

1 NIELSEN MERKSAMER
2 PARRINELLO GROSS & LEONI LLP
3 MARGUERITE MARY LEONI, ESQ. (S.B. NO. 101696)
4 CHRISTOPHER E. SKINNELL, ESQ. (S.B. NO. 227093)
5 2350 Kerner Boulevard, Suite 250
6 San Rafael, California 94941
7 Telephone: (415) 389-6800
8 Facsimile: (415) 388-6874
9 Email: mleoni@nmgovlaw.com
10 Email: cskinnell@nmgovlaw.com

11 *Attorneys for Intervener-Defendants*
12 CALIFORNIA INDEPENDENT
13 VOTER PROJECT, DAVID
14 TAKASHIMA, ABEL MALDONADO
15 & CALIFORNIANS TO DEFEND
16 THE OPEN PRIMARY

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

19 MICHAEL CHAMNESS,

20 *Plaintiff,*

21 vs.

22 DEBRA BOWEN, California Secretary of
23 State, *et al.,*

24 *Defendants,*

25 CALIFORNIA INDEPENDENT VOTER
26 PROJECT, DAVID TAKASHIMA, ABEL
27 MALDONADO & CALIFORNIANS TO
28 DEFEND THE OPEN PRIMARY,

Proposed Intervener-Defendants.

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

**NOTICE OF [Proposed]
MOTION AND [Proposed]
MOTION TO INTERVENE**

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

LOGGED

FILED
2011 FEB 28 PM 2:03
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
LOS ANGELES

1 NIELSEN MERKSAMER
2 PARRINELLO GROSS & LEONI LLP
3 MARGUERITE MARY LEONI, ESQ. (S.B. NO. 101696)
4 CHRISTOPHER E. SKINNELL, ESQ. (S.B. NO. 227093)
5 2350 Kerner Boulevard, Suite 250
6 San Rafael, California 94941
7 Telephone: (415) 389-6800
8 Facsimile: (415) 388-6874
9 Email: mleoni@nmgovlaw.com
10 Email: cskinnell@nmgovlaw.com

11 *Attorneys for Intervener-Defendants*
12 CALIFORNIA INDEPENDENT
13 VOTER PROJECT, DAVID
14 TAKASHIMA, ABEL MALDONADO
15 & CALIFORNIANS TO DEFEND
16 THE OPEN PRIMARY

17
18
19
20
21
22
23
24
25
26
27
28
IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

16 MICHAEL CHAMNESS,

17 *Plaintiff,*

18 vs.

19 DEBRA BOWEN, California Secretary of
20 State, *et al.*,

21 *Defendants,*

22 CALIFORNIA INDEPENDENT VOTER
23 PROJECT, DAVID TAKASHIMA, ABEL
24 MALDONADO & CALIFORNIANS TO
25 DEFEND THE OPEN PRIMARY,

26 *Proposed Intervener-Defendants.*
27
28

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

**NOTICE OF [Proposed]
MOTION AND [Proposed]
MOTION TO INTERVENE**

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

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

TABLE OF CONTENTS

Page

NOTICE OF MOTION..... 1

POINTS & AUTHORITIES 2

 I. INTRODUCTION 2

 II. FACTUAL BACKGROUND 4

 III. CAIVP, DAVID TAKASHIMA, ABEL MALDONADO AND
 CALIFORNIANS TO DEFEND THE OPEN PRIMARY
 ARE ENTITLED TO INTERVENE OF RIGHT UNDER
 FRCP 24(a)..... 8

 A. Proposed Interveners Have Significant Protectable
 Interests In These Actions 8

 1. CAIVP, as the representative and advocate
 for the intended beneficiaries of the Top Two
 Candidate Open Primary Act, and David
 Takashima, one of those intended
 beneficiaries, hold direct and immediate
 interests in the measure’s implementation..... 8

 2. As a declared candidate for congressional
 office in 2012, and as the legislative
 author/proponent of Proposition 14, Mr.
 Maldonado has two separate direct interests
 in defending the measure’s legality and in its
 implementation..... 11

 3. As the chief supporter of Proposition 14 in
 the campaign, Californians to Defend the
 Open Primary has a direct interest in
 defending the measure’s legality 14

 B. The Disposition Of This Action “May, As A
 Practical Matter, Impair Or Impede The [Proposed
 Interveners’] Ability To Protect [Their] Interest[s].” 15

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

C. This Motion Is Timely 15

 a. Stage of the proceedings: no significant proceedings have yet taken place in this action 16

 b. Intervention will not prejudice the existing parties 17

 c. Length of delay and reason for delay: Proposed Intervenors have moved expeditiously to intervene in this action 18

D. The Existing Parties Do Not Adequately Represent The Proposed Intervenors’ Interests 18

IV. CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Arakaki v. Cayetano,
324 F.3d 1078 (9th Cir.), cert. denied sub nom. *Hoohuli v. Lingle*, 540 U.S. 1017 (2003) 8

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 13

Bates v. Jones,
904 F. Supp. 1080 (N.D. Cal. 1995)..... 12, 21

Bldg. Indus, Ass’n of So. Cal., Inc. v. City of Camarillo,
41 Cal. 3d 810 (1986)..... 13

California Dep’t of Toxic Substances Control v. Commercial Realty Projects, Inc.,
309 F.3d 1113 (9th Cir. 2002) 16, 18

County of Fresno v. Andrus,
622 F.2d 436 (9th Cir. 1980) 11

Diamond v. Charles,
476 U.S. 54 (1986) 13

Field v. Bowen,
Case No. 10-502018 (San Francisco Super. Ct.) 2, 6

Field v. Bowen,
Case No. A129946 (Cal. Ct. App. 1st Dist.) 2, 7, 19, 20

Field v. Superior Court,
Case No. A129829 (Cal. Ct. App. 1st Dist.) 2, 7

Field v. Superior Court,
Case No. S188436 (Cal.)..... 2, 7

Grace United Methodist Church v. City of Cheyenne,
451 F.3d 643 (10th Cir. 2006) 8

Hunt v. Wash. State Apple Advertising Comm’n,
432 U.S. 333 (1977) 10

1 *Idaho Farm Bureau Fed'n v. Babbitt*,
2 58 F.3d 1392 (9th Cir. 1995) 16, 17

3 *Legislature v. Eu*,
4 54 Cal. 3d 492 (1991), *cert. denied*, 503 U.S. 919 (1992) 12

5 *Libertarian Party v. Eu*,
6 28 Cal. 3d 535 (1980) 6, 19

7 *Lightfoot v. Eu*,
8 964 F.2d 865 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993) 6, 19

9 *Northwest Forest Res. Council v. Glickman*,
10 82 F.3d 825 (9th Cir. 1996) 17

11 *Perry v. Schwarzenegger*,
12 ___ F.3d ___, 2011 U.S. App. LEXIS 153 (9th Cir. Jan. 4, 2011) 13

13 *Prete v. Bradbury*,
14 438 F.3d 949 (9th Cir. 2006) passim

15 *Railroad Comm'n v. Pullman Co.*,
16 312 U.S. 496 (1941) 20

17 *Reynolds v. Sims*,
18 377 U.S. 533 (1964) 10

19 *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,
20 547 U.S. 47 (2006) 13

21 *Sagebrush Rebellion v. Watt*,
22 713 F.2d 525 (9th Cir. 1983) 12, 19

23 *Southwest Ctr. for Biological Diversity v. Berg*,
24 268 F.3d 810 (9th Cir. 2001) 4

25 *State ex rel. Lockyer v. United States*,
26 450 F.3d 436 (9th Cir. 2006) 11, 21

27 *United Food & Commer. Workers Union Local 751 v. Brown Group*,
28 517 U.S. 544 (1996) 10

United States ex rel. McGough v. Covington Technologies Co.,
967 F.2d 1391 (9th Cir. 1992) 17

1	<i>United States v. Alisal Water Corp.</i> ,	
2	370 F.3d 915 (9th Cir. 2004)	8
3	<i>United States v. City of Los Angeles</i> ,	
4	288 F.3d 391 (9th Cir. 2002)	8
5	<i>United States v. Oregon</i> ,	
6	745 F.2d 550 (9th Cir. 1984)	16
7	<i>United States v. State of Oregon</i> ,	
8	913 F.2d 576 (9th Cir. 1990)	18
9	<i>United States v. Union Elec. Co.</i> ,	
10	64 F.3d 1152 (8th Cir. 1995)	17
11	<i>Wash. State Bldg. Constr. Trades v. Spellman</i> ,	
12	684 F.2d 627 (9th Cir. 1982), <i>cert. denied sub. nom.</i> , <i>Don't Waste</i>	
13	<i>Wash. Legal Defense Found. v. Wash.</i> , 461 U.S. 913 (1983)	12
14	<i>Wash. State Grange v. Wash. Republican Party</i> ,	
15	552 U.S. 442 (2008)	5
16	<i>Wash. State Republican Party v. Wash. State Grange</i> ,	
17	2011 U.S. Dist. LEXIS 2448 (W.D. Wash. Jan. 11, 2011)	5
18	<i>Widjaja v. Yum! Brands, Inc.</i> ,	
19	2009 U.S. Dist. LEXIS 98391 (E.D. Cal. Oct. 22, 2009)	15
20	<u>STATUTES</u>	
21	28 U.S.C. § 1367(a)	8
22	Cal. Elec. Code § 359.5	5
23	Cal. Elec. Code § 2151	4
24	Cal. Elec. Code § 2151	10
25	Cal. Elec. Code § 8002.5	7
26	Cal. Elec. Code § 8002.5(a)	5, 19
27	Cal. Elec. Code § 8002.5(b)	5
28		

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

Cal. Elec. Code § 8002.5(c) 5

Cal. Elec. Code § 806210

Cal. Elec. Code § 8141.5..... 5

Cal. Elec. Code § 840010

Cal. Elec. Code § 8403(a)(1)10

Cal. Elec. Code § 13102(b).....10

Cal. Elec. Code § 13105.....19

Cal. Elec. Code § 13105(a)6, 7

Cal. Elec. Code § 15452 5

Cal. Gov’t Code § 81000 *et seq.*..... 3

CONSTITUTIONAL AUTHORITIES

CAL. CONST. art. II, § 5 5

U.S. CONST. art. III.....13

OTHER AUTHORITIES

Federal Rule of Civil Procedure 24.....1, 8

Standing Order Regarding Newly Assigned Cases, p. 8, *available
online at* <http://www.cacd.uscourts.gov> 1

1 **NOTICE OF MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 Please take notice that on February 28, 2011, Proposed Interveners herein,
4 CALIFORNIA INDEPENDENT VOTER PROJECT, DAVID TAKASHIMA, ABEL
5 MALDONADO and CALIFORNIANS TO DEFEND THE OPEN PRIMARY, filed an
6 ex parte application to have the following motion to intervene in this action under
7 Federal Rule of Civil Procedure 24, granted on shortened time. Pursuant to Judge
8 Wright’s Standing Order, “[t]he Court considers ex parte applications on the
9 papers and does not usually set these matters for hearing. If a hearing is necessary,
10 the parties will be notified.” See Standing Order Regarding Newly Assigned Cases,
11 p. 8, *available online at* <http://www.cacd.uscourts.gov> (last visited Feb. 26, 2011).
12 Also pursuant to Judge Wright’s Standing Order, any

13 opposing papers must be filed no later than twenty four
14 (24) hours following service [of the ex parte application],
15 except in cases where the opposing party has not
16 previously appeared (i.e. responded to the Complaint). In
17 those cases where the opposing party has not previously
18 appeared, . . . opposing papers must be filed no later than
forty eight (48) hours following service [of the ex parte
application]. (*Id.*)

19 This motion is based on the following documents: this Notice of Motion and
20 the attached Points & Authorities; the ex parte application, filed herewith; the
21 Declaration of Marguerite Mary, filed herewith; the Declaration of David
22 Takashima, filed herewith; the Declaration of Allan Zaremborg, filed herewith; the
23 Declaration of Abel Maldonado, filed herewith; the Request for Judicial Noticed
24 filed herewith; and all the other papers, documents, or exhibits on file or to be filed
25 in this action, and the argument to be made at any hearing on the motion ordered
26 by the Court.¹

27 _____
28 ¹ If intervention is granted, Proposed Interveners will file an answer at the time
prescribed by the Federal Rules of Civil Procedure.

1 **POINTS AND AUTHORITIES**

2 **I. INTRODUCTION.**

3 This is not the first lawsuit to challenge the constitutionality of the
4 provisions of SB 6 (Proposition 14’s implementing legislation) governing party
5 labels on the ballot. Indeed, this is now the *fourth* court to be presented with the
6 same challenge. The other three courts—the Superior Court in San Francisco
7 County,² the California Court of Appeal for the 1st Appellate District on an original
8 writ,³ and the California Supreme Court also on an original writ⁴—have all (rightly)
9 denied efforts to enjoin Proposition 14 and SB 6. The state court action is now
10 pending on appeal.⁵ Proposed Interveners California Independent Voter Project
11 (“CAIVP”), Abel Maldonado, and Californians to Defend the Open Primary are
12 parties to the state court proceedings, having been granted intervention therein.⁶

13 CAIVP is an organization representing the interests of “Decline-to-State”
14 candidates and voters who are the direct beneficiaries of Proposition 14 and SB 6
15 (CAIVP was also one of the original drafters of the proposal that became
16 Proposition 14 and SB 6).

17 Former Lieutenant Governor and State Senator Abel Maldonado (in his
18 individual capacity) is a current candidate for congressional office, who was the
19 principal author of Proposition 14 and SB 6, its principal supporter in the
20 Legislature, and is also a beneficiary of the open primary system instituted by
21 Proposition 14.

22
23 _____
24 ² *Field v. Bowen*, Case No. 10-502018 (San Francisco Super. Ct.).

25 ³ *Field v. Superior Court*, Case No. A129829 (Cal. Ct. App. 1st Dist.).

26 ⁴ *Field v. Superior Court*, Case No. S188436 (Cal.).

27 ⁵ *Field v. Bowen*, Case No. A129946 (Cal. Ct. App. 1st Dist.).

28 ⁶ Californians to Defend the Open Primary was granted intervention under the name “Yes on 14 – Californians for an Open Primary,” the ballot measure campaign committee created and maintained by Californians to Defend the Open Primary as the only committee primarily formed and operated to support Proposition 14 at the ballot box. (See Declaration of Allan Zaremborg, filed herewith, ¶¶ 2 & 6.)

1 Californians to Defend the Open Primary is a California nonprofit
2 corporation, formed before Proposition 14 was passed by California’s voters. Its
3 sole purpose was and is to educate the public about, and to advocate for open,
4 nonpartisan primary elections in California, allowing voters to cross party lines in
5 elections for Legislature, statewide elected officials and congressional districts, and
6 to defend Proposition 14 in litigation. As part of its mission (and to comply with
7 California’s Political Reform Act, *see* Cal. Gov’t Code § 81000 *et seq.*), Californians
8 to Defend the Open Primary created and administered a political committee, Yes
9 on 14—Californians For An Open Primary, that successfully advocated for the
10 adoption of Proposition 14 by California voters, expending \$4.75 million in the
11 process.

12 David Takashima, a member of the Board of Directors of CAIVP and a
13 registered DTS voter, is also a proposed intervener who, but for Proposition 14,
14 would not have the right to vote in primary elections. Proposition 14 granted DTS
15 voters new constitutional and statutory rights to participate in primary elections—
16 where the ultimate winner is often decided—that they did not have under the pre-
17 existing system.⁷

18 The California Superior Court permitted CAIVP, Mr. Maldonado, and
19 Californians to Defend the Open Primary to intervene in the pending state court
20 action shortly after the initial complaint was filed. They have participated in the
21 proceedings at every level of the state courts, vigorously—and so far successfully—
22 defending Proposition 14 and SB 6 against constitutional attack.

23 There is no question that these Proposed Interveners, and David Takashima,
24 are entitled to intervene in these proceedings as well, and they respectfully request
25 an order from this Court granting their intervention as of right. Their interests in
26

27 ⁷ Under the pre-existing system, DTS voters were also precluded from being a
28 candidate at the primary election on an equal footing with candidates of the qualified
political parties.

1 the subject matter of this action are patent; no other defendant adequately
2 represents their particular interests; and denying intervention would seriously
3 impair Proposed Interveners' ability to protect their interests by risking
4 inconsistent court rulings and invalidation of Proposition 14, undermining the
5 jurisdiction of the California Court of Appeal, and potentially rendering the state
6 court proceedings moot. There could not be a clearer case for intervention as of
7 right.

8 Though Plaintiff opposes this intervention, counsel for Defendants Secretary
9 of State and Los Angeles County Registrar have informed Proposed Interveners'
10 counsel that their clients do not.

11 **II. FACTUAL BACKGROUND.⁸**

12 Proposition 14 is one of a series of reforms adopted by California voters in an
13 effort to fix their dysfunctional government, which was plagued with extreme
14 partisanship. Not surprisingly, virtually the entire political establishment—
15 including the leadership of both parties in the Legislature—opposed Proposition
16 14. (Declaration of Abel Maldonado, filed herewith, at ¶ 6.) Nevertheless,
17 Californians voted on June 8, 2010, to adopt Proposition 14.

18 Proposition 14 amended the state Constitution to replace party primaries
19 with a type of open primary election known as “top two,” or “voter-nominated”
20 primary election. Only candidates and voters registered with a qualified political
21 party could participate in the primary elections under the prior system; DTS voters
22 and those affiliated with non-qualified parties were prohibited from participating
23 in the primary elections.⁹

24
25 ⁸ “[A] district court is required to accept as true the non-conclusory allegations
26 made in support of an intervention motion.” *Southwest Ctr. for Biological Diversity v.*
Berg, 268 F.3d 810, 819 (9th Cir. 2001).

27 ⁹ Decline to State voters might be allowed to vote in a party's primary under the
28 former system, but only if the party deigned to permit it. *See* Cal. Elec. Code § 2151.
Other, minor party voters could not participate at all.

1 Under Proposition 14, any candidate, regardless of whether he or she is
2 affiliated with a qualified party, may run in the primary for congressional or state
3 elective office (now called “voter-nominated” offices). In addition, any voter may
4 vote at the primary election for any candidate without regard to the political party
5 preference of either the candidate or the voter. See CAL. CONST. art. II, § 5 (as
6 amended by Proposition 14); Cal. Elec. Code § 8002.5(b) (as amended by SB 6).¹⁰
7 The two candidates receiving the highest vote totals for each office at the primary
8 election, regardless of party preference, will then compete for the office at the
9 ensuing general election. See CAL. CONST. art. II, § 5 (as amended by Proposition
10 14); Cal. Elec. Code §§ 8141.5 (added by SB 6) and § 15452 (as amended by SB 6).
11 This type of top-two primary system was upheld against facial constitutional
12 challenge by the U.S. Supreme Court in *Wash. State Grange v. Wash. Republican*
13 *Party*, 552 U.S. 442 (2008), and against an as-applied constitutional challenge in
14 *Wash. State Republican Party v. Wash. State Grange*, 2011 U.S. Dist. LEXIS 2448
15 (W.D. Wash. Jan. 11, 2011).

16 Like the Washington system, on which Proposition 14 was modeled in part,
17 candidates for voter-nominated office have the option of indicating their party
18 “preference” on the ballot.¹¹ California Elections Code § 8002.5(a) (added by SB 6)
19 provides, “A candidate for a voter-nominated office may indicate his or her party
20 preference, or lack of party preference, *as disclosed upon the candidate’s most*
21

22 ¹⁰ New section 359.5, added by SB 6 defines “Voter-nominated office” to include:
23 (1) Governor; (2) Lieutenant Governor; (3) Secretary of State; (4) State Treasurer; (5)
24 Controller; (6) State Insurance Commissioner; (7) Member of the Board of Equalization;
25 (8) Attorney General; (9) State Senator; (10) Member of the Assembly; (11) United States
26 Senator; (12) Member of the United States House of Representatives.

27 ¹¹ California Elections Code § 8002.5(c) provides: “A candidate designating a party
28 preference pursuant to subdivision (a) shall not be deemed to be the official nominee of
the party designated as preferred by the candidate. A candidate’s designation of party
preference shall not be construed as an endorsement of that candidate by the party
designated. The party preference designated by the candidate is shown for the
information of the voters only and may in no way limit the options available to voters.”

1 *recent statement of registration, upon his or her declaration of candidacy.”*
2 (Emphasis added.) Elections Code § 13105(a) provides that the party preference
3 specified on the declaration of candidacy is to appear on the ballot in “substantially
4 the following form: ‘My party preference is the _____ Party.’” Voter
5 registration cards in California contain a blank in which voters can express their
6 affiliation with a non-qualified political party.

7 On or about July 28, 2010, two congressional candidates (represented by
8 counsel for Plaintiff herein) brought constitutional challenges in California
9 superior court against SB 6 and Proposition 14, one of which is *identical* to the
10 claim advanced by Mr. Chamness in this case, and seeking the same sweeping
11 relief. *See Field v. Bowen*, Case No. 10-502018 (San Francisco Superior Court). As
12 here, the plaintiffs in *Field* sought a preliminary injunction against the
13 enforcement of Proposition 14 and SB 6 in their entirety. (Indeed, much of the
14 preliminary injunction motion in this case repeats verbatim the arguments made
15 in the *Field* motion.) The trial court in *Field* properly denied that injunction,
16 holding that under the controlling California Supreme Court case law it is
17 constitutional for the State to limit party labels on the ballot to qualified parties.
18 *See Libertarian Party v. Eu*, 28 Cal. 3d 535 (1980).¹² However, the court did not
19 rule on a preliminary issue not raised by the plaintiffs, but instead tendered to the
20 court by Proposed Interveners: whether, as a matter of statutory construction, the
21 language of SB 6 really does limit candidates to the use of only “qualified” party
22

23 ¹² The Ninth Circuit came to the same conclusion 12 years later, in *Lightfoot v. Eu*,
24 964 F.2d 865, 871 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993). Plaintiff has not even
25 cited *Lightfoot* in his moving papers, much less sought to distinguish it. This omission is
26 particularly astonishing in light of the facts that (1) interveners already criticized the
27 plaintiffs in the *Field* action (and counsel for Plaintiff herein) for a similar failure to cite
28 *Libertarian Party* in their preliminary injunction moving papers; and (2) interveners
have repeatedly briefed *Lightfoot* in the pending state court proceedings. In view of this
latter fact, Plaintiff’s omission of any reference to the controlling Ninth Circuit opinion in
Lightfoot must be viewed as intentional.

1 labels on the ballot. If SB 6 is ultimately construed to permit the use of “non-
2 qualified” party labels on the ballot, it would moot the constitutional claims raised
3 in the state court action *and in this action as well*.

4 The California Court of Appeal and the California Supreme Court each
5 denied separate petitions for writs of mandate, seeking to overturn the trial court’s
6 ruling denying a preliminary injunction. *See Field v. Superior Court*, Case No.
7 A129829 (Cal. Ct. App. 1st Dist.); *Field v. Superior Court*, Case No. S188436 (Cal.).

8 A regular appeal of the trial court’s denial of a preliminary injunction
9 currently remains pending in the California Court of Appeal for the First District,
10 in *Field v. Bowen*, Case No. A129946. Most recently, Proposed Interveners filed an
11 opposition brief in the California Court of Appeal on February 12, 2011. That
12 brief—like Proposed Interveners’ briefs in the Court of Appeal and Supreme Court
13 writ proceedings—vigorously defends the constitutionality of limiting political
14 party labels on the ballot to qualified parties, but also raises the foundational
15 statutory construction question of whether SB 6 contains such a limitation, and
16 asks the California Court of Appeal to definitively construe Elections Code §§
17 8002.5 and 13105(a).

18 Having been unsuccessful thus far at all levels of the state courts, Plaintiff
19 has apparently decided to start over in a new forum, this Court, hoping for a more
20 favorable outcome.¹³ Through the present suit, Plaintiff hopes to invalidate SB 6
21 and Proposition 14 and thereby block or delay the implementation of the “top two”
22 open primary system.

23
24 ¹³ Plaintiff attempted to intervene in the California Supreme Court writ
25 proceedings, but that motion was denied when the court denied the writ; he also
26 attempted to intervene in the state appeal, but the Court of Appeal rejected his efforts to
27 do so because he sought to expand the scope of the appeal by introducing new evidence
28 not presented to the superior court. The appeals court invited Plaintiff to file an
application to file an amicus brief. *See Request for Judicial Notice*, filed herewith, Exhibit
A. Proposed Interveners are not aware that Plaintiff has accepted the Court of Appeals’
invitation.

1 **III. CAIVP, DAVID TAKASHIMA, ABEL MALDONADO AND**
2 **CALIFORNIANS TO DEFEND THE OPEN PRIMARY ARE**
3 **ENTITLED TO INTERVENE OF RIGHT UNDER FRCP 24(a).**¹⁴

4 Ninth Circuit case law requires “an applicant for intervention as of right to
5 demonstrate that ‘(1) it has a significant protectable interest relating to the
6 property or transaction that is the subject of the action; (2) the disposition of the
7 action may, as a practical matter, impair or impede the applicant’s ability to
8 protect its interest; (3) the application is timely; and (4) the existing parties may
9 not adequately represent the applicant’s interest.’” *United States v. Alisal Water*
10 *Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) (quoting *United States v. City of Los*
11 *Angeles*, 288 F.3d 391, 397 (9th Cir. 2002)). “Rule 24 traditionally receives liberal
12 construction in favor of applicants for intervention.” *Arakaki v. Cayetano*, 324
13 F.3d 1078, 1083 (9th Cir.), *cert. denied sub nom. Hoohuli v. Lingle*, 540 U.S. 1017
14 (2003). Proposed Interveners easily meet these criteria.

15 **A. Proposed Interveners Have Significant Protectable**
16 **Interests In These Actions.**

17 **1. CAIVP, as the representative and advocate for the**
18 **intended beneficiaries of the Top Two Candidate Open**
19 **Primary Act, and David Takashima, one of those**
20 **intended beneficiaries, hold direct and immediate**
21 **interests in the measure’s implementation.**

22 By his complaint, Plaintiff Chamness seeks to enjoin the enforcement of
23 Proposition 14 and its implementing legislation, SB 6, *in their entirety*, in all

24 ¹⁴ In the alternative, if intervention of right is denied, permissive intervention
25 would be appropriate here. There are common questions of law and fact related to the
26 constitutionality of SB 6’s party label provisions, and allowing intervention will not
27 “unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ.
28 Proc. 24(b). Moreover, the requisite jurisdictional basis for permitting Interveners to
advance their defense exists under 28 U.S.C. § 1367(a). *See Grace United Methodist*
Church v. City of Cheyenne, 451 F.3d 643, 672-73 (10th Cir. 2006) (when jurisdiction
over a plaintiff’s claim is based on federal question jurisdiction, the court can exercise
supplemental jurisdiction over an intervener’s claim or defense under 28 U.S.C. §
1367(a)).

1 California elections statewide (purportedly until corrective legislation is enacted by
2 a Legislature that opposed Proposition 14 in the first place). The relief Plaintiff
3 seeks would effectively kill Proposition 14’s reforms for the foreseeable future, and
4 would have devastating effects on the interests of CAIVP and David Takashima.

5 CAIVP is a non-profit 501(c)(4) organization representing and advocating
6 for the interests of non-partisan Decline-to-State (“DTS”) voters, and other
7 independent-minded voters regardless of their political party affiliation or
8 preference. (Decl. of David Takashima, filed herewith, at ¶¶ 3-12.) A major
9 project of CAIVP has been reform of California’s primary election system to
10 facilitate the greater participation of DTS voters in such primaries. (*Id.* at ¶¶ 5-7.)
11 In pursuit of that mission, CAIVP drafted the proposal that became Proposition 14
12 and is now California’s Top Two Open Primary Act. CAIVP has a direct interest in
13 this litigation that would be adversely affected by a judgment granting the relief
14 that Plaintiff is requesting. (*Id.* at ¶¶ 3-12.) CAIVP’s main organizational
15 purpose—advocating for the ability of DTS voters to participate in primary
16 elections—would be severely diminished if this Court were to grant the requested
17 relief. (*Id.*) Further, CAIVP’s ability to continue to raise funds in pursuit of its
18 mission may be negatively affected if its major reform project, Proposition 14, is
19 enjoined, as Plaintiff requests. (*Id.* at ¶ 7.)

20 David Takashima is a registered DTS voter, unaffiliated with any political
21 party. (*Id.* at ¶ 2.) Prior to enactment of Proposition 14, DTS voters had no
22 constitutional right to vote in primary elections for candidates for Governor,
23 Lieutenant Governor, Secretary of State, State Treasurer, State Controller, State
24 Insurance Commissioner, Member of the Board of Equalization, Attorney General,
25 State Senator, Member of the State Assembly, United States Senator, or Member of
26 the United States House of Representatives. Candidates for each party appeared
27 on separate ballots. Republican voters received ballots with only Republican
28 candidates on the ballot and Democratic voters received ballots with only

1 Democratic candidates. Libertarians received ballots with only Libertarian
2 candidates, and so on for all six qualified political parties in California.¹⁵

3 Proposition 14 granted DTS voters like David Takashima (the very “core” of
4 CAIVP’s focus) new constitutional rights to vote in primary elections—
5 constitutional rights that would be stripped away if Plaintiff Chamness is
6 successful in securing the requested injunction and declaration rendering
7 Proposition 14 inoperative. If Proposition 14 is enjoined, and the prior electoral
8 system re-imposed, DTS voters’ will once again be unable to participate in primary
9 elections, save at the sufferance of the political parties.

10 It is difficult to imagine a more significant protectable interest than a voter’s
11 interest in whether or not he or she is entitled to cast a ballot. The United States
12 Supreme Court has recognized that the right to vote is perhaps the most
13 fundamental right, “because [it] is preservative of all rights.” *Reynolds v. Sims*,
14 377 U.S. 533, 552 (1964).¹⁶

15 Proposition 14 and SB 6 also granted new rights to independent voters by
16 eliminating high barriers to becoming a candidate for election.¹⁷ These rights
17

18 ¹⁵ As noted above, prior to the adoption of Proposition 14, voters who declined to
19 state a party affiliation had no ability to vote for partisan candidates in the primary
20 election unless authorized to do so by party rule. *See* Cal. Elec. Code §§ 2151 & 13102(b)
(retaining this rule for presidential primaries and elections of party officers). Proposition
21 14 changed that.

22 ¹⁶ Under U.S. Supreme Court case law, an association like CAIVP has standing to
23 represent the interests of its members in litigation when (a) its members would otherwise
24 have standing to sue in their own right; (b) the interests it seeks to protect are germane to
25 the organization’s purpose; and (c) neither the claim asserted or the relief requested
26 requires the participation of individual members in the lawsuit. *Hunt v. Wash. State*
27 *Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977); *United Food & Commer. Workers*
28 *Union Local 751 v. Brown Group*, 517 U.S. 544, 552-53 (1996). These criteria are met
here.

¹⁷ *Compare* Cal. Elec. Code § 8062 (65 to 100 signatures required to seek
nomination of qualified party for statewide office) *with* Cal. Elec. Code § 8400 (1% of
registered voters statewide—currently 172,859 voters—must sign nomination papers for
an independent candidate to run statewide); *see also* Cal. Elec. Code § 8403(a)(1) (only 60
days to collect signatures on independent nomination papers for statewide office).

1 would also be stripped away from DTS voters as well if Plaintiff is successful in
2 achieving the remedies he is seeking in this action. Intervention is needed to
3 protect these fundamental electoral rights, conferred upon DTS voters by the
4 State’s Constitution and Elections Code as amended by Proposition 14 and SB 6.

5 CAIVP not only participated directly in the drafting of Proposition 14, but
6 the voters it represents, including Mr. Takashima, are precisely the intended
7 beneficiaries of Proposition 14 and SB 6 and therefore clearly have the most at
8 stake in this litigation. (See Decl. of Takashima at ¶¶ 11-13.) Accordingly, CAIVP
9 and Mr. Takashima unquestionably have a significant protectable interest
10 sufficient to warrant intervention in this suit. *See County of Fresno v. Andrus*, 622
11 F.2d 436, 438 (9th Cir. 1980) (intervention granted because proposed interveners,
12 who desired to purchase federally irrigated excess farmlands, were “precisely those
13 Congress intended to protect with the reclamation acts and precisely those who
14 will be injured if the Department of the Interior does not act expeditiously in
15 accordance with the mandates of the [law].”); *State ex rel. Lockyer v. United*
16 *States*, 450 F.3d 436, 441 (9th Cir. 2006) (health care providers—who were clearly
17 the “intended beneficiaries” of the Weldon Act—had a sufficient interest to justify
18 intervention).

19 **2. As a declared candidate for congressional office in**
20 **2012, and as the legislative author/proponent of**
21 **Proposition 14, Mr. Maldonado has two separate direct**
22 **interests in defending the measure’s legality and in its**
23 **implementation.**

24 Former State Senator and Lt. Governor Maldonado has an interest in
25 preserving the integrity of the ballot measure he authored, and of the legislative
26 compromise for which he cast the deciding vote in his role as member of the
27 California Senate.¹⁸ Moreover, Proposed Intervener Maldonado has announced

28 ¹⁸ See Decl. of Maldonado at ¶¶ 4-9 (but for the efforts of proposed intervener
Maldonado, Proposition 14 would not have been presented to California voters as a

1 his candidacy for Congress in 2012, and has a direct interest in the question of
2 whether he will run in Proposition 14’s top-two candidate open primary, or under
3 the pre-existing party primary system. (See Maldonado Decl. at ¶¶ 2-3 & 13-17.)

4 The Ninth Circuit has held that proponents of ballot measures and public
5 interest groups supporting those measures have a “significant protectable interest”
6 in defending the measure’s legality in post-election litigation. *Prete v. Bradbury*,
7 438 F.3d 949, 955 (9th Cir. 2006) (citing *Sagebrush Rebellion v. Watt*, 713 F.2d
8 525, 528 (9th Cir. 1983)). Thus, ballot measure proponents or sponsors are
9 routinely permitted to intervene in federal and California state court actions to
10 defend the legality of the measure they supported. *See, e.g., Wash. State Bldg.*
11 *Constr. Trades v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied sub. nom.*,
12 *Don’t Waste Wash. Legal Defense Found. v. Wash.*, 461 U.S. 913 (1983) (allowing
13 intervention of public interest group in lawsuit challenging initiative
14 measure group had supported); *Bates v. Jones*, 904 F. Supp. 1080, 1087 (N.D. Cal.
15 1995) (granting intervention to proponents of Proposition 140, California’s term
16 limits initiative); *Legislature v. Eu*, 54 Cal. 3d 492, 500 (1991), *cert. denied*, 503
17 U.S. 919 (1992) (in an original proceeding, the California Supreme Court permitted
18 proponent of measure to intervene to defend measure’s constitutionality). Indeed,
19 the California Supreme Court has held,

20 [W]e believe the trial court in most instances should
21 allow intervention by proponents of the initiative. To fail
22 to do so may well be an abuse of discretion. Permitting
23 intervention by the initiative proponents under these
24 circumstances would serve to guard the people’s right to
exercise initiative power, a right that must be jealously
defended by the courts.

25 *Bldg. Indus, Ass’n of So. Cal., Inc. v. City of Camarillo*, 41 Cal. 3d 810, 822

26
27 Legislative ballot measure in June and SB 6 would not be law); *see also id.* at ¶ 12
28 (Maldonado spent thousands of dollars of his own money for travel expenses promoting
Proposition 14 to California voters as part of his vision for reform).

1 (1986).¹⁹

2 But quite apart from Mr. Maldonado's interest as the author/proponent of
3 Proposition 14, Mr. Maldonado has a significant, protectable interest in this action
4 by virtue of his announced candidacy for Congress in 2012. First of all, passage of
5 Proposition 14 was one of the key achievements of Mr. Maldonado's tenure in the
6 California Senate, and he plans to run for election to Congress on his record as a
7 reformer. (Decl. of Maldonado at ¶¶ 13-17.) Moreover, Mr. Maldonado has a
8 direct interest in running for Congress under the Top-Two Candidate Open
9 Primary Act enacted by Proposition 14. Like all candidates, he has a direct interest
10 in the "rules of the road" governing his path to election; he also has an electoral

11 _____
12 ¹⁹ Proposed Interveners are, of course, mindful of the pending litigation regarding
13 Proposition 8, which raises the question of whether an initiative sponsor may have Article
14 III standing to defend a ballot measure on appeal, "when the state officers charged with
15 the laws' enforcement, including the Attorney General, refuse to provide such a defense or
16 appeal a judgment declaring the measure unconstitutional." *Perry v. Schwarzenegger*,
17 ___ F.3d ___, 2011 U.S. App. LEXIS 153 (9th Cir. Jan. 4, 2011) (certifying question to
California Supreme Court). That case is inapposite to the case of Mr. Maldonado,
however, as he has an additional and distinct interest in Proposition 14 that—standing
alone—is sufficient to warrant intervention: his interest as a declared candidate for
congressional office in 2012, discussed below.

18 Moreover, that case deals with a circumstance in which the initiative sponsor's
19 independent standing is critical to the maintenance of the appeal *because no other party*
20 *with standing to appeal had chosen to do so*. See *Prete*, 438 F.3d at 956 (holding that
21 ballot measure proponents have a "significant, protectable interest" in defending a
22 measure's legality for purposes of intervention, and distinguishing *Arizonans for Official*
23 *English v. Arizona*, 520 U.S. 43 (1997), which contained dicta questioning the Article III
24 standing of an initiative proponent to maintain an appeal "when a step taken by the
25 original plaintiff (resignation of her job) rendered the entire case or controversy moot.").
26 See also *Diamond v. Charles*, 476 U.S. 54, 68 (1986) ("although intervenors are
27 considered parties entitled, among other things, to seek review . . . an intervenor's right to
28 continue a suit *in the absence of the party on whose side intervention was permitted* is
contingent upon a showing by the intervenor that he fulfills the requirements of Art. III."
(emphasis added)). Neither the Supreme Court nor the Ninth Circuit has ever held,
however, that an intervenor must establish independent Article III standing to intervene
on the side of other parties who do have standing. See *Prete*, 438 F.3d at 956 n.8. As a
general matter, the Supreme Court has held that "the presence of one party with standing
is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum*
for Academic & Institutional Rights, Inc., 547 U.S. 47, 53 n.2 (2006). The Secretary of
State unquestionably has standing to defend the measure.

1 interest in having the opportunity to appeal to a broad portion of the electorate,
2 rather than running under the pre-existing partisan primary system. (*Id.*)

3 Mr. Maldonado's interests are concrete, direct and immediate and he must
4 be permitted to intervene to protect those interests.

5 **3. As the chief supporter of Proposition 14 in the**
6 **campaign, Californians to Defend the Open Primary**
7 **has a direct interest in defending the measure's**
8 **legality.**

9 Californians to Defend the Open Primary is a California nonprofit
10 corporation, formed before Proposition 14 was passed by California's voters. Its
11 sole purpose was and is to educate the public about and to advocate for open,
12 nonpartisan primary elections in California, allowing voters to cross party lines in
13 elections for Legislature, statewide elected officials and congressional districts, and
14 to defend Proposition 14 in litigation. (Zaremborg Decl. at ¶ 2.)

15 Yes on 14-Californians for an Open Primary, a campaign committee created
16 and controlled by Californians to Defend the Open Primary, was the campaign
17 committee primarily formed to support the measure at the June 2010 primary
18 election; it raised and spent \$4.75 million in support of the measure. (*Id.* at ¶¶ 2-
19 4.) As already noted above, in connection with Mr. Maldonado's interests, the
20 Ninth Circuit has held that public interest groups supporting a ballot measures
21 have a "significant protectable interest" in defending the measure's legality in post-
22 election litigation, *Prete*, 438 F.3d at 955, and they are routinely permitted to
23 intervene in such litigation.²⁰

24 Moreover, Californians to Defend the Open Primary has expended
25 considerable time and resources in defending the constitutionality of Proposition

26 ²⁰ The question raised by the Proposition 8 appeal is inapposite here as well, as that
27 case deals with a circumstance in which the initiative sponsor's independent standing is
28 critical to the maintenance of the appeal because no other party with standing to appeal
had chosen to do so. *See* note 19, *supra*.

1 14 and SB 6 in the pending state court action, and has an interest in this action by
2 virtue of its involvement in the pending state court litigation. (*Id.* at ¶ 5.)

3 **B. The Disposition Of This Action “May, As A Practical Matter,
4 Impair Or Impede The [Proposed Interveners’] Ability To
5 Protect [Their] Interest[s].”**

6 An adverse ruling in this case would render Proposition 14 inoperative,
7 leaving Proposed Interveners with no judicial remedy by way of appeal or
8 otherwise. Moreover, Defendants and Proposed Interveners CAIVP, Maldonado
9 and Californians to Defend the Open Primary are parties to a parallel state court
10 action that raises *identical issues* to those advanced in Plaintiff Chamness’s
11 complaint. “[B]ecause of the possibility of inconsistent rulings, disposition of this
12 action without intervention may impair or impede Intervenor-[Defendant]s’
13 ability to protect that interest.” *Widjaja v. Yum! Brands, Inc.*, 2009 U.S. Dist.
14 LEXIS 98391, *19 (E.D. Cal. Oct. 22, 2009) (Wanger, J.) (granting intervention to
15 plaintiffs in a pending state court action based on identical claims, due to the risk
16 of inconsistent rulings). Notwithstanding Proposed Interveners’ success in
17 preserving the enforcement of Proposition 14 in the state court proceedings, if this
18 Court were to issue an injunction precluding Defendant Secretary of State and
19 Defendant Los Angeles County Registrar from enforcing Proposition 14, Proposed
20 Interveners’ efforts to date would be nullified, and their victory in the State courts
21 threatened with mootness.

22 **C. This Motion Is Timely.**

23 In determining whether a motion is “timely,” a court generally evaluates
24 three factors: (1) the stage of the proceedings, (2) prejudice to existing parties, and
25 (3) the length of, and reason for, any delay in seeking to intervene. *California
26 Dep’t of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d
27 1113, 1119 (9th Cir. 2002). Courts assess these criteria, and the issue of timeliness,
28 especially “leniently” when intervention is sought of right, because of the

1 “likelihood” of “serious harm.” *United States v. Oregon*, 745 F.2d 550, 552 (9th
2 Cir. 1984) (overturning denial of State of Idaho’s motion to intervene as untimely).

3 **1. Stage of the proceedings: no significant proceedings**
4 **have yet taken place in this action.**

5 This case was apparently filed on February 17, and the pending motion for
6 preliminary injunction filed the following day, February 18, immediately before a
7 three-day holiday weekend. Proposed Interveners were not served with the
8 complaint or the pending motion for preliminary injunction, or otherwise notified
9 by Plaintiff’s counsel as a courtesy. Proposed Interveners’ counsel only learned of
10 their existence late in the afternoon last Wednesday, February 23, 2011. Proposed
11 Interveners’ counsel contacted their clients and then contacted counsel for each of
12 the present parties to request a stipulation to intervention. Counsel for
13 Defendants Secretary of State Bowen and Los Angeles County Registrar Logan do
14 not oppose the intervention. Proposed Interveners’ counsel contacted Plaintiff’s
15 attorney by telephone and e-mail on Friday, February 25, but did not receive
16 Plaintiff’s answer to the request for intervention until Saturday, February 26.
17 Plaintiff refused to stipulate to the request, and this motion to intervene is being
18 filed the very next court day. (*See generally* Declaration of Marguerite Mary
19 Leoni, filed herewith.)

20 Instructive here is *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392 (9th
21 Cir. 1995), in which the Ninth Circuit held that a motion to intervene was timely
22 when it filed after the plaintiff moved for a preliminary injunction, but before that
23 motion was heard, where the preliminary injunction motion was filed “at a very
24 early stage, before any hearings or rulings on substantive matters.” *Id.* at 1397.
25 Indeed, in this case Proposed Interveners have moved with even greater
26 expedition—in *Idaho Farm Bureau Federation*, the intervener waited at least
27 three weeks to seek intervention after the motion for preliminary injunction was
28 filed, rather than five court days. *Id.* Moreover, in that case—unlike this one—the

1 named defendants had already filed their answers before intervention was sought.
2 *Id. See also Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th
3 Cir. 1996) (“ONRC's motion to intervene was timely. ONRC moved to intervene
4 less than one week after NFRC filed its Section 2001(k)(1) claim, before the
5 Secretaries had filed an answer, and before any proceedings had taken place.
6 Moreover, ONRC's motion to intervene does not appear to have prejudiced either
7 party in the lawsuit, since the motion was filed before the district court had made
8 any substantive rulings.”).

9 **2. Intervention will not prejudice the existing parties.**

10 In addressing this criterion, the relevant question “is whether existing
11 parties may be prejudiced by the delay in moving to intervene, not whether the
12 intervention itself will cause the nature, duration, or disposition of the lawsuit to
13 change.” *United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995). *See*
14 *also United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391,
15 1395 (9th Cir. 1992) (“Industrial Indemnity’s position following intervention is
16 essentially the same as it would have been had the government intervened
17 earlier.”).

18 In this case, no party will be prejudiced by the proposed intervention.
19 Defendants Bowen and Logan do not oppose the proposed intervention. Plaintiff
20 does, but his interests will not be prejudiced by intervention now. This case is
21 barely a week old, and responses to the complaint have yet to be filed. Moreover,
22 Proposed Interveners do not seek to delay this Court’s resolution of the pending
23 motion for preliminary injunction. Proposed Interveners are all represented by
24 the same attorneys, and will file their joint opposition to that motion on March 4,
25 2011, which is the same day that the Defendants’ oppositions are due under the
26 existing briefing schedule agreed to by the Attorney General’s office and Plaintiffs’
27 counsel, and approved by this Court.

1 **3. Length of delay and reason for delay: Proposed**
2 **Intervenors have moved expeditiously to intervene in**
3 **this action.**

4 In addressing the third prong of timeliness—length and reason for delay—
5 the courts consider the length and reason for delay from the time the movant
6 “knows or has reason to know that his interests might be adversely affected by the
7 outcome of the litigation.” *Cal. Dep’t of Toxic Substances Control*, 309 F.3d at
8 1120 (quoting *United States v. State of Oregon*, 913 F.2d 576, 589 (9th Cir. 1990)).

9 As noted above, Proposed Intervenors did not learn of this suit’s pendency
10 until late in the afternoon on February 23, 2011. Upon learning of the existence of
11 this action, and the pending motion for preliminary injunction, Proposed
12 Intervenors moved expeditiously to seek intervention, first attempting to seek
13 intervention on a cooperative basis, and then filing this motion only *three court*
14 *days* after learning of this action because Plaintiff would not stipulate to
15 intervention.

16 The reason for this minor delay is simple: counsel for Proposed Intervenors
17 had to review the moving papers, research several procedural issues, consult with
18 their clients, confer with counsel for the other parties to seek their views on the
19 proposed intervention, and then research and draft the instant papers, including
20 several necessary declarations. Moreover, Proposed Intervenors did not get a
21 definitive answer from Plaintiff’s counsel regarding Plaintiff’s willingness to
22 stipulate to intervention until Saturday, February 26. This motion is filed the very
23 next court day thereafter.

24 **D. The Existing Parties Do Not Adequately Represent The**
25 **Proposed Intervenors’ Interests.**

26 “In assessing whether a present party will adequately represent an
27 intervenor-applicant’s interests, [courts must] ‘consider several factors, including
28 whether [a present party] will undoubtedly make all of the intervenor’s arguments,

1 whether [a present party] is capable of and willing to make such arguments, and
2 whether the intervenor offers a necessary element to the proceedings that would
3 be neglected.’ [Citation.] *The burden of showing inadequacy of representation is*
4 *minimal and ‘is satisfied if the applicant shows that representation of its interests*
5 *“may be” inadequate’” Prete, 438 F.3d at 956 (quoting Sagebrush Rebellion,*
6 *Inc., 713 F.2d at 528 (emphasis added)).*

7 The course of the pending state law action plainly demonstrates that the
8 existing parties will almost certainly not make all of the Proposed Interveners’
9 arguments. In those state court proceedings, Proposed Interveners have argued
10 that the party label provisions challenged by Plaintiff Chamness in this action are
11 constitutional under the California Supreme Court opinion in *Libertarian Party v.*
12 *Eu* and the Ninth Circuit’s opinion in *Lightfoot v. Eu*, discussed above. Proposed
13 Interveners have also argued, however, that the party label provisions are
14 susceptible to a construction that would avoid the constitutional question
15 presented by Plaintiff.²¹ Specifically, Proposed Interveners have argued that
16 “Elections Code §§ 8002.5(a) and 13105 do not, by their terms, limit voters to
17 writing in the name of a qualified party on their voter registration cards. Indeed,
18 those provisions can be read as *permitting* candidates who prefer non-qualified
19 political parties to state that preference on their statement of registration, their
20 nomination papers, and on the ballot.”²²

21 This statutory construction argument is central to the present action for two
22 reasons. If the Proposed Interveners’ interpretation is accepted, Plaintiff
23 Chamness’s constitutional claims will be moot, as they are based on the premise
24 that non-qualified party labels cannot be placed on the ballot. Moreover, the
25 present debate regarding the proper interpretation of SB 6 may merit abstention
26

27 ²¹ See Request for Judicial Notice, Exhibit C (Intervener-Respondents’ Answering
28 Brief in *Field v. Bowen*, Case No. A129946, Cal. Ct. App. 1st Dist.), p. 43.

²² *Id.*

1 by this Court under the doctrine of *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496
2 (1941), as will be discussed more fully in Proposed Interveners' opposition to the
3 motion for preliminary injunction.

4 The existing parties in this action most certainly will not make Proposed
5 Interveners' arguments with regard to the proper interpretation of SB 6's party
6 label provisions.

- 7 • Plaintiff Chamness in his writ proceeding in the California Supreme
8 Court has rejected such a construction of the party label provisions,
9 and for obvious reasons.²³ Mr. Chamness certainly cannot be relied
10 upon to advance Proposed Interveners' statutory construction
11 argument as it would moot his constitutional claims and his ultimate
12 goal of rendering Proposition 14 inoperative.
- 13 • Defendant Secretary of State Bowen has already declined to advance
14 Proposed Interveners' statutory construction argument in the state
15 court proceedings, and has in fact taken a contrary position in the
16 current special elections for vacancies in Senate District 17, Senate
17 District 28, and Assembly District 4, wherein she has not allowed
18 candidates from non-qualified parties to use their party label on the
19 ballot.²⁴
- 20 • Defendant Los Angeles County Registrar Dean Logan has no authority
21 over the special election procedures to fill the expected vacancy in CD
22 36, or any of the other special elections to date conducted under
23 Proposition 14 (other than, of course, to conduct the election).

24
25 ²³ See Request for Judicial Notice, Exhibit D (Verified Motion to Intervene by
26 Michael Chamness, filed Jan. 10, 2011, in *Field v. Bowen*, Case No. A129946, Cal. Ct. App.
27 1st Dist.), p. 2 (“Significantly, Appellants (who have brought a facial challenge to SB 6)
and the Secretary of State both agree that SB 6 does impose a Party Preference Ban on
minor-party candidates; while Interveners deny that it does so.”).

28 ²⁴ See Request for Judicial Notice, Exhibit E (form of ballot in the ongoing special
elections).

1 Therefore, the Registrar has consistently taken no position on the
2 merits of SB 6 in the state court proceedings, and has not defended
3 Proposition 14.

4 Thus, allowing Proposed Interveners to intervene in this action is the only
5 way in which a critical argument is likely to be raised in this action, and the
6 Proposed Interveners' interests adequately represented. *See State ex rel. Lockyer*,
7 450 F.3d at 444 (granting intervention after concluding that the government did
8 not adequately represent the interests of the proposed interveners, where the
9 intervenors had demonstrated "a likelihood that the government will abandon or
10 concede a potentially meritorious reading of the statute.").²⁵

11 Several additional factors raise concerns about the Secretary of State's
12 vigorous defense of the Top Two Open Primary Act. First, Defendant Secretary of
13 State has declared her intent to run to fill the imminent vacancy in CD 36, along
14 with Plaintiff Chamness. Hence, the credibility of any position that Defendant
15 takes in this case on whether Plaintiff should be able to place his "Coffee Party"
16 label on the ballot, is undermined by the appearance of a conflict of interest
17 between the Secretary of State's duties as the California's Chief Elections Officer to
18 impartially implement Proposition 14 and SB 6, on the one hand, and her political

19
20
21 ²⁵ *See also Bates*, 904 F. Supp. at 1087, in which the district court granted
22 intervention to initiative proponents and rejected plaintiffs' argument that intervention
23 was unnecessary because the interest of intervenors would be adequately represented by
24 Defendant Secretary of State, who "will vigorously defend the validity of the California
25 constitutional provision." The *Bates* court elaborated thus:

26 [A]n official sponsor of a ballot initiative may be considered to
27 add an element not covered by the government in defending
28 the validity of the initiative in that the very act of resorting to a
 ballot initiative indicates a rift between the initiative's
 proponents and voters and their elected officials on the issue
 that underlies the initiative.

Id.

1 self-interest on the other. And second, Plaintiff Chamness has produced several e-
2 mails from the Secretary's office that he contends contain "binding admissions"
3 that the party label provisions of SB 6 are unconstitutional. See Plaintiff's Motion
4 for Preliminary Injunction (Dkt. #4), p. 11. While Proposed Interveners believe
5 that Plaintiff misrepresents those e-mails, it is clear that Plaintiff will attempt to
6 use them to undermine Defendant Secretary of State's defense of Proposition 14.

7 **IV. CONCLUSION.**

8 In light of (1) the Proposed Interveners' significant interests in this
9 litigation, (2) and the pendency of the parallel state court action to which Proposed
10 Interveners are already parties, and (3) the fact that the existing parties will not
11 adequately represent Proposed Interveners' interests in this litigation, intervention
12 of right (or alternatively by permission) should be granted.

13 Dated: February 28, 2011

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

15 By: /s/Marguerite Mary Leoni
Marguerite Mary Leoni

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

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