

No. 11-55534

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

—————
MICHAEL CHAMNESS,

Plaintiff / Appellant,

-v.-

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

Defendants / Appellees

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

Intervenors-Defendants / Appellees

—————
*ON APPEAL FROM A CENTRAL DISTRICT OF CALIFORNIA ORDER DENYING
MICHAEL CHAMNESS' MOTION FOR PRELIMINARY INJUNCTION*

—————
**UNOPPOSED MOTION TO DISMISS APPEAL; DECLARATION OF
GAUTAM DUTTA**

—————
GAUTAM DUTTA
*Attorney for Appellant Michael Chamness
Gautam Dutta, Attorney-at-Law
39270 Paseo Padre Pkwy # 206
Fremont, CA 94538
415.236.2048
213.405.2416 fax
Dutta@BusinessandElectionLaw.com*

UNOPPOSED MOTION TO DISMISS APPEAL

Pursuant to FRAP 42(b), Plaintiff-Appellant Michael Chamness requests an order dismissing this appeal on terms agreed by the parties or fixed by the Court. Counsel for both Defendants-Appellees and Intervenors-Appellees have informed us that (1) they do not oppose this Motion and (2) agree to dismissal under which each party bears its own costs.¹

CASE ON APPEAL

Plaintiffs seek to block California's new Top Two Primary law from being implemented for federal and state elections, because its implementing statute (Senate Bill 6) is unconstitutional. Specifically, Plaintiffs have asked (1) that Senate Bill 6 ("SB 6") be struck down as unconstitutional, and (2) that Proposition 14's Top Two Primary law be declared inoperative until a new law has been passed to replace SB 6.

For over a century, minor-party candidates had been allowed to use the ballot label of "Independent". However, SB 6 – which took effect on January 1, 2011 – now bans minor-party candidates from using the ballot label of "Independent". Instead, SB 6 forces them to use the ballot label of "No Party Preference" (hereinafter, the "Party Preference Ban").

¹ Apr. 5, 2011 Declaration of Gautam Dutta ¶¶3, 6, 8.

Furthermore, SB 6 *bans write-in votes from being counted* in all federal and state general elections. Specifically, SB 6 allows voters to vote for a write-in candidate, but then bans all write-in votes from being counted (hereinafter, the “Vote Counting Ban”).

This case concerns two special elections: the May 17, 2011 special primary election in Congressional District 36, and the May 3, 2011 special general election in Assembly District 4. Recently, Jane Harman resigned from her seat in Congressional District 36. Last winter, Ted Gaines resigned from his seat in Assembly District 4. Both resignations triggered special elections that will be administered under SB 6’s new election rules.

Plaintiff-Appellant (and minor-party candidate) Michael Chamness has sued to stop SB 6 from forcing him to use the ballot label of “No Party Preference” in the Congressional election. Plaintiffs Daniel Frederick and Rich Wilson have sued to defend their rights as a write-in candidate and voter, respectively, in the Assembly election.

PROCEDURAL HISTORY

On February 18, 2011, Mr. Chamness filed a Motion for Preliminary Injunction (the “PI Motion”) with the trial court. Specifically, Mr. Chamness sought to block Senate Bill 6 from being implemented for the Congressional election. Under the Secretary of State’s timetable, vote-by-

mail ballots in the Congressional race had been scheduled to be printed on March 30, 2011 and mailed to overseas and military voters on April 2, 2011.

As his PI Motion showed, Mr. Chamness would suffer irreparable harm as soon as the first Congressional ballot was mailed to voters, for those ballots would falsely identify him as having “No Party Preference”. For this reason, Mr. Chamness sought a speedy ruling on his PI Motion. Because the trial court had not ruled on his Motion by the afternoon of March 28, 2011 (i.e., 48 hours before the Congressional ballots were scheduled to be printed), Mr. Chamness sought a writ of mandamus from this Court that evening. The next day, the Court denied writ relief, but requested the trial court “to act promptly” on Mr. Chamness’ Motion. On March 30, the trial court denied his PI Motion; Mr. Chamness filed a Notice of Appeal later that day.

On March 31, 2011, Mr. Chamness filed a Motion for Expedited Hearing and Injunction Pending Appeal (the “Motion to Expedite”) with this Court. Specifically, Mr. Chamness asked the Court to enjoin all vote-by-mail ballots from being mailed to voters (particularly on April 2, the deadline to mail ballots to overseas and military voters), until the Court had ruled on the merits of his appeal. On April 1, 2011, the Court denied Mr. Chamness’ Motion to Expedite. The following day, Congressional ballots –

which state that Mr. Chamness has “No Party Preference” – were mailed to overseas and military voters.

REASONS TO DISMISS APPEAL

Mr. Chamness asks the Court to dismiss this appeal for two reasons. First and foremost, he no longer needs a preliminary injunction, because the purpose for filing his PI Motion (i.e., to avert irreparable harm) has become moot. Namely, the Congressional ballots (which state that Mr. Chamness has “No Party Preference”) were mailed to overseas and military voters on April 2, 2011. Because those ballots have now been mailed, Mr. Chamness has already suffered irreparable harm.

Furthermore, dismissing this appeal will promote judicial economy by preventing piecemeal, duplicative litigation. Later this month, Plaintiffs Chamness, Frederick, and Wilson intend to file a Motion for Summary Judgment with respect to all of their claims (specifically, the Party Preference Ban and the Vote Counting Ban). After the trial court has ruled on their motion, it is likely that this case will return to this Court. By dismissing this appeal, the Court will enable the parties to present the entirety of this litigation in a single round of briefing.

CONCLUSION

By granting this unopposed Motion, the Court will streamline this litigation and enable all issues to be litigated in one round of briefing. Accordingly, Plaintiff-Appellant Chamness respectfully requests the Court to grant this Unopposed Motion to Dismiss Appeal.

April 5, 2011

Respectfully submitted,

/s/ _____

GAUTAM DUTTA

Attorney for Appellant Michael Chamness

Gautam Dutta, Attorney-at-Law

39270 Paseo Padre Pkwy # 206

Fremont, CA 94538

415.236.2048

213.405.2416 fax

Dutta@BusinessandElectionLaw.com

DECLARATION OF GAUTAM DUTTA

I, Gautam Dutta, declare as follows:

1. I am an attorney licensed to practice in the State of California. I have been a member of the State Bar of California since 1998 (State Bar No. 199326), and am also admitted to practice before this Court. I represent all Plaintiffs, including Plaintiff-Appellant Michael Chamness.

2. Yesterday morning, I had a telephone conversation with Brandi M. Moore, counsel for Appellee-Defendant Dean Logan.

3. During our conversation, Ms. Moore indicated that her client would not oppose a motion to dismiss this appeal.

4. Yesterday afternoon, at approximately 1:23 pm, I had a telephone conversation with George Waters, counsel for Appellee-Defendant Debra Bowen.

5. During our conversation, Mr. Waters indicated that he would ask his client her position with regard to a motion to dismiss this appeal.

6. Subsequently, at approximately 2:39 pm, I received an email from Mr. Waters. In that email, Mr. Waters stated that his client would not oppose a motion to dismiss this appeal.

7. Later than afternoon, at approximately 4:04 pm, I had a telephone conversation with Chris Skinnell, counsel for all Intervenors-Appellees.

8. During our conversation, Mr. Skinnell indicated that his clients would not oppose a motion to dismiss this appeal.

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

Executed on April 5, 2011, in Fremont, California.

DATED: Apr. 5, 2011

By: /s/ _____
GAUTAM DUTTA, ESQ.

CERTIFICATE OF SERVICE

On April 5, 2011, I electronically served an electronic copy of (1) Unopposed Motion to Dismiss Appeal, and (2) Declaration of Gautam Dutta via ECF, with which all counsel of record are registered.

/s/ _____

GAUTAM DUTTA