

CALIFORNIA COURT OF APPEAL, FIRST DISTRICT

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

Petitioners,

vs.

SUPERIOR COURT FOR
THE COUNTY OF SAN
FRANCISCO,

Respondent;

DEBRA BOWEN, in only her
official capacity as California
Secretary of State; JOHN
ARNTZ, in only his official
capacity as Director of
Elections of the City and
County of San Francisco;
DAVE MACDONALD, in
only his official capacity as
Registrar of Voters of the
County of Alameda; JESSE
DURAZO, in only his official
capacity as Registrar of Voters
of the County of Santa Clara;
DEAN LOGAN, in only his
official capacity as Registrar-
Recorder / County Clerk of the
County of Los Angeles;
NEAL KELLEY, in only his
official capacity as Registrar
of Voters of the County of
Orange; RITA WOODARD,
in only her official capacity as

CASE NO.

Division:

**VERIFIED MOTION TO
INTERVENE BY DAVID MISSO
AND LINDA HALL;
MEMORANDUM OF POINTS AND
AUTHORITIES; SUPPORTING
DECLARATION OF LINDA HALL**

[Arising from the denial of
Petitioner's Motion for Preliminary
Injunction by Hon. Charlotte Walter
Woolard, Dept. 302, Superior Court
for the County of San Francisco
(Civic Center), 400 McAllister St.,
San Francisco, CA 94102;
415.551.3723; Case No. CGC-10-
502018]

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Registrar of Voters of the
County of Tulare; and DOES
1-20;

*Real Parties in
Interest;*

ABEL MALDONADO; YES
ON 14 – CALIFORNIANS
FOR AN OPEN PRIMARY;
CALIFORNIA
INDEPENDENT VOTER
PROJECT;

Intervenors;

VERIFIED MOTION TO INTERVENE BY
DAVID MISSO AND LINDA HALL;
MEMORANDUM OF POINTS AND AUTHORITIES;
DECLARATIONS OF DAVID MISSO AND LINDA HALL

GAUTAM DUTTA, ESQ. (State Bar No. 199326)
39270 Paseo Padre Parkway # 206
Fremont, CA 94538
Telephone: 415.236.2048
Email: dutta@businessandelectionlaw.com
Fax: 213.405.2416

Attorneys for Intervenors-Applicants David Misso
and Linda Hall

VERIFICATION

I, Gautam Dutta, declare:

I am an attorney for Petitioners in the action captioned above. I have read this Motion To Intervene and know its contents. I am informed, believe, and allege based upon my information and belief that the contents are true.

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

Executed on Sept. 29, 2010, in Fremont, California.

Signed: _____

Gautam Dutta

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Unless David Misso and Linda Hall are allowed to intervene, their fundamental right to vote and run for office may be irreparably harmed on January 4, 2011. On that date, voters in Senate District 1 are set to elect the successor to the late Sen. Dave Cox. However, Respondent Superior Court's ruling in this case has jeopardized Mr. Misso's and Ms. Hall's core constitutional rights. As a result, Mr. Misso and Ms. Hall have rushed to this Court to ask that their voices be heard before it makes a ruling in this case.

II. Introduction to David Misso and Linda Hall

Mr. Misso – a Modoc County voter, local school board trustee, and ordained minister – intends run in the January 4, 2011 special election as a qualified write-in candidate.¹ In that same election, Ms. Hall – a Placer County voter and community leader – wishes to vote, and have her vote counted, for a candidate whose name might not appear on the ballot. If the Court does not grant the underlying Petition, both Mr. Misso and Ms. Hall (collectively, “Applicants”) face an imminent threat of being unlawfully deprived of their fundamental rights:

¹ Elections Code §15341 sets forth the requirements for a write-in candidate to be deemed “qualified”. Due to a medical emergency, it was not possible to obtain Mr. Misso's verification before this Motion was filed. Counsel will submit a signed verification from Mr. Misso as soon as practicable.

1. Mr. Misso may be banned from qualifying as a write-in candidate for the January 4, 2011 election in Senate District 1.
2. Ms. Hall may be banned from casting a vote for a write-in candidate in that January 4, 2011 election.

By granting their Motion to Intervene, the Court will ensure that it directly hears from Senate District 1 voters and candidates who face the spectre of imminent, irreparable harm in the January 4, 2011 Senate District 1 election.

III. Respondent's SB 6 Ruling Threatens Imminent, Irreparable Harm on Mr. Misso and Ms. Hall

Mr. Misso and Ms. Hall brought their Motion to Intervene (the "Motion") soon after they learned of a recent judicial ruling that directly threatens their rights. On July 29, 2010, Petitioners asked Respondent Superior Court to block a new election law, SB 6, from being implemented. Notably, one of SB 6's provisions expressly bans all write-in votes from being counted.²

On September 14, 2010, Respondent denied Petitioners' request for a preliminary injunction. In so doing, Respondent ruled that SB 6 banned all write-in votes from being cast in each general election, and barred any write-in candidates from

² ("A person whose name has been written on the ballot as a write-in candidate at the general election ... shall not be counted."). SB 6 Petitioners Field, Winger, Chessin, Wozniak, Mackler and Martin's Sept. 29, 2010 Petition for Writ of Mandate, Exh. 16 § 35 Pt. 8606 (emphases added).

qualifying in each general election.³ Significantly, SB 6 is scheduled to become operative no later than January 1, 2011 – three days before the Senate District 1 election.

Taken at face value, Respondent’s ruling (1) bans Mr. Misso from exercising his right to run as a qualified write-in candidate, and (2) bans Ms. Hall from exercising her right to cast a vote for a write-in candidate like Mr. Misso. As a result, Respondent’s ruling poses a grave threat to the very rights that Mr. Misso and Ms. Hall seek to exercise during the January 4, 2011 election.⁴

IV. The January 4, 2011 Special Election

The race to succeed Sen. Dave Cox will likely culminate in the January 4, 2011 election for Senate District 1 – a sprawling, 12-county region stretching from Mammoth Lake to the Oregon border. According to the Secretary of State,⁵ a total of four candidates have been certified for the race in this

³ Respondent’s Sept. 14, 2010 Ruling, Exh. 1, at 1.

⁴ Presciently, the California Association of Clerks and Elections Officials called attention to the difficulties of having to implement SB 6 in such a short timeframe: “Of greater concern is the possibility that the Governor might proclaim a Special Vacancy Election for an Assembly or Senate vacancy as early as January 2011.” (emphases added). Mar. 20, 2010 Memorandum from Los Angeles Registrar-Recorder/County Clerk Dean Logan, Exh. E, Attach. 1, at 2 (Mar. 2, 2010 letter from California Association of Clerks and Elections Officials to the State Assembly Elections Committee).

⁵ “Secretary of State Debra Bowen Announces Certified List of 1st Senate District Candidates,” Sept. 27, 2010, Exh. B.

heavily Republican⁶ district: three Republicans and one Democrat.

Voters will select the new officeholder for Senate District 1 in a two-round process. A first-round election will be held on November 2, 2010. If no candidate receives a majority (50 percent plus 1), the top votegetter from each qualified party will advance to the January 2, 2011 second-round (general) election.

As the Sacramento *Bee*'s editorial board recently noted, no candidate is likely to garner a majority on November 2, 2010.⁷ Thus, it is virtually certain that the Senate District 1 race will advance to the January 4, 2011 general election.

V. Write-In Voting in Senate District 1

Write-in voting has played a visible role in state and national politics. In 1999, write-in candidate Tom Ammiano finished second in the San Francisco mayoral election, and qualified for the runoff against Willie Brown.⁸ In 2004, write-in candidate Donna Frye nearly won the San Diego mayoral election.⁹ And only two weeks ago, U.S. Senator Lisa

⁶ In 2003, Senate District 1 voters chose to recall former Gov. Gray Davis, a Democrat, by a margin of over two to one. *See TotalCapitol.com Report on Senate District 1*, Exh. F.

⁷ "Editorial: Lawmakers' Lag Hits Locals with Big Election Bill", *Sacramento Bee*, Sept. 4, 2010, Exh. C, at 1.

⁸ *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 182.

⁹ "The San Diego Surfer Murkowski Should Read Up On," *The Atlantic*, Sept. 2010, Exh. D.

Murkowski announced that she would seek re-election as a write-in candidate.¹⁰

In this State Senate race, one of the GOP candidates might decide to run as a write-in candidate on January 4, 2010 – and another GOP candidate might sue to stop him or her from doing so. In November, all four candidates will face off against one another, irrespective of their party affiliation. Significantly, even if all three GOP candidates receive more votes than the Democratic candidate, only one of the GOP candidates will advance to the January 4, 2011 general election. There, the GOP nominee will face the lone Democrat, who will advance to the January 4, 2011 election even if he finishes last in the November election.

Notably, the trio of Republican candidates, each one an ambitious elected official,¹¹ may not be willing to reconcile after November 2 – especially because a State Senator wields considerable power.¹² In fact, some political analysts have

¹⁰ *Id.*

¹¹ Both Ted Gaines and Roger Niello are Members of the California Assembly, while Barbara Alby is Acting Board Member on the State Board of Equalization. California law permits elected officials to simultaneously run for re-election and in a special election for a different seat.

¹² Each of California's 40 State Senators represents nearly a million residents.

speculated that one of the candidates entered the race to spoil the chances of another.¹³

Given the high stakes of this race, it is a real possibility that either (or both) of the losing GOP candidates might run as a write-in candidate on January 4, 2010. In that event, the GOP nominee might invoke Respondent's interpretation of SB 6 as the basis for a lawsuit: one that would block all write-in candidates – including Mr. Misso – from qualifying for the January 4, 2011 election. Therefore, election officials could be compelled to ban voters from casting write-in votes on January 4, 2011. As a result, the rights of not only Write-In Candidate Misso, but also of prospective Write-In Voter Hall could be irreparably harmed.

VI. Mr. Misso and Ms. Hall's Participation Will Sharpen the Focus of This Case

The participation of Mr. Misso and Ms. Hall will enable the parties and the Court to sharpen the focus of this case, for both of them face imminent, irreparable harm in the January 4, 2011 election for Senate District 1. Significantly, their participation in this case will neither delay this litigation nor expand its scope. Intervenors do not seek to extend the briefing schedule for the underlying Petition. Indeed, both Mr. Misso and Ms. Hall agree with Petitioners' legal strategy; in fact, they have retained Petitioners' attorney as counsel. Moreover, they

¹³ “Barbara Alby: “Doolittle’s Sweet Revenge?”, Hogue News, Exh. G, available at <http://hoguenews.com/?p=12080> (last visited Sept. 27, 2010).

will join all arguments that have been and will be raised in Petitioners' papers, and will not independently raise any other arguments. In this light, Mr. Misso and Ms. Hall qualify for both mandatory and permissive intervention.

VII. Mr. Misso and Ms. Hall Qualify for Mandatory Intervention

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 Brennan¹⁴

Mr. Misso and Ms. Hall unquestionably meet all the criteria for mandatory intervention. To qualify for mandatory intervention under CCP Section 387(b), successful applicants must satisfy two conditions. First, they must have “a significantly protectable interest” in “the subject of the action” in which they seek to intervene.¹⁵ Second, the applicants must show that they are “so situated that the disposition of the action may as a practical matter impair or impede that person’s ability to protect that interest.”¹⁶ If the applicants satisfy both

¹⁴ *Stringfellow v. Concerned Neighbors* (1987) 480 U.S. 370 n.1 (concurring opinion) (quoted by *Siena Court Homeowners Ass’n v. Green Valley Corp.* (2008) 164 Cal.App.4th 1416, 1424).

¹⁵ *Siena*, supra note 14, 164 Cal.App.4th at 1423-24 (citing *Donaldson v. U.S.* (1971) 400 U.S. 517).

¹⁶ *Siena*, supra note 14, 164 Cal.App.4th at 1424 (citations omitted).

conditions, a court must permit them to intervene unless they are “adequately represented by other parties.”¹⁷

It is beyond question that Mr. Misso and Ms. Hall have a “significantly protectable interest” in this writ proceeding: their constitutional right to vote and run as a candidate in the January 4, 2011 election. Indeed, the outcome of the underlying writ proceeding will “as a practical matter impair or impede” their ability “to protect that interest.” Namely, if the Court denies the underlying Petition, Mr. Misso and Ms. Hall face the threat of imminent, irreparable harm, and will have no other practicable means to vindicate their rights before the election is held in Senate District 1.

In light of this looming threat to their fundamental rights, Mr. Misso’s and Ms. Hall’s participation will strengthen the ability of Petitioners to defend the rights of all Senate District 1 voters and candidates whose rights may be threatened on January 4, 2011. Therefore, both Applicants qualify for mandatory intervention.

VIII. Mr. Misso and Ms. Hall Qualify for Permissive Intervention

As a practical matter, because Mr. Misso and Ms. Hall qualify for mandatory intervention, they should also qualify for permissive intervention.¹⁸ In any event, both Applicants independently meet the criteria for permissive intervention

¹⁷ *Id.*

¹⁸ *See Royal Indemnity Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th 194, 75 Cal.Rptr.3d 481, 487.

under CCP Section 387(b). As this Court explained in *City and County of San Francisco v. State of California*, successful applicants must show, inter alia, that:

1. They have a “direct and immediate interest” in the action; and
2. The intervention will not “enlarge the issues” in the proceeding; and
3. The reasons for the permissive intervention must “outweigh any opposition by the parties presently in the action.”¹⁹

Here, Mr. Misso and Ms. Hall have a “direct and immediate” interest in this action; that is, they will “either gain or lose by the direct legal operation and effect of the judgment.”²⁰ If the underlying Petition is granted, the constitutional rights of both Applicants will be respected on January 4, 2011. But if it is not granted, their rights face the threat of imminent, irreparable harm: while Mr. Misso could be banned from qualifying as a write-in candidate, Ms. Hall could be banned from voting for the candidate of her choice.

What is more, both federal and state courts have liberally permitted both candidates and individual voters (along with grassroots groups) to intervene in election cases. In the seminal case *Cook v. Gralike*,²¹ the U.S. Supreme Court permitted a

¹⁹ *City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1036 (2005) *review denied*.

²⁰ *Id.* at 1038.

²¹ *Cook v. Gralike* (2001) 531 U.S. 510, 516 n.6.

federal candidate to intervene in a facial challenge to an election law. Similarly, California courts have a longstanding tradition of liberally permitting voters and grassroots groups to intervene in litigation.²² In this light, both federal and state case law strongly support permissive intervention to Mr. Misso and Ms. Hall so they can defend their constitutional rights.

Furthermore, the urgent need for both Applicants to prevent their rights from being irreparably harmed far outweighs any inconvenience or objection to the parties. First, Mr. Misso and Ms. Hall brought their Motion to this Court in a timely manner, within two weeks of learning about Respondent's ruling on SB 6. Since they will join in all arguments raised by Petitioners, neither Mr. Misso nor Ms. Hall will delay or expand the scope of this writ proceeding.

Second, it would be disingenuous for anyone to oppose this Motion, by suggesting that Plaintiffs can adequately represent both Applicants. Quite to the contrary, both Intervenors-Defendants and Real Party in Interest Bowen have asserted that Petitioners cannot assert their legal claims on

²² See, e.g., *Simac Design v. Alciati* (1979) 92 Cal.App.3d 146, 154 Cal.Rptr. 676, 682 (grassroots voter group permitted to intervene on motion made during oral argument); *Baroldi v. Denni* (1961) 197 Cal.App.2d 472, 17 Cal.Rptr. 647, 651 (individual voter permitted to intervene); see also *Rominger v. County of Trinity* (1983) 147 Cal.App.3d 655 (grassroots environmental group permitted to intervene); *Simpson Redwood Co. v. State of California* (1987) 196 Cal.App.3d 1192 (same).

behalf of individuals like Mr. Misso and Ms. Hall: voters and candidates who live in Senate District 1.²³

Third, Mr. Misso and Ms. Hall face an imminent threat of irreparable harm. To be sure, some parties may claim that the Applicants' claims are premature, because it is not yet certain that the January 4, 2011 election will be held.²⁴ Yet as this Motion has shown, it is virtually certain that it will be held.

Finally, as the U.S. Supreme Court has made clear, litigants need not wait until their rights have been violated before seeking judicial relief.²⁵ Instead, a court may adjudicate

²³ “Thus, Plaintiffs face no threat of harm in the conduct of [the Senate District 1] election. Plaintiffs offer no evidence by sworn declaration that any of them is entitled to vote in this election[.]” Intervenors-Defendants opposition papers, Petition Exh. 10, at 11:10 n.17; *see also* Real Party in Interest Bowen’s oral argument testimony, Sept. 14, 2010 Transcript, Petition Exh. 15, at 19.

²⁴ RPI Bowen may argue that SB 6’s new rules will not apply to the Jan. 4, 2011 special election. Yet it is at best unclear which set of rules should apply for that election. As an initial matter, Secretary of State’s legal interpretation on when SB 6 becomes operative does not carry the force of law, because that interpretation was not made through the administrative rulemaking process. *E.g., Tidewater Marine Western v. Bradshaw* (1996) 14 Cal.4th 557, 576. Moreover, case law casts doubt on RPI Bowen’s interpretation. The Legislature could have banned SB 6 from being implemented for elections called before January 1, 2011, but it chose not to do so. *See Estate of McDill* (1975) 14 Cal.3d 831, 837-38; *see also State v. City of Hinton* (1915) 77 W.Va. 266, 270 (State must give effect to new election laws to the extent possible, even if is not yet possible to fully comply with that law.

²⁵ *Babbitt v. United Farm Workers Nat’l Union* (1979) 442 U.S. 289, 299.

all claims in which the litigant faces a “realistic danger” of imminent harm.²⁶ Therefore, the Applicants have abundantly shown that they are entitled to permissive intervention.

IX. Conclusion

One does not have to await the consummation of a threatened injury to obtain preventive relief.

-- U.S. Supreme Court, *Babbitt v. United Farm Workers*²⁷

At its core, this Motion makes a simple, urgent plea. It asks that two community leaders whose rights are gravely threatened be given their day in court. By virtue of their proactive efforts to participate in this case, Mr. David Misso and Ms. Linda Hall have earned the opportunity to be heard – and to fight for the quintessentially American right to vote and run for office. Accordingly, Mr. Misso and Ms. Hall respectfully ask this Court for leave to intervene.

²⁶ *Id.* at 299; *see also Sandusky County Democratic Party v. Blackwell* (6th Cir. 2004) 387 F.3d 565, 574 (voters challenging an election law need only show that it threatens them with “real and imminent” harm); *ACLU v. Santillanes* (10th Cir. 2008) 546 F.3d 1313, 1318-19 (same).

²⁷ *Babbitt, supra* note 23, 442 U.S. at 299 (*quoting Penn. v. W. Va.* (1923) 262 U.S. 553, 593).

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 Sept. 29, 2010, I served the following documents:

- (1) Motion To Intervene by David Misso and Linda Hall,
- (2) Declaration of Linda Hall, and
- (3) [Lodged] Complaint in Intervention

on the following persons at the locations specified:

A. Stephen Acquisto, Esq., Office of the Attorney General, 1300 I St., Sacramento, CA 95814; 916.324.1456.

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.

C. Raymond Lara, Esq., Office of Alameda County Counsel, 1221 Oak St., Ste. 450, Oakland, CA 94612; 510.272.6700.

D. Mollie Lee, Esq., Office of the San Francisco City Attorney, 1 Dr. Carlton B. Goodlet Place, Ste. 234, San Francisco, CA 94102; 415.554.4705.

E. Wendy J. Phillips, Esq., Office of Orange County Counsel, 333 W. Santa Ana Blvd., Ste. 407, Santa Ana, CA 92702; 714.834.6298.

F. Kathleen Taylor, Esq., Office of Tulare County Counsel, 2900 W. Burrel St., Visalia, CA 93291; 559.636.4950.

G. Judy Whitehurst, Esq., Office of Los Angeles County Counsel, 500 W. Temple St., Rm. 652, Los Angeles, CA 90012; 213.974.1845.

H. Marguerite Mary Leoni, Esq., Nielsen Merksamer, 2350 Kerner Blvd., Ste. 250, San Rafael, CA 94901; 415.389.6800.

I. The Honorable Charlotte Walter Woolard, Superior Court for the County of San Francisco, Dept. 302, 400 McAllister St., San Francisco, CA 94102; 415.551.3723.

Following ordinary business practices, I sealed true and correct copies of the above 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 Sept. 29, 2010, in Fremont, California.

Gautam Dutta