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MICHAEL CHAMNESS, DANIEL FREDERICK, and RICH WILSON

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL CHAMNESS, DANIEL FREDERICK, RICH WILSON,

Plaintiffs,

vs.

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

Defendants,

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

Intervenors-Defendants

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

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

HEARING DATE: June 6, 2011
HEARING TIME: 1:30 pm
JUDGE: Hon. Otis D. Wright II
COURTROOM: 11

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that, on June 6, 2011, 1:30 pm (or as soon as this matter may be heard before the Honorable Otis D. Wright II in Courtroom 11), U.S. District Court for the Central District of California, 312 North Spring Street, Los Angeles, California 90012, Plaintiffs Michael Chamness, Daniel Frederick, and Rich Wilson will move this Court to grant them summary judgment that:

1. Declares Senate Bill 6 unconstitutional and unenforceable, because it violates the U.S. Constitution;
2. Declares that Proposition 14 is not self-executing;
3. Declares Proposition 14 inoperative, because its implementing statute (SB 6) has been declared unenforceable;
4. Declares that Proposition 14 shall not become operative until a lawful implementing statute has been enacted and become operative;
5. Declares that Defendant Bowen violated Plaintiff Frederick's fundamental rights under the First Amendment and Due Process Clause;
6. Declares that Defendant Bowen violated Plaintiff Wilson's fundamental right to have his lawfully cast vote counted under the First and Fourteenth Amendments, the Due Process Clause, and the Elections Clause;
7. Declares that Defendants Bowen and Logan imposed a severe burden on Plaintiff Chamness' fundamental rights under the First and Fourteenth Amendments, by (a) stifling his core political speech, and (b) dictating electoral outcomes;
8. Declares that Defendants Bowen and Logan violated Plaintiff Chamness' fundamental rights under the Elections Clause;
9. Declares that every citizen has the right to run as a write-in candidate for state or federal office;
10. Declares that every citizen has the right to cast a write-in vote and have that vote counted;
11. Awards every Plaintiff all reasonable costs and expenses, including attorney's fees, pursuant to 42 U.S.C. §1988(b).

Pursuant to Local Rule 7-3, this Motion is made following the conference of counsel, which took place on April 6, 2011.

Plaintiffs' Motion is based on this Notice of Motion and Motion, along with the accompanying (1) Memorandum of Points and Authorities, (2) Plaintiffs' Statement of Uncontroverted Facts and Conclusions of Law, (3) Declaration of Michael Chamness, (4) Declaration of Daniel Frederick, (5) Declaration of Rich Wilson, (6) Declaration of Gautam Dutta, (7) Request for Judicial Notice, (8) all the other papers, documents, or exhibits on file or to be filed in this action, and (9) oral argument made at the hearing on this Motion.

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The right to vote includes the right to have the ballot counted.

-- U.S. Supreme Court, *Reynolds v. Sims*[1]

Indeed, it seems clear that the adverse labels handicap candidates at the most crucial stage in the election process – the instant before the vote is cast.

-- U.S. Supreme Court, *Cook v. Gralike*[2]

I. Introduction

Last summer, 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*."[3] However, voters were not told one critical fact. Namely, by voting for Proposition 14, they would also be foisted with Senate Bill 6: an unjust law that has already (1) disenfranchised Plaintiff Rich Wilson, (2) disqualified Plaintiff Daniel Frederick from running as a write-in candidate, and (3) forced Plaintiff Michael Chamness to *lie to voters* that he has "No Party Preference".

Senate Bill 6 ("SB 6") tramples on our fundamental right to vote and run for office in two egregious ways. First, SB 6 *throws away all votes cast for write-in candidates* in the general election. Specifically, SB 6's Vote Counting Ban allows voters to vote for write-in candidates in the general election, but then bans their votes from being counted. As even Secretary Bowen has admitted, SB 6's Vote Counting Ban gives voters the "illusion" that their votes would be counted. Equally troubling, SB 6 bans candidates from using the ballot label of "Independent" – a ban that even the Secretary of State has admitted is *not "permissible"*. Instead, SB 6's Party Preference Ban forces minor-party candidates like Plaintiff Chamness to

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

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

[3] 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).

falsely state on the ballot that they have "No Party Preference".

As this Motion will show, SB 6's Vote Counting Ban and Party Preference Ban violate the First Amendment, Fourteenth Amendment, Due Process Clause, and Elections Clause. Plaintiffs recognize that the Court has declined to issue a preliminary injunction against SB 6's Party Preference Ban. However, a preliminary injunction "is not a preliminary adjudication on the ultimate merits."[4] Thus, the Court may consider the constitutionality of SB 6's Party Preference Ban *de novo*.[5] Because Plaintiffs are entitled to summary judgment as a matter of law, they ask the Court for a judgment that (1) declares SB 6 unconstitutional and unenforceable, (2) and declares Proposition 14 inoperative until a new law has been passed to replace SB 6.

II. Legal Standard

According to the U.S. Supreme Court, "[s]ummary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law."[6] If a party has "properly submitted" a motion for summary judgment, the "burden shifts to the opposing party to set forth specific facts showing that there is a genuine issue for trial."[7] Toward that end, the opposing party "may not rely on denials in the pleadings but must produce specific evidence … to show that the dispute exists."[8]

III. Introduction to Plaintiffs Chamness, Frederick, and Wilson

Coffee Party candidate Michael Chamness, who is registered to vote in Congressional District 36 and Senate District 28, has qualified for and appeared on the ballot of two elections: (1) the February 15, 2011 special primary election for Senate District 28 (the "SD 28 Primary"), and (2) the May 17, 2011 special primary

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[4] *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1423 (9th Cir. 1984).
[5] *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2004), *cert. denied*, 546 U.S. 826 (2005).
[6] *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993).
[7] *Albarran v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 707 (9th Cir. 2008).
[8] *Id.* at 707 (emphasis added).

election for Congressional District 36 (the "CD 36 Primary").[9] In both elections, SB 6 barred Plaintiff Chamness from using the ballot label of "Independent", and instead forced to use the ballot label of "No Party Preference".[10]

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 (runoff) election for Assembly District 4 (the "AD 4 Runoff"), but was barred from doing so.[11]

Rich Wilson, who is registered to vote in Assembly District 4, cast a write-in vote for Plaintiff Frederick in the AD 4 Runoff.[12] On May 3, 2011, Plaintiff Wilson's vote for Plaintiff Frederick was not counted.[13]

IV. Issues Presented

This case raises five weighty constitutional issues:

1. Did SB 6, as applied, violate Plaintiff Frederick's constitutional rights under the Due Process Clause and the First Amendment, when it banned him from running as a write-in candidate in the AD 4 Runoff?

2. Did SB 6, as applied, violate Plaintiff Wilson's fundamental right to have his lawfully cast vote counted (under the First and Fourteenth Amendments, the Due Process Clause, and the Elections Clause), when it banned the write-in vote that he had cast for Plaintiff Frederick from being counted?

3. Did SB 6, as applied, "stifle" Plaintiff (and minor-party candidate) Chamness' core political speech under the Ninth Circuit case *Rubin v. City of Santa Monica*,[14] when it banned him from using the ballot label of "Independent" in the CD 36 Primary and SD 28 Primary?

4. Did SB 6, as applied, unlawfully "dictate electoral outcomes" under *Rubin*,[15] when it forced Plaintiff (and Coffee Party candidate) Chamness to use the ballot label of "No Party Preference" while allowing his Democratic and Republican rivals to list their party's name on the ballot in the CD 36 Primary and the SD 28 Primary?

5. Did SB 6, as applied, violate the U.S. Constitution's Elections Clause under the U.S. Supreme Court's unanimous ruling in *Cook v. Gralike*,[16] when it forced Plaintiff (and Coffee Party candidate)

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[9] Statement of Uncontroverted Facts and Conclusions of Law ("Pl. Statement") ¶¶ 1-2.
[10] Pl. Statement ¶ 3.
[11] Pl. Statement ¶ 4-5.
[12] Pl. Statement ¶ 7.
[13] Pl. Statement ¶ 8.
[14] *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002).
[15] *Id.*
[16] *Gralike*, *supra*, 531 U.S. 510.

Chamness to use the ballot label of "No Party Preference" while allowing his Democratic and Republican rivals to list their party's name on the ballot in the CD 36 Primary?

V. Uncontroverted Facts and Legal Conclusions

As this section will show, three core conclusions are undisputed about the California's former "qualified party" election system, which SB 6 and Proposition 14 eliminated on January 1, 2011. First, a registered voter like Plaintiff Frederick could have run as a write-in candidate in any state or federal general election. Second, a registered voter like Plaintiff Wilson could have voted for a qualified write-in candidate in the general election, and have his or her vote counted. Finally, a minor-party candidate like Plaintiff Chamness could have used the ballot label of "Independent", and would not have been forced to falsely state that he had "No Party Preference".

Furthermore, briefing by the parties has also underscored six core facts:

1. SB 6 was stealthily passed by the Legislature in the middle of the night, without <u>any</u> public debate or discussion.[17]

2. Last summer, Secretary Bowen's own staff publicly stated that SB 6's Vote Counting Ban (a) gave candidates the "illusion" that they could "run as a write-in", and (b) gave voters the "illusion" that their votes would be counted if they voted for a write-in candidate.[18]

3. Last summer, Secretary Bowen's staff also publicly stated that it is not "permissible" to force candidates to state on the ballot that they have "No Party Preference".[19]

4. Proposition 14 did <u>not</u> 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.[20]

5. For over a century, minor-party candidates like Plaintiff 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 Democratic and Republican

[17] Pl. Statement ¶ 9.
[18] Pl. Statement ¶ 10.
[19] Pl. Statement ¶ 11.
[20] Pl. Statement ¶ 12.

candidates to list their party's name on the ballot.[21]

6. It would have cost between *$22,800 and $108,800* for Plaintiff Chamness to publish candidate statements in the voter guides for both the CD 36 Primary and the SD 28 Primary.[22]

A. California's Former "Qualified Party" Election System

California law classifies political parties were into two categories: qualified ("major" or state-recognized) parties and non-qualified ("minor" or non-state-recognized) parties.[23] Under California's former qualified-primary election system, only qualified parties were entitled to hold party primaries.[24] Every even-numbered year, voters had at least two chances to vote for state and federal 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 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 "qualified party" election system, major-party candidates could state their party's name on the ballot (e.g., Democratic or Republican). However, California candidates had been able to use the "Independent" ballot label *between 1891 and 2010*.[27] During that time, all minor-party candidates – who are deemed

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[21] Between 1891 and Dec. 31, 2010 (the day before SB 6 took effect), candidates were allowed to use the ballot label of "Independent". Former Political Code §1188, *codified at* Ch. 130 Stats 1891, *amended by* Ch. 136 Stats. 1915, p.274. On Nov. 2, 2010, Cecilia Iglesias ran as an Independent candidate in the 47th Congressional District. Pl. Statement ¶ 14.

[22] Pl. Statement ¶ 13.

[23] Elections Code §5100.

[24] *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).

[25] CAL.CONST art. ii §5(b) (before it was amended on Jan. 1, 2011 by Proposition 14).

[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 (emphases added). To qualify as a write-in candidate, 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 SB 6). Plaintiff Frederick is registered to vote in Assembly District 4, and attempted to qualify as a write-in candidate over *two months* before the AD 4 runoff was held. Pl. Statement ¶ 5. Therefore, Plaintiff Frederick qualified as a write-in candidate in the AD 4 Runoff.

[27] *See supra* note 21. Between 1891 and 1915, California law permitted minor-party

by the California Supreme Court to have "independent" (i.e., minor-party) status[28] – could state on the ballot that they were "Independent".[29] Within the last two decades, Quentin Kopp and Lucy Killea were both elected the State Senate as Independent candidates.[30] Currently, over one-fifth of California's voters are not registered with a major political party.[31]

B. Budgetary Cause, Electoral Effect

Two years ago, then-State Senator Abel Maldonado cast the deciding vote to pass the state budget.[32] In exchange for his vote, Maldonado demanded legislation that would eliminate the qualified-party election system.[33] The Legislature obliged by (1) putting Maldonado-authored Proposition 14 on the June 8, 2010 ballot, and (2) passing Maldonado-authored SB 6, which implemented the provisions of Proposition 14.[34]

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.[35] Subsequently, Secretary Bowen'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.[36] On June 8, 2010, a narrow majority of voters approved Proposition 14.[37]

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

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candidates to state their party's name on the ballot. Former Political Code §1188, *codified at* Ch. 130 Stats 1891, *amended by* Ch. 136 Stats. 1915, p.274. In 1912, a minor-party candidate (William Kent of the Progressive Party) was elected by California's 1st Congressional District. Pl. Statement ¶ 15.

[28] *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).

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

[30] Pl. Statement ¶ 16.

[31] Pl. Statement ¶ 17. Specifically, 20.4 percent of registered voters did not belong to a qualified party as of Feb. 20, 2011. *Id.*

[32] Pl. Statement ¶ 18.

[33] Pl. Statement ¶ 19.

[34] Pl. Statement ¶ 20.

[35] Pl. Statement ¶ 21.

[36] Pl. Statement ¶ 22.

[37] Pl. Statement ¶ 23.

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 primary election. The top two votegetters from the primary election automatically advance to the general (runoff) election – even if one candidate has received a majority of the vote.[38]

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*[.]"[39] 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.[40] 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.[41]

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

Although it provides for write-in candidacies and write-in voting,[42] SB 6 bans all write-in votes from being counted. Specifically, SB 6 requires[43] 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*.[44]

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[38] SB 6-amended Elections Code §8141.5. However, a different set of rules apply for special elections. Namely, if a candidate receives a majority in the "all-party" special primary election, he or she will win the election outright, and no general election will be held. SB 6-amended Elections Code §10705(a).

[39] Pl. Statement ¶ 24.

[40] Pl. Statement ¶ 25 (emphases added).

[41] Pl. Statement ¶ 26 (emphases added).

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

[43] 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[.]"

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

Last summer, Secretary Bowen's office 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*."[45]

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 Runoff, and (2) whether Plaintiff Wilson's vote would be counted, if he voted for Plaintiff Frederick in the AD 4 Runoff.[46] On March 2, 2011, Secretary Bowen's Chief Counsel responded that (a) SB 6 banned Plaintiff Frederick from running as a write-in candidate in the AD 4 Runoff, and (b) Secretary Bowen would enforce SB 6's Vote Counting Ban.[47] Relying on that response, Plaintiff Frederick did not file any papers to run as a write-in candidate for the AD 4 Runoff.[48] Subsequently, Plaintiff Wilson cast a write-in vote for Plaintiff Frederick.[49] On May 3, 2011, Plaintiff Wilson's write-in vote was not counted in the AD 4 Runoff.[50]

E. 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."[51] However, that "statute" – SB 6 – fails to give minor-party candidates the right to state their "political party preference". Instead, if a

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[45] Pl. Statement ¶ 10 (emphases added).
[46] Pl. Statement ¶ 27.
[47] Pl. Statement ¶ 28. The Chief of Secretary Bowen's Elections Division has also stated that Section 8605 of SB 6 bans write-in candidacies in runoff elections. Pl. Statement ¶ 41.
[48] Pl. Statement ¶ 29.
[49] Pl. Statement ¶ 30.
[50] Pl. Statement ¶ 31.
[51] CAL.CONST. art. ii §5 (b) (emphasis added). 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[.]" (emphases added).

candidate identifies with a minor party, SB 6 Section 325 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".[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":

> [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 [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***."[53]

F. Plaintiff Chamness' Unsuccessful Effort to Intervene in State Court

Plaintiff Chamness brought his claims to this Court because the California Supreme Court and California Court of Appeal had denied his requests to intervene in litigation challenging SB 6's constitutionality (the "State Court Case").[54] Last winter, Plaintiff Chamness asked the California Supreme Court for permission to intervene in the State Court Case during a mandamus proceeding, in which the Secretary of State, Registrar Logan, and Intervenors were Real Parties in Interest.[55] While Registrar Logan took no position regarding Plaintiff Chamness' request to intervene, the Secretary of State and Intervenors vigorously opposed it.[56] On December 15, 2010, the California Supreme Court denied both Plaintiff Chamness'

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[52] 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. *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).

[53] Pl. Statement ¶11 (emphases added).

[54] Pl. Statement ¶37.

[55] Pl. Statement ¶32.

[56] Pl. Statement ¶33.

request to intervene and the underlying mandamus petition.[57]

Seeking to vindicate his fundamental rights, Plaintiff Chamness first sought to bring his as-applied challenge to the California Court of Appeal (First District).[58] Toward this end, he asked the Court of Appeal for permission to intervene in the State Court case.[59] Again, Registrar Logan took no position with respect to Plaintiff Chamness' request to intervene, while the Secretary of State and Intervenors vigorously opposed his request.[60] On January 31, 2011, the Court of Appeal denied Plaintiff Chamness' request to intervene.[61]

Plaintiff Chamness has qualified for and appeared on the ballots for the CD 36 and SD 28 Primaries.[62] Secretary Bowen, who also appeared on the ballot of the CD 36 Primary (with the ballot label of "Democratic"), published CD 36 and SD 28 Lists of Certified Candidates; both lists falsely stated that Plaintiff Chamness had "No Party Preference".[63] Subsequently, Registrar Logan published ballots that falsely stated that Plaintiff Chamness had "No Party Preference".[64]

G. The Importance of Write-In Voting

Write-in voting has played an important role in local, state, and national politics. Last November, U.S. Senator Lisa Murkowski (R-Alaska) was re-elected as a write-in candidate.[65] In 1982, Californian Ron Packard won his write-in bid for Congress (43rd District) and was re-elected eight times before he retired. In 2004, write-in candidate Donna Frye finished second in the San Diego mayoral election – and would have won if her supporters had marked the "write in" oval on the ballot.[66] Other notable write-in candidates include Tonia Reyes Uranga

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57 Pl. Statement ¶34.
58 *Id.* ¶35.
59 *Id.* ¶35.
60 *Id.* ¶36.
61 *Id.* ¶37.
62 Pl. Statement ¶2.
63 Pl. Statement ¶39.
64 Pl. Statement ¶42.
65 *Miller v. Treadwell*, -- P.3d --, No. S-14112 (Alaska Dec. 22, 2010).
66 *McKinney v. Superior Court*, 21 Cal.Rptr.3d 773, 775 (Cal.Ct.App. 2004).

(finished second in a 2010 race for Long Beach City Council) and Tom Ammiano (finished second in the 1999 San Francisco mayoral election).[67]

VI. Legal Analysis

A. 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[68]

In a nutshell, 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, SB 6 Section 8606 bans all write-in votes from being counted in all state and federal elections:

> A person whose name has been written on the ballot as a *write-in candidate* at the general election … *shall not be counted*.[69]

1. 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.[70]

Having conferred that right, the State must comply with stringent constitutional requirements.[71]

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[67] *Edelstein v. San Francisco*, 56 P.2d 1029, 29 Cal. 4th 164, 182 (Cal. 2002); Pl. Statement ¶ 40.

[68] *Libertarian Party v. District of Columbia Bd.*, 2011 WL 782031, at *6 (D.D.C. Mar. 8, 2011) (emphases added, citations omitted).

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

[70] 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) (emphases added) (*quoting Diamond Multimedia Systems v. Superior Court*, 968 P.2d 539 (Cal. 1999). A citizen 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, SB 6 did not amend the right to run as a write-in candidate (Elections Code §§8600 *et seq*.). Consequently, California courts will assume that the Legislature did not intend to amend those other statutes. *See, e.g., Estate of McDill*, 537 P.2d 874, 878 (Cal. 1971).

[71] *See, e.g., Libertarian Party*, *supra*, 2011 WL 782031, at *6; *Grant v. Meyer*, 828 F.2d

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

Plaintiffs Wilson and Frederick bring two intertwined, as-applied[72] claims: SB 6, as applied (1) disqualified Plaintiff Frederick from qualifying as a write-in candidate for the AD 4 Runoff, 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 Runoff, in violation of the Due Process Clause, First and Fourteenth Amendments, and the Elections Clause.

3. Secretary Bowen Has Made a Binding Admission of Liability

Remarkably, Secretary Bowen's office has conceded that SB 6's Vote Counting Ban *deceives both candidates and voters* – and therefore violated their Due Process rights. Under the Due Process Clause, a State may not change vote-counting rules unless it has given fair and adequate notice to candidates and voters.[73] 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, SB 6 gives candidates the "illusion" that they can mount write-in candidacies in 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.*"[74]

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*.") (emphases added, citation omitted); *Turner v. District of Columbia Bd.*, 77 F.Supp.2d 25, 30 (D.D.C. 1999).

[72] "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)).

[73] *See, e.g., Griffin v. Burns*, 570 F.2d 1065, 1074 (1st Cir. 1978).

[74] Pl. Statement ¶ 10 (emphases added).

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[75] that SB 6's Vote Counting Ban violated the Due Process rights of Plantiffs Frederick and Wilson.

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

"The United States Supreme Court has repeatedly held that the individual's right to seek public office is *inextricably intertwined with the public's fundamental right to vote*, and may be limited only where necessary to achieve a compelling state purpose."[76] 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 Runoff in a timely manner.[77] However, Secretary Bowen's top lawyer told Plaintiff Frederick that SB 6 barred him from running as a write-in candidate in the AD 4 Runoff.[78] In so doing, Secretary Bowen 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.[79] Specifically, a law imposes a severe burden if it

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[75] Party admissions are admissible under the exception to the hearsay rule. 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 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).

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

[77] To be qualified, 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 SB 6). Plaintiff Frederick is registered to vote in Assembly District 4, and attempted to qualify as a write-in candidate over *two months* before the AD 4 runoff was held. Pl. Statement ¶¶ 4-5. Therefore, Plaintiff Frederick was eligible to be a write-in candidate in the AD 4 Runoff.

[78] Pl. Statement ¶¶ 41 (Secretary Bowen's top aides claim that Section 8605 SB 6 banned write-in candidacies in the general (runoff) election.

[79] *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008).

"impair[s] access to the ballot, stifle[s] core political speech, or dictate[s] electoral outcomes."[80] 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.[81]

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 Runoff.[82] 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 Runoff.

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

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."[83] Last year, the High Court noted that "the expression of a political view *implicates a First Amendment right*."[84] Furthermore, as the Ninth Circuit noted in *Gonzalez v. Arizona*, federal law enacted pursuant to the Elections Clause protects "the right of an eligible voter to cast [a] ballot and have [that] ballot counted."[85] If a state statute violates such a federal law, the state statute must be struck down:

> [C]ourts deciding issues raised under the Elections Clause need not strike any balance between competing sovereigns. Instead, the Elections Clause, as a standalone pre-emption provision, establishes its own balance, *resolving all conflicts in favor of the federal*

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[80] *Rubin*, *supra*, 308 F.3d at 1015. (*citing Gralike*, *supra*, 531 U.S. 510).
[81] *Gralike*, *supra*, 531 U.S. at 525-26.
[82] *Libertarian Party*, *supra*, 2011 WL 782031, at *6; *Grant*, *supra*, 828 F.2d at 1456; *Turner*, *supra*, 77 F.Supp.2d at 30.
[83] *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (emphasis added).
[84] *Doe v. Reed*, 561 U.S. --, No. 09-559, at 6 (June 24, 2010) (Roberts, J.) (emphases added).
[85] *Gonzalez v. Arizona*, 624 F.3d 1162, 1173 n.9 (9th Cir. 2010) (emphasis added) (*citing U.S. v. Mosley*, 238 U.S. 383, 386 (1915)).

government.[86]

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.[87] 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*."[88]

Here, SB 6 banned Plaintiff Wilson's write-in vote for Plaintiff Frederick from being counted. In this manner, SB 6 violated the Elections Clause under *Gonzalez*, for it violated federal law that protects the right to cast a vote and have it counted.[89] Furthermore, even if SB 6 did not violate the Elections Clause, strict scrutiny would apply. Tellingly, Secretary Bowen did not provide Plaintiff Wilson any government interest to justify the throwing away of all write-in votes. Because it violated Plaintiff Frederick's and Plaintiff Wilson's fundamental rights, SB 6's Vote Counting Ban must be struck down.

B. SB 6's Party Preference Ban Violated Plaintiff Chamness' Fundamental Rights

SB 6's Party Preference Ban violated Plaintiff Chamness' fundamental rights in two troubling ways: (1) it banned him from using the ballot label of "Independent" in the CD 36 and SD 28 Primaries; and (2) it unlawfully forced him to use the ballot label of "No Party Preference" in the CD 36 and SD 28 Primaries. 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

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[86] *Gonzalez*, *supra*, 624 F.3d at 1174 (emphases added).

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

[88] *Turner*, *supra*, 77 F.Supp.2d at 32-33 (emphases added) (*quoting U.S. v. Classic*, 313 U.S. 299, 315 (1941)). *See also Libertarian Party*, *supra*, 2011 WL 782031, at *9; *Gould v. Grubb*, 536 P.2d 1337, 1343 n.10 (Cal. 1975).

[89] *Gonzalez*, *supra*, 624 F.3d at 1174 (emphases added).

compelling state interest.[90] A law imposes a severe burden if it "impair[s] access to the ballot, stifle[s] core political speech, or dictate[s] electoral outcomes."[91]

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

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*[92]

The Ninth Circuit has signaled that banning the ballot label of "Independent" would constitute 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 were elected to the California State Senate within the past two decades: Lucy Killea and Quentin Kopp.

In *Rubin v. City of Santa Monica*, the Ninth Circuit has 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."[93] Furthermore, this Court *signaled its agreement* with the Sixth Circuit 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."[94]

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[90] *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008).

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

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

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

[94] *Rubin*, *supra*, 308 F.3d at 1015 (emphases added) (*citing Rosen*, *supra*, 970 F.2d 169). Secretary Bowen may claim that SB 6's Party Preference Ban did not burden Plaintiff Chamness' rights, because he could have published a candidate statement in the official voter guide. However, it is undisputed that it would have cost Plaintiff Chamness *between $15,600 to $62,400* to publish such a statement in the SD 28 Primary; and $11,600 to $46,400 to do so in the CD 36 Primary. Pl. Statement ¶13. Simply put, it is unlawful to effectively foist minor-party candidates with a candidacy fee that their major-party competitors *need not pay*. *See, e.g., Bullock*, *supra*

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.[95] The Sixth Circuit struck down that law, for "prohibiting the designation 'Independent' was unconstitutional *where the regulations allowed for other political party designations*."[96] Indeed, *Rosen* noted that banning the ballot label of "Independent" would result in "the effective *exclusion of Independent* and new party candidacies."[97]

Significantly, because the Ninth Circuit has signaled its agreement with *Rosen*, the *Rubin* Court had 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".[98] Therefore, Plaintiff Chamness need not produce any evidence to prevail, apart from election documents which show that he was forced to use the ballot label of "No Party Preference" in the CD 36 and SD 38 Primaries.[99]

What is more, 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".[100] 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 candidates from using the party label of "Independent":

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405 U.S. at 146 ("We can hardly accept as reasonable an alternative that requires candidates and voters to *abandon their party affiliations in order to avoid the burden of the filing fees*.") (emphases added).

[95] *Rosen*, *supra*, 970 F.2d at 171.

[96] *Rubin*, *supra*, 308 F.3d at 1015 (emphases added) (*citing Rosen*, *supra*, 970 F.2d at 176-77).

[97] *Rosen*, *supra*, 970 F.2d at 177 (emphasis added).

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

[99] Having been forced to use the ballot label of "No Party Preference", Plaintiff Chamness has *already been incorrectly described* as one of three candidates in the CD 36 Primary "who *decline to state their political parties*[.]" Pl. Statement ¶ 43 (emphases added).

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

> 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*[.][101]

Thus, there is a fundamental right to use the ballot label of "Independent". Accordingly, banning Plaintiff Chamness from using that label imposed a severe burden on his fundamental rights as a candidate.

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

Remarkably, Secretary Bowen has made a binding admission that SB 6's Party Preference Ban is unlawful. Last summer, in an email to the Office of the Lieutenant Governor, 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"*. According to a public statement made by Secretary Bowen's own staff, 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 [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***."[102]

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

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

Furthermore, SB 6's Party Preference Ban imposed a severe burden on

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

[102] Pl. Statement ¶ 11 (emphases added) (*citing* SB 6-amended Elections Code §325).

[103] *See* discussion at *supra* note 75.

Plaintiff Chamness, because it "dictated" the electoral outcome in the CD 36 and SD 28 Primaries.[104] As discussed earlier, a state election law "dictates electoral outcomes" if it places a class of candidates at a political disadvantage.[105] Here, SB 6 banned Plaintiff Chamness from using the ballot label of "Independent" – "a customary title" that carries a "positive connotation".[106] 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.

F. No Compelling State Interest Can Save SB 6

To save SB 6's Vote Counting Ban and Party Preference Ban, Secretary Bowen may proffer a purported state interest. Namely, she may claim that the "Independent" ballot label can be banned, because it would otherwise confuse voters or harm major parties. However, it is undisputed that California candidates had been able to use the "Independent" ballot label between 1891 and 2010.[107] 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.[108] It strains credulity to claim that a ballot label that has been used in California *since 1891* has confused voters or harmed the major political parties. Consequently, Secretary Bowen has failed to provide *any* legitimate state interest, compelling or otherwise, that would save SB 6's Vote Counting Ban or Party Preference Ban.

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

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

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

106 *Bachrach*, *supra*, 415 N.E.2d at 836.

107 Pl. Statement ¶44. Between 1891 and 1915, California law also permitted minor-party candidates to state their party's name on the ballot. *Id.* ¶ 15. In 1912, a minor-party candidate (William Kent of the Progressive Party) was elected by California's 1st Congressional District. *Id.* ¶ 15.

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

> *[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[109]

In a nutshell, SB 6 violated Plaintiff Chamness' rights under the Elections Clause, because its Party Preference Ban singled out and discriminated against Plaintiff Chamness in the CD 36 Primary. How a candidate appears on a ballot matters makes a profound difference. As the U.S. Supreme Court has noted, an adverse ballot label will "handicap candidates at the most crucial stage in the election process – the instant before the vote is cast.[110] 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.[111]

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".[112] 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."[113]

In response, the High Court held that the state statute violated the Elections

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[109] 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 elections officials' practice of giving their own political party the top position on the ballot).

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

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

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

[113] *Gralike*, *supra*, 531 U.S at 510.

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":[114]

> [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.[115]

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*[.]"[116]

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 (like herself) 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".[117] 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.[118] Furthermore, because it places minor-party candidates at a political disadvantage, SB 6 also aims to "dictate electoral outcomes".

In response, Secretary Bowen may claim that the State has a regulatory interest in favoring major-party candidates and discriminating against minor-party candidates. However, such a dubious claim ignores two key facts. First, minor-

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

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

[116] *Gralike, supra*, 531 U.S. at 525 (emphases added).

[117] Secretary Bowen 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.

[118] *Id.* at 523-25.

party candidates had been allowed to use the ballot label of "Independent" during California's former "qualified party" election system. Equally important, SB 6 has now 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.[119] But 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 register to run for office*.[120] 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*. Ironically, apart from silencing the voices of candidates, SB 6 may cause misleading information to be provided to voters. Accordingly, the Court must rule that SB 6's Party Preference Ban violated Plaintiff Chamness' rights under the Elections Clause.[121]

H. SB 6 Deserves No Judicial Deference Whatsoever

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[122]

Simply put, SB 6 deserves no 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 Intervenor Maldonado, the author of both SB 6 and Proposition 14, 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, Plaintiffs have not challenged the constitutionality of Proposition 14. Rather, they are challenging the

[119] 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).

[120] Elections Code §8002.5(c).

[121] *Id.* at 525.

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

constitutionality of SB 6, an unjust law rammed through the Legislature without any public hearing or debate.

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*[.]"[123]

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 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.

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

I. 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. To be severable, the unlawful part of a statute must be functionally, grammatically, and volitionally separable.[124] 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*

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

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

foreknowledge of its real character."[125] 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.[126]

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*.[127] 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.[128] 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*.[129] 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*.[130] Therefore, because the entirety of SB 6 is unenforceable, the Court must strike it down in its entirety.

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

Finally, Proposition 14 *must be declared inoperative* if SB 6 is struck down.

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[125] *Schenley Affiliated Brands v. Kirby*, 21 Cal.App. 3d 177, 199 (Cal.App.Ct. 1971) (emphases added).

[126] *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)).

[127] In its Statement of Purpose, Proposition 14 explicitly states that it needs implementing legislation. *See supra* note 51. 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).

[128] CAL.CONST. art. ii §5 (b).

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

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

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.[131] 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.[132]

VII. 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*[133]

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 political elites. As constitutional scholar John Hart Ely put it: "We cannot trust the ins to decide *who stays out*[.]"[134]

In 2009, California voters were never given the chance to vote on SB 6: whose core parts, according to Secretary Bowen, are not "permissible" and will instead give Californians the "*illusion*" that they can run as and vote for write-in candidates. 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.

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[131] *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).

[132] 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).

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

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

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Respectfully submitted,

By: /s/

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