

No. A137012

**IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE**

MONA FIELD, ET AL.,

Plaintiffs and Appellants,

v.

DEBRA BOWEN, ET AL.,

Defendants and Respondents, and

ABEL MALDONADO, ET AL.,

Intervenors-Respondents.

Appeal from Aug. 1, 2012 Order Granting Attorney's Fees in *Field v. Bowen*, San Francisco County Super. Ct. No. CGC-10-502018
(Hon. Curtis E.A. Karnow, Presiding).

APPELLANTS' REQUEST FOR JUDICIAL NOTICE

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*Attorneys for Plaintiffs and Appellants Mona Field, Rodney Martin,
Richard Winger, Jennifer Wozniak, Jeff Mackler, and Stephen A.
Chessin*

TO THE COURT, THE PARTIES AND THEIR ATTORNEYS OF RECORD:

Plaintiffs and Appellants Mona Field, Rodney Martin, Richard Winger, Jennifer Wozniak, Jeff Mackler, and Stephen A. Chessin (“Appellants”) hereby request that this Court take judicial notice, pursuant to California Rule of Court 8.252, of the following document (attached as Exhibit A to this Motion):

- Transcript of February 13, 2013 oral argument in *Michael Chamness, et al. v. Abel Maldonado, et al.*, Case No. 11-56303, and *Michael Chamness, et al. v. Debra Bowen*, Case No. 11-56449. Streaming audio of this hearing is available at http://www.ca9.uscourts.gov/media/view.php?pk_id=0000010402.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Court Records are Judicially-Noticeable.

Judicial notice is appropriate under California Evidence Code Sections 452 and 459. Section 459(a) states that “[t]he reviewing court may take judicial notice of any matter specified in Section 452.”

Section 452(d) states that “[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States” may be judicially-noticed. The Ninth Circuit Court of Appeals maintains a website hosting audio-recordings of its hearings. Because these recordings are records of a United States Court, they are subject to judicial notice.

For this Court's convenience, Appellants obtained a transcription of the audio and attach it to this Request. This transcription is made from the official audio recording of the hearing available at:

http://www.ca9.uscourts.gov/media/view.php?pk_id=0000010402. It is attached to this Motion as Attachment A.

B. The Hearing in the *Chamness* Case Is Relevant to the Issues on Appeal

The *Chamness v. Bowen* case challenges the same provisions of Senate Bill 6 that were challenged in *Field v. Bowen*, but brings an as-applied rather than a facial challenge. Therefore, the issues in the two cases are significantly similar. At the February 13, 2013 hearing, the Ninth Circuit heard the *Chamness* Plaintiffs' appeal of an order granting summary judgment against their claims. During oral argument, Ninth Circuit judges expressed opinions relevant to the issues on appeal in the instant case. Specifically, Judge Berzon stated that she rejected the argument that *Libertarian Party v. Eu* (1980) 28 Cal.3d 535 controls the question of whether it is acceptable to force candidates who favor non-qualified parties to state "Party Preference: None" on the ballot. Judge Watford, on the same panel, stated that the "Party Preference: None" provisions of Senate Bill 6 concerned him because he found the label "misleading." These statements are relevant to show that Plaintiffs' arguments relating to *Libertarian Party* and its party label arguments generally were not frivolous (despite the fact that they were rejected by this Court). As explained in detail in Appellants' Opening Brief §I, the issue of whether Plaintiffs' claims were frivolous is directly relevant to the question of whether Intervenor's award of attorney's fees was preempted by federal law.

Because the hearing occurred long after the briefing and hearing on Intervenor's Motion for Attorneys' Fees (which is the subject of this appeal), it was not presented to the Superior Court. The hearing transcript

contains relevant information to the issues on appeal. Accordingly, Appellants respectfully request that the Court take judicial notice of the audio recording of the hearing, and of the transcription of that recording attached to this Motion.

Respectfully submitted,

Dated: March 29, 2013

COVINGTON & BURLING LLP

By: 

ANDREW C. BYRNES

ELENA M. DIMUZIO

CHARLIN C. LU

Dated: March 29, 2013

By: /s/ Gautam Dutta

GAUTAM DUTTA

Attorneys for Appellant

**[PROPOSED] ORDER GRANTING REQUEST FOR JUDICIAL
NOTICE PURSUANT TO RULE 8.252:**

Plaintiffs and Appellants Mona Field, Rodney Martin, Richard Winger, Jennifer Wozniak, Jeff Mackler, and Stephen A. Chessin (“Appellants”) moved, under California Rule of Court 8.252 and Evidence Code Sections 452 and 459, that this Court grant an order to take judicial notice of the following:

- Audio recording and transcript of February 13, 2013 oral argument in *Michael Chamness, et al. v. Abel Maldonado, et al.*, Case No. 11-56303, and *Michael Chamness, et al. v. Debra Bowen*, Case No. 11-56449. Streaming audio of this hearing is available at http://www.ca9.uscourts.gov/media/view.php?pk_id=0000010402.

Upon review of the Motion, the Motion is hereby GRANTED.

Dated: _____

PRESIDING JUSTICE

EXHIBIT A

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NINTH CIRCUIT COURT OF APPEALS
AUDIO RECORDING OF ORAL ARGUMENT IN
MICHAEL CHAMNESS, ET AL. V. ABEL MALDONADO, ET AL.
CASE NO. 11-56303 (FEB. 13, 2013)

AUDIO RECORDING TRANSCRIBED BY:
KAREN CARLTON DAVIS
CSR NO. 6774, RPR, CCRR, CLR
JOB NO. 2193

1 APPEARANCES:

2

3 FOR PLAINTIFFS AND INTERVENOR-APPELLANT:

4 BY: DUTTA GAUTAM, ESQ.

5

6 FOR DEFENDANT-APPELLEE:

7 BY: GEORGE MICHAEL WATERS, ESQ.

8

9 FOR INTERVENOR-DEFENDANT-APPELLEE:

10 BY: CHRISTOPHER ELLIOTT SKINNELL, ESQ.

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1 PASADENA, CALIFORNIA, WEDNESDAY, FEBRUARY 13, 2013

2 * * * * *

3 MR. DUTTA: MAY IT PLEASE THE COURT. MY NAME IS
4 GAUTAM DUTTA AND I AM COUNSEL FOR APPELLANTS
5 MICHAEL CHAMNESS, DANIEL FREDERICK, RICH WILSON AND
6 JULIUS GALACKI.

7 THIS CASE BOILS DOWN TO A SIMPLE ISSUE.
8 SENATE BILL 6 CREATED WHAT'S IN EFFECT, A SPEAKER'S
9 CORNER FOR POLITICAL CANDIDATES.

10 WHEN IT COMES TO THE BALLOT, BECAUSE OF THAT,
11 THE STATE CANNOT NOW FAVOR CERTAIN POLITICAL OPINIONS
12 OVER OTHERS.

13 AND HERE'S WHERE WE SEE THE PROBLEM THAT
14 ARISES.

15 AS THE COURT KNOWS, IF YOU SAY UNDER THIS NEW
16 SYSTEM THAT YOU AGREE WITH THE POLITICAL IDEAS OF A
17 STATE-RECOGNIZED PARTY, FOR EXAMPLE, A DEMOCRAT OR
18 REPUBLICAN, THE BALLOT WILL SAY THAT YOU PREFER THAT
19 PARTY, BUT IF YOU WANT TO SAY THAT YOU AGREE WITH THE
20 POLITICAL IDEAS OF A NONSTATE-RECOGNIZED PARTY, BE IT
21 COFFEE PARTY, TEA PARTY, REFORM PARTY, WHAT HAVE YOU, THE
22 BALLOT WILL FALSELY SAY THAT YOU HAVE NO PARTY
23 PREFERENCE.

24 BECAUSE SUCH A VIEWPOINT DISCRIMINATION
25 VIOLATES THE ELECTIONS CLAUSE, THE FIRST AMENDMENT AND

1 THE FOURTEENTH AMENDMENT, WE SEEK DECLARATORY RELIEF SO
2 THAT THE LEGISLATURE CAN FIX THE PROBLEM.

3 JUDGE BERZON: BUT MY UNDERSTANDING IS THAT ALTHOUGH
4 YOU MENTION IN PASSING THIS PROBLEM OF NOT BEING ABLE TO
5 NAME THE PARTY, THAT'S NOT WHAT YOU'RE ASKING FOR.
6 YOU'RE ASKING TO BE ABLE TO SAY INDEPENDENT?

7 MR. DUTTA: IN OUR CASE, YOUR HONOR, WE WANTED TO
8 SAY INDEPENDENT, HOWEVER, THAT WOULD NOT -- FIXING THAT
9 PROBLEM ALONE WOULD NOT FIX THE CONSTITUTIONAL PROBLEM
10 BECAUSE THIS LAW DOES NOT EVEN -- AS THE COURT KNOWS,
11 DOES NOT ALLOW YOU TO SAY INDEPENDENT, WHICH IS WHAT WE
12 ARE SEEKING; BUT THERE ARE OTHER CANDIDATES WHO MOST
13 LIKELY WILL SEEK TO STATE THE NAME OF THEIR SMALL PARTY.

14 JUDGE BERZON: THAT'S NOT THIS CASE.

15 THE JUDGE: THEY'RE NOT HERE.

16 MR. DUTTA: THEY'RE NOT HERE, BUT WE DO HAVE
17 STANDING TO RAISE THIS ISSUE BECAUSE WE ARE TALKING ABOUT
18 THE ISSUE -- THE GENERAL ISSUE OF BEING SILENCED ON THE
19 BALLOT.

20 JUDGE BERZON: DOES YOUR CLIENT WANT TO PUT ON THE
21 BALLOT OR DID HE WANT TO PUT ON THE BALLOT COFFEE PARTY?

22 MR. DUTTA: IN A FUTURE ELECTION, HE MIGHT.

23 AS YOUR HONORS KNOW, HE HAS ALREADY RUN IN TWO
24 ELECTIONS; THE STATE SENATE ELECTION, AND A CONGRESSIONAL
25 PARTY.

1 JUDGE BERZON: IT'S IMPORTANT TO ME WHICH WAY THE
2 CASE IS FRAMED, AND I UNDERSTOOD IT TO BE TOTALLY FRAMED
3 THE OTHER WAY.

4 YOU HAVEN'T MADE ARGUMENTS REALLY ABOUT THE
5 QUESTION OF WHETHER YOU CAN PUT A PARTY NAME ON AS
6 OPPOSED TO INDEPENDENT.

7 MR. DUTTA: WE HAVE MADE BOTH ARGUMENTS, YOUR HONOR.
8 IT'S PROBABLY A QUESTION OF EMPHASIS.

9 IT'S TRUE THAT WE EMPHASIZED THE INDEPENDENT
10 ANGLE ASPECT OF THE ARGUMENT; BUT IN OUR BRIEF -- I THINK
11 IN PAGES 36 TO 38 OF OUR OPENING BRIEF, WE SPOKE OF OUR
12 CLAIMS BROUGHT UNDER THE ELECTION CLAUSE AND SIMILARLY IN
13 OUR REPLY BRIEF ON PAGES, I THINK, 16 AND 17, WE AGAIN
14 REPEATED THAT WHERE BASICALLY UNDER THE ELECTIONS CLAUSE,
15 IT'S CLEAR THAT IF -- WHEN IT COMES DOWN TO STATING A
16 POLITICAL OPINION, WHICH IS WHAT THIS BALLOT IS NOW
17 REDUCED TO, ONE SHOULD NOT BE CENSORED. THAT IS, IF YOU
18 HAVE AN OPINION THAT YOU LIKE PARTY X, YOU SHOULD BE ABLE
19 TO SAY PARTY X.

20 IF YOU HAVE AN OPINION THAT YOU LIKE PARTY Y,
21 YOU SHOULD BE ABLE TO SAY PARTY Y.

22 THE JUDGE: BUT YOU CAN'T. THESE ARE NOT PARTIES.
23 I MEAN, THE TEA PARTY IS NOT A QUALIFIED PARTY.

24 THERE ARE ENOUGH PEOPLE WHO WANT TO IDENTIFY
25 THEMSELVES, AND HAVE A CERTAIN IDEOLOGICAL OUTLOOK.

1 I DON'T KNOW WHAT THE REQUIREMENTS ARE, BUT I
2 ASSUME THEY COULD BE MET, AND THEN HE COULD SAY, TEA
3 PARTY OR COFFEE PARTY.

4 I DIDN'T THINK THAT THIS CASE WAS ABOUT THAT
5 ISSUE. IN OTHER WORDS, THAT -- I DON'T THINK IT IS.

6 THE STATE HAS MADE THE BARRIERS TO BECOMING
7 QUALIFIED PARTIES, SO THAT'S NOT WHAT THIS CASE IS ABOUT,
8 IS IT?

9 MR. DUTTA: IT'S ABOUT BOTH PARTS, YOUR HONOR, THE
10 RIGHT TO SAY YOU'RE INDEPENDENT, AS WELL AS THE RIGHT TO
11 SAY WHATEVER PARTY YOU CHOOSE. ALTHOUGH, AS YOUR HONOR
12 HAS MADE IT CLEAR, THAT'S NOT SPECIFICALLY WHAT WE SOUGHT
13 IN THIS CASE.

14 BUT YOUR HONOR BRINGS UP A VERY CRITICAL
15 POINT, WHICH WILL OBVIOUSLY BE RAISED BY MY TALENTED
16 OPPOSING COUNSEL.

17 THE HEART OF THIS CASE GOES DOWN TO THE ISSUE
18 OF WHAT'S CALLED THE DISTINCTION BETWEEN QUALIFIED AND
19 NONQUALIFIED PARTIES. AND WE WOULD VIGOROUSLY ARGUE THAT
20 THIS NO LONGER APPLIES HERE UNDER THIS SYSTEM.

21 AND TO DO THAT, I -- IF YOU WOULD -- WITH THE
22 COURT'S INDULGENCE, I JUST WANT TO GO THROUGH A QUICK
23 BEFORE AND AFTER OF THE LAW BECAUSE I THINK THAT WOULD
24 BECOME VERY CLEAR.

25 BEFORE CANDIDATES GOT ON THE BALLOT IN TWO

1 DIFFERENT WAYS. IF YOU WERE PART OF A BALLOT-QUALIFIED
2 PARTY, BE IT DEMOCRAT, REPUBLICAN, WHATEVER HAVE YOU, YOU
3 WOULD RUN IN JUNE AS A MEMBER OF THAT PARTY; AND UNDER
4 THE RULES YOU HAD TO HAVE BEEN A MEMBER FOR ONE YEAR, AND
5 WHOEVER FINISHED FIRST WOULD GO ON TO THE NOVEMBER
6 GENERAL ELECTION AS THAT PARTY'S NOMINEE.

7 NOW, THAT GAVE -- THAT SYSTEM GAVE THE VOTERS
8 THE ASSURANCE THAT THIS PERSON, WHOEVER RAN IN THE MAJOR
9 PARTY, THE QUALIFIED PARTY, HAD BEEN A MEMBER FOR ONE
10 YEAR. SO THAT WAY THERE'S NO JOHNNY-COME-LATELIES.

11 NOW --

12 JUDGE BERZON: AND THEY ALSO WERE THE NOMINEE OF THE
13 PARTY.

14 MR. DUTTA: YES, THEY WERE THE NOMINEE OF THE PARTY
15 AND IN NOVEMBER THE VOTERS WOULD KNOW THAT THIS PERSON
16 WAS THE NOMINEE OF THAT PARTY.

17 SO THAT'S BEFORE.

18 NOW WE GO TO AFTER.

19 THIS APPLIES FOR ALL STATE AND FEDERAL
20 CANDIDATES EXCEPT FOR PEOPLE RUNNING FOR PRESIDENT, WHICH
21 WE'LL COME BACK TO IN A MOMENT, I'M SURE.

22 THERE -- NOW, ALL CANDIDATES GET ON THE BALLOT
23 THE SAME WAY AND AT THE SAME TIME. WE'RE TALKING ABOUT
24 IN JUNE.

25 SO BASICALLY YOU HAVE --

1 THE JUDGE: PRIMARIES?

2 MR. DUTTA: IN THE JUNE PRIMARY.

3 HERE THERE'S A FUNDAMENTAL CHANGE BECAUSE,
4 FIRST OF ALL, IN THE LABEL, IT NO LONGER SAYS, IN THIS
5 CASE, IF MY NAME IS GAUTAM DUTTA, IT WOULDN'T SAY,
6 GAUTAM DATTA, REPUBLICAN, OR THIS OR THAT; IT WOULD SAY,
7 PARTY PREFERENCE EITHER REPUBLICAN OR NO PARTY
8 PREFERENCE, AS IN THE CASE -- AS IT WAS IN MY CLIENT.

9 SO THAT'S ONE CHANGE.

10 SO THE OTHER TWO CHANGES -- AND YOUR HONORS
11 CAN SURMISE -- ARE THAT THE VOTERS NO LONGER HAVE WHAT'S
12 CALLED QUALITY CONTROL FOR PEOPLE COMING FROM THE
13 BALLOT-QUALIFIED PARTIES. THEY DO NOT KNOW HOW LONG A
14 CANDIDATE HAS BEEN A MEMBER OF THAT PARTY.

15 FOR ALL THEY KNOW, A PERSON COULD HAVE JUST
16 CHANGED HIS OR HER PARTY AFFILIATION AT THE VERY MOMENT
17 THAT HE FILED HIS PAPERS AT THE VERY LAST MINUTE.

18 AND NEEDLESS TO SAY, WHEN IT COMES TO
19 NOVEMBER, THERE ARE NO MORE PARTY ENDORSEMENTS FOR
20 CANDIDATES FOR THE NOVEMBER BALLOT AND THE SUPREME COURT
21 MADE THAT CLEAR IN GRANGE (PHONETIC), AS WELL.

22 SO THAT'S THE BIGGEST CHANGE. IT NO LONGER
23 MATTERS, WHEN IT COMES TO PURPOSES OF THIS BALLOT LABEL,
24 WHETHER OR NOT SOMEONE IS FROM A BALLOT QUALIFIED OR
25 NONBALLOT-QUALIFIED PARTY BECAUSE THAT WAS A LABEL THAT

1 DENOTED HOW SOMEONE GOT ON THE BALLOT; BUT NOW THEY ALL
2 GET ON THE BALLOT THE VERY SAME WAY.

3 AND FOR THAT REASON WE WOULD POSE IT THAT THIS
4 HAS CREATED WHAT'S BASICALLY A SPEAKER'S CORNER.

5 IN WASHINGTON STATE, WHOSE SYSTEM RECENTLY
6 CAME BEFORE THIS COURT, WHAT'S VERY NOTABLE IS THAT THAT
7 STATE'S SYSTEM DID NOT HAVE THIS PROBLEM. THEY LET EVERY
8 CANDIDATE -- THEY GAVE EVERY CANDIDATE 16 CHARACTERS TO
9 DESCRIBE THEIR PARTY PREFERENCE, AS LONG AS IT WASN'T
10 OBSCENE.

11 YOU DID NOT HAVE THAT HERE. INSTEAD, HERE, IF
12 YOU HAPPEN TO HAVE THE WRONG -- QUOTE, WRONG POLITICAL
13 OPINION, THEN YOU'RE MUZZLED. YOU'RE FORCED TO SAY YOU
14 HAVE NO PARTY PREFERENCE. THAT IS JUST FUNDAMENTALLY
15 DIFFERENT FROM A SYSTEM THAT HAD BEEN APPROVED BY THIS
16 COURT AND --

17 JUDGE BERZON: I'M REALLY HAVING PROBLEMS WITH THE
18 FACT THAT YOU'VE SWITCHED GEARS SO ENTIRELY FROM YOUR
19 ARGUMENTS IN THE SENSE THAT -- AND JUST TO LAY OUT MY
20 HAND, I FIND THE FACT THAT YOU CAN'T NAME YOUR PARTY
21 SOMEWHAT TROUBLESOME. THAT ISN'T WHAT YOU WERE ARGUING
22 ABOUT.

23 YOU WERE ARGUING ABOUT WHETHER YOU WERE
24 ALLOWED TO SAY "INDEPENDENT" VERSUS "PARTY PREFERENCE
25 NONE," AND YOU'RE NOT MAKING THAT ARGUMENT.

1 MR. DUTTA: I WILL NOW, YOUR HONOR.

2 THE JUDGE: IF I CAN FEED BACK ON THAT.

3 (INAUDIBLE) WHAT I JUST DON'T SEE SEMANTICALLY
4 THE DIFFERENCE, NUMBER ONE.

5 I'VE GOT ANOTHER QUESTION, BUT ANSWER HERS AND
6 MAYBE MINE.

7 MR. DUTTA: SO GOING TO THE INDEPENDENT ARGUMENT.
8 THIS -- IN ROSEN V. BROWN FROM THE SIXTH CIRCUIT, THE
9 COURT HELD THAT YOU CANNOT ALLOW A CANDIDATE --
10 CANDIDATES FROM BALLOT-QUALIFIED PARTIES, REPUBLICAN,
11 DEMOCRAT, WHATEVER HAVE YOU, TO STATE THEIR PARTY'S NAME
12 ON THE BALLOT WHILE BANNING CANDIDATES WHO WANT TO SAY
13 INDEPENDENT.

14 JUDGE BERZON: FROM SAYING ANYTHING?

15 MR. DUTTA: FROM SAYING ANYTHING. THEY FORCE YOU TO
16 SAY "BLANK."

17 JUDGE BERZON: THEY'RE NOT DOING THAT.

18 MR. DUTTA: SO -- BUT THEY ARE BANNING YOU FROM
19 SAYING INDEPENDENT.

20 NOW, THAT WORD IS VERY IMPORTANT. AS THE
21 MASSACHUSETTS SUPREME COURT NOTED, IT CARRIES A POSITIVE
22 ORA. IT ALSO -- IN THAT CASE YOU HAD A WORD THAT WAS
23 UNENROLLED THAT WAS STRUCK DOWN. AND THE COURT HELD THAT
24 "UNENROLLED," WHICH WE ARGUE IS VIRTUALLY IDENTICAL TO
25 "NO PARTY PREFERENCE," WAS INSUFFICIENT. IT DEPRIVED NOT

1 ONLY THE CANDIDATE OF A MEANS TO COMMUNICATE HIS OR HER
2 MESSAGE BUT --

3 JUDGE BERZON: YOU CAN SAY ANYTHING YOU WANTED TO
4 EXCEPT INDEPENDENT?

5 MR. DUTTA: THAT'S CORRECT.

6 (SIMULTANEOUS TALKING)

7 MR. DUTTA: THE THING IS YOU COULD HAVE PUT "NO
8 PARTY PREFERENCE" THERE, BUT THEY BASICALLY SAID NO.

9 THIS WORD CARRIES THAT MUCH VALUE BECAUSE
10 IN -- TO PARAPHRASE THE COURT, VOTERS WHO ARE SEEKING A
11 CANDIDATE WHO HAD, QUOTE -- WHO WAS INDEPENDENT, COULD
12 FIND NONE. IT WAS THAT IMPORTANT.

13 AND THE HOLDING THERE IS THAT UNENROLLED,
14 WHICH IS THE SAME THING WE ARGUE AS NO PARTY PREFERENCE,
15 WAS CONSTITUTIONALLY INSUFFICIENT, AND YOU HAD TO ALLOW
16 CANDIDATES TO STATE THEY'RE INDEPENDENT. SO THAT'S POINT
17 ONE ON THE DEFINITION.

18 NOW, I KNOW THAT THE OTHER SIDE MIGHT SAY THAT
19 THIS TERM MIGHT BE MISLEADING, HOWEVER, THIS IS A TERM
20 THAT'S BEEN ENJOYED BY CANDIDATES -- THAT WAS ENJOYED BY
21 CANDIDATES FROM CALIFORNIA FROM 1891 TO 2010 AND DURING
22 THAT TIME --

23 JUDGE BERZON: IT HAD A PARTICULAR MEANING THEN,
24 DIDN'T IT? THE MEANING BEING THERE WAS A PROCESS FOR
25 GETTING ON THE BALLOT, WHICH WAS BYPASSING THE PRIMARIES.

1 AND IT WAS CALLED AN INDEPENDENT PETITION. AND SO IT HAD
2 AN ASCERTAINABLE MEANING AT THAT POINT.

3 MR. DUTTA: AT THAT POINT IT DID, YES. YES,
4 YOUR HONOR. AND THERE'S ALWAYS A TENSION HERE --

5 JUDGE BERZON: BUT IT DOESN'T HAVE THAT
6 ASCERTAINABLE MEANING ANYMORE BECAUSE THERE'S NO
7 REQUIREMENT EVEN TO DO THAT.

8 MR. DUTTA: THAT'S CORRECT. EXCEPT AS WE WOULD
9 NOTICE ON THE PRESIDENTIAL SIDE, WHICH IS NOW UNTOUCHED,
10 AND MARKED CLEARLY -- WE WOULD ARGUE THAT THIS ALREADY
11 SHOWS THAT IT'S DIFFERENT. IF IT HADN'T BEEN, WHY WOULD
12 YOU HAVE TWO SEPARATE THINGS, BUT NOW IT'S VERY
13 CONFUSING.

14 IF YOU RUN FOR PRESIDENT LIKE
15 MICHAEL CHAMNESS, AND HAD MICHAEL CHAMNESS'S VALUES, YOU
16 WOULD BE ABLE TO SAY YOU'RE INDEPENDENT. BUT IF YOU'RE
17 RUNNING FOR CONGRESS, WHICH HE DID, AND HAD
18 MICHAEL CHAMNESS --

19 JUDGE BERZON: YOU WOULDN'T BE ABLE TO SAY YOU'RE
20 INDEPENDENT UNLESS YOU PASS THE CRITERIA FOR GETTING ON
21 THE BALLOT AS AN INDEPENDENT?

22 MR. DUTTA: THAT'S CORRECT.

23 JUDGE BERZON: YOU COULDN'T JUST SAY INDEPENDENT.

24 MR. DUTTA: FOR PRESIDENT, YEAH. YOU HAD THE
25 INDEPENDENT NOMINATION.

1 JUDGE BERZON: IT'S NOT THE SAME THING.

2 MR. DUTTA: IT'S NOT THE SAME THING, BUT YOU ALWAYS
3 LOOK AT THINGS FROM THE PERSPECTIVE OF THE VOTER.

4 LET'S GO BACK TO BACHRACH (PHONETIC) IN THAT
5 MASSACHUSETTS SUPREME COURT CASE. THERE, ONE COULD
6 DEFINITELY ARGUE THAT UNENROLLED IS TECHNICALLY ACCURATE.
7 THAT SOMEONE WAS, QUOTE, ENROLLED WITH A BALLOT-QUALIFIED
8 PARTY. BUT THE STATE SUPREME COURT THERE SAID THAT WAS
9 NOT ENOUGH BECAUSE, TO PARAPHRASE JUSTICE RINQUIST
10 (PHONETIC) AND ROBERTSON AND JUSTICE SALIDO, THE BALLOT
11 IS THE LAST THING THE VOTERS SEE BEFORE THEY MAKE THEIR
12 CHOICE.

13 THIS IS REALLY IMPORTANT REAL ESTATE. AND
14 THIS IS A REAL ESTATE THAT STATEMENT HAS A MONOPOLY OVER
15 IT. SO WHEN -- WHAT A VOTER SEES RIGHT BEFORE HE OR SHE
16 VOTES IS CRITICAL. THAT'S WHY, EVEN IF SOMETHING IS
17 TECHNICALLY ACCURATE, IF IT'S SOMETHING THAT WOULD
18 MISLEAD THE VOTERS, THEN IT'S SOMETHING --

19 JUDGE BERZON: THE ONLY POSSIBLE ARGUMENT AS TO WHY
20 IT MISLEADS THE VOTERS IS THAT WHEN YOU SAY -- THE
21 CURRENT VERSION IS "PARTY PREFERENCE NONE," RIGHT?

22 MR. DUTTA: YES.

23 JUDGE BERZON: (INAUDIBLE) AND THE ONLY POSSIBLY
24 MISLEADING THING ABOUT IT IS THAT THE PERSON MIGHT THINK,
25 IF THEY DIDN'T KNOW THAT "PARTIES" MEANT QUALIFIED

1 PARTIES, THEY MIGHT THINK YOU DIDN'T HAVE ANY PARTY?

2 MR. DUTTA: YES.

3 JUDGE BERZON: BUT THAT -- DOESN'T THAT RUN RIGHT
4 INTO THE MORE RECENT SUPREME COURT CASES THAT SAY THAT
5 YOU JUST DON'T ASSUME THAT KIND OF IGNORANCE IN THE
6 VOTERS?

7 THE VOTERS, SINCE -- IN FACT, IT DOESN'T MEAN
8 THAT. IT MEANS NO QUALIFIED PARTY. AND THAT YOU CAN
9 ASSUME THAT'S WHAT THE -- AND YOU COULD EXPLAIN IN
10 WHATEVER WAY YOU WANT TO THE VOTERS THAT THAT'S WHAT IT
11 MEANS.

12 MR. DUTTA: WELL, ON TWO THOUGHTS, YOUR HONOR. ONE
13 IS THAT WE BELIEVE THAT IT'S BEEN ENSHRINED NOT ONLY BY
14 THE SIXTH CIRCUIT AND -- WELL, OKAY, WE GO INTO THE
15 DEFINITION OF THE WORD.

16 WE BELIEVE, LOOKING AT BACHRACH CASE -- THE
17 BACHRACH CASE, THAT FINALLY IT'S BEEN ESTABLISHED THAT
18 "INDEPENDENT" CARRIES -- HAS A VERY UNIQUE VALUE THAT HAS
19 BEEN PROVEN IN AMERICAN POLITICS; SO THAT'S POINT ONE.

20 JUDGE BERZON: WHICH ACTUALLY IS INACCURATE, IN A
21 SENSE, BECAUSE HE IS AN INDEPENDENT. HE'S A MEMBER OF
22 THE COFFEE PARTY.

23 MR. DUTTA: WELL, IT'S A DEFUSE WORD, AND THAT'S HOW
24 HE FELT COMFORTABLE DESCRIBING HIMSELF. SO NO ONE IS
25 ABLE TO SPECIALLY DEFINE WHAT INDEPENDENT MEANS, BUT WHAT

1 PEOPLE DO KNOW IS IT SOUNDS GOOD TO VOTERS AND IT'S
2 ATTRACTIVE IN THAT SENSE.

3 THE JUDGE: I DON'T UNDERSTAND WHY THE WORD
4 "INDEPENDENT" IS SO SPECIAL. WHY COULDN'T I INSIST -- IF
5 I'M TRULY NOT A MEMBER OF ANY PARTY, WHY COULDN'T I SAY,
6 I WANT TO SAY NEXT TO MY NAME "BEHOLDEN TO NO PARTY," WHY
7 DON'T I GET TO SAY THAT?

8 MR. DUTTA: WE FULLY RECOGNIZE THE STATE HAS AN
9 INTEREST IN REGULATING AND INTRODUCING SOME ORDER TO THE
10 PROCESS.

11 THE JUDGE: WHAT'S SO SPECIAL ABOUT THE WORD
12 "INDEPENDENT"? IF YOU SAY YOU CAN INSIST UPON THE LABEL
13 "INDEPENDENT" BEING PLACED NEXT TO YOUR CLIENT'S NAME,
14 WHAT'S THE LINE THAT STOPS IT FROM SAYING, OKAY, WELL,
15 ACTUALLY, I'D LIKE SOMETHING DIFFERENT BECAUSE IT GIVES
16 IT A MORE POSITIVE CONNOTATION TO MY CANDIDATE.

17 MR. DUTTA: WELL, WE WOULD SAY THAT -- I WANT TO
18 MAKE ONE THING VERY CLEAR. UNDER THE OLD SYSTEM WE WOULD
19 COMPLETELY AGREE THAT THERE ARE LIMITATIONS BECAUSE THERE
20 WE WOULD COMPLETELY AGREE THAT YOU COULD SAY -- SOMEONE
21 COULD SAY, IN LINE WITH LIBERTARIAN PARTY TO YOU, THAT
22 YOU COULD EITHER SAY THAT YOU'RE PART OF A
23 BALLOT-QUALIFIED PARTY, OR IF YOU'VE BEEN -- IF YOU
24 QUALIFIED FOR THE BALLOT BY THE INDEPENDENT PROCESS, THAT
25 YOU'RE INDEPENDENT.

1 WE WOULD AGREE THAT THAT'S CONSTITUTIONAL
2 (INAUDIBLE).

3 THE JUDGE: IN THIS NEW SYSTEM, ALL BETS ARE OFF. I
4 CAN INSIST UPON WHATEVER LABEL THAT I THINK IS MOST
5 POSITIVE FOR MY CANDIDACY ON THE BALLOT.

6 MR. DUTTA: BUT THE STATE CAN POSE SOME LIMITATIONS
7 ON IT. FOR EXAMPLE, AS IN WASHINGTON, THEY HAVE A SPACE
8 LIMITATION. IT COULDN'T BE OBSCENE. THIS IS NOT A
9 FREEHANDING RIGHT, BUT IT CAN BE REASONABLY REGULATED.

10 THE JUDGE: BEYOND THAT, YOU'RE SAYING THERE ARE NO
11 LIMITS ON THE LABEL I CAN INSIST THE STATE PUT NEXT TO MY
12 NAME ON THE BALLOT?

13 MR. DUTTA: BECAUSE OF THE WAY THEY'VE CHANGED THE
14 SYSTEM, THAT'S CORRECT. NOW WE'RE TALKING ABOUT
15 POLITICAL OPINION, WHICH WAS NOTED BY THE JUSTICES IN
16 DOE V. REED, IN THE CASE OF FIRST AMENDMENT RIGHTS. IT'S
17 NO LONGER A QUESTION OF WHETHER YOU'RE A QUOTE, BONA FIDE
18 MEMBER OF A QUALIFIED PARTY. HERE IT'S JUST A QUESTION
19 OF WHAT YOU'RE SAYING YOU BELIEVE IN. WHETHER OR NOT YOU
20 REALLY SINCERELY BELIEVE IT OR NOT, IT'S IRRELEVANT.

21 THE JUDGE: WE'VE HELD SQUARELY, AND MAYBE THE
22 SUPREME COURT AS WELL, THAT THE BALLOT IS NOT A PUBLIC
23 FORUM. YOU DON'T GET TO ENGAGE IN CAMPAIGN EXPRESSIVE
24 ACTIVITY. THAT'S NOT WHAT IT'S FOR.

25 MR. DUTTA: IT DEPENDS ON WHAT THE FORM OF THE

1 BALLOT IS. WHAT WE ARE ARGUING HERE IS THAT BECAUSE OF
2 THIS NEW FORM OF THE BALLOT, THAT YOU ARE NOW
3 CONSTITUTIONALLY REQUIRED TO ALLOW FOR MORE EXPRESSION.

4 AS THE COURT NOTED IN -- THE SIXTH CIRCUIT
5 NOTED IN ROSEN AND IT'S BEEN NOTED IN ANDERSON AND, I
6 GUESS, OTHER CASES, ONCE YOU OPEN UP THE BALLOT TO
7 CONTENT AND THE STATE MANIPULATES THE CONTENT OF A
8 BALLOT, IT'S HEMMED IN BY REQUIREMENT.

9 JUDGE BERZON: ISN'T THE CALIFORNIA APPROACH AN
10 ATTEMPT TO REGULATE TO THE CONTENT OF THE BALLOT AS
11 LITTLE AS POSSIBLE BY SPECIFYING A VERY MECHANICAL
12 STATEMENT?

13 IN OTHER WORDS, IT'S PARTY PREFERENCE, COLON,
14 AND YOU HAVE A CHOICE OF SIX. IF YOU DON'T CHOOSE ANY OF
15 THE SIX, THE ANSWER IS NO.

16 AND THAT'S REALLY THE LEAST AMOUNT OF
17 REGULATION IN A WAY, BECAUSE YOU'RE SAYING YOU CAN ONLY
18 CONVEY ONE PIECE OF INFORMATION, I.E., WHICH OF THE SIX
19 PARTIES DO YOU PREFER. AND IF YOU DON'T PREFER ANY OF
20 THEM, THEN IT'S NO. THAT WAY YOU'RE NOT SKEWING THE DEAL
21 AT ALL, AS LONG AS YOU ARE GOING TO ASSUME THAT PEOPLE
22 ADEQUATELY UNDERSTAND THAT "NO" DOESN'T MEAN NO PARTY, IT
23 MEANS NONE OF THE QUALIFIED PARTIES.

24 MR. DUTTA: THAT'S, I THINK, WHERE THE DIFFERENCE
25 LIES.

1 YES, WE'RE AWARE OF THE CASE LAW THAT SAYS
2 THAT ONE ASSUMES A WELL-INFORMED VOTER.

3 WHAT WE NOTE, THOUGH, EVEN THOUGH WE BELIEVE
4 THAT UNDER GRAYLICH (PHONETIC) AND OTHER CASES, WE HAD NO
5 OBLIGATION TO PROVIDE EVIDENCE.

6 THERE WAS AN ARTICLE IN THE VENICE ARGONAUT,
7 LOCALLY HERE, THAT NOTED THAT MY CLIENT HAD, QUOTE,
8 REFUSED TO DIVULGE WHAT HIS POLITICAL BELIEFS WERE. IT'S
9 JUST ONE ARTICLE BY A REPORTER, BUT USUALLY ONE PUTS SOME
10 THOUGHT INTO IT. AND MORE THOUGHT, I WOULD ARGUE, THAN
11 SOMEONE WHO IS LOOKING AT THE BALLOT OR ABSENTEE BALLOT
12 RIGHT BEFORE VOTING.

13 JUDGE BERZON: CAN I ASK A SEPARATE QUESTION?

14 THERE ARE A BUNCH OF INTERVENTION ISSUES BEING
15 RAISED HERE. I AM OF THE VIEW THAT THEY DON'T MATTER; IS
16 THAT CORRECT?

17 MR. DUTTA: WELL, WE ARE OF THE VIEW THAT THEY DO
18 MATTER, BUT IF THE COURT --

19 JUDGE BERZON: I GUESS WHAT I WANT TO KNOW IS, THE
20 FACT THAT YOU DIDN'T ARGUE THEM, IT SEEMS TO ME TO
21 CONFIRM MY IMPRESSION THAT YOU EITHER WIN THE CASE OR
22 LOSE THE CASE, AND WHETHER THESE OTHER PEOPLE ARE PART OF
23 IT DOESN'T MAKE ANY DIFFERENCE.

24 MR. DUTTA: IN THAT SENSE, YES, WE DO BELIEVE THAT
25 THEY DID NOT HAVE A MANDATORY RIGHT TO ENTER INTO THIS

1 CASE, BUT OBVIOUSLY WE WANT TO FOCUS ON WINNING OUR CASE.

2 JUDGE BERZON: THAT'S ALSO TRUE WITH REGARD TO THE
3 OTHER PERSON, THAT YOU WEREN'T --

4 MR. DUTTA: MR. GALACKI?

5 JUDGE BERZON: YES. TO BOTH SIDES THAT IT DOESN'T
6 MATTER WHETHER THESE PEOPLE ARE IN OR OUT?

7 MR. DUTTA: YES, THAT'S CORRECT, YOUR HONOR.

8 WITH RESPECT TO THE INTERVENTION OF RIGHT, WE
9 BELIEVE THERE'S AN IMPORTANT POINT THERE, BUT AGAIN, I
10 WANT TO TAKE UP MORE OF OUR TIME --

11 JUDGE BERZON: AND FINALLY, THE FACT THAT YOU DIDN'T
12 ARGUE THE BALLOT COUNTING, SEEMS TO ME TO BE THE BETTER
13 PART OF VALOR BECAUSE THEY CHANGED THE LAW, NOT THE CASE,
14 BUT THEY CHANGED THE LAW.

15 MR. DUTTA: THE LAW CHANGED AND SUBSEQUENTLY THE TWO
16 STATES, ARIZONA AND ALASKA, THAT HAD BEEN CONSIDERING THE
17 TOP TWO SYSTEMS, HAD DECIDED NOT TO PURSUE IT.

18 WE ARE NOT -- JUST TO BE VERY CLEAR, WE ARE
19 NOT PURSUING THAT.

20 JUDGE BERZON: THANK YOU VERY MUCH.

21 MR. DUTTA: AND IF I COULD RESERVE TIME ON REBUTTAL.
22 THANK YOU.

23 MR. WATERS: GOOD MORNING. MAY IT PLEASE THE COURT,
24 GEORGE WATERS, DEPUTY ATTORNEY GENERAL FOR CALIFORNIA
25 SECRETARY OF STATE DEBRA BOWEN.

1 THE JUDGE: CAN I ASK YOU TO CLARIFY JUST ONE TINY
2 THING BEFORE WE GET INTO YOUR PRESENTATION?

3 MR. WATERS: ABSOLUTELY.

4 THE JUDGE: UNDER THE NEW, REVISED STATUTE, ARE YOU
5 NOW REQUIRED TO STATE "PARTY PREFERENCE NONE," OR CAN YOU
6 STILL LEAVE IT BLANK?

7 MR. WATERS: YOU HAVE TWO OPTIONS. YOU CAN SAY
8 "PARTY PREFERENCE NONE" OR "PARTY PREFERENCE DEMOCRATIC."
9 THOSE ARE THE TWO OPTIONS.

10 THE JUDGE: CAN YOU LEAVE IT BLANK?

11 MR. WATERS: NO.

12 THE JUDGE: THAT OPTION HAS BEEN ELIMINATED?

13 MR. WATERS: CORRECT.

14 JUDGE BERZON: THIS IS COMPLETELY AN ADMINISTRATIVE
15 QUESTION. HOW ARE YOU DIVIDING THE TIME?

16 MR. WATERS: DIVIDING IT 15/5. 15 HERE, 5 THERE.
17 THAT COULD VARY DEPENDING. MAXIMUM 15 FOR ME,
18 YOUR HONOR.

19 I WANT TO BEGIN WITH THE POINT THAT CAME UP
20 DURING THE APPELLANT'S ARGUMENT HERE, AND THAT WAS WHAT
21 APPELLANT WAS SEEKING IN THIS CASE.

22 UP UNTIL NOW APPELLANT HAS BEEN SEEKING TO
23 APPEAR ON THE BALLOT AS AN INDEPENDENT. THAT IS IN
24 PARAGRAPH 1 OF THE INTRODUCTION OF THEIR APPELLANT BRIEF.
25 THAT WAS THE COURSE OF THE PROCEEDINGS IN THE TRIAL

1 COURT. AND THAT IS HOW WE HAVE PREPARED OUR OPPOSITION
2 BRIEF.

3 UP UNTIL NOW THE CLAIM HAS BEEN A CLAIM TO
4 APPEAR AS INDEPENDENT AS OPPOSED TO NO PARTY PREFERENCE,
5 AND I'M GOING TO ADDRESS MY COMMENTS TO THAT.

6 I THINK, TO GO A LITTLE BIT FURTHER WITH THE
7 APPELLANT'S CLAIM, UP UNTIL NOW, I NOTE THE COURT IS VERY
8 FAMILIAR WITH THE FIRST AMENDMENT AND ITS INTERACTION
9 WITH ELECTIONS, BUT I DO WANT TO STRESS AT THE OUTSET
10 THAT THE SUPREME COURT HAS MADE CLEAR THAT THERE HAS TO
11 BE CONSIDERABLE REGULATION OF ELECTIONS OTHER -- TO
12 PREVENT CHAOS. THIS IS ONE OF THOSE MEASURES.

13 PLAINTIFF'S PRESENTATION -- THE APPELLANT'S PRESENTATION
14 SO FAR HAS BEEN PURELY AS A MATTER OF LAW.

15 ON PAGE 22 OF THEIR APPELLANT'S BRIEF, THEY
16 HAVE THIS STATEMENT, "PLAINTIFF CHAMNESS DOES NOT NEED TO
17 PRODUCE ANY EVIDENCE TO PREVAIL, FOR BANNING THE BALLOT
18 LABEL OF INDEPENDENT IMPOSES A SEVERE BURDEN AS A MATTER
19 OF LAW."

20 I JUST WANT TO CLARIFY THAT. THAT IS HOW THE
21 CASE HAS BEEN TRIED UP UNTIL NOW. I THINK THE ISSUE
22 BEFORE THE COURT IS, IS THAT STATEMENT TRUE.

23 AS A MATTER OF LAW IS THE TERM "INDEPENDENT"
24 PEJORATIVE, DECEPTIVE OR ANYTHING ELSE? AND I JUST HAVE
25 TO SAY, THERE IS NO EVIDENCE IN THE RECORD ON THAT.

1 PLAINTIFF HAS OFFERED NONE.

2 THE JUDGE: YOU SAID THE TERM "INDEPENDENT," YOU
3 MEAN "NO PARTY PREFERENCE"?

4 MR. WATERS: NO PARTY PREFERENCE -- WELL, NO. YES.
5 PARDON ME. YES. NO PARTY PREFERENCE.

6 APPELLANT HAS NOT ADDRESSED THAT ISSUE. IT
7 HAS NOT GONE DOWN THAT PATH.

8 THE WHOLE QUESTION IS, AS A MATTER OF LAW IS
9 THAT PEJORATIVE, DECEPTIVE OR FOR SOME OTHER REASON
10 CONSTITUTIONALLY --

11 (SIMULTANEOUS TALKING)

12 JUDGE BERZON: I GATHER THEIR BEST SHOT AT AN
13 ARGUMENT IS IT'S INACCURATE. TO MAKE THEM SAY THAT THEY
14 HAVE NO PARTY PREFERENCE WHEN THEY DO HAVE PARTY
15 PREFERENCE, I DON'T KNOW EXACTLY HOW "INDEPENDENT" HELPS.
16 I GUESS THE ARGUMENT WOULD BE THAT "INDEPENDENT" MEANS
17 INDEPENDENT OF THE OTHER PARTIES; BUT "NO PARTY
18 PREFERENCE" MEANS THEY DON'T HAVE ANY PARTY PREFERENCE.

19 MR. WATERS: YES.

20 AND I THINK -- ACTUALLY, I'M GOING TO GO DOWN
21 THE SAME PATH THAT YOU HAVE ALREADY ARTICULATED HERE.

22 IN CALIFORNIA, CALIFORNIA HAS REGULATED
23 PARTIES FOR YEARS, AND THERE ARE BALLOT-QUALIFIED
24 PARTIES --

25 JUDGE BERZON: I WANTED TO TELL YOU THAT ONCE YOU

1 START GOING DOWN THAT LINE, I START TO HAVE PROBLEMS.
2 BECAUSE I READ THE LIBERTARIAN PARTY, WHICH IS YOUR
3 BEDROCK CASE, VERY CAREFULLY, AND IT IS -- THE REASONS IT
4 GIVES FOR DOING THIS, ALMOST ALL HAVE TO DO WITH THE FACT
5 THAT THE REPRESENTATION ON THE GENERAL BALLOT IS THAT
6 THIS IS THE CANDIDATE OF THAT PARTY, AND THAT THEY'RE
7 ENTITLED TO LIMIT THE NUMBER OF PARTIES THAT MAKE THAT
8 REPRESENTATION TO THE ONES THAT ACTUALLY HAD A NOMINATION
9 PROCESS AND DID NOMINATE PARTIES, AND FOR THE LIBERTARIAN
10 PARTY TO BE COMING IN AFTER GOING THROUGH AN INDEPENDENT
11 PROCESS, WHICH WAS NOT AT THE BEHEST OF THE LIBERTARIAN
12 PARTY, AND THEN TO SAY THIS IS THE LIBERTARIAN PARTY,
13 THEY SAY -- IT JUST IS COMPLETELY INCONSISTENT WITH OUR
14 WHOLE SYSTEM.

15 WITH THE NEW SYSTEM, I THINK ALL THE ARGUMENTS
16 IN FAVOR OF HAVING THE QUALIFIED PARTIES, AT LEAST HAVE
17 TO BE VERY DIFFERENT, AND THEY CERTAINLY CAN'T REST ON
18 THE CONCLUSION ON THE LIBERTARIAN PARTY OR ON THE
19 CONFUSION ISSUES.

20 SO I THINK YOU'VE GOT A PROBLEM. I JUST DON'T
21 KNOW THAT IT'S THIS PROBLEM.

22 MR. WATERS: IT'S NOT THIS PROBLEM. BUT TO GO
23 BEYOND THIS PROBLEM AND TO ADDRESS THE CONCERN THE COURT
24 JUST ARTICULATED, I WANT TO STRESS THAT CALIFORNIA MAKES
25 IT EASY FOR A PARTY TO BECOME BALLOT QUALIFIED. YOU NEED

1 1 PERCENT REGISTRATION OF THE VOTE AT THE PREVIOUS
2 GUBERNATORIAL ELECTION.

3 ON THE SCHEME OF THINGS AMONG STATES, THIS IS
4 AT THE EASY SIDE OF THE SPECTRUM AND CALIFORNIA HAS A
5 LONG HISTORY THAT -- THERE WERE SIX -- AT THE TIME THIS
6 CASE WAS FILED, THERE WERE SIX BALLOT-QUALIFIED PARTIES;
7 THERE ARE NOW SEVEN.

8 JUDGE BERZON: BUT THEY'RE NOT NOMINATING ANYBODY
9 NOW.

10 MR. WATERS: THEY'RE NOT. BUT WHAT I'M SAYING HERE
11 IS TWO THINGS, THE BURDEN FOR THEM TO BE ABLE TO ASSERT
12 THEIR NAME ON THE BALLOT IS LOW. AND SECONDLY, IN ONE
13 SENSE THEY ARE NOMINATING. THEY DO NOMINATE FOR
14 PRESIDENT.

15 THERE'S A WHOLE DIFFERENT SYSTEM FOR PRESIDENT
16 BECAUSE AFTER CALIFORNIA NOMINATES ITS PRESIDENTIAL
17 CANDIDATES, THEY GO OFF TO WHAT IS ESSENTIALLY A PRIVATE
18 EVENT, WHICH IS A PARTY CONVENTION AT WHICH THE PARTIES
19 IN THEIR PRIVATE CAPACITY THEN TAKE THE INPUT FROM
20 CALIFORNIA AND ELSEWHERE, NOMINATE WHOEVER THEY WANT, AND
21 THEN THEY SEND IT BACK TO CALIFORNIA AND CALIFORNIA PUTS
22 THAT NAME ON THE BALLOT.

23 THERE ARE STILL INDEPENDENT NOMINATIONS FOR
24 PRESIDENT, AND THERE IS STILL THE ENTIRE PARTY APPARATUS,
25 PARTY QUALIFICATION STATUS FOR PRESIDENTIAL ELECTION, AND

1 ALSO FOR PARTY CENTRAL --

2 THE JUDGE: AND I ASSUME THE ART SIGNS AND THE
3 ADVERTISEMENTS INDICATE WHETHER YOU ARE THE ENDORSED
4 REPUBLICAN, RATHER THAN SIMPLY SOMEBODY WHO --

5 MR. WATERS: YES.

6 THE JUDGE: -- CONSIDERS THEMSELF TO BE --

7 MR. WATERS: I WOULD ASSUME. IF I WERE AN ENDORSED
8 REPUBLICAN, I WOULD -- AND I THOUGHT THEY HATED ME, I
9 WOULD CERTAINLY --

10 JUDGE BERZON: BUT THAT DOES NOT APPEAR IN THE
11 BALLOT?

12 MR. WATERS: NO. WHAT APPEARS IN THE BALLOT IS
13 JUST -- WOULD BE DEMOCRATIC OR REPUBLICAN. IT'S NOT
14 ENDORSED BY. I MEAN, YOU ARE -- THE PRESIDENTIAL SYSTEM
15 IS ENTIRELY SEPARATE FROM THIS TOP-TWO PRIMARY SYSTEM.

16 JUDGE BERZON: FOR THE TOP-TWO PRIMARY SYSTEM,
17 THERE'S NO ENDORSEMENT THAT APPEARS ON THE BALLOT?

18 MR. WATERS: NO, NONE. CORRECT.

19 THE POINT IS IN TERMS OF INFORMING THE VOTER
20 WHO THE, QUOTE, REAL REPUBLICAN IS.

21 THE JUDGE: I WOULD ASSUME THAT MAYBE IT HAS NOTHING
22 TO DO WITH THIS CASE, BUT THERE'S PLENTY OF OTHER
23 ALTERNATIVES FOR VOTERS TO FIND OUT JUST WHAT SOMEBODY
24 BELIEVES AND WHETHER THAT --

25 MR. WATERS: YES. THERE ARE SLATE MAILERS. THERE'S

1 A CAMPAIGN. THERE IS ALL THAT. EVERYTHING THAT YOU AND
2 I SEE ON TV AND ELSEWHERE, YES. THERE'S NO LIMITATION
3 WHATSOEVER.

4 JUDGE BERZON: I READ SOMETHING IN THE BRIEFS OR THE
5 RECORD THAT SUGGESTED THAT IN ADDITION TO THE QUALIFIED
6 PARTIES, THERE ARE SOME SORT OF A REGISTRATION SYSTEM
7 WHERE PARTIES CAN REGISTER TO SORT OF BE
8 CANDIDATE-QUALIFIED PARTIES; IS THAT RIGHT?

9 MR. WATERS: WELL, YES, THERE'S SIX --

10 (SIMULTANEOUS TALKING)

11 MR. WATERS: I BELIEVE THERE ARE NOW SIX. LET'S
12 JUST ASSUME FOR THE MOMENT THAT THERE ARE SEVEN QUALIFIED
13 PARTIES. TO BECOME A QUALIFIED PARTY, YOU FILE PAPERS
14 WITH THE SECRETARY OF STATE AND YOU BECOME A POLITICAL
15 ORGANIZATION. AND THAT JUST TELLS THE SECRETARY OF STATE
16 THAT YOU ARE IN THE PROCESS OF SOLICITING, I THINK, ONE
17 OF TWO THINGS. ONE WOULD BE REGISTRATIONS IN YOUR
18 POLITICAL ORGANIZATION OF AT LEAST 1 PERCENT OF THE TOTAL
19 NUMBER OF VOTE AT THE LAST GUBERNATORIAL ELECTION, AND IF
20 YOU REACH THAT POINT, THEN YOU BECOME A PARTY.

21 OR YOU CAN ALSO DO -- I THINK IT'S 10 PERCENT
22 OF THE VOTERS AT THE LAST GUBERNATORIAL ELECTION. THEY
23 DON'T HAVE TO ENROLL IN YOUR PARTY OR REGISTER WITH IT,
24 BUT IF THEY SIGN SOME KIND OF DECLARATION SUPPORTING YOU,
25 AND YOU COME UP WITH 10 PERCENT OF THAT, THEN YOU BECOME

1 A PARTY THAT WAY.

2 SO THERE ARE 13 OF THESE ORGANIZATIONS THAT
3 ARE -- AT THE TIME THE BRIEFS WERE WRITTEN, WERE SEEKING
4 TO ACHIEVE PARTY STATUS, CORRECT, AND THEY'RE CALLED
5 POLITICAL ORGANIZATIONS.

6 JUDGE BERZON: THERE'S SOME SORT OF EVIDENCE OF THEM
7 IN THE ROLES OF THE GOVERNMENT. AND ARE THERE -- IS IT
8 COUNTED HOW MANY PEOPLE VOTE FOR THEM OR ONLY LATER?

9 MR. WATERS: NO. NO. IT'S NOT COUNTED HOW MANY
10 PEOPLE -- THE INFORMATION IS AVAILABLE ON THE SECRETARY
11 OF STATE'S WEBSITE. YOU WILL FIND THE LIST OF ENTITIES
12 SEEKING TO BECOME PARTIES.

13 BUT NO, VOTES WOULD NOT COUNT. AND THEY'RE
14 NOT TABULATED. WHAT -- THEY QUALIFIED BY DOING VOTER
15 REGISTRATIONS OR SOME SORT OF DECLARATION ALSO.

16 JUDGE BERZON: HERE'S ANOTHER QUESTION I WONDERED
17 ABOUT.

18 I GATHER THAT ONE -- FROM WHAT I COULD TELL,
19 THE ONE CONCRETE DIFFERENCE THAT IS AT ALL RELEVANT TO
20 THIS CASE BETWEEN QUALIFIED AND NOT QUALIFIED PARTIES,
21 OTHER THAN HOW THEY HAVE TO SHOW UP ON THE BALLOT, IS
22 THAT PEOPLE REGISTER AS -- CAN REGISTER AS ONE OF THE
23 QUALIFIED PARTIES?

24 MR. WATERS: CORRECT.

25 JUDGE BERZON: AND IN ORDER TO PUT THEIR NAMES ON

1 THE BALLOT, THEY HAVE TO BE REGISTERED FOR ONE OF THOSE
2 QUALIFIED PARTIES?

3 MR. WATERS: CORRECT.

4 JUDGE BERZON: DID ANYBODY CHECK THAT?

5 MR. WATERS: WHETHER THEY'RE ACTUALLY REGISTERED,
6 YES, INDEED. THAT'S PART OF WHAT PROP 14 SB 6 DID IS IT
7 ALLOWS, IN THEORY, A CANDIDATE TO -- THE DAY BEFORE THEY
8 FILE THEIR NOMINATION PAPERS, TO CHANGE THEIR PARTY
9 REGISTRATION.

10 YOU COULD BECOME A REPUBLICAN, DEMOCRAT,
11 WHATEVER.

12 SO YOU DO FILE THOSE PAPERS WITH THE SECRETARY
13 OF STATE, AND IT IS THEN PUBLIC.

14 JUST TO DEAL WITH AN ISSUE ABOUT WHETHER THAT
15 MIGHT BE PULLING THE WOOL OVER PEOPLE'S EYES, THIS IS ALL
16 PUBLIC. PEOPLE KNOW WHAT A CANDIDATE HAS BEEN
17 REGISTERED, OR THE PARTY THEY'VE BEEN REGISTERED WITH FOR
18 EITHER THE LAST FIVE OR TEN YEARS.

19 IF A CANDIDATE WERE TO, AT THE MOMENT BEFORE
20 THEY FILED THEIR NOMINATION PAPERS, CHANGE FROM ONE PARTY
21 TO ANOTHER, I THINK WE HAVE TO ASSUME THAT THAT WOULD
22 BECOME AN ISSUE IN THE CAMPAIGN. IT'S PUBLIC. IT'S ON
23 THE SECRETARY OF STATE'S WEBSITE.

24 THE SECRETARY OF STATE COULDN'T DO ANYTHING
25 AFTER THAT, BUT IN CASE THE PRESS OR ANYONE ELSE WANTED

1 TO MAKE AN ISSUE OF THAT, OR THE OPPONENT WANTED TO MAKE
2 AN ISSUE OUT OF THAT, THE AMMUNITION IS THERE.

3 THE JUDGE: ASK YOU ABOUT A DIFFERENT ISSUE BECAUSE
4 -- PUT ASIDE THE PLAINTIFF'S INSISTENCE THAT HE GETS TO
5 PUT THE LABEL "INDEPENDENT" ON THE BALLOT. PUT THAT
6 ASIDE.

7 I AM TROUBLED BY THE COMPELLED SPEECH NATURE
8 OF BEING FORCED WITH NO OTHER OPTION TO HAVE THIS "PARTY
9 PREFERENCE NONE" LABEL AFFIXED THERE. IT SEEMS TO ME
10 THERE'S A REAL DISTINCTION IN THE CASE LAW, AT LEAST THAT
11 WE HAVE UP UNTIL NOW, BETWEEN TELLING A CANDIDATE, YOU
12 ARE FORBIDDEN TO PLACE YOUR PREFERRED LABEL ON OUR BALLOT
13 VERSUS FORCING THEM AGAINST THEIR WILL TO HAVE SOME
14 MESSAGE ATTACHED TO THEIR NAME.

15 AND THAT'S WHY I ASKED IF LEAVING THE SPACE
16 BLANK IS STILL AN OPTION. AND WHEN YOU SAID NO, THAT
17 REALLY GIVES ME A LOT OF CONCERN, BECAUSE I FIND THAT
18 PARTICULAR LABEL -- IT IS MISLEADING. IT'S MISLEADING
19 EVEN TO SOMEBODY LIKE ME. I'VE LIVED IN CALIFORNIA ALL
20 MY LIFE. I WASN'T AWARE OF THE DISTINCTION BETWEEN THIS
21 "QUALIFIED PARTY" AND "NONQUALIFIED PARTY" THING UNTIL WE
22 GOT INTO THE BRIEFS IN THIS CASE.

23 I GUESS I'D LIKE TO HEAR WHAT THE STATE'S
24 INTEREST IN -- EVEN UNDER THE RELAXED, NONSCRUTINY
25 STANDARD WE APPLY, THE STATE STILL HAS TO HAVE SOME

1 LEGITIMATE INTEREST IN FORCING THIS LABEL ONTO AN
2 UNWILLING CANDIDATE, AND I HAVEN'T SEEN WHAT THAT
3 INTEREST IS YET.

4 MR. WATERS: INDEED, YOUR HONOR. I DO THINK --
5 THERE MIGHT BE A DISAGREEMENT AT THE END OF THE DAY ON
6 THIS, BUT I DO THINK THAT THE TERM "PARTY" IN CALIFORNIA
7 HAS A MEANING. IT IS ONE OF THE PARTIES THAT IS
8 STATE-RECOGNIZED AND APPEARS ON THE BALLOT IN WHICH
9 PEOPLE HAVE BEEN EXPOSED TO SINCE FOREVER.

10 I MEAN, I THINK THIS IS AN ISSUE NOT RAISED
11 HERE, BUT I MEAN, IF PEOPLE -- I MEAN, I DON'T KNOW. I
12 DON'T KNOW WHETHER ANYBODY KNOWS WHETHER THERE IS A
13 COFFEE PARTY. I'VE BEEN CITED TO A WEBSITE. I MEAN --

14 JUDGE BERZON: THERE ARE 13 ORGANIZATIONS THAT THE
15 STATE KNOWS ABOUT THAT YOU CAN'T PUT ON THE BALLOT.

16 MR. WATERS: SAY THAT AGAIN, YOUR HONOR.

17 JUDGE BERZON: THERE ARE 13 ORGANIZATIONS THAT THE
18 STATE KNOWS ABOUT THAT --

19 (SIMULTANEOUS TALKING)

20 MR. WATERS: ABSOLUTELY.

21 JUDGE BERZON: COFFEE PARTY IS ONE OF THEM.

22 MR. WATERS: COFFEE PARTY IS NOT ONE OF THEM.

23 JUDGE BERZON: BUT THERE ARE 13, AND YOU CAN'T PUT
24 THEM ON THE BALLOT. THEY'RE NOT HERE. AND ALSO NOT HERE
25 IS ANYBODY WHO WANTS TO PUT NOTHING ON THEIR NAME.

1 MR. WATERS: CORRECT.

2 JUDGE BERZON: ALL RIGHT.

3 THE JUDGE: I'D ACTUALLY LIKE AN ANSWER TO MY
4 QUESTION, THOUGH.

5 WHAT'S THE STATE'S INTEREST IN COMPELLING A
6 CANDIDATE TO HAVE THIS PARTICULAR LABEL, "PARTY
7 PREFERENCE NONE" ATTACHED TO THEIR NAME?

8 MR. WATERS: I THINK THE STATE'S INTEREST IS IN THE
9 NATURE OF CONDUCTING ORDERLY ELECTIONS, AND THAT --
10 PRESENTING THE VOTERS WITH INFORMATION THAT THE STATE
11 CONSIDERS IMPORTANT, AND WHICH HAS BEEN TRADITIONALLY
12 DONE. THAT IS THAT -- I THINK YOU CAN ASSUME THAT THE
13 LABELS FOR THE PARTIES THAT ARE BALLOT-QUALIFIED, THEY
14 ARE KNOWN TO VOTERS. THE OTHER LABELS ARE, I DON'T KNOW,
15 A BOTTOMLESS PIT. WHO KNOWS. BUT I THINK THERE IS AN
16 INFORMATION INTEREST.

17 THE JUDGE: WHAT CASE DO WE HAVE WHERE -- AGAIN, I'M
18 NOT TALKING ABOUT FORBIDDING A CANDIDATE TO PUT THEIR
19 PREFERRED LABEL ON THE BALLOT, BUT WHERE THE STATE IS
20 COMPELLING SOMEONE TO HAVE A MESSAGE ATTACHED TO THEM
21 THAT THEY DON'T WANT; WHAT CASE DO WE HAVE THAT SAYS
22 THAT'S OKAY?

23 MR. WATERS: I DON'T KNOW.

24 LET ME JUST SAY THAT CALIFORNIA TRADITIONALLY
25 HAS -- I MEAN, I ASSUME -- I THINK ONE COULD ASSUME THAT

1 THERE ARE CANDIDATES WHO DID NOT WANT TO BE -- WHO ARE
2 DESCRIBED ON THE BALLOT AS INDEPENDENT, WHO WOULD HAVE
3 PREFERRED TO HAVE BEEN DESCRIBED SOME OTHER WAY.

4 JUDGE BERZON: THAT'S NOT WHAT HE'S ASKING. HE'S
5 ASKING WHAT IF YOU JUST DON'T WANT TO PUT ANYTHING?

6 MR. WATERS: SAY IT AGAIN.

7 JUDGE BERZON: WHAT IF YOU WANT TO PUT NOTHING?

8 MR. WATERS: I THINK THAT WHILE TRADITIONALLY
9 CANDIDATES HAVE NOT BEEN ALLOWED TO PUT NOTHING, AND --
10 SO THE QUESTION NOW IS WHAT'S THE STATE INTEREST IN JUST
11 HAVING A BLANK UNDER --

12 JUDGE BERZON: NOT HAVING --

13 THE JUDGE: WHAT'S THE STATE INTEREST AS BETWEEN THE
14 TWO OPTIONS, YOU'RE BEING FORCED AGAINST YOUR WILL TO
15 HAVE THIS LABEL "PARTY PREFERENCE NONE" VERSUS HAVING
16 NOTHING ON THERE? I CAN'T THINK OF WHY THE STATE WOULD
17 HAVE AN INTEREST IN DENYING YOU THE ABILITY TO SAY, YOU
18 KNOW WHAT, IF YOU'RE NOT GOING TO LET ME PUT DOWN COFFEE
19 PARTY BECAUSE IT'S NOT QUALIFIED, THEN JUST LEAVE IT
20 BLANK; AND THE STATE IS SAYING, NO. WE'RE GOING TO FORCE
21 YOU TO SAY "PARTY PREFERENCE NONE."

22 MR. WATERS: YOUR HONOR, ALL I CAN SAY TO THAT IS
23 WHAT CALIFORNIA BELIEVES IS THAT THE MEANING OF THE
24 PHRASE "PARTY PREFERENCE NONE," IT HAS A MEANING WITHIN
25 CALIFORNIA AND IT MEANS THIS CANDIDATE IS NOT AFFILIATED

1 WITH ANY MAJOR PARTY.

2 THE JUDGE: COULD YOU, STATE, SAY, OKAY, YOU DON'T
3 LIKE "PARTY PREFERENCE NONE," WE'LL FORCE YOU TO SAY,
4 "CANDIDATE SUCH AND SUCH, AFFILIATED WITH A PARTY NOT
5 DEEMED QUALIFIED BY THE STATE OF CALIFORNIA." WE COULD
6 SAY THAT. THAT'S PERFECTLY ACCURATE.

7 MR. WATERS: I ASSUME THERE ARE A NUMBER OF THINGS
8 THE STATE COULD DO.

9 THE JUDGE: DO YOU THINK THAT WOULD BE OKAY?

10 MR. WATERS: YOUR HYPOTHETICAL AGAIN IS?

11 THE JUDGE: AFFILIATED WITH A PARTY NOT DEEMED
12 QUALIFIED BY THE STATE OF CALIFORNIA.

13 MR. WATERS: I THINK THAT WOULD RAISE ISSUES SIMILAR
14 TO THE SCARLET LETTER CASE ABOUT WHETHER THAT WAS
15 PEJORATIVE.

16 THE JUDGE: HE'S SAYING THAT THIS LABEL THAT YOU'RE
17 FORCING ME TO PUT ON THERE HAS THE SAME EFFECT ON ME.

18 MR. WATERS: BUT I BELIEVE THERE IS NO EVIDENCE -- I
19 THINK THERE'S NO REASON TO BELIEVE THAT THE LABEL IS
20 PEJORATIVE. IT MAY NOT BE WHAT THEY WANT. THERE'S NO
21 EVIDENCE THAT THIS LABEL COST THEM VOTES.

22 JUDGE BERZON: OKAY. YOU ARE USING UP YOUR
23 COLLEAGUE'S TIME.

24 MR. SKINNELL: THANK YOU.

25 MAY IT PLEASE THE COURT, CHRIS SKINNELL, FOR

1 INTERVENOR DEFENDANT.

2 BEFORE I TURN TO THE MERITS, I JUST WANT TO
3 CORRECT ONE COMMENT FROM BEFORE.

4 JUDGE BERZON, YOU ASKED WHETHER THE POLITICAL
5 PARTIES WERE ALLOWED TO SHOW THEIR ENDORSEMENTS IN THE
6 BALLOT.

7 THEY ARE PERMITTED TO PROVIDE A LIST OF
8 CANDIDATES THAT THEY'VE ENDORSED TO THE COUNTY REGISTRARS
9 AND HAVE THOSE PRINTED IN THE BACK OF THE SAMPLE BALLOT.

10 JUDGE BERZON: SAMPLE BALLOT?

11 MR. SKINNELL: YES. BY THE SAMPLE BALLOT THAT IS
12 MAILED TO ALL VOTERS IN ADVANCE.

13 JUDGE BERZON: BUT NOT ON THE BALLOT?

14 THE JUDGE: NOT THE BALLOT ITSELF, NO.

15 BUT IT IS INTENDED TO BE IDENTICAL IN MOST
16 RESPECTS TO THE ACTUAL BALLOT, AND PROVIDE GUIDANCE IN
17 THE FORMAT OF THE BALLOT WITHIN IT.

18 SO THEY ARE ENABLED BY STATE LAW TO PROVIDE
19 THEIR ENDORSEMENTS DIRECTLY TO --

20 (SIMULTANEOUS TALKING)

21 JUDGE BERZON: THE QUALIFIED PARTIES?

22 MR. SKINNELL: YES.

23 NOW, WITH RESPECT TO -- I'M JUST GOING TO
24 FOCUS ON THIS ISSUE BECAUSE OF PLAINTIFFS' ACKNOWLEDGMENT
25 THAT THE INTERVENTION WAS NOT REALLY AT ISSUE AT THIS

1 POINT AND THERE ARE JUST A FEW POINTS I WANT TO MAKE.

2 ONE, REGARDING THE QUESTION OF WHETHER OR NOT
3 NO PARTY PREFERENCE OR PARTY PREFERENCE NONE AS
4 PEJORATIVE. THE REAL KEY HERE IS THAT PLAINTIFFS HAVE
5 PRESENTED NO EVIDENCE.

6 IT IS THEIR BURDEN AS THE DISTRICT COURT
7 RECOGNIZED. THEY POINT TO ROSEN VS. BROWN AND SAY, WELL,
8 THE FACT I WASN'T ALLOWED TO USE INDEPENDENT IN THAT CASE
9 MEANT THAT IT HARMED MY CANDIDACY.

10 WHAT THEY GLOSS OVER IS THE FACT THAT THE
11 PLAINTIFF IN THAT CASE PROVIDED SUBSTANTIAL EVIDENCE OF
12 THAT, INCLUDING THE TESTIMONY OF THREE EXPERT WITNESSES.

13 AND SO THAT'S NOT PRESENT HERE. THERE IS NO
14 EVIDENCE WHATSOEVER THAT "PARTY PREFERENCE NONE" IS IN
15 ANY WAY PEJORATIVE OR HARMFUL TO CANDIDATES.

16 THE JUDGE: LET'S SAY WE ACCEPT THAT. WHAT'S THE
17 STATE'S INTEREST IN FORCING THAT LABEL ON AN UNWILLING
18 CANDIDATE?

19 WHAT'S THE STATE'S INTEREST?

20 WHY MAKE THE PERSON HAVE THAT ON THERE IF THEY
21 DON'T WANT IT?

22 MR. SKINNELL: YOUR HONOR, IT'S SIMPLY A WAY OF
23 INDICATING THAT THEY'RE NOT REGISTERED WITH ANY OF THE --
24 OR AFFILIATED WITH ANY OF THE PARTIES.

25 THE JUDGE: JUST LEAVE IT BLANK. WHAT'S THE STATE'S

1 INTEREST THAT SAYS WE'RE GOING TO COMPEL YOU TO SPEAK
2 WHEN YOU DON'T WANT TO?

3 MR. SKINNELL: IN THAT PARTICULAR RESPECT THIS
4 SYSTEM IS NO DIFFERENT AT ALL FROM WHAT EXISTED PRIOR TO
5 PROPOSITION 14.

6 BEFORE PROPOSITION 14, CANDIDATES WERE
7 COMPELLED TO USE THE LABEL. MANY OF THEM OBJECTED AND
8 THAT'S WHY WE HAVE THE LIBERTARIAN PARTY CASE. THAT'S
9 WHY WE HAVE THE --

10 JUDGE BERZON: THEY DIDN'T OBJECT IN FAVOR OF
11 NOTHING. THEY OBJECTED BECAUSE THEY WANTED TO PUT
12 LIBERTARIAN PARTY, WHICH WOULD HAVE INDICATED THAT THE
13 LIBERTARIAN PARTY HAD NOMINATED THEM AND IT HADN'T.

14 MR. SKINNELL: YES, YOUR HONOR, BUT THE REAL KEY
15 POINT OF THOSE CASES IS THAT THE CANDIDATES ARE NOT GIVEN
16 PERMISSION TO JUST CHOOSE WHATEVER THEY WANT TO HAVE ON
17 THE BALLOT.

18 JUDGE BERZON: AS I INDICATED, I HAVE REAL PROBLEMS
19 TRANSPOSING THE LIBERTARIAN PARTY CASE TO THIS SITUATION.

20 AND IT SEEMS TO ME THAT IT IS -- THE PROBLEM
21 IS RELEVANT TO THE CURRENT PROBLEM, EVEN WITH REGARD TO
22 THE INDEPENDENT VERSUS NO PARTY PREFERENCE TO THE DEGREE
23 THAT THE NO PARTY PREFERENCE HAS TO BE UNDERSTOOD TO MEAN
24 NO QUALIFIED PARTY. AND NO QUALIFIED PARTY, IT SEEMS TO
25 ME, HAS TO HAVE SOME FUNCTION IN THE SYSTEM IN ORDER FOR

1 A STATE TO FORCE PEOPLE TO USE IT.

2 AND I DON'T REALLY UNDERSTAND IN THE CURRENT
3 SYSTEM WHAT THE FACT THAT A PARTY IS QUALIFIED OR ISN'T
4 QUALIFIED HAS TO DO WITH HOW SOMEBODY APPEARS ON THE
5 PRIMARY BALLOT.

6 MR. SKINNELL: YOUR HONOR, AS MUCH AS THEY ARE
7 DIFFERENT SYSTEMS, I DON'T THINK YOU CAN SEPARATE THE
8 OPEN PRIMARY SYSTEM FROM THE PRESIDENTIAL SYSTEM, IN THE
9 SENSE THAT IN MANY ELECTIONS YOU'RE GOING TO HAVE BOTH ON
10 THE BALLOT. SO THERE IS STILL AN INTEREST IN
11 DISTINGUISHING BETWEEN QUALIFIED AND NONQUALIFIED PARTIES
12 JUST AS THERE ALWAYS HAS BEEN IN THE PRESIDENTIAL
13 CONTEXT. AND THAT'S RIGHT ON ALL FOURS WITH LIBERTARIAN
14 PARTY.

15 AND HAVING A DIFFERENT SYSTEM WHERE THEY CAN
16 PICK WHATEVER THEY WANT WITH RESPECT TO THESE
17 VOTER-NOMINATED SYSTEMS RISKS CREATING CONFUSION --

18 JUDGE BERZON: EVERYBODY KEEPS USING THIS
19 "CONFUSION" WORD.

20 WHAT'S CONFUSING?

21 I MEAN, THE ONLY ARGUMENT THAT I'VE HEARD AS
22 TO CONFUSION IS, WELL, PEOPLE CAN START CALLING
23 THEMSELVES ALL KINDS OF WEIRD THINGS, BUT THERE ARE A
24 GROUP OF PARTIES THAT ARE ACTUALLY REGISTERED WITH THE
25 STATE.

1 MR. SKINNELL: RIGHT.

2 FIRST OF ALL, AS YOUR HONOR HAS POINTED OUT,
3 NONE OF THOSE PARTIES ARE HERE.

4 JUDGE BERZON: RIGHT.

5 MR. SKINNELL: BUT AGAIN, THE FACT THAT THESE
6 PARTIES HAVE GONE THROUGH THE HOOPS OF GETTING THEMSELVES
7 QUALIFIED; THEY HAVE GONE THROUGH ALL THE STEPS; PEOPLE
8 KNOW WHAT THEY ARE; THEY ARE KNOWN QUANTITIES.

9 THEY -- ACTUALLY, THOSE LABELS HAVE SOME
10 MEANING WITHIN STATE LAW.

11 JUDGE BERZON: THEY USED TO HAVE A MEANING WITHIN
12 STATE LAW. THEY DON'T HAVE MUCH LEFT, EXCEPT FOR THE
13 PRESIDENTIAL ELECTION.

14 MR. SKINNELL: THAT'S A FAIRLY SIGNIFICANT MEANING
15 RIGHT THERE. BUT THEY ALSO HAVE THE ABILITY TO PUT THEIR
16 ENDORSEMENTS IN THE BALLOT. THEY ALSO HAD THE ABILITY TO
17 COMMUNICATE DIRECTLY WITH THE VOTERS THROUGH THE MAILING
18 LABELS THAT THE STATE PROVIDES.

19 THERE ARE A NUMBER OF BENEFITS THAT CONTINUE
20 TO BE AVAILABLE TO THOSE PARTIES THAT ARE NOT AVAILABLE
21 TO THE NONQUALIFIED PARTIES.

22 AND THEY HAVE A VERY -- THEY CONTINUE TO HAVE
23 SIGNIFICANCE WITHIN THE CONTEXT OF STATE LAW. THAT'S WHY
24 THE FIELD COURT SPECIFICALLY SAID -- IT REGARDED
25 LIBERTARIAN PARTY AND LIGHTFOOT TO STILL BE APPLICABLE TO

1 THIS --

2 JUDGE BERZON: I DIDN'T FIND IT VERY PERSUASIVE IN
3 THAT REGARD.

4 MR. SKINNELL: WELL, YOU KNOW, I WOULD ALSO NOTE
5 THAT THE ELEVENTH CIRCUIT HAS COME TO THE SAME CONCLUSION
6 IN AN OPEN PRIMARY CONTEXT.

7 JUDGE BERZON: WHAT CASE IS THAT?

8 MR. SKINNELL: DART VS. BROWN. AND WE PROVIDED THAT
9 IN OUR RULE 28 J LETTER.

10 THE JUDGE: THERE, OF COURSE, YOU HAD THE OPTION OF
11 LEAVING IT BLANK.

12 MR. SKINNELL: RIGHT. THAT IS TRUE, YOUR HONOR.
13 THAT'S -- NO, ACTUALLY, I TAKE IT BACK. THAT'S NOT TRUE.
14 YOU DIDN'T HAVE THE OPTION OF LEAVING IT BLANK, YOU HAD
15 TO LEAVE IT BLANK. YOU DIDN'T HAVE A CHOICE. IT'S THE
16 SAME --

17 THE JUDGE: THERE WAS NO COMPELLED SPEECH THAT THE
18 STATE WAS FORCING ON --

19 MR. SKINNELL: THERE WAS COMPELLED NONSPEECH IN THAT
20 CASE.

21 IT WAS THE SAME IN THE SENSE THAT THE STATE
22 WAS STILL TELLING YOU WHAT WOULD GO ON THE BALLOT AND YOU
23 HAD NO CHOICE IN THE MATTER.

24 THE JUDGE: IT IS ALSO CURTAILING YOUR RIGHT TO
25 EXPRESS YOURSELF AND MAKE YOUR VIEWS KNOWN.

1 MR. SKINNELL: THAT'S RIGHT.

2 IT WAS SAYING THAT UNLESS YOU WERE REGISTERED
3 WITH A QUALIFIED PARTY, YOU GOT TO PUT NOTHING.

4 AND I THINK IT'S USEFUL TO CONTRAST THAT CASE
5 ACTUALLY WITH ROSEN BECAUSE THEY'RE THE SAME ISSUE. CAN
6 YOU MAKE ME, IF I'M NOT A MEMBER OF THE QUALIFIED PARTY,
7 PUT A BLANK ON THE BALLOT. ROSEN SAID NO. DART SAID
8 YES.

9 AND THE KEY DIFFERENCE HERE IS THE COMPLETE
10 LACK OF EVIDENCE IN DART --

11 THE JUDGE: PUTTING A BLANK, THAT'S NOT COMPELLED
12 SPEECH. I'M SORRY. THAT'S MAYBE JUST SEMANTIC, BUT
13 COMPELLED SPEECH IS BEING FORCED TO SAY SOMETHING YOU
14 DON'T WANT TO SAY.

15 IF YOU'RE JUST BEING FORBIDDEN TO PUT YOUR
16 PREFERRED LABEL, THAT'S JUST -- YOU'RE BEING FORBIDDEN TO
17 SPEAK. IT'S NOT COMPELLED SPEECH TO SAY YOU'VE GOT TO
18 LEAVE IT BLANK.

19 MR. SKINNELL: I THINK THEY'RE TWO SIDES OF THE SAME
20 COIN, YOUR HONOR.

21 BEING FORBIDDEN TO SPEAK ON THE ONE HAND OR
22 BEING COMPELLED TO SPEAK, THEY'RE -- FROM THE FIRST
23 AMENDMENT PERSPECTIVE, THEY'RE TWO SIDES OF THE SAME
24 COIN. IT'S STILL THE GOVERNMENT TELLING YOU WHAT CAN GO
25 WITH YOUR NAME ON THE BALLOT REGARDLESS OF WHETHER IT'S A

1 BLANK OR --

2 THE JUDGE: IT KEEPS ME FROM TELLING THE VOTERS WHAT
3 MY VIEWS ARE.

4 MR. SKINNELL: THAT'S RIGHT.

5 BUT OF COURSE THE SUPREME COURT HAS SAID THAT
6 THE BALLOT ISN'T A MECHANISM FOR DISTRIBUTING POLITICAL
7 PROPAGANDA, ESSENTIALLY. IT'S A WAY OF ELECTING VOTERS.
8 AND THAT'S WHY THERE'S A LOWER STANDARD HERE THAN THERE
9 WOULD BE IN A NONPUBLIC FORUM, A NONPUBLIC CONTEXT.

10 THERE ARE NUMEROUS CASES, WHICH WE'VE CITED
11 WHERE THE GOVERNMENT REGULATES WHAT IS PERMITTED TO BE ON
12 THE BALLOT, INCLUDING THE PARTY LABELS.

13 WE HAVE CITED THE DART CASE. WE CITED THE
14 LIBERTARIAN PARTY AND LIGHTFOOT. SCHRADER VS. BLACKWELL
15 WAS A CASE THAT CAME AFTER ROSEN IN THE SIXTH CIRCUIT,
16 AND IT SAID THAT IN THAT CASE, INSTEAD OF A BLANK, THEY
17 PERMITTED THE CANDIDATES TO USE INDEPENDENT, BUT NOTHING
18 ELSE. THAT WAS ACCEPTABLE.

19 THE JUDGE: YOU HAVE CITED A LOT OF CASES THAT SEEM
20 HELPFUL FOR US. BUT IS THERE A CASE IN WHICH A COURT HAS
21 UPHELD THE FORCED AFFIXING OF A LABEL THAT SOMEBODY
22 DIDN'T WANT?

23 NOT THE CASE WHERE INDEPENDENT IS BEING
24 REQUIRED TO PUT ON THERE, BUT SOMEONE SAYS, I REALLY
25 PREFER LIBERTARIAN. SOMEWHERE -- A CASE WHERE SOMEONE

1 SAID, I'D RATHER JUST HAVE NOTHING; AND THE STATE SAYS,
2 NO, YOU'RE GOING TO TAKE THIS. AND THE COURT HAS SAID,
3 YEAH, THEY CAN REQUIRE YOU TO DO THAT?

4 MR. SKINNELL: I AM NOT AWARE OF ANY CASE THAT SAYS
5 THAT, YOUR HONOR, THAT'S ADDRESSED THOSE FACTS.

6 THE JUDGE: I HAVEN'T FOUND ONE EITHER. THAT
7 TROUBLES ME.

8 MR. SKINNELL: I STILL THINK THAT THERE'S NO
9 DISTINCTION IN THE SENSE THAT THE STATE IS STILL TELLING
10 YOU WHAT HAS TO GO WITH YOUR NAME, ONE WAY OR THE OTHER.

11 WHETHER IT'S INDEPENDENT OR WHETHER IT -- I
12 MEAN, IN THE LIBERTARIAN PARTY CASE IN THE SENSE OF
13 COMPELLED SPEECH, THEY FORCED THAT CANDIDATE TO SAY HE
14 WAS INDEPENDENT INSTEAD OF LIBERTARIAN PARTY.

15 HE WANTED TO SAY SOMETHING ELSE. HE WANTED TO
16 SAY LIBERTARIAN PARTY. THEY FORCED HIM TO SAY SOMETHING
17 HE DIDN'T WANT TO SAY.

18 AND THE CALIFORNIA SUPREME COURT -- AND THEY
19 WERE EVEN APPLYING STRICT SCRUTINY AND THEY STILL UPHELD
20 IT.

21 JUDGE BERZON: BUT BECAUSE IT WAS A COMPLETELY
22 DIFFERENT COMMUNICATION. THE COMMUNICATION WAS, WHAT
23 PARTY HAS PUT YOU ON THE BALLOT?

24 AND THE LIBERTARIAN PARTY DID NOT PUT HIM ON
25 THE BALLOT AS A CANDIDATE AS A LIBERTARIAN PARTY BECAUSE

1 IT WASN'T A QUALIFIED PARTY. SO IT MADE SENSE THERE, AND
2 IT MAKES A LOT LESS SENSE TO ME HERE.

3 MR. SKINNELL: YOUR HONOR, I GO BACK TO MY PRIOR
4 POINT THAT THERE IS STILL THAT DISTINCTION WITHIN
5 CALIFORNIA LAW WITH RESPECT TO THE PRESIDENTIAL ELECTION.

6 AND I THINK YOU RISK SIGNIFICANT CONFUSION IN
7 THE VOTERS' MINDS IF YOU HAVE ONE SYSTEM WHERE IT'S
8 RESTRICTED AND YOU USE INDEPENDENT AND IT'S LIMITED ONLY
9 TO THE QUALIFIED PARTIES, AND THEN ON THE VERY SAME
10 BALLOT YOU JUST LET PEOPLE PUT WHATEVER THEY WANT ON THE
11 BALLOT.

12 AND ALL OF A SUDDEN PEOPLE AREN'T GOING TO
13 UNDERSTAND WHAT THE SIGNIFICANCE OF THOSE LABELS ARE.

14 AND THAT'S EXACTLY WHAT THE DART CASE SAID.

15 IT SAID, YOU KNOW, IN AN OPEN PRIMARY CONTEXT
16 THERE IS A REASON TO PROVIDE THE VOTERS WITH SOME
17 INFORMATION ABOUT PARTY LABELS, EVEN TO GIVE THEM SOME
18 INFORMATION.

19 JUDGE BERZON: (INAUDIBLE) IS THERE PRIMARY EVEN AT
20 THE SAME TIME THERE'S A PRESIDENTIAL ELECTION? PROBABLY
21 NOT.

22 MR. SKINNELL: WELL, IN CALIFORNIA, JUST THIS PAST
23 YEAR, THEY WERE. IN 2012 YOU HAD THE PRESIDENTIAL
24 PRIMARY IN JUNE.

25 JUDGE BERZON: PRIMARY, RIGHT?

1 MR. SKINNELL: RIGHT.

2 BUT THEN YOU ALSO -- THIS SAME ISSUE COULD,
3 THEORETICALLY, DEPENDING ON WHO ADVANCES, OCCUR ALSO IN
4 THE GENERAL ELECTION.

5 IF YOU HAD AN INDEPENDENT CANDIDATE, AS DID
6 HAPPEN IN A FEW CASES IN CALIFORNIA IN THIS LAST YEAR --

7 JUDGE BERZON: YOU MEAN IF SOMEBODY SURVIVES AS ONE
8 OF THE TOP TWO, WHO IS NOT A MEMBER -- WHO DOES NOT
9 PREFER ONE OF THE QUALIFIED PARTIES?

10 MR. SKINNELL: THAT'S RIGHT.

11 AND THAT DID HAPPEN IN A NUMBER OF
12 CONGRESSIONAL AND STATE LEGISLATIVE RACES THIS YEAR.

13 JUDGE BERZON: THANK YOU VERY MUCH FOR YOUR TIME AND
14 YOUR ARGUMENT.

15 WE WILL GIVE YOU ONE MINUTE.

16 GO AHEAD. DON'T RUSH SO FAST.

17 MR. DUTTA: VERY QUICK REBUTTAL.

18 I WANT TO MAKE THREE OR FOUR VERY QUICK
19 POINTS.

20 ONE IS THAT, AS WE MENTION IN OUR PAPERS, THE
21 SECRETARY OF STATE'S OFFICE HAS TERMED THE MONIKER "NO
22 PARTY PREFERENCE" NOT PERMISSIBLE.

23 IN FACT, IN THE INITIATIVE DRAFT OF
24 PROP 14 -- DRAFT THAT BECAME PROP 14, THE INTERVENORS HAD
25 ACTUALLY ALLOWED CANDIDATES TO SAY THEY'RE INDEPENDENT.

1 SO WE QUESTION WHERE THE ISSUE -- WHERE THEIR PROBLEM
2 WITH THE WORD "INDEPENDENT" LIES.

3 SECOND OF ALL, THE ISSUE OF EVIDENCE.

4 COOK V. GRAYLICH, WHICH IS ONE OF THE LEADING
5 CASES, DID NOT REQUIRE EVIDENCE. AND, IN FACT, IF YOU AT
6 FOOTNOTE 8 OF COOK V. GRAYLICH, IT WAS REFERRING TO HOW
7 THEY SUBSTITUTED IN A NEW CANDIDATE TO ENSURE THAT THEY
8 WERE STANDING.

9 AND HAD HE CHECKED, AND AT THE TIME THAT THEY
10 HEARD THE CASE, THE ELECTION HAD NOT OCCURRED, SO THAT
11 CANDIDATE HAD NOT SUFFERED THE HARM TO DATE.

12 I WOULD ALSO MENTION THAT WE HAVE PROVIDED
13 EVIDENCE, EVEN THOUGH WE BELIEVE WE ARE NOT OBLIGATED TO;
14 WE BELIEVE IT'S THE STATE'S BURDEN TO PRODUCE EVIDENCE TO
15 PROVIDE A COMPELLING REASON TO UPHOLD THIS. OF COURSE,
16 OUR EVIDENCE BEING THAT THERE WAS AN ARTICLE THAT FALSELY
17 REPORTED THE POLITICAL BELIEFS OF MY CLIENT.

18 WHEN IT COMES TO OUR CLAIMS UNDER THE
19 ELECTIONS CLAUSE, SINCE WE'RE TALKING ABOUT POLITICAL
20 OPINION NOW UNDER THIS NEW SYSTEM, WE BELIEVE THAT --
21 WELL, THE STATE -- THERE'S NO STATE INTEREST THAT CAN
22 EVEN BE CONSIDERED UNDER THIS COURT'S EN BANC RULING IN
23 GONZALEZ V. ARIZONA.

24 AND FINALLY, WITH RESPECT TO THE FACT THAT NOW
25 WE HAVE TWO PARALLEL BALLOTS. YOU HAVE THE PRESIDENTIAL

1 ELECTION AND YOU HAVE EVERYTHING ELSE.

2 IN ONE CASE YOU HAVE -- CANDIDATES WERE
3 ALLOWED TO SAY THEY'RE INDEPENDENT IF THEY'RE NOT FROM
4 THE MAJOR PARTIES; AND IN ANOTHER CASE, CANDIDATES LIKE
5 MY CLIENT ARE NOT ALLOWED TO SAY THEY'RE INDEPENDENT ARE
6 FORCED TO SAY NO PARTY PREFERENCE; THAT DOES CREATE A
7 PROBLEM. IT CONFUSES VOTERS AND THIS IS SOMETHING THAT
8 IS A VERY SERIOUS CONCERN.

9 JUDGE BERZON: HOW COULD THAT GET ON THE
10 PRESIDENTIAL BALLOT AS INDEPENDENT? JUST BY SHOWING UP?

11 MR. DUTTA: CORRECT. YOU HAVE TO INDEPENDENTLY
12 QUALIFY, THAT'S CORRECT.

13 JUDGE BERZON: THANK YOU VERY MUCH.

14 THE CASE CHAMNESS VS. BOWEN IS SUBMITTED.

15 (END OF PROCEEDINGS.)
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REPORTER'S CERTIFICATE

THE UNDERSIGNED CERTIFIED SHORTHAND
REPORTER LICENSED IN THE STATE OF CALIFORNIA
DOES HEREBY CERTIFY:

THAT THE FOREGOING PROCEEDING WAS TRANSCRIBED
BY ME VIA AUDIO RECORDING AS AVAILABLE ON THE NINTH
CIRCUIT COURT OF APPEALS WEBSITE, AT
[HTTP://WWW.CA9.USCOURTS.GOV/MEDIA/VIEW.PHP?PK_ID=00000104](http://www.ca9.uscourts.gov/media/view.php?pk_id=00000104)
02.

IN WITNESS WHEREOF, I HAVE SUBSCRIBED MY
NAME THIS DATE: MARCH 28, 2013.



KAREN CARLTON DAVIS
CERTIFICATE NUMBER 6774