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**COPY**

**ENDORSED  
FILED**  
San Francisco County Superior Court

NOV 23 2011

**CLERK OF THE COURT**  
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9 CALIFORNIA SUPERIOR COURT  
10 COUNTY OF SAN FRANCISCO

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

*Plaintiffs,*

15 LINDA HALL,

*Intervenor-Applicant,*

16 vs.

17 DEBRA BOWEN, et al.

*Defendants,*

18 vs.

19 ABEL MALDONADO, et al.

*Intervenors-Defendants.*

CASE NO. CGC-10-502018

**REPLY BRIEF IN SUPPORT OF LINDA  
HALL'S MOTION TO INTERVENE;  
POINTS AND AUTHORITIES**

HEARING DATE: Dec. 2, 2011  
HEARING TIME: 9:30 am  
JUDGE: Hon. Harold E. Kahn  
DEPARTMENT: 302

1 Memorandum of Points and Authorities

2 *A voter's choice shall be considered a valid vote, if the ... [v]oter writes in a listed*  
3 *candidate's name in the designated write-in space.*

4 -- Help America Vote Act, Uniform Vote Counting Standards<sup>1</sup>

5 **I. Introduction**

6 Although Linda Hall resoundingly qualifies for mandatory intervention, Defendants  
7 oppose her Motion for one simple reason. Namely, Ms. Hall brings critical, undisputed evidence  
8 that will expose their shameful shell game with our fundamental rights. Troublingly, Secretary of  
9 State Debra Bowen has resorted to a two-faced argument. On the one hand, she does not dispute  
10 that SB 6's Vote Counting Ban *has disenfranchised* Ms. Hall. Yet on the other, Secretary Bowen  
11 disingenuously implies that she will no longer enforce SB 6's Vote Counting Ban – when in fact  
12 she is *poised to enforce it* against Ms. Hall and other voters *again*. By granting her Motion, the  
13 Court will not only enable Ms. Hall to vindicate her fundamental rights, but will heed the U.S.  
14 Supreme Court's emphatic admonition to avoid the “risk of *premature interpretation* of statutes  
15 on the basis of *factually barebones records*.”<sup>2</sup>

16 **II. The U.S. Supreme Court Has Admonished Courts to Consider Evidence Showing  
17 How a Challenged Statute Has Been Applied**

18 Contrary to Defendants' claims, this Court may properly admit evidence that shows how  
19 SB 6's Vote Counting Ban has harmed Ms. Hall's fundamental rights. Indeed, the U.S. Supreme  
20 Court has repeatedly admonished courts to consider evidence showing how a challenged statute  
21 has been *applied*.<sup>3</sup> In *Roemer*, the High Court held that a state statute did not violate the  
22 Establishment Clause.<sup>4</sup> In so doing, the High Court took judicial notice of evidence of how that

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23 <sup>1</sup> Uniform Vote Counting Standards issued under the Help America Vote Act [42 U.S.C. §15481(a)(6)]  
24 (“HAVA Vote Counting Standards”), *attached as* Nov. 2, 2011 Hall Decl. Exh. 5, at p. 3 of 8 ¶ A.8 (italics added).

25 <sup>2</sup> *Wash. State Grange v. Wash. State Republican Party* (2008) 552 U.S. 442, 449-50 (italics added, citation  
26 and quotation marks omitted); *see also Crawford v. Marion County Election Bd.* (2008) 553 U.S. 181, 189; *Roemer*  
27 *v. Bd. of Public Works* (1976) 426 U.S. 736, 742 n.4; *Storer v. Brown* (1974) 415 U.S. 727, 737 n.8; Joseph Fishkin,  
28 *Equal Citizenship and the Individual Right to Vote*, IND.L.J. Vol. 86, 1288, 1326.

<sup>3</sup> *See* legal authorities cited at *supra* note 2. An as-applied turns on whether “the particular *application* of the  
statute violate[d] [plaintiff's] constitutional rights.” *Coffman Specialties v. Dep't of Transportation* (2009) 176  
Cal.App.4<sup>th</sup> 1135, 1145 (italics added) (*citing Hale v. Morgan* (1978) 22 Cal.3d 388); *see also Legal Aid Svcs. v.*  
*Legal Services Corp.* (9<sup>th</sup> Cir. 2009) 587 F.3d 1006, 1018 (same) (*citing L.A. v. Taxpayers for Vincent* (1984) 466  
U.S. 789, 802-03).

<sup>4</sup> *Roemer, supra*, 426 U.S. at 742 n.4.

1 statute had been applied: key evidence that had not been available to the lower court before the  
2 case was appealed. In light of *Roemer*, the Court *must* consider newly available evidence on how  
3 SB 6’s Vote Counting Ban has been applied against voters like Linda Hall.<sup>5</sup>

### 4 **III. It Is Beyond Question That SB 6, As Applied, Disenfranchised Ms. Hall**

5 Try as they may, Defendants cannot whitewash one critical fact: SB 6 disenfranchised  
6 Ms. Hall, and thereby violated her fundamental right to vote. As her Opening Brief showed,  
7 federal law gives voters the express right (1) to cast a write-in vote for a candidate *whose name*  
8 *appears on the ballot*, and (2) to have their write-in vote *counted*.<sup>6</sup> It is undisputed that Ms. Hall  
9 cast a write-in vote for Dennis Campanale, a candidate whose name appeared on the May 3, 2011  
10 election for Assembly District 4.<sup>7</sup> However, because SB 6’s Vote Counting Ban<sup>8</sup> bars all write-in  
11 votes from being counted, Secretary Bowen advised local voting officials not to count any write-  
12 in votes.<sup>9</sup> As a direct result, Ms. Hall’s write-in vote was not counted – violating her fundamental  
13 rights under the U.S. Constitution and California Constitution.<sup>10</sup>

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14 <sup>5</sup> Last spring, two candidates and one voter filed an as-applied constitutional challenge (*Chamness v. Bowen*)  
15 against SB 6. Nov. 23, 2011 Declaration of Gautam Dutta (“Dutta Decl.”) Exh. 3. Contrary to Intervenor’s claim,  
the *Chamness* appeal will be fully briefed before the 2012 statewide election. Dutta Decl. Exh. 2.

16 <sup>6</sup> Linda Hall’s Nov. 2, 2011 Motion to Intervene (“Opening Brief”), at 6:17-7:2 (*citing* HAVA Vote Counting  
Standards, *supra*) (“A voter’s choice shall be considered a valid vote, if the [v]oter writes in a listed candidate’s name  
17 in the designated write-in space.”) (emphases added). *See also* *Field v. Bowen* (Cal.Ct.App. Sept. 9, 2011), *attached*  
*as* Hall Decl. Exh. 8, at 27 (“Including a line for write-in votes when those votes will not be counted *raises*  
18 *constitutional questions*.”) (italics added); *Libertarian Party v. Bd. of Elections* (D.D.C. 2011) 768 F.Supp.2d 174,  
182 (“[H]aving granted citizens the right to cast *write-in votes*, the [State] must confer the right in a manner  
19 *consistent with the Constitution*.”) (italics added); *Grant v. Meyer* (10<sup>th</sup> Cir. 1987) 828 F.2d 1446, 1456; *Turner v.*  
*Bd. of Elections* (D.D.C. 1999) 77 F.Supp.2d 25, 30.

20 <sup>7</sup> Hall Decl. ¶31 & Exh. 7.

21 <sup>8</sup> SB 6-amended Elections Code §8606 (“A person whose name has been written on the ballot as a *write-in*  
*candidate* at the general election ... *shall not be counted*.”) (italics added).

22 <sup>9</sup> Hall Decl. Exh. 6.

23 <sup>10</sup> Proposed Complaint in Intervention (“Hall Compl.”), *attached as* Hall Decl. Exh. A, ¶¶48-71; *see also*  
*supra* note 6. Intervenor’s claim that Ms. Hall’s write-in vote should not have been counted under state law, because  
24 the candidate for whom Ms. Hall voted appeared on the ballot, and did not file papers as a write-in candidate. Yet as  
25 both the U.S. and California Supreme Courts have made clear, “[s]tate law that conflicts with a federal statute is  
without effect.” *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4<sup>th</sup> 910, 12 Cal.Rptr.3d 262,  
269 (italics added) (*quoting* *Cipollone v. Liggett Group* (1992) 505 U.S. 504). Here, federal law explicitly *mandates*  
26 that a write-in vote *must be counted* if it has been cast for a candidate whose name appears on the ballot. *See supra*  
note 6. Because “state law that conflicts with a federal statute is without effect”, Intervenor’s argument fails.

27 Intervenor’s also claim that Ms. Hall could not have suffered any harm, because she knew that her vote  
would not be counted if she cast a write-in vote. However, Ms. Hall’s state of mind is *irrelevant* as a matter of law,  
for the Due Process Clause bans the State from perpetrating a “fraud upon” the voters by changing election rules  
without giving them full and fair notice. *See, e.g., Griffin v. Burns* (1<sup>st</sup> Cir. 1978) 570 F.2d 1065, 1074. Here, the  
28 ballot at issue did *not* tell voters that their vote would not be counted if they cast a write-in vote. Hall Decl. Exh. 7.  
Because voters were not given full and fair notice of SB 6’s Vote Counting Ban, Intervenor’s argument fails.

1 **IV. Ms. Hall’s Claims Are Not Moot, Because SB 6’s Vote Counting Ban Is Poised To**  
2 **Disenfranchise Voters Again**

3 Contrary to Defendants’ claims, Ms. Hall’s as-applied claims are not moot, because SB  
4 6’s Vote Counting Ban is poised to disenfranchise voters *again*.<sup>11</sup> Unless a court has issued an  
5 injunction against them, California elections officials have the power to enforce a state statute –  
6 *even if* an appellate court has declared it unenforceable.<sup>12</sup>

7 Here, Secretary Bowen has resorted to a two-faced argument worthy of Janus. Last year,  
8 this Court had ruled that SB 6 *on its face*<sup>13</sup> does *not* impose a Vote Counting Ban (a ruling that  
9 Plaintiffs subsequently appealed).<sup>14</sup> Like the Court of Appeal, this Court ruled that SB 6 on its  
10 face banned write-in votes from being *cast* in every general election.<sup>15</sup> Yet *in spite of* this Court’s  
11 ruling, Secretary Bowen imposed SB 6’s Vote Counting Ban. That is, she allowed voters to cast  
12 write-in votes in the May 3, 2011 election, but then *did not to count any of those votes*.<sup>16</sup> Half a  
13 year later, Secretary Bowen now implies that she will no longer enforce SB 6’s Vote Counting  
14 Ban.<sup>17</sup> Yet tellingly, she *did not retract her March 17, 2011 Memorandum*, which advised  
15 elections officials to apply SB 6’s Vote Counting Ban against – and thereby *disenfranchise* – Ms.  
16 Hall and other voters.<sup>18</sup>

17 In this light, one must draw three conclusions. First, neither Secretary Bowen nor any

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18 <sup>11</sup> See *Storer, supra*, 415 U.S. at 737 n.8 (admonishing courts to adjudicate election cases that are “capable of  
19 repetition, yet evade review”); *Edelstein* (2002) 29 Cal. 4<sup>th</sup> 164, 171-72 (same).

20 <sup>12</sup> See, e.g., CAL.CONST. art. iii §3.5 (a) & (c); *Billig v. Voges* (1990) 223 Cal.App.3d 962, 273 Cal.Rptr. 91,  
21 96-97; *Farley v. Healey* (1967) 67 Cal.2d 325, 327; *Alliance for a Better Downtown Millbrae v. Wade* (2003) 108  
22 Cal.App.4<sup>th</sup> 123, 132, 136.

23 <sup>13</sup> “In evaluating a facial challenge, a court considers ‘only the text of the measure itself, *not its application* to  
24 the particular circumstances of an individual.’” *Coffman, supra*, 176 Cal.App.4<sup>th</sup> at 1144-45 (italics added) (*quoting*  
25 *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069).

26 <sup>14</sup> Court’s Oct. 5, 2010 Order, *attached as* Dutta Decl. Exh. 1.

27 <sup>15</sup> *Id.* Exh. 1, at 1:20-1:21. A ruling on a motion for preliminary injunction is not “a final determination of the  
28 merits of an action.” *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528. Unlike the Court of Appeal, this  
Court did not rule on whether minor-party candidates may be banned from using the party label of “Independent”.  
*Id.* Exh. 1, at 1:24:1-25.

<sup>16</sup> Hall Decl. Exh. 6.

<sup>17</sup> Secretary Bowen’s Nov. 17, 2011 Opp’n, at 7:27-8:7.

<sup>18</sup> Compare *id.* at 7:27-8:7 with Secretary Bowen’s Mar. 17, 2011 Memorandum., *attached as* Hall Decl. Exh.  
6. Even if Secretary Bowen changed interpretation of SB 6, local elections officials would not be bound by her  
interpretation of state statutes, for they have independent authority to interpret and enforce state election statutes.  
See, e.g., CAL.CONST. art. iii §3.5 (a) & (c); *Billig, supra*, 223 Cal.App.3d 962, 273 Cal.Rptr. at 96-97 (local  
election official interprets and enforces election statute without consulting Secretary of State); *Farley, supra*, 7  
Cal.2d 325 at 327; *Alliance, supra*, 108 Cal.App.4<sup>th</sup> at 132, 136.

1 local elections official is bound by the declaratory rulings of this Court or the Court of Appeal.  
2 Second, Secretary Bowen has *deliberately disregarded* this Court’s statutory construction of SB  
3 6. Finally, SB 6’s Vote Counting Ban is poised to disenfranchise voters like Ms. Hall *again*, for  
4 Secretary Bowen has not changed her position in response to the Court of Appeal’s interlocutory  
5 order. In this light, it is abundantly clear that SB 6’s Vote Counting Ban is poised to  
6 disenfranchise voters in the 2012 statewide election. Because SB 6’s Vote Counting Ban is  
7 poised to *again* disenfranchise voters, Ms. Hall’s as-applied claims against SB 6 are “capable of  
8 repetition, yet evade review” – and are anything but moot.<sup>19</sup>

9 **V. It Is Beyond Question That Ms. Hall Is Entitled to Mandatory Intervention**

10 Despite Defendants’ desperate sophistry, it is beyond question that Ms. Hall is entitled to  
11 mandatory intervention. As Secretary Bowen herself points out, a ruling on a motion to intervene  
12 “rests in the sound discretion of the trial judge and *may not be overturned* except for an *abuse of*  
13 *that discretion.*”<sup>20</sup> First, it is beyond question that Ms. Hall has a “significantly protectable”  
14 interest in the “transaction” at issue: this litigation. As her Opening Brief shows, the Court of  
15 Appeal has made it clear that “litigation” qualifies as a “transaction”, for it identified the word  
16 “proceeding” (a synonym for “litigation”)<sup>21</sup> as a synonym for “transaction”.<sup>22</sup> Here, one-half of  
17 Ms. Hall’s causes of action mirror Plaintiffs’ causes of action that address SB 6’s Vote Counting  
18 Ban.<sup>23</sup> Therefore, it is beyond question that Ms. Hall has a significantly protectable interest.

19 <sup>19</sup> *Storer, supra*, 415 U.S. at 737 n.8; *Edelstein, supra*, 29 Cal. 4<sup>th</sup> at 171-72.

20 <sup>20</sup> Secretary Bowen’s Nov. 17, 2011 Opp’n, at 2:23-24 (italics added) (*citing* Witkin, Calif. Proc. (2008 5<sup>th</sup> ed.)  
Appeal, pp. 418-19, §§362, 363); *see also Cal. Physicians’ Svc. v. Superior Ct.* (1980) 102 Cal.App.3d 91, 96 (trial  
21 court’s rulings on motions to intervene reviewed for abuse of discretion).

22 “[I]f mandatory intervention is proper, it is *not necessary* to reach the issue of *discretionary intervention.*”  
*Siena Court Homeowners Ass’n v. Green Valley Corp.* (2008) 164 Cal.App.4<sup>th</sup> 1416, 1423 (italics added). *Contra*,  
Secretary Bowen’s Nov. 17, 2011 Opp’n, at 2:15-2:21 & 13:6-14:2; Intervenors’ Nov. 17, 2011 Opp’n, at 9:12-10:4.  
23 Although Ms. Hall does *not* seek permissive intervention, Intervenors try to mislead the Court by disingenuously  
citing irrelevant case law relating to *permissive* intervention. Consequently, the Court should disregard Section III.A  
24 of Intervenors’ papers *in their entirety*. Intervenors’ Nov. 17, 2011 Opp’n, at 9:12-10:4; *see also Siena, supra*, 164  
Cal.App.4<sup>th</sup> at 1423 [the Legislature granted the right of mandatory intervention in 1977, i.e., after *Continental Vinyl*  
25 *Products* (1972) 27 Cal.App.3d 543 and *Jersey Maid Milk Prods.* (1939) 13 Cal.2d 661 – which addressed  
permissive intervention – had been decided].

26 <sup>21</sup> One of the definitions for “proceeding” is “litigation”. *See* <http://www.thefreedictionary.com/proceeding>  
(*last visited* Nov. 22, 2011).

27 <sup>22</sup> Opening Brief, at 11:11-11:13 (*quoting Cal. Physicians’ Svc., supra*, 102 Cal.App.3d at 96).

28 <sup>23</sup> *Compare* Hall. Compl. ¶¶48-71 (First through Sixth Claims for Relief) *with* Aug. 16, 2011 First Amended  
Compl. ¶¶70-93 (First through Sixth Claims for Relief). Because Ms. Hall has a significantly protectable interest in  
several of Plaintiffs’ causes of action, the holding of *Cal. Physicians Svc.* does not apply to this case. *Cal. Physicians*

1           Second, it is beyond question that Ms. Hall’s ability to defend her significantly protectable  
2 interests will be impaired and impeded unless she joins this lawsuit. As shown earlier, SB 6’s  
3 Vote Counting Ban is poised to be enforced against Ms. Hall and other voters across the state.<sup>24</sup>  
4 Thus, if Plaintiffs’ facial challenge against SB 6’s Vote Counting Ban does not prevail, Ms. Hall  
5 (who, unlike Plaintiffs, has *already* been disenfranchised) will likely be disenfranchised *again* by  
6 SB 6’s Vote Counting Ban.<sup>25</sup> Therefore, Ms. Hall’s ability to defend her significantly protectable  
7 interests will be impaired and impeded unless she joins this lawsuit.

8           Third, it is beyond question that Plaintiffs can no longer protect Ms. Hall’s interests for  
9 two related reasons. First, the Court of Appeal did *not* consider critical, undisputed evidence  
10 showing that SB 6’s Vote Counting Ban was in fact applied against Ms. Hall and other voters in  
11 the May 3, 2011 special election. Second, Plaintiffs have decided not to appeal the Court of  
12 Appeal’s interlocutory order to the California Supreme Court.<sup>26</sup>

13           Because the Court of Appeal refused to admit undisputed evidence showing that SB 6  
14 disenfranchised Ms. Hall, Plaintiffs (who have not yet been disenfranchised by SB 6’s Vote  
15 Counting Ban) now face significant difficulty in showing that SB 6 imposes a Vote Counting

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16 *Svc.*, *supra*, 102 Cal.App.3d at 97 (creditor of a party to a tort case had no right to intervene, because the creditor  
17 only had an interest in money damages, but not in any of the underlying lawsuit’s causes of action).

18 <sup>24</sup> See Section IV *supra*.

19 <sup>25</sup> Opening Brief, at 11:13-11:16. Despite Defendants’ protestations, the U.S. Supreme Court has made it clear  
20 that an individual like Ms. Hall has a right to intervene if the existing parties can no longer protect her interests.  
21 *United Airlines v. McDonald* (1977) 432 U.S. 385, 394. Instead of distinguishing *United Airlines*, Plaintiffs cite two  
22 cases involving permissive intervention (which does not consider whether the interests of a prospective intervenor are  
23 adequately represented by the existing parties, *San Francisco v. Calif.* (2005) 128 Cal.App.4<sup>th</sup> 1030, 1036 (2005)  
24 *review denied*). Cf. *Continental Vinyl*, *supra*, 27 Cal.App.3d 543 (addressing permissive, not mandatory,  
25 intervention) (*see supra* note 20); *Jersey Maid*, *supra*, 13 Cal.2d 661 (addressing permissive, not mandatory,  
26 intervention) (*see supra* note 20). Without citing any legal authority, Secretary Bowen also claims that Ms. Hall  
27 should be barred from intervening, because the Court of Appeal had earlier denied her permission to join this  
28 litigation. Secretary Bowen’s Nov. 17, 2011 Opp’n, at 12:22-12:25. However, it is well established that an  
individual may intervene, *irrespective of* whether a court has denied an earlier attempt to join the litigation. *See, e.g.*,  
*Legal Aid Soc’y v. Dunlop* (9<sup>th</sup> Cir. 1980) 618 F.2d 48, 50. Again without citing any legal authority, Intervenor  
argue that Ms. Hall should be denied intervention, because she could later seek writ relief against SB 6’s Vote  
Counting Ban. However, such a strained argument unravels for two reasons. First, as shown in Section IV *supra*, SB  
6’s Vote Counting Ban is *not* a moot issue, and is in fact poised to disenfranchise Ms. Hall and other voters *again*. In  
any event, Ms. Hall must be allowed to intervene, for she satisfies all four requirements of mandatory intervention.  
Opening Brief, at 11:3-13:7; *see also Siena*, *supra*, 164 Cal.App.4<sup>th</sup> at 1424; CCP §387(b).

<sup>26</sup> Opening Brief, at 11:20-12:15. Contrary to Secretary Bowen’s claim, it is irrelevant whether the California  
Supreme Court would have agreed to hear Plaintiffs’ appeal. *See, e.g., United Airlines*, *supra*, 432 U.S. at 393-94  
(when considering whether the existing parties can adequately represent the interests of a prospective intervenor,  
High Court does not consider the likelihood of whether a potential appeal will succeed on the merits); *contra*,  
Secretary Bowen’s Nov. 17, 2011 Opp’n, at 12:11-12:13.

1 Ban. Against this backdrop, *only* Ms. Hall can show – and successfully argue – that SB 6  
2 imposes a Vote Counting Ban. Unless she joins this litigation, one of more Defendants will ask  
3 this Court to dismiss this case. If the Court grants such a request, *one-half* of Ms. Hall’s legal  
4 claims (i.e., her facial claims against SB 6’s Vote Counting Ban) will be argued on appeal *by*  
5 *parties who “cannot fully protect” her interests.*<sup>27</sup> Therefore, Plaintiffs can no longer protect Ms.  
6 Hall’s interests.

7 Finally, it is beyond question that Ms. Hall’s Motion to Intervene was timely. As her  
8 Opening Brief showed, Ms. Hall filed her Motion to Intervene one week after learning that  
9 Plaintiffs could no longer protect her interests (i.e., when Plaintiffs decided not to appeal the  
10 Court of Appeal’s interlocutory order).<sup>28</sup> Consequently, her Motion to Intervene was timely as a  
11 matter of law.<sup>29</sup> Because Ms. Hall has amply satisfied all four requirements for mandatory  
12 intervention, the Court must allow her to immediately join this case.

### 13 **VII. *Stare Decisis* and Law of the Case Do Not Apply to *Any* of Ms. Hall’s Claims**

14 At this early stage of Ms. Hall’s participation, the Court need not immediately decide how  
15 it would ultimately rule on any of Ms. Hall’s facial or as-applied claims. Rather, it need only  
16 consider one legal question: whether she meets all four criteria for mandatory intervention. Yet  
17 as a last resort, Defendants claim that *stare decisis* and law of the case somehow bar this Court  
18 from hearing Ms. Hall’s claims. However, their flawed claims fail for two main reasons.

19 First, neither *stare decisis* nor law of the case applies to Ms. Hall’s *as-applied* claims, for  
20 the Court of Appeal did *not* rule on whether her fundamental rights were violated when she was  
21 disenfranchised. As shown earlier, the U.S. Supreme Court has emphatically admonished courts  
22 to consider evidence showing how a challenged statute has been applied.<sup>30</sup> Here, the Court of  
23 Appeal expressly rejected the Secretary Bowen’s and Plaintiffs’ statutory interpretation of SB 6.

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24 <sup>27</sup> *Stringfellow v. Concerned Neighbors* (1987) 480 U.S. 370, 382 n.1 (concurring opinion, italics added)  
25 (quoted by *Siena*, *supra*, 164 Cal.App.4<sup>th</sup> at 1424). Ms. Hall’s six facial claims are detailed at Hall Compl., Hall  
Decl. Exh. A ¶¶72-95.

26 <sup>28</sup> Opening Brief, at 12:16-13:7.

27 <sup>29</sup> *United Airlines*, *supra*, 432 U.S. at 394. Without even attempting to distinguish the High Court’s holding in  
*United Airlines*, Intervenor’s argue that Ms. Hall’s Motion to Intervene was not timely, because she filed it after the  
Court of Appeal had issued its interlocutory order in this litigation. However, neither *stare decisis* nor law of the  
case bars this Court from hearing Ms. Hall’s claims against SB 6’s Vote Counting Ban. *See* Section VII *infra*.

28 <sup>30</sup> *See supra* note 2.

1 Specifically, the Court of Appeal ruled that SB 6 did not impose a Vote Counting Ban *on its face*,  
2 and instead ruled that SB 6 banned write-in votes from being *cast* in every general election.<sup>31</sup> Yet  
3 at the same time, the Court of Appeal made it clear that *if* SB 6, as applied, did *in fact* impose a  
4 Vote Counting Ban, it would “*raise[] constitutional questions*”.<sup>32</sup> Because the Court of Appeal  
5 ruled on SB 6’s *facial* constitutionality and did not rule on the merits of Ms. Hall’s *as-applied*  
6 claims, neither *stare decisis* nor law of the case bars this Court from hearing her as-applied claims  
7 against SB 6’s Vote Counting Ban.<sup>33</sup>

8 Furthermore, neither *stare decisis* nor law of the case bars this Court from hearing Ms.  
9 Hall’s *facial* claims against SB 6’s Vote Counting Ban. Although *stare decisis* does require a  
10 trial court to apply a relevant holding from an appellate court,<sup>34</sup> it does not bind this Court when  
11 the facts in a case are “*fairly distinguishable* from the facts of the case in which the appellate  
12 court has declared the applicable principle of law.”<sup>35</sup> Furthermore, *stare decisis* does not bar a  
13 trial court from considering – and “mak[ing] a record” of – evidence that might *not* be consistent  
14 with existing precedent.<sup>36</sup> Thus, *stare decisis* does not bar this Court from considering Ms. Hall’s  
15 undisputed evidence on how SB 6’s Vote Counting Ban has disenfranchised – and is poised to  
16 *again* disenfranchise – Ms. Hall and other voters.

17 Similarly, the law-of-the-case doctrine does not bar this Court from hearing Ms. Hall’s  
18 facial claims against SB 6’s Vote Counting Ban. For purposes of this Motion, law of the case  
19 requires a trial court to follow the holding of the first appellate court to rule on the same litigation,  
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21 <sup>31</sup> *Field, supra*, Hall Exh. 8, at 25-27 & n.5 (taking judicial notice of the Secretary Bowen’s implementation of  
22 SB 6’s Vote Counting Ban, attached as Hall Decl. Exh. 6).

23 <sup>32</sup> *Field, supra*, Hall Exh. 8, at 27 (italics added) (quoting *Edelstein v. San Francisco* (2002) 29 Cal.4<sup>th</sup> 164,  
181, 186; *Rawls v. Zamora* (2003) 107 Cal.App.4<sup>th</sup> 1110, 1114).

24 <sup>33</sup> An as-applied challenge turns on whether “the particular *application* of the statute violat[e] [plaintiff’s]  
25 constitutional rights.” *Coffman, supra*, 176 Cal.App.4<sup>th</sup> at 1145 (italics added) (citing *Hale, supra*, 22 Cal.3d 388).  
In contrast, a facial challenge turns on “only the text of the measure itself, *not its application* to the particular  
26 circumstances of an individual.” *Coffman, supra*, 176 Cal.App.4<sup>th</sup> at 1144-45 (italics added, internal quotations  
27 omitted) (quoting *Tobe, supra*, 9 Cal.4th 1069).

28 <sup>34</sup> *See, e.g., Auto Equity Sales v. Superior Ct.* (1962) 57 Cal.2d 450, 455.

<sup>35</sup> *Cuccia v. Superior Ct.* (2007) 153 Cal.App.4<sup>th</sup> 347, 62 Cal.Rptr. 3d 796, 801 (italics added, internal  
quotations omitted) (quoting *People v. Triggs* (1973) 8 Cal.3d 884).

<sup>36</sup> *Cuccia, supra*, 153 Cal.App.4<sup>th</sup> 347, 62 Cal.Rptr. 3d at 801 (if a trial court disagrees with binding  
precedent, it “*should make a record* articulating why it believes the binding opinion is erroneous and should be  
revisited by the appellate court which is free to either disagree with or overrule the opinion.”) (italics added).

1 unless it would result in “substantial injustice”.<sup>37</sup> Thus, law of the case does not bar this Court  
2 from considering Ms. Hall’s undisputed evidence on how SB 6’s Vote Counting Ban has  
3 disenfranchised – and is poised to *again* disenfranchise – Ms. Hall and other voters. In this light,  
4 Ms. Hall has met all four requirements for mandatory intervention, and neither *stare decisis* nor  
5 law of the case bars her constitutional claims from being heard. Consequently, she must be  
6 promptly allowed to join this litigation.

### 7 **VIII. Conclusion**

8 *Including a line for write-in votes on a ballot when those votes will not be counted raises*  
9 *constitutional questions.*

10 -- California Court of Appeal, *Field v. Bowen*<sup>38</sup>

11 *We are also mindful that, in the context of a facial challenge to a statute’s*  
12 *constitutionality, we should not jump to conclusions about how the statute will be administered.*

13 -- California Court of Appeal, *Field v. Bowen*<sup>39</sup>

14 At the end of the day, Defendants cling to an untenable, unjustifiable, and unjust position.  
15 If they are to be believed, a voter *whom the State has disenfranchised* may not join a case that  
16 will vindicate her fundamental right to vote. Yet as her papers have shown, there can be no  
17 question that Linda Hall deserves mandatory intervention. By allowing her to join this case at  
18 this critical juncture, the Court will not only ensure a “fair and honest” statewide election,<sup>40</sup> but it  
19 will also obtain critical, undisputed evidence that the High Court *requires* in order to resolve  
20 whether SB 6 violates our fundamental rights.<sup>41</sup> Accordingly, the Court must promptly grant  
21 Linda Hall’s Motion to Intervene.

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25 <sup>37</sup> *Morohoshi v. Pacific Home* (2004) 34 Cal.4<sup>th</sup> 482, 20 Cal.Rptr.3d 890, 896.

26 <sup>38</sup> *Field, supra*, Hall Exh. 8, at 27 (emphases added).

27 <sup>39</sup> *Id.* Hall Exh. 8, at 7 (emphases added) (citing *Grange, supra*, 552 U.S. at 449-50).

28 <sup>40</sup> *Cook v. Gralike* (2001) 531 U.S. 510, 524 (quoting *Storer, supra*, 415 U.S. at 730).

<sup>41</sup> See, e.g., *Grange, supra*, 552 U.S. at 449-50; *Crawford, supra*, 553 U.S. at 189; *Roemer, supra*, 426 U.S. at 742 n.4; *Storer, supra*, 415 U.S. at 737 n.8; Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, IND.L.J. Vol. 86, 1288, 1326.

1 DATED: Nov. 23, 2011

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3 Respectfully submitted,

4  
5 By: 

6 GAUTAM DUTTA, ESQ.

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8 Attorney for Intervenor-Applicant

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10 LINDA HALL

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1 PROOF OF SERVICE

2 I, Gautam Dutta, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled  
4 action.

5 On Nov. 23, 2011, I served the following document(s):

6 Reply Brief of Linda Hall, Declaration of Gautam Dutta, Notice of Non-Opposition  
7 on the following persons at the locations specified:

8 A. Mark Beckington, Esq., Office of the Attorney General, 300 South Spring St., Suite 1702, Los  
9 Angeles, CA 90013; 213.897.1096 (attorney for Defendant Bowen).

10 B. Steve Mitra, Esq., Office of Santa Clara County Counsel, 70 W. Hedding St., 9<sup>th</sup> Floor, East Wing,  
11 San Jose, CA 95110; 408.299.5916 (attorney for Defendant Durazo).

12 C. Raymond Lara, Esq., Office of Alameda County Counsel, 1221 Oak St., Ste. 450, Oakland, CA  
13 94612; 510.272.6700 (attorney for Defendant Macdonald).

14 D. Jon Givner, Esq., Office of the San Francisco City Attorney, 1 Dr. Carlton B. Goodlet Place, Ste.  
15 234, San Francisco, CA 94102; 415.554.4705 (attorney for Defendant Arntz).

16 E. Wendy J. Phillips, Esq., Office of Orange County Counsel, 333 W. Santa Ana Blvd., Ste. 407,  
17 Santa Ana, CA 92702; 714.834.6298 (attorney for Defendant Kelley).

18 F. Kathleen Taylor, Esq., Office of Tulare County Counsel, 2900 W. Burrel St., Visalia, CA 93291;  
19 559.636.4950 (attorney for Defendant Woodard).

20 G. Brandi Moore, Esq., Office of Los Angeles County Counsel, 500 W. Temple St., Rm. 648, Los  
21 Angeles, CA 90012-2713; 213.974.1895 (attorney for Defendant Logan).

22 H. Marguerite Mary Leoni, Esq., Nielsen Merksamer, 2350 Kerner Blvd., Ste. 250, San Rafael, CA  
23 94901; 415.389.6800 (attorney for Intervenor-Defendants).

24 Following ordinary business practices, I sealed true and correct copies of the above documents in addressed  
25 envelopes and placed them, postage prepaid, for collection and mailing with the U.S. Postal Service.

26 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and  
27 correct.

28 Executed in Fremont, California.

  
Gautam Dutta