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6 AND RODNEY MARTIN  
7

8 CALIFORNIA SUPERIOR COURT  
9 COUNTY OF SAN FRANCISCO  
10

11 MONA FIELD, RICHARD WINGER,  
STEPHEN A. CHESSIN, JENNIFER  
12 WOZNIAK, JEFF MACKLER, and  
RODNEY MARTIN,  
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*Plaintiffs,*  
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vs.  
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DEBRA BOWEN, et al.  
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*Defendants,*  
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vs.  
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ABEL MALDONADO, et al.  
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*Intervenors-Defendants.*  
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CASE NO. CGC-10-502018

**NOTICE OF MOTION AND MOTION TO  
AMEND FIRST AMENDED COMPLAINT;  
POINTS AND AUTHORITIES**

HEARING DATE: Jan. 13, 2012  
HEARING TIME: 9:30 am  
JUDGE: Hon. Harold E. Kahn  
DEPARTMENT: 302

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on Jan. 13, 2012, 9:30 am (or as soon as this matter may  
3 be heard in an appropriate Department of the California Superior Court for the County of San  
4 Francisco), at 400 McAllister Street, San Francisco, California 94102, Plaintiffs will move the  
5 Court to grant them permission to amend their First Amended Complaint pursuant to Rules 473  
6 and 576 of the Code of Civil Procedure.

7 Plaintiffs' Motion is based on this Notice of Motion and Motion, along with the  
8 accompanying Memorandum of Points and Authorities, Declaration of Gautam Dutta, Request for  
9 Judicial Notice, the pleadings and record in this matter, the oral argument of counsel, attached  
10 exhibits, and any other matter that the Court may consider just and proper to the resolution of this  
11 matter.

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1 Memorandum of Points and Authorities

2 *That the trial courts are to liberally permit such amendments, at any stage of the*  
3 *proceeding, has been the established policy in this state since 1901.*

4 -- Court of Appeal, *Hirsa v. Superior Court*<sup>1</sup>

5 **I. Introduction**

6 In the interest of justice, Plaintiffs seek leave to amend their complaint.<sup>2</sup> Last year,  
7 Plaintiffs brought a facial constitutional challenge against the Top Two Primary’s implementing  
8 law (Senate Bill 6, or “SB 6”). Subsequently, prospective Plaintiff Linda Hall was  
9 disenfranchised by SB 6, when the write-in vote that she cast was not counted. What is more,  
10 because write-in votes will no longer be counted in the general election, there is a risk that  
11 military and overseas voters – many of whom are *required to cast write-in votes* – could be  
12 disenfranchised. California law requires courts to “liberally ... permit amendment of the  
13 pleadings.”<sup>3</sup> By allowing Plaintiffs to amend their complaint and introduce new evidence, the  
14 Court will not only enable Ms. Hall to vindicate her fundamental rights, but could ensure that  
15 military and overseas voters are not disenfranchised in the 2012 statewide election.

16 **II. Background**

17 The Top Two Primary. Senate Bill 6, which was championed by former Governor  
18 Schwarzenegger, was passed by Legislature between 3:40 am and 6:55 am on February 19, 2009.<sup>4</sup>  
19 Two years later, Proposition 14 and SB 6 took effect.<sup>5</sup> Proposition 14 and SB 6 eliminated  
20 California’s former party-primary system, in which major-party candidates could qualify for the  
21 November general election by finishing first in their own party’s June primary election. Instead,  
22 candidates must now finish first or second *against all other candidates* in the primary election.  
23 The top two finishers will then advance to the general election.

24 Summary of Litigation. Plaintiffs assert that (1) SB 6 is unconstitutional on its face, and

25 <sup>1</sup> *Hirsa v. Superior Ct.* (1981) 118 Cal.App.3d 486, 488-89 (emphasis in original); *see also Sachs v. City of*  
*Oceanside* (1984) 151 Cal.App.3d 315, 319.

26 <sup>2</sup> A copy of the Proposed Second Amended Complaint has been attached as Exhibit A.

27 <sup>3</sup> *Howard v. County of San Diego* (2010) 184 Cal.App.4<sup>th</sup> 1422, 1428 (*citing Nestle v. Santa Monica* (1972) 6  
Cal.3d 920).

28 <sup>4</sup> “State Legislature Passes Emergency Budget Plan”, S.F. CHRONICLE, Feb. 19, 2011, *available at*  
<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/02/19/MNCM160B0E.DTL&tsp=1> (*last visited* Dec. 17, 2011).

<sup>5</sup> Proposition 14, *codified at* CAL.CONST. art. ii §5; Senate Bill 6, *codified at* Ch. 1, Stats. 2009.

1 (2) Proposition 14’s Top Two Primary is inoperative and unenforceable, because its  
2 implementing law (SB 6) is unconstitutional. Specifically, Plaintiffs assert that SB 6 violates the  
3 U.S. and California Constitutions in two ways. First, SB 6’s Vote Counting Ban allows voters to  
4 cast write-in votes in the general election, but then bans those votes from being counted (the  
5 “Vote Counting Ban”).<sup>6</sup> Second, SB 6’s Party Preference Ban (1) forces minor-party  
6 (“independent”) candidates to falsely state on the ballot that they have “No Party Preference”, and  
7 (2) bars them from using the ballot label of “Independent”<sup>7</sup> – a ban that even the Secretary of  
8 State has admitted is not “permissible.”<sup>8</sup>

9 Plaintiffs filed a Motion for Preliminary Injunction with this Court on July 29, 2010. On  
10 October 5, 2010, the Court denied their Motion. Among other things, the Court held that SB 6  
11 does not impose a Vote Counting Ban. According to the Court’s interlocutory ruling, SB 6 did  
12 not impose a Vote Counting Ban, but instead banned write-in votes from being *cast* in the general  
13 election.<sup>9</sup> On September 19, 2011, the Court of Appeal affirmed this Court’s interlocutory  
14 ruling.<sup>10</sup> Subsequently, Ms. Hall sought to intervene in this litigation, because she believed that  
15 in the wake of the Court of Appeal’s ruling, Plaintiffs could no longer protect her facial  
16 constitutional claims against SB 6. On December 2, 2011, this Court denied her Motion to  
17 Intervene, but took judicial notice of three critical election documents.<sup>11</sup>

18 On Friday, Dec. 2, 2011, counsel for Intervenors inquired how Plaintiffs intended to  
19 proceed in light of the Court’s ruling on Ms. Hall’s Motion to Intervene.<sup>12</sup> Plaintiffs’ counsel had  
20 intended to respond to Intervenors’ inquiry that they would file this Motion to Amend.<sup>13</sup>

21 However, instead of waiting for Plaintiffs’ timely response, Intervenors filed their Motion for

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22 <sup>6</sup> See, e.g., SB 6-amended Elections Code §§13207(a) & 15340 (giving voters the right to cast write-in  
23 ballots); SB 6-amended Elections Code §8606 (banning all write-in votes from being counted in the general election).

24 <sup>7</sup> SB 6-amended Elections Code §325.

25 <sup>8</sup> Office of the Secretary of State’s Aug. 3, 2010 correspondence with the Office of the Lieutenant Governor,  
26 *attached as Dutta Decl. Exh. 6, at Exh. A, Attach. 1.*

27 <sup>9</sup> “[T]he Legislature *intended to ban write-ins* in the general election.” Court’s Oct. 5, 2010 Order, at 1  
(italics added).

28 <sup>10</sup> *Field v. Bowen* (2011) 199 Cal.App.4<sup>th</sup> 346.

<sup>11</sup> Specifically, the Court took notice of the sample ballot in the May 3, 2011 special election, the write-in  
ballot cast by Ms. Hall in that election, and California’s Help America Vote Act (HAVA) Uniform Vote Counting  
Standards. Court’s Dec. 2, 2011 Order, at 1.

<sup>12</sup> Dec. 20, 2011 Declaration of Gautam Dutta (“Dutta Decl.”) Exh. 14, at 1.

<sup>13</sup> *Id.* Exh. 14, at 1.

1 Judgment on the Pleadings (“Intervenors’ MJP”) on Monday, Dec. 5, 2011.<sup>14</sup> Subsequently,  
2 Plaintiffs notified the parties that (1) Intervenors’ MJP is defective, because it improperly relies  
3 on extrinsic evidence; and (2) *any* Motion for Judgment on the Pleadings could become moot,  
4 because Plaintiffs intended to file this Motion to Amend.<sup>15</sup>

5 In response, Intervenors, stated that they would neither amend nor withdraw their MJP.<sup>16</sup>  
6 Intervenors’ MJP is currently scheduled to be heard on the same day as this Motion.

7 No demurrers have been filed in this litigation. To date, Plaintiffs have not asked the  
8 Court for leave to amend any of their pleadings, and no trial, motion, or discovery deadlines have  
9 been set. On November 2, 2011, Plaintiffs propounded discovery on the Secretary of State;  
10 Plaintiffs are currently reviewing the Secretary of State’s response. A case management  
11 conference is set for February 3, 2012.

12 The Right to Cast a Write-In Vote. California voters have the express right to vote for a  
13 write-in candidate in all state and federal elections, including special elections.<sup>17</sup> Elections Code  
14 §15340 – which SB 6 did not amend – states: “Each voter is entitled to *write the name of any*  
15 *public office ... on the ballot of any election.*”<sup>18</sup> Furthermore, the California Constitution  
16 expressly gives voters the right to have all lawfully cast votes counted: “A voter who casts a vote  
17 in an election in accordance with the laws of this State *shall have that vote counted.*”<sup>19</sup>

18 Moreover, all write-in votes that have been lawfully cast must be counted. Elections Code  
19 §15342 – which SB 6 did not amend – requires that all write-in votes for eligible candidates be  
20 counted: “*Any name written upon a ballot for a qualified write-in candidate ... shall be counted*  
21 *for the office, if it is written in the blank space provided[.]*”<sup>20</sup> For its part, SB 6 requires that every  
22 ballot give voters the option to vote for write-in candidates:

23 *There shall be printed on the ballot ... [t]he names of candidates with sufficient*

24 <sup>14</sup> *Id.* Exh. 14, at 1.

25 <sup>15</sup> *Id.* Exh. 14, at 1.

26 <sup>16</sup> *Id.* Exh. 15, at 1.

27 <sup>17</sup> Since 1990, there has been an average of nearly 5 special elections for federal and state office every year.  
28 “Just How ‘Special’ Are Special Elections?”, Apr. 12, 2010, Secretary of State Debra Bowen’s website, available at  
<http://www.sos.ca.gov/admin/press-releases/2010/db10-048.pdf> (last visited Dec. 18, 2011).

<sup>18</sup> Elections Code §15340 (italics added).

<sup>19</sup> CAL. CONST. art. II §2.5 (italics added).

<sup>20</sup> Elections Code §15342 (italics added).

1                    *blank spaces to allow the voters to write in names not printed on the ballot.*<sup>21</sup>  
2                    HAVA’s Uniform Vote Counting Standards. Currently, the standard ballot sent to  
3 military and overseas voters requires voters to cast write-in votes for federal and state candidates,  
4 even if the names of those candidates appear on the ballot.<sup>22</sup> During the 2000 Presidential  
5 election, approximately 7,000 voters cast write-in votes for Al Gore, and approximately 4,000  
6 voters cast write-in votes for George W. Bush.<sup>23</sup> Yet due to Florida law, *none of those votes were*  
7 *counted* in a state that Bush officially carried by 537 votes.<sup>24</sup>

8                    To prevent voters from being disenfranchised in future elections, Congress enacted the  
9 Help America Vote Act of 2002 (HAVA). In relevant part, HAVA required California to “adopt  
10 uniform and nondiscriminatory standards that define what constitutes a vote and what will be  
11 *counted* as a vote[.]”<sup>25</sup> Pursuant to HAVA, the Secretary of State has adopted Uniform Vote  
12 Counting Standards.<sup>26</sup> According to HAVA’s Uniform Vote Counting Standards, any write-in  
13 vote that is cast for a candidate *whose name appears on the ballot must be counted*, because it is a  
14 “valid vote”.<sup>27</sup>

15                    Senate Bill 6’s Vote Counting Ban. SB 6-amended Election Code §8606 *explicitly bans*  
16 *all votes cast for write-in elections from being counted* in the general election:

17                    A person whose name has been written on the ballot as a *write-in candidate* at the  
18 general election ... *shall not be counted*.<sup>28</sup>

19 On August 11, 2011, the Secretary of State’s office publicly stated that SB 6 “give[s] candidates  
20 the *illusion* that they can run as a *write-in*” and “give[s] voters the *illusion* that they can *write in a*  
21 *candidate’s name and have it [sic] counted*.”<sup>29</sup>

22 <sup>21</sup> SB 6-amended Elections Code §13207(a)(2) (italics added).  
23 <sup>22</sup> Standard Form 186A requires military and overseas voters to cast write-in votes for both federal and state  
24 candidates, even if the names of those candidates appear on the ballot. Dutta Decl. Exh. 12.  
25 <sup>23</sup> Dutta Decl. ¶2.  
26 <sup>24</sup> Dutta Decl. ¶2.  
27 <sup>25</sup> Help America Vote Act of 2002 §301(a)(6) (italics added), *codified at* 42 U.S.C. §15481(a)(6).  
28 <sup>26</sup> Secretary of State’s Uniform Vote Counting Standards (“Uniform Vote Counting Standards”), Dutta Decl.  
29 Exh. 11, at 3 of 8, available at <http://www.sos.ca.gov/voting-systems/uniform-vote-count.pdf> (last visited Dec. 18, 2011). The Court took judicial notes of the Uniform Vote Counting Standards on Dec. 2, 2011. Court’s Dec. 2, 2011 Order, at 1.  
30 <sup>27</sup> Uniform Vote Counting Standards, Dutta Decl. Exh. 11, at 3 of 8.  
31 <sup>28</sup> SB 6-amended Elections Code §8606 (italics added).  
32 <sup>29</sup> Office of the Secretary of State’s Aug. 11, 2010 correspondence with the Office of the Lieutenant Governor, attached as Dutta Decl. Exh. 6, at Exh. B, p.1.

1           May 3, 2011 Special General Election. Last spring, a special general election was called  
2 for May 3, 2011 to fill a vacancy in State Assembly District 4. The names of two candidates  
3 (Dennis Campanale and Beth Gaines) were printed on the Election ballot. In addition, the  
4 Election ballot included a blank space in which voters could write in the name of a candidate of  
5 their choice.<sup>30</sup> However, the ballot did *not* tell voters that *their votes would not be counted if they*  
6 *cast a write-in vote.*<sup>31</sup>

7           Disenfranchisement. On March 17, 2011, the Secretary of State disregarded both this  
8 Court’s interlocutory ruling and HAVA’s Uniform Vote Counting Standards with respect to  
9 counting write-in votes. On that date, the Secretary of State released a memorandum (the “SOS  
10 Memorandum”) that advised local elections officials on how to implement SB 6.<sup>32</sup> As discussed  
11 earlier, this Court had held that SB 6 banned write-in votes from being *cast*. However, the SOS  
12 Memorandum stated that, under SB 6, all ballots for the general election *must provide a “blank*  
13 *space”* in which voters may cast *write-in votes.*<sup>33</sup> Furthermore, the SOS Memorandum stated that  
14 “consistent with [Elections Code] section 8606, any name that is written on the ballot as a *write-*  
15 *in candidate* at the general election *shall not be counted.*”<sup>34</sup>

16           On or about April 26, 2011, Ms. Hall cast a write-in vote for Dennis Campanale, a  
17 candidate whose name appeared on the Election ballot.<sup>35</sup> On May 3, 2011, the write-in vote that  
18 Ms. Hall cast for Dennis Campanale – which HAVA’s Uniform Vote Counting Standards would  
19 call a “valid vote”<sup>36</sup> – was not counted. As a result, Ms. Hall was disenfranchised.

20           Subsequently, the State Senate concluded that SB 6’s provisions regarding write-in voting  
21 “could *create confusion, and could mislead voters into thinking that write-in votes* for candidates  
22 *... at a general election will be counted.*”<sup>37</sup>

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24 <sup>30</sup> Dutta Decl. Exh. 13. The Court has taken judicial notice of the write-in ballot cast by Ms. Hall. Court’s  
Dec. 2, 2011 Order, at 1.

25 <sup>31</sup> Dutta Decl. Exh. 13.

26 <sup>32</sup> Dutta Decl. Exh. 9. The Court of Appeal has taken judicial notice of the Secretary of State’s March 17,  
2011 memorandum. *Field, supra*, 199 Cal.App.4<sup>th</sup> at 370 n.5.

27 <sup>33</sup> Dutta Decl. Exh. 9 (italics added) (*citing* Elections Code §§13207(a) & 13212).

28 <sup>34</sup> Dutta Decl. Exh. 9 (italics added).

<sup>35</sup> Dutta Decl. Exh. 13.

<sup>36</sup> Uniform Vote Counting Standards, Dutta Decl. Exh. 11, at 3 of 8.

<sup>37</sup> Senate legislative analysis, *attached to* Dutta Decl. Exh. 10, at 1.

1           Court of Appeal’s Interlocutory Ruling. On September 19, 2011, the Court of Appeal  
2 affirmed this Court’s denial of Plaintiffs’ Motion for Preliminary Injunction.<sup>38</sup> Among other  
3 things, the Court of Appeal made three holdings. First, although Plaintiffs had brought an  
4 interlocutory appeal, the Court of Appeal held that it had the authority to decide the appeal purely  
5 on the merits, *without considering* whether Plaintiffs had made the required showing of *imminent*  
6 *harm.*<sup>39</sup> Second, the Court of Appeal held that SB 6’s Party Preference Ban was constitutional.  
7 Specifically, the Court of Appeal held that (a) the State may force minor-party candidates (e.g.,  
8 Reform Party, Socialist Action, Tea Party) to falsely state on the ballot that they have “No Party  
9 Preference”, and (b) the State may ban candidates from using the ballot label of “Independent” –  
10 a ballot label that California candidates had previously been able to use *for over a century.*

11           Finally, the Court of Appeal held that SB 6 *does not impose a Vote Counting Ban* as a  
12 matter of law. The Court of Appeal pointedly noted that “[i]ncluding a line for write-in votes on  
13 a ballot *when those votes will not be counted raises constitutional questions.*”<sup>40</sup> Mainly for this  
14 reason, the Court of Appeal ruled that SB 6 *bans write-in votes from being cast in the general*  
15 *election:* “No lines or spaces for write-in votes ... can be placed on general election ballots.”<sup>41</sup> In  
16 so doing, the Court of Appeal rendered a statutory interpretation that not only *directly conflicts*  
17 with how SB 6’s Vote Counting Ban was applied against Ms. Hall, but failed to take into account  
18 that military and overseas voters *must cast write-in votes* in federal and state elections.<sup>42</sup>

19           Judicial Notice of New Evidence. On December 2, 2011, this Court took judicial notice  
20 of three important documents: Ms. Hall’s sample Election ballot, the Election ballot cast by Ms.  
21 Hall, and the HAVA Uniform Vote Counting Standards.<sup>43</sup> The Election ballot showed that voters  
22 were allowed to cast write-in votes, but *were not told that their vote would not be counted* if they  
23 cast a write-in vote.<sup>44</sup>

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25 <sup>38</sup> *Field, supra*, 199 Cal.App.4<sup>th</sup> 346.

<sup>39</sup> *Id.* at 353.

<sup>40</sup> *Id.* at 371-72 (*quoting Edelstein, supra*, 29 Cal.4<sup>th</sup> at 181, 186; *Rawls v. Zamora* (2003) 107 Cal.App.4<sup>th</sup> 1110, 1114).

<sup>41</sup> *Field, supra*, 199 Cal.App.4<sup>th</sup> at 372.

<sup>42</sup> *See supra* note 22.

<sup>43</sup> Court’s Dec. 2, 2011 Order, at 1.

<sup>44</sup> Dutta Decl. Exh. 13.

1           Looming Write-In Vote: Ms. Hall seeks to cast a write-in vote for a candidate whose  
2 name appears on the ballot, and have that vote counted, in the 2012 statewide general election.  
3 However, if SB 6's Vote Counting Ban continues to be implemented as enforced by the Secretary  
4 of State, Ms. Hall will be disenfranchised *again*, for her write-in vote will not be counted.

### 5   **III.    The Importance of Write-In Voting**

6           *If the candidate who has represented an individual's interests and views is forced to*  
7 *withdraw from the campaign, alters his or her positions or is indicted for alleged felonies, that*  
8 *individual may feel compelled to become a candidate in order to fill the void. Rather than "doing*  
9 *violence" to the election process, the availability of a write-in candidacy provides the flexibility*  
10 *to deal with unforeseen political developments and may help ensure that the voters are given*  
11 *meaningful options on election day.*

12           -- California Supreme Court, *Canaan v. Abdelnour*<sup>45</sup>

13           Write-in voting has played an important role in local, state, and national politics. Nearly a  
14 decade after write-in voters were disenfranchised in the 2000 Presidential election,<sup>46</sup> U.S. Senator  
15 Lisa Murkowski (R-Alaska) was re-elected as a write-in candidate.<sup>47</sup> Ironically, by attacking  
16 write-in voting, SB 6 seeks to kill off a vital safety valve that would have made its election  
17 system *stronger*. Suppose that SB 6 had been used for last year's gubernatorial election, and that  
18 Democrat Jerry Brown and Republican Meg Whitman had been the only two candidates whose  
19 names appeared on the November 2010 ballot.

20           What if Whitman had suddenly suffered a stroke and became paralyzed a few weeks  
21 before the November general election? Under SB 6's new rules, Republican voters would face a  
22 double bind. First, SB 6 would ban the Republican Party from replacing Whitman.<sup>48</sup> Worse yet,  
23 if voters had written in the name of *another* Republican, SB 6 would force election officials to  
24 *throw away their votes*:

25                           A person whose name has been written on the ballot as a *write-in candidate* at the  
26                           general election ... *shall not be counted*.<sup>49</sup>

27           Furthermore, as shown earlier, many military and overseas voters currently *are required*

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<sup>45</sup>       *Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 718-19 (emphases added), overruled on other  
grounds, *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4<sup>th</sup> 164.

<sup>46</sup>       *See supra* notes 23 and 24.

<sup>47</sup>       *Miller v. Treadwell* (Alaska 2010) 245 P.3d 867.

<sup>48</sup>       SB 6-amended Elections Code §8807.

<sup>49</sup>       *Id.* §8606 (italics added).

1 to cast write-in votes, even for candidates who appear on the ballot. In light of the critical role  
2 that write-in voting plays in our elections, courts must scrutinize any attempt to disenfranchise  
3 anyone who casts a write-in vote.<sup>50</sup>

#### 4 **IV. Legal Analysis**

##### 5 A. California's Liberal Policy in Favor of Amending Pleadings

6 California law emphatically grants Plaintiffs the right to amend their First Amended  
7 Complaint. As the California Supreme Court has admonished, “[t]his statutory provision giving  
8 the courts the power to permit amendments in furtherance of justice has received a very liberal  
9 interpretation by the courts of this state.”<sup>51</sup> Thus, a court may permit a party to amend *any*  
10 pleading on any terms as may be proper.<sup>52</sup> “[I]t is *irrelevant that new legal theories are*  
11 *introduced* as long as the proposed amendments relate back to the same general set of facts.”<sup>53</sup>  
12 Indeed, courts routinely approve amendments that add *new parties*, even if the claims of those  
13 parties may be time-barred.<sup>54</sup> “That the trial courts are to liberally permit such amendments, at  
14 *any stage of the proceeding, has been the established policy in this state since 1901.*”<sup>55</sup>

15 Equally important, “[t]he policy favoring amendment is *so strong* that it is a rare case in  
16 which denial of leave to amend can be justified.”<sup>56</sup> Indeed, it would be an *abuse of discretion* to  
17 deny leave to bar a party from amending its pleadings unless the opposing party can show clear  
18 prejudice, such as the running of the statute of limitations, trial delay, or the loss of critical  
19 evidence.<sup>57</sup> Without a showing of such prejudice, delay alone does not provide sufficient grounds

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20 <sup>50</sup> “[H]aving granted citizens the right to cast *write-in votes*, the [State] must confer the right in a manner  
21 *consistent with the Constitution.*” *Libertarian Party v. Bd. of Elections* (D.D.C. 2011) 768 F.Supp.2d 174, 182  
22 (italics added); *see also 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.

23 <sup>51</sup> *Klopstock v. Superior Ct.* (1941) 17 Cal.2d 13, 19; *see also Nestle, supra*, 6 Cal.3d 920; *Howard, supra*, 184  
Cal.App.4<sup>th</sup> at 1428 (citing *Nestle*).

24 <sup>52</sup> *Clausen v. Pac. Telephone & Telegraph Co.* (1967) 248 Cal.App.2d 770, 785; *see also* CCP §§473(a), 576.

25 <sup>53</sup> *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4<sup>th</sup> 739, 761 (italics added) (quoting *Kittredge Sports Co. v.*  
*Superior Ct.* (1989) 213 Cal.App.3d 1045, 1048).

26 <sup>54</sup> If a party seeks to challenge new legal claims that have been added to the pleadings, it must file a demurrer.  
*See, e.g., Ryan G. v. Dep't of Transportation* (1986) 180 Cal.App.3d 1102, 1107-08.

27 <sup>55</sup> *Hirsa, supra*, 118 Cal.App.3d at 488-89 (italics in original); *see also Sachs, supra*, 151 Cal.App.3d at 319  
(party permitted to amend cross-complaint on the eve of trial).

28 <sup>56</sup> *Howard, supra*, 184 Cal.App.4<sup>th</sup> at 1428 (italics added) (citing *Douglas v. Superior Court* (1989) 215  
Cal.App.3d 155).

<sup>57</sup> *See, e.g., Atkinson, supra*, 109 Cal.App.4<sup>th</sup> 739, 761; *Solit v. Taokai Bank* (1999) 68 Cal.App.4<sup>th</sup> 1435, 1448.

1 to bar a party from amending its pleadings.<sup>58</sup>

2 B. Plaintiffs' Proposed Amendments

3 Plaintiffs seek to amend their First Amended Complaint in three ways. First, they will add  
4 Linda Hall's as-applied claims against SB 6, along with undisputed evidence supporting her  
5 claims. Specifically, the Second Amended Complaint will show that SB 6's Vote Counting Ban  
6 – which, in the Court of Appeal's words, "raises constitutional questions"<sup>59</sup> – violated Ms. Hall's  
7 fundamental right to vote under both the U.S. and California Constitutions. Second, Plaintiffs  
8 will also introduce evidence showing that (1) approximately 11,000 write-in voters were  
9 disenfranchised in Florida during the 2000 Presidential election, and (2) the standard ballot for  
10 military and overseas voters *requires them to cast write-in ballots*, even if their preferred  
11 candidates appears on the ballot. Finally, Plaintiffs will clarify and add new evidence to support  
12 their legal claims regarding SB 6's Party Preference Ban.<sup>60</sup>

13 To date, Plaintiffs have not asked the Court for leave to amend any of their pleadings.  
14 Furthermore, by defending the fundamental right to vote of military and overseas voters and  
15 Linda Hall, Plaintiffs' proposed Second Amended Complaint will further the interest of justice.  
16 Currently, military and overseas voters are presented with a Catch 22. If the Secretary of State  
17 continues to enforce SB 6's Vote Counting Ban pursuant to her March 17, 2011 SOS  
18 Memorandum, military and overseas voters – whose standard ballot requires them to cast write-in  
19 ballots – could be disenfranchised. However, if the Secretary stops enforcing the Vote Counting  
20 Ban and bans write-in votes from being *cast*, she could *still* disenfranchise military and overseas  
21 voters – because the standard ballot *requires* them to cast write-in ballots.

22 Because Linda Hall seeks to cast a write-in vote for a candidate whose name appears on  
23 the ballot, her facial claims will also represent the legal interests of military and overseas voters.  
24 Thus, amending the First Amended Complaint will promote the interest of justice, for it defends  
25 the fundamental rights of military and overseas voters. Accordingly, the Court should allow

26 <sup>58</sup> *Kittredge, supra*, 213 Cal.App.3d at 1048; *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 563-65.

27 <sup>59</sup> *Field, supra*, 199 Cal.App.4<sup>th</sup> at 371.

28 <sup>60</sup> The Second Amended Complaint will assert that Plaintiffs Mackler and Martin have the constitutional right to use the ballot label of "Independent" (which SB 6-amended Elections Code §325 now bans), and will show how this "Party Preference Ban" was applied in a recent Congressional election.

1 Plaintiffs’ to amend their First Amended Complaint.

2 C. No Argument Can Deny Plaintiffs’ Right to Amend Their Pleadings

3 Defendants may try to oppose this Motion on three grounds. First, they may claim that  
4 this Motion is not timely. However, “the trial courts are to liberally permit such amendments, at  
5 any stage of the proceeding[.]”<sup>61</sup> As Intervenor-Defendants themselves admit, “[p]roceedings in  
6 this case ha[d] been effectively *stayed*[.]”<sup>62</sup> In fact, no demurrers have been filed in this  
7 litigation. Plaintiffs recently began propounding discovery, and *no deadlines have yet been set*  
8 for discovery, motions, or trial. On December 6, 2011, Plaintiffs notified the parties that (1) they  
9 would file this Motion, and (2) this Motion could render moot any Motion for Judgment on the  
10 Pleadings. Thus, given the preliminary posture of this case, no party will be prejudiced if  
11 Plaintiffs amend their First Amended Complaint.<sup>63</sup>

12 Second, Defendants may allege that Plaintiffs’ Second Amended Complaint contains legal  
13 claims that the Court of Appeal has rejected. However, if a party seeks to challenge the legal  
14 sufficiency of new legal claims, it must do so by way of a *demurrer* that will enable the Court to  
15 fully consider the matter.<sup>64</sup> For instance, in *Atkinson v. Elk Corp.*, the defendant alleged that the  
16 plaintiff “was simply trying to *circumvent the trial court’s clear ruling*” by seeking to amend his  
17 complaint.<sup>65</sup> After the trial court denied Plaintiff leave to amend, the Court of Appeal reversed:

18 Assuming without deciding that [defendant’s] assertion is true, we believe that the  
19 *better course of action* would have been to *allow [plaintiff] to amend the*  
20 *complaint* and then let the parties test its legal sufficiency in other appropriate  
21 proceedings.<sup>66</sup>

22 Here, Plaintiffs seek to add a new party and introduce new evidence in response to the Court of  
23 Appeal’s ruling. Consequently, “the better course of action” will be to allow them to amend their  
24 First Amended Complaint.

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24 <sup>61</sup> *Hirsa, supra*, 118 Cal.App.3d at 488-89 (italics in original); *see also Sachs, supra*, 151 Cal.App.3d at 319  
(party permitted to amend cross-complaint on the eve of trial).

25 <sup>62</sup> Intervenor-Defendants’ Dec. 5, 2011 Motion for Judgment on the Pleadings, at 5:11 (italics added).

26 <sup>63</sup> *Atkinson, supra*, 109 Cal.App.4<sup>th</sup> at 761 (party opposing amendment of pleadings must make a showing of  
clear prejudice); *Solit, supra*, 68 Cal.App.4<sup>th</sup> at 1448 (same); *Kittredge, supra*, 213 Cal.App.3d at 1048 (delay alone  
will not defeat a motion to amend pleadings); *Higgins, supra*, 123 Cal.App.3d at 563-65 (same).

27 <sup>64</sup> *See, e.g., Atkinson, supra*, 109 Cal.App.4<sup>th</sup> at 760; *Kittredge, supra*, 213 Cal.App.3d 1045; *Ryan G., supra*,  
180 Cal.App.3d at 1107-08.

28 <sup>65</sup> *Atkinson, supra*, 109 Cal.App.4<sup>th</sup> at 760 (italics added).

<sup>66</sup> *Id.* at 760 (italics added) (*citing Kittredge, supra*, 213 Cal.App.3d 1045).

1 Finally, Defendants may claim that Plaintiffs should be barred from amending their  
2 pleadings, because this Court recently denied prospective Plaintiff Linda Hall’s Motion to  
3 Intervene. However, such an argument would mix apples and oranges, for motions to amend and  
4 motions to intervene are governed by different legal standards. To gain mandatory intervention,  
5 an individual must show that the existing parties can no longer protect her interests.<sup>67</sup> In stark  
6 contrast, California law gives litigants wide berth to amend their pleadings “at *any* state of the  
7 proceeding”.<sup>68</sup>

8 In denying Ms. Hall’s Motion to Intervene, the Court ruled that Plaintiffs could adequately  
9 protect Ms. Hall’s *facial* claims against SB 6’s Vote Counting Ban. Yet in so doing, the Court  
10 did *not* bar Plaintiffs from adding Ms. Hall’s as-applied and facial claims to their pleadings, and  
11 did not rule on the merits of her underlying as-applied and facial claims. Equally important,  
12 amending Plaintiffs’ pleadings will enable California courts to prevent military and overseas  
13 voters from being disenfranchised in the 2012 statewide election. Because they have a broad  
14 right to amend their pleadings, Plaintiffs may include Ms. Hall’s claims as part of their Second  
15 Amended Complaint, irrespective of her earlier Motion to Intervene.

## 16 **VI. Conclusion**

17 *Where a complaint could reasonably be amended to allege a valid cause of action, we*  
18 *must reverse the judgment.*

19 -- Court of Appeal, *Kempton v. City of Los Angeles*<sup>69</sup>

20 In short, Plaintiffs have a right to amend their pleadings as a matter of law. By granting  
21 this Motion, the Court will not only enable Plaintiffs to allege valid causes of action, but will  
22 further the interest of justice in two important ways. Namely, Linda Hall will vindicate her  
23 fundamental rights by bringing her compelling as-applied claims, and the fundamental right to  
24 vote of military and overseas voters will be protected in the looming 2012 statewide election.  
25 Accordingly, the Court must grant this Motion to Amend the First Amended Complaint.

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26 <sup>67</sup> See, e.g., *Siena Court Homeowners Assn’s v. Green Valley Corp.* (2008) 164 Cal.App.4<sup>th</sup> 1416, 1424.

27 <sup>68</sup> *Hirsa, supra*, 118 Cal.App.3d at 488-89 (italics in original); see also *Sachs, supra*, 151 Cal.App.3d at 319  
(party permitted to amend cross-complaint on the eve of trial).

28 <sup>69</sup> *Kempton v. City of Los Angeles* (2008) 165 Cal.App.4<sup>th</sup> 1344, 1348 (italics added) (citing *Gami v. Mullikin*  
*Medical Center* (1993) 18 Cal.App.4<sup>th</sup> 870, 876).

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DATED: Dec. 20, 2011

Respectfully submitted,

By:   
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