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7  
8 CALIFORNIA SUPERIOR COURT  
9 COUNTY OF SAN FRANCISCO

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

13 *Plaintiffs,*

14 vs.

15 DEBRA BOWEN, in only her official  
16 capacity as California Secretary of State;  
JOHN ARNTZ, in only his official  
17 capacity as Director of Elections of the  
City and County of San Francisco; DAVE  
18 MACDONALD, in only his official  
capacity as Registrar of Voters of the  
19 County of Alameda; JESSE DURAZO, in  
only his official capacity as Registrar of  
20 Voters of the County of Santa Clara;  
DEAN LOGAN, in only his official  
21 capacity as Registrar-Recorder / County  
Clerk of the County of Los Angeles; NEAL  
22 KELLEY, in only his official capacity as  
Registrar of Voters of the County of  
23 Orange; RITA WOODARD, in only her  
official capacity as Registrar of Voters of  
24 the County of Tulare; and DOES 1-20;

25 *Defendants.*

CASE NO. CGC-10-502018

**PLAINTIFFS' REPLY IN FURTHER  
SUPPORT OF PLAINTIFFS' MOTION  
FOR PRELIMINARY INJUNCTION;  
SUPPORTING DECLARATION OF  
GAUTAM DUTTA [REQUEST FOR  
JUDICIAL NOTICE FILED  
CONCURRENTLY]**

HEARING DATE: Sept. 14, 2010  
HEARING TIME: 9:30 am  
JUDGE: Hon. Charlotte Walter Woolard  
DEPARTMENT: 302 (Law & Motion)

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

3           – Secretary of State Debra Bowen's office<sup>1</sup>

4           **I. Introduction**

5           In trying to defend an unlawful statute, Defendant Bowen and Intervenor (collectively,  
6           “SB 6 Defendants”) cannot get their stories straight. Remarkably, they fail to even agree on what  
7           SB 6 requires with respect to write-in ballots. Yet while SB 6's plain language may not be clear  
8           to them, it is manifestly clear that SB 6 will disenfranchise thousands of voters and censor minor-  
9           party candidates – starting with a special election that has been set for January 4, 2011.

10           As this brief will show, SB 6 Defendants have all but conceded four critical points:

- 11           1.       The Legislature introduced and passed SB 6 in the middle of the night, without  
12                   holding a single hearing and without giving the public any notice.<sup>2</sup>
- 13           2.       SB 6 violates the Due Process Clause of the U.S. and California Constitutions, by  
14                   banning all write-in votes from being counted in every general election.
- 15           3.       SB 6 violates the U.S. Constitution's Election Clause and the California  
16                   Constitution's Equal Protection Clause, by favoring candidates from state-  
17                   established parties over candidates from non-state-established parties.
- 18           4.       Finally, if SB 6 is struck down as unconstitutional, Proposition 14 must be  
19                   declared inoperative, because it would then need a new statute to implement it.

20           Simply put, SB 6 is unconstitutional on its face, and its Defendants have failed to provide any  
21           reason to salvage any part of it.

22           **II. The Court Owes No Deference to an Invidious Statute That Voters Did Not Approve**

23           SB 6 Defendants try to drape SB 6 as a voter-approved measure, in hopes of coaxing the

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24           <sup>1</sup> Aug. 18, 2010 Declaration of Sean P. Welch, Motion to Intervene, Exh. B, at 1 (emphases added).

25           <sup>2</sup> SB 6 was originally introduced as a hazardous-waste bill on December 1, 2009, and then was amended and  
26           passed as an election bill on February 19, 2009, between 3:40 am and 6:55 am. First Amended Complaint ¶¶2-4.

1 Court to give SB 6 a heavy dose of deference. But contrary to SB 6 Defendants’ assertions,  
2 Plaintiffs are not challenging the constitutionality of Proposition 14, or bringing an as-applied  
3 challenge against SB 6. Instead, Plaintiffs are challenging the facial constitutionality of SB 6 – an  
4 unjust law passed by the Legislature, and not by the voters. Indeed, the California Supreme Court  
5 has made it clear that constitutionally infirm statutes do not deserve one iota of deference:  
6

7 [T]he ordinary deference a court owes to any legislative action vanishes when  
8 constitutionally protected rights are threatened.<sup>3</sup>

9 Equally telling, SB 6 Defendants do not deny that SB 6 was rammed through the  
10 Legislature without a single hearing and without any public notice. In this manner, SB 6 evaded  
11 “the normal scrutiny that comes from extensive committee reviews and repeated readings in both  
12 houses of the Legislature in the course of normal bill passage.”<sup>4</sup> Significantly, two U.S. Supreme  
13 Court Justices recently warned that they would be “less than willing to defer to the institutional  
14 strengths of the legislature” – particularly “when a law appears to have been adopted without  
15 reasoned consideration, for discriminatory purposes, or to entrench political majorities[.]”<sup>5</sup>  
16

17 As Plaintiffs’ Moving Papers have shown, SB 6 was adopted (1) without “reasoned  
18 consideration”, (2) for “discriminatory purposes” [to handicap minor-party and write-in  
19 candidates], and (3) to “entrench political majorities” [by handicapping minor-party candidates].  
20 Consequently, the Court owes no deference whatsoever to SB 6 – and must strike it down if it  
21 fails to pass muster under either the U.S. or California Constitution.<sup>6</sup>  
22

### 23 **III. SB 6 Defendants Concede That SB 6 Violates the Due Process Clause**

24 Strikingly, SB 6 Defendants have cited no authority to refute Plaintiffs’ claim that SB 6

25 <sup>3</sup> *Spiritual Psychic Science Church of Truth v. City of Azusa* (1985) 29 Cal.3d 501, 514 (emphases added).

26 <sup>4</sup> “Retailers Push Sponsored Bill To Avoid Environmental Law”, *Mercury News*, Aug. 31, 2010, Declaration  
of Gautam Dutta (“Dutta Declaration”), Exh. BB, at 2 (emphasis added).

27 <sup>5</sup> *Doe v. Reed* (June 24, 2010) 561 U.S. \_\_\_, No. 09-559, concurring op., Stevens & Breyer, JJ., at 3 n.3  
(citations omitted, emphases added).

28 <sup>6</sup> See also *City of Rancho Cucamonga v. Mackzum* (1991) 228 Cal.App.3d 929, 946-47, 279 Cal.Rptr. 220  
(examining whether a Legislature-passed implementing statute complied with the Equal Protection Clause of the U.S.  
and California Constitutions); *Marin Hospital Dist. v. Rothman* (1983) 139 Cal.App.3d 495, 500-01 (same).

1 violates the Due Process Clause of the U.S. and California Constitutions. Namely, by inviting  
2 voters to cast write-in votes and then refusing to count them, SB 6 perpetrates “fraud on the  
3 voters” by “stripping them of their vote[.]”<sup>7</sup> Since Plaintiffs’ Due Process claims are uncontested,  
4 the Court must grant Plaintiffs’ Fifth and Sixth Claims for Relief.

5  
6 **IV. Because SB 6 Bans the Counting of Write-In Votes, It Is Unconstitutional**

7 Tellingly, Defendant Bowen and Intervenors disagree on whether SB 6 bans write-in votes  
8 from being cast (which would be constitutional), or whether it bans write-in votes from being  
9 counted (which would be unconstitutional). In any event, SB 6 must be declared unconstitutional  
10 – because its plain language bans all write-in votes from being counted.

11 As Plaintiffs’ Moving Papers show, the U.S. Supreme Court, California Supreme Court,  
12 and California Constitution have all made one constitutional right resoundingly clear: if a vote  
13 has been lawfully cast, it must be counted.<sup>8</sup> Thus, if SB 6 bans lawfully cast votes from being  
14 counted, the Court must strike it down.

15 The plain language of SB 6 absolutely bans all write-in ballots from being counted in the  
16 general election:

17  
18 A person whose name has been written on the ballot as a write-in candidate at the  
19 general election ... shall not be counted.<sup>9</sup>

20 To her credit, Defendant Bowen freely admits that “SB 6 precludes counting write-in votes cast in  
21 the general election[.]”<sup>10</sup> What is more, her office’s public statements even admit that SB 6 will  
22 trick voters into throwing away their votes – the heart of Plaintiffs’ Due Process claim:

23 Since ... SB 6 precludes [write-in] votes from being counted, it makes no sense to

24  
25 <sup>7</sup> *Griffin v. Burns* (1<sup>st</sup> Cir. 1978) 570 F.2d 1065, 1074; *see also Nolles v. State Cmte. for the Reorganization of*  
26 *School Dist.* (8<sup>th</sup> Cir. 2008) 524 F.3d 892, 899; *Bennett v. Yoshina* (9<sup>th</sup> Cir. 1998) 140 F.3d 1218, 1226; Moving  
27 Papers, at 7:7-8:30. Contrary to SB 6 Defendants’ claims, Plaintiffs have legal standing to bring all of their Claims  
28 for Relief. *See* Section XI *infra* for a full discussion of standing.

<sup>8</sup> Moving Papers, at 5:15-17 & n.32 (*quoting U.S. v. Classic* (1941) 303 U.S. 299, 315 & *Gould v. Grubb*  
(1975) 14 Cal.3d 661, 671 n.10, 536 P.2d 1337, 1343); Moving Papers, at 4:1-3 (*quoting* CAL.CONST art. II § 2.5).

<sup>9</sup> SB 6, First Amended Complaint, Exh.1 §35 Pt. 8606 (emphases added).

<sup>10</sup> Defendant Bowen’s Opposition, at 5:3-4 (emphasis added).

1            give voters the **illusion** that they can write in a candidate’s name and have it  
2            counted. Making these conforming changes is only controversial because there is  
3            a lawsuit on this issue that essentially states “SB 6 says don’t count the votes, so  
4            it’s misleading to let people think they can write in a candidate’s name and have it  
              counted.” The way to solve the lawsuit is to make the [elections] code read one  
              way – which we’ve done as SB 6 intended.<sup>11</sup>

5            By publicly admitting that SB 6 gives voters the “illusion” that their write-in votes will count,  
6            Defendant Bowen has made a binding party admission<sup>12</sup> as to all of Write-In Plaintiffs’ Claims  
7            for Relief.<sup>13</sup>

8            Despite making such a remarkable public admission, Defendant Bowen insists that SB 6’s  
9            ban against counting write-in votes does not violate anyone’s constitutional rights. According to  
10            Defendant Bowen, voters have a right to have their write-in votes counted in the primary election  
11            – but not in the general election.<sup>14</sup> However, neither the U.S. Supreme Court nor the California  
12            Supreme Court would ever sanction such a mass disenfranchisement of voters.

13            Indeed, contrary to Defendant Bowen’s claim, neither *Burdick* nor *Edelstein* authorizes  
14            the State to ban lawfully cast write-in votes from being counted.<sup>15</sup> Once a lawful write-in vote  
15            has been cast, the State must count it<sup>16</sup> – and nothing in *Burdick* or *Edelstein* suggests otherwise.  
16            (Indeed, the ballot at issue in *Edelstein* banned voters from casting write-in votes.<sup>17</sup>) Finally, as

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19            <sup>11</sup> Welch Declaration, *supra* note 1, Exh. B, at 1 (emphases added). The public statements released by  
20            Defendant Bowen “constitute a body of experience and informed judgment to which courts and litigants may  
21            properly resort for guidance.” *Yamaha v. BOE* (1998) 19 Cal.4<sup>th</sup> 1, 14 (quotation and citation omitted, emphases  
22            added). *See also* Moving Papers, at 7:17-8:3 (Plaintiffs’ Due Process claim).

23            <sup>12</sup> Party admissions are admissible under the exception to the hearsay rule. Govt. Code §1220. The statement  
24            made by Defendant Bowen’s staff is admissible and not subject to the hearsay rule, because (a) the staff member was  
25            authorized by Defendant Bowen to make the statement on her behalf, and (b) the staff member made the statement  
26            within the scope of her official duties. *Id.* §1222 (authorized-party exception to hearsay rule) & 1280 (public-records  
27            exception to hearsay rule); *see also Lake v. Reed* (1997) 16 Cal.4<sup>th</sup> 448, 461-62, 940 P.2d 311.

28            <sup>13</sup> Claim I and II invoke the California Constitution (art. ii §2.5 & the Free Speech Clause); Claim III, the First  
              Amendment; Claim IV, the Elections Clause; and Claims V and VI, the Due Process Clause.

<sup>14</sup> *See* Defendant Bowen’s Opposition, at 12:7-8.

<sup>15</sup> *Burdick v. Takushi* (1992) 504 U.S. 428 (state may ban write-in votes from being cast); *Edelstein v. San*  
              *Francisco* (2002) 29 Cal.4<sup>th</sup> 164, 56 P.3d 1029 (state may ban write-in votes from being cast in the general election).

<sup>16</sup> *See, e.g., U.S. v. Classic, supra* note 8, 303 U.S. at 315; *Gould v. Grubb, supra* note 8, 14 Cal.3d at 671  
              n.10, 536; CAL.CONST art. II § 2.5; *Turner v. D.C. Bd. of Elections* (D.D.C. 1999) 77 F.Supp.2d 25, 33.

<sup>17</sup> “Ballots issued to voters ... did not provide space for write-in candidates[.]” *Edelstein, supra* note 15, 29  
              Cal.4<sup>th</sup> at 169 (emphasis added).

1 the *Turner* Court held, refusing to count lawfully cast votes immediately triggers federal strict  
2 scrutiny – and no one here has identified any compelling government interest to overcome it.<sup>18</sup>

3 Sensing the futility of Defendant Bowen’s argument, Intervenors offer a curious defense  
4 of SB 6. Namely, Intervenors argue that it is lawful to throw away write-in votes, because they  
5 claim that SB 6 also bans write-in candidates from qualifying for the general-election ballot.<sup>19</sup>  
6 That argument has no merit. “When statutory language is thus clear and unambiguous there is no  
7 need for construction, and courts should not indulge in it.”<sup>20</sup> Contrary to Intervenors’ claims, the  
8 plain language of SB 6 does not ban write-in candidates from qualifying for the general-election  
9 ballot.<sup>21</sup> Therefore, since write-in candidates are expressly permitted in the general election, SB 6  
10 unlawfully bans all votes cast for qualified write-in candidates from being counted.  
11

#### 12 **V. Contrary to Intervenors’ Claims, SB 6 Does Not Ban Write-In Votes from Being Cast**

13 Astonishingly, Intervenor Maldonado – the author of SB 6 – does not appear to know  
14 what his own brainchild requires for write-in votes. Initially, he agrees with Defendant Bowen  
15 that SB 6 allows voters to cast write-in votes, but bans<sup>22</sup> them from being counted (i.e., an  
16 unlawful election rule). But, desperately trying to save SB 6, Intervenor Maldonado promptly  
17 contradicts himself, by making the diametrically opposite argument: that SB 6 bans<sup>23</sup> voters from  
18 casting write-in votes in the general election (i.e., a lawful election rule).  
19

20 Once again, the plain language of SB 6 interrupts Intervenors’ flight of fancy. In fact, SB  
21

22  
23 <sup>18</sup> *Turner, supra* note 16, 77 F.Supp.2d at 32-34. Defendant Bowen claims that the State may ban the counting  
of write-in votes in order to limit political competition in the general election. Defendant Bowen’s Opposition, at  
9:23-24. Such a dubious rationale does not constitute a compelling government interest. *See id.*

24 <sup>19</sup> Intervenors’ Opposition, at 6:17-19.

25 <sup>20</sup> *People v. Boyd* (1979) 24 Cal.3d 285, 294 (emphases added, citations and quotation marks omitted).

26 <sup>21</sup> Section 35 of SB 6 (Pt. 8606) expressly bans the counting of write-in votes; §27 of SB 6 (Pt. 8141.5)  
expressly states that the names of “[o]nly ... two candidates” may “appear on the [general election] ballot”. SB 6,  
First Amended Complaint, Exh. 1 §§ 27, 35.

27 <sup>22</sup> “[Plaintiffs] *obviously* know that [SB 6] precludes write-in votes from being counted[.]” Intervenors’  
Opposition, at 15:4-5 (italics in original, underlining added).

28 <sup>23</sup> “[T]here are no write-in candidates, and no blank spaces [for write-in candidates] would be printed” on the  
ballot. *Id.* at 7:11-12 (emphases added).

1 6 expressly compels elections officials to add a write-in section to all ballots.<sup>24</sup> In trying to  
2 escape SB 6’s express terms, Intervenor makes two baseless claims: (1) Defendant Bowen  
3 believes that SB 6 bans voters from casting write-in votes, and (2) the “underlying legislative  
4 intent” of Prop 14 bans the casting of write-in ballots. To begin with, Defendant Bowen has  
5 reached the opposite conclusion: her office has publicly admitted that SB 6 requires ballots to  
6 provide space for write-in votes cast in the general election:  
7

8           The requirement that general election **ballots contain spaces for write-ins should**  
9           be deleted, since ... SB 6 ... specifies that a name written on the ballot at a general  
10           election ... shall not be counted.<sup>25</sup>

11 What is more, SB 6’s legislative history fails to corroborate Intervenor’s interpretation. In fact,  
12 SB 6’s Senate Rules Committee analysis mentions no details whatsoever about write-in voting.<sup>26</sup>

13           Finally, by arguing that Prop 14 itself bans voters from casting write-in votes, Intervenor  
14 torpedoed their own argument. According to Intervenor Yes on 14, “legal experts have modeled  
15 [Prop 14] after Washington State’s primary system”.<sup>27</sup> However, Washington State’s election  
16 system gives voters the right to cast write-in votes – and to have them counted.<sup>28</sup> Unlike  
17 Washington State’s election system, SB 6 expressly invites voters to cast write-in votes, but then  
18 unlawfully bans elections officials from counting them. Thus, its plain language cannot be  
19 interpreted in a way that does not violate either the U.S. or California Constitution.<sup>29</sup>

20 Accordingly, the Court must strike down SB 6’s ban on counting write-in votes.

## 21 **VI. SB 6 Defendants Concede That SB 6 Violates the Elections Clause**

22           Revealingly, SB 6 Defendants have cited no authority to refute Plaintiffs’ claim that SB 6  
23

24 \_\_\_\_\_  
25 <sup>24</sup> “There shall be printed on the ballot ... [t]he names of candidates with sufficient blank spaces to allow the  
voters to write in names not printed on the ballot.” SB 6, *supra* note 2, §35 Pt. 8606 (emphases added).

26 <sup>25</sup> Welch Declaration, *supra* note 1, Exh. A, Attach. 1, at 3 (emphases added).

27 <sup>26</sup> SB 6 Bill Analysis, First Amended Complaint, Exh. 3.

28 <sup>27</sup> “Q&A”, website of Intervenor Yes on 14, Dutta Declaration, Exh. DD, p.1 (emphases added).

29 <sup>28</sup> RCW §29a.60.021(1), Dutta Declaration, Exh. AA.

30 <sup>29</sup> For this reason, the cases cited by Intervenor do not apply here. *Cf. Kleffman v. Vonage* (2010) 49 Cal.4<sup>th</sup>  
31 334; *McCarther v. Pac. Telesis Group* (2010) 48 Cal.4<sup>th</sup> 104, 110; *Libertarian Party v. Eu* (1980) 28 Cal.3d 535, 540.

1 violates the Elections Clause of the U.S. Constitution. As Plaintiffs’ Moving Papers show, SB 6  
2 overreaches a state’s authority to administer federal elections in a “fair and honest” manner, for it  
3 enables the State to foist constitutionally infirm rules onto federal elections.<sup>30</sup> Consequently, the  
4 Court must grant Plaintiffs’ Fourth and Eighth Claims for Relief.

5  
6 **VII. SB 6 Defendants Concede that SB 6 Violates California’s Equal Protection Clause**

7 Similarly, SB 6 Defendants have cited no authority to refute Plaintiffs’ claim that SB 6  
8 violates the California Constitution’s Equal Protection Clause. Indeed, SB 6 Defendants concede  
9 that SB 6 violates the *Stanson v. Mott* line of cases, for it is undisputed that SB 6 censors minor-  
10 party candidates from stating their party preference on the ballot.<sup>31</sup> In trying to escape *Stanson*,  
11 SB 6 Defendants claim that SB 6 actually complies with existing law on “qualified party”  
12 elections. Yet to the extent that it applies, even that body of law would strike down SB 6.

13  
14 To begin with, *Libertarian Party v. Eu*<sup>32</sup> does not directly apply here, because it upheld  
15 California’s existing “qualified party” election system – which SB 6 seeks to dismantle. *Eu* held  
16 that the State may ban candidates from “non-qualified” (non-state-established) parties from being  
17 listed on the June primary-election ballot – because those parties had not yet garnered “a  
18 significant modicum of [popular] support[.]”<sup>33</sup> Under *Eu*, only candidates from “qualified”  
19 (state-recognized) parties may appear on the June “qualified party” ballot.

20  
21 In contrast, under SB 6’s Washington-style election system, the June election would no  
22 longer be limited to qualified-party candidates. Instead, both qualified-party and non-qualified-

23  
24 <sup>30</sup> *Cook v. Gralike* (2001) 531 U.S. 510, 523-24 (quotations and citations omitted); *see also U.S. Term Limits v. Thornton* (1995) 514 U.S. 779, 829-30. For a full discussion of the Election Clause, *see* Moving Papers, at 11:3-13:7. Intervenor’s insist that SB 6 does not violate the Elections Clause, because they claim that SB 6 does not violate any other constitutional provision. *Cf.* Intervenor’s Opposition, at 9:5-8 & 10:23-11:2. That argument fails because (1) SB 6 does violate other constitutional provisions, and (2) a state law can violate the Elections Clause even without expressly violating another constitutional provision. *U.S. Term Limits, supra* note 30, 514 U.S. at 829-30.

25  
26 <sup>31</sup> Moving Papers, at 9:4-11:2; *Stanson v. Mott* (1976) 17 Cal.3d 206, 217; *see also Rees v. Layton* (1970) 6 Cal.App.3d 815; *Huntington Beach v. Superior Court* (2002) 94 Cal.App.4<sup>th</sup> 1422, 1433; *Citizens for Responsible Gov’t v. City of Albany* (1997) 56 Cal.App.4<sup>th</sup> 1199, 1228; *McLain v. Meier* (8<sup>th</sup> Cir.) 637 F.2d 1159, 1166-67.

27  
28 <sup>32</sup> *Eu, supra* note 29, 28 Cal.3d 535 (invoked liberally by SB 6 Defendants).

<sup>33</sup> *Id.* at 546 (citation and quotation omitted).

1 party candidates would be listed on the ballot. The top two votegetters, irrespective of their party  
2 preference, would then qualify for the November general-election ballot. Thus, SB 6 eliminates  
3 the need to preserve the “distinction between qualified and non-qualified parties” – the very basis  
4 for the holding in *Eu*.<sup>34</sup>

5  
6 Yet in so doing, SB 6 forces non-qualified-party candidates like Plaintiffs Mackler and  
7 Martin to pay a dear price: unlike the “qualified party” election system, the ballot would  
8 misleadingly state that they have “No Party Preference.” Tellingly, Washington State – the  
9 model for SB 6’s election system – did not even adopt the “No Party Preference” label for its own  
10 elections. Unlike its California offshoot (SB 6), Washington State’s election system allows all  
11 candidates, irrespective of party, to use up to 16 characters to describe their party preference.<sup>35</sup>

12  
13 Significantly, the *Eu / Rosen v. Brown* line of cases (liberally cited by SB 6 Defendants)  
14 stands for a core constitutional principle: at a bare minimum, non-qualified-party candidates have  
15 the right to identify themselves on the ballot as “Independent”.<sup>36</sup> But instead of assigning them  
16 the party label of “Independent”, SB 6 foists non-qualified-party candidates with the party label  
17 of “No Party Preference” – a far cry from the party label of “Independent”. Therefore, to the  
18 extent that the *Eu / Rosen* line of cases applies, SB 6 must be struck down as unconstitutional.

### 19 **VIII. It Is Beyond Dispute That SB 6’s Party-Preference Provision Is Not Severable**

20  
21 The Court must declare the entirety of SB 6 unconstitutional, for SB 6’s party-preference  
22 provision is not severable. To be sure, SB 6 Defendants insist that SB 6’s severability clause  
23 would allow SB 6’s unlawful parts to be severed. However, the California Supreme Court has  
24 repeatedly held that severability clauses are not conclusive. Instead, “[t]he final determination

25  
26 <sup>34</sup> *Id.* at 546 (emphasis added); *see also* First Amended Complaint ¶30.

27 <sup>35</sup> WAC §434-215-120(1), Dutta Declaration, Exh. CC.; *see also supra* note 27; Dutta Declaration, Exh. DD.

28 <sup>36</sup> *See, e.g., Rosen v. Brown* (6<sup>th</sup> Cir. 1992) 970 F.2d 169, 175 (candidates have a constitutional right to a party voting cue of “Independent” on the ballot); *Eu, supra* note 29, at 545; *Schrader v. Blackwell* (6<sup>th</sup> Cir.) 241 F.3d 783, 788-89 (*re-aff’g Rosen*), *cert. denied* (2001) 534 U.S. 888; *Rubin v. Santa Monica* (9<sup>th</sup> Cir. 2002) 308 F.3d 1008 (*citing Schrader*); *Lightfoot v. Eu* (9<sup>th</sup> Cir. 1992) 964 F.2d 865, 870 (*citing Eu*), *cert. denied* (1993) 507 U.S. 919.

1 depends on whether the remainder [of the statute] ... would have been adopted by the legislative  
2 body had the latter foreseen the partial invalidity of the statute[.]<sup>37</sup>

3 SB 6 Defendants concede that, to salvage a statute, its unlawful parts must, inter alia, be  
4 “volitionally” separable; that is, it must be “clear that the Legislature would have enacted the  
5 measure without” the offending provisions.<sup>38</sup> SB 6 Defendants further concede that it is highly  
6 unlikely that the Legislature would have passed SB 6 without its unlawful party-preference  
7 provision.<sup>39</sup> In this light, SB 6’s party-preference provision is not volitionally separable. Thus,  
8 since its party-preference provision is not severable, SB 6 must be struck down in its entirety.  
9

10 **IX. Since SB 6 Is Unconstitutional, Prop 14 Is Inoperative As a Matter of Law**

11 Equally important, SB 6 Defendants have cited no authority to refute yet another of  
12 Plaintiffs’ core legal theories. Namely, if SB 6 is struck down, Prop 14 must be declared  
13 inoperative, for it would then need a new statute to implement it.<sup>40</sup> Thus, since SB 6 is unlawful  
14 and must be struck down, the Court must also declare Prop 14 inoperative as a matter of law.  
15

16 **X. Plaintiffs Have Shown They Are Entitled to a Preliminary Injunction**

17 Unless the Court grants a preliminary injunction, Plaintiffs’ and Californians’ fundamental  
18 right to vote and run for office will be irreparably harmed – starting on Jan. 4, 2011 (the special  
19 general election for Senate District 1)<sup>41</sup> and culminating with the 2012 statewide primary and  
20 general elections. Plaintiffs are immediately entitled to a preliminary injunction, because (1) the  
21 balance of equities overwhelmingly tips in their favor, and (2) Plaintiffs have compellingly shown  
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23  
24 <sup>37</sup> E.g., *Gerken v. FPFC* (1993) 6 Cal.4<sup>th</sup> 707, 714 (quoting *Calfarm v. Deukmejian* (1989) 48 Cal.3d 805,  
821)(emphases added); see also *Santa Barbara Sch. Dist v. Superior Court* (1975) 13 Cal.3d 315, 331.

25 <sup>38</sup> E.g., *Sonoma County v. Superior Ct.* (2009) 173 Cal.App.4<sup>th</sup> 322, 352 (citation omitted, emphases added).

26 <sup>39</sup> Moving Papers, at 13:8-23.

27 <sup>40</sup> *Id.* at 13:24-14:8 (citing *In Re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, 75, 389 P.2d 538;  
*Denninger v. Recorder’s Court* (1904) 145 Cal. 629, 635, 79 P.360).

28 <sup>41</sup> Plaintiffs’ Opposition to Noticed Motion to Intervene, at 5:7-10. Currently, it is unclear which set of rules  
should apply for the Jan. 4, 2011 special general election: those of existing law (which requires that all votes cast for  
eligible write-in candidates be counted), or those of SB 6 (which bans all write-in votes from being counted).

1 that they have more than a “reasonable probability” of prevailing on the merits.<sup>42</sup>

2 In stark contrast to Plaintiffs’ plight, not one SB 6 Defendant will be disenfranchised or  
3 censored on the ballot if a preliminary injunction is granted. Instead, Defendants can continue to  
4 administer elections pursuant to existing law, while each SB 6 Defendant can continue to litigate  
5 this case until it is resolved.

## 7 **XI. Plaintiffs Have Standing To Bring Their Motion**

8 As a last resort, SB 6 Defendants argue that Plaintiffs lack standing to bring this lawsuit,  
9 allegedly because (1) Plaintiffs’ claims are not ripe, (2) Plaintiffs lack standing to make legal  
10 claims on behalf of other candidates and voters, and (3) Plaintiffs have not conclusively shown  
11 that they will vote for a write-in candidate in a future election. However, both the U.S. and  
12 California Supreme Courts roundly reject such strained arguments. According to the U.S.  
13 Supreme Court, Plaintiffs need only show standing for a future, regularly scheduled election.<sup>43</sup>  
14 Furthermore, the High Court has repeatedly admonished courts to swiftly resolve all election-  
15 related cases, even if the election at issue has already passed:

17 The “capable of repetition, yet evading review” doctrine, in the context of election  
18 cases, is appropriate when there are “as applied” challenges as well as in the more  
19 typical case involving only facial attacks. The construction of a statute ... will  
20 have the effect of simplifying future challenges, thus increasing the likelihood that  
timely filed cases can be adjudicated before an election is held.<sup>44</sup>

## 21 **XII. Conclusion**

22 An unjust law that deprives Californians of their fundamental rights cannot stand.  
23 Accordingly, Plaintiffs respectfully ask this Court to grant their Motion for Preliminary  
24 Injunction.

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25 <sup>42</sup> *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4<sup>th</sup> 400, 58 Cal.Rptr.3d 527, 533.

26 <sup>43</sup> *Gralike, supra* note 30, 531 U.S. at 516 & n.6 (plaintiff had standing to sue regarding a regularly scheduled  
election two years in the future, because he intended to run for office at that time).

27 <sup>44</sup> *Storer v. Brown* (1974) 415 U.S. 724, 737 n.8; *see also Gralike, supra* note 30, 531 U.S. at 517 n.8; *accord,*  
*Edelstein, supra* note 15, 29 Cal.4<sup>th</sup> at 172 (“If a pending case poses an issue of broad public interest that is likely to  
recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its  
28 pendency would normally render the matter moot.”) (emphases added); *Eu, supra* note 29, 28 Cal.3d at 539-40.

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DATED: September 7, 2010

Respectfully submitted,

By: \_\_\_\_\_  
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