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5 MICHAEL CHAMNESS, DANIEL FREDERICK,
6 and RICH WILSON

7
8 IN THE UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 MICHAEL CHAMNESS, DANIEL
12 FREDERICK, RICH WILSON,

13 *Plaintiffs,*

14 vs.

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

19 *Defendants,*

20 ABEL MALDONADO, an
individual; CALIFORNIA
21 INDEPENDENT VOTER
PROJECT; and CALIFORNIANS
22 TO DEFEND THE OPEN
PRIMARY;

23 *Intervenors-*
24 *Defendants*

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

**REPLY BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

HEARING DATE: June 13, 2011
HEARING TIME: 1:30 pm
JUDGE: Hon. Otis D. Wright II
COURTROOM: 11

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 *Nothing is more destructive of respect for the government and the law of the*
3 *land than passing laws which cannot be enforced.*

4 -- Albert Einstein¹

5 **I. Introduction**

6 Four words sum up the doomed effort to defend SB 6’s fundamental flaws:
7 all bark, no bite. Instead of refuting any of Plaintiffs’ weighty constitutional
8 claims, Secretary Bowen and Intervenors try to distract the Court by twisting and
9 ignoring key precedent, misstating the law, and waving off critical evidence.
10 Intervenors – who have shamelessly misrepresented Plaintiffs’ legal positions –
11 even have the gall to falsely accuse Plaintiffs of their own forte: *deliberately*
12 *misrepresenting the law* to the Court. It is beyond question that SB 6 has (1)
13 disenfranchised Plaintiff Rich Wilson, (2) disqualified Plaintiff Daniel Frederick
14 from running as a write-in candidate, and (3) deprived Plaintiff Michael Chamness
15 of his fundamental right to express his political views on the ballot. By granting
16 them summary judgment, the Court will vindicate their fundamental rights.

17 **II. Overview**

18 Plaintiffs bring an as-applied challenge to the constitutionality of SB 6’s
19 Vote Counting Ban and Party Preference Ban.² “An as-applied First Amendment
20 challenge contends that a given statute or regulation is unconstitutional as it has
21 been applied to a litigant’s particular speech activity.”³ Thus, instead of deciding

22 _____
23 ¹ Available at <http://www.brainyquote.com/quotes/quotes/a/alberteins136890.html> (last
visited Mar. 26, 2011) (emphases added).

24 ² SB 6 implements Proposition 14’s “Top Two” primary system. As Secretary Bowen
concedes, the Washington State law on which the Top Two primary system is modeled does not
25 impose a Party Preference Ban, and instead allows minor-party candidates to state their party’s
name on the ballot. Secretary Bowen’s Opposition, at 13:19-13:23; WAC 434-215-120(1)
26 (giving candidates up to 16 characters on the ballot to describe their party preference).
Washington State also does not impose a Vote Counting Ban. Instead, Washington law allows
27 write-in candidacies in the general (runoff) election and does not ban lawfully cast write-in votes
from being counted. RCW 29a.24.311.

28 ³ *Legal Aid Services of Oregon v. Legal Services Corp.*, 587 F.3d 1006, 1018 (9th Cir. 2009)
(emphasis added) (citing *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 802-03 (1984)).

1 how SB 6 should be interpreted, the Court must decide whether Secretary Bowen
2 and Registrar Logan's actual interpretation – and enforcement – of SB 6's Vote
3 Counting Ban and Party Preference Ban violated Plaintiffs' fundamental rights.
4 Contrary to Intervenors' misrepresentations,⁴ this Motion does not seek injunctive
5 relief. Rather, Plaintiffs now ask the Court (1) to declare SB 6 unconstitutional and
6 unenforceable, and (2) to declare Proposition 14 inoperative until a new law has
7 been passed to replace SB 6. Because no "central" facts remain to be discovered,
8 the Court may grant summary judgment and fully resolve this case.⁵

9 **III. It Is Unrefuted That Secretary Bowen Has Made a Binding Admission**
10 **Regarding SB 6's Vote Counting Ban**

11 Tellingly, Secretary Bowen has failed to refute that she made a binding
12 admission regarding SB 6's Vote Counting Ban. As her own staff stated in
13 correspondence with Intervenor Maldonado's office, SB 6 gives candidates the
14 "illusion" that they can mount write-in candidacies in the general election, and
15 gives voters the "illusion" that they can cast a write-in vote that will be counted.⁶
16 Because she has admitted that her staff sent that correspondence, Secretary Bowen
17 has made a binding party admission that SB 6's Vote Counting Ban violated the
18 fundamental rights of Plaintiffs Frederick and Wilson.⁷

19 **IV. It Is Unrefuted That SB 6, As Applied, Violated Plaintiff Frederick's**
20 **Fundamental Right to Run for Public Office**

21 *The United States Supreme Court has repeatedly held that the individual's*
22 *right to seek public office is inextricably intertwined with the public's fundamental*
23 *right to vote, and may be limited only where necessary to achieve a compelling*
24 *state purpose.*

25 -- Ninth Circuit, *Davies v. Grossmont Union High School District*⁸

26 ⁴ Intervenors' Opposition, at 2:14-2:21 & 23:5-23:21.

27 ⁵ *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir. 1989); Plaintiffs' May 12, 2011
28 Opposition to Ex Parte Application, at 6:15-8:1. Intervenors apparently do not believe that
further discovery would benefit their case, for they have asked the Court to grant summary
judgment in their favor under FRCP 56(f)(1). Intervenors' Opposition, at 25:11-25:12.

⁶ Pl. Statement ¶ 10 (emphases added); Moving Papers, at 17:9-18:4 & 18:2 n.75.

⁷ Secretary Bowen's Apr. 4, 2011 Answer to First Amended Complaint ¶19. Contrary to
Secretary Bowen's claims, the correspondence sent from her office is fully admissible. *See*
Plaintiffs' May 27, 2011 Response to Objections to Their Request for Judicial Notice ¶¶10, 11.

⁸ *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1397 (9th Cir.) (emphases

1 Secretary Bowen and Intervenors (“SB 6 Defendants”) fail to refute Plaintiff
2 Frederick’s constitutional claim. Namely, his fundamental right to run for office
3 was irreparably harmed, when Secretary Bowen invoked SB 6 as the reason for
4 disqualifying him from running as a write-in candidate in the special general
5 election for Assembly District 4 (the “AD 4 Runoff”). As Plaintiffs’ Moving Papers
6 showed, Plaintiff Frederick had (a) satisfied the criteria to run as a write-in
7 candidate under Elections Code §8601, and (b) attempted to qualify as a write-in
8 candidate for the AD 4 Runoff in a timely manner.⁹ Furthermore, it is undisputed
9 that SB 6 did not repeal Election Code §15340, which gives citizens the right to
10 qualify as write-in candidates in every state and federal election.¹⁰

11 It is hornbook law that no law may perpetrate a “fraud upon” any class of
12 candidates or voters, irrespective of the state of mind of any member of that class:¹¹

13 [W]e are unwilling to reject [plaintiff’s] claim merely on the *fiction*
14 *that the voters had a duty, at their peril, somehow to foresee the ruling*
*... invalidating their ballots.*¹²

15 Furthermore, as the Moving Papers showed, it is unconstitutional to “dictate
16 electoral outcomes” by placing a class of candidates at a debilitating political
17 disadvantage.¹³ Here, SB 6’s Vote Counting Ban targeted a distinct class: write-in
18 candidates like Plaintiff Frederick and voters like Plaintiff Wilson who sought to

19 added), *cert. denied*, 501 U.S. 1252 (1991) (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983);
20 *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).

21 ⁹ Plaintiffs’ May 6, 2011 Opening Brief (“Moving Papers”), at 18:9-18:11.

22 ¹⁰ As Plaintiffs have shown, SB 6 provides for write-in candidacies and write-in voting.
Moving Papers, at 12:16 n.42 (citing SB 6-amended Election Code §§8600, 13207(a)(2), 13212,
and 15340). Nevertheless, SB 6 Defendants claim that SB 6 bars write-in candidacies in the
23 general election. Secretary Bowen’s May 23, 2011 Statement of Genuine Issues of Material Fact
 (“SOS Statement”) ¶41; Intervenors’ May 23, 2011 Statement of Genuine Issues (“Intervenor
Statement”) ¶41. However, they have not cited any provision of SB 6 that expressly repeals
24 Elections Code §15340. “If there is no ambiguity in the language, we presume the Legislature
meant what it said and the *plain meaning of the statute governs.*” *Arterberry v. San Diego*
25 *County*, 182 Cal.App.4th 1528, 1533 (Cal.Ct.App. 2010) (emphases added) (quoting *Diamond*
Multimedia Systems v. Superior Court, 968 P.2d 539 (Cal. 1999)); *see also Estate of McDill*, 537
26 P.2d 874, 878 (Cal. 1971).

27 ¹¹ *Griffin v. Burns*, 570 F.2d 1065, 1074 (1st Cir. 1978).

28 ¹² *Id.* at 1076 (emphases added).

¹³ Moving Papers, at 18:15-19:11 (citing, *inter alia*, *Rubin v. Santa Monica*, 308 F.3d 1008,
1015 (9th Cir. 2002) & *Cook v. Gralike*, 531 U.S. 510, 525-26 (2001)).

1 vote for them. Therefore, Secretary Bowen violated Plaintiff Frederick's rights
2 under the Due Process Clause and First Amendment, when she disqualified him
3 from running as a write-in candidate in the AD 4 Runoff.¹⁴

4 **V. It Is Unrefuted That SB 6's Vote Counting Ban Violated Plaintiff
5 Wilson's Fundamental Rights**

6 A. Plaintiff Wilson Has Proven That SB 6 Violated His Fundamental
7 Right to Have His Vote Counted

8 Equally telling, SB 6 Defendants have failed to refute Plaintiff Wilson's
9 constitutional claim. Namely, SB 6 banned his lawfully cast write-in vote from
10 being counted in the AD 4 Runoff. In this manner, SB 6's Vote Counting Ban
11 irreparably harmed his fundamental right under the *Elections Clause* "to cast [a]
12 ballot and have [that] ballot counted".¹⁵ Here, it is undisputed that (1) the AD 4
13 Runoff ballot allowed voters to vote for a write-in candidate, (2) Plaintiff Wilson is
14 registered to vote in AD 4, and (3) Plaintiff Wilson cast a write-in vote for Plaintiff
15 Frederick in the AD 4 Runoff.¹⁶ What is more, Secretary Bowen has admitted that
16 Plaintiff Wilson's write-in vote was not counted.¹⁷ Because it barred his lawfully
17 cast vote from being counted, SB 6's Vote Counting Ban must be summarily struck
18 down under the Elections Clause – regardless of any state interest.¹⁸

19 Even without the Elections Clause, SB 6's Vote Counting Ban not only

20 ¹⁴ See, e.g., *Libertarian Party v. D.C. Election Bd.*, 2011 WL 782031, at *6 (D.D.C. Mar. 8,
2011); *Grant v. Meyer*, 828 F.2d 1446, 1456 (10th Cir. 1987) (citation omitted); *Turner v. D.C.
21 Election Bd.*, 77 F.Supp.2d 25, 30 (D.D.C. 1999).

22 ¹⁵ *Gonzalez v. Arizona*, 624 F.3d 1162, 1173 n.9 (9th Cir. 2010) (emphasis added) (citing
23 *U.S. v. Mosley*, 238 U.S. 383, 386 (1915) (It is "as equally unquestionable that the right to have
24 one's vote counted is as open to protection ... as the right to put a ballot in a box") (emphasis
25 added); Moving Papers, at 19:12-20:17. See also *Reynolds v. Sims*, 377 U.S. 533, 555 n.29
(1964) ("The right to vote includes the right to have the ballot counted") (emphasis added); *U.S.
v. Classic*, 313 U.S. 299, 315 (1941) ("Obviously included within the right to choose, secured by
the Constitution, is the right of qualified voters within a state to cast their ballots and have them
counted.") (emphasis added); *Gould v. Grubb*, 536 P.2d 1337, 1343 n.10 (Cal. 1975).

26 ¹⁶ The write-in ballot cast by Plaintiff Wilson has been attached as Exhibit 1 (at p.4.) to the
27 May 6, 2011 Declaration of Rich Wilson.

28 ¹⁷ SOS Statement ¶8.

¹⁸ Moving Papers, at 19:17-20:1; *Gonzalez, supra*, 624 F.3d at 1174 ("[C]ourts deciding
issues raised under the Elections Clause need not strike any balance between competing
sovereigns. Instead, the Elections Clause, as a standalone pre-emption provision, establishes its
own balance, *resolving all conflicts in favor of the federal government.*") (emphases added).

1 triggers strict scrutiny, but has already violated Plaintiff Wilson’s rights under the
2 First Amendment, Fourteenth Amendment, and the Due Process Clause.¹⁹ In
3 *Libertarian Party v. D.C. Election Board*,²⁰ the District of Columbia’s federal court
4 distilled the constitutional rule that controls this case. Namely, the State may
5 lawfully ban write-in votes from being cast. But “having granted citizens the right
6 to cast write-in votes, the [State] must confer the right in a manner consistent with
7 the Constitution.”²¹ Furthermore, in *Griffin v. Burns*, the First Circuit held that
8 under the Due Process Clause, no State may perpetrate a “fraud upon” the voters by
9 changing election rules without giving full and fair notice.²² Thus, because SB 6
10 gave voters like Plaintiff Wilson the right to cast write-in votes, it unlawfully
11 banned their votes from being counted.

12 B. SB 6 Defendants Fail To Salvage SB 6’s Vote Counting Ban

13 Desperately seeking to salvage SB 6, SB 6 Defendants make five unfounded
14 claims. First, they argue that SB 6 not only banned write-in votes from being
15 counted, but also banned write-in votes from being cast. However, their claim is
16 downright false. In fact, SB 6 expressly allows write-in votes to be cast, but bans
17 those votes from being counted.²³ What is more, it is undisputed that Plaintiff
18 Wilson *did cast a write-in ballot* in the AD 4 Runoff.²⁴ Because SB 6 did not ban
19 write-in votes from being cast, the two cases repeatedly invoked by SB 6

20 _____
21 ¹⁹ Moving Papers, at 16:3-20:17; *D.C. Election Bd.*, *supra*, 2011 WL 782031, at *6
(stringent constitutional strictures apply once the State grants the right to mount write-in
22 candidacies and vote for write-in candidates) (*citing Grant*, 828 F.2d at 1456 (10th Cir. 1987);
Turner v. D.C. Election Bd., 77 F.Supp.2d 25, 30 (D.D.C. 1999)); *Griffin*, *supra*, 570 F.2d at
23 1074, 1076 (no state law may perpetrate a “fraud upon” any class of candidates or voters under
the Due Process Clause).

24 ²⁰ *D.C. Election Bd.*, *supra*, 2011 WL 782031, at *6.

²¹ *Id.* at *6 (*citing Grant*, 828 F.2d at 1456 (10th Cir. 1987); *Turner v. D.C. Election Bd.*, 77
25 F.Supp.2d 25, 30 (D.D.C. 1999)); *see also Griffin*, *supra*, 570 F.2d at 1074, 1076 (no state law
may perpetrate a “fraud upon” any class of candidates or voters under the Due Process Clause).

²² *Griffin*, *supra*, 570 F.2d at 1074.

²³ As Plaintiffs have shown, SB 6 provides for write-in candidacies and write-in voting.
26 Moving Papers, at 12:16 n.42 (*citing* SB 6-amended Election Code §§8600, 13207(a)(2), 13212,
27 and 15340).

²⁴ A copy of the ballot cast by Plaintiff Wilson has been attached as Exhibit 1 to his May 6,
28 2011 Declaration in Support of Plaintiffs’ Motion for Summary Judgment.

1 Defendants – *Burdick* and *Edelstein*, which allow the State to ban write-in votes
2 from being cast – neither apply nor control here.²⁵

3 Secretary Bowen next claims that the State has a “legitimate” interest in
4 banning write-in votes from being counted: to limit political competition in the
5 general election.²⁶ However, as the Ninth Circuit recently made clear, any state law
6 that violates the Elections Clause *must be summarily struck down* – regardless of
7 any state interest.²⁷ In any event, reducing political competition would never
8 constitute a legitimate (let alone compelling) interest. Therefore, the State’s
9 “interest” must be disregarded.

10 Third, Intervenors argue that Secretary Bowen did not correctly interpret SB
11 6’s Vote Counting Ban and Party Preference Ban.²⁸ However, the doctrine of
12 judicial estoppel bars Intervenors from raising that argument, for it contradicts a
13 key argument that they had made earlier to the San Francisco Superior Court.²⁹ In
14 any event, Intervenors’ argument is irrelevant. As Section II of this brief shows, the
15 Court has not been asked to decide whether SB 6 has been interpreted correctly.
16 Rather, the Court must decide whether Secretary Bowen and Registrar Logan
17 violated Plaintiffs’ fundamental rights, when they enforced SB 6’s Vote Counting
18 Ban and Party Preference Ban against them in two recent elections.

19 Fourth, Secretary Bowen argues that the voters somehow “approved” SB 6’s

20 ²⁵ Cf. *Burdick v. Takushi*, 504 U.S. 428 (1992); *Edelstein v. San Francisco*, 56 P.3d 1029, 29
21 Cal.4th 164, 169 (Cal. 2002).

22 ²⁶ Secretary Bowen’s Opposition, at 20:16-20:25.

23 ²⁷ *Gonzalez, supra*, 624 F.3d at 1174.

24 ²⁸ Intervenors’ Opposition, at 11:23 n.10 & 23:1-23:4.

25 ²⁹ The doctrine of judicial estoppel bars Intervenors from “*playing fast and loose with the*
26 *courts.*” *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (emphases added) (*citing Rockwell*
27 *Int’l Corp. v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208, 1210 (9th Cir. 1988)). While
28 before the San Francisco Superior Court, Intervenors argued that SB 6 did not impose a Party
Preference Ban; that is, it forced all minor-party candidates to state that they have “No Party
Preference”. Plaintiffs’ Mar. 1, 2011 Opposition to Ex Parte Application to Intervene, at 7:13-
8:4. Subsequently, the Superior Court ruled that SB 6 did impose a Party Preference Ban. Oct. 5,
2010 Superior Court Order, *attached to* First Amended Complaint, Exh. 11 (at p.110), at 1:23-
1:24. Intervenors now argue that SB 6 did not impose a Party Preference Ban. Intervenors’
Opposition, at 21:21-22:24. Because they have contradicted their previous legal position,
Intervenors’ argument regarding SB 6 must be disregarded. Plaintiffs hereby incorporate by
reference all papers that they have filed with this Court.

1 Vote Counting Ban. However, the undisputed facts easily refute her puzzling
2 claim. Indeed, SB 6 Defendants have admitted that (a) the Legislature passed SB 6
3 on February 19, 2009 (i.e., over a year before Proposition 14 appeared on the June
4 8, 2010 ballot), and (b) neither the text nor the summary of SB 6 was included in
5 the Voter Guide for Proposition 14.³⁰ Simply put, the voters did not approve any
6 part of SB 6 – which was passed by the Legislature without any hearings or debate.

7 Finally, SB 6 Defendants resort to a ludicrous argument. In their view,
8 Plaintiffs Frederick and Wilson could not have suffered any harm, because (1)
9 Plaintiff Frederick knew that he would be banned from running as a write-in
10 candidate in the AD 4 Runoff, and (2) Plaintiff Wilson knew that his write-in vote
11 would not be counted. However, Plaintiffs’ state of mind is irrelevant as a matter of
12 law. Simply put, the Due Process Clause bans the State from perpetrating a “fraud
13 upon” the voters by changing election rules without giving them full and fair
14 notice.³¹ As the Ninth Circuit has made clear, “the individual’s right to seek public
15 office is *inextricably intertwined* with the public’s fundamental right to vote[.]”³²
16 Here, the AD 4 Runoff ballot did not tell voters that if they voted for a write-in
17 candidate, their vote would not be counted – and be *thrown away*. Because the
18 voters were not given full and fair notice of SB 6’s Vote Counting Ban, SB 6
19 Defendants’ “state of mind” argument fails.

20 **VI. It Is Unrefuted That Secretary Bowen Has Made a Binding Admission**
21 **Regarding SB 6’s Party Preference Ban**

22 Tellingly, Secretary Bowen has failed to refute that she made a binding
23 admission regarding SB 6’s Party Preference Ban. As her own staff stated in
24 correspondence with Intervenor Maldonado’s office, SB 6’s Party Preference Ban is
25 not “permissible”, because it *bans minor-party candidates from using the ballot*

26 _____
27 ³⁰ Plaintiffs’ May 6, 2011 Statement of Uncontroverted Facts and Conclusions of Law (“Pl.
Statement”) ¶22; SOS Statement ¶22; Intervenor Statement ¶22.

28 ³¹ *Griffin, supra*, 570 F.2d at 1074.

³² *Davies, supra*, 930 F.2d at 1397 (emphases added).

1 *label of “Independent”*.³³ Because she has admitted that her staff sent that
2 correspondence, Secretary Bowen has made a binding party admission that SB 6’s
3 Party Preference Ban irreparably harmed Plaintiff Chamness’ fundamental rights as
4 a candidate during the recent primary elections in Congressional District 36 and
5 Senate District 28.³⁴

6 **VII. It is Unrefuted That Forcing Plaintiff Chamness To State He Had “No
7 Party Preference” Violated His Rights Under the Elections Clause**

8 Significantly, SB 6 Defendants have failed to refute Plaintiff Chamness’ first
9 legal claim. Namely, Secretary Bowen and Registrar Logan violated his rights
10 under the Elections Clause, when they forced him to use the ballot label of “No
11 Party Preference” in the recent CD 36 Congressional election. As the Moving
12 Papers showed, SB 6’s Party Preference Ban violated the Elections Clause in two
13 ways.³⁵ First, it illegally favored candidates who claimed³⁶ to identify with the
14 viewpoints of a major political party. On the one hand, SB 6 allowed major-party
15 candidates like Democrat Janice Hahn and Republican Craig Huey to state their
16 major party’s name on the ballot. On the other, it forced minor-party candidate
17 Michael Chamness (who is registered to vote with the party affiliation of the Coffee
18 Party) to *lie to voters* about his political beliefs: he was forced to falsely state on
19 the ballot that he had “No Party Preference”.³⁷

20 Second, SB 6’s Party Preference Ban illegally “dictated electoral outcomes”
21 by putting minor-party candidates at a disadvantage. To prevail, Plaintiff

22 ³³ Pl. Statement ¶ 11 (emphases added); Moving Papers, at 23:6-23:22.

23 ³⁴ Secretary Bowen’s Apr. 4, 2011 Answer to First Amended Complaint ¶19. Contrary to
24 Secretary Bowen’s claims, the correspondence sent from her office is fully admissible. *See*
25 *Plaintiffs’ May 27, 2011 Response to Objections to Their Request for Judicial Notice* ¶¶10, 11.

26 ³⁵ Moving Papers, at 24:23-26:19.

27 ³⁶ As the Moving Papers showed, SB 6 deprived voters of “party quality control”, for they
28 can no longer tell from the ballot how long a candidate has been affiliated with a party. Moving
Papers, at 27:2-27:13.

³⁷ *See* Secretary Bowen’s Opposition, at 9 (reprinting sample CD 36 Primary ballot).
Contrary to Intervenor’s misrepresentations, *Cartwright v. Barnes* does not apply here, because
the state statute there treated all candidates equally once they received sufficient support to
qualify for and appear on the ballot. *Cf. Cartwright v. Barnes*, 304 F.3d 1138, 1142 (11th Cir.
2002), *cert. denied*, 538 U.S. 908 (2003).

1 Chamness need not produce any evidence to prevail, apart from documents which
2 show that he was forced to use a discriminatory ballot label.³⁸ As the Ninth Circuit
3 recently held in *Gonzalez v. Arizona*, a state law must be summarily struck down if
4 it violates the Elections Clause – regardless of any state interest.³⁹ Here, it is
5 beyond question that SB 6’s Party Preference Ban put Plaintiff Chamness at a
6 debilitating political disadvantage, for he was banned from expressing his political
7 views on the ballot. Consequently, the Elections Clause mandates that SB 6’s Party
8 Preference Ban be struck down, for it illegally discriminated against Plaintiff
9 Chamness on the basis of his political views.

10 **VII. It Is Unrefuted That Banning Plaintiff Chamness from Using the Ballot**
11 **Label of “Independent” Violated His Fundamental Rights**

12 Equally important, SB 6 Defendants have failed to refute Plaintiff Chamness’
13 second legal claim. Namely, Secretary Bowen and Registrar Logan violated his
14 fundamental rights, when they banned him from using the ballot label of
15 “Independent” in the recent CD 36 and SD 28 Primaries – a label that minor-party
16 candidates had been allowed to use *between 1891 and 2010*.⁴⁰ As the Moving
17 Papers showed, both officials thereby (1) illegally suppressed Plaintiff Chamness’
18 core political speech by banning him from using a “customary title” that carries a
19 “positive connotation” in American politics, (2) illegally “dictated political
20 outcomes” by putting him at a political disadvantage, and (3) triggered *strict*
21 *scrutiny* by imposing those “severe” burdens upon his freedom of speech.⁴¹

22 ³⁸ Moving Papers, at 22:8-22:13, 25:13-26:29; *Rubin*, 308 F.3d at 1014-15; *Gralike*, 531
U.S. at 517 n.8 (U.S. Supreme Court admonishes courts to rule on candidates’ Elections Clause
claims even before the election at issue has been held).

23 ³⁹ Moving Papers, at 19:17-20:1 (*quoting Gonzalez, supra*, 624 F.3d at 1174 (“[C]ourts
24 deciding issues raised under the Elections Clause need not strike any balance between competing
sovereigns. Instead, the Elections Clause, as a standalone pre-emption provision, establishes its
own balance, *resolving all conflicts in favor of the federal government.*”) (emphases added)).

25 ⁴⁰ Moving Papers, at 9:24-10:1 & 10:1 n.21. It is undisputed that SB 6 §325 forces elections
26 officials to foist the ballot label of “No Party Preference” on all minor-party candidates. *See*
Moving Papers, at 13:19-14:3.

27 ⁴¹ Moving Papers. at 21:14-23:5, 23:23-24:22, 20:23-21:2; *Rubin*, 308 F.3d at 1014-15;
Bachrach v. Commonwealth, 415 N.E.2d 832, 836 (Mass. 1981); *Dudum v. Arntz*, -- F.3d --, 2011
28 WL 1901769, at *6 (9th Cir. May 20, 2011). Contrary to Intervenor’s insinuations, a number of
courts have held that a State must give the voters the option of registering to vote with a non-

1 In response, SB 6 Defendants raise three flawed arguments. First, they claim
2 that SB 6 did not impose any severe burden on Plaintiff Chamness, because he
3 could have published a candidate statement in the official voter guide. Yet as the
4 U.S. Supreme Court has warned, “[A]dverse labels handicap candidates at the *most*
5 *crucial stage* in the election process – the instant before the vote is cast.”⁴²
6 Moreover, even Secretary Bowen concedes that it would have cost a total of
7 *between \$27,200 and \$108,800* for him to publish candidate statements in both the
8 CD 36 and CD 28 Primaries.⁴³ Simply put, it is unlawful to foist minor-party
9 candidates with a fee that their major-party competitors *need not pay*.⁴⁴

10 Second, SB 6 Defendants claim that Plaintiff Chamness must produce
11 extensive evidence showing that he was harmed by the ballot label of “No Party
12 Preference”. However, the Ninth Circuit has signaled that a candidate like him
13 need not produce any evidence to prevail, apart from documents which show that
14 he was banned from using the ballot label of “Independent”.⁴⁵ (Interestingly,
15 before the CD 36 Primary was held, a local newspaper stated that Plaintiff
16 Chamness was one of three candidates who “who decline to state their political
17 parties[.]”)⁴⁶ Because he has furnished the Court with the CD 36 and SD 28
18 Primary ballots, Plaintiff Chamness has produced ample evidence to prevail on all
19 his claims. Accordingly, SB 6’s second argument fails.

20 As a last resort, SB 6 Defendants concoct two state interests to salvage SB
21 6’s Party Preference Ban. However, neither one can justify strict scrutiny. As the

22
23 qualified (minor) party. *See, e.g., Green Party v. N.Y. State Bd. Elec.*, 389 F.3d 411 (2nd Cir. 2004); *Baer v. Meyer*, 728 F.2d 471 (10th Cir. 1984); *Atherton v. Ward*, 22 F.Supp.2d 1256 (W.D. Okla. 1998); *Council of Alt. Political Parties v. State*, 781 A.2d 1041 (N.J. App. Div. 2001).

24 ⁴² *Gralike*, 531 U.S. at 525 (emphases added, quotations omitted) (*quoting Anderson v. Martin*, 375 U.S. 399, 402 (1964)).

25 ⁴³ SOS Statement ¶13.

26 ⁴⁴ *See, e.g., Bullock, supra* 405 U.S. at 146 (“We can hardly accept as reasonable an alternative that requires candidates and voters to *abandon their party affiliations in order to avoid the burden of the filing fees.*”) (emphases added).

27 ⁴⁵ Moving Papers, at 22:8-22:13; *Rubin*, 308 F.3d at 1014-15.

28 ⁴⁶ “Venice: Congressional contenders questioned on local matters, foreign policy”, *The Argonaut*, May 4, 2011, attached as Exh. A to the May 6, 2011 Decl. of Gautam Dutta (at p.5).

1 Ninth Circuit recently made clear, a “discrete election rule” (like SB 6’s Party
2 Preference) Ban deserves *less deference* than an “electoral system” (like
3 Proposition 14’s Top Two Primary).⁴⁷

4 SB 6 Defendants first claim that the ballot label of “Independent” would
5 somehow confuse voters or harm the major political parties. However, it is
6 unrefuted that California candidates had been allowed to use the “Independent”
7 ballot label between 1891 and 2010.⁴⁸ Moreover, the Minnesota Supreme Court
8 has expressly ruled that the “Independent” ballot label “fosters no confusion” *as a*
9 *matter of law* – even though Minnesota had an “Independent-Republican” Party at
10 the time of its ruling.⁴⁹ It strains credulity to claim that a ballot label that has been
11 used *for over a century* could confuse voters or harm the major political parties.
12 Therefore, SB 6 Defendants’ “confusion” argument fails to provide any state
13 interest, compelling or otherwise, to justify SB 6’s Party Preference Ban.

14 SB 6 Defendants next claim that case law somehow bans candidates from
15 using the ballot label of “Independent”. However, the cases invoked by SB 6
16 Defendants (*Lightfoot v. Eu*, *Libertarian Party v. Eu*) do not apply here, for they
17 upheld California’s previous “qualified party” election system – which SB 6
18 dismantled.⁵⁰ As the Moving Papers showed, SB 6 made a critical change to the
19 way we elect our state and federal leaders: major parties *are longer able to select*
20 *their nominees* for the November general election.⁵¹ Thus, SB 6 eliminated the
21 need to maintain the “distinction between qualified and non-qualified parties” – the
22 *very basis* for the holdings of both *Libertarian Party* and *Lightfoot*.⁵² Because SB

23 ⁴⁷ *Dudum, supra*, -- F.3d --, 2011 WL 1901769, at *12 (emphasis in original) (*citing Rubin,*
24 *supra*, 308 F.3d at 1011). Although *Dudum* constitutes binding authority, Intervenors – whose
counsel represented the *Dudum* appellants – chose not to bring it to the Court’s attention.

25 ⁴⁸ Pl. Statement ¶44.

26 ⁴⁹ *Shaw, supra*, 247 N.W. 2d at 923.

27 ⁵⁰ *Cf. Libertarian Party v. Eu*, 28 Cal.3d 535 (Cal. 1980); *Lightfoot v. Eu*, 964 F.2d 865 (9th
28 Cir. 1992).

⁵¹ Moving Papers, at 10:4-11:5 & 12:1-12:14. SB 6 excludes Presidential elections from its
scope. SB 6-amended Elections Code §359.5.

⁵² *Cf. Libertarian Party, supra*, 28 Cal.3d at 546 (emphasis added); *see also Lightfoot,*
supra, 964 F.2d at 868 (major parties may not subvert qualified-party election system by

1 6 Defendants have failed to provide any compelling state interest to save it, the
2 Court must strike down SB 6's Party Preference Ban.

3 **VIII. Plaintiffs Do Not Seek Sanctions for Intervenors' Deliberate**
4 **Misrepresentations and Omissions**

5 As this brief has documented, Intervenors have brazenly misrepresented the
6 law and Plaintiffs' positions to the Court. They have told the Court that this Motion
7 seeks an injunction, when it does not. They have refused to brief the Court on
8 binding legal authority, such as *Gonzalez v. Arizona*, *Dudum v. Arntz* (which
9 Intervenors' counsel had themselves argued), and *Libertarian Party v. D.C. Board*.
10 For good measure, Intervenors have also misstated a critical Ninth Circuit case
11 (*Rubin v. Santa Monica*). Against this backdrop, it is astounding that they had the
12 temerity to seek sanctions against Plaintiffs for not citing case law that *has no*
13 *bearing on this case*.⁵³ However, Rule 11 sanctions are only justified if counsel has
14 (1) omitted relevant case law, and (2) the omitted case law renders the case
15 "frivolous". *U.S. v. Stringfellow*, 911 F.2d 225, 226 (9th Cir. 1990). Not one of the
16 cases cited by Intervenors was relevant, and not one rendered Plaintiffs' case
17 "frivolous". Consequently, there is absolutely no basis for Rule 11 sanctions.
18 Despite the lack of professionalism by Intervenors' counsel, Plaintiffs nevertheless
19 do not seek sanctions against Intervenors or their counsel.

20 **X. Conclusion**

21 *The right to vote freely for the candidate of one's choice is of the essence of a*
22 *democratic society, and any restrictions on that right strike at the heart of*
representative government.

23 -- First Circuit, *Griffin v. Burns*⁵⁴

24 At its core, this case turns on freedom of speech. Simply put, the State
25 cannot penalize a candidate or voter for having the "wrong" political view. For this
26 simple reason, the Court must grant Plaintiffs' Motion for Summary Judgment.

27 nominating candidates outside of the party primary).

28 ⁵³ As discussed earlier, Intervenors claim that Plaintiffs should have cited *Burdick v.*
Takushi, *Libertarian Party v. Eu*, *Lightfoot v. Eu*, and *Edelstein v. San Francisco*.

⁵⁴ *Griffin, supra*, 570 F.2d at 1075 (emphases added).

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DATED: May 27, 2011

Respectfully submitted,

By: /s/ GAUTAM DUTTA, ESQ.

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6 and RICH WILSON

7
8 IN THE UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 MICHAEL CHAMNESS, DANIEL
12 FREDERICK, and RICH WILSON,

13 *Plaintiffs,*

14 vs.

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

22 *Defendants,*

23 ABEL MALDONADO, an
24 individual; CALIFORNIA
25 INDEPENDENT VOTER
26 PROJECT; and CALIFORNIANS
27 TO DEFEND THE OPEN
28 PRIMARY;

*Intervenors-
Defendants*

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

**DECLARATION OF GAUTAM
DUTTA IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

HEARING DATE: June 13, 2011
HEARING TIME: 1:30 pm
JUDGE: Hon. Otis D. Wright,

II
COURTROOM: 11_

25 I, Gautam Dutta, declare as follows:

26 1. I am an attorney licensed to practice in the State of California. I
27 represent Plaintiffs in this case.

28 2. At 4:13 pm on May 23, 2011, I was served with an electronic copy of

1 Secretary Bowen's opposition papers to our Motion for Summary Judgment.

2 3. I was not served with an electronic copy of Intervenors' opposition
3 papers to our Motion for Summary Judgment until 8:54 pm on May 23, 2011.

4 4. Plaintiffs' reply brief in this case is due by 11:59 pm today. At
5 approximately 9:15 pm today, I tried to log on to the Court's ECF server. I could
6 not log on despite repeated attempts. Shortly thereafter, I learned from the Court's
7 ECF Update Page that its ECF server would not be available to accept e-filings
8 between 5 pm today and 3 pm Monday (May 30, 2011). I have attached a copy of
9 the ECF Update Page as Exhibit 4, available at <http://support.cacd.uscourts.gov/>
10 (*last visited* May 27, 2011, 11:32 pm).

11 5. Because I cannot currently e-file Plaintiffs' reply brief, I will email it
12 to the Court and all opposing counsel tonight, and then e-file it on Monday (May
13 30, 2011), as soon as the ECF is again available to accept e-filings.

14 6. I have attached true and accurate copies of the following documents:

- 15 A. Exhibit 1: The July 1, 2002 issue of *Ballot Access News*. I
16 obtained a copy of this document at <http://www.ballot-access.org/2002/0701.html> (*last visited* May 26, 2011).
- 17 B. Exhibit 2: A *CapitolBasement.com* news article entitled
18 "Finally, a deal...". I obtained a copy of this document at
19 <http://www.capitolbasement.com/index.php?id=xs2y7n6ho8tig0>
20 (*last visited* May 26, 2011).
- 21 C. Exhibit 3: The City of Long Beach's statement of election
22 results for the Apr. 13, 2010 City Council Race in Districts 5
23 and 7. I obtained a copy of this document at
24 <http://www.longbeach.gov/civica/filebank/blobdload.asp?BlobID=27156> (*last visited* May 26, 2011).
- 25
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1 I declare under penalty of perjury and the laws of the United States that the
2 foregoing is true and correct and are based on my personal knowledge, except for
3 matters stated on information and belief; and, as to those matters, I believe them to
4 be true. If called as a witness, I could competently testify thereto.

5
6 Executed on May 27, 2011, in Fremont, California.

7 DATED: May 27, 2011

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9 By: /s/ GAUTAM DUTTA, ESQ.

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Ballot Access News -- July 1, 2002

Volume 18, Number 3

This issue was originally printed on white paper.

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OREGON COURT SAYS FIRST AMENDMENT PROTECTS A POLITICAL PARTY'S CHOICE OF A NAME

On June 12, the Oregon State Court of Appeals ruled that a party's choice of name is protected by the First Amendment, and that a state must have a compelling interest in order to block a party's name. *Freedom Socialist Party v Bradbury*, A113583. The state hasn't decided whether to appeal.

This is the first written opinion to protect minor party names. In 1970 a Pennsylvania state court had told the state to let both the Socialist Labor Party, and the Socialist Workers Party, use their names; but no opinion was issued in that case.

There is also a 5th circuit opinion from 1975, telling Mississippi that it had to let both the National Democratic Party (a Black-led party) and the Democratic Party use their names. But that opinion has not been very influential, because most observers felt the court was influenced by the fact that the Democratic National Committee at the time did not recognize the state Democratic Party as its affiliate.

EX. 1

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The specific Oregon law barred two different parties from using the same word in both their names. The Socialist Party is already a qualified party in a few congressional districts in the state. Therefore, the Secretary of State had refused to let the Freedom Socialist Party petition to get on the ballot in any particular legislative district. The party then brought the lawsuit, and is now free to begin petitioning anywhere in the state.

The Freedom Socialist Party has existed for 30 years, but it has never run a presidential candidate, or even any candidate for statewide office. When it contests partisan offices, it prefers to run for local and state legislative seats.

The Oregon ruling will help in a Natural Law Party lawsuit against a Kansas law, which requires that all parties have one-word names.

It will also be useful against a New York law that prohibits a party from using the words "American" or "United States" in its name.

The Oregon Court depended on a U.S. Supreme Court case from 1992 called *Norman v Reed*. That case presented a different issue, however. The Harold Washington Party was already a qualified party inside Chicago, and it wished to establish itself in Cook County, which includes more than just Chicago. The State Supreme Court had refused to let it petition for Cook County office on the ridiculous grounds that since it was already a qualified party in just part of the county, it was a "different" party inside Chicago than it was outside Chicago, and therefore couldn't use its name in new territory. The U.S. Supreme Court reversed the Illinois Supreme Court and let the party grow into new territory.

JUSTICE DEPT. OK's NEW ALABAMA LAW

On May 28, the U.S. Justice Department approved the new Alabama filing deadline for non-presidential independent candidates. Last year's legislature had moved it from early July, to early June. Activists had been hoping the Justice Department would refuse to approve it, since the bill passed last year and Justice Department approval was taking so long.

Also on May 28, the Secretary of State said he will put the new deadline into effect this year, even though a few weeks earlier he had said that, since the federal government was taking so long, even if they approved it, it would not take effect this year.

Two independent candidates, and also the Independent Democratic Party of Alabama, filed a federal lawsuit on June 4, charging that it violates due process to move the deadline in the middle of the election year. *Swanson v State of Alabama*, 02-T-644-N, middle dist.

FREE AIR TIME

On June 19, U.S. Senators John McCain (R-Ariz.), Russell Feingold (D-Wis.), and Robert Torricelli (D-N.J.), and Rep. Martin Meehan (D-Mass.), said that they will introduce a bill to provide free television time for candidates for Congress.

Any candidate who raised at least \$50,000 (in donations of \$200 or less) would be eligible for \$100,000 in "air time vouchers". TV broadcast license holders would be required to devote at least two hours a week in the period just before elections. Half must be near prime time; none could be between midnight and 6 a.m.

(4)

The bill will also provide free TV time for political parties, but the sponsors haven't decided yet which parties will be eligible.

The idea is supported by the American Association of Retired Persons, the AFL-CIO, Common Cause, the League of Women Voters, the NAACP, the National Council of Churches, the Sierra Club, and other groups. The campaign for the bill is sponsored by the Alliance for Better Campaigns, 1150 17th St. NW, Washington DC 20036, (202) 659-1300, <http://freeairtime.org>.

SOCIAL SECURITY FIGHT GAINS ALLY

The fight to prevent Congress from letting states use Social Security numbers for election administration has gained a powerful new ally. The Leadership Conference on Civil Rights has written letters to all members of the HR3295 conference committee, urging the committee to delete section 503 of the bill. Section 503 overrides the Privacy Act and lets the states use S.S. numbers. If the states can use S.S. numbers for elections, they can require signers of petitions to include their numbers on those petitions. This would make petitioning much more difficult.

'TYRANNY OF THE TWO-PARTY SYSTEM'

In 1997, the Supreme Court said that because the two-party system is so helpful to the United States, states may enact election laws that discriminate in favor of the two largest parties, and against all other parties. This pronouncement, signed by six of the nine justices, is in *Timmons v Twin Cities Area New Party*, 520 U.S. 351. The issue in the case was whether the Constitution protects the right of two parties to jointly nominate the same candidate.

Timmons thus did double damage to minor parties. First, it permitted the states to outlaw "fusion". Worse, it seemed to approve of discrimination of all kinds against minor parties, and their candidates, and the voters who support them. The Court was only able to get away with this because the public thinks that political science teaches that the "two-party system" is needed for good government, and that the Court's understanding of "two-party system" is correct. The Court did not cite any scholarly research to bolster its claim. It did mention an affidavit by political science professor Walter Dean Burnham, and it implied that Burnham agreed with the Court. However, Burnham had filed his affidavit on behalf of the New Party, and he had said the opposite of what the Court claimed he had said.

Nothing in the Constitution says anything about the "two-party system". Therefore, the Court cannot use the concept to uphold discrimination, unless there is a public consensus among political scientists that the two-party system is not only essential, but that it is endangered unless laws discriminate against minor parties. Minor parties need help from political scientists, to show that there is no such consensus.

Last month, Columbia University Press published *The Tyranny of the Two-Party System*, by Lisa Disch, a political science professor at the University of Minnesota. The very existence of this book, with its bold title, will help to make it more difficult for the Supreme Court to repeat its *Timmons* teaching.

Professor Disch was involved in the fight to legalize fusion, so her book is largely about fusion. But it is also about how the U.S. "two-party system" (as the Supreme Court understood the term) is not natural, but is the product of election laws passed 100 years ago. "Fusion" was once legal

everywhere in the U.S., but most states outlawed it 1895-1905. It is still completely unrestricted in Idaho, Mississippi, New York, South Carolina and South Dakota, and largely unrestricted in Connecticut, New Hampshire and Vermont.

"The Tyranny of the Two-Party System" argues that minor parties thrived in the U.S. in the 19th century, but have been pathetically weak during the 20th century. The paperback version of the book is only 194 pages and does not present statistics to bolster this assertion (instead, it cites to research by historian Peter Argersinger). The assertion is largely correct. During 1828-1900, minor party and independent candidates won 5.0% of regularly-scheduled elections for the U.S. House of Representatives, and 3.8% of gubernatorial elections (years before 1828 are excluded here because there were no minor parties in Congress before 1828).

By contrast, in the 20th century, minor party and independent candidates won only one-half of 1% of U.S. House races, and less than 1% of all gubernatorial races.

The book's chapters are:

1. The Politics of Electoral Fusion, 1994-1997.
2. The Politics of the Two-Party System (this chapter describes U.S. elections in the 19th century).
3. The Two-Party System: Genealogy of a Catchphrase.
4. The Two-Party System and the Ideology of Process.
5. Oppositional Democracy and the Promise of Electoral Fusion.
6. Conclusion: Against the Tyranny of the Two-Party System.

Although the thesis of the book is that the U.S. "two-party system" of the 20th century is an artificial construction of a certain type of election laws, the book only discusses laws that outlaw fusion.

In addition, of course, are discriminatory ballot access laws, discriminatory campaign finance laws, tax laws which permit for-profit corporations to sponsor exclusionary presidential debates, discriminatory ballot formats, and laws which put representatives of only the two major parties on bodies which administer elections.

All of these laws were passed after 1892. So, one wishes Disch had covered all of them, not just the anti-fusion laws. Also, her book will probably be criticized by those who argue that minor parties declined because major parties starting using primaries (thus making it easier for dissident groups to fight for their ideas inside the major parties). To rebut this probable criticism, she should have showed that minor parties were still strong in the period 1912-1926 (primaries started in 1909-1913 in most states).

Nevertheless, the book's main idea, that the Supreme Court's idea of the U.S. "two-party system" didn't even exist before the 1890's, comes through loud and clear. The paperback book is \$19.50 if bought on Amazon.com.

Disch is not Alone

Disch is not the only political scientist to disagree with the U.S. Supreme Court. Two past presidents of the American Political Science Association (Robert A. Dahl and Theodore J. Lowi) have concluded that a

6

multi-party system would be better for the U.S. And the vast majority of political scientists who prefer a two-party system do not define "two-party system" the way the U.S. Supreme Court seems to define it. Political scientists acknowledge that healthy two-party systems usually have vigorous minor parties (as in Great Britain, and 19th-century America), but the Court majority seems to think a "two-party system" is one with only two parties.

However, neither Lowi, nor Dahl, has published an entire book with a title that attacks the "two-party system". Although few judges will probably read Disch's book, many will probably hear about it, and that alone will have a useful impact.

LEGISLATIVE NEWS

1. California: SB 905 (a bill that previously did not refer to political parties) was amended last month to provide that only major parties may nominate by primary. Parties with registration less than 5% would nominate by convention, no later than 35 days after the major party primary. The bill passed the Assembly Elections Committee on June 25 by 4-3. The Green Party testified against it; the Libertarian Party testified in favor on condition that the bill be amended to let parties choose convention or primary. If the bill passes the Assembly, it will then be in a conference committee.

2. Indiana: Senator Richard Young, Senate Minority Leader, has agreed to co-sponsor ballot access reform next year.

3. Massachusetts: SB 2262, which passed the legislature in February, appropriates money for the public financing program, but it also directs that the voters vote in November on whether to repeal the program or not.

4. Michigan: as hoped, Governor John Engler signed HB 5237 on May 30. This is the bill to make it easier for minor parties to remain on. The Secretary of State still hasn't decided whether the new law means that the Constitution and Natural Law Parties are now on the ballot.

5. Ohio: on June 19, the Senate State & Local Government Committee amended HB 445, to provide that candidates who get on the November ballot by petition may have "independent" next to their names, if they wish. Current law doesn't permit any label, although that law was held unconstitutional in 1992. At the hearing, representatives of the Libertarian and Natural Law Parties, and of COFOE, made the case for expanding the bill to include not just "independent", but any short partisan label that doesn't mimic the name of a qualified party. Most committee members expressed a willingness to examine this idea next year.

6. Oklahoma: in a surprise, Governor Frank Keating vetoed HB 1291, which would have eliminated the straight-ticket device.

7. South Carolina: the legislature adjourned on June 6. No bill affecting minor parties passed. Two of the bills were restrictive (to outlaw fusion, and to impose filing fees on convention nominees), and one of them expanded voting rights (to permit write-ins for president).

8. Tennessee: HB 3034, which would have made it more difficult for a write-in candidate to be nominated in a partisan primary, was defeated in the House State & Local Government Committee on June 19. An identical bill, SB 2776, had already passed the Senate, but is now considered dead.

9. Washington: the House State Government Committee held a hearing on Instant Runoff Voting on June

(7)

17. Many citizens spoke in favor. The only opponent was one county elections official. This was a general hearing on this particular subject; no bills can be dealt with until next year.

BOOK REVIEW *FIXING ELECTIONS*

Fixing Elections, the Failure of America's Winner Take All Politics, by Steven Hill. Hardcover, 343 p. Routledge. \$19.25 from Amazon.com.

As the pamphlet *Common Sense* was to the American revolution, so *Fixing Elections* could be (if enough people read it) to the movement for alternative voting systems in our day. *Fixing Elections* is not so much about the virtues of proportional representation or instant-runoff voting, as it is a scathing indictment of the system now in place in the U.S. All the problems of elections and representation in the United States are covered.

Especially compelling are the chapters about why so many major party candidates seem so phony. The book tells the details, especially about major party presidential candidates, setting up focus groups and dial-meter groups, to pre-test the speeches and campaign advertisements. The book also publicizes research which shows that major party nominees tailor their messages to what the target audience wants to hear, and then they follow different policies once in office.

The book describes redistricting, and shows that the voters in 1998 and 2000 actually had more impact on which major party will win seats in congress and state legislatures in 2002, than the voters in 2002 will have! This is because computer technology has made the drawing of district lines so sophisticated, that the major party in control of the process can determine most outcomes. The voters in 1998 and 2000 were deciding which major party would control state legislatures. The decisions of those past voters therefore determined which major party was in power to draw the lines in 2001 and 2002.

Fixing Elections documents the extent to which mass media is owned by a small number of corporations, and shows how those corporations self-consciously discriminate against non-major party candidates, not only in news coverage, but even when selling advertising space or time.

The second half of the book explains why the "winner-take-all" system is responsible for these, and many other, problems. It also presents political science research showing that the fit between public opinion, and public policy, is better in nations which use proportional representation, than in the U.S.

The author does not soft-pedal his own political preferences on a wide range of issues, and some potential readers of the book won't agree with those preferences. The author is too dismissive of the role of state governments in the federal system. At one point he even refers to the "artificial created geographic entities called 'states'". However, the book manages to introduce sophisticated new ideas about voting systems in a very readable, even compelling, style. Furthermore, it's a handy reference to other books and studies. It deserves the widest readership possible.

THE ULTIMATE LOW TURNOUT ELECTION

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On June 11, Arkansas held a run-off Democratic primary for State Land Commissioner. No other office was on the ballot. In at least two precincts in the state, not a single voter turned out to vote.

FREE SPEECH VICTORY

On June 27, the U.S. Supreme Court ruled that states cannot disbar attorneys who, while running for judge, "announce their views on disputed legal or political issues". *Republican Party of Minnesota v White*, 01-521. The vote was 5-4. The same judges who voted for George Bush in *Bush v Gore* voted to strike down the restriction; the same judges who voted for Al Gore voted to uphold the restriction.

Minnesota and many other states hold elections for State Supreme Court Justices and for lower judicial posts. Regulations enforced by these states subject judges who violate the "announce" rule to removal; candidates who are not yet judges can be prohibited from working as attorneys.

The decision was written by Justice Antonin Scalia. It points out that if candidates do announce their view on disputed legal or political issues, their opponents, or good-government groups, or the State Bar Association, or newspapers, are all free to point out that the candidate is not displaying proper judicial deportment. But it holds that the state interest in restricting speech is not compelling, and therefore the restriction cannot stand.

Justice Anthony Kennedy wrote separately to say "direct restrictions on the content of candidate speech are simply beyond the power of government to impose."

Justice Sandra O'Connor also joined the majority, but wrote separately to express her opinion that judicial elections are bad policy.

WEST VIRGINIA HOPE

West Virginia requires that all petition circulators (for minor party and independent candidates) must obtain credentials, before they begin to petition. "Credentials" consist of a credit card-sized card, prepared by a county clerk, bearing the petitioner's picture. On June 17, the U.S. Supreme Court released an opinion which might help to overturn that West Virginia restriction. *Watchtower Bible & Tract Society v Village of Stratton*, 00-1737.

Stratton, Ohio, had an ordinance requiring anyone who "canvasses" to "promote a cause" by going door-to-door, to first file a form with the Mayor's office. The Mayor could not refuse to accept the form. The Jehovah's Witness won its case against this law, by a vote of 8-1.

The *Stratton* decision is by Justice John Paul Stevens. His decision was based partly on precedents that protect some anonymous campaign speech, and partly on the fact that the ordinance delays "spontaneous speech". He said, "A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she obtained the required permit." This language strengthens any potential future lawsuit against the West Virginia petitioning restriction.

MORE LAWSUIT NEWS

1. Arizona: on June 17, the State Court of Appeals ruled that public funding of campaigns cannot be financed, in part, by a surcharge on traffic and other criminal fines. *May v Bayless*, 02-0073, Phoenix. The

opinion says, "There is a significant distinction between funding a political campaign through a general tax and funding it through a surcharge...the surcharge is not taken from existing government funds; instead it is an additional charge imposed on a limited group of individuals."

2. California: on May 9, the state settled the federal lawsuit *Common Cause v Jones*, 01-3470, Los Angeles. The state will replace punchcard voting machines before the 2004 primary. Because the case was settled, there is no actual opinion.

3. Michigan: on June 12, the 6th circuit upheld a state law providing that Detroit voters may no longer elect their School Board. *Moore v Detroit School Reform Board*, 00-2334.

4. Nevada: on May 22, a lawsuit was filed in federal court, challenging the use of alphabetical order to put candidates on ballots. *Schaefer v Lomax*, cv-S-02-662, Las Vegas.

5. New York: on April 5, a U.S. District Court struck down ordinances in 7 towns which restricted campaign signs (requiring permits, limiting their size, limiting when they could be posted). *Sugarman v Village of Chester*, 192 F.Supp.2d 282 (s.d.).

New York (2): on June 21, the State Supreme Court ruled that candidates may not appear on the primary ballot of a party (other than their own party) unless at least 50% of delegates to a party convention authorize the race. Another state law says that candidates with at least 25% support at the convention may run in that party's primary, but the Court held that the 25% law doesn't apply to candidates who aren't members of that party. *Independence Party State Committee v State Bd. of Elections*, 3577-02, Albany. The decision was a victory for the Independence Party, which did not want two particular candidates (one Democrat, one Conservative) running in its primary.

6. Ohio: Ralph Nader filed his appeal with the U.S. Supreme Court on June 27. *Nader v Blackwell*, number not assigned yet. The issue is partisan labels for candidates who qualify for the November ballot by petition. Nader had won in U.S. District Court but lost in the 6th circuit.

7. Texas: on June 24, the U.S. Supreme Court refused to hear *Balderas v Texas*, 01-1196. The issue was whether it is still permissible for state legislative districts to vary in population by as much as 10% from each other.

8. Utah: on June 20, the U.S. Supreme Court upheld the Census Bureau's population figures for Utah and North Carolina, relative to how many U.S. House seats each state should have. The vote was 6-3. *Utah v Evans*, 01-714.

WRITE-IN WINNER

On June 4, voters in Long Beach, California, elected Beverly O'Neill Mayor, even though her name wasn't on the ballot. The vote was O'Neill 19,135; Dan Baker (the only candidate on the ballot) 15,173; Norm Ryan (another write-in candidate) 6,995. O'Neill wasn't on the ballot because of the city's term limits law.

2002 PETITIONING FOR STATEWIDE OFFICE
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REFORM PARTY

On June 26, the Reform Party announced that its national convention this year will be in Denver. The dates, previously announced, are September 6-8.

AMERICA FIRST PARTY

The America First Party, organized recently by Buchanan supporters who left the Reform Party, doesn't have any statewide candidates this year, but it has already placed a candidate for the U.S. House on the ballot in New Jersey, and for state legislature in Tennessee and Iowa. Its founding convention will be in Orlando, August 1-4.

GREEN PARTY

The Green Party's candidate for Governor of Maine, Jonathan Carter, will receive approximately \$900,000 for his campaign, in accordance with the state's public financing program. However, the party's candidate for Governor of Massachusetts, Jill Stein, failed to qualify for \$3,400,000. She needed donations (of between \$5 and \$100) from at least 6,000 voters. Although she submitted evidence that she had received donations from 6,450 voters, the state disqualified approximately 1,000.

LIBERTARIAN PARTY

1. A Libertarian, Bill Woolsey, won a non-partisan election for town council of James Island, South Carolina, on June 18. This was the second Libertarian to be elected to a municipal council in this state in the last two months.

2. The Libertarian Party's candidate for Lieutenant Governor of Wisconsin this year will be Marty Reynolds, who is now a Democratic legislator. He has been in the Assembly for six terms, and he is also Mayor of Ladysmith, in the northwest corner of the state. In Wisconsin, nominees for Governor and Lieutenant Governor run as a team. Reynolds is teamed with Ed Thompson, Mayor of Tomah and the brother of former Governor Tommy Thompson.

CONSTITUTION PARTY

The Constitution Party has only had one state legislator in its history. He was Rick Jore, of Montana, who switched his membership from "Republican" to "Constitution" in February 2000 while he was in the State House of Representatives. As a Constitution Party candidate in November 2000, he was narrowly defeated in a two-way race with a Democrat. This year, he is running for his old seat. He will be facing a Democrat and a Republican.

PEACE & FREEDOM PARTY

On June 13, two members of the Peace & Freedom Party were elected to the Venice, California Neighborhood Council. They are Yolanda Miranda and Alice Stek.

UNITED CITIZENS PARTY

lc

The United Citizens Party of South Carolina, which has been ballot-qualified since 1972, and which is predominantly led by African-Americans, has cross-endorsed seven Democratic legislators who are running for re-election. They will appear on the November ballot in both the Democratic column and the United Citizens column, and voters will be able to vote for them under either party label.

VIRGINIA SPEAKER IS INDEPENDENT

The interim Speaker of the House of Delegates is Lacey Putney, one of the nation's independent state legislators. He replaces a Republican who resigned his seat in a sex scandal.

INITIATIVE & REFERENDUM INSTITUTE

The Initiative and Referendum Institute, which exists to defend the initiative process, is moving as of July 31 from Washington, D.C., to this address: P.O. Box 6306, Leesburg, Va 20178. The phone will be (703) 723-9621. See www.iandrinstute.org.

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Finally, a deal...

Feb 19, 2009

"Voting near dawn to end a three-month impasse, the California Senate approved a deal that Democrats and Gov. Arnold Schwarzenegger reached with a GOP holdout to resolve the state's fiscal emergency," report the LA Times's Capitol team.

The Assembly also just approved the plan.

"Under the arrangement, Sen. Abel Maldonado of Santa Maria provided the final Republican vote needed to pass a spending plan with billions of dollars in tax hikes. In exchange, Democrats agreed to rewrite election rules that Maldonado said had allowed the Capitol to become paralyzed by partisanship, leading the state to the brink of financial ruin.

"The final plan incorporated most of the framework of the original budget compromise from Democratic and Republican leaders. It included billions of dollars in cuts to schools, healthcare institutions, higher education and programs for the poor. If signed by Schwarzenegger, who helped devise the package, it also would raise personal income taxes and the state sales tax, although a 12-cent per-gallon increase in gasoline taxes was eliminated in the final hours.

"Democrats initially said Maldonado's call for "open" primaries, in which voters could cross party lines and candidates of all parties would compete in the same primary, followed by a runoff of the top two vote-getters, was too substantial to be pushed through in a budget deal. But Maldonado said the current budget stalemate proved that California could not return to fiscal sanity without fundamental changes in the way it elects its representatives."

Maldonado invoked Ronald Reagan in a passionate speech, recognized that it might mean "the end" for him and took aim at his party's new conservative leadership.

"When I took an oath to defend the state...I never thought I'd have to defend it against my party."

Kevin Yamamura looks at who got what, with Maldonado as the big winner.

The Bee's Kevin Yamamura and Aurelio Rojas report: "The Senate resumed session around 3:40 a.m. and initially hit a snag as four Democrats refused to vote for Maldonado's proposal to have an open primary system in California elections. Intended to reduce party influence in elections, the open primary system

Ex. 2

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would have the top two candidates in a primary face off in the subsequent general election.

"But the Senate ultimately passed out that plan. Several members strongly objected to the open primary bill but voted for it anyway because they said it was even more important to avoid a cash crisis and avert the planned shutdown today of 374 construction projects valued at \$5.58 billion in the absence of a budget.

"'This is not good government, this is not political reform, this is old-fashioned special interest,' said Sen. **Gloria Romero**, as she reversed her initial 'no' vote to 'aye,' helping the open primary bill pass."

The election for open primary, lottery, spending cap, legislative pay, Proposition 10 and Proposition 63 changes will be May 19.

Political consultants...start your engines! By the way, we have advertising space available...

Capitol Weekly takes a look at the new microblogging phenomenon that grew up around the state budget stalemate.

"Sometime during the Senate lockdown Saturday, KQED Capitol reporter and blogger John Myers signed up for Twitter. From the back of the Senate chambers, Myers began posting details of the budget wrangling as most people were enjoying the beginning of their holiday weekend.

What followed in the hours of the budget stalemate was a true new-media phenomenon. Word of Myers' Twitter feed spread virally among those hungry for the latest scraps of information about the budget standoff. And within hours, Myers' Twitter site was the most authoritative and most sought-after source of real-time, insider budget information.

"The back and forth nature of these marathon sessions seemed to be a good fit for the short, headline-like nature of Twitter,' Myers said. 'Apparently, it caught on. We've gotten more than 150 emails of folks who are enjoying the postings.'

"Capitol Weekly also got into the act, starting a Twitter feed of its own to document the goings-on in the Capitol."

"Myers says his Twittering future is in question.

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"I don't think I will be a full time Twitter reporter once this impasse is resolved," said Myers. 'It's a great tool for certain kinds of journalistic coverage -- budget debates, political conventions, election nights, maybe even campaign coverage. But let's face it; I'm not about to Twitter on how Proposition 98 works."

Now that the budget appears to be wrapping up, Capitol Weekly looks ahead to the Republican convention in Sacramento this weekend.

"The political shock waves from the budget stand-off, still ongoing as of this writing, are being felt throughout Republican California. And as the party faithful prepare to gather in Sacramento this weekend, some are out for blood.

"There are moves afoot to try to censure members who support the tax increase,' DeVore said. But perhaps surprisingly, DeVore does not think censure is a good idea.

"I don't think it's appropriate for the convention,' he said. 'This is a political dispute. It's not like there's any moral shortcoming' among supporters of the budget deal.

"But that hasn't stopped some from launching fledgling recall efforts against would-be supporters of the budget deal. DeVore said there has been talk among a conservative group called the Atlas PAC about bankrolling potential recall campaigns against Republican lawmakers.

"Atlas PAC's chairman, Lee Lowrey, said recall efforts were ready to go. And his group has Anthony Adams in its sites.

"We'll be the leaders on that,' he said of a potential Adams recall. 'He's a brand-new Assemblyman, and as far as we're concerned he's going to be gone.'

Malcolm Maclachlan looks at how the budget will impact counties. **"Data from the Legislative Analyst's Office (LAO) suggests that cuts could likely hit many Republican areas hardest—while the tax burden is already falling more heavily on Democratic leaning counties.**

"According to the data distributed by Assembly Budget Committee chairwoman Noreen Evans, D-Santa Rosa, the majority of the counties using the most in state services are generally represented by Republicans. When this data on 2007-2008 state spending is compared to registration data from the Secretary of State's office, it shows that seven out of the top 10 counties receiving state expenditures, measured per capita, have Republican registration majorities. Of the top 10 counties that contributed the most per capita tax dollars in 2006, eight have Democratic registration majorities."

(18)

John Howard takes a look at how the federal stimulus package will impact Medi-Cal. "California's Medi-Cal program, a state-federal system that provides health care to 6.7 million people, is expected to receive at least \$10 billion – more than a fourth of its entire budget – as part of federal legislation intended to boost public health care funding.

"For the strapped state struggling to cover an unprecedented budget deficit, the money comes at a crucial time.

"However, to obtain the funds, which by one estimate could be as high as \$11.23 billion, the state will have to reverse restrictions on eligibility that it imposed last year."

Finally, more good news out of Sacramento. "Sacramento police announced this afternoon that Lance Armstrong's stolen time-trial bicycle valued at \$10,000 has been recovered -- and Armstrong thanked the police department for its help minutes after finishing the Clovis leg of the Amgen Tour of California.

"A local resident brought the bike into Sacramento Police headquarters on Freeport Boulevard at about 10:35 a.m. Wednesday, police said in a news release.

"'Detectives confirmed that the bike was in fact Armstrong's stolen bicycle,' the statement said.

"The bike is quite distinctive, described by the seven time Tour de France champion as one of a kind.

"Police said the person with the bike wanted to remain anonymous.

"'Right now we're treating him as a person who did the right thing and turned it in,' said Sgt. Norm Leong."

Just like **Abel Maldonado**...who also might have preferred to remain anonymous.

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City of Long Beach — Primary Nominating Election — April 13, 2010
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04/28/2010 02:39 PM
Precincts Reporting 358 of 358 = 100.00%

Total Number of Voters : 40,292 of 238,294 = 16.91%

Party	Candidate	VBM	Election	Total			
	MIKE HEDGES	1,627	35.16%	1,200	37.75%	2,827	36.21%
	GERRIE SCHIPSKE	3,001	84.84%	1,979	62.25%	4,980	63.79%
		4,628	97.21%	3,179	97.94%	7,807	97.50%
		0	0.00%	0	0.00%	0	0.00%
		133	2.79%	67	2.06%	200	2.50%

Cast Votes:
Over Votes:
Under Votes:

Precincts			Voters		
Counted	Total	Percent	Ballots	Registered	Percent
45	45	100.00%	8,007	33,416	23.96%

Council Member, District 7, Vote For 1

JILL HILL	523	19.35%	448	16.45%	971	17.90%
JACK C. SMITH	176	6.51%	151	5.55%	327	6.03%
JAMES JOHNSON	1,277	47.24%	1,165	42.78%	2,442	45.01%
TONIA REYES-JURANGA (W)	725	26.82%	937	34.41%	1,662	30.63%
FERNANDO BERNABE (W)	2	0.07%	22	0.81%	24	0.44%
	2,703	96.09%	2,723	92.62%	5,426	94.32%
	6	0.21%	14	0.48%	20	0.35%
	104	3.70%	203	6.90%	307	5.34%

Cast Votes:
Over Votes:
Under Votes:

Precincts			Voters		
Counted	Total	Percent	Ballots	Registered	Percent
37	37	100.00%	5,753	25,281	22.76%

EX. 3

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Welcome to CM/ECF
The Court's Electronic Case Filing System

Home Contact Us

- CM System Outages Log
- Court's Home Page
- Mandatory Chambers Copies
- Designated Cases
- Document Redaction and Transcripts
- Electronic Filing Events
- Searches
- E-Mailing Documents » »
- Excluded Cases/Documents
- General Order 10-07
- Re: Electronic Filing
- Frequently Asked Questions
- Judiciary Privacy Policy
- Notice to Counsel
- Software/Hardware
- Requirements
- The Helpdesk
- Training » »

PLEASE LOGIN TO THE COURT'S TRAINING WEB SITE

User Name:

Password:

Remember me next time.

Log In

Create new training account
Forgot Password?

Welcome

Great news, innovative changes are taking place within the federal judiciary.

The United States District Court Central District of California is proud to announce Case Management and Electronic Case Filing (CM/ECF). All Civil and Criminal cases are designated for electronic filing except for those outlined in the General Order.

Attention!

CM/ECF, PACER, JURY and this website will be unavailable **beginning Friday, May 27 at 5:00 PM through Monday, May 30th at 3:00 PM** due to GSA building electrical power testing.

PACER users may experience difficulties with the PACER Universal Login capabilities due to Court's being on different versions of CM/ECF. This requires a re-authentication when a user moves between different court sites during the transition period. Users experiencing login problems should call the PACER Service Center at 800/676-6856.

"Live" CM/ECF training now available through the Federal Bar Association". Please go to <http://www.fbaia.org> and click on the events link.

Online Training Available

The United States District Court Central District of California is proud to announce its new Online Training System. Online Training will allow attorneys and their support staff to attend training from the comfort of their home and/or Office See our Online Training FAQs

Implementation of PAY.GOV

In order to assist with the process of filing fees when filing documents electronically, the Court has activated on-line payments through the Court's CM/ECF pay.gov service. Currently filing fees associated with Notices of Appeal and Applications for Pro Hac Vice may be paid on-line while electronically filing these documents. Instructions on how to utilize this feature may be found on the Court's CM/ECF website at www.cacd.uscourts.gov.

New Updates to Private Policy (please read)

A Revised Version of Judicial Conference Privacy Policy has been released by the Administrative Office of the United States Courts. Click the link below for details

→ [Judicial Private Policy](#)

Court Proceeding Transcripts

Attention: Attorneys Ordering Transcripts from Court Reporters

Once the transcript is released by the Court Reporter, attorneys who are registered ECF Users MUST first log in to CM/ECF, click on the Docket Sheet Report and login to PACER before they are able to view the transcript prior to the public release of the transcript. Logging directly into PACER will NOT allow attorneys access to a non-public transcript. PACER must see the attorney as an ECF User.

The electronic transcript is released only to the attorney ordering the transcript, not the firm or other attorneys on the case. Only the CM/ECF login and password for the attorney ordering the transcript can be used to access the electronic transcript prior to the public release date.

ready to start e-filing?

LOGIN to CM/ECF

Search

New Public Website Survey

The United States District Court, Central District of California, is currently in the process of redesigning its website. In order to be responsive to the needs of our public, we have developed a brief survey designed to elicit feedback from our website's users. We invite you to complete the survey, as your suggestions and ideas will assist us greatly in this effort.

Click this link to take our survey.

Thank you. Your input is greatly appreciated

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EX. 4

Attorneys Ordering Transcripts who are not registered ECF Users will not be able to access a transcript electronically prior to the public release of the transcript.

- Public Notice: Availability of Transcripts
- AO Memo: Guidance for Court Reporters and Transcribers on the Electronic Availability of Transcripts in Case Management/Electronic Case Files (CM/ECF) and Transcript Redaction Procedures (February 22, 2008)
- AO Memo: Guidance for the Implementation of the Judicial Conference Policy to Make Transcripts of Court Proceedings Available Electronically via Case Management/Electronic Case Files (CM/ECF) (January 30, 2008)
- AO Memo: Revised Transcript Redaction Procedures (May 15, 2007)

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