

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

7 Attorney for Plaintiff

8 MICHAEL CHAMNESS

9 IN THE UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11 MICHAEL CHAMNESS,

12 *Plaintiff,*

13 vs.

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

21 *Defendants.*

CASE NO. 2:11-CV-01479 ODW
(FFMx)

**NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
INJUNCTION; MEMORANDUM OF
POINTS AND AUTHORITIES**

HEARING DATE: Mar. 21, 2011
HEARING TIME: 1:30 pm
JUDGE: Hon. Otis D. Wright II
COURTROOM: 11 (312 Spring St.)

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1 MEMORANDUM OF POINTS AND AUTHORITIES

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

3 -- Chief Justice Roberts, former Chief Justice Rehnquist, and Justice
4 Alito¹

5 *All animals are equal. But some animals are more equal than others.*

6 -- George Orwell, Animal Farm

7
8 **I. Introduction**

9 Not all candidates should be treated equal – at least according to Senate Bill
10 6, an unjust law that Secretary of State Debra Bowen has defended in court. This
11 week, Secretary of State Bowen, our State’s chief elections officer, announced her
12 candidacy for a looming Congressional election. Yet in that same election, the
13 Secretary of State will directly benefit from the law she is defending – because
14 Senate Bill 6 gives major-party candidates like her an *illegal advantage* over
15 minor-party candidates.

16 In a nutshell, Senate Bill 6 (“SB 6”) allows major-party candidates like the
17 Secretary of State to list their party’s name on the ballot, but *forces minor-party*
18 *candidates* like Plaintiff Michael Chamness *to lie to voters*: he must falsely state
19 on the ballot that he has “No Party Preference”. Unless it is swiftly enjoined, SB 6
20 will ban minor-party candidates from sharing their political views with voters in
21 every federal and state election.

22 Such an unfair, undemocratic law cannot stand for at least two reasons.
23 First, the Secretary of State *herself has conceded that SB 6’s “Party Preference*
24 *Ban” is not “permissible”*. By banning minor-party candidates from using the
25 party label of “Independent”, SB 6 violates candidates’ fundamental rights under
26

27 ¹ *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 460 (2008) (Roberts
28 & Alito, JJ., concurring) (*quoting Cook v. Gralike*, 531 U.S. 510, 532 (2001) (Rehnquist, C.J., concurring)).

1 the First and Fourteenth Amendments. Equally egregious, Senate Bill 6 violates
2 the U.S. Constitution’s Elections Clause, for it targets and discriminates against
3 candidates who prefer the viewpoints of minor parties.

4 Time is of the utmost essence. The 36th Congressional District seat
5 currently held by Rep. Jane Harman will fall vacant in a matter of days – triggering
6 a special election in which vote-by-mail ballots could be cast as early as *April 1*,
7 2011. Coffee Party candidate Michael Chamness – who has already been harmed
8 by SB 6 in a recent election – intends to join Secretary of State Bowen as a
9 candidate for that Congressional seat. Unless this Court intercedes, he will once
10 again suffer irreparable harm at the hands of a pernicious law.

11 **II. Background**

12 **A. Party Labels under the Previous “Qualified Party” Election System**

13 Had the election to replace Rep. Harman been held before January 1, 2011,
14 Mr. Chamness *could have stated on the ballot that he is “Independent”*.

15 Currently, 24 states allow minor-party candidates to state their party’s name on the
16 ballot.² Under the previous “qualified party” election system, political parties were
17 classified into two categories: qualified (“major” or state-recognized) parties and
18 non-qualified (“minor” or non-state-recognized) parties. Only qualified parties
19 were entitled to hold party primaries.³

20 Every even-numbered year, voters had at least two chances to vote for state
21 and federal candidates: (1) the qualified-party primary election, where candidates
22 from each qualified party would vie for their party’s nomination;⁴ and (2) the

23 ² Complaint ¶23. Between 1891 and 1915, California law permitted minor-party
24 candidates to state their party’s name on the ballot. In 1912, a minor-party candidate (William
Kent of the Progressive Party) was elected by California’s 1st Congressional District. *Id.*

25 ³ *Libertarian Party v. Eu*, 620 P.2d 612, 28 Cal.3d 535, 540 (Cal. 1980) (“[T]he
26 Legislature ... defined ‘party’ as a political organization that has ‘*qualified for participation in
any primary election.*’”) (emphases added).

27 ⁴ Since 2001, unaffiliated voters (i.e., those who “decline to state” a party preference) have
28 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).

1 November general election, where the nominees (top votegetters) from each
2 qualified party would all face off against (a) minor-party candidates like Plaintiff
3 Chamness, and (b) write-in candidates.

4 In special elections, voters had up to two chances to vote: (1) the “all party”
5 primary election, where all candidates squared off regardless of party. If a
6 candidate won a majority (50 percent plus 1), he or she would win outright.
7 Otherwise, the top votegetter from each qualified party would advance to the
8 general election, where they would all square off against minor-party candidates
9 and write-in candidates.

10 Under the “qualified party” election system, qualified-party candidates could
11 state their party’s name on the ballot. In addition, all minor-party candidates –
12 who are deemed by the California Supreme Court to have “independent” (i.e.,
13 minor-party) status⁵ – could state on the ballot that they were “Independent”.⁶
14 Thus, if Mr. Chamness had run in a special election under the “qualified party”
15 election system, he could have stated on the ballot that he is “Independent”.

16 B. Budgetary Cause, Electoral Effect

17 Two years ago, then-State Senator Abel Maldonado cast the deciding vote to
18 pass the state budget.⁷ In exchange for his vote, Maldonado demanded a ballot
19 measure that would eliminate the qualified-party election system.⁸ The
20 Legislature obliged by (1) putting Proposition 14 on the June 8, 2010 ballot, and
21 (2) passing SB 6, which implemented the provisions of Proposition 14.⁹ Both SB 6
22 and Proposition 14 were authored by Maldonado.¹⁰

23 ⁵ *Eu. supra* note 3, 620 P.2d 612, 28 Cal.3d at 540 (defining “independent” candidates as
24 those who “are independent of qualified political parties”) (emphasis added).

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

26 ⁷ Complaint ¶25.

27 ⁸ *Id.* ¶26.

28 ⁹ *Id.* ¶¶26-28.

¹⁰ *Id.* ¶¶27, 29.

1 Between 3:40 am and 6:55 am on February 19, 2009, the Legislature passed
2 SB 6, without holding a single hearing or giving the public any notice.¹¹
3 Simultaneously, the Legislature voted to put Proposition 14 on the June 8, 2010
4 ballot.¹² Subsequently, the Secretary of State’s June 8, 2010 Voter Information
5 Guide for Proposition 14 did not provide either a summary or the text of SB 6,
6 which fleshes out critical details of Proposition 14.¹³ On June 8, 2010, a narrow
7 majority of voters approved Proposition 14.¹⁴

8 C. SB 6 and Proposition 14’s “Top Two” Primary

9 On January 1, 2011, SB 6 and Proposition 14 abolished the “qualified party”
10 election system, and spawned an untested process for electing our federal and state
11 officials. Under SB 6’s new rules, all candidates, irrespective of their party
12 identification, square off against one another in a primary (first-round) election.
13 Except for special elections,¹⁵ the top two votegetters from the primary election
14 will automatically advance to the general (runoff) election – even if one candidate
15 has received a majority of the vote.

16 According to the California Association of Clerks and Election Officials, SB
17 6 mandates a “complex set of changes [that] has not occurred in *recent*
18 *memory*[.]”¹⁶ Specifically, SB 6 will not only force counties to spend “*millions of*
19 *dollars* statewide in ballot production and postage costs”, but could force them to
20 spend millions more in new voting equipment.¹⁷

21 ¹¹ *Id.* ¶27.

22 ¹² Complaint ¶31.

23 ¹³ *Id.* ¶33.

24 ¹⁴ *Id.* ¶34.

25 ¹⁵ In special elections, if a candidate receives a majority in the “all-party” primary election,
he or she will win the election outright, and no general election will be held. Elections Code
§10705(a).

26 ¹⁶ Mar. 3, 2010 letter from California Association of Clerks and Election Officials to the
Legislature, attached to Registrar Dean Logan’s Mar. 20, 2010 Memorandum to the Los Angeles
27 Board of Supervisors, Complaint Exh. 9, at 91 (emphases added).

28 ¹⁷ *Id.* at 91 (emphases added).

1 D. Party Labels under SB 6’s New Rules

2 Proposition 14 purports to give all candidates the right to state their
3 “political party preference, or lack of political party preference” on the ballot, “in
4 the manner provided by statute.”¹⁸ However, that “statute” – SB 6 – fails to give
5 minor-party candidates the right to state their “political party preference”.

6 To be sure, SB 6 allows candidates who claim to identify with a qualified
7 party (e.g., Democratic or Republican) to state their party’s name on the ballot.
8 However, if a candidate identifies with a minor party, he or she will be foisted with
9 the party label of “No Party Preference”. Because Plaintiff Chamness identifies
10 with a minor party (the Coffee Party), SB 6 forces him to falsely state on the ballot
11 that he has “No Party Preference”.

12 E. Plaintiff Chamness’ Facial Claim (Special Election in Congressional
13 District 36

14 Plaintiff Chamness faces imminent, irreparable harm in the looming special
15 primary election for Congressional District 36 (the “CD 36 Primary”), because he
16 will be forced to falsely state on the ballot that he has “No Party Preference”. As
17 of today, no date had been set for the CD 36 Primary, because Rep. Harman had
18 not yet resigned. If she resigns on February 28, 2011, the earliest date for which
19 the CD 36 Primary could be scheduled is April 26, 2011.¹⁹ Under that timetable,
20 voters can begin casting vote-by-mail ballots beginning *April 1, 2011* (i.e., 25 days
21

22 ¹⁸ CAL.CONST. art. ii §5(b) (emphasis added).

23 ¹⁹ This analysis assumes that the Governor will call the election by Mar. 1, 2011. The
24 Governor must call a special election within 14 days after a seat has fallen vacant. Elections
25 Code §10700. Unless it can be consolidated with an already scheduled election, a special
26 primary election must be held on a Tuesday within 56 to 70 days after the date on which the
27 Governor calls the election. Elections Code §§10703(a) & 10704(a) (special general election
28 must be held on a Tuesday within 112 to 126 after the date on which the Governor has called the
election, and the special primary election must be held on the eighth Tuesday before the date of
the special general election). Governor Brown has expressed strong interest in consolidating the
CD 36 Primary with a proposed statewide budget election in early June 2011. However, as of
Feb. 17, 2011, the Legislature had not taken action to put a June budget election on the ballot.

1 before April 26, 2011).²⁰ Moreover, if no candidate receives a majority in the CD
2 36 Primary, the general election must be held 56 days later (i.e., June 21, 2011).²¹

3 F. Mr. Chamness' As-Applied Claim (Senate District 28 Special
4 Election)

5 To date, California appellate courts have declined to hear Plaintiff
6 Chamness' facial and as-applied claims. As a result, Plaintiff Chamness suffered
7 irreparable harm in the recent special primary election for Senate District 28 (the
8 Feb. 15, 2011 "SD 28 Primary").²² Last November, SB 6 was poised to be
9 implemented in three special elections: in Senate District 28, Senate District 17,
10 and Assembly District 4.²³ Plaintiff Chamness sought to run for the vacancy in
11 Senate District 28, as a candidate affiliated with the Coffee Party.

12 To prevent SB 6 from branding him with the ballot label of "No Party
13 Preference", Plaintiff Chamness sought to intervene in a mandamus proceeding
14 before the California Supreme Court.²⁴ In that proceeding – in which the Secretary
15 of State and Registrar Logan were Real Parties in Interest – six plaintiffs ("State
16 Court Plaintiffs") sought to enjoin SB 6 from being implemented. While Registrar
17 Logan (who administered the SD 28 Primary) took no position regarding Plaintiff
18 Chamness' request to intervene, the Secretary of State *vigorously opposed it*.²⁵ On
19 December 15, 2010, the California Supreme Court denied both Mr. Chamness'
20 request to intervene and the underlying mandamus petition.²⁶

21 Plaintiff Chamness then qualified for and appeared on the SD 28 Primary
22

23 ²⁰ Elections Code §10704(c).

24 ²¹ *See supra* note 19.

25 ²² Feb. 17, 2011 Declaration of Michael Chamness ("Chamness Declaration") ¶12.

26 ²³ Complaint ¶50.

27 ²⁴ Chamness Declaration ¶9.

28 ²⁵ *Id.* ¶9.

²⁶ *Id.* ¶10.

1 ballot.²⁷ On January 5, 2011, the Secretary of State published an online List of
2 Certified Candidates for the SD 28 Primary; that list falsely stated that Plaintiff
3 Chamness had “No Party Preference”.²⁸ Subsequently, Registrar Logan published
4 vote-by-mail and election-day ballots that falsely stated that Plaintiff Chamness
5 had “No Party Preference”.²⁹ By forcing Plaintiff Chamness to falsely state that he
6 had “No Party Preference”, Defendants *inflicted irreparable harm on his*
7 *fundamental rights* between January 21, 2011 (the first day voters could cast vote-
8 by-mail ballots) and February 15, 2011 (the day of the SD 28 Primary).³⁰

9 Seeking to vindicate his fundamental rights as a candidate, Plaintiff
10 Chamness first sought to bring his as-applied challenge to the California Court of
11 Appeal (First District).³¹ Toward this end, he asked the Court of Appeal for
12 permission to intervene in a pending proceeding that had been brought by State
13 Court Plaintiffs against the Secretary of State and Registrar Logan.³² Again,
14 Registrar Logan (who administered the SD 28 Primary and will administer the CD
15 36 Primary) took no position with respect to Plaintiff Chamness’ request to
16 intervene, while the Secretary of State opposed his request.³³ On January 31, 2011,
17 the Court of Appeal denied Plaintiff Chamness’ request to intervene.³⁴

18 **III. Legal Analysis**

19 **A. Plaintiff Chamness Qualifies for a Preliminary Injunction**

20 Plaintiff Chamness must be granted a preliminary injunction, because his
21 facial and as-applied claims against SB 6 abundantly satisfy four essential

22 ²⁷ *Id.* ¶11.

23 ²⁸ Complaint ¶54.

24 ²⁹ *Id.* ¶54. A copy of the SD 28 Primary’s sample ballot has been attached as Exhibit 1 (p.
18) to the Complaint.

25 ³⁰ Chamness Declaration ¶12.

26 ³¹ *Id.* ¶13.

27 ³² *Id.* ¶13.

28 ³³ *Id.* ¶13.

³⁴ *Id.* ¶14.

1 requirements: (1) he is “likely” to succeed on the merits, (2) he is “likely” to suffer
2 irreparable harm without a preliminary injunction, (3) the balance of equities “tips
3 in his favor”, and (4) an injunction “is in the public interest”.³⁵ This Circuit
4 employs a sliding-scale analysis when examining a plaintiff’s likelihood of success
5 on the merits. Namely, a preliminary injunction is “appropriate” if (1) the balance
6 of hardships tips “sharply” in the plaintiff’s favor, and (2) the plaintiff raises
7 “serious questions going to the merits”.³⁶

8 B. Plaintiff Chamness is Likely to Succeed on the Merits

9 It is certain that Plaintiff Chamness’ as-applied and facial claims against SB
10 6 will succeed on the merits – because *Secretary of State Bowen has already*
11 *conceded that a core part SB 6 is not “permissible”*. As a starting point, Plaintiff
12 Chamness, the Secretary of State, and Registrar Logan all agree on one threshold
13 issue: SB 6 forces minor-party candidates to state on the ballot that they have “No
14 Party Preference”. Specifically, Part 325 of SB 6 requires that all candidates and
15 voters “of independent [i.e., minor-party]³⁷ status” must be listed with the ballot
16 label of “No Party Preference”.³⁸ The parties’ consensus on this issue thus gives
17 rise to this case’s overarching question: Is SB 6’s Party Preference Ban
18 constitutional?

19 C. SOS Bowen Admits that SB 6 Violates Amendments I & XIV

20
21 ³⁵ *Winter v. NRDC*, 129 S.Ct. 365, 374 (2008) (quoted by *Alliance for the Wild Rockies v. Cottrell*, No. 09-35756 (9th Cir. Jan. 25, 2011), at 8).

22 ³⁶ *Cottrell*, *supra* note 35, No. 09-35756, at 15 (emphases added).

23 ³⁷ In *Libertarian Party v. Eu*, the California Supreme Court defined an “independent”
24 candidate as a non-qualified (minor-party) candidate. *Eu*, *supra* note 3, 620 P.2d 612, 28 Cal.3d at 540.

25 ³⁸ Only registered voters can run for state and federal office. [SB 6-amended] Elections
26 Code §325 mandates that all voters “of independent status” be listed as having “No Party
27 Preference”. Further, if a candidate’s voter registration card states that he or she has “No Party
28 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).

1 Remarkably, the Secretary of State has already made a binding admission:
2 SB 6's Party Preference Ban violates the First and Fourteenth Amendments,
3 because it deprives minor-party candidates of their fundamental right to identify
4 themselves on the ballot as "Independent".³⁹

5 1. Minor-Party Candidates Have a Fundamental Right to a Ballot
6 Label of "Independent"

7 In *Rosen v. Brown*, a state law banned all minor-party candidates from
8 stating any party preference on the ballot.⁴⁰ Striking down that law, the Sixth
9 Circuit held that the First and Fourteenth Amendments give minor-party candidates
10 the right to use the ballot label of "Independent".⁴¹ Specifically, *Rosen* held that a
11 State's regulatory interest "may not extend to the effective exclusion of
12 Independent and new party candidacies."⁴² Subsequently, that constitutional right
13 was re-affirmed by the Sixth and Ninth Circuits in *Schrader* and *Rubin*,
14 respectively.⁴³

15 Instead of assigning them the party label of "Independent", SB 6 foists
16 minor-party candidates with the party label of "No Party Preference" – a far cry
17 from the party label of "Independent". Significantly, both the Massachusetts and
18 Minnesota Supreme Courts have also struck down analogous party-preference
19 bans.⁴⁴ In *Bachrach*, a state law banned minor-party candidates from stating that
20 they were "Independent". Instead, those candidates were forced to state that they

21 ³⁹ See, e.g., *Rosen v. Brown*, 970 F.2d 169, 175 (6th Cir. 1992); *Schrader v. Blackwell*, 241
22 F.3d 783, 788-89 (6th Cir. 2001) (*re-aff'g Rosen*), *cert. denied*, 534 U.S. 888 (2001); *Rubin v.*
23 *City of Santa Monica*, 308 F.3d 1008 (9th Cir. 2002) (*citing Schrader*); see also *Bachrach v.*
Commonwealth, 415 N.E.2d 832, 833 (Mass. 1981); *Shaw v. Johnson*, 247 N.W.2d 921, 923
(Minn. 1976).

24 ⁴⁰ *Rosen*, *supra* note 39, 970 F.2d 169.

25 ⁴¹ *Id.*

26 ⁴² *Id.* at 177. At the time *Rosen* was decided, only the Democratic and Republican Parties
had qualified (state-recognized) status in Ohio. *Id.*

27 ⁴³ *Id.* at 175; *Schrader*, *supra* note 39, 241 F.3d at 788-89; *Rubin*, *supra* note 39, 308 F.3d
at 1008.

28 ⁴⁴ *Bachrach*, *supra* note 39, 415 N.E.2d at 833; *Shaw*, *supra* note 39, 247 N.W.2d at 923.

1 were “Unenrolled” – a term identical in meaning to “No Party Preference. Striking
2 down that law, the Massachusetts High Court ruled that it was unconstitutional to
3 ban minor-party candidates from using the party label of “Independent”:

4
5 Voters who during the campaign might have been favorably
6 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[.]⁴⁵

7
8 2. SOS Bowen Has Made a Binding Admission that SB 6’s Party
9 Preference Ban Is Not “Permissible”

10 One week after State Court Plaintiffs filed their lawsuit, the Secretary of
11 State’s office publicly stated that Part 325 of SB 6 is not “permissible”, because it
12 *bans minor-party candidates from stating on the ballot that they are*
13 *“Independent”*. According to a public statement made by Secretary of State
14 Bowen’s own staff, SB 6’s Party Preference Ban

15 implies that a candidate ... actually has selected a party preference but
16 is not disclosing it. That is *permissible* for candidates in certain
17 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.”*⁴⁶

18 Thus, the Secretary of State has publicly conceded that SB 6’s Party Preference Ban
19 is not “permissible”, because it deprives minor-party candidates of the ballot label
20 of “Independent”. In so doing, the Secretary of State has made a binding party
21 admission⁴⁷ that SB 6’s Party Preference Ban violates the First and Fourteenth
22

23 ⁴⁵ *Bachrach, supra* note 39, 415 N.E.2d 832, 836 (emphases added); *see also Shaw, supra*
note 39, 247 N.W.2d at 923.

24 ⁴⁶ Aug. 3, 2011 email from the Secretary of State’s Legislative Analyst to the Office of the
25 Lieutenant Governor, Complaint Exh. 2, at 22.

26 ⁴⁷ Party admissions are admissible under the exception to the hearsay rule. Federal Rules of
Evidence §801(d)(2). The statement made by Secretary of State Bowen’s staff is admissible and
27 not subject to the hearsay rule, because (a) the staff member was authorized by Secretary of State
Bowen to make the statement on her behalf, and (b) the staff member made the statement within
28 the scope of her official duties. *Id.* §801(d)(2)(C) (authorized-party exception to hearsay rule); *id.*
§803(8) (public-records exception to hearsay rule).

1 Amendments. Therefore, the Court must hold that SB 6’s Party Preference Ban
2 violates the First and Fourteenth Amendments *as a matter of law*.

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

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

8 -- The Eighth Circuit, *McLain v. Meier*⁴⁸

9
10 The Secretary of State may try to drape SB 6 as a voter-approved measure, in
11 hopes of coaxing the Court to give SB 6 a heavy dose of deference. Yet even she
12 cannot deny one plain fact: SB 6 was not passed by the voters. In fact, the
13 Legislature could have put both SB 6 and Proposition 14 on the ballot, but it
14 *deliberately chose not to do so*. Why did the Legislature dodge the voters when it
15 came to SB 6, a statute that *fleshes out* critical details of Proposition 14?

16 In any event, Plaintiff Chamness is not challenging the constitutionality of
17 Proposition 14. Rather, he is challenging the constitutionality of SB 6, an unjust
18 law passed by the Legislature. Here, the Secretary of State cannot deny that SB 6
19 was rammed through the Capitol, without a single hearing and without any public
20 notice. In this manner, SB 6 evaded “the normal scrutiny that comes from
21 extensive committee reviews and repeated readings in both houses of the
22 Legislature in the course of normal bill passage.”⁴⁹

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

26 ⁴⁸ *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980) (emphases added).

27 ⁴⁹ Karen De Sa, “Retailers Push Sponsored Bill To Avoid Environmental Law”, *Mercury*
28 *News*, Aug, 31, 2010 (emphasis added).

1 *consideration, for discriminatory purposes, or to entrench political majorities[.]”*⁵⁰

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

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

7 (2) For “discriminatory purposes”. As our analysis of the Elections
8 Clause will show, SB 6 was designed to inflict political harm on
9 minor-party candidates; and

10 (3) To “entrench political majorities”. As our analysis of the Elections
11 Clause Brief will also show, SB 6 brazenly favors candidates from
12 major parties over those from minor parties.

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

15 E. Plaintiff Chamness’ As-Applied Claim Shows Compelling Merit

16 Plaintiff Chamness brings a simple as-applied⁵¹ claim: namely, SB 6
17 unlawfully deprived him of the ballot label of “Independent”. As Section III.C(2)
18 of this brief showed, the Secretary of State has conceded that every minor-
19 candidate has a fundamental right to the ballot label of “Independent”. Here, it is
20 undisputed that Plaintiff Chamness was deprived of his right to a ballot label of
21 “Independent” in the recent SD 28 Primary. Therefore, SB 6 violated his
22 fundamental rights under the First and Fourteenth Amendments, when his name
23 appeared on the ballot for the SD 28 Primary.⁵²

24 ⁵⁰ *Doe v. Reed*, *supra* note 3, 561 U.S. --, No. 09-559, concurring op., Stevens & Breyer,
25 JJ., at 3 n.3 (citations omitted, emphases added).

26 ⁵¹ “An as-applied First Amendment challenge contends that a given statute or regulation is
27 unconstitutional as it has been applied to a litigant’s particular speech activity.” *Legal Aid*
Services of Oregon v. Legal Services Corp., 587 F.3d 1006, 1018 (9th Cir. 2009) (emphasis
28 added) (citing *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 802-03 (1984)).

⁵² See legal authorities cited in *supra* note 39.

1 F. It Is Beyond Question That SB 6 Violates the Elections Clause

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

5 -- Supreme Court scholar Vicki Jackson⁵³

6
7 Beyond violating the First and Fourteenth Amendments, SB 6 also violates
8 the Elections Clause, because its Party Preference Ban singles out and discriminates
9 against Plaintiff Chamness and other minor-party candidates for federal office. As
10 the U.S. Supreme Court unanimously ruled in *Cook v. Gralike*, a state law violates
11 the Elections Clause if it aims to (1) “favor or disfavor” one class of candidates
12 over another, (2) “dictate electoral outcomes”, or (3) “evade important
13 constitutional restraints”.⁵⁴

14 In *Gralike*, the High Court struck down a state statute that targeted federal
15 candidates who did not support term limits. For example, if an incumbent did not
16 support term limits, that law required the following label to be printed beside his or
17 her name on the ballot: “DISREGARDED VOTERS’ INSTRUCTIONS ON
18 TERM LIMITS.”⁵⁵

19 In response, the High Court held that the state statute violated the Elections
20 Clause for at least two reasons. First, the statute was “plainly designed to favor

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22 ⁵³ Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001
23 Sup.Ct.Rev. 299, 336 n.112 (emphases added), *citing, inter alia*, *McLain v. Meier*, *supra* note 48,
24 637 F.2d at 1166-67; *Graves v. McElderry*, 946 F.Supp. 1569, 1573, 1579-82 (W.D. Okla. 1996)
(striking down state law that gave top ballot position to Democratic candidates); *Sangmeister v.*
Woodard, 562 F.2d 460, 465-67 (7th Cir. 1977) (striking down election officials’ practice of
giving their own political party the top position on the ballot).

25 ⁵⁴ *Gralike*, *supra* note 1, 531 U.S. at 523 (*quoting U.S. Term Limits v. Thornton*, 514 U.S.
26 779, 833-34 (1995); *see also* U.S. CONST. art. i §4 cl. 1 (Elections Clause). The High Court
27 encourages plaintiffs to bring facial claims under the Elections Clause. *Gralike*, *supra* note 1,
531 U.S. at 517 n.8 (permitting a candidate to intervene while an appeal was pending in order to
preserve the original plaintiff’s facial constitutional claim).

28 ⁵⁵ *Gralike*, *supra* note 1, 531 U.S at 510.

1 candidates who [were] willing to support” term limits and “to disfavor those who
2 either oppose term limits entirely or would prefer a different proposal”:⁵⁶

3 [I]t seems clear that the adverse labels *handicap candidates* “at the
4 most crucial state in the election process – the instant before the vote is
5 cast.” At the same time, “by directing the citizen’s attention to the
6 single consideration of the candidates’ fidelity to term limits, the labels
7 imply that the issue “is an important – perhaps paramount
8 consideration in the citizen’s choice, which *may decisively influence* ⁵⁷
9 *the citizen* to cast his ballot” against candidates branded as unfaithful.

10 The High Court then concluded that the statute unlawfully aimed to “dictate
11 electoral outcomes,” because “the labels surely place their targets at a *political*
12 *disadvantage*[.]”⁵⁸

13 SB 6’s Party Preference Ban must be struck down for the same reasons stated
14 in *Gralike*. As the Secretary of State admits, SB 6 grants a party label to candidates
15 (like herself) who identify with the viewpoints of a major party, while forcing
16 candidates (like Plaintiff Chamness) who identify with the viewpoints of a minor
17 party to falsely state that they have “No Party Preference”.

18 Thus, SB 6 was “plainly designed to favor” candidates who identify with the
19 viewpoints of major party, and was designed to “disfavor” and “handicap”
20 candidates who identify with the viewpoints of a minor party.⁵⁹ Furthermore,
21 because it places disfavored candidates at a political disadvantage, SB 6 also aims
22 to “dictate electoral outcomes”. Therefore, it is beyond question that SB 6 violates
23 the Elections Clause.⁶⁰

24 G. SB 6’s Party Preference Ban Is Not Severable

25 Significantly, SB 6’s Party Preference Ban is not severable; that is, it is not
26

27 ⁵⁶ *Id.* at 510 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

28 ⁵⁷ *Gralike*, *supra* note 1, 531 U.S. at 524 (quoting *Anderson v. Martin*, 375 U.S. 399, 402) (1964) (emphases added).

⁵⁸ *Gralike*, *supra* note 1, 531 U.S. at 525 (emphases added).

⁵⁹ *Id.* at 523-25.

⁶⁰ *Id.* at 525.

1 possible to save SB 6 by “cutting out” its unlawful Party Preference Ban. To be
2 severable, the unlawful part of a statute must be functionally, grammatically, and
3 volitionally separable.⁶¹

4 To be sure, the Secretary of State may argue that the Party Preference Ban is
5 severable, because SB 6 has a severability clause. However, the California
6 Supreme Court has repeatedly held that severability clauses are not conclusive –
7 particularly when the unlawful part of a statute is not “volitionally” separable.
8 Suppose the Legislature had been able to foresee that part of a statute that it was
9 about to pass would later be declared unconstitutional. If it is “clear” that the
10 Legislature would have still passed that statute without its unlawful part, then that
11 part would be “volitionally” separable, and the statute’s remaining parts could be
12 saved.⁶²

13 Here, it is undisputed that when the Legislature passed SB 6’s Party
14 Preference Ban, it did so because *it intended to implement Proposition 14*.⁶³
15 Specifically, Subsection V(b) of Proposition 14 called for a “statute” to implement
16 the “manner” in which candidates could state their party preference on the ballot.⁶⁴
17 In response, the Legislature enacted SB 6’s Party Preference Ban, which regulated
18 the “manner” in which candidates may (or may not) state their party preference on
19 the ballot.

20 Thus, it is crystal “clear” the Legislature would not have passed SB 6 without

21 ⁶¹ *Gerken v. FPPC*, 863 P.2d 694, 698 (Cal. 1993).

22 ⁶² *Sonoma County v. Superior Ct.*, 173 Cal.App.4th 322, 352 (Cal.Ct.App. 2009); *accord*,
23 *Gerken*, *supra* note 61, 863 P.2d at 698 (“The final determination [on whether a severability
24 clause is conclusive] *depends on whether the remainder* [of the statute] ... *would have been*
25 *adopted* by the legislative body had the latter foreseen the partial *invalidity* of the statute.”)
(*quoting Calfarm*, 771 P.2d 1247, 48 Cal.3d 805, 821 (Cal. 1989)).

26 ⁶³ In its Statement of Purpose, Proposition 14 explicitly states that it needs implementing
27 legislation. Complaint ¶30. When the Legislature enacts implementing legislation, it must be
28 assumed that it actually intended to implement the constitutional provision in question. *See, e.g.*,
People v. Broussard, 856 P.2d 1134, 1137 (Cal. 1993).

⁶⁴ Complaint ¶37.

1 the Party Preference Ban – because without the Party Preference Ban, the
2 lawmakers *could not have implemented Subsection V(b) of Proposition 14*.⁶⁵
3 Therefore, SB 6’s Party Preference Ban is not “volitionally” separable, and SB 6 as
4 a whole *cannot be saved as a matter of law*.⁶⁶ Therefore, because the entirety of SB
5 6 is unenforceable, the Court must block it from being implemented and enforced.

6 H. Since SB 6 Is Unenforceable, Proposition 14 Must Be Declared
7 Inoperative

8 Finally, because SB 6 is not enforceable, Proposition 14 *must be declared*
9 *inoperative* as a matter of law. It is undisputed that (1) SB 6 was passed in order to
10 implement Proposition 14, and (2) Proposition 14 needs a lawful statute to
11 implement it, because it is not a self-executing provision.⁶⁷ Thus, because SB 6 is
12 unenforceable in its entirety, Proposition 14 lacks a lawful statute to implement it.
13 Consequently, Proposition 14 must be declared inoperative until the Legislature has
14 passed a new law to implement it.⁶⁸

15 I. It Is Certain That Plaintiff Chamness Will Succeed on the Merits

16 It is more than “likely” that Plaintiff Chamness will succeed on the merits.⁶⁹
17 First, as this brief has shown, SB 6’s Party Preference Ban must be struck down, for
18 it violates the First Amendment, Fourteenth Amendment, and the Elections Clause.
19 (Tellingly, even the Secretary of State has conceded that SB 6 violates the First and
20 Fourteenth Amendments.) Second, because SB 6’s Party Preference Ban is not

21 ⁶⁵ *Sonoma County*, *supra* note 62, 173 Cal.App.4th at 352.

22 ⁶⁶ *Id.* at 352; *Gerken*, *supra* note 61, 863 P.2d 694, 6 Cal.4th at 714.

23 ⁶⁷ *E.g., People v. Vega-Hernandez*, 179 Cal.App.3d 1084, 1092 (Cal.Ct.App. 1986);
24 *Borchers Bros. v. Buckeye Incubator Co.*, 379 P.2d 1, 59 Cal.2d 234, 238 (Cal. 1963). In its
25 Statement of Purpose, Proposition 14 explicitly states that it needs implementing legislation:
26 “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).
Complaint ¶28.

27 ⁶⁸ See, e.g., *In re Redevelopment Plan for Bunker Hill*, 389 P.2d 538, 61 Cal.2d 21, 75 (Cal.
1964); *Denninger v. Recorder’s Court*, 79 P. 360, 145 Cal. 629, 635 (Cal. 1904).

28 ⁶⁹ *Winter*, *supra* note 35, 129 S.Ct. at 374 (quoted by *Cottrell*, *supra* note 35, at 8).

1 severable, the entirety of SB 6 must be declared unenforceable. Finally,
2 Proposition 14 must be declared inoperative, because SB 6 is both unconstitutional
3 and unenforceable. Accordingly, it is certain that Plaintiff Chamness will succeed
4 on the merits.

5 **IV. Plaintiff Chamness Faces Imminent, Irreparable Harm**

6 Furthermore, it is certain that Plaintiff Chamness will suffer imminent,
7 irreparable harm unless he is granted a preliminary injunction. As the U.S.
8 Supreme Court has made clear, a political candidate like Mr. Chamness need not
9 wait until his rights have been grievously harmed. Instead, he is entitled to
10 immediate relief if it is “likely” that a law will harm his fundamental rights.⁷⁰

11 Here, Plaintiff Chamness intends to run as a candidate from the Coffee Party
12 in the looming CD 36 Primary. Had he run before SB 6 had taken effect, he would
13 have been permitted to use the ballot label of “Independent”. But in a matter of
14 weeks, SB 6 will force him to falsely state that he has “No Party Preference” – and
15 *lie to voters about his political beliefs*. Against this threatening backdrop, it is a
16 certainty that Plaintiff Chamness will suffer irreparable harm if SB 6 is allowed to
17 be implemented for the CD 36 Primary.

18 Moreover, injunctive relief is particularly appropriate under the U.S.
19 Supreme Court’s “capable of repetition, yet evading review” doctrine. Namely,
20 because no one can predict when the next special election will strike, the U.S.
21 Supreme Court urges courts to swiftly resolve constitutional challenges before
22 voting begins in an election:

23 The “*capable of repetition, yet evading review*” doctrine, in the context
24 of *election cases*, is appropriate when there are “as applied” challenges
25 as well as in the more *typical case* involving only *facial attacks*. The
26 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.*⁷¹

27 ⁷⁰ Winter, *supra* note 35, 129 S.Ct. at 374 (quoted by Cottrell, *supra* note 35, at 8).

28 ⁷¹ Storer v. Brown, 415 U.S. 724, 737 n.8 (1974) (cited by Gralike, *supra* note 1, 531 U.S.
at 517 n.8).

1 Far from being an aberration, special elections have been a mainstay in
2 California politics. Since 1990, the Golden State has held nearly five federal and
3 state elections per year.⁷² In fact, five special elections will have already been held
4 in the first half of 2011 alone.⁷³ In the looming CD 36 Primary, it is beyond
5 question that Plaintiff Chamness faces imminent, irreparable harm. By granting
6 him injunctive relief, the Court will stop SB 6 from harming more candidates in the
7 immediate future.

8 **V. The Balance of Hardships Tips Sharply in Plaintiff Chamness' Favor**

9 As this brief has shown, the balance of hardships tips sharply in Plaintiff
10 Chamness' favor. If his plea for injunctive relief is denied, he will effectively be
11 deprived of his fundamental right to run for office – because he will be forced to lie
12 to voters about his political beliefs on the ballot. In stark contrast, Secretary Bowen
13 will not be deprived of her right to run for office if Plaintiff Chamness secures
14 injunctive relief: she will continue to benefit from being able to state her party's
15 name on the ballot. In short, SB 6 is about to inflict grievous harm on
16 Congressional candidate Michael Chamness, but is about to give a political boost to
17 Congressional candidate Debra Bowen. There can be no question that the balance
18 of hardships tips sharply in Plaintiff Chamness' favor.

19 **VI. Granting Injunctive Relief Will Strongly Benefit the Public Interest**

20 Granting injunctive relief will strongly benefit the public interest. As
21 discussed earlier, only injunctive relief will protect the fundamental rights of minor-
22 party candidates and the voters who support them. Furthermore, a preliminary
23 injunction will prevent *millions of taxpayer dollars from being illegally spent* on
24 costly changes that may not need to be made. According to the California
25 Association of Clerks and Election Officials, SB 6 mandates a “complex set of
26

27 ⁷² Complaint ¶44.

28 ⁷³ Complaint ¶50.

1 changes [that] has not occurred in *recent memory*[.]”⁷⁴ Specifically, SB 6 will not
2 only force counties to spend “*millions of dollars* statewide in ballot production and
3 postage costs”, but could force them to spend millions more in new voting
4 equipment.⁷⁵ By granting injunctive relief, the Court will deliver much needed
5 certainty to the local officials who administer our elections. Therefore, issuing a
6 preliminary injunction will greatly benefit the public interest.

7 **VII. Plaintiff Chamness Is Entitled to a Preliminary Injunction**

8 This brief has painstakingly shown that Plaintiff Chamness is entitled to a
9 preliminary injunction. First, it is not just “likely”, but certain that he will prevail
10 on the merits. Remarkably, even Secretary of State Bowen has conceded that a
11 core part of SB 6 is not “permissible”.⁷⁶ Second, it is certain that SB 6 will
12 grievously harm Plaintiff Chamness’ rights as a candidate. Unless it is blocked, SB
13 6 will muzzle his voice on the ballot. Third, the balance of hardships tips sharply in
14 Plaintiff Chamness’ favor – a critical circumstance to which the Ninth Circuit pays
15 special heed.⁷⁷ Simply put, SB 6 will grievously harm minor-party candidate
16 Chamness, while simultaneously helping major-party candidate Bowen. Finally,
17 the public will greatly benefit from injunctive relief, for millions of taxpayer dollars
18 will not be wasted on an unconstitutional law. For all these reasons, the Court must
19 grant Plaintiff Chamness immediate injunctive relief.⁷⁸

20 **VIII. Conclusion**

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

24 ⁷⁴ Complaint ¶35.

25 ⁷⁵ *Id.* (emphases added).

26 ⁷⁶ Complaint ¶40.

27 ⁷⁷ *Cottrell*, *supra* note 35, No. 09-35756, at 15.

28 ⁷⁸ *Winter*, *supra* note 35, 129 S.Ct. at 374 (*quoted by Cottrell*, *supra* note 35, No. 09-35756, at 8).

1 -- Former Chief Justice Burger, *Buckley v. Valeo*⁷⁹

2
3 *Over the years, I've proven that I'm principled and that solving*
4 *problems is much more important to me than party labels.*

5 -- California Secretary of State Debra Bowen⁸⁰

6 In our democracy, we entrust our elected leaders with the power to pass fair
7 and just laws. To be sure, the lawmaking process is far from tidy (Otto von
8 Bismarck famously compared it to sausage-making). Yet at the same time, we must
9 constantly guard against overreaching by entrenched political elites. As
10 constitutional scholar John Hart Ely put it: “We cannot trust the ins to decide *who*
11 *stays out*[.]”⁸¹

12 In 2009, Californians were never given the chance to vote on SB 6: whose
13 core part, according to the Secretary of State, deprives candidates of their
14 fundamental constitutional rights. It now falls on this Court to protect not only the
15 fundamental rights of political outsiders, but the very integrity of our State’s
16 election system.

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26 ⁷⁹ *Buckley v. Valeo*, 424 U.S. 1, 251(1976) (Burger, C.J., concurring in part, dissenting in
part) (emphases added).

27 ⁸⁰ Complaint ¶7 & Exh. 8, at 86.

28 ⁸¹ John Hart Ely, *Democracy and Distrust* 120 (Harvard 1980) (emphases added).

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Respectfully submitted,

By: /s/
GAUTAM DUTTA, ESQ.

Attorney for Plaintiff

MICHAEL CHAMNESS