

No. 11-56449

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL CHAMNESS, DANIEL FREDERICK, and RICH WILSON

Plaintiffs / Appellants,

DAVID STEINMAN, RANDI CLAUSEN,
CHARLES RICHARDSON, and ANDREW ARNOLD,

Intervenor Applicants-Plaintiffs /
Appellants,

-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 INTERVENE

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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 Brennan¹

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.

– The Court, *Bates v. Jones*²

I. Introduction

Unless they are allowed to join this litigation, Randi Clausen, Andrew Arnold, David Steinman, and Charles Richardson – voters and candidates who each belong to the Green Party or Libertarian Party – could be deprived of their fundamental rights in the looming 2012 statewide election.

This litigation could *restore* two rights that had been previously guaranteed by the California Constitution: (1) the right of voters and candidates to participate in the June primary election of the ballot-qualified party (e.g., Libertarian Party, Green Party) to which they belong, and (2) the right of ballot-qualified parties to nominate federal and state candidates for the November general election. However, if the Court does not resolve this litigation before **March 29, 2012**, Intervenor-Applicants will likely be barred from exercising those twin rights in the 2012 statewide election. Because they have a critical stake in this litigation, all four Intervenor-Applicants must promptly be granted intervention of right.

II. Background

A. The Party-Primary System Will Likely Be Restored If Plaintiffs Prevail

¹ *Stringfellow v. Concerned Neighbors*, 480 U.S. 370, 382 n.1 (1987) (concurring opinion).

² *Bates v. Jones*, 127 F.3d 870, 873-74 (9th Cir. 1997) (emphases added) (granting motion to intervene on appeal).

If Plaintiffs prevail, California’s former party-primary system – which Proposition 14 and Senate Bill 6 had eliminated – will likely be restored for the 2012 statewide election. Before Proposition 14 took effect, Article 2 of the California Constitution had given candidates and voters the right to participate in “primary elections for partisan offices” such as Member of U.S. Congress.³

Under the party-primary system, candidates from ballot-qualified parties could qualify for the November general election by finishing first in their own party’s June primary election. However, under Proposition 14 and Senate Bill 6, they must now finish first or second *against every other candidate* in the June 5, 2012 statewide primary election (the “June 2012 Primary”). The top two finishers, irrespective of party, will then advance to the November 6, 2012 general election (the “November 2012 General Election”).

In their appeal, Plaintiffs ask the Court to declare that Proposition 14 is inoperative and unenforceable, for its implementing law (Senate Bill 6) is unconstitutional.⁴ Toward that end, Plaintiffs will show that SB 6 must be struck down *in its entirety*, because one of its core parts is unconstitutional. Specifically, SB 6’s Party Preference Ban (1) forces minor-party (e.g., 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”⁵ – which California candidates had been able

³ CAL.CONST. art. ii §5(a) (pre- Proposition 14 version), *available at* <http://voterguide.sos.ca.gov/past/2010/primary/pdf/english/text-proposed-laws.pdf#prop14> (last visited Dec. 12, 2011).

⁴ 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).

⁵ In *Rubin v. City of Santa Monica*, the 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.*

to use *for over a century*.⁶ 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"*.⁷

Although Plaintiffs do not seek injunctive relief, Secretary of State Debra Bowen has told the Court that she will abide by the Court's ruling. In her own counsel's words, "there is *no reason to suspect* that the Secretary of State would 'refuse' to follow a federal court order."⁸ Thus, if the Court declares that Proposition 14 is unenforceable, it can assume that Secretary Bowen will not only stop enforcing Proposition 14, but will also *restore the party-primary system* – a *major* change of California's election rules.

B. Critical Election Deadline: March 29, 2012

On March 29, 2012 – two weeks after the parties finish briefing this case – Secretary Bowen must send a final, certified list of candidates to elections officials across the state.⁹ Pursuant to federal law, vote-by-mail ballots must then be sent out to military and overseas voters beginning April

Brown, 970 F.2d 169 (6th Cir. 1992)). On Aug., 18, 2011, the Court took judicial notice of Secretary Bowen's statement that SB 6's Party Preference Ban was not "permissible". Plaintiffs' Motion to Expedite, Dkt. No. 10, at 7 n.17.

SB 6 must be declared unconstitutional *in its entirety* if its Party Preference Ban is declared unconstitutional, because SB 6 *is not severable*. It is undisputed that the Legislature 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 SB 6 *without* its Party Preference Ban, SB 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 SB 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.

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

⁷ *See supra* note 5.

⁸ Secretary Bowen's Sept. 26, 2011 Opp'n, Dkt. No. 12, at 5 (quotations in original, italics added).

⁹ Plaintiffs' Nov. 17, 2011 Letter to the Court, Dkt No. 23-1, at 1, *attached as* Exhibit 3 to the accompanying Declaration of David Steinman ("Steinman Decl."), at pp. 1 & 10 of 14.

6, 2012.¹⁰ It takes several days for elections officials to design, prepare, and print ballots. Thus, to ensure that military and overseas ballots can be sent out in compliance with federal law, the June 2012 Primary ballot – and the *rules for administering the statewide election* – must be finalized no later than March 29, 2012.¹¹

C. Procedural Posture

Plaintiffs filed a Motion to Expedite Appeal on September 13, 2011. After the Appellate Commissioner denied their Motion, Plaintiffs filed a Motion for Reconsideration. Specifically, Plaintiffs asked the Court to resolve this case by March 9, 2012 (i.e., the last date for federal and state candidates to file nomination papers for the 2012 statewide election).¹²

On November 16, 2011, the Court denied Plaintiffs’ Motion for Reconsideration. In so doing, the Court declined to calendar a hearing date for Plaintiffs’ appeal, but took judicial notice of the 2012 California election calendar.¹³ Plaintiffs’ Opening Brief is due January 31, 2012; Defendants’ Answering Brief, on March 1, 2012; and Plaintiffs’ Reply Brief, on March 15, 2012.

III. **Introduction to Intervenor-Applicants**

David Steinman seeks to join this appeal in his capacity as a 2012 candidate for Congressional District 33. He is registered to vote in Los Angeles County, with the party affiliation of the Green Party. If the Green

¹⁰ *Id.* Exh. 3, attached as Steinman Decl. Exh.3, at p.11 of 14; Secretary of State’s Memorandum on the federal Military and Overseas Voter Empowerment Act (“MOVE Act”, codified at 42 U.S. §§1973ff *et seq.*), attached as Exhibit 1 to Declaration of Gautam Dutta in Support of Request for Judicial Notice, at p. 3 of 4, available at <http://www.sos.ca.gov/elections/ccrov/pdf/2010/january/10042cbm.pdf> (last visited Dec. 14, 2011).

¹¹ Presumably in response to this litigation, the Orange County Registrar has told candidates and voters that Proposition 14’s “changes *may not be final.*” Plaintiffs’ Nov. 17, 2011 Letter to the Court, Dkt. No. 23-3, attached as Steinman Decl. Exh. 3, at p. 1 of 14 (italics added).

¹² Plaintiffs’ Motion for Reconsideration, Dkt. No. 17, at 2, 4-5.

¹³ Court’s Nov. 16, 2011 Order, Dkt. No. 22 (*granting* Plaintiffs’ Oct. 11, 2011 RJN, Dkt. No. 16).

Party regains the right to hold its party primary, he intends to become the Green Party's nominee for the November 2012 General Election, by seeking the Green Party's nomination in the June 2012 Primary.¹⁴

Charles Richardson seeks to join this appeal in his capacity as a 2012 candidate for Congressional District 17. He is registered to vote in Alameda County, with the party affiliation of the Libertarian Party. If the Libertarian Party regains the right to hold its party primary, he intends to become the Libertarian Party's nominee for the November 2012 General Election, by seeking the Green Party's nomination in the June 2012 Primary.¹⁵

Randi Clausen seeks to join this appeal in her capacity as a voter who lives in Congressional District 33, which Mr. Steinman seeks to represent. Ms. Clausen is registered to vote in Los Angeles County. Last week, she changed her party affiliation to the Green Party. If the Green Party regains the right to hold its party primary, she intends to help select the Green Party's nominee for the November 2012 General Election, by voting in the Green Party's June 2012 Primary.¹⁶

Andrew Arnold seeks to join this appeal in her capacity as a voter who lives in Congressional District 17, which Mr. Richardson seeks to represent. Mr. Arnold is registered to vote in Alameda County. Last week, he changed his party affiliation to the Libertarian Party. If the Libertarian Party regains the right to hold its party primary, he intends to help select the Libertarian Party's nominee for the November 2012 General Election, by voting in the Libertarian Party's June 2012 Primary.¹⁷

¹⁴ Steinman Decl. ¶¶1, 4.

¹⁵ Declaration of Charles Richardson ("Richardson Decl.") ¶¶1, 4.

¹⁶ Declaration of Randi Clausen ("Clausen Decl.") ¶¶1, 2, 5.

¹⁷ Declaration of Andrew Arnold ("Arnold Decl.") ¶¶1, 4.

IV. Intervenor-Applicants Amply Qualify for Intervention of Right

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.*¹⁸

Intervenor-Applicants easily satisfy the requirements to intervene as of right. The Court requires that prospective intervenors satisfy four requirements:

1. The applicants 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 applicants’ ability to protect that interest;
3. The applicants’ interest “may not be” adequately represented by the existing parties in the lawsuit;
4. The application for intervention must be timely.¹⁹

Rule 24 – which also governs intervention on appeal²⁰ – “traditionally receives liberal construction *in favor of* applicants for *intervention*.”²¹ The Court has made it clear that intervention is especially warranted in cases involving a statewide election, in order to ensure that the voters are not deprived of their fundamental rights.²²

¹⁸ *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).

¹⁹ *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).

²⁰ *Bates, supra*, 127 F.3d at 873 (citing *Landreth Timber Co. v. Landreth*, 731 F.2d 1348, 1353 (9th Cir. 1984), *rev'd on the merits*, 469 U.S. 1016 (1984)).

²¹ *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003), *cert. denied sub. nom. Hoohuli v. Lingle*, 540 U.S. 1017 (2003) (italics added).

²² “Even *more important*, however, are the *rights of the voters*.” *Bates, supra*, 127 F.3d at 873 (italics added).

A. Intervenor-Applicants Have a Significantly Protectable Interest That Could Be Impaired and Impeded

At the outset, Intervenor-Applicants have a significantly protectable interest in this litigation, for they seek to defend their fundamental right to vote and seek public office.²³ As shown earlier, if Proposition 14 is declared unenforceable, Article 2 of the California Constitution will once again grant candidates and voters the *right* to participate in “primary elections for partisan offices”.²⁴

If it the constitutional right to vote and run in party primaries is restored, the State *must* allow voters and candidates like Intervenor-Applicants to exercise that right.²⁵ Thus, if the pre-Proposition 14 California Constitution is restored, Intervenor-Applicants Steinman and Richardson must be respectively granted the right to run in the Green Party and Libertarian Party – and if they win the primary, they must be granted the right to appear on the ballot of the November 2012 General Election.

Similarly, Intervenor-Applicants Clausen and Arnold must not only be granted the right to vote for Steinman and Richardson in their respective party primaries, but also be granted the right to vote for the respective Green Party and Libertarian Party *nominees* in the November 2012 General Election. Because a favorable ruling could restore their constitutional right

²³ As the Court has made clear, both the right to vote and run for public office are fundamental. *See* the legal authorities cited in note 18 *supra*. The Court has also made it clear that 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 Indus. v. Int’l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992) (*citing, inter alia*, *Smith v. Pangilinan*, 651 F.2d 1320, 1325-26 (9th Cir. 1981); *Shores v. Hendy Realization*, 133 F.2d 738, 742 (9th Cir. 1943)).

²⁴ CAL.CONST. art. ii §5(a) (pre- Proposition 14 version), *available at* <http://voterguide.sos.ca.gov/past/2010/primary/pdf/english/text-proposed-laws.pdf#prop14> (*last visited* Dec. 12, 2011).

²⁵ *See, e.g., Libertarian Party v. District of Columbia Bd.*, 768 F.Supp.2d 174, 182 (D.D.C. 2011); *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 Illinois decided to extend this forum, it *became obligated to do so in a manner consistent with the Constitution.*”) (*italics added, citation omitted*); *Turner v. District of Columbia Bd.*, 77 F.Supp.2d 25, 30 (D.D.C. 1999).

to vote and seek public office in their party primary, Intervenor-Applicants have a significantly protectable interest in this litigation.

B. Plaintiffs Can No Longer Represent Intervenor-Applicants' Interests

Equally important, Plaintiffs can no longer adequately represent Intervenor-Applicants' interest in this litigation. Unlike Intervenor-Applicants Steinman and Richardson, no Plaintiff is seeking public office in the 2012 Primary. Last month, the Court denied Plaintiffs' request to resolve this litigation before March 9, 2012. If Plaintiffs prevail, Intervenor-Applicants will regain the constitutional right to participate in their party primary. However, if the Court rules in Plaintiffs' favor *after* March 29, 2012, it will be *too late to restore party primaries* for the 2012 statewide election.²⁶

Because the Court has denied Plaintiffs' request to resolve this case before March 9, 2012, it is at best unclear whether this case will be resolved before March 29, 2012 – the *last date* on which Intervenor-Applicants can regain the constitutional right to participate in the 2012 Primary. Because they could not convince the Court to resolve this case before March 9, 2012, Plaintiffs can no longer represent Intervenor-Applicants' significantly protectable interest.

C. This Motion to Intervene Is Timely

Finally, Intervenor-Applicants have brought a timely Motion to Intervene. In analyzing timeliness, the Court “focuses on the date the person attempting to intervene *should have been aware his interests would no longer be protected adequately* by the parties, rather than the date the person

²⁶ See discussion at Section IIB *supra*.

learned of the litigation.”²⁷ The Court considers three main factors in considering whether a motion to intervene is timely:

1. The state of the proceedings;
2. Prejudice to existing parties; and
3. The length of²⁸ and reason for any delay in seeking intervention.

“Mere lapse of time alone is *not determinative*” when analyzing timeliness.²⁹ Toward that end, the Court “bear[s] in mind that the timeliness requirement for intervention as of right should be treated *more leniently* than for permissive intervention *because of the likelihood of more serious harm.*”³⁰

This Motion will not prejudice any existing party, for briefing on the underlying appeal has not yet begun. As the Court has held, an intervention motion is timely as a matter of law if it “was filed at a very early stage, *before any hearings or rulings on substantive matters.*”³¹ In fact, the Court has ruled that a motion to intervene is timely as a matter of law, where it was brought approximately one month after a motion for preliminary injunction had been filed.³² Here, no hearing has been held (or calendared) for this case, and briefing has not yet begun. Therefore, granting this Motion will not prejudice any existing party.

Moreover, Intervenor-Applicants rushed to this Court shortly after learning that Plaintiffs could no longer represent their interests. On November 16, 2011, the Court denied Plaintiffs’ Motion for Reconsideration. Intervenor-Applicants learned of the Court’s denial (which

²⁷ *Bates, supra*, 127 F.3d at 873 (italics added, citations and quotations omitted); *see also Officers for Justice v. Civil Service Comm’n*, 934 F.2d 1092, 1095 (9th Cir.1991); *Legal Aid Soc’y v. Dunlop*, 618 F.2d 48, 50 (9th Cir.1980).

²⁸ *Dep’t of Toxic Substances Control v. Comm. Realty Projs.*, 309 F.3d 1113, 1119 (9th Cir. 2002).

²⁹ *U.S. v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) (citation omitted, italics added) (reversing trial court’s denial of State of Idaho’s motion to intervene, which the trial court had deemed untimely).

³⁰ *Id.* at 552 (italics added).

³¹ *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (italics added).

³² *Id.* at 1397.

did not receive any media coverage) between December 2 and 8, 2011, and promptly retained counsel.³³ Thus, this Motion was filed approximately *one week* after Intervenor-Applicants learned that Plaintiffs could no longer represent their interests.³⁴ Accordingly, Intervenor-Applicants have brought a timely Motion to Intervene.

V. Conclusion

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*³⁵

At its core, this Motion raises a simple issue: do voters and candidates have a right to intervene in an election case, if the existing parties have failed to protect their interests? To date, Plaintiffs have failed to convince the Court to resolve this case before March 29, 2012 – the *last date* on which Intervenor-Applicants can benefit from a favorable ruling with respect to the 2012 statewide election. As this Motion has shown, Plaintiffs can no longer protect the fundamental rights of Intervenor-Applicants: voters and candidates who could suffer irreparable harm if the Libertarian Party and Green Party do *not* regain the right to nominate candidates for the November 2012 General Election.³⁶ Therefore, to prevent “any unnecessary inequities and delay in the upcoming election cycle”, the Court *must* grant this Motion to Intervene.³⁷

³³ Steinman Decl. ¶¶10, 14; Richardson Decl. ¶¶10, 14; Clausen Decl. ¶¶11, 15; Arnold Decl. ¶¶10, 14.

³⁴ *Bates, supra*, 127 F.3d at 873; *Officers for Justice, supra*, 934 F.2d at 1095; *Dunlop, supra*, 618 F.2d at 50.

³⁵ *Bates, supra*, 127 F.3d at 872 (italics added).

³⁶ Any infringement of the fundamental right to vote and seek public office constitutes irreparable harm. *See, e.g., Cardona v. Oakland Unified Sch. Dist.*, 785 F.Supp. 837, 840 (N.D. Cal. 1992); *Montano v. Suffolk County Legislature*, 268 F.Supp.2d 243, 260 (E.D.N.Y. 2003); *Fla. Dem. Party v. Hood*, 342 F.Supp.2d 1073, 1082 (N.D. Fla. 2004).

³⁷ *Bates, supra*, 127 F.3d at 872.

DATED: Oct. 14, 2011

By: /s/

GAUTAM DUTTA, ESQ.

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 Dec. 14, 2011, I electronically filed, via CM/ECF, a copy of the foregoing Motion to Intervene with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ _____

GAUTAM DUTTA