

No. 11-56449

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL CHAMNESS, DANIEL FREDERICK, and RICH WILSON

Plaintiffs / Appellants,

JULIUS GALACKI

Intervenor-Applicant / Appellant,

-v.-

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

Defendants / Appellees

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

Intervenors-Defendants / Appellees

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

REQUEST FOR JUDICIAL NOTICE

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I. Documents for Which Judicial Notice Is Requested

Pursuant to Federal Rule of Evidence 201, Appellants respectfully ask the Court to take judicial notice of the following documents, which have been attached as exhibits to the accompanying Declaration of Gautam Dutta in Support of Request for Judicial Notice:

<u>Exhibit</u>	<u>Document</u>
1	Letter dated Sept. 7, 2011 to the California Court of Appeal (in <i>Field v. Bowen</i>), in which the <i>Field</i> plaintiffs apprised that court of a newly issued California Senate analysis of Senate Bill 6's provisions.
2	Sept. 15, 2011 order issued by the California Court of Appeal in <i>Field v. Bowen</i> barring the California Senate's Sept. 7, 2011 analysis from entering the record
3	Sept. 19, 2011 interlocutory order issued by the California Court of Appeal in <i>Field v. Bowen</i> , in which the state court directly contradicted the statutory construction of Senate Bill 6 agreed upon by the Secretary of State, Plaintiffs, the California Senate, a prominent election-law scholar, and the district court

II. Relevance of Documents

Exhibits 1 & 2: In its Sept. 7, 2011 legislative analysis,¹ the California Senate Committee on Elections and Constitutional Amendments stated that Senate Bill 6's provisions regarding write-in voting "could create

¹ The California Senate's analysis was attached as Exhibit 21 to Plaintiffs' Sept. 15, 2011 Request for Judicial Notice (Docket No. 6-1), and was also attached to the *Field* Plaintiffs' Sept. 7, 2011 letter to the California Court of Appeal (attached as Exhibit 1 to this Request for Judicial Notice).

confusion, and could *mislead voters into thinking that write-in votes for candidates ... at a general election will be counted.*²

After the *Field* plaintiffs apprised it of the California Senate's analysis (their letter has been attached as Exhibit 1), the California Court of Appeal issued an order (Exhibit 2) *barring* the Senate's newly released legislative analysis from entering the record.

Exhibit 3: On Sept. 19, 2011, the California Court of Appeal issued an interlocutory order (Exhibit 3) in *Field v. Bowen*. In *Field*,³ the plaintiffs had challenged the facial constitutionality of Senate Bill 6 (SB 6), and sought a preliminary injunction against SB 6 and Proposition 14. Last fall, the Superior Court denied their Motion for Preliminary Injunction.

In its order, the California Court of Appeal (the "State Court") affirmed the Superior Court's denial of a preliminary injunction. Although the *Field* plaintiffs had brought an interlocutory appeal, the State Court insisted on ruling on the facial constitutionality of SB 6 *on the merits*, *without even considering* whether the *Field* plaintiffs had made the required

² *Field* Plaintiffs' Sept. 7, 2011 letter to the California Court of Appeal (attached as Exhibit 1), at 1 (emphases added). *See also supra* note 1.

³ *Mona Field v. Debra Bowen* (California Court of Appeal, First District, No. A129946 & Superior Court, County of San Francisco, No. CGC 10-502018). *See* Sept. 21, 2011 Motion to Expedite Appeal, Docket No. 10, at 10, 11, 15.

showing of imminent harm.⁴ The State Court’s interlocutory order will become final 30 days after it was issued.⁵

Among other things, the State Court made two rulings directly relevant to this case. First, it ruled that SB 6 bans write-in votes from being *cast* in every federal and state general election. In so doing, the State Court *directly contradicted the statutory construction* of SB 6 agreed upon by the Secretary of State, Plaintiffs, the California Senate, a prominent election-law scholar,⁶ and the district court: namely, SB 6 *allows write-in votes to be cast* in the general election, but then *bans them from being counted*. It is *undisputed* that write-in votes have been cast, but have not been counted in *two consecutive* general elections: in Congressional District 36 and Assembly District 4.

Second, the State Court ruled that it is constitutional to ban minor-party candidates from using the ballot label of “Independent”, and to force them to falsely state on the ballot that they have “No Party Preference”. In so doing, the State Court not only disregarded the Secretary of State’s

⁴ Exh. 3, at 4-5.

⁵ California Rule of Court §8.264. A petition for review to the California Supreme Court may be filed within 10 days after an order from the California Court of Appeal has become final. *Id.* §8.500(e)(1).

⁶ “Adding insult to injury, a law passed to implement Proposition 14 *specifically prohibits the counting of write-in votes* in the general election.” Jessica A. Levinson, *Is the Party Over? Examining the Constitutionality of Proposition 14 As It Relates to Ballot Access for Minor Parties*, LOYOLA OF LOS ANGELES L.R. Vol. 44, 463, 471 (emphases added).

admission that such a ban was not “permissible”,⁷ but glossed over key precedent from this Court. Namely, in *Rubin v. City of Santa Monica*, this Court signaled that banning the ballot label of “Independent” would trigger strict scrutiny under the First and Fourteenth Amendments.⁸

Because the State Court did not issue an injunction against any elections official, elections officials across the state may *independently* decide whether or not to follow the State Court’s interlocutory order.⁹

III. The Court May Take Judicial Notice under FRE 201

The Court may take judicial notice of any fact that is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”¹⁰ Toward that end, a court must take judicial notice if requested by a party and supplied with the necessary information.¹¹

⁷ Sept. 21, 2011 Motion to Expedite Appeal, Docket No. 10, at 8.

⁸ *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002) (Court signals agreement with seminal Sixth Circuit case affirming the constitutional right to use the ballot label of “Independent”) (*citing Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992)).

⁹ Unless an injunction has been issued against them, elections officials are not bound by an appellate court’s interpretation of a statute. *See, e.g., Billig v. Voges*, 273 Cal.Rptr. 91, 96-97, 223 Cal.App.3d 962 (Cal.Ct.App. 1990) (local elections official independently interprets and enforces Elections Code without consulting the Secretary of State); CAL.CONST. art. iii §3.5 (a) & (c); *Farley v. Healey*, 431 P.2d 650, 67 Cal.2d 325, 327 (Cal. 1967); *Alliance for a Better Downtown Millbrae v. Wade*, 133 Cal.Rptr.2d 249, 108 Cal.App.4th 123, 132, 136 (Cal.Ct.App. 2003).

¹⁰ Federal Rule of Evidence §201(b); *see also Dudum v. Arntz*, 640 F.3d 1098, 1102 n.6 (9th Cir. 2011).

¹¹ Federal Rule of Evidence §201(b); *see also United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003).

The Court may take judicial notice of matters of record in other proceedings “both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.”¹² Because Exhibits 1, 2, and 3 consist of directly relevant records from another court proceeding, the Court may take judicial notice of them.

Accordingly, the Court may take judicial notice of all of the documents listed above.

Executed on Sept. 23, 2011, in Fremont, California.

DATED: Sept. 23, 2011

By: /s/ _____
GAUTAM DUTTA, ESQ.

¹² *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo*, 971 F.2d 244, 248 (9th Cir. 1992) (internal citation omitted); *see also Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n. 6 (9th Cir. 2006); *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 (9th Cir. 2002) (judicial notice taken of amended complaint in another court); *Mullis v. U.S. Bankruptcy Ct.*, 828 F.2d 1385, 1388 n.9 (9th Cir. 1987) (judicial notice taken of documents filed in bankruptcy court).

CERTIFICATE OF SERVICE

On Sept. 23, 2011, I served an electronic copy, via ECF, of this Request for Judicial Notice and the supporting Declaration of Gautam Dutta.

/s/ _____

GAUTAM DUTTA