

SUPREME COURT OF CALIFORNIA

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

Petitioners,

vs.

SUPERIOR COURT FOR
THE COUNTY OF SAN
FRANCISCO,

Respondent;

DEBRA BOWEN, in only her
official capacity as California
Secretary of State; JOHN
ARNTZ, in only his official
capacity as Director of
Elections of the City and
County of San Francisco;
DAVE MACDONALD, in
only his official capacity as
Registrar of Voters of the
County of Alameda; JESSE
DURAZO, in only his official
capacity as Registrar of Voters
of the County of Santa Clara;
DEAN LOGAN, in only his
official capacity as Registrar-
Recorder / County Clerk of the
County of Los Angeles;
NEAL KELLEY, in only his
official capacity as Registrar
of Voters of the County of
Orange; RITA WOODARD,
in only her official capacity as

CASE NO. S188436

**VERIFIED REPLY IN FURTHER
SUPPORT OF PETITION FOR
WRIT OF MANDATE;
MEMORANDUM OF POINTS AND
AUTHORITIES; EXHIBITS**

[Arising from the Oct. 5, 2010
denial of Petitioner's Motion for
Preliminary Injunction 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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Registrar of Voters of the
County of Tulare; and DOES
1-20;

*Real Parties in
Interest;*

ABEL MALDONADO; YES
ON 14 – CALIFORNIANS
FOR AN OPEN PRIMARY;
CALIFORNIA
INDEPENDENT VOTER
PROJECT;

Intervenors;

VERIFIED REPLY IN FURTHER SUPPORT OF
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VERIFICATION

I, Gautam Dutta, declare:

I am an attorney for Petitioners in the action captioned above. I have read this Reply in Further Support of Petition for Writ of Mandate and know its contents. I am informed, believe, and allege based upon my information and belief that the contents are true.

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

Executed on Dec. 9, 2010, in Fremont, California.

Signed: _____

Gautam Dutta

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Instead of refuting any of Petitioners' claims, the Secretary of State and Intervenors ("SB 6 Defendants") concede several critical issues. Of greatest importance, the Secretary of State *has publicly admitted that SB 6's Party Preference Ban is unlawful*. Indeed, it is undisputed that SB 6 foists political candidates with viewpoint-based discrimination. Specifically, SB 6 will ban minor-party candidates from stating *any* party affiliation (including "Independent") on the ballot – a brazen violation of both the U.S. and California Constitutions.

As the Petition has compellingly shown, this case cannot wait. It is undisputed that SB 6 will be implemented for *three* special elections within a matter of *weeks*: in Senate District 28, Senate District 17, and Assembly District 4.¹ Indeed, SB 6

¹ Tellingly, Intervenors oppose Michael Chamness' Request for Judicial Notice with respect to a number of news articles that shed light on the key issues in this case. For example, Exhibits A, E, F, and G are news articles that provide readily verifiable facts as to the three special elections for which SB 6 is about to be implemented. Exhibit B is a news article, in which Intervenor Maldonado's Chief of Staff stated that he opposed any effort to cure SB 6's infirmities. Finally, Exhibit L is a news article that documents Intervenors' easy access to the Legislature, which Intervenors have branded as their political adversary. Specifically, that article reported that a couple weeks ago, Intervenor California Independent Voter Project funded a Hawaii getaway for California lawmakers, lobbyists, and corporate officials.

Defendants’ critical concessions further underscore one glaring fact: unless this Court swiftly intercedes, SB 6 will inflict irreparable harm on minor-party candidates like Intervenor-Applicants Michael Chamness and Carol Winkler. Against such a menacing backdrop, the Court must grant this urgent Petition – and thereby vindicate *every* candidate’s fundamental right to run for office.

II. The Secretary of State Has Made a Binding Admission That SB 6’s Party Preference Ban Is Unlawful

Remarkably, the Secretary of State not only concedes that SB 6 imposes a Party Preference Ban, but *admits that such*

Each of those news articles qualify for judicial notice, for they (1) provide the Court with readily verifiable and highly relevant legislative facts, including Intervenor Maldonado’s opposition to amending SB 6’s infirm provisions; and (2) shed light on relevant legal issues in this case, including the timing of SB 6’s implementation in three looming elections. The Court may take judicial notice of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” California Evidence Code §452(h); *see also Oneida Indian Nation of New York v. State of New York* (2nd Cir. 1982) 691 F.2d 1070, 1086 (court may take judicial notice of legislative facts); *Zimonra v. Alamo Rent-A-Car* (10th Cir. 1997) 111 F.3d 1495, 1503. The Court may also take judicial notice of the content of news articles. *See, e.g., League of United Latin American Citizens v. Wilson* (9th Cir. 1997) 131 F.3d 1297, 1305 (*citing* news articles concerning legal challenge filed to block the implementation of a state law); *Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232,1235 n.1. Accordingly, Intervenor-Applicant Chamness renews his Nov. 24, 2010 Request for Judicial Notice.

a ban is unlawful. Indeed, it is undisputed that Part 325 of SB 6 (1) bans minor-party candidates from stating on the ballot that they are “Independent”, and (2) forces them to state that they have “No Party Preference”.²

As the Petition painstakingly documented, the Secretary of State’s office publicly admitted that Part 325 of SB 6 is not “permissible”, for that provision bans minor-party candidates like Mr. Chamness and Ms. Winkler from stating that they are “Independent”.³ In response, the Secretary of State’s opposition papers *did not even mention or refer to her office’s critical admission*. Consequently, RPI Secretary of State has made a *binding* party admission as to *all* of Petitioners’ claims regarding SB 6’s Party Preference Ban.⁴

² For a thorough analysis of Part 325 of SB 6, *see* Petition Points and Authorities (hereinafter, “Moving Papers”), at 32-33. Tellingly, neither the Secretary of State nor Intervenors referred or cited to Part 325 in their opposition papers.

Ignoring the express language of Part 325, Intervenors fiercely deny that SB 6 imposes a Party Preference Ban. However, their strained argument fails for two reasons. First, as the Moving Papers explain, the doctrine of judicial estoppel bars Intervenors from raising such an argument. Moving Papers, at 50-53. Moreover, Intervenors’ statutory interpretation suffers from a fatal flaw: it relies on an incorrect definition of the term “party”. Moving Papers, at 53-56.

³ *See id.* at 33.

⁴ *See* Moving Papers, at 33 & n.36. To no surprise, Intervenors stridently insist that the Secretary of State did not believe that Section 325 was unlawful. *Cf.* Intervenors’ Preliminary Opposition (“Intervenors’ Opposition”), at 10-12. However, Intervenors’ contrived reading of the Secretary of State’s statements ignores the inconvenient truth. First, the

III. It Is Unrefuted that SB 6 Violates Amendments I, XIV and the California Constitution’s Free Speech Clause

...Independent is a customary title long availed of in American politics, having a “positive connotation” despite an equivocal meaning[.]

– Massachusetts Supreme Judicial Court, *Bachrach v. Commonwealth*⁵

Furthermore, no party has refuted another of Petitioner’s core claims. Namely, SB 6’s Party Preference Ban violates both the U.S. Constitution (Amendments I & XIV) and the California Constitution (Free Speech Clause), for it bans minor-party candidates from stating that they are “Independent”.

As the Petition shows, the Sixth and Ninth Circuits have uniformly held that minor-party candidates have the right to a party label of “Independent”.⁶ What is more, both the

Secretary of State has not disputed Petitioners’ summary of her public statements regarding SB 6’s Party Preference Ban. In fact, one week after this lawsuit was filed in Superior Court, the Secretary of State publicly admitted that Section 325 of SB 6 is not “*permissible*”. Moving Papers, at 33.

⁵ *Bachrach v. Commonwealth* (1981) 382 Mass. 268, 415 N.E.2d 832, 836 (quotations in original).

⁶ Moving Papers, at 48-50 (citing *Rosen v. Brown* (6th Cir. 1992) 970 F.2d 169, 175; *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, 1015 (*citing Schrader*)).

Massachusetts and Minnesota Supreme Courts have also upheld that same right.⁷ In *Bachrach v. Commonwealth*, the Massachusetts High Court expressly ruled that it was unconstitutional to force minor-party candidates to use the party label of “Unenrolled” – a term identical in meaning to SB 6’s “No Party Preference”.⁸ In this light, SB 6 unlawfully bans minor-party candidates from using the party label of “Independent”. Accordingly, the Court must strike down SB 6’s Party Preference Ban.

IV. It Is Unrefuted That SB 6 Violates the U.S. Constitution’s Elections Clause

Contrary to Intervenor’s claims, *Rosen v. Brown* (6th Cir. 1992) gave every candidate from a minor (non-qualified) party the right to use the party label of “Independent”. *Rosen*, 970 F.2d 169. At the time *Rosen* was decided, only two parties had qualified (state-recognized) status in the State of Ohio: the Democratic Party and the Republican Party. *Id.* at 177. Against this backdrop, a state statute banned all non-qualified-party (i.e., minor-party) candidates from stating on the ballot that they were “Independent”. Striking down that statute, *Rosen* noted, a State’s regulatory interest “may not extend to the effective exclusion of *Independent and new party candidacies*. *Id.* at 177 (emphases added). Specifically, *Rosen* held that the First and Fourteenth Amendments gave minor-party candidates the right to a party label of “Independent”. *Id.* at 178. Subsequently, *Rosen*’s holding was re-affirmed by the Sixth and Ninth Circuits. See *Schrader, supra*, 241 F.3d at 788-89 (*re-aff’g Rosen*); *Rubin, supra*, 308 F.3d at 1015 (*citing Schrader*)).

⁷ *Bachrach, supra* note 5, 382 Mass. 268, 415 N.E.2d at 833; *Shaw v. Johnson* (1976) 311 Minn. 237, 247 N.W.2d 921, 923.

⁸ *Bachrach, supra* note 5, 382 Mass. 268, 415 N.E.2d at 836.

Furthermore, as the Petition showed, SB 6 Defendants have conceded Petitioners' Elections Clause claims. During the proceedings in the Superior Court, SB 6 Defendants waived their right to oppose Petitioners' Elections Clause claims, for they did not invoke *any* legal authority relating to the Elections Clause.⁹ Nevertheless, Intervenors have raised three flawed arguments at this belated hour.

First, Intervenors claim that the U.S. High Court cases *Cook v. Gralike* and *U.S. Term Limits v. Thornton* are “readily distinguishable”. However, both *Gralike* and *U.S. Term Limits* control this case, for they laid down critical cornerstones on how states may regulate federal elections under the Elections Clause. As the Petition showed, SB 6 violates the Elections Clause under *Gralike* and *U.S. Term Limits*, for it aims to (1) “favor or disfavor” one class of candidates over another, (2) “dictate electoral outcomes”, or (3) “evade important constitutional restraints”.¹⁰

Tellingly, *SB 6 Defendants do not dispute that SB 6 violates all three factors laid down by the High Court*. Instead, Intervenors claim that the Election Clause may be invoked only if the statute in question also violates the Equal Protection Clause. That argument fails for two reasons. First, as the Petition showed, SB 6's Party Preference Ban brazenly violates

⁹ Moving Papers, at 36 & n. 43.

¹⁰ *Id.* at 35-37 (quoting *Cook v. Gralike* (2001) 531 U.S. 510, 523 & *U.S. Term Limits v. Thornton* (1995) 514 U.S. 779, 833-34).

the California Constitution’s Equal Protection Clause. Furthermore, as the U.S. Supreme Court has also made clear, a law can *independently* violate the Elections Clause – without violating *any other* constitutional provision.¹¹

Finally, Intervenor-Applicants Chamness and Winkler may not invoke the Elections Clause, because they are not candidates for federal office. However, Petitioners Martin and Mackler *are* seeking federal office in the upcoming 2012 election.¹² In this light, the U.S. Supreme Court’s “capable of repetition, yet evading review” election doctrine gives both Petitioners and Intervenor-Applicants standing to bring all of their facial claims, including those under the Elections Clause.¹³

In summary, SB 6 Defendants have not only waived their opportunity to address Petitioners’ Elections Clause claims, but have failed to refute them at this late hour. Consequently, the Court must rule that SB 6’s Party Preference Ban violates the U.S. Constitution’s Elections Clause.

V. SB 6 Deserves Strict Scrutiny

¹¹ *U.S. Term Limits*, *supra* note 10, 514 U.S. at 829-30.

¹² Petition ¶¶14-15.

¹³ Indeed, both this Court and the U.S. Supreme Court have admonished that facial challenges election cases be swiftly resolved. *Storer v. Brown* (1974) 415 U.S. 724, 737 n.8; *see also Gralike*, *supra* note 10, 531 U.S. at 517 n.8; *Libertarian Party v. Eu* (1980) 28 Cal.3d 535, 540.

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

– California Supreme Court, *Spiritual Psychic Science Church of Truth v. City of Azusa*¹⁴

Despite their belated (if not foreclosed) efforts,¹⁵ SB 6 Defendants have failed to refute that SB 6’s Party Preference Ban triggers strict scrutiny. It is undisputed that SB 6 targets and discriminates against minor-party candidates. Nevertheless, SB 6 Defendants now invite the Court to abandon its longstanding precedent of applying strict scrutiny to Equal Protection claims. The Court should decline their invitation.

Beginning with *Gould v. Grubb* and continuing with *Libertarian Party v. Eu*, this Court has consistently applied strict scrutiny to claims brought under the California Constitution’s Equal Protection Clause.¹⁶ In *Gould*, a law enabled incumbents to be listed first on the ballot. In striking

¹⁴ *Spiritual Psychic Science Church of Truth v. City of Azusa* (1985) 29 Cal.3d 501, 514.

¹⁵ In their Superior Court papers, both the Secretary of State and Intervenors have conceded that SB 6’s Party Preference Ban triggers strict scrutiny. See Moving Papers, at 43 n.73; Secretary of State’s opposition papers, Petition Exh. 8, at 13:5-6 (“compelling state interest” supports SB 6); Intervenors’ opposition papers, Petition Exh. 10, at 10:5-6 (the State has a “compelling interest in regulating the method by which” to regulate the contents of the ballot).

¹⁶ *Gould v. Grubb* (1975) 14 Cal.3d 661, 671-72; *Eu*, *supra* note 13, 28 Cal.3d at 547 (applying strict scrutiny to Equal Protection claims).

down that law, this Court ruled that discrimination against political outsiders automatically triggered strict scrutiny:

[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*.¹⁷

Although Equal Protection claims brought under the *federal* Constitution do not automatically trigger strict scrutiny, this Court has made it clear that strict scrutiny must apply to Equal Protection claims brought under the *California* Constitution. Apart from citing two inapposite cases,¹⁸ SB 6 Defendants have provided no other reason for the Court to abrogate its longstanding doctrine – especially with regard to an invidious law that Intervenor Maldonado rammed through the Legislature in the middle of the night.¹⁹ Accordingly, the Court

¹⁷ *Gould*, *supra* note 16, 14 Cal.3d at 672 (quotations in original, citations omitted); *see also id.* at 674.

¹⁸ *Lightfoot v. Eu* (which did apply strict scrutiny) does not apply here, for it did not adjudicate any claims brought under the California Constitution’s Equal Protection Clause. *Lightfoot v. Eu* (9th Cir. 1992) 964 F.2d 865, 866 (1993) *cert. denied*, 507 U.S. 919. Similarly, this Court’s decision in *Edelstein v. San Francisco* did not adjudicate any claims brought under the California Constitution’s Equal Protection Clause. *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164.

¹⁹ SB 6, authored by Intervenor Maldonado, was introduced and passed between 3:40 am and 6:55 am on February 9, 2009. Verified First Amended Complaint (“FAC”) ¶3, attached as

should reject SB 6 Defendants’ misguided attempt to gut strict scrutiny for challenges brought under the California Constitution’s Equal Protection Clause.

VI. It Is Unrefuted That SB 6 Violates the California Constitution’s Equal Protection Clause

[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[.]

Exhibit 4 to this Reply. Petitioners provided copies of both their Verified Complaint and Verified First Amended Complaint, which are identical except for one paragraph not germane to this proceeding (§11). Because some pages were inadvertently omitted from the Court’s copy of the FAC (in Petition Exhibit 4), Petitioners have re-filed the FAC with the Court.

Contrary to Intervenor’s claims, Petitioners and Intervenor-Applicants did *not* “omit[] a critical exhibit from the Declaration of [Intervenor Counsel] Sean Welch.” That exhibit was attached as Exhibit K to Michael Chamness’ Request for Judicial Notice. *Contra*, Intervenor’s Opposition, at 37. When referring to that Declaration – in which the Secretary of State admits that SB 6’s Party Preference Ban is unlawful – the Petition’s footnotes consistently cited to Exhibit K of the RJN. *E.g.*, Moving Papers, at 33 n.35 & 28 n.26. Evidently, Intervenor’s counsel do not relish reading footnotes.

Finally, Petitioners wish to correct one last misstatement. Contrary to Intervenor’s claim, the parties do *not* have a “custom” to electronically serve documents or to call opposing counsel before filing motions. In short, Petitioners properly served their Petition to all opposing counsel via first-class mail, and Intervenor had seven full days to respond to it. *Contra*, Intervenor’s Opposition, at 35 n.25.

– Supreme Court scholar Vicki Jackson²⁰

Having failed to do away with strict scrutiny, SB 6 Defendants fail to refute another of Petitioners’ key claims: that SB 6’s Party Preference Ban violates the California Constitution’s Equal Protection Clause – which, as this Court noted in *Gould v. Grubb*, “requires all candidates, newcomers and incumbents alike, to be treated *equally*.”²¹

Simply put, SB 6’s Party Preference Ban unlawfully censors political candidates on the basis of their political viewpoint. 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 Party Preference.” In this manner, major-party candidates will win votes simply *because their party’s name appears beside their name on the ballot*.

²⁰ 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 64, 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 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).

²¹ *Gould, supra* note 16, 14 Cal.3d at 674 (emphases added).

Such viewpoint-based censorship does not pass muster under *Stanson v. Mott*'s "equal access" doctrine.²²

The *Stanson* doctrine, which had been foreshadowed by *Gould v. Grubb* and *Rees v. Layton*, bans ballots from favoring certain "political viewpoints" or a "particular partisan position".²³ What is more, *Rees* struck down a law that, like SB 6, discriminated against political outsiders.²⁴ Specifically, that law allowed incumbents to be identified on the ballot as the holder of that office, while banning their challengers from listing their occupation on the ballot.²⁵

Tellingly, SB 6 Defendants do not even dispute that SB 6's Party Preference Ban violates the *Stanson* doctrine.²⁶ However, Intervenor disingenuously try to argue that *Stanson* was somehow overruled by *Vargas v. City of Salinas* and

²² See Moving Papers, at 40-41; *Stanson v. Mott* (1976) 17 Cal.3d 206, 217.

²³ See, e.g., *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1422, 1433 (quoting *Stanson*, *supra* note 22, 17 Cal.3d at 219, and citing *Citizens for Responsible Gov't v. City of Albany* (1997) 56 Cal.App.4th 1199, 1228); see also *Rees v. Layton* (1970) 6 Cal.App.3d 815, 822-23.

²⁴ *Rees*, *supra* note 23, 6 Cal.App.3d at 822-23. Unlike Intervenor, Petitioners do *not* regard *Rees*' seminal holding as "distinguishable".

²⁵ *Id.* at 822-23.

²⁶ Indeed, the Secretary of State's opposition papers do not cite to *any* case relating to the *Stanson* doctrine. See Secretary of State's Preliminary Opposition (hereinafter, "SOS Opposition"), at ii.

Libertarian Party v. Eu.²⁷ However, neither case overruled *Stanson*. As the Petition noted, *Vargas* did not discuss whether the State may favor certain candidates or parties on the ballot.²⁸ Moreover, *Eu* did not need to apply *Stanson* for a simple reason: unlike SB 6, the law at issue in *Eu* guaranteed *minor-party candidates the party label of “Independent”*.²⁹ In this light, the *Stanson* doctrine remains good law³⁰ – and stands ready to strike down SB 6’s Party Preference Ban.

VII. SB 6 Defendants Have Failed to Give Any Compelling State Interest to Justify SB 6’s Party Preference Ban

In a final effort to elude the *Stanson* doctrine, SB 6 Defendants argue that this Court’s holding in *Libertarian Party v. Eu* provides a compelling state interest to save SB 6. Yet as the Petition showed, *Eu* provides no such rationale – because it upheld the constitutionality of the very election system that SB 6 seeks to dismantle.³¹

Nevertheless, Intervenors argue that *Eu* would “bless” SB 6’s Party Preference Ban, because voters would become “confused” if the names of minor parties appeared on the ballot. However, voters in the 24 states that allow minor-party labels would beg to differ, for they thereby gain valuable information

²⁷ *Eu*, *supra* note 13, 28 Cal.3d 535; *Vargas v. City of Salinas* (2009) 46 Cal.4th 1.

²⁸ Instead, *Vargas* adjudicated how public funds could be spent in connection with a specific ballot measure. *See* Moving Papers, at 41 n.62.

²⁹ *Eu*, *supra* note 13, 28 Cal.3d at 537.

³⁰ *See also supra* note 23.

³¹ Moving Papers, at 46-47.

about the candidates who are running for office.³² 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.”³³ By allowing candidates to share information with voters on the ballot, candidates and voters alike can interact and “police themselves” in the marketplace of political ideas.³⁴

Ironically, SB 6’s new party-label rules could themselves confuse voters. Indeed, even 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*

³² Indeed, voters can get detailed information about *any* party and its political beliefs with a single click of the mouse. For example, detailed information about the Coffee Party may be accessed at <http://www.coffeepartyusa.com/content/about-us> (*last visited* Dec. 8, 2010).

³³ *Wash. State Grange v. Wash. State Republican Party* (2008) 552 U.S. 442, 460 (Roberts & Alito, JJ., concurring) (*quoting Cook v. Gralike, supra* note 10, 531 U.S. at 532 (Rehnquist, C.J., concurring)). *Accord, Rosen, supra* note 6, 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.”).

³⁴ *See Rees, supra* note 23, 6 Cal.App.3d at 823. Intriguingly, California permitted minor-party candidates to list their party’s name on the ballot between 1891 and 1915. Declaration of Richard Winger in Further Support of Petition for Writ of Mandate ¶9. In fact, in 1912 minor-party candidate William Kent (who ran as a “Progressive”, two years before the Progressive Party gained qualified status in California) was elected to the U.S. Congress (1st District). *Id.* ¶10. In 1915, the Legislature repealed the right to choose a party label other than “Independent”. *Id.* ¶11.

use the party label of “Democrat.”³⁵ Far from giving voters more meaningful choices, SB 6 would instead confuse them: by providing misleading information about both major *and* minor-party candidates. Accordingly, Intervenor’s “voter confusion” argument fails to provide *any* state interest to salvage SB 6.

VIII. It Is Unrefuted That SB 6’s Party Preference Ban Is Not Severable

Significantly, SB 6 Defendants have failed to refute another of Petitioners’ core claims: that SB 6’s Party Preference Ban is not severable. SB 6 Defendants insist that SB 6’s severability clause would allow its unlawful parts to be severed. However, this Court has repeatedly held that severability clauses are not conclusive.³⁶ As this Court has noted, an infirm statute can only be saved if its unlawful parts are “volitionally” separable; that is, it must be “clear that the Legislature would have enacted the measure without” its unlawful parts.³⁷

³⁵ FAC, Petition Reply Exh. 4 ¶46.

³⁶ “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.” *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.

³⁷ *Sonoma County v. Superior Ct.* (2009) 173 Cal.App.4th 322, 352; *accord, Gerken, supra* note 36, 6 Cal.4th at 714 (“The final determination [on whether a severability clause is

Here, it is undisputed that the Legislature passed SB 6's Party Preference Ban *in order to implement Proposition 14*.³⁸ Thus, since SB 6's Party Preference Ban is not "volitionally" separable, it is not severable as a matter of law. Therefore, the Court must direct Respondent (1) to declare that the entirety of SB 6 is unenforceable, and (2) to enjoin Real Parties in Interest from implementing or enforcing SB 6 in its entirety.

IX. It Is Unrefuted That Proposition 14 Must Be Declared Inoperative Until a New Law Is Passed to Implement It

Equally important, SB 6 Defendants have conceded that if SB 6 is struck down, Proposition 14 itself must be declared inoperative. Significantly, SB 6 Defendants do not dispute that Proposition 14 needs a lawful statute to implement it, because it

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 36, 48 Cal.3d at 821).

³⁸ 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. 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. *See* Proposition 14, attached as Exhibit M to the Request for Judicial Notice by Michael Chamness, at 2. In response, the Legislature enacted SB 6's Party Preference Ban, which regulated the "manner" in which candidates could state their party preference on the ballot. *See* Plaintiffs' Motion for Preliminary Injunction, Petition Exh. 1, at 13:8-23.

is not a self-executing provision.³⁹ Thus, because SB 6 is unenforceable in its entirety, Proposition 14 must be declared inoperative until a new law has been passed to implement it.⁴⁰

X. Intervenor-Applicants Must Be Allowed to Intervene, For They Are Threatened with Imminent, Irreparable Harm

In a last-ditch effort to stop this Petition, the Secretary of State asks the Court to exclude Mr. Chamness and Ms. Winkler from this proceeding, on the pretext that they are *not* threatened

³⁹ *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, RJN by Michael Chamness, Exhibit M. *See also* Plaintiffs’ Motion for Preliminary Injunction, Petition Exh. 1, at 13:1-8.

⁴⁰ *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. *See also* Plaintiffs’ Motion for Preliminary Injunction, Petition Exh. 1, at 13:1-8.

According to Intervenor, their “political opponents” would let Proposition 14 “languish in the Legislature” if SB 6 is struck down. Intervenor’s Opposition, at 7. Yet, as the Petition pointed out, Intervenor 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, Request for Judicial Notice by Michael Chamness, Exhibit L, at 1.

with imminent, irreparable harm.⁴¹ However, it is beyond dispute that SB 6 threatens Mr. Chamness and Ms. Winkler with imminent, irreparable harm. As this Petition shows, both Mr. Chamness and Ms. Winkler are eligible⁴² – and *intend* – to run as minor-party candidates in the looming special elections for Senate Districts 28 and 17, respectively.

The Secretary of State offers three invalid reasons against allowing Mr. Chamness and Ms. Winkler to intervene. She tries to argue that Mr. Chamness and Ms. Winkler had time and

⁴¹ Even without the participation of Intervenor-Applicants Chamness and Winkler, the U.S. Supreme Court’s “capable of repetition, yet evading review” doctrine gives Petitioners 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. *See* Moving Papers, at 59-60.

⁴² The Secretary of State doubts that Mr. Chamness and Winkler are eligible to run for the State Senate vacancies in Districts 28 and 17, respectively; purportedly because they did not file declarations to accompany their Motions to Intervene. SOS Opposition, at 9-10. However, Mr. Chamness and Ms. Winkler have accomplished the same goal through other means. Indeed, they have both filed Verified Motions to Intervene – in which they confirm that (1) they are registered to vote in Senate Districts 28 and 17, respectively, and (2) they intend to run in the looming special elections in those respective districts, as candidates identifying with the party labels of “Coffee Party” and “Independent”, respectively. *See Gralike, supra* note 10, 531 U.S. at 517 n.8 (a candidate has standing to challenge an election law *before* the candidate filing deadline). In addition, Ms. Winkler’s Verified Motion to Intervene confirms that she is registered with the party label of “Independent”, while Mr. Chamness is registered to vote under the party affiliation of the Coffee Party. *See* Verified Motion to Intervene of Carol Winkler, at 5; Declaration of Michael Chamness ¶2 (filed concurrently with this Reply).

opportunity to intervene in the Superior Court or Court of Appeal. However, they did not. As their Motions to Intervene showed, Mr. Chamness must file his candidate nomination papers for Senate District 28 within a matter of *days*; and Ms. Winkler may have to file her candidate nomination papers as early as January 17, 2011.

No party can plausibly dispute Mr. Chamness and Ms. Winkler's predicament. Indeed, it is undisputed that the special elections in which Mr. Chamness and Ms. Winkler seek to run were triggered by the November 2, 2010 general election – one month *after* the Superior Court denied Petitioners' Motion for Preliminary Injunction.⁴³ Furthermore, the reporter's transcripts in the pending Court of Appeal case only arrived on December 1, 2010, one week after this Petition was filed.⁴⁴ In this light, Mr. Chamness and Ms. Winkler had no other recourse but to seek relief from this Court.

⁴³ Moving Papers, at 23-25.

⁴⁴ Dec. 1, 2010 letter from the Court of Appeal (First District) to counsel regarding Case No. A129946, attached as Exhibit F. Contrary to Intervenor's insinuations, Petitioners did not "obscure" this related case from this Court's attention. In fact, Petitioners advised the Court of every related case at the top of the fourth page of its Points and Authorities, and attached their Notice of Appeal as Exhibit B to their Petition. *See* Moving Papers, at 22 & Exh. B.

Earlier, the Superior Court denied Petitioners' claims with respect to the fundamental rights of write-in voters and candidates, and granted Intervenor's Motion to Intervene. Should it become necessary, Petitioners reserve the right to litigate those issues at a later time.

The Secretary of State also argues that Mr. Chamness and Ms. Winkler do not qualify for mandatory intervention, allegedly because they have not shown a “protectable interest” in the “transaction” at issue. Yet as their Motions to Intervene have shown, both Mr. Chamness and Ms. Winkler *do* have a “significantly protectable interest” in the transaction at issue: this writ proceeding.⁴⁵

Similarly, the Secretary of State suggests that Mr. Chamness and Ms. Winkler do not qualify for permissive intervention, allegedly because they have not shown a “direct” interest in this litigation. Yet as their Motions to Intervene have shown, both Mr. Chamness and Ms. Winkler have a “direct and immediate” interest in this writ proceeding, under the very case cited by the Secretary of State.⁴⁶ Further, as both Motions to Intervene irrefutably noted, both federal and California courts liberally permit both candidates and individual voters to intervene in election cases.⁴⁷

⁴⁵ Motion to Intervene by Michael Chamness, at 15-16 (*citing Stringfellow v. Concerned Neighbors* (1987) 480 U.S. 370, 382 n.1 (concurring opinion); *Siena Court Homeowners Ass’n v. Green Valley Corp.* (2008) 164 Cal.App.4th 1416, 1424; *California Physicians’ Service v. Superior Court* (1980) 102 Cal.App.3d 91, 96); Motion to Intervene by Carol Winkler, at 15-16 (*citing* same cases).

⁴⁶ Motion to Intervene by Michael Chamness, at 17 (*citing City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1036 (2005) *review denied*); Motion to Intervene by Carol Winkler, at 17 (*citing* the same case).

⁴⁷ Motion to Intervene by Michael Chamness, at 17-18 (*citing Gralike, supra* note 10, 531 U.S. at 516 n.6; *Simac*

As a last resort, the Secretary of State argues that Mr. Chamness and Ms. Winkler have no right to intervene until SB 6 has been “applied” to them – and forces them to state that they have “No Party Preference.”⁴⁸ In other words, Petitioners must *wait until their rights have been violated*. However, both the U.S. Supreme Court and leading federal courts have roundly rejected such a troubling requirement.⁴⁹ Further, this 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.⁵⁰ In this light, both Mr. Chamness and Ms. Winkler amply qualify for

Design v. Alciati (1979) 92 Cal.App.3d 146, 154 Cal.Rptr. 676, 682; *Baroldi v. Denni* (1961) 197 Cal.App.2d 472, 17 Cal.Rptr. 647, 651; *see also Rominger v. County of Trinity* (1983) 147 Cal.App.3d 655; *Simpson Redwood Co. v. State of California* (1987) 196 Cal.App.3d 1192); Motion to Intervene by Carol Winkler, at 17-18 (*citing* same cases).

⁴⁸ SOS Opposition, at 10-11, 13.

⁴⁹ “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); *see also Sandusky County Democratic Party v. Blackwell* (6th Cir. 2004) 387 F.3d 565, 574 (voters challenging an election law need only show that it threatens them with “real and imminent” harm); *ACLU v. Santillanes* (10th Cir. 2008) 546 F.3d 1313, 1318-19 (same).

⁵⁰ *See, e.g., Gralike, supra* note 10, 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.

both mandatory and permissive intervention. Accordingly, Petitioners have made a compelling showing of imminent harm.

XI. Issuing a Writ of Mandate Will Greatly Benefit the Public Interest

The balance of equities heavily favors Intervenor-Applicants Chamness and Winkler, for issuing a Writ will greatly benefit the public interest. In stark contrast to Mr. Chamness and Ms. Winkler’s plight, not one SB 6 Defendant will be deprived of the fundamental right to run for office if a Writ 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.⁵¹ Finally, that granting this Petition will not only give election officials much needed certainty, but ensure that counties do not illegally spend taxpayer dollars to implement SB 6.

XII. Petitioners Are Entitled to a Preliminary Injunction

Petitioners have painstakingly shown that Respondent erred when it denied them a preliminary injunction, for (1) there is more than a “reasonable probability” Petitioners will prevail on the merits, and (2) Intervenor-Applicants Chamness and Winkler are threatened with imminent, irreparable harm in two

⁵¹ 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), codified at Ch. 98, Stats. 2000 (giving qualified parties the option of allowing “decline to state” voters to vote in qualified-party primaries).

looming special elections.⁵² Consequently, Respondent should direct Respondent to grant Petitioners' Motion for Preliminary Injunction.

XIII. Conclusion

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

– Archibald Cox⁵³

This Court has a constitutional duty to protect political outsiders from being targeted by unjust laws. By banning the names of minor parties from appearing on the ballot, SB 6 eviscerates the fundamental right of candidates to run for office. For this compelling reason, SB 6 – which was passed in order to implement Proposition 14 – is unenforceable *in its entirety*.

Time is of the utmost essence. Although they have had over half a year's notice, the Legislature and Intervenor Maldonado have taken no action to cure SB 6's grave infirmities. As a result of their deliberate inaction, SB 6 is poised to inflict irreparable harm on minor-party candidates in *three* looming special elections. At this eleventh hour, only this Court can prevent SB 6 from silencing the voices of grassroots

⁵² *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 58 Cal.Rptr.3d 527, 533 (citation omitted).

⁵³ 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 5, 382 Mass. at 281).

leaders like Mr. Chamness and Ms. Winkler. Therefore, the Court must issue a Writ of Mandate that (1) declares SB 6 unconstitutional and unenforceable in its entirety, and (2) declares Proposition 14 inoperative until a new law has been passed to implement it.

Respectfully submitted on Dec. 9, 2010

GAUTAM DUTTA

By: _____

Gautam Dutta

Attorney for Petitioners

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 3,180 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 Dec. 9, 2010.

GAUTAM DUTTA

By: _____

Gautam Dutta

Attorney for Petitioners

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 Dec. 9, 2010, I served the following documents:

- (1) Reply in Further Support of Petition for Writ of Mandate
- (2) Petitioners' First Amended Complaint, originally attached as Exhibit 4 to the Nov. 24, 2010 Petition for Writ of Mandate and now attached as Exhibit 4 to the Reply in Further Support of Petition for Writ of Mandate.
- (3) Dec. 1, 2010 Letter from the Court of Appeal (First District), attached as Exhibit F to the Reply in Further Support of Petition for Writ of Mandate.

on the following persons at the locations specified:

A. Mark Beckington, Esq., Office of the Attorney General, 300 South Spring St., Ste. 1702, Los Angeles, CA 90013; 213.897.1096 (Attorney for RPI Debra Bowen).

B. Steve Mitra, Esq., Office of Santa Clara County Counsel, 70 W. Hedding St., 9th Floor, East Wing, San Jose, CA 95110; 408.299.5916 (Attorney for RPI Jesse Durazo).

C. Raymond Lara, Esq., Office of Alameda County Counsel, 1221 Oak St., Ste. 450, Oakland, CA 94612; 510.272.6700 (Attorney for RPI Dave Macdonald).

D. Mollie Lee, Esq., Office of the San Francisco City Attorney, 1 Dr. Carlton B. Goodlet Place, Ste. 234, San

Francisco, CA 94102; 415.554.4705 (Attorney for RPI John Arntz).

E. Wendy J. Phillips, Esq., Office of Orange County Counsel, 333 W. Santa Ana Blvd., Ste. 407, Santa Ana, CA 92702; 714.834.6298 (Attorney for RPI Neal Kelley).

F. Kathleen Taylor, Esq., Office of Tulare County Counsel, 2900 W. Burrell St., Visalia, CA 93291; 559.636.4950 (Attorney for RPI Rita Woodard).

G. Patrice J. Salseda, Esq., Office of Los Angeles County Counsel, 500 W. Temple St., Rm. 648, Los Angeles, CA 90012; 213.974.1895 (Attorney for RPI Dean Logan).

H. Marguerite Mary Leoni, Esq., Nielsen Merksamer, 2350 Kerner Blvd., Ste. 250, San Rafael, CA 94901; 415.389.6800 (Attorney for Intervenors Abel Maldonado, Yes on 14, and California Independent Voter Project).

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 (Respondent).

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 Dec. 9, 2010, in Fremont, California.

Gautam Dutta