

1 GAUTAM DUTTA, ESQ. (State Bar No. 199326)
39270 Paseo Padre Parkway # 206
2 Fremont, CA 94538
Telephone: 415.236.2048
3 Email: dutta@businessandelectionlaw.com
Fax: 213.405.2416

4 Attorney for Plaintiff

5 MICHAEL CHAMNESS

6
7
8 IN THE UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 MICHAEL CHAMNESS,

12 *Plaintiff,*

13 vs.

14 DEBRA BOWEN, in only her
official capacity as California
15 Secretary of State; DEAN LOGAN,
in only his official capacity as
16 Registrar-Recorder / County Clerk
of the County of Los Angeles; and
17 DOES 1-20;

18 *Defendants.*

CASE NO. CV-11-1479 ODW (FFMx)

**PLAINTIFF'S OPPOSITION TO EX
PARTE MOTION TO INTERVENE;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION
OF GAUTAM DUTTA IN SUPPORT
OF PLAINTIFF'S OPPOSITION TO
EX PARTE MOTION TO
INTERVENE**

HEARING DATE: N/A
HEARING TIME: N/A
JUDGE: Hon. Otis D. Wright II
COURTROOM: 11 (312 Spring St.)

1 prevails, SB 6 will be struck down as unconstitutional, and the Legislature – to
2 which Intervenor-Applicants enjoy easy access¹ – will have the opportunity to cure
3 SB 6’s infirmities. As soon as the Legislature passes a new law to replace SB 6,
4 Proposition 14 will once again become operative.

5 Ironically, Intervenor-Applicants played a pivotal role in launching this
6 lawsuit. Seeking to consolidate litigation concerning SB 6, Plaintiff Chamness
7 asked for permission to intervene in *Field v. Bowen*, a case that will be decided by
8 year’s end by the California Court of Appeal (First District Case No. A129946). If
9 the Court of Appeal had granted his request to intervene, Plaintiff Chamness *would*
10 *not have filed this lawsuit*. However, Intervenor-Applicants fiercely opposed
11 Plaintiff Chamness’ request to intervene – a critical fact that they concealed from
12 this Court.² Subsequently, the Court of Appeal denied Plaintiff Chamness’ request
13 to intervene.³ Thus, to defend his fundamental rights in the looming Congressional
14 election, Plaintiff Chamness *had no alternative* but to rush to this Court.

15 **III. The Role of Intervenor-Applicants**

16 In contrast to Plaintiff Chamness’ plight, not one of the Intervenor-
17 Applicants is threatened with imminent, irreparable harm: their political expression
18 will not be muzzled on the ballot. Significantly, Intervenor-Applicants Californians
19 to Defend the Open Primary (“CDOP”), California Independent Voter Project
20 (“CIVP”), and David Takashima *played no role whatsoever* in either passing SB 6
21 or putting Proposition 14 on the ballot. On February 19, 2009, SB 6 was passed by

22 ¹ Intervenor-Applicants appear to have the Legislature’s ear. Last fall, Intervenor-
23 Applicant California Independent Voter Project funded a Hawaii resort getaway for 22 state
24 lawmakers, who met with “lobbyists and corporate officials who want to influence California’s
25 future policies.” The *Desert Sun*, “Statehouse Insider: Lawmakers Confer with Lobbyists in
26 Hawaii,” Nov. 21, 2010, attached as Exhibit 1 to the Feb. 28, 2011 Declaration of Gautam Dutta.

25 ² On Jan. 25, 2011, Intervenor-Applicants filed a brief opposing Plaintiff Chamness’
26 Motion to Intervene with the Court of Appeal. Their opposition brief has been attached as
27 Exhibit 2 to the Dutta Declaration.

27 ³ The Court of Appeal did not state any reason for denying Plaintiff Chamness’ Motion to
28 Intervene. Intervenor-Applicants’ Mar. 1, 2011 Request for Judicial Notice, Exh. A. Plaintiff
Chamness will not file an amicus brief in the Court of Appeal.

1 the Legislature without any debate or discussion, between the “business” hours of
2 3:40 am and 6:55 am. At the exact same time, the Legislature voted to put
3 Proposition 14 on the June 2010 statewide ballot. Significantly, Intervenor-
4 Applicant Maldonado, the author of both SB 6 and Proposition 14, chose not to
5 allow voters to vote on SB 6 – a statute that implements critical details of
6 Proposition 14. Tellingly, Intervenor-Applicant Maldonado now seeks to intervene
7 in his capacity as a Congressional candidate who will benefit from SB 6.

8 **IV. Intervenor-Applicants Violated the Court’s Standing Order**

9 Troublingly, Intervenor-Applicants have violated the Court’s Standing Order
10 (para. 10), for they misrepresented Plaintiff’s position with regard to their Motion.
11 When Plaintiff’s counsel spoke to counsel for Intervenor-Applicants, he told them
12 that (1) Plaintiff would welcome her clients’ participation by way of an *amicus*
13 brief, and (2) Plaintiff would oppose an ex parte Motion to Intervene, because
14 Intervenor-Applicants do not have a right to intervene under federal law.⁴

15 In response, Intervenor-Applicants told the Court that Plaintiff Chamness
16 opposed their Motion to Intervene, but *did not tell* the Court that Plaintiff Chamness
17 had invited them to file an amicus brief – which would have eliminated the need to
18 file any Motion. Because they deliberately misrepresented the legal position of
19 Plaintiff’s counsel, Intervenor-Applicants’ counsel violated Local Rule 7-19.1 and
20 Standing Order Paragraph 10. Consequently, their Motion to Intervene must be
21 summarily denied.

22 **V. Abel Maldonado Is Barred from Intervening as a Matter of Law**

23 At the outset, Intervenor-Applicant Maldonado, a former state lawmaker, is
24 barred from intervening as a matter of law. In *Arizonans for Official English v.*
25 *Arizona*, the U.S. Supreme Court made it clear that state lawmakers are barred from
26 defending the constitutionality of a statute, unless state law expressly allowed them
27

28 ⁴ Dutta Declaration Exh. 3.

1 to do so.⁵ Citing *Arizonans*, the Ninth Circuit recently noted in *Perry v.*
2 *Schwarzenegger* that there is no “particularized state interest” that authorizes
3 lawmakers or political candidates to defend a state statute.⁶

4 Thus, Intervenor-Applicant Maldonado is barred from intervening in this
5 case for two reasons. First, he *is no longer a state lawmaker*, but a political
6 candidate *who seeks to benefit from SB 6*. Last week, Intervenor-Applicant
7 Maldonado announced that he would run for the U.S. House of Representatives in
8 2012. Moreover, even if he were still a lawmaker, there is no “particularized state
9 interest” that authorizes California lawmakers to defend a state statute like SB 6.

10 Seeking to escape *Arizonans* and *Perry*, Intervenor-Applicant Maldonado
11 argues that he deserves intervention, because this lawsuit could harm him
12 politically in his 2012 race for Congress. However, no “particularized state
13 interest” supports such an argument.⁷ In a case cited by the Ninth Circuit, the
14 California Court of Appeal has flatly held that a “bare political interest” does not
15 constitute “an appropriate basis for intervention”.⁸ Consequently, Intervenor-
16 Applicant Maldonado is barred from intervening as a matter of law.

17 **VI. Intervenor-Applicants Fail to Qualify for Mandatory Intervention**

18 Furthermore, none of the Intervenor-Applicants qualifies for intervention of
19 right. The Ninth Circuit requires that four criteria be met to qualify for intervention
20 of right:

- 21 1. The application for intervention must be timely;
- 22 2. The applicant’s interest must be inadequately represented by the
23 existing parties in the lawsuit

24 ⁵ *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (citing *Karcher v. May*,
25 484 U.S. 72, 82 (1987)).

26 ⁶ *Perry v. Schwarzenegger*, No. 10-16696, 2011 U.S. App. LEXIS 153 (9th Cir. Jan. 4,
2011), at 13.

27 ⁷ *Perry*, *supra* note 6, No. 10-16696, 2011 U.S. App. LEXIS 153, at 13.

28 ⁸ *City and County of San Francisco v. State of California*, 128 Cal.App.4th 1030, 1039-40
(Cal.App.Ct. 2005), *review denied*, 27 Cal.Rptr.3d 724 (2005).

- 1 3. The applicant must have a “significantly protectable” interest relating
- 2 to the property or transaction that is the subject of the transaction; and
- 3 4. The applicant must be so situated that disposition of the action may, as
- 4 a practical matter, impair or impede the applicant’s ability to protect
- 5 that interest.⁹

6 As we will show, Intervenor-Applicants have failed to satisfy all four criteria.

7 A. Intervenor-Applicants’ Motion Was Not Timely

8 Intervenor-Applicants’ untimely Motion must be denied, because they could

9 have filed it sooner but *failed to do so*. According to their counsel Marguerite

10 Leoni, Intervenor-Applicants first learned about Plaintiff Chamness’ Motion for

11 Preliminary Injunction one week ago, on February 23, 2011. However, they

12 inexplicably did not file their Motion to intervene until March 1, 2011 – one week

13 later.

14 At 3:58 pm yesterday (February 28, 2011), counsel for Intervenor-Applicants

15 sent the parties a “Proposed” Motion to Intervene that *had not been electronically*

16 *filed with this Court*.¹⁰ As of 10:38 am this morning, Plaintiff Chamness had still

17 been served with the final, electronically filed version of the documents.¹¹

18 Intervenor-Applicants’ inexcusable delay in filing their Motion has not only

19 prejudiced Plaintiff Chamness, but needlessly imposed a burden on the Court’s time

20 and resources. Because opposition briefs to Plaintiff Chamness’ Motion to

21 Intervene are due within 72 hours (i.e., this Friday), Plaintiff Chamness has filed

22 this brief today – 24 hours before it was due. As a result of Plaintiff’s diligence, the

23 Court will have one more day to study the papers relating to this Motion to

24 Intervene.

25

26 ⁹ *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996) (citation omitted).

27 ¹⁰ Dutta Declaration Exh. 4.

28 ¹¹ Dutta Declaration ¶4.

1 Tellingly, Ms. Leoni chose not to contact Plaintiff Chamness' counsel until
2 the evening of February 25, 2011 – the start of the weekend.¹² Had she contacted
3 Plaintiff's counsel on February 23 (when she first learned of this case), she could
4 have promptly advised her clients of their two options: (1) file an *uncontested*
5 amicus brief, or (2) file a contested Motion to Intervene. In this manner, she would
6 have had ample time to file either document with the Court *by yesterday morning*.

7 Trying to make virtue out of vice, Intervenor-Applicants have in effect asked
8 the Court to reward them for their own delay. Namely, their Motion asks the Court
9 to delay ruling on their Motion to Intervene, while still allowing them to file an
10 opposition to Plaintiff Chamness' Motion for Preliminary Injunction. However,
11 Intervenor-Applicants could have achieved their objective *without filing any*
12 *motion*: they simply could have accepted Plaintiff Chamness' invitation to file an
13 amicus brief. Because Intervenor-Applicants have failed to account for their
14 inexcusable delay, their untimely Motion to Intervene must be denied.¹³

15 B. Intervenor-Applicants Have Already Conceded that the Secretary of
16 State Will Adequately Represent Their Interests

17 Furthermore, the Court must deny Intervenor-Applicants' bid to intervene,
18 because they have already conceded that the Secretary of State will adequately
19 represent their interests. The Secretary of State has a constitutional duty to enforce
20 a state election law, unless an appellate court has declared that law
21 unconstitutional.¹⁴ As the Ninth Circuit has held, “a presumption of adequacy of
22 representation arises” if a prospective intervenor and an existing party have the
23 “same ultimate objective”.¹⁵ In *Glickman*, the Ninth Circuit held that sharing the

24 _____
25 ¹² Dutta Declaration Exh. 5.

26 ¹³ Because their Motion was not timely, Intervenor-Applicants also fail to qualify for
permissive intervention. *Glickman*, *supra* note 9, at 839.

27 ¹⁴ CAL.CONST. art. iii §3.5(a) & (c) (*cited by Billig v. Voges*, 223 Cal.App.3d 962, 273
Cal.Rptr. 91, 96 (Cal.Ct. App. 1990)).

28 ¹⁵ *Glickman*, *supra* note 9, at 838.

1 same interpretation of a statute constitutes the “same ultimate objective”.¹⁶

2 Here, the Secretary of State and Registrar Logan have concluded that SB 6
3 imposes a “Party Preference Ban” – and Intervenor-Applicants *have agreed with*
4 *their interpretation* of SB 6. As Intervenor-Applicants admitted in state court, SB 6
5 forces minor-party candidates like Plaintiff Chamness to falsely state on the ballot
6 that they have “No Party Preference”:

7 [A]ll candidates appear on the same primary election ballot, but only
8 those registered with a qualified (i.e., major) political party may
9 indicate a *party preference* with the label of that party printed *on the*
10 *ballot*.¹⁷

11 Thus, because the Secretary of State and Intervenor-Applicants share the “same
12 ultimate objective” – defending the constitutionality of SB 6’s Party Preference Ban
13 – it must be “presumed” that the Secretary of State will adequately represent
14 Intervenor-Applicants’ interests.¹⁸

15 In a desperate effort to salvage their Motion, Intervenor-Applicants now *seek*
16 *to contradict the position they had taken in state court*. Namely, their papers flatly
17 deny that SB 6 imposes a Party Preference Ban: SB 6 “*permit[s]* candidates who
18 prefer non-qualified [i.e., minor] political parties to state that preference ... on the
19 ballot.”¹⁹ However, the doctrine of judicial estoppel absolutely bars Intervenor-
20 Applicants from “playing fast and loose with the courts.”²⁰ As the Ninth Circuit
21 has held, judicial estoppel bans a litigant from contradicting an earlier position that
22 it had previously taken, especially before a different tribunal.²¹

23 Here, Intervenor-Applicants admitted that SB 6 imposed a Party Preference

24 ¹⁶ *Id.* at 838.

25 ¹⁷ Intervenor-Applicants’ Sept. 9, 2010 Sur-Reply Brief, attached as Exhibit 6 to the Dutta
26 Declaration, at 32:7-3:9.

27 ¹⁸ *Glickman*, *supra* note 9, at 838.

28 ¹⁹ Intervenor-Applicants’ Motion to Intervene, at 19:18-20.

²⁰ *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (*citing Rockwell Int’l Corp. v.*
Hanford Atomic Metal Trades Council, 851 F.2d 1208, 1210 (9th Cir. 1988)).

²¹ *Russell*, *supra* note 19, 893 F.2d at 1037.

1 Ban in state court, only to contradict their legal position in this Court.
2 Consequently, the doctrine of judicial estoppel bars them from “playing fast and
3 loose with the courts.” Therefore, Intervenor-Applicants must be held to their
4 original legal position: SB 6 does impose a Party Preference Ban. Because
5 Intervenor-Applicants and the Secretary of State share the same legal position, this
6 Court must “presume” that the Secretary of State will adequately represent
7 Intervenor-Applicants’ interests. Accordingly, Intervenor-Applicants’ Motion to
8 Intervene fails, for they have conceded that the Secretary of State will adequately
9 represent their interests as a matter of law.

10 C. Intervenor-Applicants Fail to Show a “Significantly Protectable”
11 Interest in this Lawsuit

12 None of the Intevenor-Applicants has shown a “significantly protectable”
13 interest in this litigation. To show such an interest, a litigant must establish that (1)
14 “the interest asserted is protectable under some law,” and (2) there is a “relationship
15 between the legally protected interest and the claims at issue.”²² Although
16 Intervenor-Applicants could satisfy the first requirement, they fail to satisfy the
17 second requirement as a matter of law.

18 Here, the “interest asserted” by the Intervenor-Applicants is straightforward:
19 they oppose any effort that could delay Proposition 14 from being implemented for
20 our federal and state elections. Plaintiff Chamness seeks to enjoin SB 6, which
21 implements Proposition 14. If SB 6 is enjoined, Proposition 14 must be declared
22 inoperative until a new statute is passed to replace SB 6. Thus, Intervenor-
23 Applicants seek to intervene because this lawsuit could delay Proposition 14 from
24 being implemented. However, such an interest fails to qualify any of them for
25 intervention of right – because there is no “relationship” between their interest in
26 Proposition 14 and Plaintiff Chamness’ claims against SB 6.

27
28 ²² *Glickman, supra* note 9, 82 F.3d at 837 (citation omitted).

1 In *Northwest Forest Resource Council v. Glickman*,²³ the Ninth Circuit
2 explained how to evaluate whether a litigant has a “relationship” between his or her
3 legal interest and the claims at issue. There, a federal statute exempted certain
4 timber from being regulated by environmental laws. To block that timber from
5 being logged and sold, an environmental group sought to intervene. However,
6 because the federal statute expressly exempted that logging from existing
7 environmental laws, the Ninth Circuit ruled that the group could not intervene:

8 In this case, the statute under which the declaratory action arises
9 explicitly preempts other laws. The environmental laws that
10 [Intervenor-Applicant] and others claim they have supported therefore
11 *cannot protect [Intervenor-Applicant’s] various interests with respect*
12 *to [Plaintiff’s] claims under [the federal statute at issue].”*²⁴

13 Thus, the Ninth Circuit held that the environmental group failed to show a
14 “significantly protected interest”, because there was no “relationship” between its
15 interest in environmental protection and the statute that exempted certain timber
16 sales from all environmental regulation.

17 An analogous situation applies here. It is undisputed and accepted – even by
18 Intervenor-Applicants – that the provisions of Proposition 14 were intended to be
19 conditional. Namely, Proposition 14 *needs – and cannot operate without – an*
20 *implementing statute.*²⁵ Therefore, if Proposition 14 loses its implementing statute
21 (i.e., SB 6), it *must immediately be suspended* until a new statute is passed to
22 replace SB 6 – and that is exactly how it was intended to operate.

23 In other words, Intervenor-Applicants must take the bitter with the sweet: by
24 its very design, Proposition 14 must be suspended if SB 6 is declared
25 unconstitutional. As shown earlier, Intervenor-Applicants have no legally
26 recognized interest in SB 6.²⁶ Thus, if SB 6 is struck down, Intervenor-Applicants

27 ²³ *Id.* at 837.

28 ²⁴ *Id.* at 837 (emphases added).

²⁵ See Plaintiff Chamness’ Motion for Preliminary Injunction, at 17:6-17:14.

²⁶ Namely, Abel Maldonado is barred from intervening as a matter of law, and the remaining Intervenor-Applicants played no role whatsoever in passing SB 6. See sections III and V *supra*.

1 “cannot protect” their interest in preventing Proposition 14 from being suspended –
2 because they *have no asserted no legally recognized interest in SB 6*.²⁷ Therefore,
3 Intervenor-Applicants have failed to show any “significantly protectable” interest in
4 this litigation, for there is no “relationship” between their legal interests in
5 Proposition 14 and Plaintiff’s legal claims against SB 6.²⁸

6 1. CDOP and CIVP Have No “Significantly Protectable Interest”

7 Seeking to sidestep the Ninth Circuit’s holding in *Glickman*, Intevenor-
8 Applicants insist CDOP and CIVP have a right to intervene, because they are the
9 only groups to defend Proposition 14 in post-election litigation. However, their
10 argument fails for one simple reason: Plaintiff Chamness *is not challenging the*
11 *constitutionality of Proposition 14*. It is undisputed that CDOP and CIVP played
12 no role in passing SB 6, the state statute challenged in this lawsuit. Thus, because
13 they were not “directly involved in the enactment of the law”, they have no
14 “significantly protectable” interest under *Glickman*.²⁹

15 2. The “Bare Political Interests” of Intervenor-Applicants CDOP
16 and CIVP Do Not Justify Intervention

17 In a last-gasp effort, Intervenor-Applicants CDOP and CIVP argue that their
18 political reputation and fundraising clout will also be harmed if SB 6 is struck
19 down. However, as Part V(A) showed, invoking a “bare political interest” will not
20 entitle a litigant to intervention. Moreover, as the Court of Appeal recently held,
21 claims regarding harm to a group’s “reputation” are “far too speculative a basis” by
22 which to justify intervention.³⁰ Thus, CDOP and CVIP’s “bare political interest”

23 _____
24 ²⁷ *Glickman*, *supra* note 9, 82 F.3d at 837.

25 ²⁸ Because Intervenor-Applicants do not have any legally recognized interest in this
26 litigation, they also do not qualify for permissive intervention, for they have failed to assert
27 “independent grounds for jurisdiction”. *Glickman*, *supra* note 9, at 839.

28 ²⁹ *Id.* at 837. Because SB 6 was not a ballot measure, *Crete v. Bradbury* does not control
this case. *Cf. Crete v. Bradbury*, 438 F.3d 949, 955 (allowing “chief petitioner” of ballot measure
to intervene).

³⁰ *City and County of San Francisco*, *supra* note 8, 128 Cal.App.4th at 1043.

1 will not entitle them to intervene. In summary, the Court must deny this Motion to
2 Intervene, for no Intervenor-Applicant has shown a “significantly protectable”
3 interest in this litigation.

4 D. Intervenor-Applicants Do Not Have Any Legally Recognized Interests
5 That Will Be “Impeded or Impaired”

6 Because Intervenor-Applicants have failed to show any “significantly
7 protectable” interests, they cannot show that this lawsuit will “impede or impair”
8 their interests as a matter of law. In *Glickman*, the Ninth Circuit squarely held that
9 unless a litigant could show a “significantly protectable” interest”, his or her
10 interests would not be “impeded or impaired” as a matter of law.³¹ Here,
11 Intervenor-Applicants have failed to show any “protectable interest” in this
12 litigation. Consequently, their interests will not be “impeded or impaired” as a
13 matter of law.

14 **VII. Intervenor-Applicants Can Protect Their Interests Through Other**
15 **Means**

16 As savvy political insiders, Intervenor-Applicants have other means to
17 protect their interest in Proposition 14 – resources that are not available to
18 grassroots candidates like Plaintiff Chamness. First, as a number of courts have
19 noted, rejected intervenors have often filed amicus briefs to ensure that their
20 perspective is heard.³² Moreover, having already sponsored a Hawaii junket for 22
21 state lawmakers, Intervenor-Applicants appear to have the Legislature’s ear.³³
22 Unlike Plaintiff Chamness, Intervenor-Applicants are well positioned to lobby the
23 Legislature to pass a new statute to replace SB 6 – and thereby ensure that
24 Proposition 14 remains in operation.

25 ³¹ *Glickman*, *supra* note 9, 82 F.3d at 838.

26 ³² See, e.g., *Glasco v. Hills*, 412 F.Supp. 615, 621 (D.N.J. 1976); *San Francisco*, *supra* note
27 8, 128 Cal.App.4th at 1044; *Jersey Maid Milk Prods. Co. v. Brock*, 91 P.2d 599, 13 Cal.2d 661,
665 (Cal. 1939); *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Bd.*, 136
28 Cal.App.3d 829, 186 Cal.Rptr. 552, 555 n.4 (Cal.Ct.App. 1982).

³³ See detailed discussion at *supra* note 1.

1 **VII. Conclusion**

2 This misguided, untimely Motion should never have been filed. As this brief
3 showed, Intervenor-Applicants have no right to intervene for at least five reasons.
4 First, they violated the Local Rules and the Court’s Standing Order, by
5 misrepresenting Plaintiff’s legal position. Second, their Motion to Intervene was
6 untimely. Third, the Secretary of State will adequately represent their interests in
7 this litigation, because they share the same legal interpretation of SB 6’s Party
8 Preference Ban. Fourth, Intervenor-Applicants lack a legally recognized interest in
9 the subject matter of this litigation: the constitutionality of SB 6. Finally,
10 Intervenor-Applicants could have shared their legal perspective with the court
11 through an amicus brief, and thereby spared the Court from this needless burden on
12 its time. For all these reasons, this meritless Motion must be swiftly denied.

13
14
15
16 DATED: Mar. 1, 2011

17 Respectfully submitted,

18
19
20 By: /s/

21 _____
GAUTAM DUTTA, ESQ.

22
23 Attorney for Plaintiff

24 MICHAEL CHAMNESS
25
26
27
28