No. 11-56449

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL CHAMNESS, DANIEL FREDERICK, and RICH WILSON

Plaintiffs / Appellants,

JULIUS GALACKI

Intervenor-Defendant / Appellant,

-v.-

DEBRA BOWEN, in only her official capacity as California Secretary of State, and DEAN LOGAN, in only his official capacity as Registrar-Recorder / County Clerk of Los Angeles County,

Defendants / Appellees

ABEL MALDONADO, CALIFORNIA INDEPENDENT VOTER PROJECT, CALIFORNIANS TO DEFEND THE OPEN PRIMARY,

Intervenors-Defendants / Appellees

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

PLAINTIFFS' OPENING BRIEF

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FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

FRAP 26.1 does not apply, for Plaintiffs-Appellants Michael Chamness, Daniel Frederick, and Rich Wilson are not corporations.

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Adverse labels handicap candidates at the most crucial stage in the election process – the instant before the vote is cast.

-- The U.S. Supreme Court, *Cook v. Gralike*[1]

Without a designation next to an Independent's name on the ballot, the voter has no clue as to what the candidate stands for. Thus, the state affords a crucial advantage to party candidates by allowing them to use a designation, while denying the Independent the crucial opportunity to communicate a designation of their candidacy.

-- Sixth Circuit, *Rosen v. Brown*[2]

[I]n *Rosen v. Brown*, the Sixth Circuit invalidated a regulation *prohibiting the political party designation of "Independent"* while permitting "Republican" or "Democrat" designations, holding that party labels designate the views of party candidates and the regulations therefore hinder "core political speech."

-- The Court, *Rubin v. City of Santa Monica*[3]

I. Introduction

Three years ago, the California Legislature stealthily passed a law that has silenced the voices of political outsiders. That law (Senate Bill 6) – which implemented Proposition 14's new Top Two Primary regime – forced Congressional candidates like Coffee Party candidate Michael Chamness to *lie to voters* about their political beliefs. Specifically, Senate Bill 6 banned minor-party candidates from using the ballot label of "Independent" and forced them to use the ballot label of "No Party Preference". Furthermore, Senate Bill 6 *unlawfully disqualified* leaders like Daniel Frederick from running as a write-in candidate for state office – and *disenfranchised* voters like Rich Wilson, who had exercised his fundamental right to cast a write-in vote for Mr. Frederick.

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[1] *Cook v. Gralike*, 531 U.S. 510, 525 (2001) (emphases added, quotations omitted) (*quoting Anderson v. Martin*, 375 U.S. 399, 402 (1964)).

[2] *Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992) (emphases added).

[3] *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002) (emphases added) (*citing Rosen*, *supra*, 970 F.2d 169).

One year after this as-applied[4] challenge was filed, the Legislature has taken no action to fix Senate Bill 6's fatal flaw: its ban against using the ballot label "Independent" – which *even the Secretary of State has admitted is not "permissible"*. As Plaintiffs will show, Senate Bill 6's invidious discrimination against political outsiders violates the First Amendment, Fourteenth Amendment, Elections Clause, and Due Process Clause. Because Plaintiffs are entitled to summary judgment, they ask the Court to (1) declare Senate Bill 6 unconstitutional and unenforceable, and (3) declare Proposition 14 inoperative and unenforceable until a new law has been passed to replace Senate Bill 6.

II. Statement of Jurisdiction

This lawsuit alleges violations of fundamental rights that are protected by the First Amendment, Fourteenth Amendment, Elections Clause, Due Process Clause, and 42 U.S.C. §1983. Accordingly, the trial court had federal-question jurisdiction under 28 U.S.C. §1331.

This appeal arises from (1) an order denying Plaintiffs summary judgment and granting summary judgment *sua sponte* to Defendants, and (2) an order granting intervention of right to Abel Maldonado, California Independent Voter Project, and Californians to Defend the Open Primary. Accordingly, the Court has jurisdiction under 28 U.S.C. §1291 (appealable final decision).

This appeal was filed in a timely manner. Specifically, it was filed on August 24, 2011, the day after the trial court entered its order denying

[4] "An as-applied First Amendment challenge contends that a given statute or regulation is unconstitutional as it has been applied to a litigant's *particular* speech activity." *Legal Aid Services of Oregon v. Legal Services Corp.*, 587 F.3d 1006, 1018 (9th Cir. 2009) (italics added) (*citing Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 802-03 (1984)).

Plaintiffs summary judgment and granting summary judgment *sua sponte* in favor of Defendants.[5]

III. Statement of Issues Presented for Review

A. Were the fundamental rights of a minor-party candidate violated, when he was banned from using the ballot label of "Independent" and was forced to *falsely* state on the ballot that he had "No Party Preference"?

B. Were the fundamental rights of a candidate and a voter who supported him violated, when the write-in vote that the voter cast for the candidate was not counted?

C. Does a group of related litigants have a right to intervene in a lawsuit that challenges the constitutionality of a law, when it played no role in enacting that law and when its interests will be adequately represented by the existing parties?

IV. Statement of the Case

Michael Chamness filed this case on February 17, 2011, and filed a Motion for Preliminary Injunction to enjoin the special Congressional election in which he planned to run. On March 1, 2011, Intervenors-Defendants filed an Ex Parte Application to Intervene, which Plaintiffs opposed. The Application to Intervene was granted on March 7, 2011.

After the trial court heard their Motion for Preliminary Injunction, Plaintiffs filed a Petition for Writ of Mandamus with this Court. On March 29, 2011, the Court's Motions Panel denied that Petition, while requesting the trial court to "act promptly" on Plaintiffs' Motion for Preliminary Injunction. The next day, the trial court denied Plaintiffs' Motion for Preliminary Injunction.

That same day (March 30, 2011), Plaintiffs filed a Motion for Expedited Hearing and Injunction Pending Appeal with this Court. In response, the Court asked the Secretary of State and Intervenors-Defendants

[5] *See* FRAP 4(a)(1)(A) (notice of appeal must be filed within 30 days after relevant order has been entered).

to file opposition papers by 12 noon on April 1, 2011 – one day before military and overseas ballots were required to be mailed in the special Congressional election.[6] That evening, the Court's Motions Panel denied Plaintiffs' Motion.[7] Subsequently, the Court granted Plaintiffs' unopposed motion to dismiss their appeal.

On May 6, 2011, Plaintiffs filed a Motion for Summary Judgment. Subsequently, the trial court issued a tentative ruling denying Plaintiffs' Motion but granting summary judgment *sua sponte* in favor of Defendants. After holding oral argument, the trial court finalized its ruling on August 24, 2011. This appeal followed.

On October 4, 2011, the Appellate Commissioner denied Plaintiffs' request to expedite this appeal. Subsequently, the Court's Motions Panel denied Plaintiffs' Motion for Reconsideration. On December 14, 2011, voters and candidates from the Green Party and Libertarian Party sought to intervene in this litigation as of right. On January 10, 2012, the Court's Motions Panel denied them leave to intervene, but took judicial notice that all military and overseas ballots for the June 5, 2012 statewide primary election must be mailed by **April 6, 2012.**[8]

V. Statement of Undisputed Facts[9]

A. Introduction to Plaintiffs

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[6] Mar. 31, 2011 Motion for Expedited Appeal and Injunction Pending Appeal, Dkt. No. 2, No. 11-55534, *attached as* Plaintiffs' accompanying Second Request for Judicial Notice, Exh. 3.

[7] ER 1066-67.

[8] ER 1052; Dec. 14, 2011 Request for Judicial Notice, Dkt. No. 25-1, at 3.

[9] When reviewing a summary-judgment ruling, the Court views facts "in the light most favorable" to the party against whom summary judgment was granted. *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007).

Coffee Party[10] candidate **Michael Chamness** appeared on the ballot of two elections: (1) the February 15, 2011 special primary election for Senate District 28 (the "SD 28 Election"), and (2) the May 17, 2011 special primary election for Congressional District 36 (the "CD 36 Election"). In both elections, SB 6's Party Preference Ban barred Plaintiff Chamness from using the ballot label of "Independent", and instead forced him to use the ballot label of "No Party Preference".[11]

Earlier, the Secretary of State's office had publicly stated that SB 6's Party Preference Ban is not "permissible".[12] This Court *has taken judicial notice* of that statement.[13] Shortly before the CD 36 Election, a local newspaper published an article that incorrectly stated that Plaintiff Chamness as one of two "candidates who decline[d] to state their political parties[.]"[14]

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[10] According to its website, the Coffee Party aims to "fight the Cycle of Corruption and restore self-governance to the People. To do so we must achieve (1) campaign finance reform, (2) Wall Street reform, and (3) tax code reform." *See* http://www.coffeepartyusa.com/mission-statement (*last visited* Jan. 30, 2012).

[11] SB 6 presumes that only registered voters may qualify as candidates. In *Libertarian Party v. Eu*, the California Supreme Court defined an "independent" candidate as a non-qualified (minor-party) candidate. *Libertarian Party v. Eu*, 620 P.2d 612, 28 Cal.3d 535, 540 (Cal. 1980). SB 6-amended Elections Code §325 mandates that all voters "of independent status" be listed as having "No Party Preference". Further, if a candidate's voter registration card states that he or she has "No Party Preference", his or her declaration of candidacy must also state that he or she has "No Party Preference." SB 6-amended Elections Code §8002.5(a). Finally, if a candidate's declaration of candidacy states that he or she has "No Party Preference", then "No Party Preference" must be printed beside his or her name on the ballot. SB 6-amended Elections Code §13105 (a). *See also* RJN Exh. 1 (Plaintiff Chamness' voter registration form showing his affiliation with the Coffee Party).

[12] ER 2011, 2037.

[13] ER 2001-02, 2004, 2007, 2037.

[14] Jan. 31, 2012 Request for Judicial Notice ("RJN") Exh. 2, at 1.

It would have cost *between $27,200 and $108,800* for Plaintiff Chamness to publish a candidate statement on his political beliefs in the voter guides for both the CD 36 and SD 28 Elections.[15]

Daniel Frederick, who is registered to vote in Assembly District 4, sought to run as a write-in candidate in the May 3, 2011 special general (second-round) election for Assembly District 4 (the "AD 4 Election"), but was barred from doing so.[16] The Secretary of State's office has publicly stated that Senate Bill 6 "give[s] candidates the *illusion* that they can run as a write-in[.]". This Court has taken judicial notice of that statement.[17]

Rich Wilson, who is registered to vote in Assembly District 4, cast a write-in vote for Plaintiff Frederick in the AD 4 Election. On May 3, 2011, Plaintiff Wilson's vote for Plaintiff Frederick was not counted.[18] The Secretary of State's office has publicly stated that Senate Bill 6 "give[s] voters the *illusion* that they can write in a candidate's name and have it counted." This Court has taken judicial notice of that statement.[19]

B. Proposition 14 and Senate Bill 6's Top Two Primary Regime

Nearly two years ago, California voters were lured into an insidious trap. Eager to reform the way our elections are conducted, a slim majority of voters approved Proposition 14, which promised to "protect and preserve the right of every Californian to vote for the candidate *of his or her choice*."[20] In essence, Proposition 14 banned all state-recognized political

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15 ER 2089 ¶ 13; RJN Exhs. 6 & 7.

16 ER 3101:20-3102:9.

17 ER 2001-02, 2004, 2007, 2041 (italics added).

18 ER 3101:20-3102:9; RJN Exh. 4. Plaintiff Wilson's write-in ballot has been attached as RJN Exh. 4.

19 ER 2001-02, 2004, 2007, 2041 (italics added).

20 Senate Constitutional Amendment 4 (styled on the June 8, 2010 ballot as Proposition 14), Statement of Purpose §2(a), *codified at* Res. Ch. 2, Stat. 2009 (emphases added), *reprinted at* ER 3093d. Proposition 14's amendments to the California Constitution have been codified at

parties (e.g., Democratic Party, Republican Party) from nominating candidates for the November general election.[21]

Disturbingly, voters were not told that by approving Proposition 14, they were unwittingly voting for a package deal. Namely, in addition to Proposition 14, voters would be foisted with its *implementing statute*, Senate Bill 6: an unjust law that would (1) force minor-party candidates to lie to voters about their political beliefs, and (2) disenfranchise all voters who cast write-in votes in the general election.[22]

C. California's Former "Party Primary" System

California law classifies political parties into two categories: qualified ("major" or state-recognized) parties and non-qualified ("minor" or non-state-recognized) parties.[23] Under California's former party-primary system, only major parties were entitled to hold party primaries.[24] Every even-numbered year, voters were guaranteed two opportunities to vote for federal and state candidates:[25] (1) the primary election, where candidates from each qualified party would vie for their party's nomination; and (2) the general election, where the nominees (top votegetters) from each qualified

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CAL.CONST. art. ii §5.

[21] Significantly, Proposition 14 did *not* confer any new rights on politically independent voters. Before SB 6 took effect, unaffiliated voters had been allowed to vote in Democratic and Republican primaries *for the past decade*. What is more, neither SB 6 nor Proposition 14 gave unaffiliated voters the right to vote in the Democratic or Republican Presidential primaries. ER 2089 ¶ 12.

[22] It is undisputed that neither the text nor a summary of Senate Bill 6 was included in the official ballot materials for Proposition 14. ER 2094 ¶22.

[23] Elections Code §5100.

[24] *Libertarian Party*, *supra*, 620 P.2d 612, 28 Cal.3d at 540 ("[T]he Legislature … defined 'party' as a political organization that has '*qualified for participation in any primary election*.'") (emphases added).

[25] Pre-Proposition 14 CAL.CONST art. ii §5 (b), *reprinted at* ER 3093h & 3093i.

party would all face off against (a) minor-party candidates like Plaintiff Chamness, and (b) qualified write-in candidates like Plaintiff Frederick.[26]

Under the party-primary system, major-party candidates could state their party's name on the ballot (e.g., Democratic or Republican). However, California candidates had *also* been able to use the "Independent" ballot label.[27] During that time, all minor-party candidates – who are deemed by the California Supreme Court to have "independent" (i.e., minor-party) status[28] – could state on the ballot that they were "Independent".[29]

D. The Importance of the "Independent" Ballot Label

Currently, *over one-fifth* of California's voters are not registered with a major political party.[30] Between 1891 and 2010, California law gave candidates the right to use the ballot label of "Independent". (In fact, until 1915 California law even allowed minor-party candidates to state their party's *name* on the ballot.)[31] In 1912, a minor-party candidate (William

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[26] "Each voter is *entitled to write the name of any candidate* for any public office … on the ballot *for any election*." Elections Code §15340 (italics added). To qualify as a write-in candidate, candidates for must (1) be registered to vote in the district in which the election at issue is being held, and (2) submit the required filing papers at least 14 days before that election is held. Elections Code §8601 (which was *not* amended by SB 6). Plaintiff Frederick was registered to vote in Assembly District 4, and attempted to qualify as a write-in candidate over *two months* before the AD 4 Election was held. ER 2086 ¶5. Therefore, Plaintiff Frederick qualified as a write-in candidate for the AD 4 Election.

[27] Former Political Code §1188, *codified at* Ch. 130 Stats 1891, *amended by* Ch. 136 Stats. 1915, p. 274.

[28] *Libertarian Party, supra*, 620 P.2d 612, 28 Cal.3d at 540 (defining "independent" candidates as those who "are independent of *qualified* political parties") (italics added).

[29] Elections Code §13105 (c) [before it was amended on January 1, 2011 by SB 6].

[30] ER 2092 ¶ 17; RJN Exh. 10. Specifically, 20.4 percent of registered voters did not belong to a qualified party as of Feb. 20, 2011. *Id.*

[31] Former Political Code §1188, *codified at* Ch. 130 Stats 1891, *amended by* Ch. 136 Stats. 1915, p.274; ER 2091 ¶ 15. In 1912, a minor-party candidate (William Kent of the Progressive Party) was elected to California's 1st Congressional District. ER 2091 ¶ 15. A number of courts have held that a State must give the voters the option of registering to vote

Kent) was elected to Congress.[32] Within the last two decades, Quentin Kopp and Lucy Killea were both elected to the State Senate with the ballot label of "Independent".[33]

On November 2, 2010, an Orange County Congressional candidate (Cecilia Iglesias) appeared on the ballot with the ballot label of "Independent".[34] Although a growing number of Californians are politically independent, Senate Bill 6 bans federal and state candidates from using the ballot label of "Independent".[35]

E. The Importance of Write-In Voting

A mainstay in American politics, write-in voting enables voters to respond to last-minute developments, such as criminal charges against a candidate or the sudden death or illness of a candidate.[36] In 2010, a write-in candidate (Lisa Murkowski) was elected to the U.S. Senate.[37] In 1982, Californian Ron Packard won his write-in bid for Congress and was re-elected eight times before he retired.[38] In 2004, write-in candidate Donna Frye finished second in the San Diego mayoral election – and would have *won* had her supporters correctly marked the "write in" oval on the ballot.[39] Although write-in voting has played a key role in our elections, Senate Bill 6

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with a non-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).

32 ER 2091 ¶ 15.

33 ER 2091 ¶ 16; RJN Exh. 3.

34 ER 2090 ¶ 14.

35 *See supra* note 11.

36 *See, e.g., Canaan v. Abdelnour*, 710 P.2d 268, 277, 40 Cal.3d 703, 718-19 (Cal. 1985), subsequently overruled on other grounds, *Edelstein v. San Francisco*, 56 P.3d 1029, 29 Cal.4th 164 (Cal. 2002).

37 *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010).

38 ER 2102 ¶40.

39 *McKinney v. Superior Court*, 21 Cal.Rptr.3d 773, 775 (Cal.Ct.App. 2004).

now disenfranchises anyone who casts a write-in ballot in the general election.[40]

F. Budgetary Cause, Electoral Effect

Three years ago, then-State Senator Abel Maldonado cast the deciding vote to pass the state budget.[41] In exchange for his vote, Maldonado demanded legislation that would eliminate the party-primary system.[42] The Legislature obliged by (1) putting Maldonado-authored Proposition 14 on the June 8, 2010 ballot, and (2) introducing and passing Maldonado-authored SB 6, which implemented the provisions of Proposition 14.[43]

Between 3:40 am and 6:55 am on February 19, 2009, the Legislature passed SB 6 and voted to put Proposition 14 on the June 8, 2010 ballot, without holding a single hearing or giving the public any notice.[44] Subsequently, the Secretary of State's Voter Information Guide for Proposition 14 *did not provide either a summary or the text of SB 6*, which fleshes out *critical details* of Proposition 14.[45] On June 8, 2010, Proposition 14 was narrowly approved by the voters.[46]

According to the California Association of Clerks and Election Officials, SB 6 mandates a "complex set of changes [that] *has not occurred in recent memory*[.]"[47] Specifically, SB 6 will not only force counties to spend "*millions of dollars* statewide in ballot production and postage costs",

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[40] SB 6-amended Elections Code §8606 ("A person whose name has been written on the ballot as a *write-in* candidate at the general election … *shall not be counted*.") (italics added).

[41] ER 2092 ¶ 18.

[42] ER 2093 ¶ 19.

[43] ER 2094 ¶ 20.

[44] ER 2094 ¶ 21.

[45] ER 2095 ¶ 22.

[46] ER 2095 ¶ 23.

[47] ER 2096 ¶ 24 (italics added).

but could force them to spend millions more in new voting equipment.[48] Last year, Los Angeles County Registrar Dean Logan stated that the changes required by SB 6 would have

> *overwhelmed the capacity of our ballot*. If the proposed open primary process were in place back in 2006 *our voting system would not have been able to accommodate* all of the contests and measures on the ballot.[49]

G. Ballot Labels under SB 6's New Rules

Proposition 14 purports to give all candidates the right to state their "political party preference, or lack of political party preference" on the ballot, "in the manner provided by *statute*."[50] However, that "statute" – Senate Bill 6 – fails to give minor-party candidates the right to state their "political party preference". Instead, if a candidate identifies with a minor party, Senate Bill 6 bans that candidate from using the ballot label of "Independent", and instead forces him or her to use the ballot label of "No Party Preference".[51] (Notably, one class of candidates was exempted from SB 6's Party Preference Ban: candidates for President, who can still state on the ballot that they are "Independent".)[52]

Because it bans candidates from using the ballot label of "Independent", Secretary Bowen's own staff has concluded that SB 6's Party Preference Ban is not "permissible":

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[48] RJN Exh. 12, at 5 (italics added); ER 2096 ¶ 25.

[49] RJN Exh. 12, at 2 (italics added); ER 2097 ¶ 26.

[50] CAL.CONST. art. ii §5 (b) (italics added). Furthermore, in Section 2(a) of its Statement of Purpose, Proposition 14 explicitly states that it *needs* implementing legislation: "This act, along with legislation already enacted by the Legislature *to implement this act*, are intended to implement an open primary system in California[.]" ER 3093h (italics added).

[51] *See supra* note 11. The trial court also ruled that SB 6-amended Elections Code §13105 (a) forced Plaintiff Chamness to use the ballot label of "No Party Preference" in the CD 36 and SD 28 Elections. ER 1033:9-1034:2.

[52] SB 6 excludes Presidential elections from its scope. SB 6-amended Elections Code §359.5 & §13105(c).

> [SB 6's Party Preference Ban] implies that a candidate … actually has selected a party preference but is not disclosing it. That is ***permissible*** for candidates in certain circumstances [i.e., if a candidate chooses not to disclose his or her party preference], but ***not in all instances.*** What *the term should imply* is that the voter has not chosen, made, or stated a party preference and is therefore "***independent***."[53]

In spite of her own office's legal analysis of SB 6's Party Preference Ban, the Secretary of State banned Plaintiff Chamness from using the ballot label of "Independent" in the CD 36 and SD 28 Elections.

H. Write-In Voting under SB 6's New Rules

Although it provides for both write-in candidacies and write-in voting,[54] SB 6 bans all write-in votes from being *counted*. Specifically, SB 6 mandates[55] that voters be allowed to cast a write-in ballot in the general election, but then *bans their votes from being counted*:

> A person whose name has been written on the ballot as a *write-in candidate* at the general election … *shall not be counted*.[56]

Significantly, Secretary Bowen's office has publicly admitted that SB 6's Vote Counting Ban *deceives both candidates and voters*:

> Since … SB 6 precludes [write-in] votes from being counted, it *makes no sense* to give candidates the illusion that they can run as a write-in or give voters the illusion that they can write in a candidate's name and have it counted. Making these conforming changes is only controversial because *there is a lawsuit on this issue* that essentially states "SB 6 says don't count the votes, so it's *misleading to let people think they can write in a candidate's name and have it counted*."[57]

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[53] ER 2037 (emphases added).

[54] *See* SB 6-amended Elections Code §8600 (write-in candidacies), §13207(a)(2) (write-in voting), §13212 (write-in voting), §15340 (write-in voting).

[55] SB 6-amended Elections Code §13207(a)(2) mandates that all ballots include the "names of candidates with sufficient blank spaces to allow the voters to write in names not printed on the ballot[.]"

[56] SB 6-amended Elections Code §8606 (emphases added).

[57] ER 2041 (emphases added).

On February 27, 2010, Plaintiffs Frederick and Wilson asked Secretary Bowen (1) whether Plaintiff Frederick would be allowed to run as a write-in candidate in the AD 4 Election, and (2) whether Plaintiff Wilson's vote would be counted, if he voted for Plaintiff Frederick in the AD 4 Election.[58] On March 2, 2011, Secretary Bowen's Chief Counsel responded that (a) SB 6 banned Plaintiff Frederick from running as a write-in candidate, and (b) Secretary Bowen would enforce SB 6's Vote Counting Ban.[59] Relying on that response, Plaintiff Frederick did not file any papers to run as a write-in candidate for the AD 4 Election.[60] Subsequently, Plaintiff Wilson cast a write-in vote for Plaintiff Frederick.[61] On May 3, 2011, Plaintiff Wilson's write-in vote was not counted in the AD 4 Election.[62]

I. Relevant Procedural History

Plaintiff Chamness was forced to file this lawsuit because the California Supreme Court and California Court of Appeal had denied his requests to intervene in *Field v. Bowen*, a *facial* challenge to SB 6's constitutionality.[63] Last winter, Plaintiff Chamness had asked the California Supreme Court for leave to intervene during a mandamus proceeding, in which the Secretary of State, Registrar Logan, and Intervenors-Defendants were Real Parties in Interest.[64] While Registrar Logan took no position regarding Plaintiff Chamness' request, the Secretary of State and

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58 ER 2097 ¶ 27.
59 ER 2097 ¶ 28. The Chief of the Secretary of State's Elections Division has also stated that SB 6 bans all write-in votes from being counted in the general election. RJN Exh. 11.
60 ER 2098 ¶ 29.
61 ER 2099 ¶ 30.
62 ER 2099 ¶ 31.
63 ER 2101 ¶37.
64 ER 2100 ¶32.

Intervenors-Defendants vigorously opposed it.[65] On December 15, 2010, the California Supreme Court denied both Plaintiff Chamness' request to intervene and the underlying mandamus petition.[66]

Plaintiff Chamness then sought to bring his as-applied challenge to the California Court of Appeal. Toward that end, he asked the Court of Appeal for permission to intervene in *Field*.[67] Again, Registrar Logan took no position with respect to Plaintiff Chamness' request, while the Secretary of State and Intervenors-Defendants vigorously opposed his request.[68] On January 31, 2011, the Court of Appeal denied Plaintiff Chamness' request to intervene.[69] The *Field* Court would later hold that (1) SB 6's Party Preference Ban was not *facially* unconstitutional, and (2) SB 6 could not harm any write-in voters or candidates, for it also banned write-in votes from being *cast* in the general election.[70]

Plaintiff Chamness filed this lawsuit on February 17, 2011, and filed a Motion for Preliminary Injunction the following day.[71] Subsequently, the trial court denied Plaintiff Chamness' Motion for Preliminary Injunction.

On March 1, 2011, Intervenors-Defendants filed an Ex Parte Application to Intervene. In response, Plaintiffs filed their opposition papers

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65 ER 2100 ¶33.
66 ER 2100 ¶34.
67 ER 2100 ¶35.
68 ER 2100 ¶35.
69 ER 2101 ¶37.
70 *Field v. Bowen*, 199 Cal.App.4th 346 (Cal.Ct.App. 2011). The *Field* Court also denied a voter's request to file an amicus letter, which that SB 6 did in fact *allow* write-in votes to be cast in the general election. This Court has taken judicial notice of the voter's letter and the *Field* Court's denial of her request to file an amicus letter. ER 2004, 2014, 2012. *See also* SB 6-amended Elections Code §8606 ("A person whose name has been written on the ballot as a *write-in* candidate at the general election … *shall not be counted*.") (italics added). The ruling in *Field* was not appealed. Plaintiffs' Nov. 6, 2011 Letter to the Court, Dkt. No. 21.
71 Plaintiffs Frederick and Wilson joined this case on Mar. 10, 2011. ER 3128.

that same day.[72] One week later, the Court granted Intervenors-Defendants intervention of right.[73]

Subsequently, Plaintiff Chamness appeared on the ballots for the CD 36 and SD 28 Elections; both ballots falsely stated that Mr. Chamness had "No Party Preference".[74] In addition, Secretary of State Debra Bowen – who also appeared on the CD 36 ballot with the ballot label of "Democratic" – published CD 36 and SD 28 Lists of Certified Candidates. Both of those lists falsely stated that Plaintiff Chamness had "No Party Preference".[75] On May 17, 2011, Plaintiff Chamness received 0.2 percent of the vote and finished sixteenth among 17 candidates.[76]

On May 6, 2011, Plaintiffs filed a Motion for Summary Judgment (the "MSJ"). At the Secretary of State's request, the trial court postponed the hearing by one week; the trial court later cancelled that hearing. On July 14, 2011, the trial court issued a tentative ruling granting summary judgment *sua sponte* in favor of the Secretary of State and Intervenors-Defendants, and scheduled the MSJ for hearing.[77] On August 24, 2011, the trial court denied Plaintiffs' MSJ, and granted summary judgment *sua sponte* in favor of Defendants.[78] Plaintiffs promptly appealed.[79]

Subsequently, Plaintiffs asked this Court to expedite this appeal. In response, the Appellate Commissioner denied their request; the Court's

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[72] ER 3158, 3187, 3154. Plaintiffs had offered to stipulate to an amicus brief before opposing Intervenors-Defendants' Ex Parte Application to Intervene. ER 3093:15-3093:18.

[73] ER 1047.

[74] ER 3093a, 3093b.

[75] ER 2101 ¶39.

[76] ER 2105.

[77] ER 1063.

[78] ER 1007. The court's order was filed on Aug. 23, 2011 and entered on Aug. 24, 2011.

[79] ER 1001.

Motions Panel subsequently denied Plaintiffs' Motion for Reconsideration.[80] Last month, voters and candidates from the Libertarian and Green Parties asked the Court for leave to intervene.[81] On January 10, 2012, the Court's Motions Panel denied them leave to intervene.[82] In so doing, the Court took judicial notice that all military and overseas ballots for the June 5, 2012 statewide primary election must be mailed by **April 6, 2012:** eight days after the Secretary of State has released the final, certified list of all candidates for federal and state offices.[83]

J. The Trial Court's Order Granting Intervention

The trial court granted intervention of right to California Independent Voter Project ("CIVP"), Abel Maldonado, and Californians to Defend the Open Primary ("CDOP") for three reasons. First, the trial court ruled that CIVP had a "direct interest" in this lawsuit, because CIVP had "committed substantial resources and effort" towards advocating for Proposition 14's Top Two Primary Regime. Second, the trial court ruled that Maldonado had a "direct interest" in this lawsuit, because (1) he wished to run for Congress in the Top Two Primary Regime, and (2) he was "an author and proponent of Proposition 14[.]" Finally, the trial court ruled that CDOP had a "direct interest" in this lawsuit, because it had created a group that made a "monetary investment" in Proposition 14.[84]

Notably, the trial court did not discuss one core requirement for intervention that had been raised by Plaintiffs: whether (and how)

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80 ER 1053, 1054.
81 Dec. 14, 2012 Motion to Intervene, Dkt. No. 24.
82 ER 1052.
83 ER 1052; Dec. 14, 2011 Request for Judicial Notice, Dkt. No. 25-1, at 3.
84 ER 1049-50.

Intervenors-Defendants would *not* be adequately represented by the existing parties.[85]

K. The Trial Court's Order Granting Motion for Summary Judgment *Sua Sponte* Against Plaintiffs

On August 24, 2011, the trial court denied Plaintiffs' MSJ and instead granted summary judgment *sua sponte* in favor of Defendants. The trial court recognized that any law that imposes a "severe burden" on constitutional rights must be subjected to strict scrutiny.[86] Quoting this Court (in *Rubin*), the trial court noted that restrictions on speech do impose a "severe burden" when they "significantly impair access to the ballot, stifle core political speech, or dictate electoral outcomes."[87]

1. Disposition of Plaintiff Chamness' Claims

At the outset, the trial court ruled that under "Supreme Court, Ninth Circuit, and California case law", Plaintiff Chamness' rights were not severely burdened when he was banned from using the ballot label of "Independent". The trial court first ruled that Plaintiff Chamness "ha[d] alternative means *other than the ballot itself* to advertise or otherwise explain his party affiliation to voters." Second, the trial court ruled that SB 6's Party Preference Ban was imposed on all minor-party candidates in a "generally applicable, evenhanded, and politically neutral way." Third, the trial court ruled that Plaintiff Chamness' claims could not prevail because he had not "presented any evidence" that SB 6 discriminated against minor-party candidates like Plaintiff Chamness.[88] Finally, the trial court ruled that

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[85] *Compare* ER 3193-95 (Plaintiffs' Opposition) *with* ER 1049-50 (trial court's order).

[86] ER 1039:25-1039:26 (*citing Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Rubin*, *supra*, 308 F.3d 1008, 1014 (9th Cir. 2002)).

[87] ER 1040:13-1040:15 (*quoting Rubin*, *supra*, 308 F.3d at 1015).

[88] Although he was not required to do so (*see* discussion *infra*), Plaintiff Chamness *did* present evidence that SB 6 discriminated against minor-party

the Secretary of State did not make any binding admissions regarding SB 6, even though her office had publicly stated that SB 6's Party Preference Ban was not "permissible".[89]

The trial court also ruled that two "important, if not compelling" state interests justified SB 6's Party Preference Ban.[90] It held that SB 6 enabled the State to "maintain[] the distinction" between major and minor parties. The trial court further ruled that voters could have been "confus[ed] or misle[d]" if Plaintiff Chamness had been allowed to use the ballot label of "Independent".

2. Disposition of Plaintiffs Frederick and Wilson's Claims

The trial court also ruled that Plaintiffs Frederick and Wilson's rights were not severely burdened. First, it ruled that their claims lacked merit, because the State has the power to ban write-in votes from being *cast* in the general election.[91] Second, the trial court ruled that voters would not be "deceive[d]" if their write-in votes were not counted, because "both Frederick and Wilson were aware that write-in votes in the general election would not be counted."[92] Third, the trial court ruled that the "important regulatory interests" – limiting political competition in the general election – supported the need for SB 6's Vote Counting Ban.[93] Finally, the trial court ruled that the Secretary of State did not make any binding admissions

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candidates like himself. *See supra* note 14 & RJN Exh. 2 (media article incorrectly reported that Plaintiff Chamness refused to state his political preference).

[89] ER 1040:25-1041:14; 1042:17-1042:18; 1043:5 n.7 (italics added); ER 2037, 2004.

[90] ER 1041:15-1042:13.

[91] In so doing, the trial court disregarded a critical fact. Namely, the ballot from AD 4 Election *had allowed Plaintiff Wilson to cast a write-in vote*. *See* RJN Exh. 4 (Plaintiff Wilson's write-in ballot).

[92] ER 1043:15-1044:11; 1045:3-1045:13.

[93] ER 1044:12-1044:24.

regarding SB 6, even though her office had publicly stated that SB 6's Vote Counting Ban would deceive voters and candidates.[94]

VI. Standard of Review

"This Court reviews *de novo* a district court's ruling on a motion to intervene as of right[.]"[95] Similarly, the Court subjects a trial court's granting of summary judgment to *de novo* review.[96] Since this case does not present any disputes of material fact,[97] the Court need only decide whether the district court correctly applied the substantive constitutional law.[98]

VII. Summary of Argument

Plaintiffs will present six arguments. First, Plaintiffs will show that Senate Bill 6 violated the fundamental rights of Plaintiff Chamness, when it banned him from using the ballot label of "Independent" and forced him to falsely state that he had "No Party Preference" in the CD 36 and SD 28 Elections. Second, Plaintiffs will show that Senate Bill 6 violated the fundamental rights of Plaintiffs Frederick and Wilson, when it (a) banned Plaintiff Frederick from qualifying as a write-in candidate in the AD 4 Election, and (b) banned Plaintiff Wilson's write-in vote for Plaintiff Frederick from being counted in the AD 4 Election.

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[94] *Compare* ER 1045:3-1045:6 & n.9 *with* ER 2041, 2004.

[95] *Prete v. Bradbury*, 483 F.3d 949, 953-54 (9th Cir. 2006) (*citing U.S. v. Alisal Water Corp.*, 370 F.3d 915, 918 (9th Cir. 2004)). The Court reviews rulings on permissive intervention for abuse of discretion. *Prete*, *supra*, 483 F.3d at 954 n.6 (citation omitted). Although Intervenors-Defendants appeared to alternatively seek permissive intervention, the trial court did not rule on that request because it granted them intervention of right. *See id.* at 954 n.6; ER 3186:12.

[96] *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002).

[97] When reviewing a summary-judgment ruling, the Court views facts in the light most favorable" to the party against whom summary judgment was granted. *Blankenhorn*, *supra*, 485 F.3d at 470.

[98] *See, e.g., Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007); *Green v. City of Tucson*, 340 F.3d 891, 895 (9th Cir. 2003).

Third, Plaintiffs will show that Senate Bill 6 must be declared unconstitutional in its entirety, because one of its core parts (its Party Preference Ban) is unconstitutional. Fourth, Plaintiffs will show that Proposition 14 must be declared inoperative and unenforceable, for its implementing statute (Senate Bill 6) is unconstitutional. Fifth, Plaintiffs will show that Senate Bill 6 deserves scant deference. Finally, Plaintiffs will show that the trial court should have barred Intervenors-Defendants from joining this lawsuit.

VIII. Senate Bill 6's Party Preference Ban Violated Plaintiff Chamness' Fundamental Rights

The ballot is the last thing the voter sees before he makes his choice.

-- Chief Justice Roberts, former Chief Justice Rehnquist, and Justice Alito[99]

Contrary to the trial court's ruling, SB 6's Party Preference Ban violated Plaintiff Chamness' fundamental rights in two troubling ways. Namely, it unlawfully banned him from using the ballot label of "Independent" in the CD 36 and SD 28 Elections, and forced him to use the ballot label of "No Party Preference" in the CD 36 and SD 28 Elections. As a starting point, any state election law that imposes a "severe burden" on free-speech rights must be struck down, unless it is narrowly tailored and serves a compelling state interest.[100] A law imposes a severe burden if it "impair[s] access to the ballot, stifle[s] core political speech, or dictate[s] electoral outcomes."[101]

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[99] *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 460 (2008) (Roberts & Alito, JJ., concurring) (*quoting Gralike*, *supra*, 531 U.S. at 532 (Rehnquist, C.J., concurring)).

[100] *Wash. State Grange*, *supra*, 552 U.S. at 451.

[101] *Rubin*, *supra*, 308 F.3d at 1015.

A. Banning the ballot label of "Independent" Imposed a Severe Burden on Candidates' Free-Speech Rights

> *Once a State admits a particular subject to the ballot and commences to manipulate the content or to legislate what shall and shall not appear, it must take into account the provisions of the Federal and State Constitutions regarding freedom of speech and association, together with the provisions assuring equal protection of the laws.*
>
> -- Sixth Circuit, *Rosen v. Brown*[102]

Contrary to the trial court's ruling, this Court has signaled that banning the ballot label of "Independent" imposes a severe burden on a candidate's rights. As shown earlier, California candidates had been allowed to use the ballot label of "Independent" for over a century, between 1891 and 2010. Moreover, two Independent candidates have been elected to the California State Senate within the past two decades: Lucy Killea and Quentin Kopp.

In *Rubin v. City of Santa Monica*, this Court made two principles clear. First, ballot labels "affect[] core political speech", for they "provide a *shorthand designation of the views of* party *candidates* on matters of public concern."[103] Furthermore, the Court signaled its agreement with the Sixth Circuit, which had held that banning the ballot label of "Independent" would "stifle" core political speech":

> [I]n *Rosen v. Brown*, the Sixth Circuit invalidated a regulation *prohibiting the political party designation of "Independent" while permitting "Republican" or "Democrat" designations*, holding that party labels designate the views of party candidates and the regulations therefore hinder "core political speech."[104]

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[102] *Rosen*, *supra*, 970 F.2d at 175 (emphases added) (*citing Bachrach v. Commonwealth*, 415 N.E.2d 832, 835, 382 Mass. 268 (Mass. 1981)); *see also Riddell v. Nat'l Democratic Party*, 508 F.2d 770, 775-79 (5th Cir. 1975).

[103] *Rubin*, *supra*, 308 F.3d at 1015 (italics added) (*quoting Schrader v. Blackwell*, 241 F.3d 783, 789 (6th Cir. 2001)).

[104] *Rubin*, *supra*, 308 F.3d at 1015 (emphases added) (*citing Rosen*, *supra*, 970 F.2d 169).

In *Rosen,* a state law had banned minor-party candidates from using the ballot label of "Independent", and instead forced them to have a blank space next to their name on the ballot.[105] The Sixth Circuit struck down that law, for "prohibiting the designation 'Independent' was unconstitutional *where the regulations allowed for other political party designations*."[106] Indeed, *Rosen* noted that banning the ballot label of "Independent" would result in "the effective *exclusion of Independent* and new party candidacies."[107]

Significantly, because the Ninth Circuit has signaled its agreement with *Rosen*, there is no need to re-apply the U.S. Supreme Court's "severe burden" balancing test with respect to the fundamental right to use the ballot label of "Independent".[108] Contrary to the trial court's ruling, Plaintiff Chamness need not produce any evidence to prevail, for banning the ballot label of "Independent" imposes a severe burden as a matter of law.

Significantly, both the Massachusetts and Minnesota High Courts have also held that it is unconstitutional to ban the ballot label of "Independent". In *Bachrach*, a state law had banned minor-party candidates from using the ballot label of "Independent".[109] Instead, those candidates were forced to state that they were "Unenrolled" – a term identical in meaning to "No Party Preference". Striking down that law, the

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105 *Rosen*, *supra*, 970 F.2d at 171.

106 *Rubin*, *supra*, 308 F.3d at 1015 (italics added) (*citing Rosen*, *supra*, 970 F.2d at 176-77).

107 *Rosen*, *supra*, 970 F.2d at 177 (italics added).

108 *See Rubin*, *supra*, 308 F.3d at 1014-15 (*citing* the High Court's "severe burden" test articulated in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 385 (1997)).

109 *Bachrach*, *supra*, 415 N.E.2d at 833; *see also Shaw v. Johnson*, 247 N.W.2d 921, 923 (Minn. 1976).

Massachusetts High Court ruled that it was unconstitutional to ban candidates from using the party label of "Independent":

> Voters who during the campaign might have been favorably impressed with the candidate as an *Independent*, would be confronted on the ballot with a candidate who was called Unenrolled. *Unenrolled is hardly a rallying cry*[.][110]

Although was not required to produce any evidence of harm, Plaintiff Chamness did proactively produce three critical pieces of evidence:[111]

1. A media article that falsely stated that Coffee Party candidate Michael Chamness as a candidate who "decline[d] to state [his] political part[y]."[112]
2. The CD 36 Election ballot that falsely states that he has "No Party Preference."[113]
3. The SD 28 Election ballot that falsely states that he has "No Party Preference."[114]

The High Court recognizes that "[t]he ballot is the *last thing* a voter sees before he makes his choice."[115] As the news article about Plaintiff Chamness shows, even the media – who are expected to *inform* voters – were misled by the ballot label of "No Party Preference".[116] Subsequently, Plaintiff Chamness finished second-to-last in the CD 36 Election.[117] Thus, SB 6's Party Preference Ban not only irreparably harmed Plaintiff Chamness' rights, but it *misled the media* into falsely reporting that he had refused to disclose his political views.

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110 *Bachrach*, *supra*, 415 N.E.2d at 836 (emphases added); *see also Shaw*, *supra*, 247 N.W. 2d at 923.

111 Although Plaintiffs had provided this evidence to the trial court, its ruling nonetheless stated that Plaintiffs had provided any evidence regarding SB 6's Party Preference Ban. ER 1042:17-1042:18.

112 RJN Exh. 2, at 1.

113 ER 3093a.

114 ER 3093b.

115 *Wash. State Grange*, *supra*, 552 U.S. at 460 (italics added).

116 RJN Exh. 2, at 1.

117 ER 2105.

Because it had imposes a "severe burden" Coffee Party candidate Chamness' fundamental rights as a candidate, SB 6's Party Preference Ban should have been subjected to strict scrutiny.[118]

B. Secretary Bowen Has Admitted That Banning the Ballot Label of "Independent" Is Not "Permissible"

Although disregarded by the trial court, Secretary of State Debra Bowen made a binding admission (of which this Court has taken judicial notice) that SB 6's Party Preference Ban is unlawful.[119] In an email to the Lieutenant Governor's office, her office stated that SB 6's Party Preference Ban is not "permissible", because it *bans minor-party candidates from using the ballot label of "Independent"*.[120] According to a public statement made by Secretary Bowen's own staff, Senate Bill 6's Party Preference Ban

> implies that a candidate … actually has selected a party preference but is not disclosing it. That is ***permissible*** for candidates in certain circumstances [citing an example where a candidate chooses not to disclose his or her party preference], but ***not in all instances.*** What *the term should imply* is that the voter has not chosen, made, or stated a party preference and is therefore "***independent***."[121]

Thus, the Secretary of State has publicly conceded that SB 6's Party Preference Ban is not "permissible", because it deprives minor-party candidates of the ballot label of "Independent". In so doing, the Secretary of State has made a *binding* party admission[122] that SB 6's Party Preference

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118 *See Wash. State Grange*, *supra*, 552 U.S. at 451.

119 ER 2004, 2010, 2011, 2037.

120 ER 2037, 2035.

121 ER 2037, 2035.

122 The trial court gave little weight to this critical evidence, because it apparently believed that party admissions are relevant in criminal cases but less so in civil cases. Aug. 22, 2011 Transcript, at 9:16-9:18 ("I would see your point *if this were a criminal case*, but I am not understanding how that applies here.") (italics added). However, all party admissions are admissible under the exception to the hearsay rule, regardless of whether they are made in civil or criminal cases. Federal Rules of Evidence §801(d)(2). The statement made by Secretary of State Bowen's staff is admissible and not subject to the hearsay rule, because (a) the staff member was authorized by

Ban stifles core political speech.[123] Therefore, SB 6's Party Preference Ban imposed a severe burden on Plaintiff Chamness' free-speech rights as a matter of law.

C. SB 6's Party Preference Ban Imposes a Severe Burden by Dictating Electoral Outcomes

[T]he state has chosen to serve the convenience of those voters who support incumbent and major-party candidates at the expense of other voters. Such favoritism burdens the fundamental right to vote possessed by supporters of the [unfavored] candidates.

-- The Eighth Circuit, *McLain v. Meier*[124]

Furthermore, SB 6's Party Preference Ban imposed a severe burden on Plaintiff Chamness, because it "dictated" the electoral outcome in the CD 36 and SD 28 Elections.[125] As the U.S. Supreme Court has explained, a state

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Secretary of State Bowen to make the statement on her behalf, and (b) the staff member made the statement within the scope of her official duties. *Id.* §801(d)(2)(C) (authorized-party exception to hearsay rule); *id.* §803(8) (public-records exception to hearsay rule).

[123] In *Field v. Bowen*, the California Court of Appeal affirmed a trial court's denial of a preliminary injunction against Senate Bill 6. *Field v. Bowen*, 199 Cal.App.4th 346 (Cal.Ct.App. 2011). Among other things, *Field* held that there is no fundamental right to use the ballot label of "Independent". However, *Field* (which does not bind this Court) is distinguishable for at least four reasons. First, *Field* disregarded the Secretary of State's admission that SB 6's Party Preference Ban is not "permissible". Second, unlike Plaintiff Chamness' as-applied challenge, *Field* addressed a *facial* challenge. *See Wash. Grange*, *supra*, 552 U.S. at 449-50 (High Court admonishes plaintiffs to bring as-applied, not facial constitutional challenges). Third, *Field* distinguished *Rosen* by noting that the *Rosen* plaintiff) had presented evidence that he would be harmed if he were barred from using the "Independent" ballot label, while the *Field* plaintiffs (who brought a facial challenge) had not done so. *Field*, *supra*, 199 Cal.App.4th at 364. Finally, *Field disregarded* this Court's signal that it would adopt *Rosen v. Brown*'s critical holding (i.e., that there is a fundamental right to use the ballot label of "Independent"). *Compare Rubin*, *supra*, 308 F.3d at 1015 (discussing import of *Rosen*'s holding regarding the ballot label of "Independent") *with Field*, *supra*, 199 Cal.App.4th at 356, 362 (disregarding *Rubin*'s discussion of *Rosen*).

[124] *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980) (emphases added).

[125] *See Rubin*, *supra*, 308 F.3d at 1015; *Gralike*, *supra*, 531 U.S. at 525-26.

election law "dictates electoral outcomes" if it places a class of candidates at a political disadvantage.[126] Here, SB 6 stopped Plaintiff Chamness from using the ballot label of "Independent" – "a customary title" that carries a "*positive* connotation".[127] In this manner, SB 6 placed Plaintiff Chamness and other minor-party candidates at a political disadvantage. Because it thus "dictated" electoral outcomes, SB 6's Party Preference Ban imposed a severe burden on Plaintiff Chamness' rights as a candidate – triggering strict scrutiny.

D. No State Interest Can Save SB 6's Party Preference Ban

The First Amendment bars government from censoring pure speech or speakers in order to "improve the quality" or "increase the fairness" of public debate.

– Archibald Cox[128]

Although banning the "Independent" ballot label triggers strict scrutiny, the trial court did not provide any legitimate state interest to justify SB 6's Party Preference Ban. In that regard, the trial court ruled that SB 6's Party Preference Ban did not burden Plaintiff Chamness' rights, because he could have published a candidate statement in an official voter guide. Yet as the U.S. Supreme Court has warned, it is unlawful to foist minor-party candidates with a candidacy fee that their major-party competitors *need not pay*.[129]

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126 *Gralike*, *supra*, 531 U.S. at 525-26.

127 *Bachrach*, *supra*, 415 N.E.2d at 836 (italics added).

128 Archibald Cox, The Supreme Court 1979 Year Forward: Freedom of Expression in the Burger Court, 94 Harv.L.Rev. 1, 67 (1980) (*quoted by Bachrach*, *supra*, 415 N.E.2d 832, 382 Mass. at 281).

129 *Bullock v. Carter*, 405 U.S. 134, 146 (1972) ("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*.") (italics added).

Here, major-party candidates could freely use the ballot label of their choice, while Coffee Party Chamness was banned from doing so. To "explain[] his party affiliation to voters", it would have cost him *between $27,200 to $108,800* to publish candidate statements in the CD 36 and SD 28 Elections.[130] Far from being "evenhanded and politically neutral", SB 6's Party Preference Ban foisted him with the "burden" of a fee that major-party candidates did not need to pay.[131] Consequently, the State cannot justify SB 6's Party Preference Ban by arguing that Plaintiff Chamness could have paid for a candidate statement.

The trial court also ruled that the "Independent" ballot label could be banned, because it could confuse or mislead voters. However, such an asserted interest collapses under the weight of case law. As the High Court has admonished, a State must not sweep "broader than necessary to advance electoral order[.]"[132] Indeed, the Minnesota Supreme Court has expressly held that the "Independent" ballot label "fosters no confusion" as a matter of law – even though Minnesota had an "Independent-Republican" Party at the time.[133]

Moreover, it is *undisputed* that (1) California candidates had been able to use the "Independent" ballot label between 1891 and 2010, and (2) over the past two decades, two candidates have been elected to the California

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[130] *Compare* ER 2089 ¶ 13 *and* RJN Exhs. 6 & 7 *with* ER 1041:9-1041:10.

[131] *Compare Bullock*, *supra*, 405 U.S. at 146 *with* ER 1041:12-1041:14.

[132] *Norman v. Reed*, 502 U.S. 279, 290 (1992).

[133] *Shaw*, *supra*, 247 N.W. 2d at 923. *Cf. Lightfoot v. Eu*, 964 F.2d 865, 868 (9th Cir. 1992) (major parties banned from subverting the State's *former* party-primary system by nominating candidates outside the party primary); *Libertarian Party*, *supra*, 620 P.2d 612, 28 Cal.3d 535 (because the State's *former* party-primary system allowed minor-party candidates to use the "Independent" ballot label, the State was not required to print the name of their party on the ballot).

Senate with the ballot label of "Independent".[134] It strains credulity that a ballot label that had been used in California *for over a century* could confuse or mislead voters.

Equally important, SB 6's Party Preference Ban *has already misled voters*. As shown earlier, SB 6's misleading ballot label of "No Party Preference" misled the media into falsely reporting that Coffee Party candidate Chamness had refused to disclose his party affiliation.[135] Furthermore, SB 6's Party Preference Ban could also confuse voters in the 2012 general election, because minor-party candidates will be listed two different ways on the ballot. While state, Congressional, and U.S. Senate candidates will be banned from using the "Independent" ballot label, Presidential candidates *will be allowed to state on the ballot that they are "Independent"*:

> If a [Presidential] candidate has qualified for the ballot by virtue of an independent nomination, the word *"Independent" shall be printed*[.]"[136]

In other words, SB 6's Party Preference Ban selectively discriminates against minor-party candidates based on the office that they are seeking – an unlawful practice that the U.S. Supreme Court refuses to countenance.[137]

In effect, SB 6 has deprived voters of "party quality control". Before SB 6 took effect, only candidates who had belonged to a major party for an extended period of time could use that party's name on the ballot.[138] But

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134 ER 2103 ¶44, ER 2091 ¶16.

135 RJN Exh. 2, at 1.

136 SB 6-amended Elections Code §13105 (c) (italics added); *see also* SB 6-amended Elections Code §359.5.

137 *Norman*, *supra*, 502 U.S. at 290 (State is barred from banning a candidate to use a ballot label that other candidates may use).

138 Specifically, major-party candidates in regularly scheduled elections had been required to belong to their party for at least one year; in special elections, three months. Elections Code §8001(a).

under SB 6, voters can no longer tell from the ballot how long a candidate has been affiliated with a party – because candidates can change their party affiliation *the minute before they file papers to run for office*.[139] For example, a person affiliated with the Tea Party could change his affiliation to "Democratic" on the last day of registration – *and be listed as a Democrat*. By the same token, a person affiliated with the Coffee Party could change his affiliation to "Republican" on the last day of registration – *and be listed as a Republican*.

Finally, the trial court ruled that binding authority banned candidates from using the ballot label of "Independent". However, the cases invoked by the trial court (*Lightfoot v. Eu*, *Libertarian Party v. Eu*) do *not* apply here, for they upheld California's *former* party-primary election system – which SB 6 *dismantled*.[140] As shown earlier, Senate Bill 6 made a critical change to the way we elect our state and federal leaders: major parties *are longer able to select their nominees* for the November general election.[141] Thus, SB 6 *eliminated* the need to maintain the "*distinction* between qualified and non-qualified parties" – the *very basis* for the holdings of both *Libertarian Party* and *Lightfoot*.[142] Because SB 6 Defendants have failed to provide any compelling state interest to save it, the Court must strike down SB 6's Party Preference Ban.

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[139] SB 6-amended Elections Code §8002.5(c).

[140] *Cf. Libertarian Party*, *supra*, 28 Cal.3d at 546 (emphasis added) (because the State's former party-primary system allowed minor-party candidates to use the "Independent" ballot label, the State was not required to print the name of their party on the ballot); *Lightfoot*, *supra*, 964 F.2d 865, 868 (major parties may not subvert the State's former qualified-party election system by nominating candidates outside of the June party primary).

[141] As discussed earlier, SB 6 excludes Presidential elections from its scope. SB 6-amended Elections Code §359.5.

[142] *See supra* note 140.

Beyond silencing the voices of minor-party candidates, SB 6 may cause misleading information to be provided to voters. For that reason alone, no state interest can save SB 6's Party Preference Ban.

E. SB 6's Party Preference Ban Violated Plaintiff Chamness' Rights under the Elections Clause

[O]nce a candidate is legally entitled to appear on the ballot there is substantial support in the lower courts to invalidate laws that favor incumbents, or nominees of preferred parties[.]

-- Supreme Court scholar Vicki Jackson[143]

Contrary to the trial court's ruling, SB 6 violated Plaintiff Chamness' rights under the Elections Clause, for its Party Preference Ban singled out and discriminated against Plaintiff Chamness in the CD 36 Election. How a candidate is listed on the ballot makes a profound difference. As Justices Scalia and Kennedy have noted, ballot labels provide candidates with "a means to *garner* the *support* of those who trust and agree with [their] party."[144] Toward that end, an "adverse" ballot label will "handicap candidates at the most crucial stage in the election process – the instant *before* the vote is cast.[145] In the landmark *Anderson v. Martin*, the High Court struck down a state statute that forced candidates to state their race on the ballot, because it held that such a statute aimed to politically harm African American candidates.[146]

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[143] Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001 Sup.Ct.Rev. 299, 336 n.112 (underlining added), *citing, inter alia, McLain*, *supra*, 637 F.2d at 1166-67; *Graves v. McElderry*, 946 F.Supp. 1569, 1573, 1579-82 (W.D. Okla. 1996) (striking down state law that gave top ballot position to Democratic candidates); *Sangmeister v. Woodard*, 562 F.2d 460, 465-67 (7th Cir. 1977) (striking down elections officials' practice of giving their own political party the top position on the ballot).

[144] *Wash. State Grange*, *supra*, 552 U.S. at 466 (Scalia & Kennedy, JJ., dissenting) (italics added).

[145] *Gralike*, 531 U.S. at 525 (italics added, quotations omitted) (*quoting Anderson*, 375 U.S. at 402).

[146] *Anderson*, *supra*, 375 U.S. at 402.

As the High Court unanimously held in *Cook v. Gralike*, a state law violates the Elections Clause if it aims to (1) "favor or disfavor" one class of candidates over another, (2) "dictate electoral outcomes", or (3) "evade important constitutional restraints".[147] In *Gralike*, the High Court struck down a state statute that targeted federal candidates who did not support term limits. For example, if an incumbent did not support term limits, that law required the following label to be printed beside his or her name on the ballot: "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS."[148]

In response, the High Court held that the state statute violated the Elections Clause for at least two reasons. First, the statute was "plainly designed to favor candidates who [were] willing to support" term limits and "to disfavor those who either oppose term limits entirely or would prefer a different proposal":[149]

> [I]t seems clear that the adverse labels *handicap candidates* "at the most crucial state in the election process – the instant before the vote is cast." At the same time, "by directing the citizen's attention to the single consideration of the candidates' fidelity to term limits, the labels imply that the issue "is an important – perhaps paramount consideration in the citizen's choice, which *may decisively influence the citizen* to cast his ballot" against candidates branded as unfaithful.[150]

The High Court then concluded that the statute unlawfully aimed to "dictate electoral outcomes," because "the labels surely place their targets at a *political disadvantage*[.]"[151]

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147 *Gralike*, *supra*, 531 U.S. at 523 (*quoting U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995)).

148 *Gralike*, *supra*, 531 U.S at 510.

149 *Id.* at 510 (*citing Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

150 *Gralike, supra*, 531 U.S. at 524 (*quoting Anderson*, *supra*, 375 U.S. at 402) (italics added).

151 *Gralike, supra*, 531 U.S. at 525 (emphases added).

SB 6's Party Preference Ban must be struck down for the same reasons stated in *Gralike*. Indeed, SB 6 grants a party label to candidates who identify with the viewpoints of a major party, while forcing candidates who identify with the viewpoints of a minor party to lie to voters: to falsely state on the ballot that they have "No Party Preference".[152] Thus, SB 6 was "plainly designed to favor" candidates who identify with the viewpoints of major party, and was designed to "disfavor" and "handicap" candidates who identify with the viewpoints of a minor party.[153] Furthermore, because it places minor-party candidates at a political disadvantage, SB 6 also aims to "dictate electoral outcomes".

Although the trial court ruled that state interests could justify SB 6's Party Preference Ban, it was mistaken for two reasons. However, a state law must be summarily struck down if it violates the Elections Clause – *regardless* of any state interest.[154] Because SB 6's Vote Counting Ban violates the Elections Clause, no state interest can save it. Accordingly, the Court must rule that SB 6's Party Preference Ban violated Plaintiff Chamness' rights under the Elections Clause.[155]

IX. SB 6's Party Preference Ban Is Not Severable

SB 6's Party Preference Ban is not severable; that is, it is not possible to save SB 6 by "cutting out" its unlawful Party Preference Ban.[156] To be

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[152] Defendants may argue that Plaintiff Chamness can avoid being foisted with the "No Party Preference" label, by accepting a "blank" ballot label. However, it is unconstitutional to force *any* minor-party candidate to accept a "blank" ballot label, while allowing major-party candidates to state their party's name on the ballot. *Rosen*, *supra*, 970 F.2d at 172, 174.

[153] *Gralike*, *supra*, 531 U.S. at 523-25.

[154] *See, e.g., Foster v. Love*, 522 U.S. 67, 71 (1997).

[155] *Gralike*, *supra*, 531 U.S. at 525.

[156] Plaintiffs concede that SB 6's Vote Counting Ban (i.e., SB 6-amended Elections Code §8606, whose infirmities are discussed *infra*) is severable.

severable, the unlawful part of a statute must be functionally, grammatically, and volitionally separable.[157] Whether one part of an infirm law is severable from another is a question of state law.[158] Although SB 6 has a severability clause, the California Supreme Court has repeatedly held that such clauses are not conclusive – particularly when the unlawful part of a statute is not "volitionally" separable.

Under California law, boilerplate severability clauses are not "persuasive", because they are "routinely attached prior to the actual contingency … *without foreknowledge* of its real character."[159] Suppose the Legislature had been able to foresee that part of a statute that it was about to pass would later be declared unconstitutional. If it is "clear" that the Legislature would have still passed that statute without its unlawful part, then that part would be "volitionally" separable, and the statute's remaining parts could be saved.[160]

Here, it is undisputed that when the Legislature passed SB 6's Party Preference Ban, it did so because *it intended to implement Proposition 14*.[161]

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157 *Gerken v. FPPC*, 863 P.2d 694, 698 (Cal. 1993).

158 *See, e.g., Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1180 (9th Cir. 2001).

159 *Schenley Affiliated Brands v. Kirby*, 21 Cal.App. 3d 177, 199 (Cal.Ct.App. 1971) (italics added).

160 *Sonoma County v. Superior Ct.*, 173 Cal.App.4th 322, 352 (Cal.Ct.App. 2009); *accord*, *Gerken*, *supra*, 863 P.2d at 698 ("The final determination [on whether a severability clause is conclusive] *depends on whether the remainder* [of the statute] … *would have been adopted* by the legislative body had the latter *foreseen* the partial *invalidity* of the statute.") (italics added) (*quoting Calfarm*, 771 P.2d 1247, 48 Cal.3d 805, 821 (Cal. 1989)).

161 In its Statement of Purpose, Proposition 14 explicitly states that it needs implementing legislation: "This act, along with legislation already enacted by the Legislature *to implement this act*, are intended to implement an open primary system in California[.]" ER 3093h (italics added). When the Legislature enacts implementing legislation, it must be assumed that it actually *intended* to implement the constitutional provision in question. *See, e.g., People v. Broussard*, 856 P.2d 1134, 1137 (Cal. 1993).

Specifically, Article 2 of Proposition 14 called for a "statute" to implement the "manner" in which candidates could state their party preference on the ballot.[162] In response, the Legislature enacted SB 6's Party Preference Ban, which controls the "manner" in which candidates may (or may not) state their party preference on the ballot.

Thus, it is crystal "clear" the Legislature would not have passed SB 6 without the Party Preference Ban – because without the Party Preference Ban, the lawmakers *could not have implemented Subsection V(b) of Proposition 14*.[163] Thus, SB 6's Party Preference Ban is not "volitionally" separable, and SB 6 as a whole *cannot be saved as a matter of law*.[164] Therefore, because the entirety of SB 6 is unenforceable, the Court must strike it down in its entirety.

X. Proposition 14 Must Be Declared Inoperative If SB 6 Is Struck Down

Finally, Proposition 14 *must be declared inoperative and unenforceable* if SB 6 is struck down. It is undisputed that (1) SB 6 was passed in order to implement Proposition 14, and (2) Proposition 14 needs a lawful statute to implement it, because it is not a self-executing provision.[165] Thus, because SB 6 is unenforceable in its entirety, Proposition 14 lacks a lawful statute to implement it. Therefore, Proposition 14 must be declared inoperative until the Legislature has passed a new law to implement it.[166]

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[162] CAL.CONST. art. ii §5 (b).

[163] *Sonoma County*, *supra*, 173 Cal.App.4th at 352.

[164] *Id.* at 352; *Gerken*, *supra*, 863 P.2d 694, 6 Cal.4th at 714.

[165] *See, e.g., 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).

[166] *See, e.g., In re Redevelopment Plan for Bunker Hill*, 389 P.2d 538, 61 Cal.2d 21, 75 (Cal. 1964); *Denninger v. Recorder's Court*, 79 P. 360, 145 Cal. 629, 635 (Cal. 1904).

XI. SB 6's Vote Counting Ban Violated the Fundamental Rights of Plaintiffs Frederick and Wilson

[H]aving granted citizens the right to cast write-in votes, the [State] *must confer the right* in a manner *consistent with the Constitution*.

-- U.S. District Court, District of Columbia[167]

Contrary to the trial court's ruling, SB 6's Vote Counting Ban violated the fundamental rights of Plaintiffs Wilson and Frederick, because it banned the write-in vote that Plaintiff Wilson cast for Plaintiff Frederick from being counted. Specifically, Section 8606 of the Elections Code now bans all write-in votes from being counted in all federal and state elections:

> A person whose name has been written on the ballot as a *write-in candidate* at the general election … *shall not be counted*.[168]

A. The State Gives Write-In Candidates and Their Voters the Right to Participate in *Every* State and Federal Election

Significantly, the State has given candidates the right to run write-in candidacies and has given voters the right to cast write-in votes for them:

> Each voter is entitled to write the name of any candidate for any public office, including that of President and Vice President of the United States, on the ballot of any election.[169]

Having conferred that right, the State should have been required to comply with stringent constitutional requirements.[170]

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[167] *Libertarian Party v. District of Columbia Bd.*, 768 F.Supp.2d 174, 182 (D.D.C. 2011) (italics added, citations omitted).

[168] SB 6-amended Elections Code §8606 (emphases added).

[169] Elections Code §15340 (emphases added). "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 County*, 182 Cal.App.4th 1528, 1533 (Cal.App. 2010) (italics added) (*quoting Diamond Multimedia Systems v. Superior Court*, 968 P.2d 539 (Cal. 1999)). A person qualifies as a write-in candidate by filing candidacy papers within 14 days of the date of any state or federal election. Elections Code §8601. Although it made nearly 60 amendments to the Elections Code, Senate Bill 6 did not eliminate the right to run as a write-in candidate in the general election (Elections Code §§8600 *et seq*.). Consequently, California courts will assume that the Legislature did not intend to eliminate the right to run as a write-in candidate in the general election. *See, e.g., Estate of McDill*, 537 P.2d 874, 878 (Cal. 1971).

B. SB 6's Vote Counting Ban Violated Plaintiffs Wilson and Frederick's Fundamental Rights

Plaintiffs Wilson and Frederick bring two intertwined, as-applied[171] claims: SB 6, as applied (1) disqualified Plaintiff Frederick from qualifying as a write-in candidate for the AD 4 Election, in violation of the Due Process Clause and the First Amendment, and (2) banned Plaintiff Wilson's write-in vote (which he cast for Plaintiff Frederick) from being counted in the AD 4 Election, in violation of the Due Process Clause, First and Fourteenth Amendments, and the Elections Clause.

C. The Secretary of State Has Made a Binding Admission of Liability

Remarkably, the Secretary of State has conceded that SB 6's Vote Counting Ban *deceives both candidates and voters* – and therefore violated their Due Process rights. As the First Circuit held in *Griffin v. Burns*, a State may perpetrate a "fraud on the voters" by changing election rules without giving full and fair notice to candidates and voters.[172] Here, SB 6 gives voters no warning whatsoever that, if they vote for a write-in candidate, their vote will be *thrown away*. As the Secretary Bowen's staff admitted (in a document of which this Court has taken judicial notice), SB 6 gives candidates the "illusion" that they can mount write-in candidacies in

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[170] *See, e.g., District of Columbia Bd.*, *supra*, 768 F.Supp.2d at182; *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).

[171] *See supra* note 4.

[172] *See, e.g., Griffin v. Burns*, 570 F.2d 1065, 1074 (1st Cir. 1978). *Contra*, ER 1045 ("[B]oth Frederick and Wilson were aware that write-in votes in the general election would not be counted.").

the general election, and gives voters the "illusion" that they can cast a write-in vote that will be counted:

> Since … SB 6 precludes [write-in] votes from being counted, it *makes no sense* to give candidates the illusion that they can run as a write-in or give voters the illusion that they can write in a candidate's name and have it counted. Making these conforming changes is only controversial because *there is a lawsuit on this issue* that essentially states "SB 6 says don't count the votes, so it's *misleading to let people think they can write in a candidate's name and have it counted*."[173]

By publicly admitting that SB 6 would *trick* candidates like Plaintiff Frederick and *disenfranchise* voters like Plaintiff Wilson, Secretary Bowen has made a binding party admission[174] that SB 6's Vote Counting Ban violated the Due Process rights of Plaintiffs Frederick and Wilson.

D. SB 6 Imposed a Severe Burden on Plaintiff Frederick and Plaintiff Wilson's Fundamental Rights

As this Court has noted, "[t]he 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*, and may be limited only where necessary to achieve a compelling state purpose."[175] Here, Plaintiff Frederick (a) was eligible to run as a write-in candidate under Elections Code §8601, and (b) attempted to qualify as a write-in candidate for the AD 4 Election in a timely manner.[176] However, the Secretary of

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[173] ER 2004, 2007, 2010, 2011, 2041 (italics added).

[174] *See supra* note 122.

[175] *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).

[176] To qualify, write-in candidates for state office must (1) be registered to vote in the district in which the election at issue is being held, and (2) submit the required filing papers at least 14 days before that election is held. Elections Code §8601 (which was not amended by Senate Bill 6). Plaintiff Frederick is registered to vote in Assembly District 4, and was barred from

State barred him from running as a write-in candidate in the AD 4 Election.[177] In so doing, she imposed a severe burden on Plaintiff Frederick's right to run for public office.

As a starting point, any state election law that imposes a "severe burden" on free-speech rights must be struck down, unless it is narrowly tailored and serves a compelling state interest.[178] Specifically, a law imposes a severe burden if it "impair[s] access to the ballot, stifle[s] core political speech, or dictate[s] electoral outcomes."[179] As the U.S. Supreme Court has admonished, a state election law "dictates electoral outcomes" if it places a class of candidates at a political disadvantage.[180]

Here, SB 6 barred Plaintiff Frederick from exercising his constitutional right (conferred by Elections Code §8601) to run as a write-in candidate in the AD 4 Election.[181] In so doing, SB 6 placed Plaintiff Frederick and all other write-in candidates at a debilitating political disadvantage: they were *disqualified* from running for office. Because it thus "dictated electoral outcomes", SB 6 imposed a severe burden on Plaintiff Frederick's fundamental right to run as a write-in candidate in the AD 4 Election.

E. SB 6's Vote Counting Ban Imposed a Severe Burden on Plaintiff Wilson's Fundamental Rights

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qualifying as a write-in candidate over *two months* before the AD 4 Election was held. ER 2086 ¶¶ 4, 5 & ER 2097-98 ¶¶ 28, 29. Therefore, Plaintiff Frederick was eligible to be a write-in candidate in the AD 4 Election.

[177] ER 2097-98 ¶¶ 28, 29.

[178] *Wash. State Grange*, *supra*, 552 U.S. at 451.

[179] *Rubin*, *supra*, 308 F.3d at 1015. (*citing Gralike*, *supra*, 531 U.S. 510).

[180] *Gralike*, *supra*, 531 U.S. at 525-26.

[181] *District of Columbia Bd.*, *supra*, 768 F. Supp.2d, at 182; *Grant*, *supra*, 828 F.2d at 1456; *Turner*, *supra*, 77 F.Supp.2d at 30.

By banning Plaintiff Wilson's vote from being counted, SB 6 imposed a severe burden on Plaintiff Wilson's fundamental rights. The U.S. Supreme Court has made it clear that "[t]he right to vote includes the right to have the ballot counted."[182] Last year, the High Court noted that "the expression of a political view *implicates a First Amendment right*."[183] Furthermore, as the High Court held in *U.S. v. Mosley*, federal law enacted pursuant to the Elections Clause protects the right of a voter to cast a ballot and have that ballot counted.[184] As shown earlier, if a state statute violates such a federal law, the state statute must be struck down, irrespective of any state interest.[185] Because SB 6's Vote Counting Ban violates the Elections Clause, no state interest can save it.

Moreover, any law that bans the counting of a lawfully cast vote triggers *strict scrutiny*, because it would impose a content-based restriction on the right to core political speech.[186] In *Turner v. District of Columbia Board*, a federal court quashed an attempt to prevent write-in votes from being counted. There, an election board claimed that federal law barred it from counting the write-in votes cast in an election. The *Turner* Court emphatically disagreed:

> 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*."[187]

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[182] *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (emphasis added).

[183] *Doe v. Reed*, 561 U.S. --, 130 S.Ct. 2811, 2831 (Roberts, J.) (italics added).

[184] *See, e.g., U.S. v. Mosley*, 238 U.S. 383, 386 (1915) (Civil Rights Act of 1870, 16 Stat. 140-146, passed by Congress pursuant to its authority under the Elections Clause, safeguards the fundamental right of every voter to cast a ballot and have that ballot counted); *Gamza v. Aguirre*, 619 F.2d 449, 452 (5th Cir. 1980) (re-aff'g *Mosley*); *cf. Gralike*, *supra*, 531 U.S. 510.

[185] *See, e.g., Foster*, *supra*, 522 U.S. at 71.

[186] *Turner*, *supra*, 77 F.Supp.2d at 32-33; *see also Rubin*, *supra*, 308 F.3d at 1015.

[187] *Turner*, *supra*, 77 F.Supp.2d at 32-33 (emphases added) (*quoting U.S.*

Here, SB 6 banned Plaintiff Wilson's write-in vote for Plaintiff Frederick from being counted. In this manner, SB 6 must be summarily struck down under the Election Clause, for it violated a federal law that protects the right to cast a vote and have it counted.[188] Even without the Election Clause, SB 6's Vote Counting Ban would trigger strict scrutiny, for it imposed a severe burden on Plaintiffs Frederick and Wilson's fundamental rights.

F. No State Interest Can Save SB 6's Vote Counting Ban

Contrary to the trial court's ruling, no government interest can save SB 6's Vote Counting Ban. According to the trial court, write-in votes should not be counted in the general election, because counting those votes would *increase* political competition.[189] However, limiting political competition would *never* constitute a legitimate (let alone compelling) state interest. The trial court also ruled that the voters *intended* to disenfranchise write-in voters. However, it is undisputed that neither the text nor a summary of Senate Bill 6 was included in the voter materials for Proposition 14.[190] Thus, the voters were not given *any* notice that SB 6 would force election officials not to count write-in votes. Because it cannot survive strict scrutiny, SB 6's Vote Counting Ban must be struck down.

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v. Classic, 313 U.S. 299, 315 (1941)). *See also District of Columbia Bd.*, *supra*, 768 F.Supp.2d at 182; *Gould v. Grubb*, 536 P.2d 1337, 1343 n.10 (Cal. 1975). The trial court sought to distinguish *Turner*, claiming that the High Court's ruling in *Burdick v. Takushi* (504 U.S. 428) gave the State the power not to *count* write-in votes. Because *Burdick* did *not* confer such power (*see infra* note 188), *Turner*'s emphatic warning not to tamper lawfully cast votes is binding on this case.

188 *Mosley*, *supra*, 238 U.S. at 386; *Foster*, *supra*, 522 U.S. at 71; *see also supra* notes 154 and 184. Because Senate Bill 6 did not ban write-in votes from being *cast* in the general election, *Burdick v. Takushi* does not apply to this case. *Cf. Burdick*, *supra*, 504 U.S. 428 (State may ban write-in votes from being cast in the general election.)

189 ER 1044:15-1044:19.

190 ER 3093c-3093i.

XII. Senate Bill 6 Deserves Scant Deference

Thus, when a law appears to have been adopted without reasoned consideration, for discriminatory purposes, or to entrench political majorities, we are less than willing to defer to the institutional strengths of the legislature.

-- Justices Breyer and Stevens[191]

Simply put, Senate Bill 6 deserves scant deference from the Court, because it was *not* passed by the voters. The Legislature could have put *both* SB 6 and Proposition 14 on the ballot, but it *deliberately chose not to do so.* Why did the lawmakers dodge the voters when it came to Senate Bill 6, a Legislature-passed statute that *fleshes out* critical details of Proposition 14's new election rules?

Significantly, Justices Breyer and Stevens recently warned that they would be "*less than willing to defer* to the institutional strengths of the legislature" – particularly "when a law appears to have been adopted *without reasoned consideration*, for *discriminatory purposes*, or to *entrench political majorities*[.]"[192] Furthermore, as this Court recently made clear, a "discrete election *rule* (e.g., voter ID laws, candidacy filing deadlines, or *restrictions on what information can be included on ballots*)" deserves *less deference* than an "electoral *system*".[193]

Here, Plaintiffs do not challenge the constitutionality of Proposition 14's Top Two Primary "electoral *system*".[194] Rather, they are challenging the constitutionality of a "discrete election *rule*": Senate Bill 6, which imposes "restrictions on what information can be included on ballots."[195]

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191 *Doe*, *supra*, 130 S.Ct. at 2831 n.3 (concurring op., Stevens & Breyer, JJ.) (italics added).

192 *Doe*, *supra*, 130 S.Ct. at 2831 n.3 (citations omitted, italics added).

193 *Dudum v. Arntz*, 640 F.3d 1198, 1114 (9th Cir. 2011) (italics in original).

194 *See id.* at 1114.

195 *See id.* at 1114.

Needless to say, Senate Bill 6 should receive absolutely no deference from the High Court or this Court. Indeed, the Legislature passed Senate Bill 6

> (1) Without "reasoned consideration". SB 6 was introduced and passed *between 3:40 am and 6:55 am* on February 19, 2009, without any public notice or committee hearings;[196]
>
> (2) For "discriminatory purposes". As our analysis of the Elections Clause shows, SB 6 was designed to inflict political harm on minor-party candidates; and
>
> (3) To "entrench political majorities". As our analysis of the Elections Clause also shows, SB 6 brazenly favors candidates from major parties over those from minor parties.

In short, the Court should be "less willing to defer" to the Legislature with regard to Senate Bill 6 – and must strike it down if it fails to pass constitutional muster.

XIII. The Trial Court Should Not Have Granted the Motion to Intervene

> *Moreover, the cases in which we have allowed public interest groups to intervene generally share a common thread: Unlike [the putative intervenor], these groups were directly involved in the enactment of the law or in the administrative proceedings out of which the litigation arose.*
>
> -- The Court, *Northwest Forest Resource Council v. Glickman*[197]

The trial court should have granted intervention of right for three main reasons:[198] (1) Intervenors-Defendants are barred outright from intervening as a matter of law, (2) Intervenors-Defendants have no "significantly

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[196] Although Plaintiffs had fully briefed this topic in their papers (*see* ER 3122:9-3122:10), the trial court was not aware during oral argument of the circumstances by which Senate Bill 6 had been passed. Aug. 22, 2011 Transcript, at 8:1-8:14. After being briefed on those circumstances, the trial court stated: "I would kill if Congress were that efficient. I really would." *Id.* at 8:15-8:16.

[197] *Northwest Forest Resource Council v. Glickman* ("*Northwest Forest*"), 82 F.3d 825, 837 (9th Cir. 1996); *see also Bates v. Jones*, 127 F.3d 870, 874 (9th Cir. 1997) (*quoting Northwest Forest*).

[198] To qualify for intervention of right, a litigant must show that they meet four requirements: (a) it has a "significantly protectable" interest in a lawsuit, (b) that interest could be impeded or impaired, (c) its interests will not be adequately represented by the existing parties, and (d) it has filed a timely motion to intervene. *Northwest Forest*, *supra*, 82 F.3d at 836.

protectable" interest that would be impeded or impaired by this lawsuit, and (3) Intervenors-Defendants cannot overcome the strong presumption that their interests will be adequately represented by the Secretary of State.

A. Intervenor-Defendants Are Barred Outright from Intervening As a Matter of Law

At the outset, binding authority bars Abel Maldonado, CDOP and CIVP from intervening in this case.

Abel Maldonado. Although disregarded by the trial court, U.S. Supreme Court precedent bars Abel Maldonado (who authored Senate Bill 6 when he was a state senator) from joining this case. In *Arizonans for Official English v. Arizona*, the High Court made it clear that legislators are barred from defending the constitutionality of a statute, unless state law expressly allows them to do so.[199] Here, it is undisputed that no California law expressly allows legislators to defend the constitutionality of a statute.

Thus, Maldonado is barred from intervening in this case for at least two reasons. First, he *is no longer a legislator*, but a political candidate who seeks to *personally benefit* from Senate Bill 6.[200] Second, even if he were still a legislator, no state law authorizes past or present legislators to defend state election laws.

Seeking to escape *Arizonans*, Intervenor-Defendant Maldonado may argue that he deserves intervention, because the outcome of this case could harm him *politically*. Yet in a case approvingly cited by this Court, a state appeals court flatly held that under state law, a "bare political interest" does

[199] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (*citing Karcher v. May*, 484 U.S. 72, 82 (1987)); *see also Perry v. Schwarzenegger*, 628 F.3d 1191, 1195 (9th Cir. 2011).

[200] ER 3177:6-3177:7.

not constitute "an appropriate basis for intervention".[201] Consequently, Intervenor-Defendant Maldonado is barred from intervening outright.

CDOP and CIVP. Although disregarded by the trial court, this Court's precedent bars CDOP and CIVP from intervening in this lawsuit, because they played no role whatsoever in passing Senate Bill 6. As *Northwest Forest* and *Bates v. Jones* made clear, a group that was not "directly involved in the enactment of" a statute *does not qualify* for intervention of right. Here, it is undisputed that CDOP and CIVP played no role in enacting Senate Bill 6, the statute at issue in this lawsuit. Consequently, CDOP and CIVP are both barred from intervening as of right.[202]

B. Intervenors-Defendants Have No Significantly Protectable Interest in this Case

In its brief legal analysis, the trial court ruled that Intervenors-Defendants had a "direct interest" in this case – because, *after* the Legislature passed Senate Bill 6, Intervenors-Defendants played a role in enacting Proposition 14.[203] However, their argument fails for at least two reasons. To begin with, Plaintiffs are *not* challenging the constitutionality of Proposition 14, but that of Senate Bill 6.

Furthermore, no Intervenor-Defendant has any significantly protectable interest under this Court's holding in *Northwest Forest Resource Council v. Glickman* ("*Northwest Forest*").[204] To show such an interest, a

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[201] *City and County of San Francisco v. State of California*, 128 Cal.App.4th 1030, 1039-40 (Cal.App.Ct. 2005), *review denied*, 27 Cal.Rptr.3d 724 (2005) (*cited with approval*, *Perry v. Schwarzenegger*, 628 F.3d 1191, 1199 n.10 (9th Cir. 2011)).

[202] *Northwest Forest*, *supra*, 82 F.3d at 837; *Bates*, *supra*, 127 F.3d at 874.

[203] ER 1028.

[204] *Northwest Forest*, *supra*, 82 F.3d at 837.

litigant must prove that (1) "the interest asserted is protectable under some law," and (2) there is a "relationship between the legally protected interest and the claims at issue."[205]

Although Intervenors-Defendants might satisfy the first requirement, they fail to satisfy the second requirement as a matter of law. Here, the "interest asserted" by Intervenors-Defendants is straightforward: they oppose any effort that could delay Proposition 14 from being implemented in California. If this lawsuit prevails, the statute that implements Proposition 14 (i.e., Senate Bill 6) will be declared unconstitutional. And if Senate Bill 6 is declared unconstitutional, Proposition 14 must be declared inoperative and unenforceable until a new statute is passed to replace Senate Bill 6.

Thus, Intervenors-Defendants seek to intervene because this lawsuit could delay Proposition 14 from being implemented. However, such an interest fails to qualify any of them for intervention of right – because there is no "relationship" between their interest in Proposition 14 and Plaintiffs' as-applied claims against SB 6.[206]

In *Northwest Forest*,[207] this Court explained how to evaluate whether there is a "relationship" between a litigant's legal interest and the legal claims at issue. There, the Court was asked to construe a statute that exempted certain timber from being subject to existing environmental laws. An environmental group sought to intervene to block that timber from being logged, on the grounds that the timber was protected by the existing environmental laws. However, because the statute at issue had *pre-empted*

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205 *See, e.g., Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993).
206 *See id.*
207 *Northwest Forest*, *supra*, 82 F.3d at 837.

those environmental laws, this Court held that the group was barred from intervening as of right:

> In this case, the statute under which the declaratory action arises explicitly *preempts* other laws. The environmental laws that [the putative intervenor] and others claim they have supported therefore *cannot protect [the putative intervenor's] various interests* with respect to [the plaintiff's] claims under [the statute at issue]."[208]

Thus, this Court held that the environmental group failed to show a "significantly protected interest", for there was no "relationship" between its interest in environmental protection and a statute that pre-empted existing environmental laws.

An analogous situation applies here. It is undisputed and accepted – even by Intervenors-Defendants – that the provisions of Proposition 14 were intended to be *conditional*. Namely, Proposition 14 *needs – and cannot operate without – an implementing statute*. Therefore, if Proposition 14 *loses* its implementing statute (Senate Bill 6), it must be declared inoperative and *unenforceable* until a new statute is passed to replace SB 6 – and that is *exactly* how it was intended to operate.

In other words, Intervenors-Defendants must take the bitter with the sweet. Proposition 14 can operate only if, *and only if*, it is supported by a valid implementing law. Thus, *by its very design*, Proposition 14 *must* be declared unenforceable if Senate Bill 6 (which was introduced and passed by the Legislature between 3:40 am and 6:55 am) is struck down as unconstitutional.

As shown earlier, Intervenors-Defendants have no legally recognized interest in Senate Bill 6.[209] Thus, if Senate Bill 6 is declared

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[208] *Id.* at 837 (italics added).

[209] Namely, Abel Maldonado is barred from intervening as a matter of law, and CDOP and CIVP played no role whatsoever in enacting Senate Bill

unconstitutional, Intervenors-Defendants "cannot protect" their interest in Proposition 14 – because they *have no legally recognized interest in Senate Bill 6*.[210] Therefore, Intervenors-Defendants have no "significantly protectable" interest in this litigation, for there is no "relationship" between their legal interests in Proposition 14 and Plaintiffs' as-applied claims against SB 6.[211]

In a last-gasp effort, CDOP and CIVP may claim that their political reputation and fundraising clout will be harmed if Plaintiffs prevail. Yet as Plaintiffs have shown, invoking a "bare political interest" will *not* entitle a litigant to intervention.[212] As one court recently held, claims regarding harm to a group's "reputation" are "*far too speculative* a basis" by which to justify intervention.[213] Thus, CDOP and CVIP's "bare political interest" will not entitle them to intervene. Consequently, no Intervenor-Defendant has any "significantly protectable" interest in this case as a matter of law.

C. Intervenors-Defendants Do Not Have Any Legally Recognized Interests That Will Be "Impeded or Impaired"

In addition, Intervenors-Defendants have failed to show that this lawsuit will "impede or impair" their interests. In *Northwest Forest*, this Court squarely held that unless a litigant could show a "significantly protectable" interest", his or her interests would not be "impeded or impaired" as a matter of law.[214] Here, Intervenors-Defendants have failed to

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6. *See* discussion *supra*.

[210] *Northwest Forest*, *supra*, 82 F.3d at 837.

[211] *See Sierra Club*, *supra*, 995 F.2d at 1484.

[212] *See City and County of San Francisco*, *supra*, 128 Cal.App.4th at 1039-40; *see also Perry*, *supra*, 628 F.3d at 1199 n.10.

[213] *City and County of San Francisco*, *supra*, 128 Cal.App.4th at 1043 (italics added); *see also Perry*, *supra*, 628 F.3d at 1199 n.10.

[214] *Northwest Forest*, *supra*, 82 F.3d at 838.

show *any* "protectable interest" in this litigation. Consequently, their interests will not be "impeded or impaired" as a matter of law.

D. Intervenors-Defendants Fail to Overcome the Presumption That the Secretary of State Can Adequately Represent Their Interests

Finally, the trial court should have barred Intervenor-Defendants from intervening, because the latter had failed to overcome the strong presumption that the Secretary of State would adequately represent their interests. The Secretary of State has a constitutional duty to enforce a state election law, unless an appellate court has declared that law unconstitutional.[215] In that vein, this Court has held that "a *presumption of adequacy* of representation arises" if a putative intervenor and an existing party have the "same ultimate objective".[216] Here, the Secretary of State and Intervenors-Defendants share the "same ultimate objective": defending the constitutionality of Senate Bill 6. Therefore, it must be "presumed" that the Secretary of State will adequately represent Intervenor-Applicants' interests.[217]

To be sure, Intervenors-Defendants will likely seek to overcome this strong presumption. However, a presumption of adequacy of representation cannot be rebutted without a "*compelling* showing to the contrary."[218] Here, Intervenors-Defendants might claim that they disagree with the manner in which Secretary of State has litigated this case. But as this Court has

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[215] CAL.CONST. art. iii §3.5(a) & (c); *see also Billig v. Voges*, 223 Cal.App.3d 962, 273 Cal.Rptr. 91, 96 (Cal.Ct. App. 1990).

[216] *Northwest Forest*, *supra*, 82 F.3d at 838 (italics added).

[217] *See id.* at 838.

[218] *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 952 (9th Cir. 2009) (italics added) (*quoting Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)).

repeatedly held, "mere differences in litigation strategy are *not enough* to justify intervention as a matter of right."[219]

In any event, the Secretary of State has vigorously fought Plaintiffs throughout this litigation, and played a pivotal role in convincing the trial court to deny Plaintiffs' Motions for Preliminary Injunction and Summary Judgment. Because she has mounted "a full and vigorous defense" of Senate Bill 6, there can be no doubt that the Secretary of State has adequately represented the interests of Intervenors-Defendants.[220] Because Intervenors-Defendants failed to rebut the presumption of adequacy, the trial court should have denied their request for intervention of right.

XIV. Conclusion

In short, I see grave risks in legislation, enacted by incumbents of the major political parties, which distinctly disadvantages minor parties or independent candidates.

-- Former Chief Justice Warren Burger, *Buckley v. Valeo*[221]

All animals are equal, but some animals are more equal than others.

-- George Orwell, *Animal Farm*

In our democracy, we entrust our elected leaders with the power to pass fair and just laws. To be sure, the lawmaking process is far from tidy (Otto von Bismarck famously compared it to sausage-making). Yet at the same time, we must constantly guard against overreaching by entrenched

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[219] *Perry*, *supra*, 587 F.3d at 954 (italics added); *see also U.S. v. City of Los Angeles*, 288 F.3d 391, 402-03 (9th Cir. 2002); *Northwest Forest*, *supra*, 82 F.3d at 838; *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997); *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999).

[220] *See Perry*, *supra*, 587 F.3d at 954.

[221] *Buckley v. Valeo*, 424 U.S. 1, 251 (1976) (Burger, C.J., concurring in part and dissenting in part) (emphases added).

political elites. As constitutional scholar John Hart Ely put it: "We cannot trust the ins to decide who stays *out*[.]"[222]

In 2009, California voters were never given the chance to vote on Senate Bill 6: an unjust law whose core parts, according to California's Secretary of State, are not "permissible". It now falls on this Court to protect not only the fundamental rights of political outsiders, but the very integrity of our State's election system.

Jan. 31, 2012

Respectfully submitted,

___s/_Gautam Dutta_____

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[222] John Hart Ely, *Democracy and Distrust* 120 (Harvard 1980) (italics added).

CERTIFICATE OF SERVICE

On Jan. 31, 2012, I electronically filed, via CM/ECF, a copy of the foregoing document 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_____

GAUTAM DUTTA

ADDENDUM: EXCERPTS OF RELEVANT LAWS

I. California Constitution art. ii §5(b) (relevant part of Proposition 14)

(b) Except as otherwise provided by Section 6, a candidate for a congressional or state elective office may have his or her political party preference, or lack of political party preference, indicated upon the ballot for the office in the manner provided by statute.

II. Elections Code §325

"Independent status" means a voter's indication of "No Party Preference" as provided in Section 2151 and Section 2154.

III. Elections Code §13105

(a) In the case of candidates for a voter-nominated office in a primary election, a general election, or a special election to fill a vacancy in the office of United States Senator, Member of the United States House of Representatives, State Senator, or Member of the Assembly, immediately to the right of and on the same line as the name of the candidate, or immediately below the name if there is not sufficient space to the right of the name, there shall be identified in eight-point roman lowercase type the name of the political party designated by the candidate pursuant to Section 8002.5. The identification shall be in substantially the following form: "My party preference is the _____ Party." If the candidate designates no political party, the phrase "No Party Preference" shall be printed instead of the party preference identification. If the candidate chooses not to have his or

her party preference listed on the ballot, the space that would be filled with a party preference designation shall be left blank.

(b) In the case of candidates for President and Vice President, the name of the party shall appear to the right of and equidistant from the pair of names of these candidates.

(c) If for a general election any candidate for President of the United States or Vice President of the United States has received the nomination of any additional party or parties, the name(s) shall be printed to the right of the name of the candidate's own party. Party names of a candidate shall be separated by commas. If a candidate has qualified for the ballot by virtue of an independent nomination, the word “Independent” shall be printed instead of the name of a political party in accordance with the above rules.

IV. Elections Code §8606

A person whose name has been written on the ballot as a write-in candidate at the general election for a voter-nominated office shall not be counted.

STATEMENT OF RELATED CASES

One related case is currently pending before this Court: *Michael Chamness v. Debra Bowen (Galacki)* (Case No. 11-56303). Another related case is currently pending before the California Superior Court, San Francisco County: *Mona Field v. Debra Bowen* (Case No. CGC 10-502018).

s/_Gautam Dutta_____

GAUTAM DUTTA

FRAP 32(a)(7)(B)(iii) CERTIFICATE OF COMPLIANCE

I certify that the foregoing document contains 12,443 words.

s/_Gautam Dutta_____

GAUTAM DUTTA