No. 11-70882

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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In re MICHAEL CHAMNESS,

Plaintiff-Petitioner,

-v.-

U.S. DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

-and-

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-Real Parties in Interest

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

Intervenors-Real Parties in Interest

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*ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA*

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# EMERGENCY PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. §1651

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## CIRCUIT RULE 27-3 CERTIFICATE

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2. Facts Showing the Existence and Nature of the Emergency

Unless this Court takes action by tomorrow (March 29, 2011), Petitioner Michael Chamness' fundamental right to run for office will be

irreparably harmed. On Wednesday (March 30, 2011), vote-by-mail ballots for the May 17, 2011 election in Congressional District 36 will start being printed. Unless this Petition is granted, Petitioner Chamness will be unlawfully banned from using the ballot label of "Independent", and will instead be forced to use the ballot label of "No Party Preference". In stark contrast, major-party candidates in this election – including Secretary of State Debra Bowen, a Real Party in Interest in this case – *will be allowed to list their party's name* on the ballot.

On Saturday (Apr. 2, 2011), the first batch of Ballots must be mailed to military and overseas voters, who constitute *0.75 percent* of the registered voters in Congressional District 36. The remaining – and larger – batch of vote-by-mail Ballots must be made available to <u>all</u> vote-by-mail voters (i.e., not just military and overseas voters) *three weeks later*, on April 23, 2011.

Although it has been apprised of Petitioner's plight, the District Court has not yet ruled on his Motion for Preliminary Injunction – which was filed on February 18, 2011 and heard on March 21, 2011. Because he will suffer irreparable harm as soon as the Ballots have been mailed, Petitioner urges the Court to <u>immediately</u> enjoin Real Party in Interest Dean Logan from printing and mailing the Congressional ballots. In this manner, the Court will maintain the status quo while it considers this Petition.

3. When and How Counsel Notified

I notified counsel for Real Party in Interest Dean Logan by two telephone calls to Patrice Salseda's and Brandi Moore's offices on March 25, 2011, at approximately 4:39 pm and 4:47 pm. During the first call, I spoke with Ms. Salseda's assistant, and told her that my client would likely seek emergency relief from the Ninth Circuit today. A few minutes later, at 4:47 pm, Ms. Moore's assistant Hazel Bataclan called me. I told her that my client would likely seek emergency relief from the Ninth Circuit on March 28, 2011. Ms. Bataclan stated that she would promptly notify Ms. Moore. The next day (March 26, 2011), I received an email (attached as Exhibit 1 to the Mar. 26, 2011 Declaration of Gautam Dutta) from Ms. Moore. In her email, Ms. Moore confirmed that she had received my messages, and asked me to keep her updated.

I notified counsel for Real Party in Interest Debra Bowen by two telephone calls to George Waters on March 25, 2011, at approximately 4:41 pm and 4:57 pm. During the first call, Mr. Waters did not answer. Consequently, I left a voicemail asking him to call me back on my cell phone (415.236.2048) regarding an urgent matter. Shortly thereafter, I called Mr. Waters again. When he did not answer, I left a voicemail in which I stated that my client would likely seek emergency relief from the

Ninth Circuit today. This morning, Mr. Waters called me at approximately 8:32 am and confirmed that he had received my messages.

I notified counsel for Intervenors - Real Parties in Interest by a telephone call to Marguerite Leoni and Chris Skinnell on March 25, 2011, at approximately 4:49 pm. During our conversation, I told them that my client would likely seek emergency relief from the Ninth Circuit today.

I have served an electronic copy of this Petition via email, and to the District Court via FedEx overnight.

4. Submission to the District Court

Petitioner Chamness has already asked the District Court for the full relief sought by this Petition, but the District Court has not yet ruled on his request. On February 18, 2011, Petitioner filed his Motion for Preliminary Injunction (the "PI Motion"). Like this Petition, the PI Motion asked the District Court to block Real Parties in Interest Dean Logan and Debra Bowen from implementing California's new election rules for the looming election in Congressional District 36. The District Court heard oral argument on the PI Motion on March 21, 2011.

On March 23, 2011, Petitioner Chamness notified the trial court that the ballots at issue were scheduled to be printed *seven days later*, on March

30, 2011.[1] However, as of this afternoon, the District Court had not ruled on the PI Motion – forcing Petitioner to rush to this Court.

Dated: Mar. 28, 2011

GAUTAM DUTTA

[1] ER 105 ¶7.

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

-- Chief Justice Roberts, former Chief Justice Rehnquist, and Justice Alito[2]

*All animals are created equal. But some animals are more equal than others.*

-- George Orwell, *Animal Farm*

## I. Introduction and Relief Sought

Unless this Court takes action by tomorrow (March 29, 2011), Coffee Party candidate Michael Chamness' fundamental right to run for office will be irreparably harmed. On Wednesday (March 30, 2011), vote-by-mail ballots (the "Ballots") for the special election to replace former Congressmember Jane Harman will start being printed.[3] If this Petition is not granted, Petitioner Chamness will be unlawfully banned from using the ballot label of "Independent" and will instead be forced to use the Ballot label of "No Party Preference".[4] In stark contrast, major-party candidates in

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2 *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 460 (2008) (Roberts & Alito, JJ., concurring) (*quoting Cook v. Gralike*, 531 U.S. 510, 532 (2001) (Rehnquist, C.J., concurring)).

3 ER 105 ¶7.

4 The Secretary of State will release the certified list of candidates for Congressional District 36 this Wednesday (Mar. 30, 2011). ER 101.

this election – including Secretary of State Debra Bowen, a Real Party in Interest in this case – *will be allowed to list their party's name* on the ballot.

This Saturday (Apr. 2, 2011), the first batch of Ballots must be mailed to military and overseas voters, who constitute *0.75 percent* of the registered voters in Congressional District 36.[5] The remaining – and larger – batch of Ballots must be made available to all vote-by-mail voters (i.e., not just overseas and military voters) *three weeks later*, on April 23, 2011.[6]

Two years ago, the Legislature stealthily passed Senate Bill 6, an invidious law that even Secretary of State Debra Bowen has conceded is not "permissible". In a radical departure, Senate Bill 6 ("SB 6") allows major-party candidates to list their party's name on the ballot, but forces minor-party candidates to use the ballot label of "No Party Preference". By banning minor-party candidates from using the party label of "Independent", SB 6 not only disregarded an unanimous Supreme Court ruling, but flouted critical precedent from this Court.

Unless he secures relief by tomorrow, Petitioner's fundamental rights will be irreparably harmed. Although it was promptly apprised of the imminent ballot-printing deadline, the District Court has not yet ruled on

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5 ER 101; Mar. 26, 2011 Declaration of Gautam Dutta ¶3.

6 Apr. 23, 2011 is the first day on which every voter (not just military and overseas voters) may cast vote-by-mail ballots. ER 101.

Petitioner's Motion for Preliminary Injunction – which was filed on February 18, 2011 and heard on March 21, 2011.[7] Because he will suffer irreparable harm *as soon as the Ballots have been mailed*, Petitioner urges the Court to immediately enjoin Real Party in Interest Dean Logan from printing and mailing them to military and overseas voters. In this manner, the Court will preserve the status quo until the Court has considered this Petition. Furthermore, Petitioner requests that a preliminary injunction be swiftly issued against SB 6.[8]

## II. Issues Presented

A. Whether a Legislature-passed state statute, as applied, stifles core political speech under *Rubin v. City of Santa Monica* and *Rosen v. Brown*,[9] by banning minor-party[10] candidates from using the ballot label of "Independent".

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7 ER 28, 25, 105.

8 Should the Court desire further briefing with respect to his request for preliminary injunction, Petitioner Chamness respectfully requests a ruling by April 15, 2011. In this manner, Real Party in Interest Dean Logan would have sufficient time to prepare and print the Congressional Ballots in advance of Apr. 23, 2011, the first day on which every voter (not just military and overseas voters) may cast vote-by-mail ballots. ER 101.

9 *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002) (*citing with approval Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992)).

10 As defined below, a "minor-party" candidate is not affiliated with a "major", or state-recognized, party (e.g., the Republican Party or the Democratic Party).

B. Whether a Legislature-passed state statute that has already been applied violates the U.S. Constitution's Elections Clause[11] under *Cook v. Gralike*;[12] because it forces minor-party federal candidates to use the ballot label of "No Party Preference", while allowing their major-party competitors to list their party's name on the ballot.

C. Whether a preliminary injunction should be granted, where a Legislature-passed state statute that has already been applied threatens to irreparably harm a minor-party candidate's fundamental rights under the First Amendment, Fourteenth Amendment, and the Elections Clause.[13]

## III. Statement: Legal Background

### A. Party Labels under the Former "Qualified Party" Election System

Had the election to replace Rep. Harman been held before January 1, 2011, Petitioner Chamness *could have stated on the ballot that he is "Independent"*. Currently, 24 states allow minor-party candidates to state

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11 U.S. CONST. art. i §4 cl.1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.").

12 *Gralike*, *supra*, *531* U.S. 510 .

13 *See Rosen, supra*, 970 F.2d 169 (core political speech protected by the First and Fourteenth Amendments); *Rubin v. City of Santa Monica*, *supra*, 308 F.3d at 1015 (agreeing with *Rosen*'s analysis of core political speech); *Gralike*, *supra*, 531 U.S. 510 (Elections Clause bans the State from discriminating against candidates on the basis of their political viewpoints).

their party's name on the ballot.[14] Under the former "qualified party" election system, political parties were classified into two categories: qualified ("major" or state-recognized) parties and non-qualified ("minor" or non-state-recognized) parties. Only qualified parties were entitled to hold party primaries.[15]

Every even-numbered year, voters had at least two chances to vote for state and federal candidates: (1) the qualified-party primary election, where candidates from each qualified party would vie for their party's nomination;[16] and (2) the November general election, where the nominees (top votegetters) from each qualified party would all face off against (a) minor-party candidates like Petitioner Chamness, and (b) write-in candidates.

In special elections, voters had up to two chances to vote: (1) the "all party" primary election, where all candidates squared off regardless of party. If a candidate won a majority (50 percent plus 1), he or she would

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[14] ER 3:15-3:16 & n.2. Between 1891 and 1915, California law permitted minor-party candidates to state their party's name on the ballot. In 1912, a minor-party candidate (William Kent of the Progressive Party) was elected by California's 1st Congressional District. *Id.*

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

[16] Since 2001, unaffiliated voters (i.e., those who "decline to state" a party preference) have been allowed to vote in every Democratic and Republican primary for state and federal office (excluding Presidential primaries). *See* Elections Code §13102(b) (giving qualified parties the option of allowing "decline to state" voters to vote in their primaries).

win outright. Otherwise, the top votegetter from each qualified party would advance to the general election, where they would all square off against minor-party candidates and write-in candidates.

Under the "qualified party" election system, qualified-party candidates could state their party's name on the ballot. In addition, all minor-party candidates – who are deemed by the California Supreme Court to have "independent" (i.e., minor-party) status[17] – could state on the ballot that they were "Independent".[18] Thus, if Mr. Chamness had run in a special election under the "qualified party" election system, he could have stated on the ballot that he is "Independent".

B. Budgetary Cause, Electoral Effect

Two years ago, then-State Senator Abel Maldonado cast the deciding vote to pass the state budget.[19] In exchange for his vote, Maldonado demanded a ballot measure that would eliminate the qualified-party election system.[20] The Legislature obliged by (1) putting Proposition 14 on the June 8, 2010 ballot, and (2) passing SB 6, which implemented the

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17 *Eu. supra*, 620 P.2d 612, 28 Cal.3d at 540 (defining "independent" candidates as those who "are independent of qualified political parties") (emphasis added).

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

19 ER 125:17-125:18.

20 ER 125:18-125:19.

provisions of Proposition 14.[21] Both SB 6 and Proposition 14 were authored by Maldonado.[22]

Between 3:40 am and 6:55 am on February 19, 2009, the Legislature passed SB 6, without holding a single hearing or giving the public any notice.[23] Simultaneously, the Legislature voted to put Proposition 14 on the June 8, 2010 ballot.[24] Subsequently, the Secretary of State's June 8, 2010 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.[25] On June 8, 2010, a narrow majority of voters approved Proposition 14.[26]

C. SB 6 and Proposition 14's "Top Two" Primary

On January 1, 2011, SB 6 and Proposition 14 abolished the "qualified party" election system, and spawned an untested process for electing our federal and state officials. Under SB 6's new rules, all candidates, irrespective of their party identification, square off against one another in a

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21 ER 125:19-125:21.

22 ER 125:21-125:22.

23 ER 126:1-126:2

24 ER 126:3-126:4

25 ER 126:4-126:6.

26 ER 126:6-126:7.

primary (first-round) election. Except for special elections,[27] the top two votegetters from the primary election will automatically advance to the general (runoff) election – even if one candidate has received a majority of the vote.

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*[.]"[28] Specifically, SB 6 will not only force counties to spend "*millions of dollars* statewide in ballot production and postage costs", but could force them to spend millions more in new voting equipment.[29]

D. Party 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."[30] However, that "statute" – SB 6 – fails to give minor-party candidates the right to state their "political party preference".

To be sure, SB 6 allows candidates who claim to identify with a qualified party (e.g., Democratic or Republican) to state their party's name

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27 In special elections, if a candidate receives a majority in the "all-party" primary election, he or she will win the election outright, and no general election will be held. Elections Code §10705(a).

28 ER 230 (emphases added).

29 ER 230 (emphases added).

30 CAL.CONST. art. ii §5 (b) (emphasis added).

on the ballot. However, if a candidate identifies with a minor party, (SB 6-amended) Elections Code §325 forces him or her to use the party label of "No Party Preference" (hereinafter, the "Party Preference Ban").[31] Because Petitioner Chamness identifies with a minor party (the Coffee Party), SB 6 forces him to falsely state on the ballot that he has "No Party Preference".

E. Petitioner Chamness' As-Applied Claim (Senate District 28 Special Election)

As a result, Petitioner Chamness suffered irreparable harm in the recent special primary election for Senate District 28 (the Feb. 15, 2011 "SD 28 Election"). Earlier this year, Petitioner Chamness qualified for and appeared on the SD 28 Primary ballot.[32] On January 5, 2011, the Secretary of State published a List of Certified Candidates for the SD 28 Primary; that list falsely stated that Petitioner Chamness had "No Party Preference".[33] Subsequently, Registrar Logan published vote-by-mail and election-day

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31 Only registered voters can run for state and federal office. In *Libertarian Party v. Eu*, the California Supreme Court defined an "independent" candidate as a non-qualified (minor-party) candidate. *Eu. supra*, 620 P.2d 612, 28 Cal.3d at 540.

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).

32 ER 146 ¶11.

33 ER 129:1-129:3.

ballots that falsely stated that Petitioner Chamness had "No Party Preference".[34] By forcing Petitioner Chamness to falsely state that he had "No Party Preference", Real Parties in Interest Bowen and Logan *inflicted irreparable harm* on his fundamental rights between January 21, 2011 (the first day voters could cast vote-by-mail ballots) and February 15, 2011 (the day of the SD 28 Primary).[35]

F. Petitioner Chamness' Threatened Harm (Special Election in Congressional District 36

Petitioner Chamness faces imminent, irreparable harm in the looming Congressional election *within 48 hours*. As shown earlier, SB 6 will unlawfully ban Petitioner Chamness from using the ballot label of "Independent", and instead force him to use the ballot label of "No Party Preference". On Wednesday (Mar. 30, 2011), vote-by-mail Ballots for overseas and military voters will start being printed:[36] the Ballots will falsely state that Petitioner Chamness has "No Party Preference". On Saturday (Apr. 2, 2011), the Ballots will be mailed to overseas and military voters. As soon as the first Ballot is deposited in the mail, Petitioner Chamness *will suffer irreparable harm*.

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34 ER 107.

35 ER 146 ¶12.

36 ER 105 ¶7.

## IV. Statement: Undisputed Facts

### A. The 36th District Special Congressional Election

Although the special election for Congressional District 36 (the "Election") has been scheduled for May 17, 2011, the Election will effectively begin this Wednesday (Mar. 30, 2011) – when vote-by-mail ballots for overseas and military voters will start being printed.[37] According to Los Angeles Registrar Dean Logan, overseas and military voters constitute 0.75 percent of the registered voters in Congressional District 36.[38] On Saturday (Apr. 2, 2011), the vote-by-mail ballots are scheduled to be mailed.[39] Significantly, the remaining – and larger – batch of ballots must be made available to all vote-by-mail voters (i.e., not just overseas and military voters) *three weeks later*, on April 23, 2011.[40]

### B. Core Facts About SB 6 and Proposition 14

Equally important, four undisputed facts about SB 6 and Proposition 14 have already emerged from this litigation:

1. SB 6 was stealthily passed by the Legislature in the middle of the night, without any public debate or

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37 ER 105 ¶7.

38 Mar. 26, 2011 Declaration of Gautam Dutta ¶3.

39 ER 105 ¶7; ER 101 ¶17. The Military and Overseas Voter Empowerment Act ("MOVE Act") requires that vote-by-mail ballots be mailed to military and overseas voters within 45 days of a federal election. MOVE Act, 42 U.S.C. §1973ff.

40 Apr. 23, 2011 is the first day on which every voter (not just military and overseas voters) may cast vote-by-mail ballots. ER 101.

discussion.[41]

2. Last summer, Secretary Bowen's own staff publicly stated that it is not "permissible" to force candidates to state on the ballot that they have "No Party Preference".[42]

3. Proposition 14 did not confer any new rights on politically independent voters. In fact, unaffiliated voters have been allowed to vote in Democratic and Republican primaries *for the past decade*.[43]

4. For over a century, minor-party candidates like Coffee Party member Michael Chamness were allowed to use the ballot label of "Independent". But SB 6 now forces them to use the ballot label of "No Party Preference" – while allowing candidates like Secretary Debra Bowen to list their major party's name on the ballot.[44]

These compelling facts strongly support granting a preliminary injunction to Petitioner Chamness.

## V. Procedural History

Although he has already sought relief from three different courts, not one tribunal – including the California Supreme Court and the California Court of Appeal – has ruled on the merits of his case to date. Last November, SB 6 was poised to be implemented in three special elections:

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41 ER 126:1-126:2.

42 ER 132:7-133:2.

43 Between 2001 and 2010, unaffiliated ("decline to state") voters were allowed to vote in every Democratic or Republican primary for state and federal (non-Presidential) office. ER 124:22 n.4; CAL.CONST. art. ii §5 (c).

44 Between 1891 and 2010, candidates were allowed to use the ballot label of "Independent". ER 152:2-152:4. Just as one example, Cecilia Iglesias ran as an Independent candidate in the 47th Congressional District on Nov. 2, 2010. ER 108.

in Senate District 28, Senate District 17, and Assembly District 4.[45] Petitioner Chamness sought to run for the vacancy in Senate District 28, as a candidate affiliated with the Coffee Party.[46]

To prevent SB 6 from branding him with the ballot label of "No Party Preference", Petitioner Chamness sought to intervene in a mandamus proceeding before the California Supreme Court.[47] In that proceeding – in which both Secretary Bowen and Registrar Logan were Real Parties in Interest – six plaintiffs ("State Court Plaintiffs") sought to enjoin SB 6 from being implemented. While Registrar Logan (who administered the SD 28 Election) took no position regarding Petitioner Chamness' request to intervene, the Secretary of State *vigorously opposed it.*[48] On December 15, 2010, the California Supreme Court denied both Mr. Chamness' request to intervene and the underlying mandamus petition.[49]

Seeking to vindicate his fundamental rights as a candidate, Petitioner Chamness first sought to bring his as-applied challenge to the California Court of Appeal (First District).[50] Toward this end, he asked the Court of

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45 ER 128:8-128:10.

46 ER 145 ¶8.

47 ER 145 ¶9.

48 ER 145 ¶9.

49 ER 146 ¶10.

50 ER 146 ¶13.

Appeal for permission to intervene in a pending proceeding that had been brought by State Court Plaintiffs against Secretary Bowen and Registrar Logan.[51] Again, Registrar Logan (who administered the SD 28 Election and will administer the CD 36 Election) took no position with respect to Petitioner Chamness' request to intervene, while Secretary Bowen opposed his request.[52] On January 31, 2011, the Court of Appeal denied Petitioner Chamness' request to intervene.[53]

Petitioner Chamness filed his Motion for Preliminary Injunction with the District Court on February 18, 2011.[54] On March 1, 2011, Abel Maldonado, California Independent Voter Project, and Californians to Defend the Open Primary ("Intervenors") filed an ex parte Application to Intervene; Petitioner Chamness filed an opposition on the same day.[55] Subsequently, Intervenors lodged an opposition brief on March 4, 2011, the date on which opposition briefs were due.[56] On the evening of March 7,

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51 ER 146 ¶13.

52 ER 146 ¶13.

53 ER 146 ¶14.

54 ER 28 ¶4.

55 ER 29.

56 ER 30.

2011 – four days before Petitioner Chamness' reply brief was due – the District Court granted the Application to Intervene.[57]

On March 21, 2011, the District Court heard oral argument on Petitioner Chamness' Motion for Preliminary Injunction. During the hearing, the Court stated that Petitioner Chamness' had not shown any violation of his rights:

> [Y]ou haven't demonstrated that your client's First Amendment rights have been burdened *because he is able to articulate his position* on issues of the day, communicate those points of view to the voters *by way of the voter information package or pamphlet* that goes along with the materials that each of the voters sees.[58]

Although this matter was fully briefed over two weeks ago, the District Court had not ruled on this urgent matter as of this morning (March 28, 2011).

## VI. Standard of Review

This Court considers five *Bauman* factors in deciding whether to grant a writ of mandamus:

1. Whether the party seeking the writ has no other means, such as a direct appeal, of securing the desired relief

2. Whether the petitioner will be harmed in a way not correctable on appeal

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[57] ER 31 ¶43. Should it prove necessary, Petitioner Chamness reserves the right to appeal the granting of the Application to Intervene at a later time.

[58] ER 18-19 (emphases added).

3. Whether the district court's order is clearly erroneous as a matter of law

4. Whether the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules

5. Whether the order raises new and important problems, or issues of law of first impression.[59]

Significantly, the *Bauman* factors should not be "mechanically applied", especially since not every factor will be relevant to every case.[60]

## VII. Reasons for Granting the Writ

### A. This Petition Satisfies the *Bauman* Test

The Court should immediately grant this Petition, because Petitioner Chamness has compellingly met the first, second, third, and fifth *Bauman* factors. First, if he does not immediately secure a writ of mandamus, Petitioner Chamness will be harmed in a way "not correctable on appeal" (Factor 2). Namely, overseas and military ballots stating that he has "No Party Preference" will start being printed *this Wednesday* (Mar. 30, 2011) – and will inflict irreparable harm on Petitioner Chamness the moment they are deposited in the mail. Thus, because Petitioner's underlying Motion for

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59 *Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977); *see also Cole v. U.S. Dist. Court*, 366 F.3d 813, 816-17 (9th Cir. 2004).

60 *Cole*, *supra*, 366 F.3d at 817 & n.3 (*citing Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989); *In re Canter*, 299 F.3d 1150, 1153 (9th Cir. 2002); *Unified Sewerage Agency v. Jelco*, 646 F.2d 1339, 1344 (9th Cir. 1981)).

Preliminary Injunction will become moot in a matter of hours, the Court must decide the merits of his Motion.[61]

Second, Petitioner Chamness has no other means of securing the desired relief (Factor 1). Indeed, because the trial court has not ruled on his Motion for Preliminary Injunction, there currently is no order from which to appeal. Furthermore, because the trial court's inaction can be treated as a *de facto* order denying Petitioner's Motion,[62] the trial court's "order" raises a novel issue of first impression (Factor 5). Namely, does SB 6 – which supplies the building blocks for California's new election regime – hinder core political speech or violate the U.S. Constitution's Elections Clause?

Finally, the trial court's *de facto* denial of Petitioner's Motion for Preliminary Injunction was "clearly erroneous as a matter of law" (Factor 3), for the trial court *did not apply the proper legal standard* when examining

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61 *See Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 847 F.2d 1389, 1391 (9th Cir. 1988) (*quoting Matsumoto v. Pua*, 775 F.2d 1393, 1395 (9th Cir. 1985)).

62 Although he views the trial court's inaction as an *de facto* denial of his Motion for Preliminary Injunction, Petitioner Chamness has styled this matter as a writ of mandamus out of an abundance of caution. To be sure, "when a court declines to make a formal ruling on a motion for preliminary injunction, its refusal to issue a separate order will be treated as equivalent to the denial of a preliminary injunction and will be appealable." *Rolo v. General Development Corp.*, 949 F.2d 695, 703 (9th Cir. 1991) (*citing* 11 C. Wright and A. Miller Federal Practice and Procedure §2962 at 614 (1973)). *See also U.S. v. Lynd*, 301 F.2d 818, 822 (5th Cir. 1962) (trial court's failure to issue a timely ruling on motion on the merits for preliminary injunction held to be an order denying that motion) (*cited by Rolo, supra*, 949 F.2d at 703); *McCoy v. Louisiana Bd. of Education*, 332 F.2d 915, 917 (5th Cir. 1964) (same); *Cedar Coal Co. v. United Mine Workers*, 560 F.2d 1153, 1161 (4th Cir. 1977) ("indefinite continuance" of hearing on motion for preliminary injunction "amounted to the refusing of an injunction and is appealable as such under 28 U.S.C. §1292(a).").

Petitioner's Motion for Preliminary Injunction on the merits. By showing the trial court's clear legal errors, the remainder of this brief will prove that Petitioner Chamness is immediately entitled to a preliminary injunction against SB 6.

B. The Trial Court Erred When It Concluded That Petitioner Had No Constitutional Right to the Ballot Label of "Independent"

*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[.]*

-- Sixth Circuit, *Rosen v. Brown*[63]

At the outset, the trial court erred when it concluded that Petitioner Chamness did not have a constitutional right to the ballot label of "Independent", because he could share his political positions with the voters by publishing a candidate statement in the official voter guide:

> [Y]ou haven't demonstrated that your client's First Amendment rights have been burdened *because he is able to articulate his position* on issues of the day, communicate those points of view to the voters *by way of the voter information package or pamphlet* that goes along with the materials that each of the voters sees.[64]

In so doing, the trial court disregarded critical precedent to the contrary.

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63 *Rosen, supra*, 970 F.2d at 175 (emphases added) (*citing Riddell v. Nat'l Democratic Party*, 508 F.2d 770, 775-79 (5th Cir. 1975).

64 ER 18-19 (emphases added).

In *Rubin v. City of Santa Monica*, this Court signaled its agreement with seminal Sixth Circuit case of *Rosen v. Brown*, which held that "prohibiting the designation 'Independent' [is] unconstitutional where the regulations allowed for other political party designations."[65] The Sixth Circuit thus held that a State's regulatory interest "may not extend to the effective exclusion of Independent and new party candidacies."[66] Citing *Rosen* with approval, this Court made it clear that state election laws must be struck down if they "impair access to the ballot, stifle *core political speech*, or dictate electoral outcomes."[67]

When examining ballot labels, this Court has made two principles clear. First, ballot labels "affect[] core political speech", because they "provide a *shorthand designation of the views of* party *candidates* on matters of public concern."[68] Furthermore, this Court has signaled its agreement with the Sixth Circuit that banning the ballot label of "Independent" would unconstitutionally stifle "core political speech":

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65 *Rubin*, *supra*, 308 F.3d at 1015 (emphasis added) (*citing Rosen*, *supra*, 970 F.2d 169). Because he has a right to the "Independent" ballot label *as a matter of law*, Petitioner Chamness need not produce any evidence (apart from the ballot used in the special election for Senate District 28) to prevail. *Rubin*, *supra*, 308 F.3d at 1015.

66 *Rosen*, *supra*, 970 F.2d at 177 (emphasis added).

67 *Rubin*, *supra*, 308 F.3d at 1015 (emphases added) (*citing Gralike*, *supra*, 531 U.S. at 514-15).

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

> [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."[69]

Significantly, both the Massachusetts and Minnesota Supreme Courts have also held that it is unconstitutional to ban the ballot label of "Independent".[70] In *Bachrach*, a state law banned minor-party candidates from stating that they were "Independent". 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 Massachusetts High Court ruled that it was unconstitutional to ban minor-party 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*[.][71]

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69 *Rubin*, *supra*, 308 F.3d at 1015 (emphases added) (*citing Rosen*, *supra*, 970 F.2d 169) (state law banning the ballot label "Independent" violated the First and Fourteenth Amendments). Because this Court has signaled its agreement with the Sixth Circuit's holding in *Rosen*, this Court (in *Rubin*) had no need to re-apply the U.S. Supreme Court's "severe burden" balancing test with respect the right to use the ballot label of "Independent". *Rubin*, *supra*, 308 F.3d at 1014-15. Likewise, Petitioner Chamness need not re-apply the "severe burden" test with respect to his fundamental right to use the ballot label of "Independent".

70 *Bachrach*, 415 N.E.2d at 833; *Shaw*, 247 N.W.2d at 923.

71 *Bachrach*, 415 N.E.2d 832, 836 (emphases added); *see also Shaw*, 247 N.W.2d at 923.

Accordingly, the trial court erred when it concluded that there is no constitutional right to use the ballot label of "Independent".[72]

C. The Trial Court Erred When It Disregarded Secretary Bowen's Binding Admission of Liability

Furthermore, the trial court erred when it disregarded the Secretary Bowen's binding admission of liability. Last summer, in an email to the Office of the Lieutenant Governor, her office stated that (SB 6-amended) Elections Code §325 is not "permissible", because it *bans minor-party candidates from using the ballot label of "Independent"*. According to a public statement made by Secretary Bowen's own staff, SB 6's Party Preference Ban

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[72] Moreover, publishing a candidate statement can be prohibitively expensive. Just as one example, it would have cost Petitioner Chamness *between $15,600 and $62,400* to publish a candidate statement in the official voter guide for his previous election (in Senate District 28). ER 164-66.

In her papers, Secretary Bowen disingenuously argues that the ballot label of "Independent" would somehow "confuse" voters and "undermine" the political advantages enjoyed by the major parties. Yet by that logic, voters have been "confused" and the major parties have been "undermined" for over a century: it is undisputed that California candidates had been able to use the "Independent" ballot label *between 1891 and 2010*. ER 154 n.12. As Petitioner's counsel noted during oral argument, Quentin Kopp was elected to the California State Senate in 1986, 1990, and 1994 as an Independent candidate, and Lucy Killea was elected to the California Senate in 1992 as an Independent candidate. ER 5.

Moreover, the Minnesota Supreme Court has expressly ruled that the "Independent" ballot label "fosters no confusion" *as a matter of law* – even though Minnesota had an "Independent-Republican" Party at the time of its decision. *Shaw*, *supra*, 247 N.W. 2d at 923. ). Finally, Secretary Bowen disingenuously claims that the terms "Independent" and "No Party Preference" are identical as a matter of law. However, the Massachusetts Supreme Court has expressly rejected precisely such an argument. In *Bachrach v. Commonwealth*, the Massachusetts High Court held that it was unconstitutional to force candidates to use a ballot label of "Unenrolled" – a term identical in meaning to "No Party Preference". *Bachrach*, *supra*, 415 N.E.2d at 836.

> 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***."[73]

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[74] that SB 6's Party Preference Ban stifles core political speech under *Rosen* and *Rubin*.

In response, the trial court refused to consider Secretary Bowen's admission: "You give greater weight to the opinions of elected officials than the Court does."[75] Thus, the trial court disregarded a critical admission of liability without giving any legal justification. Because Secretary Bowen has admitted that SB 6's Party Preference Ban is not "permissible", the

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[73] ER 114 (emphases added).

[74] Party admissions are admissible under the exception to the hearsay rule. Federal Rule 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 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).

[75] ER 24.

Court must hold that SB 6's Party Preference Ban violates the First and Fourteenth Amendments under *Rosen*, *Rubin*, *Bachrach*, and *Shaw*.[76]

D. The Trial Court Erred in Implicitly Rejecting Petitioner Chamness' As-Applied Claim

By rejecting Petitioner Chamness' right to a ballot label of "Independent", the trial court implicitly rejected his as-applied[77] claim. Namely, Secretary Bowen and Registrar Logan unlawfully banned Petitioner Chamness from using the ballot label of "Independent" in the Feb. 15, 2011 special election for Senate District 28.[78] While minor-party candidate Chamness was foisted with the ballot label of "No Party Preference", his major-party competitors were allowed to use the ballot labels of "Democrat" and "Republican".[79] As the Ninth Circuit signaled in *Rubin*, that exact practice "hinder[s] core political speech".[80] Therefore, it is beyond dispute that SB 6's Party Preference Ban is unconstitutional as applied, for it

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76 *See supra* notes 69 and 70.

77 "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) (emphasis added) (*citing Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 802-03 (1984)).

78 ER 130:9-130:16 & nn. 37-38 (showing that Secretary Bowen and Registrar Logan applied SB 6-amended Elections Code §§325, 8002.5, & 13105(a) on Petitioner Chamness).

79 ER 107.

80 *Rubin*, *supra*, 308 F.3d at 1015.

inflicted irreparable harm on Petitioner Chamness' fundamental rights in SD 28 Election.

E. The Trial Court Erred in Implicitly Rejecting Petitioner Chamness' Elections Clause Claim

> *[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[81]

Equally important, the trial court also erred when it implicitly rejected Petitioner Chamness' Elections Clause claim. In a nutshell, SB 6 violates the Elections Clause, because its Party Preference Ban singles out and discriminates against Petitioner Chamness and other minor-party candidates for federal office. Earlier, in *Anderson v. Martin*, the High Court invoked the Elections Clause to strike down a state statute that forced candidates to list their race on the ballot, because it held that such a statute aimed to politically harm African American candidates.[82]

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81 Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001 Sup.Ct.Rev. 299, 336 n.112 (emphases added), *citing, inter alia, McLain v. Meier, 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 election officials' practice of giving their own political party the top position on the ballot).

82 *Anderson v. Martin*, 375 U.S. 399, 402 (1964).

As the U.S. Supreme Court recently (and unanimously) ruled 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".[83] 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."[84]

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":[85]

> [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 –

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83 *Gralike*, *supra*, 531 U.S. at 523 (*quoting U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995); *see also* U.S. CONST. art. i §4 cl. 1 (Elections Clause). The High Court encourages plaintiffs to bring facial claims under the Elections Clause. *Gralike*, *supra*, 531 U.S. at 517 n.8 (permitting a candidate to intervene while an appeal was pending in order to preserve the original plaintiff's facial Elections Clause claim).

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

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

> perhaps paramount consideration in the citizen's choice, which *may decisively influence the citizen* to cast his ballot" against candidates branded as unfaithful.[86]

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*[.]"[87]

SB 6's Party Preference Ban must be struck down for the same reasons stated in *Gralike*. As Secretary Bowen admits, SB 6 grants a party label to candidates (like herself) who identify with the viewpoints of a major party, while forcing candidates (like Petitioner Chamness) who identify with the viewpoints of a minor party to falsely state that they have "No Party Preference".

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.[88] Furthermore, because it places disfavored candidates at a political disadvantage, SB 6 also aims to "dictate electoral outcomes". Therefore, it is beyond question that SB 6 violates the Elections Clause.[89]

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

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

88 *Id.* at 523-25.

89 *Id.* at 525.

F. The Court Erred By Implicitly Treating SB 6 as a Voter-Passed Measure

*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[90]

In addition, the trial court erred when it implicitly treated SB 6 as a voter-passed measure.[91] Yet unlike Proposition 14, SB 6 was not passed by the voters. Simply put, SB 6 deserves no heightened deference from this or any Court, because it was not passed by the voters. In fact, as the author of both SB 6 and Proposition 14, then-Senator Maldonado could have put both SB 6 and Proposition 14 on the ballot, but he *deliberately chose not to do so.* Why did Intervenor Maldonado dodge the voters when it came to SB 6, a Legislature-passed statute that *fleshes out* critical details of Proposition 14's new election rules?

In any event, Petitioner Chamness is not challenging the constitutionality of Proposition 14. Rather, he is challenging the constitutionality of SB 6, an unjust law rammed through the Legislature

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90 *Doe v. Reed*, 561 U.S. __, No. 09-559, concurring op., Stevens & Breyer, JJ., at 3 n.3 (June 24, 2010) (emphases added).

91 ER 16-17.

without any public hearing or debate. In this manner, SB 6 evaded "the normal scrutiny that comes from extensive committee reviews and repeated readings in both houses of the Legislature in the course of normal bill passage."[92]

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*[.]"[93]

Needless to say, SB 6 would receive absolutely no deference under the Justices' standard. Indeed, SB 6 was passed by the Legislature:

> (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;
>
> (2) For "discriminatory purposes". As Petitioner's analysis of the Elections Clause shows, SB 6 was designed to inflict political harm on minor-party candidates; and
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> (3) To "entrench political majorities". As Petitioner's analysis of the Elections Clause also shows, SB 6 brazenly favors candidates from major parties over those from minor parties.

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92 ER 133 n.49.

93 *Doe v. Reed*, *supra*, 561 U.S. --, No. 09-559, concurring op., Stevens & Breyer, JJ., at 3 n.3 (citations omitted, emphases added).

Consequently, the Court owes no deference whatsoever to SB 6 – and must strike it down if it fails to pass constitutional muster.

G. The Trial Court Did Not Dispute That Party Preference Ban Is Not Severable

Significantly, the trial court did not dispute that 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. To be severable, the unlawful part of a statute must be functionally, grammatically, and volitionally separable.[94]

To be sure, the Secretary of State may argue that the Party Preference Ban is severable, because SB 6 has a severability clause. However, the California Supreme Court has repeatedly held that severability clauses are not conclusive – particularly when the unlawful part of a statute is not "volitionally" separable. 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

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

that statute without its unlawful part, then that part would be "volitionally" separable, and the statute's remaining parts could be saved.[95]

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*.[96] Specifically, Subsection V(b) of Proposition 14 called for a "statute" to implement the "manner" in which candidates could state their party preference on the ballot.[97] In response, the Legislature enacted SB 6's Party Preference Ban, which regulated 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*.[98] Therefore, SB 6's Party Preference Ban is not

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95 *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.") (*quoting Calfarm*, 771 P.2d 1247, 48 Cal.3d 805, 821 (Cal. 1989)).

96 In its Statement of Purpose, Proposition 14 explicitly states that it needs implementing legislation. ER 137 ¶63. 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).

97 ER 137 n.64.

98 *Sonoma County*, *supra*, 173 Cal.App.4th at 352.

"volitionally" separable, and SB 6 as a whole *cannot be saved as a matter of law*.[99] Therefore, because the entirety of SB 6 is unenforceable, the Court must block it from being implemented and enforced.

H. The Trial Court Did Not Dispute That Proposition 14 Must Be Declared Inoperative If SB 6 Is Struck Down

Finally, the trial court did not dispute that Proposition 14 *must be declared inoperative* 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.[100] Thus, because SB 6 is unenforceable in its entirety, Proposition 14 lacks a lawful statute to implement it. Consequently, Proposition 14 must be declared inoperative until the Legislature has passed a new law to implement it.[101]

I. It Is *Certain* That Petitioner Chamness Will Succeed on the Merits

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

100 *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). 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* [i.e., SB 6], are intended to implement an open primary system in California[.]" (emphases added). ER 138 n.67.

101 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).

It is more than "likely" that Petitioner Chamness will succeed on the merits.[102] First, as this brief has shown, SB 6's Party Preference Ban must be struck down, for it violates the First Amendment, Fourteenth Amendment, and the Elections Clause. (Tellingly, even the Secretary of State has conceded that SB 6 violates the First and Fourteenth Amendments.) Second, because SB 6's Party Preference Ban is not severable, the entirety of SB 6 must be declared unenforceable. Finally, Proposition 14 must be declared inoperative, because SB 6 is both unconstitutional and unenforceable. Accordingly, it is certain that Petitioner Chamness will succeed on the merits.

J. The Trial Court Erred in Considering Pullman Abstention for a Critical First Amendment Case

*... Pullman abstention is rarely, if ever, appropriate in First Amendment cases.*

-- Judge Stephen Reinhardt[103]

During oral argument, the trial court also erred when it considered abstaining from ruling on this critical matter under the Pullman abstention

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102 *Winter, supra*, 129 S.Ct. at 374 (*quoted by Cottrell, supra*, at 8).

103 *J-R Distributors v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984), *rev'd on other grounds sub nom. Brocket v. Spokane Arcades*, 472 U.S. 491 (1985).

doctrine.[104] Yet in so doing, the trial court ignored this Court's warning that abstention is "inappropriate when First Amendment rights are at stake."[105]

To abstain under Pullman, a federal court must show that three factors apply: (1) the case involves a "sensitive area of social policy upon which federal courts should not enter unless no alternative for adjudication exists", (2) a "definitive ruling" on the state-law issue "would end the controversy" (i.e., a state court could provide a saving construction of the statute that would eliminate the potential constitutional violation), and (3) resolution of the "possibly determinative issue of state law is doubtful" (i.e., it is far from clear how the law at issue should be construed).[106]

In *J-S Distributors*, this Court held that it is "rarely, if ever, appropriate" for a federal court not to hear the merits of First Amendment cases – especially when "*fundamental civil rights* are at issue."[107] Thus, the Ninth Circuit held that the first Pullman factor "will *almost never* be present" in First Amendment cases, "because the constitutional guarantee of free expression is, quite properly, always an area of particular federal

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104 ER 16. *See also Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941).

105 *J-R Distributors*, *supra*, 725 F.2d at 487 (emphasis added).

106 *Id.* at 487-88 (emphasis added) (citations omitted).

107 *Id.* at 488 (emphases added) (*quoting Jones v. Metzger*, 456 F.2d 854, 856 (6th Cir. 1972) & *citing C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 381 (9th Cir. 1983)).

concern."[108] As this Court noted, "abstention by federal courts in First Amendment cases *could often result in the suppression of free speech* that is meant to be protected by the Constitution."[109] Finally, *J-S Distributors* held that the second and third Pullman factors cannot be present as a matter of law, if the "key provisions" of the statute "are not susceptible to … saving constructions."[110]

Turning to this case, the same analysis holds true. Unless this Court intercedes, Petitioner Chamness' fundamental right to free speech will be violated – for the second time. Consequently, the first Pullman factor is not present. Second, there is no "saving construction" of SB 6's Party Preference Ban: it has already violated Petitioner Chamness' fundamental rights, by forcing him to falsely state that he has "No Party Preference". Furthermore, by denying him permission to intervene in the related state lawsuit, both the California Supreme Court and the California Court of Appeal *refused to allow him to defend his fundamental rights*. Thus, the second and third Pullman factors are not present.[111] Therefore, because none

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108 *J-R Distributors*, *supra*, 725 F.2d at 488 (*citing Zwickler v. Koota*, 389 U.S. 241, 252 (1967); *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)).

109 *J-R Distributors*, *supra*, 725 F.2d at 488 (emphases added).

110 *Id.* at 488.

111 Because there is not ambiguity on how to construe SB 6's Party Preference Ban, *Burdick v. Takushi* does not apply to this case. *Burdick*, 846 F.2d 587, 589 (9th Cir. 1988) (Pullman abstention only appropriate when it is unclear how a state statute should be construed).

of the Pullman factors are present here, the constitutionality of SB 6's Party Preference Ban is ripe for adjudication by this Court.

K. Petitioner Chamness Faces Imminent, Irreparable Harm

Furthermore, it is certain that Petitioner Chamness will suffer imminent, irreparable harm unless he is granted a preliminary injunction. As the U.S. Supreme Court has made clear, a political candidate like Petitioner Chamness need not wait until his rights have been grievously harmed. Instead, he is entitled to immediate relief if it is "likely" that a law will harm his fundamental rights.[112]

Here, Petitioner Chamness has qualified as a in the looming Congressional election. Had he run before SB 6 had taken effect, he would have been permitted to use the ballot label of "Independent". But in a matter of weeks, SB 6 will force him to falsely state that he has "No Party Preference" – and *lie to voters about his political beliefs*. Against this threatening backdrop, it a certainty that Petitioner Chamness will suffer irreparable harm if SB 6 is allowed to be implemented for the CD 36 Primary.

Moreover, injunctive relief is particularly appropriate under the U.S. Supreme Court's "capable of repetition, yet evading review" doctrine.

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112 *Winter*, *supra*, 129 S.Ct. at 374 (*quoted by Cottrell*, *supra*, at 8).

Namely, because no one can predict when the next special election will strike, the U.S. Supreme Court urges courts to swiftly resolve constitutional challenges before voting begins in an election:

> The "*capable of repetition, yet evading review*" doctrine, in the context of *election cases*, is appropriate when there are "as applied" challenges as well as in the more *typical case* involving only *facial attacks*. The construction of a statute … will have the effect of simplifying future challenges, thus *increasing the likelihood that timely filed cases* can be *adjudicated before an election is held.*[113]

Far from being an aberration, special elections have been a mainstay in California politics. Since 1990, the Golden State has held nearly five federal and state elections per year.[114] In fact, five special elections will have already been held in the first half of 2011 alone.[115] In the looming CD 36 Primary, it is beyond question that Petitioner Chamness faces imminent, irreparable harm. By granting him injunctive relief, the Court will stop SB 6 from harming more candidates in the immediate future.

L. It Is Beyond Question That the Balance of Hardships Tips Sharply in Petitioner Chamness' Favor

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113 *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (*cited by Gralike*, *supra*, 531 U.S. at 517 n.8).

114 ER 140.

115 ER 140.

It is beyond question that the balance of equities tips sharply[116] in Petitioner Chamness' favor. Tellingly, Secretary Bowen concedes a fundamental fact: while she will have the freedom to state on the ballot that she is a Democrat, Petitioner Chamness will be banned from using the ballot label of "Independent". Instead, he will be forced to lie to voters that he has "No Party Preference".

Equally critical, not one voter will be disenfranchised if a preliminary injunction is granted. In fact, neither SB 6 nor Proposition 14 granted unaffiliated voters any new "rights". Instead, it is undisputed that (1) unaffiliated voters had been able to vote in the Democratic or Republican primaries *for the past decade*, and (2) Proposition 14 did not give unaffiliated voters the right to vote in the 2012 Presidential primaries.[117] Thus, SB 6 will strip candidates like Michael Chamness of their fundamental rights, while giving unaffiliated voters *no say* on who will become the Republican and Democratic nominees for the White House. Therefore, the balance of equities tips sharply in Petitioner Chamness' favor.

D. It Is Beyond Question that the Public Interest Will Benefit from

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116 *Cottrell*, *supra*, at 8. Under the Ninth Circuit's sliding-scale analysis, a preliminary injunction is "appropriate" if (1) the balance of hardships tips "sharply" in the plaintiff's favor, and (2) the plaintiff raises "serious questions" going to the merits. *Id.* at 15. Because he has unquestionably satisfied both criteria, Petitioner Chamness is absolutely entitled to a preliminary injunction.

117 ER 124:22 n.4; CAL.CONST. art. ii §5(c).

Injunctive Relief

Finally, it is beyond question that the public interest will strongly benefit if the Court orders injunctive relief.[118] Only a preliminary injunction will protect the fundamental rights of Michael Chamness and the voters who support him in the looming Congressional special election. Furthermore, a preliminary injunction will not only stop millions of taxpayer dollars from being illegally spent, but will grant California elections officials a much needed reprieve from what the California Association of Clerks and Election Officials has called a "complex set of changes [that] has *not occurred in recent memory.*"[119] Therefore, granting a preliminary injunction will strongly promote the public interest.

## VIII. Conclusion

*[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*[120]

*This case is not one of those unusual cases in which [the Court] would be justified in standing by and allowing constitutional violations to go unremedied.*

-- *Johnson v. Miller*[121]

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118 *Cottrell, supra*, No. 09-35756, at 8.

119 ER 140:19-20:6; ER 162.

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

Unless this Court by tomorrow, Congressional candidate Michael Chamness will be irreparably harmed by an unjust law: one that, according to fellow candidate Debra Bowen, gives an impermissible advantage to major-party Congressional candidates *just like her*.

By enjoining Registrar Logan from printing and mailing ballots to overseas and military voters, the Court will gain *at least two weeks* to fully consider the merits of Petitioner Chamness' plea for injunctive relief. It now falls on this Court to issue a preliminary injunction against SB 6 – and thereby ensure that the voices of Michael Chamness and other grassroots candidates are not silenced on the ballot.

March 28, 2011

Respectfully submitted,

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[121] *Johnson v. Miller*, 929 F.Supp. 1529, 1562 (S.D. Ga. 1996), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997) (emphasis added) (granting preliminary injunction against illegal redistricting plan).

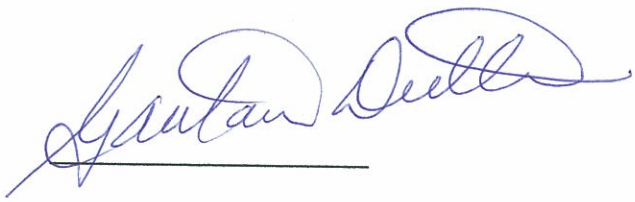
## STATEMENT OF RELATED CASES

Petitioner Michael Chamness is not aware of any related cases that are pending in this Court pursuant to Ninth Circuit Rule 28-2.6.

## CERTIFICATE OF COMPLIANCE

I certify, pursuant to FRAP 32 (a)(7)(C) and Circuit Rule 32-1, that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 7,535 words.

March 28, 2011



GAUTAM DUTTA

## CERTIFICATE OF SERVICE

On March 28, 2011, I served an electronic copy of this Petition for a Writ of Mandamus by email to the following addresses:

George.waters@doj.ca.gov

bmoore@counsel.lacounty.gov

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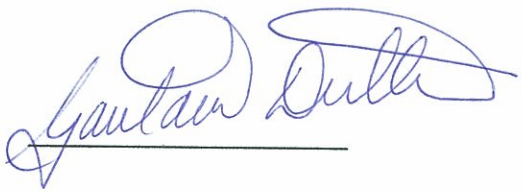
I have also served a copy of this document by FedEx overnight upon the U.S. District Court for the Central District of California at:

The Honorable Otis D. Wright II
U.S District Court
312 N. Spring St., Courtroom 11
Los Angeles, CA 90012



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