

1 GAUTAM DUTTA, ESQ. (State Bar No. 199326)
39270 Paseo Padre Parkway # 206
2 Fremont, CA 94538
Telephone: 415.236.2048
3 Email: Dutta@BusinessandElectionLaw.com
Fax: 213.405.2416
4

Attorney for Plaintiffs
5 MONA FIELD, RICHARD WINGER, STEPHEN A.
CHESSIN, JENNIFER WOZNIAK, JEFF MACKLER, and
6 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,
13

Plaintiffs,
14

15 vs.

16 DEBRA BOWEN, et al.
17

Defendants,
18

19 vs.

20 ABEL MALDONADO, et al.
21

Intervenors-Defendants.
22
23
24
25
26
27
28

CASE NO. CGC-10-502018

**REPLY BRIEF IN SUPPORT OF MOTION
TO AMEND FIRST AMENDED
COMPLAINT**

HEARING DATE: Jan. 27, 2012
HEARING TIME: 9:30 am
JUDGE: Hon. Harold E. Kahn
DEPARTMENT: 302

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

3 -- Court of Appeal, *Kempton v. City of Los Angeles*¹

4 **I. Introduction**

5 Defendants have failed to refute three key points made by Plaintiffs. First, California law
6 emphatically protects a plaintiff’s right to amend a complaint. Second, prospective Plaintiff
7 Linda Hall brings viable as-applied claims: her fundamental rights were violated when her write-
8 in vote was not counted in a recent election. Finally, Ms. Hall brings viable *facial* claims, for
9 state law enables her to represent the interests of military and overseas voters – many of whom
10 *may be forced to cast write-in ballots* in the 2012 statewide election. By granting this Motion, the
11 Court will not only honor long established precedent, but protect our citizens’ fundamental right
12 to vote.

13 **II. Defendants Concede That Plaintiffs Have the Right to Amend the Complaint**

14 At the outset, Defendants concede that California law emphatically gives Plaintiffs the
15 right to amend their First Amended Complaint (the “Complaint”). As the Court of Appeal has
16 observed, “it is *irrelevant* that new legal theories are introduced as long as the proposed
17 amendments relate back to the same general set of facts.”² Among other things, Plaintiffs allege
18 that Senate Bill 6 will violate their fundamental rights, because it will ban their write-in votes
19 from being counted in the 2012 general election.

20 Here, Ms. Hall’s fundamental rights were violated, when her write-in vote was not
21 counted. Equally important, SB 6 is poised to disenfranchise her if she casts another write-in vote
22 in the 2012 general election. Thus, it is beyond dispute that Ms. Hall’s claims “relate back” to the
23 “same general set of facts” alleged in the Complaint. Therefore, Plaintiffs have an
24 unquestionable right to amend their Complaint to include Ms. Hall’s weighty constitutional
25 claims.

26 **III. Ms. Hall Will Enable Plaintiffs to Bring Viable Claims**

27 ¹ *Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1348.

28 ² *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761 (italics added) (*quoting Kittredge Sports Co. v. Superior Ct.* (1989) 213 Cal.App.3d 1045, 1048).

1 As Plaintiffs’ Opening Brief showed, Ms. Hall will enable Plaintiffs to bring strong,
2 viable claims against Senate Bill 6. A trial court *must* allow a complaint to be amended, if that
3 amendment would enable it to “allege a valid cause of action.”³ To no surprise, Defendants seek
4 to defeat this Motion by attacking Ms. Hall’s claims on the merits. Yet as shown below, their
5 strained arguments against Ms. Hall’s robust as-applied and facial claims carry no weight.

6 A. Ms. Hall’s Fundamental Right to Vote Was Violated

7 Contrary to Defendants’ claims, Ms. Hall’s fundamental right to vote indeed violated
8 during the May 3, 2011 special election. As Plaintiffs’ Opening Brief showed, federal law
9 *mandates* that any write-in vote that is cast for a candidate whose name appears on the ballot *must*
10 *be counted*, because it is a “valid vote”.⁴ Furthermore, the Court of Appeal has made it clear that
11 “[i]ncluding a line for write-in votes on a ballot when those votes will not be counted *raises*
12 *constitutional questions*.”⁵ Here, it is undisputed – and the Court has taken judicial notice – that
13 Ms. Hall cast a write-in vote for a candidate whose name appeared on the ballot.⁶ Because she
14 did not count Ms. Hall’s lawfully cast write-in vote, Secretary of State Bowen violated federal
15 law.

16 B. Ms. Hall’s Claims Are Far From Moot

17 As Plaintiffs’ Opening Brief showed, Ms. Hall’s claims are far from moot. Ms. Hall seeks
18 to cast a write-in vote for a candidate whose name appears on the ballot for the 2012 general
19 election. As Plaintiffs and Ms. Hall have shown, Secretary Bowen – who is *not* bound by the
20 Court of Appeal’s recent ruling – has *not* retracted her March 17, 2011 Memorandum, in which
21 she urged elections officials to disregard all write-in ballots that are cast in the general election.⁷

22 ³ *Kempton, supra*, 165 Cal.App.4th at 1348; *see also Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th
23 870, 876; *Atkinson, supra*, 109 Cal.App.4th at 760; *Kittredge, supra*, 213 Cal.App.3d 1045.

24 ⁴ Dec. 20, 2011 Motion to Amend (“Opening Brief”), at 6:2-6:14 (*citing* Uniform Vote Counting Standards
adopted pursuant to Help America Vote Act §301(a)(6), *codified at* 42 U.S.C. §15481(a)(6)). *See also* Opening
25 Brief, at 5:12-6:1 (state law gives all voters the right to cast a write-in vote that will be counted in every election).

26 ⁵ *Field v. Bowen* (2011) 199 Cal.App.4th 346, 371-72 (*italics added*) (*quoting Edelman v. San Francisco*
27 (2002) 29 Cal.4th 164, 181, 186; *Rawls v. Zamora* (2003) 107 Cal.App.4th 1110, 1114).

28 ⁶ Court’s Dec. 2, 2011 order (taking judicial notice of the write-in vote cast by Ms. Hall).

⁷ Opening Brief, at 7:7-7:15; Nov. 23, 2011 Reply Brief of Linda Hall, at 4:1-5:8 & nn. 12, 18 & 7:6-7:15.
The Court of Appeal has taken judicial notice of Secretary Bowen’s March 17, 2011 Memorandum. *Field, supra*,
199 Cal.App.4th at 370 n.5. Plaintiffs hereby incorporate by reference their Jan. 13, 2012 Opposition to Defendants’
Motion for Judgment on the Pleadings, the Jan. 13, 2012 Declaration of Gautam Dutta, Ms. Hall’s Nov. 2, 2011
Motion to Intervene, Ms. Hall’s Nov. 2, 2011 Request for Judicial Notice, and Ms. Hall’s Nov. 23, 2011 Reply Brief.

1 Furthermore, it matters profoundly whether or not write-in votes are counted. In the razor-tight
2 2000 Presidential election, approximately 11,000 voters were disenfranchised when they cast
3 write-in votes for Al Gore and George W. Bush.⁸

4 Currently, the standard *federal* ballot sent to military and overseas voters requires them to
5 cast write-in votes for candidates in *every* election – even if the names of their preferred
6 candidates appear on the ballot.⁹ However, the Court of Appeal recently ruled that SB 6 bans
7 write-in votes from being *cast* in the general election: “No lines or spaces for write-in votes ...
8 can be placed on general election ballots.”¹⁰

9 Against this backdrop, military and overseas voters are now presented with a Catch 22.
10 Simply put, they could be disenfranchised in the 2012 general election *regardless* of how SB 6 is
11 implemented. As shown earlier, the federal standard ballot requires military and overseas voters
12 to cast write-in votes, even if their chosen candidate appears on the ballot. If the Secretary of
13 State continues enforcing SB 6’s Vote Counting Ban,¹¹ their votes will not be counted. What is
14 more, military and overseas voters will be disenfranchised *even if* the Secretary of State retracts
15 her March 17, 2011 Memorandum, because the Court of Appeal has *banned* “lines or spaces for
16 write-in votes” from being “placed on general election ballots.”¹² Given the fundamental rights at
17 stake, the interests of justice *require* that Ms. Hall’s weighty claims be heard.¹³

18 C. Ms. Hall May Defend the Fundamental Rights of Military and Overseas Voters

19 Contrary to Intervenors’ claims, California law gives Ms. Hall the right to defend the
20 fundamental rights of military and overseas voters who are threatened with mass
21 disenfranchisement. In fact, a plaintiff may challenge the constitutionality of a statute *on a third*
22 *party’s behalf*, if the plaintiff is “vitaly interested in the validity” of that statute.¹⁴ In *Andal v.*
23 *City of Stockton*, several cell phone companies challenged the constitutionality of a statute that

24 ⁸ Opening Brief, at 6:4-6:7.

25 ⁹ Opening Brief, at 6:2-6:4 & Dec. 20, 2011 Dutta Declaration (“Dutta Decl.”) Exh. 12.

26 ¹⁰ *Field, supra*, 199 Cal.App.4th at 372.

27 ¹¹ SB 6-amended Elections Code §8606.

28 ¹² *Field, supra*, 199 Cal.App.4th at 372.

¹³ CCP §473.

¹⁴ *See, e.g., Andal v. City of Stockton* (2006) 137 Cal.App.4th 86, 94-95; *Gowens v. City of Bakersfield* (1960) 179 Cal.App.2d 282, 285 (*quoting Quong Ham Wah Co. v. Industrial Accident Comm’n* (1920) 184 Cal. 26, 31 (“[A] discriminatory law is, equally with the other laws offensive to the constitution, *no law at all.*”) (italics added)).

1 imposed a fee on their customers.¹⁵ As a defense, the government claimed that the cell phone
2 companies lacked standing, because they were not responsible for paying that customer fee.
3 Rejecting that argument, the Court of Appeal held that the cell phone companies had standing to
4 sue – because they were “engaged in a competitive business that could be *adversely affected* by
5 the tax on customers.”¹⁶ Consequently, *Andal* held that the cell phone companies were “vitaly
6 interested in the validity” of the statute.¹⁷

7 Like the *Andal* plaintiffs, Ms. Hall is “vitaly interested in the validity” of SB 6. Indeed,
8 Ms. Hall has shown a far *stronger* interest than the economic interests of the *Andal* plaintiffs.
9 Namely, if this lawsuit against SB 6 does not prevail, the *fundamental* right to vote of military
10 and overseas voters could be irreparably harmed. Therefore, because she is “vitaly interested in
11 the validity” of SB 6, Ms. Hall has the *right* to challenge SB 6’s constitutionality on behalf of
12 military and overseas voters.

13 **IV. This Motion Is *Not* a Motion for Reconsideration**

14 Contrary to Defendants’ claims, this Motion to Amend is *not* a Motion for
15 Reconsideration. To be sure, the Court recently denied prospective Plaintiff Linda Hall’s Motion
16 to *Intervene*. Yet as Plaintiffs’ Opening Brief shows, motions to amend and motions to intervene
17 are controlled by different legal standards.¹⁸ Furthermore, it is undisputed that the Court’s earlier
18 order did not rule on *whether* Plaintiffs could amend their Complaint, and *did not rule on the*
19 *merits of Ms. Hall’s claims*. Consequently, this Motion is not a Motion for Reconsideration.

20 **VI. Granting This Motion Will Not Prejudice Defendants**

21 Finally, Defendants will not be prejudiced if Plaintiffs are allowed to amend the
22 Complaint. “The policy favoring amendment is *so strong* that it is a rare case in which denial of
23

24 ¹⁵ *Andal, supra*, 137 Cal.App.4th at 94-95.

25 ¹⁶ *Id.* at 94 (italics added) (*citing Gowens, supra*, 179 Cal.App.2d at 285 (“A court *cannot sit in a vacuum* or
refuse to recognize the generally known facts of competitive business life.”) (italics added)).

26 ¹⁷ *Andal, supra*, 137 Cal.App.4th at 94 (*citing Gowens, supra*, 179 Cal.App.2d at 285).

27 ¹⁸ To gain mandatory intervention, an individual must show that the existing parties can no longer protect her
interests. In stark contrast, California law gives parties wide berth to amend their pleadings “at *any* state of the
proceeding.” *Hirsa v. Superior Ct.*, (1981) 118 Cal.App.3d 486, 488-89 (italics in original); *see also* Opening Brief,
28 at 13:1-13:15 & nn. 67, 68; *Siena Court Homeowners Assn’s v. Green Valley Corp.* (2008) 164 Cal.App.4th 1416,
1424; *Sachs v. City of Oceanside* (1984) 151 Cal.App.3d 315, 319.

1 leave to amend can be justified.”¹⁹ Indeed, it would be an abuse of discretion to bar a party from
2 amending its pleadings, unless an opponent can show *clear prejudice*: the running of the statute
3 of limitations, trial delay, or the loss of critical evidence.²⁰

4 Defendants have failed to show – and in fact cannot show – *any* clear prejudice.
5 Significantly, Intervenor’s have conceded that “[p]roceedings in this case ha[d] been effectively
6 *stayed*[.]”²¹ In the same vein, the Secretary of State’s two procedural objections fail to undermine
7 California’s strong “policy favoring amendment”.²² First, contrary to the Secretary of State’s
8 claims, Plaintiffs’ Opening Brief *did* provide a thorough summary of the changes made in their
9 proposed Second Amended Complaint.²³ As their cogent briefs attest, Defendants fully grasp the
10 substance and import of Ms. Hall’s claims.²⁴

11 Second, the Court has the authority to treat this Motion as a Motion to Supplement the
12 First Amended Complaint. Indeed, “[i]t is axiomatic that a court is *not bound by the title or label*
13 *which embellishes a pleading*.”²⁵ A supplemental complaint, which addresses matters occurring
14 after a lawsuit has been filed, may be admitted if it “aids” the “case made by the original
15 complaint.”²⁶ Here, Ms. Hall’s claims unquestionably “aid” Plaintiffs’ Complaint, for they
16 strengthen one of Plaintiffs’ core claims: that SB 6 disenfranchises all voters who cast write-in
17 ballots in the general election. Because Plaintiffs’ proposed pleading will further the interests of
18 justice,²⁷ Defendants will not be prejudiced if their Motion is granted.

19 **VII. Conclusion**

20 In short, Plaintiffs have the undeniable right to amend their Complaint, for Ms. Hall’s
21 constitutional claims will help California courts ensure that no military or overseas voters are

22 ¹⁹ *Howard v. San Diego County* (2010) 184 Cal.App.4th 1422, 1428 (italics added); *see also Douglas v.*
23 *Superior Ct.* (1989) 215 Cal.App.3d 155).

24 ²⁰ *See, e.g., Atkinson, supra*, 109 Cal.App.4th at 761; *Solit v. Taokai Bank* (1999) 68 Cal.App.4th 1435, 1448.

25 ²¹ Intervenor’s Dec. 5, 2011 Motion for Judgment on the Pleadings, at 5:11 (italics added).

26 ²² *See Howard, supra*, 184 Cal.App.4th at 1428; *see also Douglas, supra*, 215 Cal.App.3d 155.

27 ²³ Opening Brief, at 11:2-12:1; *contra*, Secretary of State’s Jan. 13, 2012 Opp’n, at 4:21-5:5 (*citing* CRC
28 3.1324).

29 ²⁴ Secretary of State’s Jan. 13, 2012 Opp’n, at 3:15-4:19; Intervenor’s Jan. 13, 2012 Opp’n, at 2:17-8:19.
30 Plaintiffs note that Intervenor’s Opposition is not paginated.

31 ²⁵ *Peck v. Superior Ct.* (1960) 185 Cal.App.2d 573, 576 (italics added).

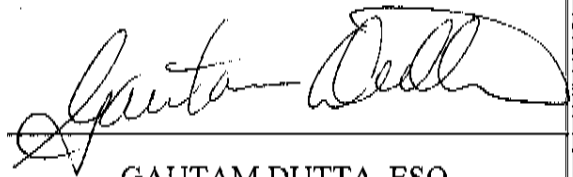
32 ²⁶ 5 Witkin, *Calif. Proc.* (5th ed. 2008) Pleadings §1248, p. 692 (*quoted by* Secretary of State’s Jan. 13, 2012
33 Opp’n, at 8:18-20).

34 ²⁷ CCP §473.

1 disenfranchised in the looming statewide election. Although Defendants challenge other claims
 2 raised by Plaintiffs' proposed pleading, the Court should follow what the Court of Appeal would
 3 call the "better course of action": allow Plaintiffs "to amend the complaint and then let the parties
 4 test its legal sufficiency *in other appropriate proceedings*."²⁸ In this manner, the Court will not
 5 only honor firmly established precedent, but further the interests of justice.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

DATED: Jan. 20, 2012



GAUTAM DUTTA, ESQ.

²⁸ *Atkinson, supra*, 109 Cal.App.4th at 760 (italics added).

PROOF OF SERVICE

I, Gautam Dutta, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above entitled action. On Jan. 27, 2012, I served the following document(s):

Plaintiffs' Reply Brief; Plaintiffs' Notice of Non-Opposition to Request for Judicial Notice on the following persons at the locations specified:

A. Mark Beckington, Esq., Office of the Attorney General, 300 South Spring St., Suite 1702, Los Angeles, CA 90013; 213.879.1096 (attorney for Defendant Bowen).

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

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

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

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

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


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

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

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

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

Executed in Fremont, California.


Gautam Dutta