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LINDA HALL

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CALIFORNIA SUPERIOR COURT

COUNTY OF SAN FRANCISCO

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

Plaintiffs,

LINDA HALL,

Intervenor-Applicant,

vs.

DEBRA BOWEN, et al.

Defendants,

vs.

ABEL MALDONADO, et al.

Intervenors-Defendants.

CASE NO. CGC-10-502018

NOTICE OF MOTION AND MOTION TO INTERVENE BY LINDA HALL; POINTS AND AUTHORITIES

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

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on Nov. 30, 2011, 9:30 am (or as soon as this matter may be heard in an appropriate Department of the California Superior Court for the County of San Francisco), at 400 McAllister Street, San Francisco, California 94102, Linda Hall will move the Court to grant her mandatory intervention.

Ms. Hall's Motion is based on this Notice of Motion and Motion, along with the accompanying Memorandum of Points and Authorities, Declaration of Linda Hall, Request for Judicial Notice, the pleadings and record in this matter, the oral argument of counsel, attached exhibits, and any other matter that the Court may consider just and proper to the resolution of this matter.

Memorandum of Points and Authorities

An intervenor of right has by definition … an interest at stake which the other parties will not fully protect, and which the intervenor can fully protect only by joining the litigation.

-- Justice Brennan[1]

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

-- California Court of Appeal, *Field v. Bowen*[2]

I. Introduction

Unless she is permitted to join this litigation, one-half of Linda Hall's constitutional claims against the Top Two Primary will be decided *without her critical participation*. Last summer, Ms. Hall was *disenfranchised* by the Top Two Primary's implementing law (Senate Bill 6). Although she cast a vote for a qualified candidate, her write-in vote was not counted in the May 3, 2011 special general election for Assembly District 4 (the "Election").

Both the U.S. and California Supreme Courts have admonished courts to promptly hear and resolve challenges to election laws, especially when a voter brings an as-applied challenge.[3] By participating in this case, Ms. Hall will provide critical, firsthand evidence on whether Senate Bill 6's Vote Counting Ban, *as it has been applied*, violates the fundamental right to vote.[4]

Recently, the Court of Appeal held that Senate Bill 6 (SB 6) does *not* impose a Vote Counting Ban as a matter of law. However, Ms. Hall can *prove* that (1) SB 6 did *in fact* impose a Vote Counting Ban in the May 3, 2011 Election, and (2) Ms. Hall was disenfranchised as a result. By hearing her weighty grievances, the Court will be able to resolve a core question raised by this case: whether the State has the power to disenfranchise voters who cast lawful votes.

II. Introduction to Intervenor-Applicant Linda Hall

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1 *Stringfellow v. Concerned Neighbors* (1987) 480 U.S. 370, 382 n.1 (concurring opinion) (emphases added) (*quoted by Siena Court Homeowners Ass'n v. Green Valley Corp.* (2008) 164 Cal.App.4th 1416, 1424).

2 *Field v. Bowen* (Sept. 19, 2011, Case No. A129946), *attached as* Linda Hall Exh. 8, at 27 (emphases added).

3 *Storer v. Brown* (1974) 415 U.S. 727, 737 n.8; *Edelstein v. San Francisco* (2002) 29 Cal.4th 164, 172; *Roemer v. Bd. of Public Works* (1976) 426 U.S. 736, 742 n.4 (High Court admonishes courts to take into account how a challenged statute has been applied).

4 *See, e.g., Coffman Specialties v. Dep't of Transportation* (2009) 176 Cal.App.4th 1135, 1145 (*citing Hale v. Morgan* (1978) 22 Cal.3d 388 (as-applied challenges inquire whether the particular *application* of the statute violate[d] [plaintiff's] constitutional rights.") (italics added); *Legal Aid Svcs. v. Legal Services Corp.* (9th Cir. 2009) 587 F.3d 1006, 1018 (same) (*citing L.A. v. Taxpayers for Vincent* (1984) 466 U.S. 789, 802-03).

A registered voter in Placer County, Assembly District 4, and Senate District 1, Linda Hall seeks to join this lawsuit in two capacities: as a disenfranchised voter and as a voter who wishes to cast a write-in vote that is counted.[5] If she is allowed to join this litigation, she will ask the Court to declare that (1) SB 6 violated her fundamental right to vote, when it forced elections officials not to count her write-in vote in the May 3, 2011 Election, (2) SB 6 enables voters to cast write-in votes in every general election but then bans those votes from being counted, and (3) SB 6's Vote Counting Ban is unconstitutional both on its face and as it has been applied against her.[6]

III. The Importance of Write-In Voting

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

Write-in voting has played an important role in local, state, and national politics. Last year, U.S. Senator Lisa Murkowski (R-Alaska) was re-elected as a write-in candidate.[8] Ironically, by attacking write-in voting, SB 6 seeks to kill off a vital safety valve that would have made its election system *stronger*. Suppose that SB 6 had been used for last year's gubernatorial election, and that Democrat Jerry Brown and Republican Meg Whitman had been the only two candidates whose names appeared on the November 2010 ballot.

What if Whitman had suddenly suffered a stroke and became paralyzed a few weeks before the November general election? Under SB 6's new rules, Republican voters would face a double bind. First, SB 6 would ban the Republican Party from replacing Whitman.[9] Worse yet, if voters had written in the name of *another* Republican, SB 6 would force election officials to *throw away* their votes:

> A person whose name has been written on the ballot as a *write-in candidate* at the

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[5] Hall Decl. ¶1.

[6] A copy of Ms. Hall's proposed Complaint in Intervention has been attached as Hall Decl. Exh. A.

[7] *Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 718-19 (emphases added), overruled on other grounds, *Edelstein*, *supra*, 29 Cal.4th 164.

[8] *Miller v. Treadwell* (Alaska 2010) 245 P.3d 867.

[9] SB 6-amended Elections Code §8807.

general election … *shall not be counted*.[10]

In light of the critical role that write-in voting has played in our elections, courts must scrutinize any attempt to disenfranchise anyone who casts a write-in vote.[11]

IV. Background

The Top Two Primary. Senate Bill 6, which was championed by former Governor Schwarzenegger, was passed by Legislature between 3:40 am and 6:55 am on February 19, 2009.[12] Two years later, Proposition 14 and SB 6 took effect.[13] Proposition 14 and SB 6 eliminated California's former party primary system, in which major-party candidates could qualify for the November general election by finishing first in their own party's June primary election. Instead, candidates must now finish first or second *against all other candidates* in the primary election. The top two finishers will then advance to the general election.

In relevant part, SB 6 expressly allows voters to cast write-in votes in every general election for state and federal office.[14] However, if a voter does cast a write-in vote, SB 6 forces elections officials not to count that vote (the "Vote Counting Ban").[15]

Summary of Litigation. Plaintiffs assert that (1) SB 6 is unconstitutional on its face, and (2) Proposition 14's Top Two Primary is inoperative and unenforceable, because its implementing law (SB 6) is unconstitutional. Plaintiffs assert that SB 6 violates the U.S. and California Constitutions in two ways. First, SB 6's Vote Counting Ban allows voters to cast write-in votes, but then bans those votes from being counted. Second, SB 6's Party Preference Ban (1) forces minor-party ("independent") candidates to falsely state on the ballot that they have "No Party Preference", and (2) bars them from using the ballot label of "Independent"[16] – a ban

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[10] SB 6-amended Elections Code §8606 (emphases added).

[11] "[H]aving granted citizens the right to cast *write-in votes*, the [State] must confer the right in a manner *consistent with the Constitution*." *Libertarian Party v. Bd. of Elections* (D.D.C. 2011) 768 F.Supp.2d 174, 182 (italics added); *see also Grant v. Meyer* (10th Cir. 1987) 828 F.2d 1446, 1456; *Turner v. Bd. of Elections* (D.D.C. 1999) 77 F.Supp.2d 25, 30.

[12] "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* Oct. 31, 2011).

[13] Proposition 14, *codified at* CAL.CONST. art. ii §5; Senate Bill 6, *codified at* Ch. 1, Stats. 2009.

[14] *See, e.g.,* SB 6-amended Elections Code §§13207(a) & 15340.

[15] SB 6-amended Elections Code §8606.

[16] SB 6-amended Elections Code §325.

that even the Secretary of State has admitted is not "permissible."[17]

Plaintiffs filed a Motion for Preliminary Injunction with this Court on July 29, 2010. After the Court denied that Motion, Plaintiffs filed an interlocutory appeal on October 5, 2010. On September 19, 2011, the Court of Appeal affirmed this Court's interlocutory ruling.[18]

The Right to Cast a Write-In Vote. California voters have the express right to vote for a write-in candidate in all state and federal elections, including special elections.[19] Elections Code §15340 – which SB 6 did not amend – states: "Each voter is entitled to *write the name of any public office* … on the ballot of *any election*."[20] Furthermore, the California Constitution expressly gives voters the right to have all lawfully cast votes counted: "A voter who casts a vote in an election in accordance with the laws of this State *shall have that vote counted*."[21]

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

> 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*."[23]

HAVA's Uniform Vote Counting Standards. The Help America Vote Act of 2002 (HAVA) required California to "adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote[.]"[24] Pursuant to HAVA, the Secretary of State has adopted Uniform Vote Counting Standards.[25] According to the Uniform Vote Counting

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[17] Office of the Secretary of State's Aug. 3, 2010 correspondence with the Office of the Lieutenant Governor, *attached as* Hall Decl. Exh. 11, at Exh. A, Attach. 1.

[18] *Field*, *supra*, Hall Decl. Exh. 8.

[19] Since 1990, there has been an average of nearly 5 special elections for federal and state office every year. "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* Oct. 31, 2011).

[20] Elections Code §15340 (italics added).

[21] CAL. CONST. art. II §2.5 (italics added).

[22] Elections Code §15342 (italics added).

[23] SB 6-amended Elections Code §13207(a)(2) (italics added).

[24] Help America Vote Act of 2002 §301(a)(6), *codified at* 42 U.S.C. §15481(a)(6).

[25] Secretary of State's Uniform Vote Counting Standards ("Uniform Vote Counting Standards"), Exh. 5, at 3 of 8, *available at* *http://www.sos.ca.gov/voting-systems/uniform-vote-count.pdf* (*last visited* Oct. 31, 2011).

Standards, any write-in vote that is cast for a candidate *whose name appears on the ballot must be counted*, because it is a "valid vote".[26]

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

> A person whose name has been written on the ballot as a *write-in candidate* at the general election … *shall not be counted*.[27]

On August 11, 2011, Secretary Bowen's office publicly stated that SB 6 "give[s] candidates the *illusion* that they can run as a *write-in*" and "give[s] voters the *illusion* that they can *write in a candidate's name and have it* [sic] *counted*."[28]

May 3, 2011 Special General Election. Last spring, a special general election was called for May 3, 2011 to fill a vacancy in State Assembly District 4. The names of two candidates (Dennis Campanale and Beth Gaines) were printed on the Election ballot. In addition, the May 3, 2011 Election ballot included a blank space in which voters could write in the name of a candidate of their choice.[29] However, the ballot did *not* tell voters that *their votes would not be counted if they cast a write-in vote.*[30]

Ms. Hall sought to cast a write-in vote in the Election.[31] However, she understood if she cast a write-in vote in the Election, her vote would not be counted.[32] At the time, Ms. Hall was aware that Plaintiffs had filed this litigation to challenge the facial constitutionality of Senate Bill 6 (SB 6), including SB 6's Vote Counting Ban and Party Preference Ban.[33] She was also aware that (a) Plaintiffs had appealed this Court's denial of their Motion for Preliminary Injunction to the Court of Appeal, and (b) Plaintiffs' appeal was pending before the Court of Appeal.[34]

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[26] Uniform Vote Counting Standards, Exh. 5, at 3 of 8.

[27] SB 6-amended Elections Code §8606 (italics added).

[28] Office of the Secretary of State's Aug. 11, 2010 correspondence with the Office of the Lieutenant Governor, *attached as* Hall Decl. Exh. 11, at Exh. B, p.1.

[29] Hall Decl. Exh. 1.

[30] Hall Decl. Exh. 1.

[31] Hall Decl. ¶11.

[32] Hall Decl. ¶12.

[33] Hall Decl. ¶13.

[34] Hall Decl. ¶14. In a writ petition, Plaintiffs also asked the Court of Appeal to block SB 6 from being implemented in the Jan. 4, 2011 special general election for Senate District 1. However, no Plaintiff is registered to vote in Senate District 1, where Ms. Hall is registered to vote. For this reason, Ms. Hall asked the Court of Appeal for permission to intervene in that proceeding. Because SB 6 was ultimately not implemented for the Senate District 1 election, the Court of Appeal denied both Plaintiffs' writ petition and Ms. Hall's motion to intervene. Hall Decl.

Ms. Hall's Amicus Letter. As of April 7, 2011, Ms. Hall had not voted in the May 3, 2011 Election.[35] On that date, she asked the Court of Appeal for permission to file an amicus letter in this litigation.[36] Her amicus letter showed that SB 6's Vote Counting Ban had been implemented for the Election. Specifically, her amicus letter showed that (a) the Election ballot included a blank space in which voters could write in the name of a candidate of their choice, (b) the ballot did not tell voters that their votes would not be counted if they cast a write-in vote, and (c) due to SB 6's Vote Counting Ban, voters like Ms. Hall would be *disenfranchised* if they exercised their right to cast a write-in vote in the Election.[37] Also on April 7, 2011, Plaintiffs asked the Court of Appeal to take judicial notice of the May 3, 2011 Election ballot.[38] On April 18, 2011, the Court of Appeal denied Ms. Hall permission to file her amicus letter.[39]

Disenfranchisement. On March 17, 2011, the Secretary of State disregarded HAVA's Uniform Vote Counting Standards with respect to counting write-in votes. On that date, the Secretary of State released a memorandum (the "SOS Memorandum") that advised local elections officials on how to implement SB 6.[40] Specifically, the SOS Memorandum stated that to comply with SB 6, all ballots for the general election must provide a "blank space" in which voters may cast write-in votes.[41] Furthermore, the SOS Memorandum stated that "consistent with [Elections Code] section 8606, any name that is written on the ballot as a *write-in candidate* at the general election *shall not be counted*."[42]

On or about April 26, 2011, Ms. Hall cast a write-in vote for Dennis Campanale, a candidate whose name appeared on the Election ballot.[43] On May 3, 2011, the write-in vote that Ms. Hall cast for Dennis Campanale – which HAVA's Uniform Vote Counting Standards would

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Exhs. 12 (motion to intervene), 13 (Intervenors' opp'n), 14 (Intervenors' RJN), 15 (Oct. 14, 2010 Court order).

[35] Hall Decl. ¶15.

[36] Hall Decl. ¶15.

[37] Hall Decl. ¶16; Linda Hall's Apr. 7, 2011 amicus letter, Hall Decl. Exh. 2, at 1-2.

[38] Hall Decl. Exh. 3.

[39] Hall Decl. Exh. 4.

[40] Hall Decl. Exh. 6. The Court of Appeal has taken judicial notice of Secretary Bowen's March 17, 2011 memorandum. *Field*, *supra*, Hall Decl. Exh. 8, at 26 n.5.

[41] Hall Decl. Exh. 6 (italics added) (*citing* Elections Code §§13207(a) & 13212).

[42] *Id.* Exh. 6 (italics added).

[43] Hall Decl. Exh. 7.

call a "valid vote"[44] – was not counted. As a result, Ms. Hall was disenfranchised.

Subsequently, Plaintiffs apprised the Court of Appeal of an important legislative analysis. According to the legislative analysis, SB 6's provisions regarding write-in voting "could *create confusion*, and could *mislead voters into thinking that write-in votes* for candidates … at a general election *will be counted*."[45] In response, the Court of Appeal barred Plaintiffs' letter from entering the record.[46]

Court of Appeal's Interlocutory Ruling. On September 19, 2011, the Court of Appeal affirmed this Court's denial of Plaintiffs' Motion for Preliminary Injunction.[47] Among other things, the Court of Appeal made three holdings. First, although Plaintiffs had brought an interlocutory appeal, the Court of Appeal held that it had the authority to decide the appeal purely on the merits, *without considering* whether Plaintiffs had made the required showing of *imminent harm.*[48] Second, the Court of Appeal held that SB 6's Party Preference Ban was constitutional. Specifically, the Court of Appeal held that (a) the State may force minor-party candidates (e.g., Reform Party, Socialist Action, Tea Party) to falsely state on the ballot that they have "No Party Preference", and (b) the State may ban candidates from using the ballot label of "Independent" – a ballot label that California candidates had previously been able to use *for over a century*.

Finally, the Court of Appeal held that SB 6 *does not impose a Vote Counting Ban* as a matter of law. Instead, the Court of Appeal held that SB 6 *bans write-in votes from being cast in the general election*[49] – a statutory interpretation that *directly conflicts* with how SB 6's Vote Counting Ban was applied against Ms. Hall. In so doing, the Court of Appeal pointedly noted that "[i]ncluding a line for write-in votes on a ballot *when those votes will not be counted raises constitutional questions*."[50] However, the Court of Appeal declined to take judicial notice of the ballot that was used in the May 3, 2011 Election.[51] Specifically, the Election ballot showed that

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[44] Uniform Vote Counting Standards, Hall Decl. Exh. 5, at 3 of 8.
[45] Senate legislative analysis, *attached to* Hall Decl. Exh. 9, at 1.
[46] Hall Decl. Exh. 10.
[47] *Field*, *supra*, Hall Decl. Exh. 8.
[48] *Id.* Exh. 8, at 28.
[49] *Id.* Exh. 8, at 23-28.
[50] *Field*, Hall Decl. Exh. 8, at 27 (*quoting Edelstein*, *supra*, 29 Cal.4th at 181, 186; *Rawls v. Zamora* (2003) 107 Cal.App.4th 1110, 1114).
[51] *Id.* Exh. 8, at 26 n.5.

voters were allowed to cast write-in votes, but *were not told that their vote would not be counted* if they cast a write-in vote.[52] Thus, the Court of Appeal has barred Plaintiffs from introducing evidence showing that Ms. Hall was disenfranchised.

It is Ms. Hall's understanding that Plaintiffs faced an October 31, 2011 deadline to decide whether to ask the California Supreme Court to review the Court of Appeal's interlocutory ruling. Last week, she learned that Plaintiffs had decided not to seek the High Court's review.

<u>Looming Write-In Vote</u>: Ms. Hall seeks to cast a write-in vote, and have that vote counted, in future federal and state elections, including the 2012 statewide general election. However, if SB 6's Vote Counting Ban continues to be implemented under the SOS Memorandum, she will be disenfranchised *again,* for her write-in vote will not be counted.

<u>The Need for Mandatory Intervention</u>. Plaintiffs Field, Winger, Chessin, Wozniak, and Ms. Hall share six claims in common. Namely, SB 6's Vote Counting Ban *facially* violates the U.S. Constitution (Due Process Clause, Amendment I, Elections Clause) and the California Constitution (Due Process Clause, Vote Counting Clause, Free Speech Clause).[53]

Before the Court of Appeal issued its interlocutory ruling, Ms. Hall was confident that Plaintiffs could adequately protect her interests.[54] However, Plaintiffs can no longer protect her interests, because they have not appealed the Court of Appeal's ruling.[55] In its ruling, the Court of Appeal held that SB 6 does *not* impose a Vote Counting Ban as a matter of law – even though Ms. Hall was *disenfranchised* by SB 6's Vote Counting Ban. Because the Court of Appeal has rejected their statutory construction of SB 6, Plaintiffs will now face significant difficulty showing that (1) SB 6 does impose – and has *in fact* imposed – a Vote Counting Ban, and (2) SB 6's Vote Counting Ban is unconstitutional.

Unless she is permitted to join this litigation, one or more of Defendants will likely ask this Court for judgment in their favor within a matter of days.[56] If the Court grants such a request,

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[52] Hall Decl. Exh. 2; Hall Decl. Exh. 3.
[53] *See* Complaint in Intervention (Causes of Action Nos. 7-12), Hall Decl. Exh. A.
[54] Hall Decl. ¶44.
[55] Hall Decl. ¶45.
[56] Hall Decl. ¶47.

Plaintiffs will likely file an appeal.[57] Thus, unless she is permitted to intervene, *six of her 12 constitutional claims may be decided* on appeal *without her critical participation.*

III. Legal Analysis

Ms. Hall unquestionably meets all the criteria required for mandatory intervention. To qualify for mandatory intervention, an applicant must satisfy four criteria:

1. She must have a "significantly protectable" interest in the "property or transaction" at issue;
2. The disposition of the litigation "may as a practical matter impair or impede" her ability "to protect that interest"; and
3. The existing parties cannot "adequately represent[]" that interest.
4. She has filed a timely motion to intervene.[58]

A. Ms. Hall Has a Significantly Protectable Interest That Will Likely Be Impaired

At the outset, Ms. Hall has a "significantly protectable" interest in the "transaction" at issue: this litigation. As one Court of Appeal has approvingly noted, Black's Law Dictionary defines "transaction" as the "[a]ct of transacting or conducting any business; negotiation, management; *proceeding*[.]"[59] Indeed, the outcome of this litigation will likely impair and impede Ms. Hall's ability to protect her interests. Namely, if Plaintiffs' facial challenge against SB 6's Vote Counting Ban does not prevail, Ms. Hall will suffer irreparable harm, for she will be disenfranchised in the 2012 statewide general election. Moreover, by showing how SB 6's Vote Counting Ban was applied against her,[60] Ms. Hall will enable the Court to determine whether (a) SB 6 does in fact impose a Vote Counting Ban, and (b) whether SB 6's Vote Counting Ban is unconstitutional.

B. Plaintiffs Can No Longer Protect Ms. Hall's Interests

Equally important, Ms. Hall also qualifies for mandatory intervention because Plaintiffs can no longer protect her interests. As Justice Brennan noted, mandatory intervention *must* be granted if the existing parties "cannot fully protect" a person's interests.[61] Plaintiffs and Ms. Hall share six claims in common: namely, they both assert that SB 6's Vote Counting Ban is facially

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[57] Hall Decl. ¶47.

[58] *Siena*, *supra*, 164 Cal.App.4th at 1423-24; CCP §387(b); *see also Donaldson v. U.S.* (1971) 400 U.S. 517.

[59] *Calif. Physicians' Svc. v. Superior Court* (1980) 102 Cal.App.3d 91, 96 (italics added).

[60] *See Storer*, *supra*, 415 U.S. at 737 n.8.

[61] *Stringfellow*, *supra*, 480 U.S. 370 n.1 (*quoted by Siena*, *supra*, 164 Cal.App.4th at 1424).

unconstitutional. Until the Court of Appeal issued its interlocutory ruling, Plaintiffs had adequately protected Ms. Hall's interests, for they had asserted that (1) SB 6 imposes – and has in fact imposed – a Vote Counting Ban, and (2) SB 6's Vote Counting Ban is unconstitutional, both on its face and as it has been *applied* against voters like Ms. Hall.

However, the Court of Appeal has now held that SB 6 does *not* impose a Vote Counting Ban as a matter of law, and has declined to take into account factual evidence on how SB 6 has been implemented. Specifically, the Court of Appeal (1) barred Plaintiffs from presenting factual evidence on how SB 6's Vote Counting Ban was applied against voters like Ms. Hall in the May 3, 2011 Election, and (2) did not allow Ms. Hall to file an amicus letter showing how the Vote Counting Ban was applied against her.[62] Because they have *not* appealed the Court of Appeal's ruling, Plaintiffs can no longer protect Ms. Hall's interests.

Moreover, unless Ms. Hall is permitted to join this litigation, one or more of Defendants will likely ask this Court for judgment in their favor *within a matter of days*. If the Court grants such a request, Plaintiffs will likely file an appeal. Thus, unless she joins this litigation, *one-half* of her legal claims may be decided on appeal *by parties who "cannot fully protect" her interests.*

C. Ms. Hall's Motion Is Timely

Finally, Ms. Hall has brought a timely Motion to Intervene, for she rushed to this Court *within days* after learning that Plaintiffs could no longer protect her interests. In analyzing timeliness, courts focus "on the date the person attempting to intervene should have been aware his interests *would no longer be protected adequately* by the parties, *rather than the date the person learned of the litigation*."[63]

In *United Airlines v. McDonald*, plaintiffs in a gender discrimination case were denied class certification. After learning that the plaintiffs would not appeal that denial, a former flight attendant sought to intervene. However, the trial court held that her motion to intervene was not timely. Reversing the trial court's ruling, the U.S. Supreme Court held that the former flight attendant had filed a timely motion to intervene, for she had filed her motion to intervene 18 days

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[62] Hall Decl. Exh. 3 & Exh. 8, at 26 n.5.

[63] *Bates v. Jones* (9th Cir. 1997) 127 F.3d 870, 873 (Reinhardt, J.) (italics added); *accord*, *United Airlines v. McDonald* (1977) 432 U.S. 385, 394; *see also Truck Ins. Exch. v. Superior Ct.* (1997) 60 Cal.App.4th 342, 351.

after learning that the plaintiffs would not appeal:

> In short, *as soon as it became clear* to the respondent that the *interests of the unnamed class members would no longer be protected* by the named class representatives, she *promptly moved to intervene* to protect those interests.[64]

Like the flight attendant in *United Airlines*, Ms. Hall intervened in a timely manner. As discussed earlier, Plaintiffs adequately protected her interests until they decided not to appeal the Court of Appeal's interlocutory ruling. Because she rushed to the Court one week after learning that Plaintiffs would not appeal, Ms. Hall has brought a timely Motion to Intervene.

V. Conclusion

[H]aving granted citizens the right to cast write-in votes, the [State] must confer the right in a manner consistent with the Constitution.

-- California Court of Appeal, *Field v. Bowen*[65]

To cast a lawful vote only to be told that the vote will not be counted or released is to rob the vote of any communicative meaning whatsoever.

-- *Turner v. Election Board* (D.D.C. 1999)[66]

Having already been disenfranchised, Ms. Hall seeks to join this litigation to ensure that voters like her will not be disenfranchised *again* in the looming statewide election. As she has compellingly shown, Ms. Hall unquestionably satisfies all the requirements for mandatory intervention. To paraphrase the U.S. Supreme Court, her participation will also shed crucial light on "the *construction* of [SB 6's Vote Counting Ban], an understanding of its operation, and possible *constitutional limits* on its *application*."[67] By calling attention to SB 6's grave infirmities, Linda Hall has earned the opportunity to join this case as a party. Accordingly, this Court must grant her mandatory intervention.

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[64] *United Airlines*, *supra*, 432 U.S. at 394 (italics added).

[65] *Field v. Bowen*, Hall Decl. Exh. 8, at 23 (*quoting Libertarian Party v. Bd. of Elections* (D.D.C. 2011) 768 F.Supp.2d 174, 182). *See also Grant*, *supra*, 828 F.2d at 1456; *Turner*, *supra*, 77 F.Supp.2d at 30.

[66] *Turner*, *supra*, 77 F.Supp.2d at 33 (*quoted by Field*, *supra*, Hall Exh. 8, at 22-23).

[67] *Storer*, *supra*, 415 U.S. at 737 n.8; *see also Roemer*, *supra*, 426 U.S. at 742 n.4.

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3 DATED: Nov. 1, 2011
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5 Respectfully submitted,
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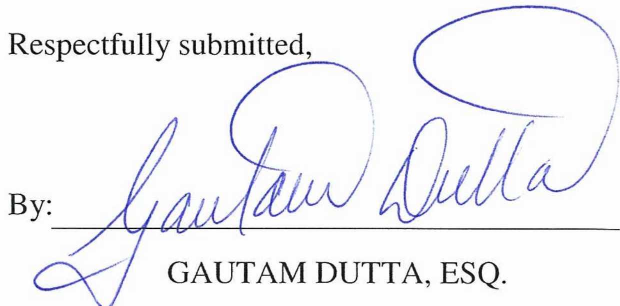
7 By: 
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