

No. 11-56449

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL CHAMNESS, DANIEL FREDERICK, and RICH WILSON

Plaintiffs / Appellants,

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

Intervenor Applicants-Plaintiffs /
Appellants,

-v.-

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

Defendants / Appellees

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

Intervenors-Defendants / Appellees

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

REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE

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The Legislature shall provide for primary elections for partisan offices[.]

A political party that participated in a primary election for a partisan office ... shall not be denied the ability to place on the general election ballot the candidate who received, at the primary election, the highest vote among that party's candidates.

-- Pre-Proposition 14 California Constitution¹

Having granted citizens [a] right ... the [State] must confer the right in a manner consistent with the Constitution.

– U.S. District Court (D.D.C.), *Libertarian Party v. Bd. of Elections*²

I. Introduction

Defendants have made two critical concessions. First, they concede that the Court's holding in *Bates v. Jones*³ controls this Motion. Namely, voters and candidates like Intervenor-Applicants have a right to join a statewide election case *on appeal*, in order to protect their right to benefit from a favorable ruling from this Court.⁴ Equally important, Defendants concede that **March 29, 2012** is the *last date* on which Intervenor-Applicants can benefit from a favorable ruling. For those two reasons alone, Intervenor-Applicants must be granted leave to intervene.

II. Intervenor-Applicants' Legal Interest Vis-à-Vis Proposition 14

Since Defendants claim not to grasp Intervenor-Applicants' legal interest in this case, we will recite it again. Previously, the California Constitution – and, by extension, the U.S. Constitution⁵ – (1) gave voters

¹ CAL.CONST. art. ii §§5(a) & 5(b) (pre-Proposition 14 version, emphases added), attached as Exhibit 2 to Dec. 18, 2011 Request for Judicial Notice, Dkt. No. 27-6, at 5 of 17.

² *Libertarian Party v. Bd. of Elections*, 768 F.Supp.2d 174, 182 (D.D.C. 2011) (emphases added).

³ *Bates v. Jones*, 127 F.3d 870 (9th Cir. 1997).

⁴ *Id.* at 873.

⁵ Once the State grants a right to citizens, it must confer that right in a manner consistent with the stringent requirements of the U.S. Constitution. Dec. 14, 2011 Motion to Intervene (“Opening Brief”), at 8 & n.25 (citing *Libertarian Party*, *supra*, 768 F.Supp.2d at 182; *Grant v. Meyer*, 828 F.2d 1446, 1456 (10th Cir. 1987); *Turner v. Bd. of Elections*, 77 F.Supp.2d 25, 30 (D.D.C. 1999)). *Contra*, Intervenor-Defendants Dec. 27, 2011 Opp’n, at 7 (“Proposed Intervenor do not claim that *federal* law gives them a right to run or vote in partisan ... primaries”) (italics added).

and candidates the right to participate in the June primary election of the ballot-qualified party to which they belong (e.g., Green Party, Libertarian Party), and (2) gave the top votegetter from each party's primary election the right to appear on the ballot in the November general election.⁶ Proposition 14 took away those twin rights.

Intervenor-Applicants and Plaintiffs have shown – and Defendants have conceded – that Proposition 14 must be declared unenforceable *if* its implementing statute (Senate Bill 6) is declared unconstitutional *in toto*.⁷ Thus, if Proposition 14 is declared unenforceable, the U.S. Constitution *mandates* that the right to run and vote in party primaries be *restored*.⁸ In such an event, the Secretary of State will restore the party-primary system – a *major* change of California's election rules.

Defendants further concede that March 29, 2012 is the last date on which the party-primary system can be restored for the 2012 statewide election. It is undisputed that (1) the Secretary of State must send a final, certified list of federal and state candidates to local elections officials by March 29, 2012; (2) pursuant to federal and state law, ballots for the June 2012 Primary Election must be mailed to military and overseas voters beginning April 6, 2012; and (3) it takes several days to design, prepare, and

⁶ See *supra* note 1; see also *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1397 (9th Cir. 1991), *cert. denied*, 501 U.S. 1252 (1991) (“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*.”) (italics added).

⁷ Intervenor-Applicants and Plaintiffs assert that Senate Bill 6 is unconstitutional in its entirety, because one of its core parts (i.e., its Party Preference Ban) is unconstitutional *as applied*. Opening Brief, at 3-4 & nn. 4 & 5 (citing, *inter alia*, *Rubin v. Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002) (Silverman, J.); *contra*, *Field v. Bowen*, 199 Cal.App.4th 346 (Cal.Ct.App. 2011) (affirming trial court’s denial of preliminary injunction with respect to *facial* challenge of Senate Bill 6). The Secretary of State does not dispute this analysis regarding SB 6’s unconstitutionality and Proposition 14’s unenforceability. Without citing any legal authority, Intervenor-Defendants claim that “there is no basis for blocking Proposition 14 and SB 6[.]”. Intervenor-Defendants’ Opp’n, at 7 n.3. However, because they cite no legal authority to support their claim, Intervenor-Defendants have conceded that Proposition 14 must be declared unenforceable if the entirety of Senate Bill 6 is declared unconstitutional.

⁸ See *supra* note 5.

print ballots.⁹ Thus, March 29, 2012 is the last date on which the election rules can be changed – and the last date on which Intervenor-Applicants *can benefit from* a favorable court ruling – for the 2012 statewide election.

III. *Bates v. Jones* Controls

Tellingly, Defendants have conceded that the Court’s ruling in *Bates v. Jones*¹⁰ – which Defendants *do not even cite* – controls this Motion. Shortly before California’s 1998 statewide election, the *Bates* plaintiffs challenged the constitutionality of an initiative (Proposition 140) that had imposed lifetime term limits on California lawmakers. On appeal, twenty state candidates and voters (the “*Bates* Intervenor”) asked this Court for leave to intervene on the side of the plaintiffs, for they sought to protect their right to *benefit from* a favorable ruling. Specifically, the candidates (whom Proposition 140 had banned from running for re-election) sought to regain the right to run for re-election; while the voters sought to regain the right to vote for those candidates. The Court allowed all of them to intervene.¹¹

The Court allowed the *Bates* Intervenor to join the litigation on appeal for two main reasons. First, the Court held that candidates and voters who seek to regain rights that had been taken away by a potentially invalid statute *must* be allowed to intervene, in order “to avoid to the greatest extent possible any unnecessary *inequities and delay* in the upcoming election cycle.”¹²

Second, the Court held that the *Bates* Intervenor met all of the requirements for intervention, particularly timeliness. Rejecting the

⁹ Opening Brief, at 4-5.

¹⁰ *Bates, supra*, 127 F.3d 870.

¹¹ The Court granted Intervenor-Applicants permissive intervention after concluding that Intervenor-Applicants met the requirements for intervention under Rule 24 of the Federal Rules of Civil Procedure. *Id.* at 873-74 & n.4.

¹² *Id.* at 872 (italics added).

Secretary of State's strenuous opposition, the Court made it clear that litigants may intervene *on appeal* if the existing parties can no longer adequately protect their interests:

We focus on the date the person attempting to intervene should have been aware his interests would no longer be protected adequately by the parties, *rather than the date the person learned of the litigation.*¹³

Toward that end, the Court pinpointed the exact time that the plaintiffs could no longer protect the *Bates* Intervenors' interests: *after oral argument* of the appeal, when the *Bates* Intervenors learned that they might not "benefit from a favorable ruling" from the Court.¹⁴ Finally, the Court held that the State would not suffer any prejudice from the intervention, for "the State, *like the public, will benefit* from the uniform applicability of its laws."¹⁵

Because its facts mirror this case, *Bates* controls here. Like the *Bates* Intervenors, Intervenor-Applicants are voters and candidates who seek to join a statewide election case on appeal, on the side of Plaintiffs. Like the *Bates* Intervenors, Intervenor-Applicants Steinman and Richardson seek to regain two constitutional rights that Proposition 14 (whose validity has been challenged) took away: (1) the right to run, respectively, in the Green Party and Libertarian Party primary in June 2012, and (2) if they win their party primary, the right to *appear on the ballot* of the November 2012 General Election. Similarly, Intervenor-Applicants Arnold and Clausen seek to *regain* (1) the right to vote for Richardson and Steinman, respectively, *in a restored Libertarian and Green Party primary*, and (2) the right to vote for a Libertarian Party or Green Party candidate, respectively, in the November 2012 General Election.

¹³ *Id.* at 873 (italics added, quotation marks omitted) (citing *Officers for Justice v. Civil Service Comm'n*, 934 F.2d 1092, 1095 (9th Cir. 1991); *Legal Aid Soc'y v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980)).

¹⁴ *Bates, supra*, 127 F.3d at 873.

¹⁵ *Id.* at 874 (italics added).

Furthermore, Intervenor-Applicants seek to protect their right “to benefit from a favorable ruling” *at an early stage of the proceedings*. Unlike the *Bates* Intervenor (who successfully intervened *after* oral argument), Intervenor-Applicants seek to intervene *before briefing on the appeal has even begun*. In response, Defendants have made no effort to distinguish (let alone cite) *Bates*. Consequently, *Bates* controls this Motion.

IV. It Is Beyond Question That Intervenor-Applicants Have a Right to Intervene on Appeal

It is beyond question that Intervenor-Applicants have a right to intervene on appeal, for they meet all criteria required by Rule 24 of the Federal Rules of Civil Procedure.¹⁶ First, Intervenor-Applicants have shown – and the Secretary of State does not dispute – that they have a significantly protectable interest that could be impeded and impaired by this litigation.¹⁷ As the Court made clear in *Bates*, voters and candidates have a right to intervene on appeal, in order to protect their ability to *regain* constitutionally protected¹⁸ rights that were taken away by a statute whose validity has been challenged.¹⁹

Here, Intervenor-Applicants seek to intervene in order to protect their ability to benefit from a favorable court ruling. Specifically, they seek to regain (1) the right to run and vote in the party primary of the Libertarian Party or Green Party, (2) the right to qualify for the nomination of Green

¹⁶ See *id.* at 873.

¹⁷ Opening Brief, at 8-9.

¹⁸ See *supra* note 5. See also *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993) (an interest is significantly protectable if it is “protectable *under some law*” and “there is a relationship between the legally protected interest and the claims at issue.”) (italics added).

¹⁹ *Bates, supra*, 127 F.3d at 872. Intervenor-Defendants claim that Intervenor-Applicants have no significantly protectable interest in this litigation. Yet in so doing, they neither cite nor try to distinguish *Bates*, which controls this Motion. Moreover, the case invoked by Intervenor-Applicants (*Glickman*) does not apply here, for *Glickman*’s prospective intervenors *did not challenge the validity of the statute at issue*. Cf. *Nw. Forest Resource Council v. Glickman*, 82 F.3d 825, 828 (9th Cir. 1996) (group seeks to intervene in litigation involving *statutory construction*).

Party or Libertarian Party for the November 2012 General Election, and (3) the right to vote for the Green Party or Libertarian Party nominee in the November 2012 General Election. Those intertwined rights were taken away by Proposition 14, whose validity has been challenged in this lawsuit.

It is beyond dispute that after March 29, 2012, Intervenor-Applicants will lose the ability to benefit from a favorable court ruling with respect to the 2012 statewide election. Consequently, Intervenor-Applicants have a significantly protectable interest that could be impeded and impaired.

Second, Intervenor-Applicants have shown that Plaintiffs can no longer represent the former's interests. As their Opening Brief showed, Intervenor-Applicants will regain the constitutional right to run and vote in the Green Party and Libertarian Party primary if Plaintiffs prevail.²⁰ However, if the Court rules in Plaintiffs' favor *after* March 29, 2012, it will be *too late to restore party primaries* for the 2012 statewide election. Because the Court has denied Plaintiffs' request to resolve this case before March 9, 2012, it is at best unclear whether this case will be resolved before March 29, 2012 – the *last date* on which Intervenor-Applicants can benefit from a favorable court ruling.²¹ Therefore, Plaintiffs can no longer represent Intervenor-Applicants' interest in this litigation.

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

²⁰ Opening Brief, at 9.

²¹ See *Bates, supra*, 127 F.3d at 873.

learned of the litigation.”²² The Court weighs three main factors in considering whether a motion to intervene is timely:

1. The stage of the proceedings;
2. Prejudice to existing parties; and
3. The length of and reason for any delay in seeking intervention.²³

Toward that end, *Bates* provides *binding* guidance. As discussed earlier, *Bates* (1) allowed the *Bates* Intervenors to join a statewide election case *after* oral argument had been held before this Court, (2) held that the State could suffer no prejudice from that intervention as a matter of law, and (3) concluded that the *Bates* Intervenors promptly moved to intervene as soon as they learned that the plaintiffs could no longer protect their interests.²⁴

Here, Intervenor-Applicants seek to join this statewide election litigation at a far earlier stage than the *Bates* Intervenors: *before* briefing is scheduled to begin and before oral argument has been calendared. Moreover, Intervenor-Applicants did not delay seeking intervention: it is undisputed that they filed this Motion *one week* after learning that Plaintiffs could no longer protect their interests.²⁵ Furthermore, the facts raised by this Motion are undisputed, and the State will suffer no prejudice if this Motion

²² *Id.* at 873 (italics added, citations and quotations omitted); *see also Officers for Justice, supra*, 934 F.2d at 1095; *Dunlop, supra*, 618 F.2d at 50.

²³ Opening Brief, at 10 (citing *Dep’t of Toxic Substances Control v. Comm. Realty Projs.*, 309 F.3d 1113, 1119 (9th Cir. 2002)).

²⁴ *See* Section III *supra*.

²⁵ Opening Brief, at 10-11. Defendants argue that Intervenor-Applicants should have filed their Motion to Intervene in the trial court, at the onset of this litigation. However, as this Court has repeatedly held, a prospective intervenor is *not* required to file a motion to intervene until the moment that he “should have been aware that his interests would no longer be protected adequately by the parties, *rather than the date the person learned of the litigation.*” *Bates, supra*, 127 F.3d at 873 (italics added, citations and quotations omitted); *see also Officers for Justice, supra*, 934 F.2d at 1095; *Dunlop, supra*, 618 F.2d at 50. *Contra*, Secretary of State’s Opp’n, at 3-4 (quoting *Chamness v. Bowen*, 2011 WL 3021492, at *3 (C.D. Cal. 2011) (Wright, J.) (disregarding this Court’s holding in *Bates v. Jones*, trial court rules that a motion to intervene was not timely, apparently because the prospective intervenor did not seek to intervene immediately *after learning of the underlying litigation*), *appeal pending* (9th Cir. No. 11-56303)).

is granted *as a matter of law*.²⁶ Because their Motion satisfies all criteria required under Rule 24 of the Federal Rules of Civil Procedure, Intervenor-Applicants must be granted intervention of right.²⁷

V. This Motion Is *Not* a Motion to Expedite

In a last-ditch effort, Defendants claim that this Motion to Intervene is a *de facto* motion to expedite the underlying appeal. However, the undisputed facts contradict their contrived claim. Indeed, this Motion does *not* ask the Court to expedite the underlying appeal. Instead, it asks the Court to allow Intervenor-Applicants to *join* this litigation, for Plaintiffs can no longer protect Intervenor-Applicants' legal interest: to resolve the underlying appeal (which could restore their right to participate in their party primary) *before* March 29, 2012.²⁸ Simply put, this Motion raises only one legal question: do Intervenor-Applicants have a right to intervene?

VI. Conclusion

Under these circumstances, and given the fundamental nature of the right at stake, *we find it both "imperative" and in the public interest* that we allow these applicants to intervene.

– The Court, *Bates v. Jones*²⁹

In short, Intervenor-Applicants have *proven* their right to intervene in the underlying appeal: a case that will decide whether they will regain their

²⁶ See *supra* note 15. Defendants do not dispute Intervenor-Applicants' sworn declarations that (1) Intervenor-Applicants Steinman and Clausen are affiliated with the Green Party, and (2) Intervenor-Applicants Richardson and Arnold are affiliated with the Libertarian Party.

²⁷ Contrary to Intervenor-Defendants' claims, Intervenor-Applicants also qualify for permissive intervention. *Bates, supra*, 127 F.3d at 873-74 & n.4 (granting permissive intervention on appeal in statewide election case, where the voters and candidates met all criteria required by FRCP Rule 24) (*citing Sierra Club, supra*, 995 F.2d at 1481); see also *Freedom from Religion Found. v. Rodgers*, -- F.3d --, No. 09-17753, at 6143-45 (9th Cir. May 9, 2011) (O'Scannlain, J.) (permissive intervention warranted in federal-question litigation if (1) the prospective intervenors "do[] not seek to bring any counterclaims or crossclaims", and (2) their motion to intervene is timely and raises "*a common question of law and fact* between [their] claim or defense and the main action.") (italics added, citations and quotations omitted).

²⁸ Thus, if the Court calendars oral argument for a date before March 29, 2012, this Motion to Intervene will likely become moot.

²⁹ *Bates, supra*, 127 F.3d at 873-74 (italics added) (*quoting Landreth Timber Co. v. Landreth*, 731 F.2d 1348, 1358 (9th Cir. 1984), *rev'd on the merits*, 469 U.S. 1016 (1984)).

right to run and vote in the Libertarian Party and Green Party Primary for the 2012 statewide election. To date, Plaintiffs have failed to convince the Court to resolve this case before March 29, 2012 – the last date on which Intervenor-Applicants can benefit from a favorable ruling from this Court. Because Plaintiffs can no longer protect their interests, the Court’s ruling in *Bates* unequivocally grants Intervenor-Applicants the right to intervene on appeal. Accordingly, Intervenor-Applicants *must* be granted intervention as of right.

DATED: Jan. 2, 2012

By: /s/

GAUTAM DUTTA, ESQ.

FRAP 27(d)(2) CERTIFICATE OF COMPLIANCE

I certify that the foregoing document does not exceed 10 pages.

/s/ _____

GAUTAM DUTTA

CERTIFICATE OF SERVICE

On Jan. 2, 2012, I electronically filed, via CM/ECF, a copy of the foregoing document with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ _____

GAUTAM DUTTA