

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

NIELSEN MERKSAMER  
PARRINELLO GROSS & LEONI LLP  
MARGUERITE MARY LEONI, ESQ. (S.B. NO. 101696)  
CHRISTOPHER E. SKINNELL, ESQ. (S.B. NO. 227093)  
2350 Kerner Boulevard, Suite 250  
San Rafael, California 94941  
Telephone: (415) 389-6800  
Facsimile: (415) 388-6874  
Email: [mleoni@nmgovlaw.com](mailto:mleoni@nmgovlaw.com)  
Email: [cskinnell@nmgovlaw.com](mailto:cskinnell@nmgovlaw.com)

*Attorneys for Proposed Intervener-Defendants*  
CALIFORNIA INDEPENDENT  
VOTER PROJECT, DAVID  
TAKASHIMA, ABEL MALDONADO  
& CALIFORNIANS TO DEFEND  
THE OPEN PRIMARY

IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MICHAEL CHAMNESS,  
*Plaintiff,*  
vs.  
DEBRA BOWEN, California Secretary of  
State, *et al.,*  
*Defendants,*  
CALIFORNIA INDEPENDENT VOTER  
PROJECT, DAVID TAKASHIMA, ABEL  
MALDONADO & CALIFORNIANS TO  
DEFEND THE OPEN PRIMARY,  
*Proposed Intervener-Defendants.*

Case #11-cv-01479-ODW (FFMx)

**INTERVENER-  
APPLICANTS' THREE-PAGE  
REPLY TO PLAINTIFF'S  
OPPOSITION TO  
INTERVENTION**

JUDGE: Hon. Otis D. Wright II  
COURTROOM: 11  
HEARING DATE: N/A (see  
Standing Order Regarding Newly  
Assigned Cases, p. 8)

1 Most of the arguments in Plaintiff's Opposition to Intervention warrant no  
 2 response. They are adequately addressed by the case law and discussion contained in the  
 3 motion to intervene. However, a few new points merit brief reply:

4 **I. INTERVENER-APPLICANTS ARE NOT "JUDICIALLY ESTOPPED"**  
 5 **FROM RAISING THE STATUTORY CONSTRUCTION ARGUMENT.**

6 Plaintiff acknowledges that Interveners seek to present a statutory construction  
 7 argument in this case that the existing parties have rejected,<sup>1</sup> but claims that Intervener's  
 8 interests will nevertheless be adequately represented because Interveners have "admitted"  
 9 their statutory construction is incorrect and are "judicially estopped" from arguing  
 10 otherwise.<sup>2</sup> That is false. Intervener-Applicants raised this statutory construction issue  
 11 in their Answer, filed in the San Francisco Superior Court, in the Court of Appeal  
 12 proceedings and in the California Supreme Court. Moreover, for judicial estoppel to  
 13 apply, a party must take a position that "directly contradicts" a position earlier taken.  
 14 *United States v. Castillo-Basa*, 483 F.3d 890, 898-99 n.5 (9th Cir. 2007). A legal  
 15 position that it would be constitutional for SB 6 to limit ballot labels to qualified parties  
 16 does not "directly contradict" the conclusion that SB 6 does not do that, or vice versa.

17 **II. INTERVENER-APPLICANTS DID NOT VIOLATE THE COURT'S**  
 18 **STANDING ORDER.**

19 Intervener-Applicants accurately informed the Court that Plaintiff opposes  
 20 intervention—just witness the 12-page opposition that Plaintiff has filed. Yet Plaintiff  
 21 claims Intervener-Applicants have "misrepresented" his position by not informing the  
 22

23  
 24 <sup>1</sup> As stated in Intervener-Applicants' moving papers, Ninth Circuit case law holds that  
 25 whether existing parties can be expected to make all a proposed intervenor's arguments is a  
 consideration relevant to the question of whether the intervenor's interests will be "adequately  
 represented" by existing parties. *Sagebrush Rebellion v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983).

26 <sup>2</sup> This fabricated "admission" and the effort to claim judicial estoppel are merely the latest  
 27 demonstration of the propensity of Plaintiff's counsel to seek ways by which he can avoid meeting  
 28 arguments on their merits. This propensity has figured prominently in the state court  
 proceedings, and in the papers that Plaintiff has already filed. *See generally* Plaintiff's Motion for  
 Preliminary Injunction (Dkt. #4) (three claims that opposing party has "admitted" some point,  
 and six claims that opposing party has "conceded" some key point).

1 Court that Plaintiff would stipulate to the filing of an *amicus* brief. This claim lacks merit.

2 In the first place, Plaintiff's e-mail to Ms. Leoni, detailing his position and  
3 referencing his agreement to stipulate to the filing of an *amicus* brief, was presented to  
4 the Court as an exhibit to the Declaration of Marguerite Leoni, filed in support of  
5 intervention. Moreover, participation as an *amicus* is an inadequate substitute for  
6 participation by intervention. Interveners have significant procedural rights that *amici*  
7 lack, including (1) the right to submit evidence to the Court;<sup>3</sup> (2) the right to appeal  
8 adverse rulings; and (3) the right to discovery. It is therefore incorrect to say, as Plaintiff  
9 does, that the invitation to file an *amicus* brief "would have eliminated the need" to file  
10 this motion to intervene. (Plaintiff's Opposition, p. 3:17.)<sup>4</sup>

### 11 **III. PLAINTIFF MISREPRESENTS INTERVENERS' INTERESTS.**

12 Plaintiff claims that Interveners' interest are nothing more than "bare political  
13 interests" that do not warrant intervention. However, the "bare political interests"  
14 addressed in the state court case on which he relies, *City & County of San Francisco v.*  
15 *California*, 128 Cal. App. 4th 1030 (2005), were simply "philosophical" (*id.* at 1309)—i.e.,  
16 ideological—preferences, rather than the concrete interests alleged in the moving papers,  
17 to wit:

- 18 • David Takashima's fundamental interest, created by the State Constitution and  
19 Elections Code, to participate in primary elections (where elections are often  
20 decided) without restriction—an interest that will be nullified if Plaintiff receives  
21 the relief he seeks. Plaintiff conspicuously fails to even mention this interest.
- 22 • Mr. Maldonado's reputational interest in Proposition 14, and his separate interest  
23 in the "rules of the road" governing his efforts to be elected to Congress in 2012.

24  
25 <sup>3</sup> The Court may, of course, allow such evidence in its discretion.

26 <sup>4</sup> Plaintiff also complains that the intervention motion is untimely, in part because he was  
27 not served with the "final, electronically filed version" of the moving papers. (Plaintiff's  
28 Opposition, p. 5:14-17.) He did not receive those "electronically-filed" documents because GO 10-  
07(V)(C)(1) required that they be filed manually. However, Counsel for Intervener served the  
moving papers on Plaintiff's counsel by e-mail and by Federal Express on February 28th—the day  
before they were filed. There is accordingly no basis for his claim of prejudice.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

This interest in electoral rules is virtually indistinguishable from Plaintiff's purported interest in this case.<sup>5</sup>

- With respect to CIVP and CDOP, Plaintiff acknowledges that they have an interest in the enforceability of Proposition 14, *see* Opposition, pp. 9:21–10:5, but disingenuously claims that they have no interest in SB 6—and therefore no interest in this lawsuit—because they “played no role” in SB 6’s enactment. This is an artificial distinction. Based on the alleged unconstitutionality of SB 6, Plaintiff seeks a declaration that Proposition 14 is unenforceable in its entirety until a hostile Legislature enacts “corrective” legislation. Intervener-Applicants’ acknowledged interest in Proposition 14 will be unavoidably impaired if Plaintiff receives the relief he seeks.

Dated: March 2, 2011

NIELSEN MERKSAMER  
PARRINELLO GROSS & LEONI LLP

By: /s/ Marguerite Mary Leoni  
Marguerite Mary Leoni

By: /s/ Christopher E. Skinnell  
Christopher E. Skinnell

*Attorneys for Intervener-Applicants*

---

<sup>5</sup> Contrary to Plaintiff’s suggestion, there is no case holding that a legislator is forever after barred from ever intervening in a lawsuit merely because he has left office, even if he still has interests—as Mr. Maldonado does—that will be affected by the litigation.