2011 Dutta Decl. Exh. 2, at 4:11 & Exh. 49.

³² Sept. 12, 2011 Dutta Decl. Exh. 2, at 4:22.

³³ Sept. 12, 2011 Dutta Decl. Exh. 2, at 4:24-5:2.

³⁴ *Sills v. Bureau of Prisons*, 76 F.2d 792, 795-96 (D.C. Cir. 1985) (Mikva, J).

³⁵ *See, e.g., Groendyke Transport. Inc. v. Davis*, 406 F.2d 1158, 1163 (5th Cir. 1969), *cert. denied*, 394 U.S. 1012 (1969); *Joshua v. U.S.*, 17 F.3d 378, 380 (Fed. Cir. 1994) (re-affirming *Groendyke*).

Court will grant summary reversal if the lower court has committed “clear error”.³⁶ Toward that end, the Court reviews issues of law *de novo*.³⁷

Moreover, “[t]his Court reviews *de novo* the denial of a motion to intervene as of right.”³⁸ In so doing, the Court reviews the trial court’s determination of timeliness (one part of the test for intervention of right) for abuse of discretion.³⁹ “An abuse of discretion will be found if the district court based its decision on an erroneous legal standard or clearly erroneous findings of fact.”⁴⁰ Toward that end, this Court “review[s] conclusions of law *de novo* and findings of fact for clear error.”⁴¹ Put another way, a ruling by a trial court will be reversed if it did not “g[e]t the law right”.⁴²

VII. The Trial Court’s Order Denying Mr. Galacki’s Motion to Intervene Must Be Summarily Reversed

Mr. Galacki easily satisfies the requirements to intervene as of right.

The Court requires that four criteria to qualify for intervention of right:

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;
4. The applicant’s interest “may not be” adequately represented by

³⁶ Circuit Rule 3-6(a).

³⁷ *Fortney v. U.S.*, 59 F.3d 117, 119 (9th Cir. 1995).

³⁸ *U.S. v. State of Washington*, 86 F.3d 1499, 1503 (citation omitted).

³⁹ *Id.* at 1503 (citations omitted).

⁴⁰ *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

⁴¹ *Id.* at 1131.

⁴² *Id.*

the existing parties in the lawsuit.⁴³

As the Court has made clear, “Rule 24 traditionally receives liberal construction *in favor of* applicants for *intervention*.”⁴⁴ As the trial court correctly ruled, Mr. Galacki easily satisfied the first two requirements. Indeed, it is undisputed that (1) Mr. Galacki has a “significantly protectable” interest in the underlying Top Two Primary litigation, and (2) his ability to protect that interest has already been impeded and impaired. Namely, by denying Plaintiffs’ claims, the trial court deprived Mr. Galacki of his fundamental right to vote and run for public office *without giving him a hearing* – violating his right to Due Process.⁴⁵

A. No Other Party Can Adequately Represent Mr. Galacki’s Interests

Contrary to the trial court’s erroneous ruling, Mr. Galacki must be allowed to intervene, for no other party can adequately represent his interests as a matter of law.⁴⁶ The Court weighs three factors in deciding whether existing parties can adequately represent a prospective intervenor’s interests: (1) whether the interest of an existing party “is such that it will undoubtedly

⁴³ *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)); see also FRCP 24(a)(2).

⁴⁴ *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).

⁴⁵ *Walls v. Central Contra Costa Transit Auth.*, -- F.3d --, 2011 WL 3319442 at *3 (9th Cir. 2011); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); see also *Kassbaum v. Steppenwolf Prods.*, 236 F.3d 487, 494 (9th Cir. 2000); *Bates, supra*, 127 F.3d at 873-74; *Keith v. Volpe*, 858 F.3d 467, 473-76 (9th Cir. 1988).

⁴⁶ *Fortney, supra*, 59 F.3d at 119.

make all the intervenor's arguments"; (2) whether the existing party is "capable and willing to make such arguments"; and (3) whether the prospective intervenor would "offer any necessary elements" to the litigation that other parties would "neglect".⁴⁷ Toward that end, a prospective intervenor has the "minimal" burden of making such a showing: he or she "need only show that representation of its interests by existing parties 'may be' inadequate".⁴⁸

Here, Mr. Galacki's interests will not be adequately represented for one simple reason. Namely, Plaintiffs have not and cannot raise two of his Elections Clause claims under *Cook v. Gralike*: that SB 6 (1) violated his fundamental right to run for office, and (2) violated his fundamental right to cast a vote and have it counted.⁴⁹

As the trial court noted, Plaintiffs Daniel Frederick and Rich Wilson, respectively, have also brought write-in claims stemming from the recent state election in Assembly District 4. But contrary to the trial court's opinion, *Gralike* only applies to elections involving federal candidates with respect to the Elections Clause.⁵⁰ Specifically, Plaintiff Daniel Frederick – who, like Mr. Galacki, was illegally banned from running as a write-in

⁴⁷ *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001).

⁴⁸ *Id.* at 823 (emphases added) (quoting *Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972)).

⁴⁹ *Gralike, supra*, 531 U.S. 510.

⁵⁰ *Id.* at 523 (examining when a state exceeds its power to "prescribe the procedural mechanisms for holding congressional elections") (emphasis added).

candidate – invoked the First Amendment, but not the Elections Clause.⁵¹

For his part, Plaintiff Rich Wilson – who, like Mr. Galacki, cast a write-in vote that was not counted – did not invoke *Gralike*, but instead brought a different Elections Clause claim: namely, a federal statute (which was enacted by Congress pursuant to its authority under the Elections Clause) protects his right to cast a ballot and have that ballot counted.⁵²

Because Plaintiffs Frederick and Wilson did not and cannot raise Mr. Galacki’s unique Elections Clause claims, they cannot adequately represent Mr. Galacki’s interests.

Secretary Bowen may argue that Mr. Galacki should still be banned from intervening, because both he and Plaintiffs shares the same “ultimate objective”: to strike down SB 6. To be sure, a “presumption of adequacy” arises if a prospective intervenor and an existing party share the same “the same ultimate objective.”⁵³ However, prospective intervenors may rebut that presumption if they do not share “sufficiently congruent” interests.⁵⁴

⁵¹ Plaintiff Frederick was barred from running as a write-in candidate in the May 3, 2011 special general election for Assembly District 4. Plaintiffs’ MSJ, at 18:5-19:11, *attached as Exhibit 25 to the Dutta Decl.*

⁵² Plaintiff Rich Wilson cast a write-in vote in the May 3, 2011 special general election for Assembly District 4. Plaintiffs’ MSJ, at 19:18-19:20, *attached as Exhibit 25 to Dutta Decl.*; *see also U.S. v. Mosley*, 238 U.S. 383, 386 (1915) (Civil Rights Act of 1870, 16 Stat. 140-146, passed by Congress pursuant to its authority under the Elections Clause, safeguards the fundamental right of every voter to cast a ballot and have that ballot counted); *Gamza v. Aguirre*, 619 F.2d 449, 452 (5th Cir. 1980) (re-affirming *Mosley*); *cf. Gralike, supra*, 531 U.S. 510.

⁵³ *Berg, supra*, 268 F.3d at 823.

⁵⁴ *Id.* at 823; *see also Bates, supra*, 127 F.3d at 873 n.4.

Here, the interests of Mr. Galacki and Plaintiffs diverge in one critical respect: unlike Mr. Galacki, Plaintiffs do not seek to run for Congress in the 2011-12 election cycle.⁵⁵ Plaintiffs' MSJ does not seek injunctive relief against Senate Bill 6. Unless Mr. Galacki is allowed to intervene, it may prove difficult for Plaintiffs to fully resolve their appeal before December 30, 2011, when he must file candidacy papers to waive the \$1,740.00 Congressional filing fee.⁵⁶

In short, Plaintiffs cannot adequately defend the fundamental rights of Mr. Galacki: a Tea Party candidate who must file candidacy papers beginning December 30, 2011 to waive the \$1,740.00 Congressional filing fee. Because Plaintiffs do not share "sufficiently congruent" interests with Mr. Galacki, he must be allowed not only to intervene as of right, but to consolidate his claims into Plaintiffs' pending appeal.⁵⁷

B. Mr. Galacki's Motion to Intervene Was Timely

Equally important, the trial court did not "get the law right" when it ruled that Mr. Galacki had not brought a timely Motion to Intervene.⁵⁸

Courts consider three factors in determining whether an applicant has

⁵⁵ *Bates, supra*, 127 F.3d at 873 n.4 (voters and candidates allowed to intervene with respect to looming election because their interests would not have been adequately represented by the existing parties).

⁵⁶ *Id.* at 873 n.4; *Groendyke, supra*, 406 F.2d at 1163.

⁵⁷ *Berg, supra*, 268 F.3d at 823; *Volpe, supra*, 858 F.3d at 473-76; *see also Bates, supra*, 127 F.3d at 873 n.4.

⁵⁸ *Cottrell, supra*, 632 F.3d at 1131.

brought a timely motion to intervene: (1) the “stage of the proceeding” when an applicant seeks to intervene, (2) the prejudice to other parties, and (3) “the reason for and length of the delay.”⁵⁹ Here, it is undisputed Mr. Galacki filed his Motion to Intervene *two days* after the event that inflicted irreparably harm on his fundamental rights: when his write-in vote was not counted. Furthermore, in *Bates v. Jones*, this Court admonished courts to enable voters and candidates to vindicate their rights in election cases – *even after a case has been appealed*.⁶⁰ Having rushed to Court only hours after his write-in vote was not counted, Mr. Galacki has unquestionably brought a timely motion to intervene.

1. The Trial Court Disregarded the Legal Standard Laid Down by This Court in *Bates v. Jones* and *Keith v. Volpe*

First, the trial court did not “get the law right” when it barred Mr. Galacki from intervening, because it was about to rule against Plaintiffs’ MSJ and in favor of the non-moving parties.⁶¹ Because the Court intended to rule against the legal claims brought by Plaintiffs and Mr. Galacki, binding precedent from this Court (let alone basic principles of fairness) demanded that Mr. Galacki be allowed to intervene – especially since the

⁵⁹ *Alisal, supra*, 370 F.3d at 921.

⁶⁰ *Bates, supra*, 127 F.3d at 873-74 (emphasis added, quotation marks omitted).

⁶¹ Trial court’s July 22, 2011 order, at 4:11, Sept. 12, 2011 Dutta Decl. Exh. 2.

trial court had previously postponed the hearing on Plaintiffs' MSJ in order to accommodate Secretary Bowen.⁶²

More troubling, the trial court disregarded – and *did not even cite* – the clear legal standard laid down by this Court in *Keith v. Volpe* and *Bates v. Jones*. Under *Volpe*, a party may supplement and add related claims to a pleading, if relevant events, transactions, or occurrences have happened after that pleading has been filed:⁶³

Rule 15(d) is intended to give district courts broad discretion in allowing *supplemental pleadings*. The rule is a tool of *judicial economy and convenience*. Its use is therefore *avored*.

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).⁶⁴

Just as important, this Court has firmly rejected attempts to bar voters and candidates from intervening in election cases on the basis of “untimeliness”. In fact, the *Bates* Court held that voters and candidates must even be allowed to intervene *on appeal*:⁶⁵

The state ... has repeatedly expressed its legitimate desire to avoid to the greatest extent possible any unnecessary inequities

⁶² E.g., *Kassbaum*, 236 F.3d at 494; *Bates*, *supra*, 127 F.3d at 873-74; *Volpe*, *supra*, 858 F.3d at 473-76.

⁶³ *Volpe*, *supra*, 858 F.3d at 473-76 (*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*).

⁶⁴ *Volpe*, *supra*, 858 F.3d at 473, 475 (emphases added) (*citing* advisory committee's note and quoting *Griffin v. County School Bd.*, 377 U.S. 218, 226-27 (1964) (supplemental pleadings “are well within the basic aim of the rules to make pleadings a *means to achieve an orderly and fair administration of justice.*”) (emphases added)).

⁶⁵ *Bates*, *supra*, 127 F.3d at 873.

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.⁶⁶

Here, Mr. Galacki rushed to the trial court with his related claims against SB 6 in a timely manner: less than 48 hours after his write-in vote was not counted and *more than five weeks before* the August 22, 2011 hearing on Plaintiffs' MSJ.⁶⁷ Consequently, he easily met this Court's requirements of timeliness under *Bates* and *Volpe*.

Equally critical, this Court and state appellate courts could issue conflicting rulings regarding SB 6 – which could trigger “continuing conflict between the federal and state courts”.⁶⁸ On September 7, 2011, the California Court of Appeal (First District) heard oral argument on facial claims against SB 6's constitutionality. Plaintiffs there have appealed the denial of their request for a preliminary injunction against SB 6. To date, the Court of Appeal has (1) barred Plaintiff Chamness from intervening and bringing his as-applied claims to that litigation, (2) barred Placer County

⁶⁶ *Id.* at 872 (emphases added). Contrary to the trial court's ruling, *U.S. v. Alisal Water Corp.* did not bar Mr. Galacki from intervening. Indeed, as *Alisal* itself noted, intervention “has been granted after settlement agreements were reached”. *U.S. v. Alisal*, 370 F.3d 915 (9th Cir. 2004) (emphasis added); *see also Bates*, *supra*, 127 F.3d at 873; *Forest Conservation Council v. U.S. Forest Svc.*, 66 F.3d 1489, 1499 (9th Cir. 1995).

⁶⁷ Contrary to Intervenor-Defendants' insinuations, Mr. Galacki filed his Motion to Intervene before the trial court had scheduled the MSJ hearing. Mr. Galacki's Aug. 18, 2011 Reply Brief in Support of Emergency Motion, Docket No. 12-1, at 10.

⁶⁸ *Bates*, *supra*, 127 F.3d at 873.

voter Linda Hall from filing an amicus letter that showed how SB 6 could trick voters into casting write-in votes *without knowing that those votes would not be counted*.⁶⁹ As a result, the Court of Appeal will consider only facial, and not as-applied, claims against SB 6.

Two significant risks emerge if this Court does not swiftly hear and rule on the merits of Plaintiffs’ and Mr. Galacki’s appeals. First, there is a possibility that the Court of Appeal’s ruling regarding SB 6’s constitutionality may differ from that of this Court.⁷⁰ Second, because Secretary Bowen and Registrar Logan are also parties in the state-court litigation, there is a “possibility” that they *may refuse to follow this Court’s ruling* – especially since Plaintiffs’ MSJ does not seek an injunction against them.⁷¹ In such a scenario of “continuing conflict between federal and state courts”, Mr. Galacki would be forced to file a separate lawsuit to defend his rights as a 2012 Tea Party candidate – an outcome that this Court expressly disfavored in *Bates*:

⁶⁹ Dutta Decl. Exhs. 69 & 71; Emergency Motion, at 20.

⁷⁰ *Bates, supra*, 127 F.3d at 873.

⁷¹ “Whether the Secretary of State will, as a general matter, actually refuse to follow this court’s ruling is irrelevant. It is enough that he has signaled the possibility that he may do so.” *Id.* at 873 (emphases added). Unless a court has issued an injunction against them, California elections officials have the power to enforce a statute – *even if* an appeals court has declared it unenforceable. *See, e.g.*, CAL.CONST. art. iii §3.5 (a) & (c); *Billig v. Voges*, 273 Cal.Rptr. 91, 96-97, 223 Cal.App.3d 962 (Cal.Ct.App. 1990) (local elections official interprets and enforces Elections Code without consulting the Secretary of State); *Farley v. Healey*, 431 P.2d 650, 67 Cal.2d 325, 327 (Cal. 1967); *Alliance for a Better Downtown Millbrae v. Wade*, 133 Cal.Rptr.2d 249, 108 Cal.App.4th 123, 132, 136 (Cal.Ct.App. 2003).

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 if all that is required is to permit candidates ... to become bound by our decision. The state's electoral process would be subject to *disruption* if eligibility in each district has to be decided in a *separate lawsuit*. Surely all parties should want uniformity in the ... election. Whatever the outcome of this case, intervention can only be a step in that direction.

Under these circumstances, and given the fundamental nature of the right at stake, *we find it both "imperative" and in the public interest that we allow these applicants to intervene.*⁷²

Because there is a "possibility" that the Top Two Primary will not be uniformly applied and enforced in the 2012 statewide election, Tea Party candidate Galacki has an undeniable right to intervene as of right.

2. The Trial Court Erroneously Ruled that Mr. Galacki's Intervention Would Prejudice the Opposing Parties

Second, the trial court did not "get the law right" when it ruled that allowing Mr. Galacki to intervene would prejudice the opposing parties. As shown earlier, *Bates* – which the trial court did not even cite – held that it was "both *imperative and in the public interest*" that aggrieved voters and candidates be allowed to intervene and vindicate their rights in cases involving the fundamental right to vote – even after a district court has resolved a case.⁷³ Significantly, Secretary Bowen and Intervenor-Defendants have not asserted that they would be prejudiced if Mr. Galacki

⁷² *Bates, supra*, 127 F.3d at 873-74 (emphases added, quotation in original).

⁷³ *Id.* at 873-74 (emphasis added, quotation marks omitted).

were allowed to intervene.⁷⁴ Indeed, this Court has held that the State *cannot be prejudiced as a matter of law* if aggrieved candidates and voters like Mr. Galacki were allowed to intervene, for allowing them to intervene would *benefit the public interest*:

[T]he state does not assert that it will be prejudiced by intervention, and *we find no reason to think otherwise*. In fact, the state, like the public, will benefit from the uniform applicability of its laws. We therefore deem the first motion timely and grant ... intervention.⁷⁵

Simply put, the trial court should have allowed Mr. Galacki to intervene and consolidate his legal claims with those of Plaintiffs.

Moreover, briefing Mr. Galacki's claims will not impose any prejudice on the parties. The facts relating to his claims are undisputed, and Defendants have now had *nearly two months* to study his legal claims – which involve the same case law that the parties have already briefed at great length. Specifically, Mr. Galacki bases his two unique Elections Clause claims entirely on *Cook v. Gralike* (531 U.S. 510), an unanimous 2001 Supreme Court opinion that was first cited in Plaintiffs' Feb. 18, 2011 Motion for Preliminary Injunction.⁷⁶ In this light, the parties will be able to quickly assess and respond to Mr. Galacki's claims.

⁷⁴ Dutta Decl. Exhs. 50 & 52.

⁷⁵ *Bates, supra*, 127 F.3d at 874 (emphases added, citations omitted).

⁷⁶ Dutta Decl. Exh. 64, at p.14

3. No Legal Authority Barred Mr. Galacki from Bringing As-Applied Claims Against SB 6

Finally, the trial court did not “get the law right” when it concocted a new requirement for intervention: namely, a prospective intervenor must be kept out if he or she seeks to bring any as-applied constitutional claims. No appellate court has imposed such a requirement. In fact, the Supreme Court has urged voters and candidates to bring as-applied claims when challenging election laws.⁷⁷ Furthermore, this Court has 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 a looming election.⁷⁸

In addition to his two as-applied claims under the Elections Clause, Mr. Galacki brings a facial claim as a Tea Party candidate for Congress. Namely, SB 6 will unlawfully (1) force him to falsely state on the 2012 ballot that he has “No Party Preference”, and (2) deprive him of his constitutional right to use the ballot label of “Independent”. Because Mr.

⁷⁷ *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008); *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 (2008). See also Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, IND.L.J. Vol. 86, 1288, 1326 (noting High Court’s strong preference for as-applied challenges).

⁷⁸ *Bates, supra*, 127 F.3d at 872. Contrary to the trial court’s ruling, *Edelstein v. San Francisco* does not apply here. In a nutshell, the section cited by the trial court does not bar voters or candidates from bringing as-applied claims, but instead holds that the State has the authority to ban voters from casting write-in ballots in the general election. *Edelstein v. San Francisco*, 56 P.2d 1029, 29 Cal.4th 164, 173-74, 178 (Cal. 2002). In contrast, the plain language of SB 6 enables voters to cast write-in ballots in the general election, but then bans those votes from being counted. SB-6 amended Elections Code §13207 (requiring ballots to allow voters to cast write-in votes in every election); SB-6 amended Elections Code §8606 (banning all write-in votes that are cast in the general election from being counted).

Galacki has challenged SB 6's constitutionality with respect to the June 5, 2012 election, the trial court was required to allow him to intervene.

VIII. Conclusion

Surely all parties should want uniformity in the ... election. Whatever the ultimate outcome of this case, intervention can only be a step in that direction.

-- The Court, *Bates v. Jones*⁷⁹

It is not too late to allow Mr. Galacki to defend and vindicate his fundamental rights, which the trial court entirely disregarded.⁸⁰ As this Motion has compellingly shown, Mr. Galacki is clearly entitled to intervene *as a matter of law*, and time is of the utmost essence.⁸¹ It is not too late to re-affirm this Court's holdings in *Bates* and *Volpe*, which the trial court wholly disregarded.⁸² It is not too late to promote judicial economy by consolidating Mr. Galacki's claims into Plaintiffs' pending Top Two Primary appeal.⁸³ Finally, it is not too late to prevent a rash of separate state and federal lawsuits from "disrupti[ng]" the looming 2012 statewide election.⁸⁴ Therefore, this Court must summarily reverse the trial court's denial of Tea Party candidate Julius Galacki's Motion to Intervene, and consolidate his weighty constitutional claims with those of Plaintiffs.

⁷⁹ *Bates, supra*, 27 F.3d at 873 (emphases added).

⁸⁰ *Sills, supra*, 76 F.2d at 795-96; *Bates, supra*, 27 F.3d at 873.

⁸¹ *Groendyke, supra*, 406 F.2d at 1163.

⁸² *Sills, supra*, 76 F.2d at 795-96.

⁸³ *Volpe, supra*, 858 F.3d at 473-76; *Bates, supra*, 27 F.3d at 873; *Groendyke, supra*, 406 F.2d at 1163.

⁸⁴ *Bates, supra*, 27 F.3d at 872-73; *see also Groendyke, supra*, 406 F.2d at 1163.

Sept. 13, 2011

Respectfully submitted,

/s/ _____

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STATEMENT OF RELATED CASES

One related case is currently pending before the Court: *Michael Chamness v. Debra Bowen* (Case No. 11-56449). Two related cases are currently pending before the California Court of Appeal (First District) and the Superior Court for San Francisco County, respectively: *Mona Field v. Debra Bowen* (Case No. A129946), and *Mona Field v. Debra Bowen* (Case No. CGC 10-502018).

/s/ _____

GAUTAM DUTTA

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 Sept. 13, 2011, I electronically served an electronic copy, via ECF, of this Motion Summary Reversal and Consolidation of Related Cases, along with the accompanying Declaration of Gautam Dutta.

/s/ _____

GAUTAM DUTTA