

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 / 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*

MOTION TO EXPEDITE APPEAL¹

GAUTAM DUTTA
*Attorney for Appellants-Plaintiffs
Gautam Dutta, Attorney-at-Law
39270 Paseo Padre Pkwy # 206
Fremont, CA 94538
415.236.2048; 213.405.2416 fax
Dutta@BusinessandElectionLaw.com*

¹ Plaintiffs have re-filed this Motion (which was served on Sept. 13, 2011) at the request of the Clerk's Office.

FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

FRAP 26.1 does not apply here, for Plaintiffs-Appellants are natural persons.

CIRCUIT RULE 27-12 STATEMENT

Los Angeles County Registrar Dean Logan has indicated that he takes no position with respect to this Motion, while Secretary Bowen and Intervenor-Defendants oppose it.² Plaintiffs have obtained a certified copy of the required transcript from the trial court, and have requested that it be filed with this Court.³

Plaintiffs propose the following briefing schedule:

<u>Event</u>	<u>Due Date</u>
Appellants' Opening Brief	Oct. 19, 2011, or 13 days after the Court has granted this Motion, whichever is later
Answering Brief	Nov. 2, 2011, or 14 days ⁴ after the Opening Brief has been served, whichever is later
Appellants' Reply Brief	Nov. 9, 2011, or 7 days after the Answering Brief has been served, whichever is later
Hearing Date	Nov. 18, 2011, or 9 days after Appellants' Reply Brief has been served, whichever is later

² Sept. 15, 2011 Declaration of Gautam Dutta ("Dutta Decl.") ¶¶6, 7, 8.

³ *Id.* ¶9.

⁴ Plaintiffs had offered to give Intervenor-Defendants more time to prepare their Answering Brief. However, Intervenor-Defendants rejected their offer, for they oppose holding oral argument in this case until next year. *Id.* ¶7.

The “capable of repetition, yet evading review” doctrine, in the context of election cases, is appropriate when there are “as applied” challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

-- The Supreme Court, *Storer v. Brown*⁵

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.

-- The Court, *Bates v. Jones*⁶

I. Introduction and Summary

Unless the Court expedites this appeal, voters and candidates across California could be irreparably harmed *in a matter of weeks*. This lawsuit challenges the constitutionality of two core parts of the Top Two Primary’s implementing law. On September 7, 2011, a state appeals court held oral argument in a related case. If this Court’s ruling conflicts with that of the state court, “[t]he state’s electoral process would be subject to disruption[.]”⁷ Namely, some residents would be allowed to exercise their fundamental rights to vote and run for public office, while others *would be banned from doing so*.⁸ What is more, SB 6 may harm candidates in a special election

⁵ *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (emphases added).

⁶ *Bates v. Jones*, 127 F.3d 870, 872 (9th Cir. 1997) (emphases added).

⁷ *See id.* at 873 (emphasis added).

⁸ *See id.* at 872.

that could soon be called in Los Angeles County.⁹ For these urgent reasons, this Court must speedily grant this Motion for Expedited Appeal.

II. Overview

This appeal will ask the Court to declare Proposition 14's Top Two Primary unenforceable as a matter of law, for its implementing statute (Senate Bill 6) is unconstitutional and unenforceable. California law classifies political parties into two categories: qualified ("major" or state-recognized) parties and non-qualified ("minor" or non-state-recognized) parties.¹⁰ Under California's former qualified-primary election system, only qualified parties were entitled to hold party primaries.¹¹

On January 1, 2011, SB 6 and Proposition 14 dismantled the "qualified party" election system, and spawned an untested process for electing our federal and state officials. Under SB 6's new rules, all candidates, regardless their party identification, square off against one another in a primary election. The top two votegetters from the primary election automatically advance to the general election – even if one candidate has received a majority of the vote.¹²

⁹ See *Storer, supra*, 415 U.S. at 737 n.8.

¹⁰ Elections Code §5100.

¹¹ *Libertarian Party v. Eu*, 620 P.2d 612, 28 Cal.3d 535, 540 (Cal. 1980) (“[T]he Legislature ... defined ‘party’ as a political organization that has ‘*qualified for participation in any primary election.*’”) (emphases added).

¹² SB 6-amended Elections Code §8141.5. A different set of rules apply for special elections. Namely, if a candidate receives a majority in the “all-party” special primary election,

According to the California Association of Clerks and Election Officials, SB 6 mandates a “complex set of changes [that] *has not occurred in recent memory*[.]”¹³ Specifically, SB 6 will not only force counties to spend “*millions of dollars* statewide in ballot production and postage costs”, but could force them to spend millions more in new voting equipment.¹⁴ Last year, Los Angeles County Registrar Dean Logan stated that the changes required by SB 6 would have

*overwhelmed the capacity of our ballot. If the proposed open primary process were in place back in 2006 our voting system would not have been able to accommodate all of the contests and measures on the ballot.*¹⁵

Senate Bill 6 has trampled on every Californian’s right to vote and run for office in three egregious ways. First, SB 6 *has thrown away all votes cast for write-in candidates* in two straight general elections. Specifically, SB 6’s Vote Counting Ban has created what one constitutional scholar would call a “trap for the unwary”.¹⁶ Namely, SB 6 enables voters to cast votes for write-in candidates in the general election, but then *bans their write-in votes from being counted*.¹⁷ As even Secretary Bowen has admitted,

he or she will win the election outright, and no general election will be held. *Id.* §10705(a).

¹³ Dutta Decl. Exh. 6, at 12 (emphases added).

¹⁴ Dutta Decl. Exh. 6, at 12 (emphases added).

¹⁵ Dutta Decl. Exh. 6, at 12 (emphases added).

¹⁶ Joseph Fishkin, *Voting as a Positive Right: A Reply to Flanders*, 28 ALASKA L.R. 29, 31 (June 1, 2011).

¹⁷ SB 6-amended Elections Code §13207(a)(2) (enabling voters to cast write-in votes in every election); SB 6-amended Elections Code §8606 (banning all write-in votes that are cast in

SB 6's Vote Counting Ban gives voters the "illusion that they can write in a candidate's name and have it counted."¹⁸ In this light, SB 6 violated the rights of Plaintiff Wilson and Intervenor-Applicant Galacki¹⁹ under the Due Process Clause, Elections Clause, First Amendment, and Fourteenth Amendment.²⁰

Second, SB 6 has prompted Secretary Bowen and Registrar Logan to ban write-in candidates from running in the general election. In so doing, they have 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*.²¹

Tellingly, even Secretary Bowen has admitted that SB 6 "give[s] candidates the illusion that they can run as a write-in[".]"²² In this light, SB 6 violated the rights of Plaintiff Frederick and Intervenor-Applicant Galacki under the First Amendment and the Elections Clause.²³

the general election from being counted).

¹⁸ Dutta Decl. Exh. 3 (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, *attached as* Exhibit 4 to the Dutta Decl. (*granting* Mr. Galacki's Aug. 5, 2011 Request for Judicial Notice).

¹⁹ After the trial court denied his Motion to Intervene, Mr. Galacki appealed to this Court, and has concurrently filed a Motion for Summary Reversal and Consolidation of Related Cases. *See Michael Chamness v. Debra Bowen*, No. 11-56303.

²⁰ Dutta Decl. Exh. 6, at 16-20 & Exh. 13, at 29-36.

²¹ Elections Code §15340 (emphases added).

²² Dutta Decl. Exh. 3 (at Exh. B, p.1, emphases added). *See supra* note 18.

²³ Specifically, SB 6, as applied, violated the rights of Mr. Frederick under the First

Finally, SB 6's Party Preference Ban has barred candidates from using the ballot label of "Independent" – a ban that even Secretary Bowen *has admitted is not "permissible"*.²⁴ Instead, SB 6's Party Preference Ban has forced Coffee Party candidate Michael Chamness – and will soon force Tea Party candidate Julius Galacki – to falsely state on the ballot that he has "No Party Preference". In this light, SB 6 has not only violated Mr. Chamness' rights under the Elections Clause, First Amendment, and Fourteenth Amendment, but now threatens Mr. Galacki with the same irreparable harm.

SB 6 has already been implemented for four special elections in 2011, and could soon be implemented for another special election in Los Angeles County.²⁵ Meanwhile, candidates have already begun campaigning for the June 5, 2012 statewide primary election. On August 15, 2011, California's federal and state legislative districts were redrawn to reflect the 2010 Census, and candidates must now establish residency in new districts.²⁶ Significantly, as a result of SB 6, major-party candidates can no longer qualify for the general election by finishing first in their own party's primary. Instead, they must now finish first or second *against all other*

Amendment, and violated the rights of Mr. Galacki under the First Amendment and the Elections Clause. Dutta Decl. Exh. 6, at 16-20 & Exh. 13, at 29-36.

²⁴ Dutta Decl. Exh. 3 (at Exh. A, Attach. 1, p.1, emphasis added). *See supra* note 18.

²⁵ If Assemblymember Warren Furutani wins the Nov. 2, 2011 special election for Los Angeles City Council, a special election must be called to replace him in the Assembly. RJN, Dutta Decl. Exh. 11 (list of qualified candidates for Los Angeles City Council District 15).

²⁶ Dutta Decl. Exh. 4 (at Exh. 1); CAL.CONST. art. 4 §2(c) (imposing residency requirement on state legislative candidates).

candidates in June 2012. Because candidates must now campaign across the entire pool of voters, the June primary election has become more costly.²⁷

To qualify as a candidate for Member of the U.S. Congress, an individual must pay a filing fee of \$1,740.00.²⁸ To have that onerous fee waived, candidates like Mr. Galacki must file candidacy papers and gather at least 3,000 valid signatures from voters beginning **Dec. 30, 2011.**²⁹ During that time, if a member of the public inquires regarding his party affiliation, he or she will be falsely told that Tea Party candidate Julius Galacki has “No Party Preference”.³⁰

III. Procedural History and Legislative Background

Last fall, SB 6 was poised to be implemented in three special elections: in Senate District 28, Senate District 17, and Assembly District 4.³¹ Michael Chamness sought to run for the vacancy in Senate District 28 as a candidate affiliated with the Coffee Party, a minor (non-state-recognized) party.

²⁷ RJN, Dutta Decl. Exh. 25.

²⁸ 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 <http://thomas.loc.gov/home/faqlist.html> (*last visited* Sept. 10, 2011) (Congressional annual salary currently set at \$174,000).

²⁹ 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)].

³⁰ The party affiliation of any registered voter is not confidential, and may be released to the public. Secretary Bowen’s Guidelines for Access to Public Records, RJN, Dutta Decl. Exh. 24, at p.4; *see also* Elections Code §2194(c) (party affiliation of registered voters is not confidential); Gov’t Code §6254.4 (same).

³¹ Dutta Decl. Exh. 13, at 19.

To prevent SB 6 from branding him with the ballot label of “No Party Preference”, Mr. Chamness sought to intervene in a mandamus proceeding before the California Supreme Court.³² In that proceeding – in which Secretary Bowen and Registrar Logan were Real Parties in Interest – six plaintiffs (“State Court Plaintiffs”) sought to enjoin SB 6 from being implemented.³³ While Registrar Logan took no position regarding Mr. Chamness’ request to intervene, Secretary Bowen vigorously opposed it.³⁴ On December 15, 2010, the California Supreme Court denied both Mr. Chamness’ request to intervene and the underlying mandamus petition.³⁵

Seeking to vindicate his fundamental rights as a candidate, Mr. Chamness first sought to bring his as-applied challenge to the California Court of Appeal. Toward this end, he asked the Court of Appeal for permission to intervene in State Court Plaintiffs’ litigation. In that proceeding, State Court Plaintiffs had appealed the Superior Court’s denial of their request for a preliminary injunction against SB 6 and Proposition 14.³⁶ Again, Registrar Logan took no position with respect to Mr. Chamness’ request to intervene, while Secretary Bowen vigorously opposed

³² *Id.* Exh. 13, at 19.

³³ *Id.* Exh. 13, at 19.

³⁴ *Id.* Exh. 13, at 19.

³⁵ *Id.* Exh. 13, at 19.

³⁶ Dutta Decl. Exh. 13, at 20.

it.³⁷ On January 31, 2011, the Court of Appeal denied Mr. Chamness' request to intervene.³⁸

Meanwhile, Placer County voter Linda Hall asked the Court of Appeal for permission to file an amicus letter.³⁹ Her amicus letter included the sample ballot for a state election conducted under SB 6's new rules.⁴⁰ Significantly, that ballot showed how SB 6 could trick voters into casting write-in votes *without knowing that those votes would not be counted*.⁴¹ On April 18, 2011, the Court of Appeal denied Ms. Hall's request to file an amicus letter.⁴²

Subsequently, Mr. Chamness decided to run for Congress in the May 17, 2011 special primary election for Congressional District 36. To stop being again branded with the ballot label of "No Party Preference", Mr. Chamness filed a Motion for Preliminary Injunction with the trial court.⁴³ On March 21, 2011, the trial court heard oral argument on Mr. Chamness' Motion for Preliminary Injunction. Two days later, Mr. Chamness notified the trial court that the first batch of ballots for the Primary Election was scheduled to be printed on March 30, 2011. Because the District Court had

³⁷ *Id.* Exh. 13, at 20.
³⁸ *Id.* Exh. 13, at 20.
³⁹ Dutta Decl. Exh. 3 (at Exh. 71).
⁴⁰ *Id.* Exh. 3 (at Exh. 71).
⁴¹ *Id.* Exh. 3 (at Exh. 71).
⁴² *Id.* Exh. 3 (at Exh. 69).
⁴³ Dutta Decl. Exh. 13, at 21.

not ruled on the Motion for Preliminary Injunction less than 48 hours before the printing deadline, Mr. Chamness sought a Writ of Mandamus from this Court. In response, this Court denied his request, but asked the trial court to “act promptly on petitioner’s motion for a preliminary injunction.”⁴⁴

On Mar. 30, 2011, the trial court denied Mr. Chamness’ Motion for Preliminary Injunction, which he immediately appealed. After this Court declined to enjoin SB 6 pending his appeal, Mr. Chamness voluntarily dismissed his appeal.⁴⁵

On May 6, 2011, Plaintiffs Chamness, Frederick, and Wilson filed a Motion for Summary Judgment (“Plaintiffs’ MSJ”).⁴⁶ 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, 2011.⁴⁷ Subsequently, the trial court denied Plaintiffs’ MSJ, and granted summary judgment in favor of the non-moving parties.⁴⁸ Plaintiffs promptly appealed; their appeal is currently scheduled to be fully briefed by March 15, 2012.⁴⁹

⁴⁴ Dutta Decl. Exh. 13, at 22.

⁴⁵ Dutta Decl. Exh. 13, at 22.

⁴⁶ Dutta Decl. Exh. 6.

⁴⁷ *Id.* Exh. 10.

⁴⁸ *Id.* Exh. 2.

⁴⁹ Appellants’ Reply Brief is currently due on Mar. 15, 2012. Court’s Aug. 25, 2011 Time Schedule Order, Docket No. 1-3; Dutta Decl. Exh. 1.

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”).⁵⁰ 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.⁵¹ 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.⁵²

On June 28, 2011, the statutory deadline to file write-in nomination papers for the General Election passed.⁵³ 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.⁵⁴ On July 12, 2011, the write-in vote that Mr. Galacki cast for himself in the General Election was not counted.⁵⁵ Two days later, Mr. Galacki asked the trial court for permission to intervene in this litigation. After the trial court denied his Motion to Intervene, Mr. Galacki filed an Emergency Motion for Summary Reversal with this Court.⁵⁶ On August 18, 2011, the Court declined to grant emergency relief, but granted Mr. Galacki’s requests for judicial notice.⁵⁷

⁵⁰ Dutta Decl. Exh. 13, at 16.

⁵¹ Dutta Decl. Exh. 13, at 16.

⁵² Dutta Decl. Exh. 13, at 16.

⁵³ 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.

⁵⁴ Dutta Decl. Exh. 13, at 17.

⁵⁵ Dutta Decl. Exh. 13, at 18.

⁵⁶ Dutta Decl. Exh. 13.

⁵⁷ Dutta Decl. Exh. 5 (*granting* Mr. Galacki’s Aug. 5, 2011 Request for Judicial Notice,

Mr. Galacki has concurrently asked the Court to summarily reverse the trial court's ruling, as well as to consolidate his appeal with this appeal.

On Sept. 5, 2011, legislation (Assembly Bill 1413) was introduced to amend Senate Bill 6, the statute challenged in this litigation.⁵⁸ Had it been enacted, AB 1413 would have banned write-in votes from being cast in every general election. Furthermore, instead of forcing minor-party candidates to falsely state that they had "No Party Preference" (as SB 6 currently does), AB 1413 would have forced minor-party candidates to falsely state on the ballot that they had the following party preference: "Preference: None Selected".⁵⁹

Significantly, the legislative analysis of AB 1413 stated that SB 6's provisions regarding write-in voting "could *create confusion*, and could *mislead voters into thinking that write-in votes for candidates ... at a general election will be counted*."⁶⁰ As of the close of the legislative session

Dutta Decl. Exh. 3 *and granting* Mr. Galacki's Aug. 18, 2011 Request for Judicial Notice, Dutta Decl. Exh. 4); *see also supra* note 18.

⁵⁸ AB 1413 (Fong) (*as amended* Sept. 2, 2011), RJN, Dutta Decl. Exh. 21.

⁵⁹ *Id.* (contemplating amendments to Elections Code §15340 (which currently gives every voter the right to cast a write-in vote in "any" election), Elections Code §13207(a)(2) (which currently requires that voters be allowed to cast write-in votes in every election), SB 6-amended Elections Code §8606 (which currently *bans write-in votes that have been cast from being counted* in every general election), SB 6-amended Elections Code §325 (which forces minor-party candidates to falsely that they have "No Party Preference"), and SB 6-amended Elections Code §13105(a)).

⁶⁰ RJN, Dutta Decl. Exh. 22, at p.5 (emphases added).

on Sept. 9, 2011, AB 1413 had not passed the State Senate. Therefore, it was not enacted.⁶¹

On September 7, 2011, the California Court of Appeal heard oral argument on State Court Plaintiffs' facial challenge against SB 6, and is expected to issue a ruling shortly.⁶²

IV. Legal Standard

The Supreme Court has admonished courts to promptly resolve as-applied challenges such as this appeal.⁶³ This Court will expedite an appeal if irreparable harm could otherwise occur.⁶⁴ Any violation of the fundamental right to vote and run for public office constitutes irreparable harm.⁶⁵ Accordingly, the Court routinely expedites the appeals of cases involving looming elections.⁶⁶

⁶¹ Dutta Decl. Exhs. 5 & 23. Because AB 1413 could have rendered moot at least part of this appeal, Plaintiffs postponed filing this Motion until after the last day of the legislative session (Sept. 9, 2011) had passed. *Id.* ¶4 & Exh. 23.

⁶² RJN, Dutta Decl. Exh. 12. Generally, California courts must rule on a case within 90 days after it has been submitted. CAL.CONST. art. 6 §19; Gov't Code §68210.

⁶³ *Storer, supra*, 415 U.S. at 737 n.8; *see also 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); 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).

⁶⁴ Circuit Rule 27-12.

⁶⁵ *See, e.g., 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 Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1397 (9th Cir. 1991) ("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*["]) (emphases added, citations omitted), *cert. denied*, 501 U.S. 1252 (1991); *Bates, supra*, 127 F.3d at 872 & n.3 (Court expedites intervention of aggrieved voters and candidates due to looming election).

⁶⁶ *See, e.g., Garza v. Los Angeles County*, 98 F.3d 763, 768 (9th Cir. 1991); *Doe v. Reed*,

V. Reasons to Grant Motion

The Court should expedite this appeal for three compelling reasons. First, SB 6 could inflict irreparable harm on candidates in a matter of weeks. Second, unless the Court promptly rules on this appeal, the June 5, 2012 statewide primary could be “subject to disruption”, for its ruling on this appeal could conflict with a pending ruling in a related case from the California Court of Appeal.⁶⁷ Finally, the public would immediately benefit if the Court swiftly decides the heart of this lawsuit: Is California’s new Top Two Primary enforceable?

A. Voters and Candidates Could Suffer Irreparable Harm in a Matter of Weeks Unless This Appeal Is Expedited

Simply put, the Court must expedite this appeal, for voters and candidates could suffer the same harm that Plaintiffs have already suffered *in a matter of weeks*. In *Storer v. Brown*, the Supreme Court admonished courts to promptly rule on election cases that “are capable of repetition, yet evade review”.⁶⁸ Three decades later, the High Court urged plaintiffs who challenge election rules to bring as-applied constitutional claims.⁶⁹ Heeding

586 F.3d 671, 676 (9th Cir. 2009); *Daily Herald Co. v. Munro*, 758 F.2d 350, 351 (9th Cir. 1985); *Bates, supra*, 127 F.3d at 871 & n.1 (Court resolves appeal nearly one year before election).

⁶⁷ See *Bates, supra*, 27 F.3d at 873 (emphasis added).

⁶⁸ *Storer, supra*, 415 U.S. at 737 n.8.

⁶⁹ *Grange, supra*, 552 U.S. at 449-50; *Crawford, supra*, 553 U.S. at 189; see also Fishkin, *supra*, IND.L.J. Vol. 86 at 1326. “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

the Supreme Court's emphatic admonishment, Plaintiffs have brought an as-applied constitutional challenge against SB 6.

SB 6 has already inflicted irreparable harm on Plaintiffs and Intervenor-Applicant Galacki in three straight elections: in Congressional District 36, Senate District 28, and Assembly District 4. Significantly, if a special election is suddenly called, voters and candidates *would have scant time to retain counsel and rush to court* before the first ballots are cast. In fact, if another special Congressional election is suddenly called, voting in could begin *11 days later* (i.e., 45 days before the date of the election).⁷⁰ Moreover, if Assemblymember Warren Furutani is elected to the Los Angeles City Council on November 8, 2011, yet another special election will be called to replace him in the State Assembly – and voting could begin *31 days later* (i.e., 25 days before the date of the election).⁷¹

Furthermore, SB 6 will inflict irreparable harm on candidates for the June 5, 2012 statewide primary election *beginning December 30, 2011*. On

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

⁷⁰ The Governor must call a special election within 14 days after a seat has fallen vacant. Elections Code §10700. For federal elections, vote-by-mail ballots must be mailed to military and overseas voters *45 days before* the date of an election. 42 U.S.C. §1973ff-1. For state elections, vote-by-mail ballots must be mailed to all voters *25 days before* the date of an election. Elections Code §10704(c). In California, a special primary election can be held as soon as *56 days after* the Governor has called the election. Elections Code §10703(a) & 10704(a) (special general election must be held on a Tuesday within 112 to 126 days after the date on which the Governor has called the election, and the special primary election must be held on the *eighth Tuesday before* the date of the special general election).

⁷¹ *Id.*; RJN, Dutta Decl. Exh. 11. If a candidate garners a majority of the vote in the primary election, he or she wins outright. LOS ANGELES CITY CHARTER, art. 4 §425(a).

that date, candidates like Intervenor-Applicant Galacki may begin to collect the 3,000 signatures required to forgo onerous filing fees (\$1,740.00 for Congress).⁷² However, if a member of the public inquires regarding Mr. Galacki's party affiliation, he or she will be falsely told that he has "No Party Preference" – even though he is registered with the Tea Party.⁷³

As Justices Scalia and Kennedy recently noted, "[t]here can be no dispute that candidate acquisition of *party labels* on [the] ballot ... is a *means of garnering the support* of those who trust and agree with the party."⁷⁴ By forcing officials to release false information about minor-party candidates, SB 6 *will harm their ability to collect signatures* from voters who would otherwise support them – and thereby inflict irreparable harm on their fundamental right to run for public office.⁷⁵

B. The 2011-12 Election Cycle Could Be Disrupted Unless This Appeal Is Expedited

Unless this appeal is expedited, the state's 2011-12 election cycle could be disrupted, for there is a significant risk that SB 6 might be

⁷² 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)].

⁷³ The party affiliation of any registered voter is not confidential, and may be released to the public. Secretary Bowen's Guidelines for Access to Public Records, RJN, Dutta Decl. Exh. 24, at p.4; *see also* Elections Code §2194(c) (party affiliation of registered voters is not confidential); Gov't Code §6254.4 (same).

⁷⁴ *Grange, supra*, 552 U.S. at 466 (Scalia & Kennedy, JJ., dissenting) (emphases added).

⁷⁵ *See id.* at 466; *Davies, supra*, 930 F.2d at 1397.

inconsistently enforced and applied.⁷⁶ Amidst such legal uncertainty, some voters and candidates could be allowed to exercise their fundamental rights, while others could suffer irreparable harm.

In *Bates*, this Court announced one “controlling principle”: it would do its utmost to prevent “any unnecessary *inequities and delay* in the upcoming election cycle.”⁷⁷ There, this Court and the California Supreme Court had issued conflicting rulings on whether a new state law was constitutional, and the Secretary of State had asked the Supreme Court to grant certiorari – even before this Court had issued a decision on the merits.⁷⁸ Against that backdrop, the Court resolved the case *nearly one year before the June 1998 statewide election*.⁷⁹ The Court gave two express reasons for its speedy ruling: (1) to prevent “inconsistent application of the [challenged] law”, and (2) to “facilitate any further judicial action that may occur”.⁸⁰

The legal and factual backdrop of this litigation mirrors that of *Bates*. First, this Court and the California Court of Appeal could issue conflicting rulings on whether SB 6 is constitutional. To date, the Court of Appeal has

⁷⁶ See *Bates, supra*, 127 F.3d at 872.

⁷⁷ *Id.* at 872 (emphases added).

⁷⁸ *Id.* at 871-72 & n.3.

⁷⁹ The Court heard oral argument on Aug. 6, 1997 and issued its decision on Oct. 7, 1997. *Id.* at 871 & n.1.

⁸⁰ *Id.* at 872.

denied Plaintiff Chamness' Motion to Intervene, and denied voter Linda Hall's request to file an amicus brief that showed how SB 6's Vote Counting Ban would disenfranchise voters.

Here, Plaintiffs appeal the trial court's denial of their Motion for Summary Judgment and its granting of summary judgment in favor of the non-moving parties. Rather than seek injunctive relief, their as-applied challenge asks the Court (1) to declare SB 6 unconstitutional and unenforceable, and (2) to declare Proposition 14 unenforceable.

In contrast, the State Court Plaintiffs have appealed the Superior Court's denial of their Motion for Preliminary Injunction. Their facial⁸¹ challenge (brought against Secretary Bowen, Registrar Logan, and five other county registrars) asks the California Court of Appeal (1) to declare SB 6 unconstitutional and unenforceable, and (2) to issue an injunction against SB 6 and Proposition 14 because they are both unenforceable.⁸² In response, Intervenor-Defendants have asked the Court of Appeal to

⁸¹ Under California law, plaintiffs bringing a facial challenge must show that the challenged statute violates constitutional guarantees "in the generality or great majority of cases." *Coffman Specialties, Inc. v. Dep't of Transportation*, 76 Cal.App.4th 1135, 1145 (Cal.Ct.App. 2009).

⁸² Dutta Decl. Exh. 17, at 10.

dismiss State Court Plaintiffs' entire case *on the merits* – and renewed that request during oral argument on September 7, 2011.⁸³

Three significant risks emerge if the Court does not expedite this appeal. First, in a matter of days, the Court of Appeal could issue a ruling on SB 6 that could conflict with how this Court would ultimately rule. Second, Secretary Bowen and Registrar Logan (who also parties to State Court Plaintiffs' litigation) *could refuse to follow this Court's ruling* – especially since that Plaintiffs' MSJ does not seek an injunction against them.⁸⁴ In such a scenario, 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*.⁸⁵

Finally, the 2012 statewide election could be marred by chaos and “disruption” if there is a “continuing conflict between the federal and state courts”.⁸⁶ Just as one example, Los Angeles County could continue to enforce SB 6 and Proposition 14, while other counties that are not parties to

⁸³ Dutta Decl. Exh. 19, at 9-10 & ¶10. *See also id.* Exh. 20, at 35 n.72 (refuting the legal basis for Intervenor-Defendants' argument).

⁸⁴ Unless a court has issued an injunction against them, California elections officials have the power to enforce a state statute – *even if* an appellate 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).

⁸⁵ *Bates, supra*, 127 F.3d at 873-74.

⁸⁶ *See id.* at 127 F.3d at 873.

the State Court Plaintiffs' litigation *could decline to do so*. As this Court has made clear, “[s]uch a result would be *inconsistent with the elementary principles of fairness* that govern California’s elections.”⁸⁷

C. The Public Will Benefit If This Appeal Is Expedited

By expediting this appeal, the Court will not only prevent the looming election cycle from being disrupted, but will strongly promote public policy in two critical ways. First, it will provide elections officials with much needed certainty, both legally and fiscally.⁸⁸ It is undisputed that SB 6 will not only force counties to spend “*millions of dollars* statewide in ballot production and postage costs”, but could force them to spend millions more in new voting equipment.⁸⁹

Equally important, an expedited ruling would give candidates much needed certainty. The Top Two Primary has made campaigns for the June primary election more costly, for major-party candidates must now seek support from voters outside their party. If Plaintiffs prevail, the Top Two Primary will be declared unenforceable, and the previous *party-primary system might be reinstated for the 2012 statewide election* – a drastic change of the rules. By promptly ruling on this appeal, the Court will instill

⁸⁷ See *id.*, *supra*, 127 F.3d at 873 (emphases added) (citing *Storer*, *supra*, 415 U.S. at 736; *Legislature v. Deukmejian*, 669 P.2d 17 (Cal. 1983)).

⁸⁸ See *Dudum v. Arntz*, 640 F.3d 1098, 1116 (9th Cir. 2011) (state has an interest in saving money).

⁸⁹ See *id.* at 1116; Dutta Decl. Exh. 6, at 12 (emphases added).

confidence in candidates, voters, and the public at large that the 2012 statewide election will be fairly and uniformly administered.⁹⁰

VI. Conclusion

The controlling principle for our decision is the need for uniformity in the ... election.

-- The Court, *Bates v. Jones*⁹¹

Senate Bill 6 has already inflicted irreparable harm on voters and candidates in at least three elections – and is poised to strike again.⁹² Unless this Court expedites this appeal, SB 6 will continue to (1) *disenfranchise voters* like Plaintiff Wilson who cast write-in votes, (2) *illegally disqualify candidates* like Plaintiff Frederick from exercising their fundamental right to run for office, and (3) *unlawfully censor* what candidates like Coffee Party candidate Chamness and Tea Party candidate Galacki may say on the ballot. In short, this appeal simply cannot wait. By granting this Motion, the Court will not only prevent a rash of lawsuits from “disrupti[ng]” the 2011-12 election cycle, but ensure that *no one* will be denied his or her constitutional right to a “fair and honest” election.⁹³

⁹⁰ See *Bates, supra*, 127 F.3d at 873 (emphases added) (citing *Storer, supra*, 415 U.S. at 736; *Legislature v. Deukmejian*, 669 P.2d 17 (Cal. 1983)).

⁹¹ *Bates, supra*, 127 F.3d at 872 (emphasis added).

⁹² See *Storer, supra*, 415 U.S. at 737 n.8 (enunciating “capable of repetition, but evading review” doctrine); *Grange, supra*, 552 U.S. at 449-50 (admonishing plaintiffs to bring as-applied constitutional challenges); *Crawford, supra*, 553 U.S. at 189 (same); see also Fishkin, *supra*, IND.L.J. Vol. 86 at 1326 (noting High Court’s strong preference for as-applied challenges).

⁹³ See *Cook v. Gralike*, 531 U.S. 510, 524 (2001) (quoting *Storer, supra*, 415 U.S. at 730);

Sept. 15, 2011

Respectfully submitted,

/s/ _____

GAUTAM DUTTA

Attorney for Appellants

Gautam Dutta, Attorney-at-Law

39270 Paseo Padre Pkwy # 206

Fremont, CA 94538

415.236.2048; 213.405.2416 fax

Dutta@BusinessandElectionLaw.com

Bates, supra, 127 F.3d at 873.

STATEMENT OF RELATED CASES

One related case is currently pending before the Court: *Michael Chamness v. Debra Bowen* (Case No. 11-56303). 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. 21, 2011, I served, via ECF, an electronic copy of this
Motion to Expedite Appeal.

/s/ _____

GAUTAM DUTTA