

California Court of Appeal, First District, Division 3

MONA FIELD, RICHARD
WINGER, STEPHEN A.
CHESSIN, JENNIFER
WOZNIAK, JEFF
MACKLER, and RODNEY
MARTIN,

Appellants,

vs.

DEBRA BOWEN, et al.,

Respondents;

ABEL MALDONADO, et al.;

Intervenors-Respondents;

CASE NO. A129946

APPELLANTS' OPENING BRIEF

[Arising from the denial of Appellants' Motion for Preliminary Injunction on Oct. 5, 2010 by Hon. Charlotte Walter Woolard, Dept. 302, Superior Court for the County of San Francisco (Civic Center), 400 McAllister St., San Francisco, CA 94102; 415.551.3723; Case No. CGC-10-502018]

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**CERTIFICATE OF INTERESTED ENTITIES OR
PERSONS**

Appellants hereby certify that they are not aware of any person or entity that must be listed under the provisions of California Rule of Court 8.208(e).

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MEMORANDUM OF POINTS AND AUTHORITIES

Thus, when a law appears to have been adopted without reasoned consideration, for discriminatory purposes, or to entrench political majorities, we are less than willing to defer to the institutional strengths of the legislature.

-- Justices Breyer and Stevens¹

The ballot is the last thing the voter sees before he makes his choice.

-- Chief Justice Roberts, former Chief Justice Rehnquist, and Justice Alito²

I. Introduction: Statement of the Nature of the Action and Relief Sought in the Trial Court

Two years ago, the Legislature introduced and passed a law in the middle of night, without holding a single hearing and without giving the public any notice.³ In a matter of days, that law – Senate Bill 6 – will *ban minor-party candidates from sharing their political viewpoints with voters*. Just as one example, Intervenor-Applicant Michael Chamness – a

¹ *Doe v. Reed* (June 24, 2010) 561 U.S. ___, No. 09-559, concurring op., Stevens & Breyer, JJ., at 3 n.3 (emphases added).

² *Wash. State Grange v. Wash. State Republican Party* (2008) 552 U.S. 442, 460 (Roberts & Alito, JJ., concurring) (quoting *Cook v. Gralike* (2001) 531 U.S. 510, 532 (Rehnquist, C.J., concurring)).

³ First Amended Complaint (“FAC”), Appellants’ Appendix (hereinafter, “App.”) Vol. 1, at 1001 ¶¶2-4.

candidate whose name will appear on the ballot in a looming state election – will be forced to falsely state on the ballot that he has “No Party Preference”.

Making matters even worse, the plain language of SB 6 could soon force elections officials to *disenfranchise every voter who votes for a write-in candidate*. Specifically, SB 6 allows write-in votes to be cast during the general (runoff) election, but then bans those votes from being counted. In effect, SB 6 commands that every write-in vote be *thrown away*.

As this Brief will show, SB 6 – which was passed by the Legislature in order to implement Proposition 14’s “Top Two” Primary – brazenly violates both the U.S. and California Constitutions. In fact, the Secretary of State has not only *admitted that a critical part of SB 6 is not “permissible”*, but conceded that it also “give[s] voters the illusion that they can write in a candidate’s name and have it counted.”⁴

Therefore, this Court should (1) reverse the Superior Court’s denial of Appellants’ Motion for Preliminary Injunction, (2) declare SB 6 unconstitutional and unenforceable, (3) enjoin SB 6 from being implemented and enforced, and (4) declare Proposition 14 to be inoperative, until a new law is passed to implement it.

⁴ Aug. 3, 2010 email (“SOS Email 1”) and Aug. 11, 2010 email (“SOS Email 2”) from the Secretary of State’s Office to then-Lieutenant Governor Abel Maldonado’s Office, Declaration of Intervenors’ counsel Sean Welch, App. Vol. 1, at 1266 and 1270 (emphases added).

II. Introduction to Appellants and Intervenor-Applicant Michael Chamness

Intervenor-Applicant Michael Chamness has qualified to appear on the ballot for the looming special election in Senate District 28, as a candidate stating a preference for the Coffee Party, a non-qualified (minor) party. He pays taxes and is registered to vote in Los Angeles County.

Appellants Jeff Mackler and Rodney Martin seek to run for the U.S. Congress in 2012, as candidates stating a preference for Socialist Action and the Reform Party, respectively. They pay taxes and are registered to vote in Alameda and Tulare Counties, respectively.

Appellants Mona Field, Richard Winger, Stephen A. Chessin, and Jennifer Wozniak wish (1) to vote for candidates whose names might not appear on the ballot in future state and federal elections, and (2) to ensure that their votes are counted. They pay taxes and are registered to vote in, respectively, Los Angeles, San Francisco, Santa Clara, and Orange Counties.

III. Statement of Order Appealed from; Procedural History

An appeal became necessary after the Superior Court denied Appellants' Motion for Preliminary Injunction. Earlier, Appellants asked this Court to issue a writ that enjoined SB 6 from being implemented; the Court subsequently issued an

order that summarily denied their Petition for Writ of Mandate.⁵ On October 5, 2010, the Superior Court entered a final order denying Plaintiffs’ Motion for Preliminary Injunction. Appellants immediately appealed that order.⁶

On October 24, 2010, seeking to defend the fundamental rights of Intervenor-Applicant Chamness, Appellants asked the California Supreme Court to issue a writ that enjoined SB 6 from being implemented.⁷ After asking the Attorney General’s Office to file an opposition brief, the High Court issued an order that summarily denied Appellants’ Petition for Writ of Mandate.⁸

III. Statement of the Facts

A. The Previous “Qualified Party” System

Nine days ago, SB 6 abolished California’s previous “qualified party” system – spawning an untested process to fill state and federal offices. California law classifies political

⁵ *Mona Field v. Superior Court of San Francisco County* (Court of Appeal Case No. 129829, filed Sept. 29, 2010), Appellants’ Request for Judicial Notice (“RJN”), Exh. 13; Oct. 14, 2010 Order denying Petition for Writ of Mandate, RJN, Exh. 20.

⁶ Oct. 5, 2010 Order Denying Plaintiffs’ Motion for Preliminary Injunction (the “Order”), Exh. A; Oct. 5, 2010 Notice of Appeal by Plaintiffs, App. Vol. 2, at 1543.

⁷ *Mona Field v. Superior Court of San Francisco County* (California Supreme Court Case No. S188436, filed Nov. 24, 2010), RJN, Exh. 1.

⁸ Nov. 29, 2010 Letter from the California Supreme Court to the Office of the Attorney General, RJN Exh. 5; Dec. 15, 2010 Order denying Petition for Writ of Mandate, RJN, Exh. 12.

parties into two categories: qualified (state-recognized) parties and non-qualified (non-state-recognized, or “minor”) parties. Only qualified parties were entitled to hold party primaries.⁹

Every even-numbered year, voters had up to two chances to vote for state and federal candidates: (1) the qualified-party primary election, where candidates from each qualified party would vie for their party’s nomination;¹⁰ and (2) the November general election, where the nominee (top votegetter) of each qualified party would face off against (a) minor-party candidates (like Intervenor-Applicant Chamness and Appellants Mackler and Martin), and (b) write-in candidates.

In special elections, voters also had up to two chances to vote: (1) the “all party” primary election, where all candidates squared off regardless of party; and, if no one received a majority, (2) a general election, where the nominee (top votegetter) of each qualified party would face off against minor-party candidates and write-in candidates.

B. Party Labels under the “Qualified Party” System

⁹ *Libertarian Party v. Eu*, 28 Cal.3d 535, 540 (“[T]he Legislature ... defined ‘party’ as a political organization that has ‘qualified for participation in any primary election.’”) (emphases added).

¹⁰ Since 2001, unaffiliated voters (i.e., those who “decline to state” a party preference) have been allowed to vote in every Democratic and Republican primary for state and federal office (excluding Presidential primaries). See Elections Code §13102(b) (giving qualified parties the option of allowing “decline to state” voters to vote in their primaries).

Under the qualified-party system, qualified-party candidates could state the name of their political party on the ballot. Moreover, all non-qualified-party (minor-party) candidates – who are deemed by the California Supreme Court to have “independent” status¹¹ – could state on the ballot that they are “Independent”.¹² Thus, if Mr. Chamness had run in an election under the qualified-party system, he could have stated on the ballot that he is “Independent”.

C. Budgetary Cause, Electoral Effect

Two years ago, then-State Senator Abel Maldonado cast the deciding vote to pass the state budget.¹³ In exchange for his vote, Maldonado demanded a ballot measure that would eliminate the qualified-party election system.¹⁴ The Legislature obliged by (1) putting Proposition 14 on the June 8, 2010 ballot, and (2) passing SB 6, in order to implement the provisions of Proposition 14.¹⁵ Both SB 6 and Proposition 14 were authored by Maldonado.

Between 3:40 am and 6:55 am on February 19, 2009, the Legislature passed SB 6, without holding a single hearing or giving the public any notice.¹⁶ Simultaneously, the Legislature

¹¹ *Id.* at 540 (defining “independent” candidates as those who “are independent of qualified political parties”) (emphasis added).

¹² Elections Code §13105(c) [before it was amended on January 1, 2011 by SB 6].

¹³ App. Vol. 1, at 1103:13-14.

¹⁴ *Id.* at 1103:14-15.

¹⁵ *Id.* at 1103:15-1104:7.

¹⁶ *Id.* at 1103:16-18

voted to put Proposition 14 on the June 8, 2010 ballot.¹⁷ Significantly, the Secretary of State’s June 8, 2010 Voter Information Guide for Proposition 14 did not provide either a summary or the text of SB 6, which fleshes out critical details of Proposition 14.¹⁸ Subsequently, a narrow majority of voters approved Proposition 14.¹⁹

D. The “Top Two” Primary

On January 1, 2011, SB 6 and Proposition 14 abolished the “qualified party” system, and spawned an untested process for electing our state and federal officials. Under SB 6’s new rules, all candidates, irrespective of their party identification, square off against one another in a primary election. Except for special elections,²⁰ the top two votegetters from that election will automatically advance to the general (runoff) election. Significantly, during the general election SB 6 bans all write-in votes from being counted (hereinafter, the “Vote Counting Ban”).

E. Party Labels under SB 6’s New Rules

Equally important, Proposition 14 purports to give all candidates the right to state their “political party preference, or lack of political party preference” on the ballot, “in the manner

¹⁷ *Id.* at 1104:3-5.

¹⁸ *Id.* at 1104:4-7.

¹⁹ *Id.* at 1104:7-8.

²⁰ Special elections will run in the same fashion, with one exception: if a candidate receives a majority in the “all-party” primary election, he or she will win the election outright.

provided by statute.”²¹ However, that “statute” – SB 6 – fails to give minor-party candidates the right to state their “political party preference”.

To be sure, SB 6 allows candidates who claim to identify with a qualified party (e.g., Democratic or Republican) to state that party’s name on the ballot. However, if a candidate identifies with a minor party, he or she will be foisted with the party label of “No Party Preference” (hereinafter, the “Party Preference Ban”). Therefore, since Intervenor-Applicant Chamness identifies with a minor party (the Coffee Party), he will be forced to state on the ballot that he has “No Party Preference”.

F. The Underlying Motion for Preliminary Injunction

In their Motion for Preliminary Injunction, Appellants asked the Superior Court to block SB 6 from being implemented because it was unconstitutional on its face. Specifically, Appellants assert that SB 6’s Party Preference Ban violates the U.S. Constitution (Elections Clause, Amendment I, and Amendment XIV) and the California Constitution (Equal Protection Clause, Free Speech Clause). Furthermore, Appellants assert that SB 6’s Vote Counting Ban violated the U.S. Constitution (Amendment I, Elections Clause, and Due Process Clause) and the California Constitution (Art. II §2.5, Free Speech Clause, and Due Process Clause).

²¹ App. Vol. 1, at 1170:37-39.

G. The Superior Court’s Denial of Appellants’
Motion for Preliminary Injunction

On October 5, 2010, the Superior Court denied Appellants’ Motion for Preliminary Injunction. In so doing, the Superior Court made three rulings. First, it held that Appellants had standing to bring their all of their legal claims. Second, it held that Appellants did not show a likelihood of success on the merits. Finally, it held that Appellants’ showing of imminent harm was “not sufficient.”²²

With regard to likelihood of success on the merits, the Superior Court made two key rulings. First, the Superior Court held that SB 6 imposes a “Party Preference Ban”. That is, SB 6 bans candidates from non-qualified (i.e., minor) parties like Mr. Chamness from stating the name of their party on the ballot.

In addition, the Superior Court upheld the constitutionality of SB 6’s Party Preference Ban:

Insufficient evidence and case law support the argument that the party-preference ban violates the Equal Protection Clause or the Elections Clause.

The state may require candidates not affiliated with qualified [state-recognized] parties to use the “independent” label.

Several federal circuit courts have also held that a state is not constitutionally obligated to permit candidates to list their preferred party label on the ballot.²³

²² Order, Exh. A, at 2.

²³ *Id.* (emphases added).

However, the Superior Court did not rule on one of Appellants’ key arguments: that, at a bare minimum, minor-party candidates have the constitutional right to identify themselves on the ballot as “Independent”.²⁴

Finally, the Superior Court ruled that SB 6 banned voters from casting write-in votes in all general elections:

When [SB 6-amended] Elections Code sections 8141.5 and 8606 are read together, it is apparent that the Legislature intended to ban write-ins in the general election.²⁵

H. Three Looming Special Elections

SB 6 is poised to be implemented for three special elections that will be held within a matter of weeks. Special elections have been a mainstay in California politics. Since 1990, California has held an average of 4.8 special elections per year for state and federal office since 1990.²⁶ Nearly a year ago, the California Association of Clerks and Elections Officials presciently called attention to the difficulties of having to implement SB 6 in such a short timeframe:

²⁴ Plaintiffs’ Reply Brief, App. Vol. 2, at 1492:12-18. *See also Rosen v. Brown* (6th Cir. 1992) 970 F.2d 169, 175 (candidates have a constitutional right to a party voting cue of “Independent” on the ballot); *Schrader v. Blackwell* (6th Cir. 2001) 241 F.3d 783, 788-89 (*re-aff*’g *Rosen*) (2001) *cert. denied*, 534 U.S. 888; *Rubin v. City of Santa Monica* (9th Cir. 2002) 308 F.3d 1008 (*citing Schrader*).

²⁵ Order, Exh. A, at 1.

²⁶ Secretary of State’s Apr. 12, 2010 News Release, Exh. 4, at 1.

Of *greater concern* is the possibility that the Governor might proclaim a Special Vacancy Election for an Assembly or Senate vacancy *as early as January 2011*.²⁷

1. Senate District 28

The first two special elections to implement SB 6 will be held on February 15, 2011 in Senate Districts 28 and 17. On November 2, 2010, the late Jenny Oropeza was posthumously re-elected to Senate District 28, which covers nearly 1 million residents from West Los Angeles to Torrance to the City of Carson.²⁸ Sen. Oropeza's seat officially fell vacant on December 6, 2010, the date on which all state lawmakers were sworn into office.

On December 16, 2010, the Governor set the date of the special primary election (the "SD 28 Primary") in Senate District 28 for February 15, 2011; and, if necessary, the special general (runoff) election for April 19, 2011.

Significantly, the Secretary of State has set January 21 as the first date on which voters can cast vote-by-mail ballots for the SD 28 Primary – for which Mr. Chamness has qualified as a candidate.

2. Senate District 17

SB 6 will also be implemented for the special primary election that has been called for Senate District 17, which

²⁷ Mar. 2, 2010 letter from California Association of Clerks and Elections Officials to the State Assembly Elections Committee, Exh. 5, Attach. 1, at 2 (emphases added). .

²⁸ Sen. Oropeza unexpectedly died two weeks before the Nov. 2, 2010 general election.

covers nearly 1 million residents from Ventura, Los Angeles, Kern, and San Bernardino Counties. On December 21, 2010, George Runner resigned his Senate District 17 seat midway through his four-year term, after he was elected to the State Board of Equalization.

Subsequently, the Governor set the date of the special primary election in Senate District 17 for February 15, 2011 (the “SD 17 Primary”); and, if necessary, the special general (runoff) election for April 19, 2011.²⁹ As in the SD 28 Election, the Secretary of State has also set January 21 as the first date on which voters can cast vote-by-mail ballots for the SD 17 Primary.

2. Assembly District 4

Finally, SB 6 will soon be implemented for a special election in Assembly District 4, which the Governor will call in a matter of days. One week ago, Ted Gaines – who was recently re-elected to Assembly District 4 – won a special general (runoff) election in Senate District 1. On January 6, 2011, he resigned from his Assembly seat and was sworn in as a State Senator.³⁰

²⁹ Governor’s Proclamation of Senate District 17 Special Election, *attached as Exhibit 27 to Appellants’ Request for Judicial Notice*.

³⁰ “Ted Gaines to Take Senate Oath Today in Capitol”, *Lodi News*, Jan. 6, 2011, *attached as Exhibit 25 to Appellants’ Request for Judicial Notice*.

The Governor has until January 20, 2011 (i.e., 14 days from the date of Gaines' resignation)³¹ to call a special election to replace Gaines in Assembly District 4, which stretches across Sacramento, Placer, El Dorado, and Alpine Counties. If he calls the election on January 20, the primary special election for Assembly District 4 could be held in late March 2011, and the general special election could be held in late May 2011.

By deciding this important case, the Court will provide much needed clarity on SB 6's new election rules, before the next special election is called.

IV. De Novo Review Applies

The Court should apply de novo review to the Superior Court's ruling on Appellants' likelihood of success. To obtain a preliminary injunction, Appellants must satisfy two requirements:

1. They are "likely to suffer greater injury from a denial of the injunction than the defendants are likely to suffer from its grant" (i.e., imminent harm)
2. There is a "reasonable probability" that Plaintiffs will prevail on the merits (i.e., likelihood of success).³²

Significantly, if a trial court bases its assessment of likelihood of success on legal (rather than factual) questions,

³¹ Elections Code §10700.

³² *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 58 Cal.Rptr.3d 527, 533 (citation omitted).

the reviewing court should apply de novo review.³³ Here, the Superior Court concluded that SB 6 did not show a likelihood of success as a matter of law. Consequently, de novo review must apply to the Superior Court’s ruling on likelihood of success.

V. Likelihood of Success

Appellants have shown more than a “reasonable probability” of prevailing on the merits.

A. The Court Owes No Deference to a Law Voters Did Not Approve

The Secretary of State and Intervenors (“SB 6 Defendants”) try to drape SB 6 as a voter-approved measure, in hopes of coaxing the Court to give SB 6 a heavy dose of deference. Yet they cannot deny one plain fact: SB 6 was not passed by the voters. In fact, Intervenor Maldonado could have asked the Legislature to put both SB 6 and Proposition 14 on the ballot, but he *deliberately chose not to do so*. Why did Intervenor Maldonado dodge the voters when it came to SB 6, a statute that *fleshes out* critical details of Proposition 14? And last summer, why did he solicit – and then publicly oppose – the Secretary of State’s detailed proposal on how to cure the infirm provisions of SB 6?³⁴

³³ *Id.* at 533-34.

³⁴ On August 3 and 11, 2010, at Intervenor Maldonado’s office request, the Secretary of State’s office emailed Intervenor Maldonado’s office a comprehensive list of amendments that would cure SB 6’s infirmities. *See* SOS Email 1 and SOS Email 2, App. Vol. 1, at 1266 and 1270. One month later,

In any event, Plaintiffs are not challenging the constitutionality of Proposition 14. Rather, Appellants and Intervenor-Applicant Chamness are challenging the constitutionality of SB 6, an unjust law passed by the Legislature. The California Supreme Court has made it clear that a statute that endangers one’s fundamental rights does not deserve one iota of deference:

[T]he ordinary deference a court owes to any legislative action vanishes when constitutionally protected rights are threatened.³⁵

Here, SB 6 Defendants cannot deny that SB 6 was rammed through the Legislature, without a single hearing and without any public notice. In this manner, SB 6 evaded “the normal scrutiny that comes from extensive committee reviews and repeated readings in both houses of the Legislature in the course of normal bill passage.”³⁶

Significantly, Justices Breyer and Stevens recently warned that they would be “*less than willing to defer* to the institutional strengths of the legislature” – particularly “when a law appears to have been adopted *without reasoned*

Intervenor Maldonado, the author of SB 6, publicly stated through his Chief of Staff that he opposed “tinkering with SB 6 ... in any way.” “AM Alert: Prop 14 Case in Court”, Sacramento *Bee*, Sept. 14, 2010, *attached as Exhibit 3 to RJN Exh. C*, at 1.

³⁵ *Spiritual Psychic Science Church of Truth v. City of Azusa* (1985) 29 Cal.3d 501, 514 (emphases added).

³⁶ “Retailers Push Sponsored Bill To Avoid Environmental Law”, *Mercury News*, Aug, 31, 2010, App. Vol. 1, at 1501 (emphasis added).

*consideration, for discriminatory purposes, or to entrench political majorities[.]”*³⁷

Needless to say, SB 6 would receive absolutely no deference under the Justices’ standard. Indeed, SB 6 was passed by the Legislature:

(1) Without “reasoned consideration”. SB 6 was introduced and passed between 3:40 am and 6:55 am on February 19, 2009, without any public notice or committee hearings;

(2) For “discriminatory purposes”. As this Brief will show, SB 6 was designed to inflict political harm on minor-party candidates; and

(3) To “entrench political majorities”. As this Brief will show, SB 6 brazenly favors candidates from major parties over those from minor parties.

Consequently, the Court owes no deference whatsoever to SB 6 – and must strike it down if it fails to pass constitutional muster.³⁸

B. The Secretary of State and Intervenors Have Conceded That SB 6 Censors Minor-Party Candidates

³⁷ *Doe v. Reed*, *supra* note 3, 561 U.S. ____, No. 09-559, concurring op., Stevens & Breyer, JJ., at 3 n.3 (citations omitted, emphases added).

³⁸ *See, e.g., City of Rancho Cucamonga v. Mackzum* (1991) 228 Cal.App.3d 929, 946-47 (examining whether a Legislature-passed implementing statute complied with the Equal Protection Clause of the U.S. and California Constitutions); *Marin Hospital Dist. v. Rothman* (1983) 139 Cal.App.3d 495, 500-01 (same).

Significantly, both the Secretary of State and Intervenors have conceded that SB 6 bans minor-party candidates from stating any party preference (including “Independent”) on the ballot. SB 6 forces all minor-party candidates to falsely state on the ballot that they have “No Party Preference”. Here, (SB 6-amended) Elections Code section 325 requires that all candidates and voters “of independent [i.e., minor-party]³⁹ status” be listed as having “No Party Preference”.⁴⁰ Thus, while Republican and Democratic candidates can freely state their party preference, minor-party candidates like Intervenor-Applicant Chamness will be forced to tell voters that they have “No Party Preference”.⁴¹

³⁹ In *Libertarian Party v. Eu*, the California Supreme Court defined an “independent” candidate as a non-qualified (minor-party) candidate. *Libertarian Party v. Eu*, *supra* note 9, 28 Cal.3d at 540 (defining an independent candidate is one who is “independent of qualified political parties”) (emphases added).

⁴⁰ Only registered voters can run for state and federal office. [SB 6-amended] Elections Code §325 mandates that all voters “of independent status” be listed as having “No Party Preference”. Further, if a candidate’s voter registration card states that he or she has “No Party Preference”, his or her declaration of candidacy must also state that he or she has “No Party Preference.” [SB 6-amended] Elections Code §8002.5(a). Finally, if a candidate’s declaration of candidacy states that he or she has “No Party Preference”, then “No Party Preference” must be printed beside his or her name on the ballot. [SB 6-amended] Elections Code §13105(a).

⁴¹ Appellants raised this same point in their opening brief to writ proceeding before the California Superior Court. Significantly, neither the Secretary of State nor Intervenors addressed or disputed this issue in their opposition papers in that proceeding. In so doing, they waived their right to

C. The Secretary of State Has Already Applied SB 6's Party Preference Ban

The designation of parties and candidates on the ballot is a matter of continuing public importance, and a challenge to the validity of a statute governing such designations demands final resolution to permit the orderly conduct of future elections.

-- California Supreme Court, *Libertarian Party v. Eu*⁴²

On January 4, 2011, Intervenor-Applicant Chamness learned that he had qualified to appear on the ballot of the SD 28 Primary.⁴³ The next day, the Secretary of State published two documents that affix Intervenor-Applicant Chamness with the party label of “*No Party Preference*”.⁴⁴ As Section V of this Brief shows, SB 6 foists minor-party candidates with the party label of “*No Party Preference*”. Furthermore, the Secretary of State agrees with Appellants and Intervenor-Applicant Chamness that SB 6 imposes a Party Preference Ban on minor-party candidates. Thus, it is all but certain that the sample, vote-by-mail, and election-day ballots *will all state that Mr. Chamness has “No Party Preference.”*⁴⁵ Consequently,

subsequently re-litigate this issue. *See People v. Boyd* (1979) 24 Cal.3d 285, 294 n.6 (“[A]ny point not appearing in a party’s brief will ordinarily be deemed waived.”).

⁴² *Eu, supra* note 9, 28 Cal.3d at 540 (emphases added).

⁴³ Jan. 10, 2011 Declaration of Michael Chamness (“Chamness Declaration”) ¶14.

⁴⁴ *Id.* ¶¶15-16; Exh. 1 & 2.

⁴⁵ Mr. Chamness will provide the Court with a copy of the SD 28 Primary sample ballot (whose format will be identical to the vote-by-

Intervenor-Applicant Chamness will suffer irreparable harm beginning on January 21, 2011 – when voters will begin casting vote-by-mail ballots in the SD 28 Primary.

Thus, if he is permitted to participate in this case, Intervenor-Applicant Chamness will help the Court decide whether SB 6 is constitutional, for he can definitively show how SB 6 has been applied to a minor-party candidate. To paraphrase California and federal law, the Court could then expeditiously determine “whether the particular application of the statute [here, SB 6] violate[d] [Mr. Chamness’s] constitutional rights.”⁴⁶

D. SB 6’s Party Preference Ban Violates Amendments I, XIV, and the California Free Speech Clause

As a starting point, SB 6’s Party Preference Ban violates the First and Fourteenth Amendments and the California Constitution’s Free Speech Clause. Indeed, case law stemming from the “qualified party” system – on which the Superior

mail and election-day ballot) as soon as it becomes available. According to the Secretary of State, voters can begin casting vote-by-mail ballots on January 21, 2011, and all sample ballots must be sent to voters no later than February 5, 2011. *See* Secretary of State’s SD 28 Primary Calendar, Exh. 3, at 2.

⁴⁶ *Coffman Specialties v. Dep’t of Transportation* (2009) 176 Cal.App.4th 1135, 1145 (*citing Hale v. Morgan* (1978) 22 Cal.3d 388) (emphasis added); *see also Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084; *Legal Aid Services of Oregon v. Legal Services Corp.* (9th Cir. 2009) 587 F.3d 1006, 1018 (*citing L.A. v. Taxpayers for Vincent* (1984) 466 U.S. 789, 802-03).

Court’s ruling relied – stands for a core constitutional principle. Namely, at a bare minimum, minor-party candidates have the right to identify themselves on the general-election ballot as “Independent”.⁴⁷

In *Rosen v. Brown*, a state law banned minor-party candidates – at the time, all candidates who were not affiliated with either the Democratic or Republican Parties – from stating any party preference on the ballot.⁴⁸ Striking down that law, the Sixth Circuit held that the First and Fourteenth Amendments give minor-party candidates the right to a party label of “Independent”.⁴⁹ Specifically, *Rosen* held that a State’s regulatory interest “may not extend to the effective exclusion of Independent and new party candidacies.”⁵⁰ Subsequently, that constitutional right was re-affirmed by the Sixth and Ninth Circuits in *Schrader* and *Rubin*, respectively.⁵¹

Yet instead of assigning them the party label of “Independent”, SB 6 foists minor-party candidates with the

⁴⁷ See, e.g., *Rosen*, *supra* note 24, 970 F.2d at 175; *Eu*, *supra* note 9, at 545; *Schrader*, *supra* note 24, 241 F.3d at 788-89; *Rubin*, *supra* note 24, 308 F.3d 1008 (*citing Schrader*); see also *Bachrach v. Commonwealth* (1981) 382 Mass. 268, 415 N.E.2d 832, 833; *Shaw v. Johnson* (1976) 311 Minn. 237, 247 N.W.2d 921, 923.

⁴⁸ *Rosen*, *supra* note 24, 970 F.2d 169.

⁴⁹ *Id.*

⁵⁰ *Id.* at 177. At the time *Rosen* was decided, only the Democratic and Republican Parties had qualified (state-recognized) status in the State of Ohio. *Id.*

⁵¹ *Id.* at 175; *Schrader*, *supra* note 24, 241 F.3d at 788-89; *Rubin*, *supra* note 24, 308 F.3d at 1008.

party label of “No Party Preference” – a far cry from the party label of “Independent”. Significantly, both the Massachusetts and Minnesota Supreme Courts have also struck down analogous party-preference bans.⁵² In *Bachrach*, the Massachusetts High Court ruled that it was unconstitutional to force minor-party candidates to use the party label of “Unenrolled” – a term identical in meaning to “No Party Preference”:

Voters who during the campaign might have been *favorably impressed with* the candidate as an Independent, would be confronted on the ballot with a candidate who was called Unenrolled. *Unenrolled is hardly a rallying cry[.]*⁵³

Tellingly, Washington State – touted by Intervenors as the model for SB 6’s new election rules⁵⁴ – *did not even adopt the “No Party Preference” label* for its own elections. Unlike its SB 6 offshoot, Washington State’s election system allows *every* candidate to use up to 16 characters to describe his or her party preference.⁵⁵ Therefore, to the extent that the “qualified party” line of cases applies, SB 6’s Party Preference Ban

⁵² *Bachrach*, *supra* note 47, 415 N.E.2d at 833; *Shaw*, *supra* note 47, 247 N.W.2d at 923.

⁵³ *Bachrach*, *supra* note 47, 415 N.E.2d 832, 836 (emphases added); *see also Shaw*, *supra* note 47, 247 N.W.2d at 923.

⁵⁴ According to Intervenor Yes on 14, “[l]egal experts have modeled [Prop 14] after Washington State’s primary system.” App. Vol. 2, at 1490:14-15.

⁵⁵ WAC §434-215-120(1), App. Vol. 2, at 1502.

violates not only the First and Fourteenth Amendments, but also the California Constitution's Free Speech Clause.⁵⁶

E. The Secretary of State Has Conceded that SB 6's Party Preference Ban Is Unconstitutional

Remarkably, even the Secretary of State has *publicly admitted that SB 6's Party Preference Ban is not lawful*. One week after Appellants filed their Motion for Preliminary Injunction, the Secretary of State's office publicly stated that (SB 6-amended) Elections Code section 325 is not "permissible", because it *bans minor-party candidates from stating on the ballot that they are "Independent"*. In the Secretary of State's office's own words, SB 6's Party Preference Ban

implies that a candidate, or a voter, actually has selected a party preference but *is not disclosing it*. That is permissible for candidates in certain circumstances [citing an example where a candidate chooses not to disclose his or her party preference], but *not in all instances*. What *the term should imply* is that the voter has not chosen, made, or stated a party preference and is therefore "independent."⁵⁷

⁵⁶ Because SB 6's Party Preference Ban violates the First Amendment, it also violates the California Constitution's Free Speech Clause. "[T]he California liberty of speech clause is broader and more protective than the free speech clause of the First Amendment." *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 366.

⁵⁷ SOS Email 1, App. Vol. 1, at 1266 (emphases added). Appellants raised this same point in their opening brief to the writ proceeding before the California Supreme Court. Significantly, the Secretary of State neither addressed nor

By publicly stating that SB 6’s Party Preference Ban is not “permissible”, the Secretary of State has made a binding party admission⁵⁸ that SB 6’s Party Preference Ban violates the First and Fourteenth Amendments, as well as the California Constitution’s Free Speech Clause.⁵⁹

F. Appellants May Bring a Facial Challenge Against SB 6’s Party Preference Ban

In rejecting Appellants’ claims regarding SB 6’s Party Preference Ban, the Superior Court ruled that “[i]nsufficient evidence and case law support the argument that the party-

disputed this issue in their opposition papers to that proceeding. Reply Brief in Further Support of Writ of Mandate, RJN Exh. 9, at 11-12. Consequently, she has waived the opportunity to litigate this issue. *See Boyd, supra* note 41, 24 Cal.3d at 294 n.6.

⁵⁸ Party admissions are admissible under the exception to the hearsay rule. Govt. Code §1220. The statement made by Defendant Bowen’s staff is admissible and not subject to the hearsay rule, because (a) the staff member was authorized by Defendant Bowen to make the statement on her behalf, and (b) the staff member made the statement within the scope of her official duties. *Id.* §1222 (authorized-party exception to hearsay rule); *id.* §1280 (public-records exception to hearsay rule); *see also Lake v. Reed* (1997) 16 Cal.4th 448, 461-62.

⁵⁹ *Rosen, supra* note 24, 970 F.2d at 175; *Eu, supra* note 9, at 545; *Schrader, supra* note 24, 241 F.3d at 788-89; *Rubin, supra* note 24, 308 F.3d 1008 (*citing Schrader*); *Bachrach, supra* note 47, 382 Mass. 268, 415 N.E.2d at 833; *Shaw, supra* note 47, 311 Minn. 237, 247 N.W.2d at 923; *Los Angeles Alliance for Survival, supra* note 56, 22 Cal.4th at 366 (“[T]he California liberty of speech clause is broader and more protective than the free speech clause of the First Amendment.”).

preference ban violates the Equal Protection Clause or the Elections Clause.”⁶⁰ In so doing, the Superior Court appeared to adopt an argument raised by the Secretary of State: that Appellants may only bring their party-preference claims under an as-applied challenge. Specifically, the Secretary of State has argued that, until SB 6’s Party Preference Ban is implemented, Appellants have “no basis” to assert their Equal Protection claims.⁶¹ In other words, Appellants must *wait until their rights have been violated* – an argument that the U.S. Supreme Court has repeatedly rejected.⁶²

Further, the California Supreme Court, several Courts of Appeal, and the U.S. Supreme Court have all ruled *in favor of* facial challenges to election rules, particularly under the U.S. Constitution’s Elections Clause and the California Constitution’s Equal Protection Clause.⁶³ For instance, the *Rees* Court did not require any factual evidence that a pro-incumbent election rule would harm non-incumbent candidates.

⁶⁰ Order, Exh. A, at 2 (emphases added).

⁶¹ Secretary of State’s opposition papers, App. Vol. 2, at 1436:21.

⁶² “One does not have to await the consummation of a threatened injury to obtain preventive relief.” *Babbitt v. United Farm Workers* (1979) 442 U.S. 289, 299 (quoting *Pennsylvania v. West Virginia* (1923) 262 U.S. 553, 593).

⁶³ See, e.g., *Gralike*, *supra* note 2, 531 U.S. at 523 (state law held to facially violate the Elections Clause); *Ferrara v. Belanger* (1976) 18 Cal.3d 253; *Rees v. Layton* (1970) 6 Cal.App.3d 815, 822-23; *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1422.

Instead, *Rees* ruled that a pro-incumbent election rule violated the Equal Protection Clause *as a matter of law*.⁶⁴

Similarly, Appellants asked the Superior Court to rule on whether SB 6's Party Preference Ban facially violates the Elections Clause and the Equal Protection Clause. Since both issues may be decided as a matter of law, the Superior Court erred when it required Appellants to produce evidence to support their facial constitutional challenge.

G. It Is Unrefuted That SB 6's Party Preference Ban Violates the Elections Clause

Remarkably, SB 6 Defendants have conceded that SB 6's Party Preference Ban violates the U.S. Constitution's Elections Clause, because it unlawfully targets minor-party candidates for federal office (e.g., Appellants Mackler and Martin). As the U.S. Supreme Court unanimously ruled in *Cook v. Gralike*, a state law violates the Elections Clause if it aims to (1) "favor or disfavor" one class of candidates over another, (2) "dictate electoral outcomes", or (3) "evade important constitutional restraints".⁶⁵

In *Gralike*, the High Court struck down a state law that targeted federal candidates who did not support term limits. For example, if an incumbent did not support term limits, that law required the following candidate label to be printed on the

⁶⁴ *Rees*, *supra* note 63, 6 Cal.App.3d at 822-23.

⁶⁵ *Gralike*, *supra* note 2, 531 U.S. at 523 (*quoting U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34).

ballot beside his or her name: “DISREGARDED VOTERS’ INSTRUCTIONS ON TERM LIMITS.”⁶⁶

In response, the High Court held that the state law violated the Elections Clause for at least two reasons. First, the statute was “plainly designed to favor candidates who [were] willing to support” term limits and “to disfavor those who either oppose term limits entirely or would prefer a different proposal”:⁶⁷

[I]t seems clear that the adverse labels *handicap candidates* “at the most crucial state in the election process – the instant before the vote is cast.” At the same time, “by directing the citizen’s attention to the single consideration of the candidates’ fidelity to term limits, the labels imply that the issue “is an important – perhaps paramount consideration in the citizen’s choice, which *may decisively influence the citizen* to cast his ballot” against candidates branded as unfaithful.⁶⁸

The High Court then concluded that the statute unlawfully aimed to “dictate electoral outcomes,” because “the labels surely place their targets at a *political disadvantage*[.]”⁶⁹

SB 6 must be struck down for the same reasons stated in *Gralike*. As the Secretary of State admits, SB 6 grants a party label to candidates who identify with the viewpoints of a major party, while refusing to do so for those identify with the

⁶⁶ *Gralike*, *supra* note 2, 531 U.S. at 510.

⁶⁷ *Id.* at 510 (*citing Anderson v. Celebrezze* (1983) 460 U.S. 780, 788 n.9).

⁶⁸ *Gralike*, *supra* note 2, 531 U.S. at 524 (*quoting Anderson v. Martin* (1964) 375 U.S. 399, 402) (emphases added).

⁶⁹ *Gralike*, *supra* note 2, 531 U.S. at 525 (emphases added).

viewpoints of a minor party (they are forced to state that they have “No Party Preference”). Thus, SB 6 was “plainly designed to favor” candidates who identify with the viewpoints of major party, and was designed to “disfavor” and “handicap” candidates who identify with the viewpoints of a minor party.⁷⁰ Furthermore, because it places disfavored candidates at a political disadvantage, SB 6 also aims to “dictate electoral outcomes”. Therefore, SB 6’s Party Preference Ban violates the Elections Clause.⁷¹

1. SB 6 Defendants Concede Appellants’ Elections Clause Claim

Significantly, the Superior Court erred when it denied Appellants’ claim that SB 6’s Party Preference Ban violated the Elections Clause. When briefing Appellants’ Motion for Preliminary Injunction, SB 6 Defendants failed to cite any legal authority relating to the Elections Clause.⁷² As the California Supreme Court has made clear, “any point not appearing in a

⁷⁰ *Id.* at 523-25.

⁷¹ *Id.* at 525.

⁷² *See* App. Vol. 2, at 34:24-26 & 48:11-13. In opposition papers filed with the Superior Court and the California Supreme Court, Intervenor claimed that SB 6 may be invoked only if the statute in question also violates other constitutional provisions. That argument fails for two reasons: (1) the Party Preference Ban does violate other constitutional provisions, including the California Constitution’s Equal Protection Clause and the First and Fourteenth Amendments, and (2) a law can independently violate the Elections Clause without violating *any other* constitutional provision. *U.S. Term Limits, supra* note 65, 514 U.S. at 829-30.

party's brief will ordinarily be deemed waived.”⁷³ Thus, because SB 6 Defendants had waived⁷⁴ their opportunity to rebut Appellants' Elections Clause claim, the Superior Court erred when it denied that claim.

H. SB 6's Party Preference Ban Violates the California Constitution's Equal Protection Clause

[T]he state has chosen to serve the convenience of those voters who support incumbent and major-party candidates at the expense of other voters. Such favoritism burdens the fundamental right to vote possessed by supporters of the [unfavored] candidates.

-- The Eighth Circuit, *McLain v. Meier*⁷⁵

By mandating that all ballots favor major-party candidates over minor-party candidates, SB 6 flatly violates the California Constitution's Equal Protection Clause – and there is no compelling state interest that can save it.

⁷³ See *Boyd*, *supra* note 41, 24 Cal.3d at 294 n.6.

⁷⁴ During oral argument, Intervenors stated that they did not “concede the Election Clause issue.” Transcript, Vol. 2, at 48:11-13. Even then, Intervenors could cite no legal authority relating to the Elections Clause. *Id.*

Tellingly, in their opposition to the California Supreme Court writ proceeding, Intervenors did not dispute that SB 6 violates all three factors laid down by *Gralike*. See Appellants' Dec. 9, 2010 Reply Brief in California Supreme Court writ proceeding, RJN Exh. 9, at 15. Therefore, Intervenors are barred from re-litigating this issue at this late state. See *Boyd*, *supra* note 41, 24 Cal.3d at 294 n.6.

⁷⁵ *McLain v. Meier* (8th Cir. 1980) 637 F.2d 1159, 1167 (emphases added).

Significantly, the U.S. Supreme Court pays keen attention to how a state treats candidates who qualify to appear on the ballot.⁷⁶ As Chief Justice Roberts, former Chief Justice Rehnquist, and Justice Alito have observed, “[t]he ballot is the last thing the voter sees before he makes his choice”.⁷⁷ Furthermore, as Justices Scalia and Kennedy have recognized, party labels play a critical role in helping candidates connect with voters who share their viewpoints and values:

There can be no dispute that candidate acquisition of *party labels* on [the] ballot ... is a *means of garnering the support* of those who trust and agree with the party.⁷⁸

Under SB 6’s Party Preference Ban, if a candidate claims to identify with a qualified party, he or she can state that party’s name on the ballot – *even if that party publicly repudiates him or her*. In stark contrast, if a candidate identifies with a minor party, he or she will be forced to state that he or she has “No

⁷⁶ See, e.g., *Gralike*, *supra* note 2, 531 U.S. 510 (High Court strikes down discriminatory party label); *U.S. Term Limits*, *supra* note 65, 514 U.S. 779 (same); *Anderson*, *supra* note 68, 375 U.S. 399 (same); see also *Wash. State Grange*, *supra* note 2, 552 U.S. 442 (High Court discusses importance of party labels).

⁷⁷ *Wash. State Grange*, *supra* note 2, 552 U.S. at 460 (Roberts & Alito, JJ., concurring) (*quoting Gralike*, *supra* note 2, 531 U.S. at 532 (Rehnquist, C.J., concurring)) (emphases added). Accord, *Rosen*, *supra* note 24, 970 F.2d at 175 (“An election ballot is a State-devised form through which candidates and voters are required to express themselves at the climactic moment of choice.”).

⁷⁸ *Wash. State Grange*, *supra* note 2, 552 U.S. at 466 (Scalia & Kennedy, JJ., dissenting) (emphases added).

Party Preference.” In this manner, major-party candidates will win votes simply *because their party’s name appears beside their name on the ballot.*

1. *Stanson v. Mott Controls This Case*

In the landmark case of *Stanson v. Mott*, the California Supreme Court laid down a cornerstone Equal Protection rule: the government may not favor incumbents, “take sides”, or otherwise “bestow an unfair advantage on one of several competing factions” in an election.⁷⁹ Furthermore, the High Court has also ruled that the Equal Protection Clause “requires all candidates, newcomers and incumbents alike, to be treated *equally.*”⁸⁰ Toward that end, the High Court applies strict scrutiny to any law that gives a preferred class of candidates an advantage on the ballot:

[W]e think that the instant classification scheme, which substantially *dilutes the weight of votes* of those supporting non-incumbent candidates, must be subjected to “strict judicial scrutiny.” Under this standard, the charter provision can be upheld only if the government can demonstrate that the classifications drawn are necessary to achieve a *compelling governmental interest.*⁸¹

Under the *Stanson* doctrine, the wording and structure of a ballot cannot favor certain “political viewpoints” or a

⁷⁹ *Stanson v. Mott* (1976) 17 Cal.3d 206, 217 (citing *Gould v. Grubb* (1975) 14 Cal.3d 661).

⁸⁰ *Gould*, *supra* note 79, 14 Cal.3d at 674 (emphasis added) (citation omitted),

⁸¹ *Id.* at 672 (quotations in original, citations omitted); *see also id.* at 674.

“particular partisan position”.⁸² What is more, *Stanson* strongly implies that if a government does “take sides” on the ballot, it must provide “equal access” to “all competing factions” – effectively creating a *limited public forum*.⁸³ Accordingly, the California Supreme Court and Courts of Appeal have struck down ballots that favored incumbents or certain political viewpoints.⁸⁴ Furthermore, as U.S. Supreme Court scholar Vicki Jackson has noted, a number of federal courts have struck down ballots that favor major-party candidates:

[O]nce a candidate is legally entitled to appear on the ballot there is *substantial support* in the lower courts *to invalidate laws that favor incumbents, or nominees of preferred parties*[.]⁸⁵

⁸² See, e.g., *Huntington Beach City Council*, *supra* note 63, 94 Cal.App.4th at 1433 (quoting *Stanson*, *supra* note 79, 17 Cal.3d at 219, and citing *Citizens for Responsible Gov’t v. City of Albany* (1997) 56 Cal.App.4th 1199, 1228).

⁸³ *Stanson*, *supra* note 79, 17 Cal.3d at 217; *Huntington Beach City Council*, *supra* note 63, 94 Cal.App.4th at 1433; *Citizens for Responsible Gov’t*, *supra* note 82, 56 Cal.App.4th at 1228.

⁸⁴ *Gould*, *supra* note 79, 14 Cal.3d 661 (incumbents cannot be listed first); *Ferrara*, *supra* note 63, 18 Cal.3d 253 (government cannot print its argument on ballot measure while refusing to publish the opposing argument); *Rees*, *supra* note 63, 6 Cal.App.3d 815 (government cannot ban non-incumbents from stating their profession on the ballot, while allowing incumbents to be listed as the holder of the office).

⁸⁵ Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001 Sup.Ct.Rev. 299, 336 n.112 (emphases added), citing, *inter alia*, *McLain*, *supra* note 75, 637 F.2d at 1166-67; *Graves v. McElderry* (W.D. Okla. 1996) 946 F.Supp. 1569, 1573, 1579-82 (striking down state law that gave top ballot position to Democratic candidates); *Sangmeister*

2. Rees Applied the Stanson Doctrine in an Analogous Case

In *Rees v. Layton*,⁸⁶ the Court of Appeal struck down a discriminatory party label that closely resembles the one here. An election law had allowed incumbents to be listed on the ballot as the holder of that office, while banning their challengers from listing their occupation on the ballot. The government claimed that this practice was necessary to prevent non-incumbents from “misleading the electorate.”⁸⁷

Dismissing that argument, *Rees* reasoned that candidates could effectively police themselves. The Court noted that “a misleading occupation on the ballot would be fuel to an opponent’s campaign.”⁸⁸ *Rees* concluded that such government intervention violated the Equal Protection Clause.⁸⁹ The California Supreme Court expressly re-affirmed *Rees*, in *Gould v. Grubb*.⁹⁰

Rees directly applies to SB 6’s Party Preference Ban. Under SB 6’s scheme, a favored class of candidates (i.e., those who identify with the viewpoints of a major party) will be allowed to tell voters their party preference on the ballot; while

v. Woodard (7th Cir. 1977) 562 F.2d 460, 465-67 (striking down election officials’ practice of giving their own political party top ballot position).

⁸⁶ *Rees, supra* note 63, 6 Cal.App.3d 815.

⁸⁷ *Id.* at 823.

⁸⁸ *Id.* at 823.

⁸⁹ *Id.* at 823.

⁹⁰ *Gould, supra* note 79, 14 Cal.3d at 673 n.13.

a disfavored class of candidates (i.e., those who identify with the viewpoints of a minor party) will be banned from doing so. In this manner, major-party candidates will win votes simply *because their party's name appears beside their name on the ballot*. To paraphrase Justices Scalia and Kennedy, those favored few will thereby “garner[] the support of those who trust and agree with [their] party.”⁹¹

In contrast, minor-party candidates will be deprived of the ability to reach potential voters by way of the ballot. Under SB 6, minor-party candidates like Intervenor-Applicant Chamness, Appellant Mackler, and Appellant Martin will face a Hobson’s choice: (1) appear on the ballot with the party label of “No Party Preference”, or (2) out of dire political necessity, adopt the party label of a major party. Because it denies “equal access”⁹² to candidates of every political viewpoint, SB 6’s Party Preference Ban not only triggers strict scrutiny, but violates the Equal Protection Clause of the California Constitution.⁹³

I. SB 6 Defendants Have Given No Compelling State Interest to Justify SB 6’s Party Preference Ban

The First Amendment bars government from censoring pure speech or speakers in order to “improve the quality” or “increase the fairness” of public debate.

⁹¹ *Wash. State Grange, supra* note 2, 552 U.S. at 466.

⁹² *Stanson, supra* note 79, 17 Cal.3d at 217.

⁹³ *Gould, supra* note 79, 14 Cal.3d at 672.

– Archibald Cox⁹⁴

Finally, the Secretary of State and Intervenors claim that the State has a “compelling interest” in denying equal access on the ballot to minor-party candidates.⁹⁵

1. Giving minor-party candidates a party label will not confuse voters

During oral argument, Intervenors argued that it would “confuse” voters if minor-party candidates were allowed to state the name of their party on the ballot. However, voters in the 24 states that allow minor-party labels would beg to differ, for they thereby gain valuable information about candidates.⁹⁶ As Chief Justice Roberts, former Chief Justice Rehnquist, and Justice Alito have noted, “The ballot is the *last thing* the voter sees before he makes his choice.”⁹⁷ By allowing candidates to

⁹⁴ Archibald Cox, *The Supreme Court 1979 Year Forward: Freedom of Expression in the Burger Court*, 94 Harv.L.Rev. 1, 67 (1980) (*quoted by Bachrach, supra* note 47, 382 Mass. at 281).

⁹⁵ Secretary of State’s opposition papers, App. Vol. 2, at 1437:5-6 (“compelling state interest” supports SB 6); Intervenors’ opposition papers, App. Vol. 2, at 1363:5-6 (the State has a “compelling interest in regulating the method by which” to regulate the contents of the ballot).

⁹⁶ Intriguingly, California permitted minor-party candidates to list their party’s name on the ballot between 1891 and 1915, and a minor-party candidate was elected in 1912. Declaration of Richard Winger, RJN Exh. 11 ¶¶9-10.

⁹⁷ *Wash. State Grange v. Wash. State Republican Party*, *supra* note 2, 552 U.S. at 460 (Roberts & Alito, JJ., concurring) (emphases added) (*quoting Cook v. Gralike, supra* note 2, 531

share information with voters on the ballot, candidates and voters alike can interact and “police themselves” in the marketplace of political ideas.⁹⁸

Ironically, SB 6’s new party-label rules could themselves confuse voters. In fact, if a candidate switches his party registration from “Tea Party” to “Democrat” *on the day of the candidate filing deadline*, SB 6 would still allow him or her to use the party label of “Democratic.”⁹⁹ Thus, instead of giving voters more meaningful choices, SB 6 may do voters a disservice – by providing misleading information about both major and minor-party candidates. Therefore, since SB 6 could cause voter confusion, there is no state interest whatsoever to salvage its Party Preference Ban.

2. Libertarian Party v. Eu Does Not Authorize SB 6’s Party-Preference Ban

Trying to overcome strict scrutiny, SB 6 Defendants will argue that previous law on “qualified party” elections provides a compelling government interest to justify SB 6. Yet to the extent it applies, case law on “qualified party” elections¹⁰⁰

U.S. at 532 (Rehnquist, C.J., concurring)). *Accord, Rosen, supra* note 24, 970 F.2d at 175 (“An election ballot is a State-devised form through which candidates and voters are required to express themselves at the climactic moment of choice.”).

⁹⁸ See *Rees, supra* note 63, 6 Cal.App.3d at 823.

⁹⁹ [SB 6-amended] Elections Code §8002.5(c).

¹⁰⁰ In a slew of sur-reply papers filed in the Superior Court, Intervenor claimed that Appellants’ Reply Brief had raised new arguments relating to SB 6’s Party Preference Ban. See Plaintiffs’ Response to Intervenor’s Sur-Reply, App. Vol. 2, at

would also strike down SB 6 – because it gave minor-party candidates the constitutional right to state on the ballot that they are “Independent”.

In *Libertarian Party v. Eu*,¹⁰¹ the California Supreme Court held that, under the existing “qualified party” election system, the State could require all minor-party candidates to use the party label of “Independent”. However, *Eu* did not allow the State to foist minor-party candidates with the party label of “No Party Preference”.

To begin with, *Eu* does not apply here, for it upheld California’s previous “qualified party” system – which SB 6 dismantled. In *Eu*, the California Supreme Court ruled that the State could grant candidates from qualified parties certain advantages over candidates from non-qualified (minor) parties. Specifically, *Eu* held that, under the previous “qualified party”

1531:13-4:21. However, a reply brief may provide an “elaboration of issues raised in [the] opening brief or rebuttals to [opposition] briefing.” *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 (emphases added). As Appellants have documented, their Reply Brief merely responded to and rebutted arguments that Intervenors had themselves raised. *See* App. Vol. 2, at 1531:13-1532:21. In any event, the Superior Court permitted Intervenors’ to file their sur-reply papers, which responded to arguments raised in Appellants’ Reply and Opening Briefs. *See id.* at 1530:16-1531:12. Moreover, during oral argument, Intervenors further expanded on the arguments that their sur-reply papers had raised. Transcript, Vol. 2, at 41:7-15. *See People v. Miller* (2007) 146 Cal.App.4th 545, 52 Cal.Rptr.3d 894, 898 (reviewing court may adjudicate all issues “raised during argument, whether that argument has been oral or in writing.”) (citation omitted).

¹⁰¹ *Eu, supra* note 9, 28 Cal.3d 535.

system, the State had a “compelling state interest” to maintain the “distinction between qualified and non-qualified parties.”¹⁰²

Under *Eu*, only candidates from qualified parties could appear on the June qualified-primary ballot; the winner of each qualified party’s respective primary then advances to the November general election, as that party’s nominee. Thus, each qualified party could nominate *exactly one*¹⁰³ candidate for each state and federal office in the November general election.

Conversely, *Eu* allowed the State to ban minor-party candidates from participating in the June qualified-primary election. As a result, minor (non-qualified) parties did not have the right to nominate any candidates for the November general election. Instead, minor-party candidates had to qualify for the November election “independent of” the June qualified-party election.¹⁰⁴ Therefore, to avoid “confusion”, *Eu* held that the State could require minor-party candidates to use the party label of “Independent” in the general election.¹⁰⁵

3. Libertarian Party v. Eu Does Not Directly Apply to This Case

In a nutshell, SB 6 allows both qualified-party and minor-party candidates to participate in the June primary

¹⁰² *Id.* at 546.

¹⁰³ A candidate who loses in a qualified party’s primary election is banned from appearing on the ballot in the general election. Elections Code §8301. However, that candidate may run as a write-in candidate in the general election. *Id.* §8600.

¹⁰⁴ *Eu*, *supra* note 9, 28 Cal.3d at 544 (emphasis added).

¹⁰⁵ *Id.* at 546 (quotation omitted).

election, but forbids minor-party candidates from stating any party preference on the ballot. For instance, a June primary election for Governor could feature two Republicans, two Democrats, and two minor-party candidates. The top two votegetters, irrespective of their party preference, would then appear on the November general-election ballot.¹⁰⁶ Thus, it is now possible for two Republicans or two Democrats to be the only two candidates for Governor on the November ballot.

SB 6's regime thus made a critical change to the way we elect our state and federal leaders.¹⁰⁷ Namely, major parties *are longer able to select their nominees* for the November general election. Thus, SB 6 eliminated the need to maintain the “distinction between qualified and non-qualified parties” – the *very basis* for the holding in *Eu*.¹⁰⁸ Accordingly, *Eu* does not provide any “compelling state interest” that would justify SB 6's Party Preference Ban.

J. Intervenors May Not Play “Fast and Loose” with the Courts

It seems patently wrong to allow a person to abuse the judicial process by first advocating one position, and later, if it becomes beneficial, to assert the opposite.

-- Court of Appeal, *Jackson v. Los Angeles County*¹⁰⁹

¹⁰⁶ [SB 6-amended] Elections Code §8141.5.

¹⁰⁷ SB 6 excludes Presidential elections from its scope. [SB 6-amended] Elections Code §359.5.

¹⁰⁸ *Eu, supra* note 9, 28 Cal.3d at 546.

¹⁰⁹ *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 (1998) *review denied* (emphases added) (*quoting* Comment, The Judiciary Says, You Can't Have It Both Ways:

In a last-ditch effort to save SB 6, Intervenors may seek to contradict a position that they had taken in Superior Court. However, the doctrine of judicial estoppel absolutely bars them from “playing fast and loose with the courts.”¹¹⁰ Only a few weeks ago, Intervenors had strenuously defended SB 6’s Party Preference Ban before the Superior Court:

...Plaintiffs also challenge SB 6’s retention of the pre-existing system of *allowing **only** ‘qualified’ party labels* to appear *on the ballot* opposite a candidate’s name. *[T]his precise system is constitutional.*¹¹¹

[A]ll candidates appear on the same primary election ballot, but only those registered with a qualified political party may indicate *a party preference* with the label of that party printed *on the ballot.*¹¹²

Startlingly, after convincing the Superior Court to uphold SB 6’s Party Preference Ban, Intervenors then sought to *deny its very existence* before this Court:

Judicial Estoppel – A Doctrine Precluding Inconsistent Positions (1996) 30 Loyola L.A. L.Rev. 323, 327).

¹¹⁰ *Jackson, supra* note 109, 60 Cal.App.4th at 181 (*quoting Russell v. Rolfs* (9th Cir.1990) 893 F.2d 1033, 1037).

¹¹¹ Intervenors’ Opposition to Plaintiffs’ Motion for Preliminary Injunction, App. Vol. 2, at 1353:4-5 (emphases added).

¹¹² Intervenors’ Sur-Reply Brief, App. Vol. 2, at 1508:7-9 (emphases added).

SB 6 *does not “censor” minor-party candidates,* and Intervenor has not “conceded” that it does.¹¹³

In particular, Intervenor *deny* that a candidate who has disclosed a preference for a *non-qualified party ... is banned* from having that party preference *appear on the ballot[.]*¹¹⁴

Under the doctrine of judicial estoppel, the Court must disregard Intervenor’s shameless attempt to “abuse the judicial process.”¹¹⁵ Judicial estoppel should apply when:

1. The same party has taken two positions;
2. The positions were taken in judicial or quasi-judicial proceedings;
3. The party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true);
4. The two positions are totally inconsistent; and
5. The first position was not taken as a result of ignorance, fraud, or mistake.¹¹⁶

¹¹³ Intervenor’s Oct. 8, 2010 opposition filed with the Court of Appeal (First District), RJN Exh. 16, at 10 (emphases added).

¹¹⁴ Intervenor’s Oct. 8, 2010 opposition filed with the Court of Appeal (First District), RJN Exh. 16, attached thereto as Exhibit F ¶52 (emphases added).

¹¹⁵ *Jackson, supra* note 109, 60 Cal.App.4th at 181 (citation omitted).

¹¹⁶ *Id.* at 183 (citations omitted).

It is astonishing that Intervenor Maldonado – the author of SB 6 – apparently does not know what his own brainchild says. Here, Intervenor took two “totally inconsistent” positions in two separate proceedings (requirements 1, 2 & 4), successfully convinced the Superior Court to adopt the first position (requirement 3),¹¹⁷ and did not take their first position as a result of “ignorance, fraud, or mistake” (requirement 5). Consequently, the doctrine of judicial estoppel bars them from repudiating their prior position on SB 6’s Party Preference Ban.

K. There Is No Basis for Intervenor’s Statutory Construction of the Elections Code

Contrary to Intervenor’s claims, SB 6’s Party Preference Ban expressly bans minor-party candidates from stating their party’s name on the ballot. Indeed, both Appellants and the Secretary of State agree on one critical point. Namely, (SB 6-amended) Elections Code section 325 expressly forces candidates of “independent status” – namely, minor-party candidates – to state that they have “No Party Preference”.¹¹⁸ However, Intervenor argues that SB 6 does allow minor-party candidates to state “the name of the political party that [they]

¹¹⁷ Indeed, the Superior Court’s ruling on this issue cited federal case law that was first invoked by Intervenor, and was not even cited by the Secretary of State. *Compare* Order, Exh. A, at 2; *with* Intervenor’s Opposition to Motion for Preliminary Injunction, App. Vol. 2, at 1361:13-21.

¹¹⁸ See discussion at Sections V(B) and V(C) *supra*.

prefer[.]” on the ballot, because they may fill in the name of their minor party on their voter registration card.¹¹⁹

This issue boils down to whether SB 6’s voter-registration-card provisions are exempt from the Elections Code’s definition of the term “party” as “qualified party”. Intervenors have tried to argue that Section 338’s definition of “party” “clearly does not apply to [voter] registration cards.”¹²⁰ However, their argument fails for at least two reasons.

First, the California Supreme Court, Elections Code Section 338, and the Secretary of State have all defined the term “party” as a “qualified party”.¹²¹ Significantly, SB 6 *did not amend* the Elections Code’s definition of “party”. As the California Supreme Court has repeatedly admonished, “[i]t is *bedrock law* that if the law-maker gives us an express definition, *we must take it as we find it*[.]”¹²²

¹¹⁹ Cf. [SB 6-amended] Elections Code 2151(a).

¹²⁰ Intervenors’ opposition to Court of Appeal writ proceeding, RJN Exh. 16, at 11.

¹²¹ “[T]he Legislature ... defined ‘party’ as a political organization that has ‘qualified for participation in any primary election.’” *Eu, supra* note 9, 28 Cal.3d at 540 (emphases added). As the Secretary of State’s counsel noted, “[u]nder the Elections Code – *this is very important* – the term “party” has a *very specific definition*. It’s defined under Elections Code 338 as *qualified party*.” Transcript, Vol. 2, at 35:20-23 (emphases added).

¹²² *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 804 (emphases added) (*quoting Bird v. Dennison* (1857) 7 Cal. 297, 307). The California Supreme Court “assume[s] that the Legislature has in mind *existing* laws when it passes a statute.” *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 977 n.10

Equally important, the Elections Code does not exempt – and *expressly applies* – Section 338’s definition of “party” to voter registration cards:

For purposes of this division [i.e., Elections Code Division 5, which includes the voter-registration-card provisions of Sections 5002 and 5003], the *definition of “party” in Section 338 is applicable.*¹²³

To be sure, the two provisions cited by Intervenors (i.e., Elections Code Sections 5002 and 5003) allow voters to write in a preference for a non-qualified party.¹²⁴ However, *neither section refers to non-qualified parties as “parties.”* Instead, Section 5002 explicitly classifies non-qualified parties into two categories: “political bodies” and “miscellaneous” groups.¹²⁵

Thus, the Elections Code’s voter-registration-card provisions are expressly controlled by Section 338’s definition

(emphasis added) (*quoting Estate of McDill* (1975) 14 Cal.3d 831, 837-8).

¹²³ Elections Code §5000. Because Section 338’s definition of “party” controls here, Intervenors have absolutely no grounds to argue that Sections 5002 and 5003 are exempt from Section 338’s definition of “party”.

¹²⁴ A sample voter registration form from San Francisco County has been attached as Exhibit 3 to RJN Exh. 3. *Cf.* Intervenors’ opposition papers, RJN Exh. 16, at 11.

¹²⁵ The Secretary of State is required to tabulate the number of voters declaring a preference for each political body. To be deemed a political body, a political group or organization must hold a convention, elect officers, and notify the Secretary of State that it intends to qualify as a qualified political party. Otherwise, a political group will be deemed a “miscellaneous” group. Elections Code §5002.

of “party”. If a candidate does not identify a “party preference” for a *qualified* party on his or her registration card, SB 6 will “presume” that he or she has “No Party Preference”¹²⁶ – and will foist the label “No Party Preference” under *every* minor-party candidate’s name on the ballot.¹²⁷ Therefore, *SB 6 bans minor-party candidates from stating any party preference on the ballot* – and no court may rewrite the statute in order to save it.¹²⁸

L. It is Beyond Dispute That SB 6’s Party Preference Ban Is Not Severable

The Superior Court should have declared the entirety of SB 6 unenforceable, for SB 6’s Party Preference Ban is not severable. To be sure, the Secretary of State and Intervenors insist that SB 6’s severability clause would allow its unlawful parts to be severed. However, the California Supreme Court has repeatedly held that severability clauses are not conclusive.¹²⁹

According to the High Court, an infirm statute can only be saved if its unlawful parts are, *inter alia*, “volitionally” separable. Suppose the Legislature had foreseen that part of a law that it wanted to pass would later be declared

¹²⁶ SB 6-amended Elections Code §2154(b).

¹²⁷ *Id.* §8002.5(a).

¹²⁸ *See, e.g., Metromedia v. City of San Diego* (1982) 32 Cal.3d 180, 187.

¹²⁹ *Gerken v. FPPC* (1993) 6 Cal.4th 707, 714 (emphases added) (*quoting Calfarm v. Deukmejian* (1989) 48 Cal.3d 805, 821); *see also Santa Barbara Sch. Dist v. Superior Court* (1975) 13 Cal.3d 315, 331.

unconstitutional. If it is “clear” that the Legislature would have still passed that law without its unconstitutional part, then that part would be “volitionally” separable, and the law itself would be severable as a matter of law.¹³⁰

It is undisputed that when the Legislature passed SB 6’s Party Preference Ban, it did so because *it intended to implement Proposition 14*.¹³¹ Specifically, Subsection V(b) of Proposition 14 called for a “statute” to implement the “manner” in which candidates could state their party preference on the ballot.¹³² In response, the Legislature enacted SB 6’s Party Preference Ban, which regulated the “manner” in which candidates may (or may not) state their party preference on the ballot.

Here, it is “clear” the Legislature would not have passed SB 6 without the Party Preference Ban – because without it, the lawmakers *could not have implemented Subsection V(b) of*

¹³⁰ *Sonoma County v. Superior Ct.* (2009) 173 Cal.App.4th 322, 352; *accord*, *Gerken*, *supra* note 129, 6 Cal.4th at 714 (“The final determination [on whether a severability clause is conclusive] *depends on whether the remainder* [of the statute] ... *would have been adopted* by the legislative body had the latter *foreseen* the partial *invalidity* of the statute.”) (*quoting Calfarm*, *supra* note 129, 48 Cal.3d at 821).

¹³¹ In its Statement of Purpose, Proposition 14 explicitly states that it needs implementing legislation. App. Vol. 1, at 1069:4-6.

When the Legislature enacts implementing legislation, it must be assumed that it actually intended to implement the constitutional provision in question. *See, e.g., People v. Broussard* (1993) 5 Cal.4th 1067, 856 P.2d 1134, 1137.

¹³² App. Vol. 1, at 1076.

*Proposition 14.*¹³³ In this light, SB 6’s Party Preference Ban is not “volitionally” separable – and SB 6 itself is not severable – as a matter of law.¹³⁴ Therefore, the Court must direct the Superior Court (1) to declare that the entirety of SB 6 is unenforceable, and (2) to enjoin Respondents from implementing or enforcing SB 6 in its entirety.

M. Since SB 6 Is Unenforceable, Prop 14 Is Inoperative As a Matter of Law

Equally important, SB 6 Defendants have cited no authority to refute yet another of Plaintiffs’ core legal theories. Namely, if SB 6 is struck down, Proposition 14 must be declared inoperative. It is undisputed that Proposition 14 needs a lawful statute to implement it, because it is not a self-executing provision.¹³⁵ Thus, because SB 6 is unenforceable in its entirety, Proposition 14 must be declared inoperative until the Legislature¹³⁶ – or the voters – pass a new law to implement it.¹³⁷

¹³³ *Sonoma County*, *supra* note 130, 173 Cal.App.4th at 352.

¹³⁴ *Id.* at 352; *Gerken*, *supra* note 129, 6 Cal.4th at 714.

¹³⁵ *E.g.*, *People v. Vega-Hernandez* (1986) 179 Cal.App.3d 1084, 1092; *Borchers Bros. v. Buckeye Incubator Co.* (1963) 59 Cal.2d 234, 238. In its Statement of Purpose, Proposition 14 explicitly states that it needs implementing legislation: “This act, *along with legislation* already enacted by the Legislature *to implement this act* [i.e., SB 6], are intended to implement an open primary system in California[.]” (emphases added). Proposition 14, App. Vol. 1, at 1069:4-6.

¹³⁶ According to Intervenors, their “political opponents” would let Proposition 14 “languish in the Legislature” if SB 6 is struck down. Intervenors’ Opposition, at 7. However,

N. The Importance of Write-In Voting

[T]he availability of a write-in candidacy provides the flexibility to deal with unforeseen political developments and may help ensure that the voters are given meaningful options on election day.

-- California Supreme Court, *Canaan v. Abdelnour*¹³⁸

Ironically, by attacking write-in voting, SB 6 seeks to kill off a vital safety valve that would have made its election system stronger. With SB 6, only two candidates will appear on the November general-election ballot. Suppose that SB 6 had been used for last November's gubernatorial election, and that Democrat Jerry Brown and Republican Meg Whitman were the only two candidates whose names appeared on the ballot.

What if Brown had suddenly suffered a stroke and became paralyzed a few weeks before the November general election? Under SB 6's rules, Democratic voters would face a

Intervenors appear to have the Legislature's ear. A couple weeks ago, Intervenor California Independent Voter Project funded a Hawaii resort getaway for 22 lawmakers, where they met with "lobbyists and corporate officials who want to influence California's future policies." "Statehouse Insider: Lawmakers Confer with Lobbyists in Hawaii," *The Desert Sun*, Nov. 21, 2010, *attached as Exhibit L to Request for Judicial Notice by Michael Chamness, RJN Exh. 3, at 1.*

¹³⁷ See, e.g., *In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, 75; *Denninger v. Recorder's Court* (1904) 145 Cal. 629, 635.

¹³⁸ *Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 718 (emphasis added) (*quoting Thompson v. Willson* (1967) 223 Ga. 370, 155 S.E.2d 401, 404), subsequently overruled on other grounds, *Edelstein v. San Francisco* (2002) 29 Cal.4th 164.

double bind. First, SB 6 would ban the Democratic Party from replacing Brown. Worse yet, if voters wrote in the name of another Democrat, the plain language of SB 6 would force election officials to *throw away* their votes.¹³⁹

Write-in voting has played a visible and critical role in state and national politics. In 1999, write-in candidate Tom Ammiano finished second in the San Francisco mayoral election, and qualified for the runoff against Willie Brown.¹⁴⁰ In 2004, write-in candidate Donna Frye nearly won the San Diego mayoral election.¹⁴¹ And last November, U.S. Senator Lisa Murkowski (R-AK) was re-elected as a write-in candidate.

In light of the critical role that write-in candidates have played in politics, one should exercise great caution before concluding that SB 6 banned voters from casting write-in ballots.

O. SB 6 Illegally Bans Lawfully Cast Write-In Votes from Being Counted

The right to vote includes the right to have the ballot counted.

-- *Reynolds v. Sims*¹⁴²

¹³⁹ SB 6-amended Elections Code §8606 (emphases added).

¹⁴⁰ *Edelstein, supra* note 138, 29 Cal.4th at 182.

¹⁴¹ “The San Diego Surfer Murkowski Should Read Up On”, *Atlantic Monthly*, Sept. 2010, attached as Exhibit D to RJN Exh. 14, at 1.

¹⁴² *Reynolds v. Sims* (1964) 377 U.S. 533, 555 n.29.

*Since ... SB 6 precludes [write-in] votes from being counted, it makes no sense to give voters the **illusion** that they can write in a candidate's name and have it counted.*

– Secretary of State Debra Bowen's office¹⁴³

SB 6's write-in provisions violate both the U.S. and California Constitutions, for they (1) allow voters to cast write-in votes, then (2) bans their votes from being counted. Specifically, SB 6 explicitly orders election officials not to count any write-in votes cast in the general election.¹⁴⁴ Yet the U.S. Supreme Court, California Supreme Court, and California Constitution have all made one constitutional right resoundingly clear: If a vote has been lawfully cast, it must be counted.¹⁴⁵

1. California Law Protects the Right To Cast a Write-In Vote

To begin with, Elections Code Section 15340 – which SB 6 does not amend – expressly guarantees every voter the right to cast a vote for a write-in candidate at every election:

Each voter is entitled to write the name of any public office ... on the ballot of any election.¹⁴⁶

¹⁴³ SOS Email 2, App. Vol. 1, at 1270.

¹⁴⁴ “A person whose name has been written on the ballot as a *write-in candidate* at the general election ... *shall not be counted.*” SB 6-amended Elections Code §8606 (emphases added).

¹⁴⁵ *U.S. v. Classic* (1941) 303 U.S. 299, 315; *Gould, supra* note 79, 14 Cal.3d at 671 n.10, 536 P.2d 1337, 1343); CAL.CONST art. II § 2.5.

¹⁴⁶ Elections Code §15340 (emphasis added).

Significantly, the plain language of SB 6 re-affirms that right. Specifically, SB 6 purports to protect not only the right to cast a write-in vote, but the right to run as a write-in candidate:

Nothing in this section shall be construed as preventing or prohibiting any qualified voter of this state from casting a ballot for any person by writing the name of that person on the ballot, or from having that ballot counted and tabulated, nor shall any provision of this section be construed as preventing or prohibiting any person from standing or campaigning for any elective office by means of a “write-in” campaign.¹⁴⁷

What is more, SB 6 requires that ballots have sufficient space so that voters can cast votes for write-in candidates:

There shall be printed on the ballot ... [t]he names of candidates with *sufficient blank spaces to allow the voters to write in names not printed on the ballot*.¹⁴⁸

Therefore, both the Elections Code and SB 6 expressly give voters the right to cast write-in votes in every state and federal election.

2. SB 6 Violates the California Constitution

A refusal to count an elector’s vote completely ignores it and is tantamount to a refusal to allow him to cast it.

-- California Supreme Court, *Canaan v. Abdelnour*¹⁴⁹

¹⁴⁷ SB 6-amended Elections Code §13 (emphases added).

¹⁴⁸ *Id.* §13207(a)(2) (emphasis added).

¹⁴⁹ *Canaan*, *supra* note 138, 40 Cal.3d at 719.

Since both the Elections Code and SB 6 expressly permit voters to cast write-in votes, they must be counted. As a starting point, the California Constitution (Article II, Section 2.5) requires that every lawfully cast vote be counted:

A voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted.¹⁵⁰

Furthermore, Elections Code 15342 – which SB 6 does not amend – requires that all-write in votes that have been cast for eligible candidates must be counted:

Any name written upon a ballot for a qualified write-in candidate ... shall be counted for the office[.]¹⁵¹

Yet rather than comply with the California Constitution, SB 6 expressly bans all write-in ballots from being counted in the general election:

“A person whose name has been written on the ballot as a write-in candidate at the general election ... shall not be counted.”¹⁵²

At the same time, SB 6 explicitly gives voters the ability to cast write-in votes in every election.¹⁵³ Thus, SB 6 induces voters to

¹⁵⁰ CAL.CONST. art. II §2.5 (emphases added).

¹⁵¹ Elections Code §15342 (emphases added). Elections Code §15341 sets forth the requirements for a write-in candidate to be deemed “qualified.”

¹⁵² SB 6-amended Elections Code §8606 (emphases added).

¹⁵³ “There *shall be printed on the ballot* ... [t]he names of candidates with *sufficient blank spaces to allow the voters to*

cast write-in votes, but *does not tell them that their votes will not count*. Therefore, because SB 6 bans all lawfully cast write-in votes from being counted, it violates the California Constitution.

3. The Secretary of State Admits that SB 6 Gives Voters the “Illusion” That Their Write-In Votes Will Count

It is well settled that a State may not change vote-counting rules unless it has given fair and adequate notice to voters.¹⁵⁴ Remarkably, a public statement from the Secretary of State’s office *admits that SB 6 will trick voters into throwing away their votes* – the heart of Appellants’ Due Process claim:

Since ... SB 6 precludes [write-in] votes from being counted, it *makes no sense to give voters the illusion that they can write in a candidate’s name and have it counted*. Making these conforming changes is only controversial because *there is a lawsuit on this issue that essentially states “SB 6 says don’t count the votes, so it’s misleading to let people think they can write in a candidate’s name and have it counted.” The way to solve the lawsuit is to make the [elections] code read one way – which we’ve done as SB 6 intended.*¹⁵⁵

write in names not printed on the ballot.” SB 6-amended Elections Code §13207(a)(2) (emphases added).

¹⁵⁴ See, e.g., *Griffin v. Burns* (1st Cir. 1978) 570 F.2d 1065, 1074.

¹⁵⁵ SOS Email 2, App. Vol. 1, at 1270 (emphases added). See also App. Vol. 1, at 1108:7-1109:3 (Plaintiffs’ Due Process claim).

By publicly admitting that SB 6 gives voters the “illusion” that their write-in votes will count, the Secretary of State has made a binding party admission¹⁵⁶ as to all of Write-In Plaintiffs’ Claims for Relief.

P. SB 6’s Counting Ban Violates the First Amendment and the Free Speech Clause

Despite the Secretary of State’s remarkable public admission, SB 6 Defendants insist that SB 6’s write-in provisions are constitutional. However, SB 6’s ban on counting write-in votes flatly violates the First Amendment of the United States Constitution and the Free Speech Clause of the California Constitution, for it foists on voters an unlawful, content-based restriction on their right to core political speech.

1. Turner v. D.C. Election Bd. Controls

To cast a lawful vote only to be told that the vote will not be counted or released is to rob the vote of any communicative meaning whatsoever.

-- *Turner v. D.C. Election Board* (D.D.C. 1999)¹⁵⁷

Turner v. D.C. Board of Elections provides the Court with persuasive guidance with regard to SB 6’s write-in provisions.¹⁵⁸ In *Turner*, a federal judge quashed an attempt to prevent lawfully cast votes from being counted. There, the District of Columbia’s elections board refused to count the

¹⁵⁶ See detailed discussion at *supra* note 59.

¹⁵⁷ *Turner v. District of Columbia Bd. of Elections* (D.D.C. 1999) 77 F.Supp.2d 25, 33 (emphases added).

¹⁵⁸ *Id.* at 25.

votes cast in an election, because it believed that doing so would violate federal law. The Court emphatically disagreed: “Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots *and have them counted*.”¹⁵⁹

As the United States Supreme Court recently noted in *Doe v. Reed*, “the expression of a political view *implicates a First Amendment right*.”¹⁶⁰ *Turner* held that not counting lawfully cast votes automatically triggers strict scrutiny. At the outset, the Court held that the *very act of voting constitutes protected symbolic speech*.¹⁶¹ *Turner* also concluded that counting lawful votes and certifying the results constituted core political speech.”¹⁶² Furthermore, the *Turner* Court held that suppressing the counting of votes imposed a content-based restriction on speech, for “keeping a veil over the results” would “cut short public expression” about both issues and candidates.¹⁶³

¹⁵⁹ *Id.* at 33 (emphasis in original) (quoting *United States v. Classic*, 303 U.S. 299, 315 (1941); accord, *Gould*, *supra* note 79, 14 Cal.3d at 671 n.10 (“There is more to the right to vote than the right to mark a piece of paper and drop it in a box or a right to pull a lever in a voting booth. It also includes the right *to have the vote counted at full value without dilution or discount*.”)(emphases added, citations and quotations omitted).

¹⁶⁰ *Doe*, *supra* note 1, 561 U.S. ____, t 6 (emphases added).

¹⁶¹ *Turner*, *supra* note 157, 77 F.Supp.2d at 31.

¹⁶² *Id.* at 32 (citing *McIntyre v. Ohio Elections Comm’n* (1995) 514 U.S. 334, 346 (emphasis added)).

¹⁶³ *Turner*, *supra* note 157, 77 F.Supp.2d at 33.

Finally, *Turner* concluded that refusing to count votes would impose a “severe” restriction on the vote: “To cast a lawful vote only to be told that the vote will not be counted or released is *to rob the vote of any communicative meaning whatsoever*.”¹⁶⁴ The Court concluded that no compelling government interest could justify a ban on counting legally cast votes.

Turner’s analysis applies here with equal vigor. As in *Turner*, California voters have an absolute constitutional right to have their votes counted in every election. Therefore, SB 6’s Vote Counting Ban automatically triggers strict scrutiny – and no party here has identified any compelling government interest to overcome it.¹⁶⁵

Because California law gives voters the right to cast votes for write-in candidates, all votes cast for eligible write-in candidates must be counted.¹⁶⁶ Consequently, SB 6 violates the First Amendment and the Free Speech Clause of the California Constitution.¹⁶⁷

¹⁶⁴ *Id.* at 33 (emphases added).

¹⁶⁵ *Turner*, *supra* note 157, 77 F.Supp.2d at 32-34. Defendant Bowen claims that the State may ban the counting of write-in votes in order to limit political competition in the general election. Secretary of State’s opposition papers, App. Vol. 2, at 1433:23-24. Such a dubious rationale does not constitute a compelling government interest.

¹⁶⁶ Elections Code §15340 (all voters have the right to cast write-in votes); CAL.CONST. Art. II §2.5 (all lawfully cast votes must be counted).

¹⁶⁷ “[T]he California liberty of speech clause is broader and more protective than the free speech clause of the First

2. The Superior Court Misconstrued SB 6's Counting Ban

In its ruling, the Superior Court held that SB 6 banned voters from casting votes for write-in candidates. In so doing, the Superior Court sidestepped weighty constitutional questions at issue, for the law does allow the State to ban voters from casting write-in votes.¹⁶⁸ Furthermore, by ignoring the plain language of SB 6, the Superior Court effectively rewrote several provisions of the Elections Code.

3. No Statutory Provision Cited by the Superior Court Bans Write-In Votes from Being Cast

In its ruling, the Superior Court concluded that Parts 8606 and 8141.5 of SB 6 ban write-in votes from being cast:

When [SB 6-amended] Elections Code sections 8141.5 and 8606 are read together, it is apparent that the Legislature intended to ban write-ins in the general election. (*See also* comments of the Secretary of State and the Assembly Bill Analysis.)¹⁶⁹

Amendment.” *Los Angeles Alliance for Survival*, *supra* note 56, 22 Cal.4th at 366 (citations omitted).

¹⁶⁸ *See Burdick v. Takushi* (1992) 504 U.S. 428 (state may ban write-in votes from being cast); *Edelstein*, *supra* note 138, 29 Cal.4th at 169 (state may ban write-in votes from being cast in the general election).

¹⁶⁹ Order, Exh. A, at 1.

However, neither (SB 6-amended) Elections Code sections 8606 nor 8141.5 bans voters from casting write-in votes – a right that SB 6 expressly purports to protect.¹⁷⁰

“When statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it.”¹⁷¹ Significantly, the plain language of Section 8606 does not ban write-in votes from being cast. Instead, as the Secretary of State freely admits,¹⁷² Section 8606 bans write-in votes from being counted:

“A person whose name has been written on the ballot as a write-in candidate at the general election ... shall not be counted.”¹⁷³

Similarly, the plain language of (SB 6-amended) Elections Code section 8141.5 does not even mention whether write-in votes should be counted. Instead, that provision specifies the two candidates whose names may be printed on the general-election ballot:

Only the two candidates ... who receive the highest and second-highest numbers of votes cast at the primary shall appear on the ballot as candidates for that office at the general election.¹⁷⁴

¹⁷⁰ See discussion at Section V.O.1, *supra*.

¹⁷¹ *Boyd, supra* note 41, 24 Cal.3d at 294 (emphases added, citations and quotation marks omitted).

¹⁷² “SB 6 precludes counting write-in votes cast in the general election[.]” Secretary of State’s opposition papers, App. Vol. 2, at 1429:3-4 (emphasis added).

¹⁷³ SB 6-amended Elections Code §8606 (emphases added).

¹⁷⁴ *Id.* §8141.5.

“If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.”¹⁷⁵ Here, the plain language of the provisions cited by the Superior Court (a) does not ban write-in votes from being cast, and (b) expressly bans write-in votes from being counted. Therefore, the Superior Court had no basis to conclude that SB 6 banned write-in votes from being cast.

4. The Superior Court Mistakenly Based Its Ruling on Inaccurate Legislative History

In response, Intervenors will insist that the Secretary of State’s public statements and legislative history require the Court to disregard SB 6’s Vote Counting Ban.¹⁷⁶ In so doing, the Superior Court cast aside a cardinal rule of statutory interpretation. Namely, unless a statute “is susceptible of more than one reasonable interpretation,” a court may not consider legislative history and “the wider historical circumstances” of a statute’s enactment.¹⁷⁷ In any event, neither source cited by the

¹⁷⁵ *Arterberry v. County of San Diego* (2010) 182 Cal.App.4th 1528, 1533 (emphases added) (*quoting Diamond Multimedia Systems v. Superior Court* (1999) 19 Cal.4th 1036); *see also Olson v. Automobile Club* (2008) 42 Cal.4th 1142, 74 Cal.Rptr.3d 81, 84 (emphases added) (“If the statute’s text evinces an unmistakable plain meaning, we need go no further.”) (emphases added) (*quoting Beal Bank v. Arter & Hadden* (2007) 42 Cal.4th 503, 508).

¹⁷⁶ Order, Exh. A, at 1.

¹⁷⁷ *Dyna-Med v. Fair Employment & Housing Comm’n* (1987) 43 Cal.3d 1379, 1387; *see also Wolski v. Fremont Investment & Loan* (2005) 127 Cal.App.4th 347, 353 (legislative

Superior Court¹⁷⁸ would compel the Court to airbrush SB 6’s plain language.

To begin with, the Secretary of State has flatly contradicted the Superior Court’s reading of SB 6. Indeed, her office has publicly stated that SB 6’s Vote-Counting Ban will trick voters into disenfranchising themselves.¹⁷⁹ Moreover, at oral argument in the Superior Court, the Secretary of State’s counsel reiterated that SB 6’s plain language does give voters the right to cast write-in votes. Specifically, he admitted that SB 6 requires “corrective legislation”, because it “still provides for *write-in lines* under the candidates’ names.”¹⁸⁰ Thus, the Secretary of State’s public statements undermine the Superior Court’s interpretation of SB 6.

To be sure, Intervenors will assert that SB 6’s Assembly Bill Analysis compels the Court to rewrite the plain language of the Vote-Counting Ban. Specifically, that Analysis claims that

intent may not be considered unless the statutory language at issue is “ambiguous, uncertain or unclear.”).

¹⁷⁸ “See also comments of the Secretary of State and the Assembly Bill Analysis.” Order, Exh. 1, at 1.

¹⁷⁹ “Since ... SB 6 precludes [write-in] votes from being counted, it *makes no sense to give voters the **illusion** that they can write in a candidate’s name and have it counted.*” SOS Email 2, App. Vol. 1, at 1270 (emphases added).

¹⁸⁰ Transcript, Vol. 2, at 34:9-11 (emphases added). Moreover, the Secretary of State’s office has also admitted same problem: “The *requirement that general election ballots contain spaces for write-ins should be deleted*, since ... SB 6 ... specifies that a name written on the ballot at a general election ... shall not be counted.” SOS Email 2, App. Vol. 1, at 1270 (emphases added).

SB 6 bans voters from casting write-in votes.¹⁸¹ As the outset, that evidence should be disregarded, because Intervenor belatedly introduced it ten days after they had filed their opposition papers.¹⁸² Equally important, if legislative analysis “directly conflict[s]” with a statute’s plain language, it must be “disregarded.”¹⁸³

Here, the legislative analysis at issue “directly conflicts with” several Elections Code provisions that *expressly give voters the right to cast write-in votes*. Specifically, Elections Code Section 15340 guarantees the right to cast a write-in vote in every election, while another section of SB 6 itself¹⁸⁴ requires that every ballot provide space where voters can write in the names of candidates. What is more, the election system that SB 6 and Proposition 14 were modeled after¹⁸⁵ – Washington

¹⁸¹ Plaintiffs’ Opposition to Intervenor’s Written Objections to Plaintiffs’ Evidence, App. Vol. 2, at 1525 ¶4.

¹⁸² See discussion of Intervenor’s unauthorized sur-reply papers at note 100 *supra*. To justify their belated proffer of evidence, Intervenor brazenly misquoted Appellants’ Reply Brief. Plaintiffs’ Opposition to Intervenor’s Written Objections to Plaintiffs’ Evidence, App. Vol. 2, at 1525 ¶ 6.

¹⁸³ *In re Barry W.* (1993) 21 Cal.App.4th 358, 26 Cal.Rptr.2d 161, 166; see also *Calif. Teachers’ Ass’n v. Governing Bd.* (1983) 141 Cal.App.3d 606, 614 (“If a law is clear the [legislative analysis] must be disregarded.”).

¹⁸⁴ SB 6-amended Elections Code §13207(a)(2).

¹⁸⁵ “Legal experts have modeled [Prop 14] after Washington State’s primary system”. Website of Intervenor Yes on 14, Plaintiffs’ Reply Brief, App. Vol. 2, at 1490:14-15 (emphases added).

State’s election system – gives voters the right to cast write-in votes and to have them counted.¹⁸⁶

Moreover, the Superior Court’s reading of SB 6 violates several other canons of construction. First, it renders SB 6’s Vote-Counting Ban superfluous. As a general rule, courts must “give significance to every word of a statute, when possible, and avoid a construction that renders a word surplusage.”¹⁸⁷ Here, why did the Legislature expressly ban the counting of write-in ballots, if it had actually meant to ban the casting of write-in votes?

What is more, the California Supreme Court assumes “that the Legislature has in mind existing laws when it passes a statute”:

The failure of the Legislature *to change the law in a particular respect* when the subject is generally before it and changes in other respects are made is *indicative of an intent to leave the law as it stands in the aspects not amended.*¹⁸⁸

¹⁸⁶ RCW §29A.60.021(1) App. Vol. 2, at 1499. Significantly, Washington State allows the names of only two candidates to appear on the general-election ballot (like SB 6-amended §8141.5 SB 6), but also allows voters to cast votes for write-in candidates. RCW §29A.52.112.

¹⁸⁷ *Arterberry, supra* note 175, 182 Cal.App.4th at 1534 (emphases added) (*quoting Home Depot v. Contractors’ State License Bd.* (1996) 41 Cal.App.4th 1592, 1602); *see also Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22.

¹⁸⁸ *McDill, supra* note 122, 14 Cal.3d at 837-38 (citations omitted, emphases added).

Tellingly, although it made nearly 60 amendments to the Elections Code, SB 6 did not abolish Elections Code Section 15340, which guarantees voters the right to vote for a write-in candidate in every election. Thus, it must be “assumed” that the Legislature did not intend to take away the right to cast a write-in vote. Finally, as the California Supreme Court has made clear, a court cannot rewrite a statute in order to save it, for “[t]hat is a legislative and not a judicial function.”¹⁸⁹

Unlike its Washington State model, SB 6’s election regime expressly invites voters to cast write-in votes, but then unlawfully bans elections officials from counting them. Thus, SB 6’s plain language cannot be interpreted in a way that does not violate either the U.S. or California Constitution.

Accordingly, the Court must direct the Superior Court (1) to declare SB 6’s Vote-Counting Ban unconstitutional, and (2) to enjoin Respondents from implementing and enforcing SB 6’s Vote-Counting Ban.

Q. SB 6 Defendants Concede That SB 6’s Vote-Counting Ban Violates the Due Process Clause

Strikingly, SB 6 Defendants have conceded Appellants’ claim that SB 6’s Vote-Counting Ban violates the Due Process Clause of the U.S. and California Constitutions. As the Secretary of State herself concedes, (SB 6-amended) Elections Code section 8606 *explicitly invites* voters to cast write-in votes, then bans their votes from being counted. In this

¹⁸⁹ *Metromedia*, *supra* note 128, 32 Cal.3d at 187 (citations and quotations omitted, emphases added).

manner, SB 6 perpetrates “fraud on the voters” by “stripping them of their vote[.]”¹⁹⁰ Significantly, SB 6 Defendants’ opposition papers did not challenge Appellants’ Due Process claim. Since Appellants’ Due Process claims are uncontested, the Court must direct the Superior Court to (1) grant Plaintiffs’ Fifth and Sixth Claims for Relief, and (2) enjoin Respondents from implementing SB 6’s Vote-Counting Ban.

R. SB 6 Defendants Concede That SB 6’s Vote Counting Ban Violates the Elections Clause

What is more, SB 6 Defendants have also conceded Appellants’ claim that SB 6’s Vote-Counting Ban violates the Elections Clause of the U.S. Constitution. SB 6 explicitly invalidates all votes cast for write-in candidates. Thus, SB 6 was “plainly designed to favor” candidates whose names appear on the ballot, and it was designed to “disfavor” and “handicap” candidates who receive write-in votes.¹⁹¹ Because SB 6 places its political targets at a disadvantage, it unlawfully attempts to “dictate electoral outcomes.”¹⁹²

As discussed earlier, SB 6 Defendants’ opposition papers barely discussed the Election Clause, and failed to cite any legal

¹⁹⁰ *Griffin v. Burns*, *supra* note 154, 570 F.2d at 1074; *see also Nolles v. State Cmte. for the Reorganization of School Dists.* (8th Cir. 2008) 524 F.3d 892, 899; *Bennett v. Yoshina* (9th Cir. 1998) 140 F.3d 1218, 1226; Plaintiffs’ Motion for Preliminary Injunction, App. Vol. 1, at 1108:7-1109:3.

¹⁹¹ *Gralike*, *supra* note 2, at 523-25.

¹⁹² *Id.* at 525.

authority relating to the Elections Clause.¹⁹³ Therefore, because SB 6 Defendants waived the opportunity to rebut Appellants’ claim, the Superior Court erred when it denied Appellants’ Election Clause claim. Thus, because SB 6’s Vote-Counting Ban is unconstitutional, the Court should direct the Superior Court to enjoin Respondents from implementing and enforcing SB 6.

S. Appellants Have Shown Likelihood of Success on the Merits

Simply put, there is more than a “reasonable probability” that Appellants will prevail on the merits in this case.¹⁹⁴ First, as this Brief has shown, SB 6’s Party Preference Ban must be struck down; for it violates both the U.S. and California Constitutions. Second, because SB 6’s Party Preference Ban is not severable, the entirety of SB 6 must be struck down as unconstitutional. Accordingly, Appellants have compellingly shown a “reasonable probability of success.”

VI. Appellants Have Shown Imminent Harm

A. It Was Foreseeable That a Candidate Like Intervenor-Applicant Chamness Would Face Imminent, Irreparable Harm

The Superior Court erred when it held that Appellants had not made a “sufficient” showing of imminent harm, because it was foreseeable that a candidate like Intervenor-

¹⁹³ See discussion at *supra* note 75.

¹⁹⁴ *Huong Que*, *supra* note 32, 150 Cal.App.4th 400, 58 Cal.Rptr.3d at 533 (citation omitted).

Applicant Chamness would face imminent, irreparable harm. In that regard, the Superior Court failed to consider both High Court jurisprudence and “important record evidence”.¹⁹⁵ Specifically, the Superior Court believed that SB 6’s new election rules would not kick in until 2012:

This is going to come up in 2012. There is plenty of time to have this resolved in due course through the courts, and *I don’t think that there has been a sufficient showing that something might happen beforehand*.¹⁹⁶

However, record evidence did show that SB 6 would harm candidates and voters *well before* the New Year. Last summer, the Secretary of State’s office predicted that exact scenario: “If history is any guide, *there will be a special primary election* to fill a legislative or congressional vacancy in 2011[.]”¹⁹⁷ By the spring, California will already have held at least four special elections – and this is no aberration. In fact, California has held a whopping 96 special elections for state and federal vacancies since 1990.¹⁹⁸

What is more, the U.S. Supreme Court has repeatedly admonished courts to swiftly resolve facial constitutional challenges before the election at issue is held:

¹⁹⁵ See, e.g., *O’Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1471 (trial judge committed error by failing to consider “important record evidence”).

¹⁹⁶ Transcript, Vol. II, at 29:14-17 (emphases added).

¹⁹⁷ SOS Email 1, App. Vol. 1, at 1266.

¹⁹⁸ Secretary of State’s Apr. 12, 2010 News Release, Exh. 5, at 1.

The “*capable of repetition, yet evading review*” doctrine, in the context of *election cases*, is appropriate when there are “as applied” challenges as well as in the more *typical case* involving only *facial attacks*. The construction of a statute ... will have the effect of simplifying future challenges, thus *increasing the likelihood that timely filed cases can be adjudicated before an election is held*.¹⁹⁹

As the High Court has also made clear, litigants are entitled to immediate relief if there is a “realistic danger” that a law will harm their constitutional rights.²⁰⁰

In the looming SD 28 Primary, Intervenor-Applicant Chamness faces imminent, irreparable harm. In a matter of days, be forced to falsely state on the ballot that they have “No Party Preference”. In this light, Appellants and Intervenor-Applicant Chamness have made a compelling showing of imminent, irreparable harm.²⁰¹

B. Issuing a Writ Will Benefit the Public Interest

Furthermore, the balance of equities heavily favors Intervenor-Applicant Chamness, for enjoining SB 6 will benefit

¹⁹⁹ *Storer v. Brown* (1974) 415 U.S. 724, 737 n.8; *see also Gralike, supra* note 2, 531 U.S. at 517 n.8; *accord, Eu, supra* note 9, 28 Cal.3d at 540.

²⁰⁰ *Babbitt, supra* note 62, 442 U.S. at 299.

²⁰¹ Even without the participation of Intervenor-Applicant Chamness, the U.S. Supreme Court’s “capable of repetition, yet evading review” doctrine gives Appellants standing to assert their legal claims with respect to the three looming special elections in Senate District 28, Senate District 17, and Assembly District 4. *E.g., Storer, supra* note 199, 415 U.S. at 737 n.8.

the public interest. To show imminent harm, litigants must show that they are “likely to suffer greater injury from a denial of the injunction than the defendants are likely to suffer from its grant”.²⁰² In stark contrast to Mr. Chamness’ plight, not one SB 6 Defendant will be deprived of the fundamental right to run for office if a preliminary injunction is issued. What is more, millions of politically unaffiliated (“decline to state”) voters will *continue* to be able to vote in the Republican and Democratic primaries.²⁰³

Furthermore, by granting Appellants relief, the Court will not only give election officials much needed certainty, but ensure that counties do not illegally spend taxpayer dollars on costly changes that may not need to be made. According to the California Association of Clerks and Election Officials, SB 6 mandates a “complex set of changes [that] has not occurred in *recent memory*[.]”²⁰⁴ Specifically, SB 6 will not only force counties to spend “*millions of dollars* statewide in ballot production and postage costs”, but could force them to spend

²⁰² *Huong Que*, *supra* note 32, 150 Cal.App.4th 400, 58 Cal.Rptr.3d 527, 533 (citation omitted).

²⁰³ In fact, “decline to state” voters have been allowed to vote in every Democratic and Republican primary for state and federal (excluding Presidential) office since 2001. See Elections Code §13102(b) (giving qualified parties the option of allowing “decline to state” voters to vote in qualified-party primaries).

²⁰⁴ Mar. 3, 2010 letter from California Association of Clerks and Election Officials to the Legislature, attached to Registrar Logan Letter, Exh. 5, at 4 (emphases added).

millions more in new voting equipment.²⁰⁵ Thus, granting Appellants’ Motion for Preliminary Injunction would greatly benefit the public interest.

VII. Appellants Are Entitled to a Preliminary Injunction

Appellants have painstakingly shown that the Superior Court erred when it denied them a preliminary injunction. To secure a preliminary injunction, one must show (1) there is a “reasonable probability” they will prevail on the merits, and (2) he or she faces the “realistic danger” of imminent, irreparable harm. Equally important, under California’s sliding-scale analysis for injunctive relief, “the greater the plaintiff’s showing on one [factor], the less must be shown on the other [factor] to support an injunction.”²⁰⁶

Here, Appellants have shown that it is a certainty they will prevail on the merits. What is more, Appellants have shown that SB 6 threatens Intervenor-Applicant Chamness with imminent, irreparable harm. Consequently, this Court should direct the Superior Court to grant Appellants’ Motion for Preliminary Injunction.

VIII. Conclusion

In short, I see grave risks in legislation, enacted by incumbents of the major political parties, which distinctly disadvantages minor parties or independent candidates.

²⁰⁵ *Id.* (emphases added).

²⁰⁶ *O’Connell, supra* note 195, 141 Cal.App.4th at 1463 (quoting *Butt v. State of California* (1992) 4 Cal.4th 668).

-- Former Chief Justice Burger, *Buckley v. Valeo*²⁰⁷

*To no one will we sell, to no one will we deny or delay,
right or justice.*

-- Magna Carta²⁰⁸

In our democracy, we entrust our elected leaders with the power to pass fair and just laws. To be sure, the lawmaking process is far from tidy (Otto von Bismarck famously compared it to sausage-making). Yet at the same time, we must constantly guard against overreaching by entrenched political elites. As constitutional scholar John Hart Ely put it: “We cannot trust the ins to decide *who stays out*[.]”²⁰⁹

In 2009, Californians were never given the chance to vote on SB 6: whose core parts, according to the Secretary of State, are not “permissible” and will “give voters the *illusion*” that their write-in votes will count. It now falls on this Court to protect not only the fundamental rights of political outsiders, but the very integrity of our State’s election system.

²⁰⁷ *Buckley v. Valeo* (1976) 424 U.S. 1, 251 (concurring in part, dissenting in part) (emphases added).

²⁰⁸ Magna Carta, cl. 40, available at <http://www.fordham.edu/halsall/source/magnacarta.html> (last visited Jan. 10, 2011).

²⁰⁹ John Hart Ely, *Democracy and Distrust* 120 (Harvard 1980) (emphases added).

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately 1.5-spaced, 14-point Times New Roman typeface. According to the Word Count feature in my Microsoft Word for Windows software, this brief contains 12,902 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on Jan. 10, 2011.

GAUTAM DUTTA

By: _____

Gautam Dutta

Attorney for Appellants

PROOF OF SERVICE

I, Gautam Dutta, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action.

On Jan. 10, 2011, I served the following documents:

- (1) Appellants' Opening Brief
- (2) Appellants' Appendix
- (3) Appellants' Request for Judicial Notice

on the following persons at the locations specified:

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H. Marguerite Mary Leoni, Esq., Nielsen Merksamer, 2350 Kerner Blvd., Ste. 250, San Rafael, CA 94901; 415.389.6800 (counsel for Intervenors-Respondents).

I. The Honorable Charlotte Walter Woolard, Superior Court for the County of San Francisco, Dept. 302, 400 McAllister St., San Francisco, CA 94102; 415.551.3723.

J. The Supreme Court of California, 350 McAllister St., San Francisco, CA 94102.

Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelopes and placed them, postage prepaid, for collection and mailing with the U.S. Postal Service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed Jan. 10, 2011, in Fremont, California.

Gautam Dutta