

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:

**PETITION FOR WRIT OF  
MANDATE; MEMORANDUM OF  
POINTS AND AUTHORITIES**

**STAY REQUESTED**

*To avoid duplicative litigation,  
Petitioners ask the Court to stay all  
Superior Court proceedings.  
Currently, the parties must respond to  
Petitioners' First Amended Complaint  
by Oct. 7, 2010.*

[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]

—

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;*

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PETITION FOR WRIT OF MANDATE;  
MEMORANDUM OF POINTS AND AUTHORITIES

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**CERTIFICATE OF INTERESTED ENTITIES OR  
PERSONS**

Petitioners hereby certify that they are not aware of any person or entity that must be listed under the provisions of California Rule of Court 8.208(e).

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**TO THE HONORABLE JUSTICES OF THE  
CALIFORNIA COURT OF APPEAL, FIRST DISTRICT:  
PRELIMINARY AND JURISDICTIONAL STATEMENT**

1. Petitioners seek an Alternative Writ of Mandate that directs Respondent to enjoin Real Parties in Interest from implementing and enforcing Senate Bill 6 for all future state and federal elections. That Writ shall also direct Respondent to declare that Proposition 14 is inoperative, because its implementing legislation (Senate Bill 6) is unenforceable and unconstitutional.

2. This Petition, brought in the public interest, seeks to enjoin Real Parties in Interest (“RPIs”) from violating Petitioners’ fundamental right to fully participate in state and federal elections. Specifically, Petitioners seek to enjoin RPIs from implementing and enforcing Senate Bill 6 (“SB 6”), a statutory scheme that (a) will disenfranchise voters who wish to for write-in candidates and (b) will discriminate against minor-party and write-in candidates for state and federal office.

3. Unless it is enjoined, SB 6 will become operative no later than Jan. 1, 2011.

4. Under SB 6, voters will no longer be able to cast votes for eligible write-in candidates and have those votes counted.

5. Under SB 6, minor-party candidates will be banned from stating any party preference (including “Independent”) on the ballot. In contrast, candidates who

identify themselves as Democrats or Republicans may state their party preference on the ballot.

6. Unless this Petition is speedily granted, California voters may be denied their fundamental rights as early as January 4, 2011, during a special general election to fill a vacancy in Senate District 1.

7. In that election, Intervenor-Applicants David Misso and Linda Hall and other voters and candidates face imminent, irreparable harm, because they could be deprived of their fundamental right to run for office and vote for a write-in candidate.

8. Because it is unlikely that the statutory appeals process would resolve this case before the January 4, 2011 election,<sup>1</sup> Petitioners have not invoked Civil Code 904.1(a)(6) to appeal Respondent's denial of Petitioners' Motion for Preliminary Injunction. Instead, Petitioners respectfully invoke the jurisdiction of this Court pursuant to California Constitution, Article VI, Section 10 and California Code of Civil Procedure Section 1085.

9. To avoid duplicative litigation, Petitioners also ask the Court to stay all related proceedings in the Superior Court for the County of San Francisco (Case No. CGC-10-502018). Currently, the parties must respond to Petitioners' First Amended Complaint by Oct. 7, 2010.

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<sup>1</sup> See *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1274; *City of Half Moon Bay v. Superior Court* (2003) 106 Cal.App.4<sup>th</sup> 795, 803.

10. This Petition raises novel constitutional issues of great public importance<sup>2</sup> that must be resolved before the Jan. 4, 2011 special election in Senate District 1. Moreover, this Petition does not ask the Court to resolve any questions of material fact. Therefore, the Court may properly exercise jurisdiction in this matter.

11. Petitioners have no adequate remedy at law. No other proceeding is available to Petitioners to obtain a speedy and final resolution of this constitutional challenge to SB 6.

### FACTS

12. On Feb. 19, 2009, the Legislature introduced and passed SB 6 in the middle of the night, without holding a single hearing and without giving the public any notice.<sup>3</sup>

13. The Legislature passed SB 6 in order to implement Proposition 14, which was approved by a narrow majority of voters on June 8, 2010.

14. If both Prop 14 and SB 6 become operative, they will eliminate California's existing "qualified party" election system (except for Presidential elections). Instead, all

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<sup>2</sup> *See id.*

<sup>3</sup> SB 6 was originally introduced as a hazardous-waste bill on December 1, 2009, and then was amended and passed as an election bill on February 19, 2009, between 3:40 am and 6:55 am. First Amended Complaint ("FAC"), Exh. 16 ¶¶2-4.

candidates for state and federal office would square off against one another during a first-round (primary) election. The top two votegetters from the primary election would then advance to a runoff (general) election.

15. SB 6 expressly amends the Election Code by banning all votes cast for write-in candidates from being counted in the general election.<sup>4</sup>

16. SB 6 amends the Election Code by forcing minor-party candidates (but not major-party candidates) to state that they have “No Party Preference” on the ballot.

#### The “Qualified Party” Election System

17. Under existing law, California voters fill state and federal offices through a “qualified party” election system. A political party gains “qualified” (state-recognized) status if it meets certain stringent criteria.<sup>5</sup>

18. Every even-numbered year, voters have up to two opportunities to vote for state and federal candidates: (a) the

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<sup>4</sup> “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, Exh. 16, FAC Exh. 1 §35, Pt. 8606 (emphases added).

<sup>5</sup> FAC, Exh. 16 ¶11; Election Code §5100.

June<sup>6</sup> qualified-party primary election, and (b) the November general election.

19. During the June qualified-party primary election, voters affiliated with each qualified party (and voters who declined to state a preference for a qualified party)<sup>7</sup> select that party's nominee for the general election. The top votegetter from the party primary then advances as that party's nominee to the November general election.

20. During the November general election, all voters may choose, irrespective of their party affiliation, between three classes of candidates: (a) the nominees from each qualified political party, (b) "independent" candidates who were affiliated with either no party or with a non-qualified party,<sup>8</sup> and (c) write-in candidates. The top votegetter in the general election then wins.

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<sup>6</sup> Since 2006, the qualified-party primary election for state and federal office (except President) has been held in June.

<sup>7</sup> Under existing law, each qualified party has the option to allow "decline to state" (unaffiliated) voters to vote in its party primary. *See* Elections Code §13102(b), *codified at* Ch. 98, Stats. 2000. For example, the Democratic Party and Republican Party permitted "decline to state" voters to vote in their June 8, 2010 primary.

<sup>8</sup> All such candidates were listed with the party label of "Independent".

## **THE PARTIES**

21. Petitioner Mona Field, an individual, lives and is registered to vote in the County of Los Angeles. She paid taxes to the State of California during the past year. Plaintiff Field has voted in several recent elections for state and federal office, and intends to continue doing so in future special and regularly scheduled elections. She wishes to vote, and have her vote be counted, in future elections for candidates whose names might not appear on the ballot.

22. Petitioner Richard Winger, an individual, lives and is registered to vote in the County of San Francisco. He paid taxes to the State of California during the past year. Plaintiff Winger has voted in several recent elections for state and federal office, and intends to continue doing so in future special and regularly scheduled elections. He wishes to vote, and have his vote be counted, in future elections for candidates whose names might not appear on the ballot.

23. Petitioner Stephen A. Chessin, an individual, lives and is registered to vote in the County of Santa Clara. He paid taxes to the State of California during the past year. Plaintiff

Chessin has voted in several recent elections for state and federal office, and intends to continue doing so in future special and regularly scheduled elections. He wishes to vote, and have his vote be counted, in future elections for candidates whose names might not appear on the ballot.

24. Petitioner Jennifer Wozniak, an individual, lives and is registered to vote in the County of Orange. She paid taxes to the State of California during the past year. Plaintiff Wozniak has voted in several recent elections for state and federal office, and intends to continue doing so in future special and regularly scheduled elections. She wishes to vote, and have her vote be counted, in future elections for candidates whose names might not appear on the ballot.

25. Petitioner Jeff Mackler, an individual, lives and is registered to vote in the County of Alameda. In 2012, Plaintiff Mackler wishes to run for the office of Member of the United States House of Representatives (9<sup>th</sup> Congressional District), as a candidate stating a preference for Socialist Action, a “non-qualified” (non-state-recognized) political group. In the interim, should a special election be called for any state or

federal office, he may also wish to run for that office, as a candidate stating a preference for Socialist Action.

26. Petitioner Rodney Martin, an individual, lives and is registered to vote in the County of Tulare. In 2012, Plaintiff Martin wishes to run for the office of Member of the United States House of Representatives (21<sup>st</sup> Congressional District), as a candidate stating a preference for the Reform Party, a “non-qualified” (non-state-recognized) political group. In the interim, should a special election be called for any state or federal office, he may also wish to run for that office, as a candidate stating a preference for the Reform Party.

27. Respondent California Superior Court for the County of San Francisco has the authority to grant injunctive and declaratory relief. If this Court issues a Writ, Respondent must grant injunctive and declaratory relief as requested in this Petition.

28. RPI Debra Bowen, in her official capacity as California Secretary of State, serves as the State’s chief elections officer; and administers and enforces the provisions of

the Elections Code with respect to elections for state and federal office.

29. RPI John Arntz, in his official capacity as Director of Elections of the City and County of San Francisco, administers the preparation of all ballots and the counting of all votes cast within the County of San Francisco for candidates for state and federal office.

30. RPI Dave Macdonald, in his official capacity as Registrar of Voters of the County of Alameda, administers the preparation of all ballots and the counting of all votes cast within the County of Alameda for candidates for state and federal office.

310. RPI Jesse Durazo, in his official capacity as Registrar of Voters of the County of Santa Clara, administers the preparation of all ballots and the counting of all votes cast within the County of Santa Clara for candidates for state and federal office.

32. RPI Dean Logan, in his official capacity as Registrar-Recorder / County Clerk of the County of Los Angeles, administers the preparation of all ballots and the

counting of all votes cast within the County of Los Angeles for candidates for state and federal office.

33. RPI Neal Kelley, in his official capacity as Registrar of Voters of the County of Orange, administers the preparation of all ballots and the counting of all votes cast within the County of Orange for candidates for state and federal office.

34. RPI Rita Woodard, in her official capacity as Registrar of Voters of the County of Tulare, administers the preparation of all ballots and the counting of all votes cast within the County of Tulare for candidates for state and federal office.

35. Intervenor-Defendant Abel Maldonado, who intervened in his capacity as a candidate for state office, supported the Proposition 14 campaign and authored SB 6 when he was a State Senator.

36. Intervenor-Defendant California Independent Voter Project supported the Proposition 14 campaign.

37. Intervenor-Defendant “Yes on 14 – Californians for an Open Primary” supported and played a visible role in the Proposition 14 campaign.

38. Intervenor-Applicant David Misso, who has concurrently filed a Motion to Intervene, intends to run as a write-in candidate in the January 4, 2011 Senate District 1 special runoff (general) election.

39. Intervenor-Applicant Linda Hall, who has concurrently filed a Motion to Intervene, wishes to vote, and have her vote counted, for a candidate whose name might not appear on the ballot in the January 4, 2011 Senate District 1 special runoff (general) election.

#### **CLAIMS ASSERTED**

40. By expressly banning elections officials from counting all write-in votes, SB 6 violates: the California Constitution (Article II, Section 2.5), the First Amendment, the California Constitution’s Free Speech Clause, the Due Process Clause (U.S. and California Constitutions), and Elections Clause (U.S. Constitution).

41. By banning minor-party (i.e., non-qualified-party) candidates from stating any party preference on the ballot, SB 6 violates: the Equal Protection Clause (California Constitution), the Elections Clause (U.S. Constitution), and the First and

Fourteenth Amendments (according to case law first cited by Intervenor-Defendants).

42. The fundamental rights of Intervenor Applicants David Misso and Linda Hall – along with similarly situated voters and candidates – could be irreparably harmed on January 4, 2011. On that date, a special election that has been set in Senate District 1, in which both Mr. Misso and Ms. Hall live and are registered to vote.

42. Mr. Misso and similarly situated residents of Senate District 1 wish to run as qualified write-in candidates for the January 4, 2011 ballot. Unless SB 6 is enjoined from being implemented, it threatens to ban Mr. Misso from qualifying as a write-in candidate for the Jan. 4, 2011 special election – and inflict irreparable harm on the fundamental rights of Mr. Misso and similarly situated candidates.

43. Ms. Hall and similarly situated voters in Senate District 1 wish to vote, and have those votes counted, for candidates whose names might not appear on the January 4, 2011 ballot. Unless SB 6 is enjoined from being implemented, it threatens to unlawfully ban write-in votes from being cast and counted in the Jan. 4, 2011 special election – and inflict irreparable harm on the fundamental rights of Ms. Hall and similarly situated voters.

44. Petitioners believe that there is no requirement to plead demand and refusal under the circumstances presented in this case. Without prejudice to that position, Petitioners allege that (a) their Motion for Preliminary Injunction (denied on Sept.

14, 2010 by Respondent) demanded that RPIs act or refrain from taking action as described in this Petition, and (b) RPIs, by opposing or refusing to support Petitioners' Motion, refused to act or refrain from taking action as described in this Petition.

### **RELIEF SOUGHT**

Plaintiffs seek the following relief:

1. That this Court issue an alternative writ of mandate that directs Respondent to enjoin RPIs from implementing or enforcing SB 6, or, in the alternative, to show cause before this Court at a specified time and place why RPIs have not done so;

2. That, upon RPIs' and Intervenors-Defendants' return to the alternative writ, a hearing be held before this Court at the earliest practicable time so that the issues raised by this Petition may be promptly adjudicated;

3. That, following the hearing upon this Petition, the Court issue a peremptory writ that directs Respondent to enjoin RPIs from implementing or enforcing SB 6.

4. That Petitioners be awarded their reasonable costs and expenses, including attorney's fees, pursuant to California Code of Civil Procedure §1021.5 and 42 U.S.C. §1988(b); and

5. For all other relief that the Court deems just and equitable.

**VERIFICATION**

I, Gautam Dutta, declare:

I am an attorney for Petitioners in the action captioned above. I have read this Petition for Writ of Mandate 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

*Thus, when a law appears to have been adopted without reasoned consideration, for discriminatory purposes, or to entrench political majorities, we are less than willing to defer to the institutional strengths of the legislature.*

-- Justices Breyer and Stevens, *Doe v. Reed*<sup>9</sup>

### **I. Introduction**

Last year, the Legislature introduced and passed a law in the middle of night, without holding a single hearing and without giving the public any notice.<sup>10</sup> Today, that law – SB 6 – is poised to disenfranchise thousands of California voters and censor what minor-party political candidates may say on the ballot.

Unless this Court swiftly intervenes, a class of candidates and voters – including Intervenor Applicants Misso and Hall – face the threat of imminent, irreparable harm in special election that has already been set for January 4, 2011:

- If the plain language of SB 6 is implemented, California voters will be deprived of their constitutional right to have every lawfully cast vote counted.

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<sup>9</sup> *Doe v. Reed* (June 24, 2010) 561 U.S. \_\_\_, No. 09-559, concurring op., Stevens & Breyer, JJ., at 3 n.3 (emphases added).

<sup>10</sup> SB 6 was originally introduced as a hazardous-waste bill on December 1, 2009, and then was amended and passed as an election bill on February 19, 2009, between 3:40 am and 6:55 am. FAC, Exh. 16 ¶¶2-4.

- If SB 6 is not enjoined, minor-party candidates will be banned from stating any party preference (including “Independent”) on the ballot.
- Unless the Court issues a Writ, several critical provisions of the Election Code will be rewritten, in violation of the canons of construction.

For voters and candidates like Intervenor Applicants Misso and Hall, time is of the utmost essence. Because of SB 6, Intervenor-Applicant Misso may be banned from running as a write-in candidate for the January 4, 2011 special election. Because of SB 6, Intervenor-Applicant Hall and other similarly situated voters may be banned from casting a vote for a write-in candidate in that same election.<sup>11</sup> As a result, Misso, Hall, and voters throughout the 12 counties of Senate District 1 face the looming threat of irreparable harm.

As this Petition will show, SB 6 – which the Legislature passed in order to implement Proposition 14 – brazenly violates both the U.S. and California Constitutions. Therefore, the Court should issue a writ that directs Respondent to (1) enjoin SB 6 from being implemented; (2) declare SB 6 unenforceable;

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<sup>11</sup> After Sen. Dave Cox died of cancer, the Governor set a first-round (primary) election for Nov. 2, 2010. To win, a candidate must receive a majority (50 percent plus 1) of the vote. Since no candidate is expected to win a majority, the Sacramento *Bee* editorial board expects the race to head to a Jan. 4, 2011 “general” (runoff) election. See “Editorial: Lawmakers’ lag hits locals with big election bill”, *Sacramento Bee*, Sept. 4, 2010, Motion To Intervene by David Misso and Linda Hall (hereinafter “Motion To Intervene”), Exh. C.

and (3) declare Proposition 14 to be inoperative, because it would then need a new statute to implement it.

## II. Jurisdiction

Unless Petitioners and Intervenor Applicants Misso and Hall obtain immediate writ relief, Californians' fundamental right to vote may be irreparably harmed as early as Jan. 4, 2011. A reviewing court may properly hear writ petitions (a) that raise issues "of widespread interest",<sup>12</sup> (b) that present "a significant and novel constitutional issue",<sup>13</sup> (c) in which petitioners have been "effectively deprived of the opportunity to present a substantial portion of [their] causes of action",<sup>14</sup> or (d) in which the petitioners "will suffer harm or prejudice in a manner that cannot be corrected on appeal."<sup>15</sup>

This Petition amply satisfies those requirements. First, it presents an issue "of widespread interest".<sup>16</sup> Namely, are SB 6's new ground rules for California's state and federal elections constitutional and ready to be implemented? If SB 6 is struck down, Proposition 14 itself must be declared inoperative, because a new statute would have to be passed to implement it.

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<sup>12</sup> *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816; *Omaha*, *supra* note 1, 209 Cal.App.3d at 1273-74; *Half Moon Bay*, *supra* note 1, 106 Cal.App.4<sup>th</sup> at 803.

<sup>13</sup> *Omaha*, *supra* note 1, 209 Cal.App.3d at 1273-74.

<sup>14</sup> *Brandt*, *supra* note 12, 37 Cal.3d at 816.

<sup>15</sup> *Omaha*, *supra* note 1, 209 Cal.App.3d at 1273-74; *Half Moon Bay*, *supra* note 1, 106 Cal.App.4<sup>th</sup> at 803.

<sup>16</sup> *Brandt*, *supra* note 12, 37 Cal.3d at 816; *Omaha*, *supra* note 1, 209 Cal.App.3d at 1273-74; *Half Moon Bay*, *supra* note 1, 106 Cal.App.4<sup>th</sup> at 803.

In that vein, elections officials would greatly benefit from prompt guidance from this Court, because they must reconfigure their ballots and voting equipment to comply with SB 6. According to election officials, there may not be enough lead time to implement SB 6 before the 2012 election season.<sup>17</sup> Adding to the sense of urgency, it is possible that the next special election could be called within days of the Jan. 4, 2011 special election.<sup>18</sup>

Second, this Petition presents at least three “significant and novel” constitutional issues:<sup>19</sup>

1. Can the Legislature ban lawfully cast write-in votes from being counted, and thus violate an express provision of the California Constitution?<sup>20</sup>
2. Does the California Supreme Court case *Libertarian Party v. Eu*<sup>21</sup> give the State a compelling interest to force minor-party candidates to use the party label of “No Party Preference”?

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<sup>17</sup> See Mar. 10, 2010 letter from Los Angeles Registrar-Recorder/County Clerk Dean Logan to the Los Angeles County Board of Supervisors and Mar. 2, 2010 letter from Madera County Clerk-Recorder Rebecca Martinez to the State Assembly Elections Committee, Motion To Intervene, Exh. E.

<sup>18</sup> If Assemblymember Ted Gaines wins the Jan. 4, 2011 special election for Senate District 1, a special election must then be called to fill his current Assembly seat.

<sup>19</sup> *Omaha*, *supra* note 1, 209 Cal.App.3d at 1273-74.

<sup>20</sup> See CAL.CONST. Art. II § 2.5 (“A voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted.”).

<sup>21</sup> *Libertarian Party v. Eu* (1980) 28 Cal.3d 535.

3. Does a law that censors candidates on the basis of their political viewpoint violate the U.S. Constitution’s Elections Clause and the California Constitution’s Equal Protection Clause?<sup>22</sup>

Third, Respondent’s mistaken ruling effectively deprives Petitioners of the “opportunity to present a substantial portion of [their] causes of action.”<sup>23</sup> Disregarding the plain language of SB 6 and the Election Code, Respondent ruled that SB 6 banned write-in votes from being cast. (Even RPI-Defendant Secretary of State Bowen, who enforces the Election Code, rejects that interpretation.)<sup>24</sup> In so doing, Respondent gutted three-quarters of Petitioners’ Claims for Relief – which take SB 6’s plain language at face value.

Finally, unless this Petition is promptly granted, Petitioners and voters and candidates throughout Senate District 1 – including Intervenor Applicants Misso and Hall – face imminent, irreparable harm “that cannot be corrected on appeal.”<sup>25</sup> As the U.S. Supreme Court has made clear, litigants

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<sup>22</sup> See *Cook v. Gralike* (2001) 531 U.S. 510, 523; *Stanson v. Mott* (1976) 17 Cal.3d 206, 217.

<sup>23</sup> *Brandt, supra* note 12, 37 Cal.3d at 816.

<sup>24</sup> “SB 6 precludes counting write-in votes cast in the general election[.]” RPI Bowen’s opposition papers, Exh. 8, 5:3-4 (emphasis added).

<sup>25</sup> *Omaha, supra* note 1, 209 Cal.App.3d at 1273-74; *Half Moon Bay, supra* note 1, 106 Cal.App.4<sup>th</sup> at 803.

are entitled to immediate relief if there is a “realistic danger” that a law will harm their constitutional rights.<sup>26</sup>

Due to Respondent’s mistaken interpretation of SB 6, Intervenor-Applicant Misso and similarly situated Senate District 1 residents may be denied the fundamental right to run for office as a write-in candidate on January 4, 2011. Equally critical, Intervenor-Applicant Hall and similarly situated voters may be denied the fundamental right to vote for a write-in candidate in the Jan. 4, 2011 election, and to have that vote counted. Moreover, the statutory appeals process (under CCP §904.1(a)(6)) is unlikely to resolve this case before the January 4, 2011 election. Consequently, Intervenor-Applicant Hall and Petitioners face a “realistic danger” of irreparable harm.<sup>27</sup>

Adjudication of this case cannot wait. By hearing this Petition, the Court will remove the danger of irreparable harm, rule on novel constitutional issues, and clarify the ground rules

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<sup>26</sup> *Babbitt v. United Farm Workers Nat’l Union* (1979) 442 U.S. 289, 299; *see also Sandusky County Democratic Party v. Blackwell* (6<sup>th</sup> 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* (10<sup>th</sup> Cir. 2008) 546 F.3d 1313, 1318-19 (same).

<sup>27</sup> Even without the participation of Intervenor Applicants Misso and Hall, the U.S. Supreme Court’s “capable of repetition, yet evading review” doctrine gives Petitioners standing to assert their legal claims with respect to the Jan. 4, 2011 special election. Indeed, the High Court has admonished courts to adjudicate “timely filed cases . . . before an election is held.” *Storer v. Brown* (1974) 415 U.S. 724, 737 n.8 (emphasis added); *see also Gralike, supra* note 22, 531 U.S. at 517 n.8.

for our state and federal elections. Therefore, the Court may properly take jurisdiction over this Petition.

### **III. Background**

#### **A. Denial of Preliminary Injunction**

Petitioners have diligently brought this critical case to the Court's attention. On July 29, 2010, Petitioners filed their Motion for Preliminary Injunction with Respondent Superior Court (San Francisco County). After full briefing by the parties, Respondent denied the Motion on September 14, 2010. Two weeks later, Petitioners brought this Petition to the Court.

#### **B. Summary of Respondent's Decision**

In denying Petitioners' Motion for Preliminary Injunction, Respondent made three conclusions of law. First, it concluded that Petitioners had standing to bring their all of their legal claims. Second, it concluded that Petitioners failed to "show a likelihood of success on the merits." Third, it concluded that Petitioners' showing of imminent harm was "not sufficient."<sup>28</sup>

Respondent made two rulings in connection with Petitioners' likelihood of success. First, Respondent did not strike down SB 6's "party-preference ban", which forces minor-party candidates to state that they have "No Party Preference" on the ballot:

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<sup>28</sup> Respondent's Sept. 14, 2010 Ruling ("Ruling"), Exh. A, at 2.

Insufficient evidence and case law support the argument that the party-preference ban violates the Equal Protection Clause or the Elections Clause.

The state may require candidates not affiliated with qualified [state-recognized] parties to use the “independent” label. (*See Libertarian Party v. Eu* (1980) 23 Cal.3d 535.)

Several federal circuit courts have also held that a state is not constitutionally obligated to permit candidates to list their preferred party label on the ballot.<sup>29</sup>

Significantly, Respondent did not rule on one of Petitioners’ key rebuttal arguments: that, at a bare minimum, minor-party candidates have the right (under the First and Fourteenth Amendments) to identify themselves on the ballot as “Independent”.<sup>30</sup>

Second, Respondent ruled that SB 6 banned voters from casting write-in votes in all general elections:

When [Section 27 (Part 8141.5) and Section 35 (Part 8606)] are read together, it is apparent that the Legislature intended to ban write-ins in the general election. (*See also* comments of the

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<sup>29</sup> *Id.* (emphases added).

<sup>30</sup> Plaintiffs’ Reply Brief, Exh. 3, at 9:12-18. *See also Rosen v. Brown* (6<sup>th</sup> Cir. 1992) 970 F.2d 169, 175 (candidates have a constitutional right to a party voting cue of “Independent” on the ballot); *Schrader v. Blackwell* (6<sup>th</sup> Cir. 2001) 241 F.3d 783, 788-89 (*re-aff’g Rosen*), *cert. denied* (2001) 534 U.S. 888; *Rubin v. City of Santa Monica* (9<sup>th</sup> Cir. 2002) 308 F.3d 1008 (*citing Schrader*).

Secretary of State and the Assembly bill analysis.)<sup>31</sup>

#### IV. The Court Should Apply De Novo Review

The Court should apply de novo review to Respondent's conclusions on Petitioners' likelihood of success. To obtain a preliminary injunction, Petitioners must satisfy two requirements:

1. They are "likely to suffer greater injury from a denial of the injunction than the defendants are likely to suffer from its grant" (i.e., imminent harm)
2. There is a "reasonable probability" that Plaintiffs will prevail on the merits (i.e., likelihood of success).<sup>32</sup>

"[T]he greater the plaintiff's showing on one, the less must be shown on the other to support an injunction."<sup>33</sup>

Significantly, if a trial court bases its assessment of likelihood of success on legal (rather than factual) questions, the reviewing court should apply de novo review – especially when analyzing the constitutionality of a statute.<sup>34</sup> Here, after

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<sup>31</sup> Ruling, Exh. A, at 1.

<sup>32</sup> *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4<sup>th</sup> 400, 58 Cal.Rptr.3d 527, 533 (citing *Robbins v. Superior Court* (1985) 38 Cal.3d 199).

<sup>33</sup> *O'Connell v. Superior Court* (2006) 141 Cal.App.4<sup>th</sup> 1452, 1463 (quoting *Butt v. State of California* (1992) 4 Cal.4<sup>th</sup> 668).

<sup>34</sup> *Huong Que, supra* note 32, 150 Cal.App.4<sup>th</sup> 400, 58 Cal.Rptr.3d at 533-34.

construing SB 6, Respondent concluded it did not violate any constitutional provisions. Consequently, de novo review applies to Respondents’ conclusions on the likelihood of success.

## V. Likelihood of Success

Since RPIs and Intervenors-Defendants (collectively, “SB 6 Defendants”) have conceded several of Petitioners’ claims, Petitioners have shown more than a “reasonable probability” of prevailing on the merits.

### A. The Court Owes No Deference to a Law Voters Did Not Approve

SB 6 Defendants try to drape SB 6 as a voter-approved measure, in hopes of coaxing the Court to give SB 6 a heavy dose of deference. But contrary to their assertions, Plaintiffs are not challenging the constitutionality of Proposition 14, or bringing an as-applied challenge against SB 6. Instead, Plaintiffs are challenging the facial constitutionality of SB 6 – an unjust law passed by the Legislature, and not by the voters. Indeed, the California Supreme Court has made it clear that constitutionally infirm statutes do not deserve one iota of deference:

[T]he ordinary deference a court owes to any legislative action vanishes when constitutionally protected rights are threatened.<sup>35</sup>

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<sup>35</sup> *Spiritual Psychic Science Church of Truth v. City of Azusa* (1985) 29 Cal.3d 501, 514 (emphases added).

Equally telling, SB 6 Defendants do not deny that SB 6 was rammed through the Legislature without a single hearing and without any public notice. In this manner, SB 6 evaded “the normal scrutiny that comes from extensive committee reviews and repeated readings in both houses of the Legislature in the course of normal bill passage.”<sup>36</sup>

Significantly, Justices Breyer and Stevens recently warned that they would be “less than willing to defer to the institutional strengths of the legislature” – particularly “when a law appears to have been adopted without reasoned consideration, for discriminatory purposes, or to entrench political majorities[.]”<sup>37</sup>

Needless to say, SB 6 would receive absolutely no deference under the Justices’ standard. Indeed, SB 6 was passed by the Legislature:

(1) Without “reasoned consideration”. SB 6 was introduced and passed between 3:40 am and 6:55 am on February 19, 2009, without any public notice or committee hearings;<sup>38</sup>

(2) For “discriminatory purposes”. As this Petition will show, SB 6 was designed to inflict political harm on minor-party and write-in candidates; and

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<sup>36</sup> “Retailers Push Sponsored Bill To Avoid Environmental Law”, *Mercury News*, Aug, 31, 2010, Record, Vol. 1, at 2 (emphasis added).

<sup>37</sup> *Doe v. Reed*, *supra* note 9, 561 U.S. \_\_\_, No. 09-559, concurring op., Stevens & Breyer, JJ., at 3 n.3 (citations omitted, emphases added).

<sup>38</sup> Plaintiffs’ Reply Brief, Exh. 3, at 2:16-17.

(3) To “entrench political majorities”. As this Petition will show, SB 6 brazenly favors candidates from state-recognized parties over those from minor parties.

Consequently, the Court owes no deference whatsoever to SB 6 – and must strike it down if it fails to pass muster under either the U.S. or California Constitution.<sup>39</sup>

B. It Is Undisputed That SB 6 Censors Minor-Party Candidates

Notably, the parties all agree that SB 6 bans minor-party candidates from stating any party preference (including “Independent”) on the ballot. Specifically, SB 6’s “party-preference ban” forces candidates from “non-qualified” (non-state-recognized) parties to state on the ballot that they have “No Party Preference”.<sup>40</sup> In contrast, SB 6 allows Republican or Democratic candidates to state their party preference on the ballot.<sup>41</sup>

C. Petitioners May Bring a Facial Challenge Against SB 6’s Party-Preference Ban

In rejecting Petitioners’ Equal Protection claims, Respondent ruled that “[i]nsufficient evidence and case law support the argument that the party-preference ban violates the

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<sup>39</sup> See also *City of Rancho Cucamonga v. Mackzum* (1991) 228 Cal.App.3d 929, 946-47, 279 Cal.Rptr. 220 (examining whether a Legislature-passed implementing statute complied with the Equal Protection Clause of the U.S. and California Constitutions); *Marin Hospital Dist. v. Rothman* (1983) 139 Cal.App.3d 495, 500-01 (same).

<sup>40</sup> FAC, Exh. 16 ¶¶50, 52.

<sup>41</sup> *Id.* ¶¶49, 52.

Equal Protection Clause or the Elections Clause.”<sup>42</sup> In so doing, Respondent appeared to adopt RPI Bowen’s argument that Petitioners may only bring their party-preference claims under an as-applied challenge. Specifically, RPI Bowen has argued that, until SB 6’s party-preference ban is implemented, Petitioners have “no basis” to assert their Equal Protection claims.<sup>43</sup> In other words, Petitioners must wait until their rights have been violated – an argument that the U.S. Supreme Court has repeatedly rejected.<sup>44</sup>

Furthermore, both the U.S. Supreme Court and California courts have ruled in favor of facial challenges to election rules, particularly under the U.S. Constitution’s Elections Clause and the California Constitution’s Equal Protection Clause.<sup>45</sup> For instance, the *Rees* Court did not require any factual evidence that a pro-incumbent election rule would harm non-incumbent candidates. Instead, *Rees* ruled that a pro-incumbent election rule violated the Equal Protection Clause as a matter of law.<sup>46</sup>

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<sup>42</sup> Ruling, Exh. A, at 2.

<sup>43</sup> RPI Bowen’s opposition papers, Exh. 8, at 12:21.

<sup>44</sup> “One does not have to await the consummation of a threatened injury to obtain preventive relief.” *Babbitt, supra* note 26, 442 U.S. at 299 (quoting *Penn. v. W. Va.* (1923) 262 U.S. 553, 593).

<sup>45</sup> See, e.g., *Gralike, supra* note 22, 531 U.S. 510, 523 (a law’s intent controls Elections Clause analysis); *Rees v. Layton* (1970) 6 Cal.App.3d 815, 822-23; *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4<sup>th</sup> 1422; *Ferrara v. Belanger* (1976) 18 Cal.3d 253.

<sup>46</sup> *Rees, supra* note 45, 6 Cal.App.3d at 822-23.

Here, no party disputes two core questions at issue: whether SB 6’s party-preference ban violates the Elections Clause or the Equal Protection Clause of the California Constitution. Since both issues may be decided as a matter of law, Petitioners have properly brought their facial challenge to this Court.

D. SB 6’s Party-Preference Ban Violates the California Constitution’s Equal Protection Clause

*[T]he state has chosen to serve the convenience of those voters who support incumbent and major-party candidates at the expense of other voters. Such favoritism burdens the fundamental right to vote possessed by supporters of the [unfavored] candidates.*

-- The Eighth Circuit, *McLain v. Meier*<sup>47</sup>

By requiring that all ballots favor major-party candidates over minor-party candidates, SB 6 flatly violates the California Constitution’s Equal Protection Clause. Significantly, the U.S. Supreme Court pays keen attention to how states treat candidates who qualify to appear on the ballot.<sup>48</sup>

As Chief Justice Roberts and Justice Alito have observed, “[t]he ballot is the last thing the voter sees before he makes his

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<sup>47</sup> *McLain v. Meier* (8<sup>th</sup> Cir. 1980) 637 F.2d 1159, 1167 (emphases added).

<sup>48</sup> *See, e.g., Gralike, supra* note 22, 531 U.S. 510 (High Court strikes down discriminatory party label); *U.S. Term Limits v. Thornton* (1995) 514 U.S. 779 (same); *Anderson v. Martin* (1964) 375 U.S. 399 (same); *see also Wash. State Grange v. Wash. Republican Party* (2008) 552 U.S. 442 (High Court discusses importance of party labels).

choice”.<sup>49</sup> Furthermore, as Justices Scalia and Kennedy have recognized, party labels play a critical role in helping candidates connect with voters who share their viewpoints and values:

There can be no dispute that candidate acquisition of party labels on [the] ballot ... is a means of garnering the support of those who trust and agree with the party.<sup>50</sup>

1. Stanson v. Mott Controls This Case

In the landmark case of *Stanson v. Mott*, the California Supreme Court laid down a core Equal Protection rule: the government may not favor incumbents, “take sides”, or otherwise “bestow an unfair advantage on one of several competing factions” in an election.<sup>51</sup> Furthermore, the State High Court has also ruled that the Equal Protection Clause “requires all candidates, newcomers and incumbents alike, to be

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<sup>49</sup> *Wash. State Grange*, *supra* note 48, 552 U.S. at 460 (Roberts & Alito, JJ., concurring)(emphases added)(*quoting Gralike*, *supra* note 22, 531 U.S. at 532 (Rehnquist, C.J., concurring)). *Accord, Rosen*, *supra* note 30, 970 F.2d at 175 (“An election ballot is a State-devised form through which candidates and voters are required to express themselves at the climactic moment of choice.”); *Graves v. McElderry* (W.D. Okl. 1996) 946 F.Supp. 1569, 1578 (*citing Rosen*); *Bachrach* (1981) 382 Mass. 268, 415 N.E.2d 832, 834; *Anderson v. Martin* (1964) 375 U.S. 399, 402.

<sup>50</sup> *Wash. State Grange*, *supra* note 48, 552 U.S. at 466 (Scalia & Kennedy, JJ., dissenting) (emphases added).

<sup>51</sup> *Stanson*, *supra* note 22, 17 Cal.3d at 217 (*citing Gould v. Grubb* (1975) 14 Cal.3d 661).

treated equally.”<sup>52</sup> Toward that end, the California Supreme Court applies strict scrutiny to any law that gives a class of candidates an advantage on the ballot.<sup>53</sup>

Under the *Stanson* doctrine, the wording and structure of a ballot cannot favor certain “political viewpoints” or a “particular partisan position”.<sup>54</sup> What is more, *Stanson* strongly implies that if a government does “take sides” on the ballot, it must provide “equal access” to “all competing factions” – effectively creating a limited public forum.<sup>55</sup> Accordingly, the California Supreme Court and Courts of Appeal have struck down ballots that unlawfully favored incumbents or certain

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<sup>52</sup> *Gould*, *supra* note 51, 14 Cal.3d at 674 (emphasis added)(quoting *Mann v. Powell* (N.D.Ill. 1969) 333 F.Supp. 1261, 1267).

<sup>53</sup> *Gould*, *supra* note 51, 14 Cal.3d at 672; *Eu*, *supra* note 21, 28 Cal.3d at 546 (“compelling state interest” required to justify giving candidates from qualified parties preferential treatment on the ballot).

<sup>54</sup> *See, e.g., Huntington Beach City Council* (2002) 94 Cal.App.4<sup>th</sup> 1422, 1433 (quoting *Stanson*, *supra* note 22, 17 Cal.3d at 219, and citing *Citizens for Responsible Gov’t v. City of Albany* (1997) 56 Cal.App.4<sup>th</sup> 1199, 1228).

<sup>55</sup> *Stanson*, *supra* note 22, 17 Cal.3d at 217; *Huntington Beach City Council*, *supra* note 54, 94 Cal.App.4<sup>th</sup> at 1433; *Citizens for Responsible Gov’t*, *supra* note 54, 56 Cal.App.4<sup>th</sup> at 1228. At the hearing on Petitioners’ Motion for Preliminary Injunction, Intervenor-Defendants also argued that the scope of *Stanson*’s holding was narrowed in *Vargas v. City of Salinas* (2009) 46 Cal. 4<sup>th</sup> 1. However, *Vargas* examined whether certain public funds could be spent in connection with a specific ballot measure, and did not discuss whether the State may ban candidates from stating any party preference on the ballot.

political viewpoints.<sup>56</sup> Furthermore, as Supreme Court scholar Vicki Jackson has noted, courts in the Fifth, Seventh and Eighth Circuits (including *McLain v. Meier*, quoted earlier) have struck down ballots that “favor nominees of preferred parties”:<sup>57</sup>

[O]nce a candidate is legally entitled to appear on the ballot there is substantial support in the lower courts to invalidate laws that favor incumbents, or nominees of preferred parties[.]

2. *Rees* Applied the *Stanson* Doctrine in an Analogous Case

In *Rees v. Layton*,<sup>58</sup> a Court of Appeal struck down a discriminatory party label that closely resembles the one here. An election rule had allowed incumbents to be listed on the ballot as the holder of the office, while banning their challengers from listing their occupation on the ballot. The

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<sup>56</sup> *Gould, supra* note 51, 14 Cal.3d 661 (incumbents cannot be listed first); *Ferrara, supra* note 45, 18 Cal.3d 253 (government cannot print its argument on ballot measure while refusing to publish the opposing argument); *Rees, supra* note 45, 6 Cal.App.3d 815 (government cannot ban non-incumbents from stating their profession on the ballot, while allowing incumbents to be listed as the holder of the office).

<sup>57</sup> Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001 Sup.Ct.Rev. 299, 336 n.112 (emphases added), *citing, inter alia, Gould, supra* note 51, 14 Cal.3d 661, *McLain v. Meier* (8<sup>th</sup> Cir. 1980) 637 F.2d 1159, 1166-67, *Graves v. McElderry* (W.D. Okla. 1996) 946 F.Supp. 1569, 1573, 1579-82 (striking down state law that gave top ballot position to Democratic candidates); *Sangmeister v. Woodard* (7<sup>th</sup> Cir. 1977) 562 F.2d 460, 465-67 (striking down election officials’ practice of giving their own political party top ballot position).

<sup>58</sup> *Rees, supra* note 45, 6 Cal.App.3d 815.

government claimed that this practice was necessary to prevent non-incumbents from “misleading the electorate.”

Dismissing that argument, *Rees* reasoned that candidates could effectively police themselves. The Court noted that “a misleading occupation on the ballot would be fuel to an opponent’s campaign.”<sup>59</sup> *Rees* concluded that such government intervention violated the Equal Protection Clause.<sup>60</sup> Subsequently, the California Supreme Court expressly re-affirmed *Rees* in *Gould v. Grubb*.<sup>61</sup>

*Rees* directly applies to the ballots required by SB 6. Under SB 6’s ballot, a favored class of candidates (those from state-recognized parties) will be allowed to tell voters their party preference; while a disfavored class of candidates will be forbidden from doing so. In this manner, candidates from state-recognized parties will attract support just by appearing on the ballot. To paraphrase Justices Scalia and Kennedy, those preferred candidates will thereby “garner[] the support of those who trust and agree with [their] party.”<sup>62</sup>

In contrast, minor-party candidates will be deliberately deprived of the ability to reach potential voters by way of the ballot. Under SB 6, candidates like Plaintiffs Mackler or Martin who prefer the viewpoints of minor parties will face a Hobson’s choice: (1) appear on the ballot with the party label

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<sup>59</sup> *Id.* at 823.

<sup>60</sup> *Id.*

<sup>61</sup> *Gould, supra* note 51, 14 Cal.3d at 673 n.13.

<sup>62</sup> *Wash. State Grange, supra* note 48, 552 U.S. at 466.

of “No Party Preference”, or (2) adopt the party label of a state-recognized party. Because it denies “equal access”<sup>63</sup> to candidates of every political viewpoint, SB 6’s party-preference ban not only triggers strict scrutiny, but violates the Equal Protection Clause of the California Constitution.<sup>64</sup>

E. SB 6 Defendants Have Given No Compelling State Interest to Justify SB 6’s Party-Preference Ban

Tellingly, SB 6 Defendants have not disputed that SB 6’s party-preference ban triggers strict scrutiny. Instead, they claim that the State has a “compelling interest” in denying equal access on the ballot to minor-party candidates.<sup>65</sup>

1. Giving minor-party candidates a party label will not confuse voters

First, SB 6 Defendants argue that it would “confuse” voters if minor-party candidates were allowed to use a party label of their choosing. For instance, Intervenor-Defendants ask: “What if somebody wants to put GOP or Republic Party?”<sup>66</sup> Two answers quickly come to mind. First, giving candidates the freedom to use party labels has received a groundswell of national support. In fact, a whopping 24 states

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<sup>63</sup> *Stanson, supra* note 22, 17 Cal.3d at 217.

<sup>64</sup> *Gould, supra* note 51, 14 Cal.3d at 672.

<sup>65</sup> RPI Bowen’s opposition papers, Exh. 8, at 13:5-6, (“compelling state interest” supports SB 6); Intervenor’s opposition papers, Exh. 10, at 10:5-6 (the State has a “compelling interest in regulating the method by which” to regulate the contents of the ballot).

<sup>66</sup> Sept. 14, 2010 Hearing Transcript (“Transcript”), Exh. 15, at 26:26.

currently allow candidates to use party labels of their own choosing. Second, many right-of-center candidates would probably prefer to use the party label “Republican”, as it would probably pick up more support than the less familiar party labels “GOP” or “Republic Party”.

Ironically, SB 6’s new party labels could itself confuse voters, because it gives a party label to every candidate who identifies with a state-recognized party – even if that party publicly repudiates him or her.<sup>67</sup> Indeed, if a candidate switches his party registration from Democrat to Republican, SB 6 would allow him to use the party label of “Republican.” What is more, candidates can effectively police themselves in the marketplace of ideas (and party labels). To paraphrase *Rees*, “a misleading [party label] on the ballot would be fuel to an opponent’s campaign.”<sup>68</sup> In this light, the “voter confusion” argument does not give the State any compelling interest to justify SB 6’s party-preference ban.

2. *Libertarian Party v. Eu* Does Not Authorize SB 6’s Party-Preference Ban

Trying to overcome strict scrutiny, SB 6 Defendants will argue that existing law on “qualified party” elections provides a compelling government interest to justify SB 6. Yet to the extent that it applies, case law on “qualified party” elections –

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<sup>67</sup> FAC, Exh. 16 ¶46.

<sup>68</sup> *Rees*, *supra* note 45, 6 Cal.App.3d at 823.

which was first cited in Intervenors-Defendants’ opposition papers<sup>69</sup> – would also strike down SB 6.

In its ruling, Respondent upheld SB 6’s party-preference ban for two reasons. First, Respondent accurately noted that, under *Libertarian Party v. Eu*,<sup>70</sup> the State may require candidates from non-qualified (non-state-recognized) parties to use the party label of “Independent”.<sup>71</sup> Second, citing federal cases such as *Schrader v. Blackwell*, *McLaughlin v. Bd. of Elections*, and *Rubin v. Santa Monica*, Respondent held that the

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<sup>69</sup> A reply brief may provide an “elaboration of issues raised in [the] opening brief or rebuttals to [opposition] briefing.” *Reichardt v. Hoffman* (1997) 52 Cal.App.4<sup>th</sup> 754, 764 (emphases added). In a slew of sur-reply papers, Intervenors-Defendants claimed that Petitioners’ Reply Brief had raised new arguments in connection with SB 6’s party-preference ban. See Plaintiffs’ Response to Intervenors-Defendants’ Sur-Reply, Exh. 6, at 3:13-4:21. However, as Petitioners have documented, their Reply Brief merely responded to and rebutted arguments that Intervenors-Defendants had themselves raised. See *id.* In any event, Respondent permitted Intervenors-Defendants’ to file their sur-reply papers, which responded to arguments raised in Petitioners’ Reply and Opening Briefs. See *id.* at 2:16-3:12. Moreover, during oral argument, Intervenors-Defendants further expanded on the arguments that their sur-reply papers had raised. Transcript, Exh. 15, at 26-27. See *People v. Miller* (2007) 146 Cal.App.4<sup>th</sup> 545, 52 Cal.Rptr.3d 894, 898 (reviewing court may adjudicate all issues “raised during argument, whether that argument has been oral or in writing.”)(quoting *People v. Manning* (1973) 33 Cal.App.3d 586).

<sup>70</sup> *Eu, supra* note 21, 28 Cal.3d 535.

<sup>71</sup> Ruling, Exh. A, at 2.

State “is not constitutionally obligated to permit candidates to list their preferred party label on the ballot.”<sup>72</sup>

However, *Eu* does not provide the State with any compelling interest to justify SB 6’s party-preference ban. To begin with, *Eu* does not directly apply here, because it upheld California’s existing “qualified party” election system – which SB 6 seeks to dismantle.

In *Eu*, the California Supreme Court ruled that the State could grant candidates from qualified parties certain advantages over candidates from non-qualified parties. Specifically, *Eu* held that, due to the framework of the existing “qualified party” election system, there was a “compelling state interest” to maintain the “distinction between qualified and non-qualified parties.”<sup>73</sup> As an initial matter, *Eu* held that the State may ban candidates from “non-qualified” (non-state-established) parties from appearing on the June primary-election ballot – because those parties had not yet garnered “a significant modicum of support[.]”<sup>74</sup>

Under *Eu*, only candidates from qualified parties may appear on the June primary-election ballot; the winner of each qualified party’s respective primary then advances to the November general election, as that party’s nominee. Thus, each

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<sup>72</sup> *Id.* (citing *Schrader, supra* note 30, 241 F.3d 783; *Rubin, supra* note 30, 308 F.3d 1008; *McLaughlin v. No. Carolina Bd. of Education* (4<sup>th</sup> Cir. 1995) 65 F.3d 1215, 1223-24, *cert. denied* (1996) 517 U.S. 1104).

<sup>73</sup> *Eu, supra* note 21, 28 Cal.3d at 546.

<sup>74</sup> *Id.* at 546 (citation and quotation omitted).

qualified party can nominate exactly one<sup>75</sup> candidate for each state and federal office in the November general election.

Conversely, *Eu* permits the State to ban candidates from non-qualified parties from participating in the June primary election. In this manner, non-qualified parties do not have the opportunity to nominate any candidates for the November general election. Instead, candidates from non-qualified parties must qualify for the November election “independent of” the June qualified-party election.<sup>76</sup> Thus, to avoid “confusion” in the general election, *Eu* held that the State could require those candidates to use the party label of “Independent”.<sup>77</sup>

### 3. Libertarian Party v. Eu Does Not Directly Apply to This Case

In contrast to our existing “qualified party” election system, SB 6 would enable both qualified-party and non-qualified-party candidates to participate in the June primary election. For instance, a June primary election for Governor could feature two Republicans, two Democrats, and two non-qualified-party candidates. The top two votegetters, irrespective of their party preference, would then appear on the

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<sup>75</sup> Under the so-called “sore loser” law, a candidate who loses in a qualified party’s primary election is banned from appearing on the ballot in the general election. Election Code §8301. However, that candidate may run as a write-in candidate in the general election. *Id.* §8600.

<sup>76</sup> *Eu, supra* note 21, 28 Cal.3d at 544 (emphasis added).

<sup>77</sup> *Id.* at 546 (quotation omitted).

November general-election ballot.<sup>78</sup> Thus, it would be possible for two Republicans or two Democrats to be the only two candidates for Governor in the November general election.

In this light, SB 6’s election regime makes a critical change to the way we elect our state and federal leaders.<sup>79</sup> Namely, state-recognized parties would no longer be able to select their nominees for the November general election. Thus, SB 6 eliminates the need to maintain the “distinction between qualified and non-qualified parties” – the very basis for the holding in *Eu*.<sup>80</sup> Accordingly, *Eu* does not provide any “compelling state interest” that would justify SB 6’s party-preference ban.

F. To the Extent It Applies, “Qualified Party” Case Law Would Strike Down SB 6

Significantly, to the extent it would apply, legal authority on “qualified party” primaries would also strike down SB 6’s party-preference ban. Indeed, the “qualified party” line of cases – which Respondent’s ruling relies on – stands for a core constitutional principle. Namely, at a bare minimum, non-qualified-party candidates have the right to identify themselves on the general-election ballot as “Independent” or “Unaffiliated”.<sup>81</sup>

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<sup>78</sup> SB 6, FAC, Exh. 16, at Exh. 1 §27 Pt. 8141.5.

<sup>79</sup> SB 6 excludes Presidential elections from its scope. *Id.* §7, Pt. 359.5.

<sup>80</sup> *Eu*, *supra* note 21, 28 Cal.3d at 546.

<sup>81</sup> *See, e.g., Rosen*, *supra* note 30, 970 F.2d 169, 175; *Eu*, *supra* note 21, at 545; *Schrader*, *supra* note 30, 241 F.3d at

In *Rosen*, a state law banned a minor-party candidate from stating any party preference on the ballot.<sup>82</sup> Striking down that law, the Sixth Circuit held that the First and Fourteenth Amendments give minor-party candidates the right to a party label of “Independent”.<sup>83</sup> Subsequently, that constitutional right – which had been recognized earlier by the Massachusetts and Minnesota Supreme Courts<sup>84</sup> – was incorporated into *Schrader* and *Rubin*, two cases which Intervenor-Defendants were the first to invoke.<sup>85</sup>

Tellingly, Washington State – the model for SB 6’s election system<sup>86</sup> – did not even adopt the “No Party Preference” label for its own elections. Unlike its SB 6 offshoot, Washington State’s election system allows every

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788-89; *Rubin*, *supra* note 30, 308 F.3d 1008 (*citing Schrader*); *McLaughlin*, *supra* note 72, 65 F.3d at 1223-24 (non-qualified-party candidates are entitled to a party label of “Unaffiliated”).

<sup>82</sup> *Rosen*, *supra* note 30, 970 F.2d 169.

<sup>83</sup> *Id.*

<sup>84</sup> *Bachrach*, *supra* note 49, 382 Mass. 268, 415 N.E.2d at 833; *Shaw v. Johnson* (1976) 311 Minn. 237, 247 N.W.2d 921, 923.

<sup>85</sup> *Id.* at 175; *Schrader*, *supra* note 30, 241 F.3d at 788-89; *Rubin*, *supra* note 30, 308 F.3d at 1008. *See also McLaughlin*, *supra* note 55, 65 F.3d at 1223-24 (non-qualified-party candidates are entitled to a party label of “Unaffiliated”).

<sup>86</sup> According to Intervenor-Defendant Yes on 14, “legal experts have modeled [Prop 14] after Washington State’s primary system.” “Q&A”, website of Intervenor-Defendant Yes on 14, Plaintiffs’ Reply Brief, Exh. 3, at 7:14-15.

candidate to use up to 16 characters to describe his or her party preference.<sup>87</sup>

Instead of assigning them the party label of “Independent”, SB 6 foists minor-party candidates with the party label of “No Party Preference” – a far cry from the party label of “Independent”. Significantly, the Massachusetts Supreme Court has struck down an analogous party-preference ban. Applying strict scrutiny, the justices ruled it was unconstitutional to force minor-party candidates to use the party label of “Unenrolled” – a term identical in meaning to “No Party Preference”:<sup>88</sup>

Voters who during the campaign might have been favorably impressed with the candidate as an Independent, would be confronted on the ballot with a candidate who was called Unenrolled. Unenrolled is hardly a rallying cry[.]<sup>89</sup>

Therefore, to the extent that the “qualified party” line of cases applies, SB 6’s party-preference ban cannot survive strict scrutiny. Consequently, the Court must direct Respondent to enjoin RPIs from implementing and enforcing SB 6’s party-preference ban.

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<sup>87</sup> WAC §434-215-120(1), Exh. B.

<sup>88</sup> *Bachrach*, *supra* note 49, 382 Mass. 268, 415 N.E.2d 832, 833, 836; *see also Shaw*, *supra* note 84, 311 Minn. 237, 247 N.W.2d at 923 (state may not deny minor-party candidates the party label “Independent”).

<sup>89</sup> *Bachrach*, *supra* note 49, 382 Mass. 268, 415 N.E.2d 832, 836 (emphases added); *see also Shaw*, *supra* note 84, 311 Minn. 237, 247 N.W.2d at 923 (state may not deny minor-party candidates the party label “Independent”).

### G. SB 6’s Party-Preference Ban Violates the Elections Clause

Similarly, SB 6’s party-preference ban brazenly violates the U.S. Constitution’s Elections Clause. Remarkably, SB 6 Defendants have conceded this claim.<sup>90</sup> As the U.S. Supreme Court unanimously held in *Cook v. Gralike*, a state law violates the Elections Clause if it aims to (1) “favor or disfavor” one class of candidates over another, (2) “dictate electoral outcomes”, or (3) “evade important constitutional restraints”.<sup>91</sup>

In *Gralike*, the High Court struck down a state election law that targeted federal candidates who did not support term limits. There, if a Senator or Congressman did not support term limits, the statute required that the following candidate label be printed on the ballot beside their name:

“DISREGARDED VOTERS’ INSTRUCTIONS ON TERM LIMITS.”<sup>92</sup>

In response, the High Court held that the statute violated the Elections Clause for at least two reasons. First, the statute was “plainly designed to favor candidates who [were] willing to

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<sup>90</sup> In their opposition papers and at the Sept. 14, 2010 hearing on Petitioners’ Motion for Preliminary Injunction, SB 6 Defendants failed to cite any legal authority that refuted Petitioners’ Election Clause claims. *See* Plaintiffs’ Reply Brief, Exh. 3, at 8:3 n.30; Transcript, Exh. 15, at 20:27-21:1 & 33:14-16.

<sup>91</sup> *Gralike*, *supra* note 22, 531 U.S. at 523 (quoting *U.S. Term Limits v. Thornton*, *supra* note 48, 514 U.S. 779).

<sup>92</sup> *Gralike*, *supra* note 22, 531 U.S. at 510.

support” term limits and “to disfavor those who either oppose term limits entirely or would prefer a different proposal”.<sup>93</sup>

[I]t seems clear that the adverse labels handicap candidates “at the most crucial state in the election process – the instant before the vote is cast.” At the same time, “by directing the citizen’s attention to the single consideration of the candidates’ fidelity to term limits, the labels imply that the issue “is an important – perhaps paramount consideration in the citizen’s choice, which may decisively influence the citizen to cast his ballot” against candidates branded as unfaithful.<sup>94</sup>

The High Court then concluded that the statute unlawfully aimed to “dictate electoral outcomes,” because “the labels surely place their targets at a political disadvantage[.]”<sup>95</sup>

SB 6 must be struck down for the same reasons stated in *Gralike*. It is undisputed that SB 6 grants a party label to candidates who identify with the viewpoint of a state-recognized party, while refusing to do so for all other candidates. Thus, SB 6 was “plainly designed to favor” candidates who identify with the viewpoint of a state-recognized party, and was designed to “disfavor” and “handicap” candidates who identify with the viewpoint of smaller, non-state-recognized parties.<sup>96</sup> Finally, because it

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<sup>93</sup> *Id.* at 510 (citing *Anderson v. Celebrezze* (1983) 460 U.S. 780, 788 n.9).

<sup>94</sup> *Gralike, supra note 22*, 531 U.S. at 524 (quoting *Anderson, supra note 42*, 375 U.S. at 402)(emphases added).

<sup>95</sup> *Gralike, supra note 22*, 531 U.S. at 525 (emphases added).

<sup>96</sup> *Id.* at 523-25.

places disfavored candidates at a political disadvantage, SB 6 also aims to “dictate electoral outcomes”. Therefore, SB 6’s party-preference ban violates the Elections Clause.<sup>97</sup>

1. SB 6 Defendants Concede Petitioners’ Elections Clause Claim

Significantly, Respondent erred when it denied Petitioners’ claim that SB 6’s party-preference ban violated the Elections Clause – because SB 6 Defendants had conceded that claim. As the California Supreme Court has made clear, “any point not appearing in a party’s brief will ordinarily be deemed waived.”<sup>98</sup>

Here, as Petitioners’ Reply Brief noted, SB 6 Defendants’ opposition papers barely discussed the Election Clause, and failed to cite any legal authority relating to the Elections Clause.<sup>99</sup> Therefore, because SB 6 Defendants

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<sup>97</sup> *Id.* at 525.

<sup>98</sup> *People v. Boyd* (1979) 24 Cal.3d 285, 294 n.6 (*citing Utz v. Aureguy* (1952) 109 Cal.App.2d 803, 807)(emphases added).

<sup>99</sup> Petitioners’ Reply Brief, Exh. 3, at 7:22-8:4. In their opposition papers, Intervenor-Defendants (but not RPI Bowen) appear to claim that SB 6 does not violate the Elections Clause, because the party-preference ban allegedly does not violate any other constitutional provision. *Cf.* Intervenor-Defendants’ opposition papers, Exh. 10, at 10:23-11:2. That argument fails for two reasons: (1) the party-preference ban does violate other constitutional provisions, including the California Constitution’s Equal Protection Clause, and (2) as the U.S. Supreme Court has held, a law can independently violate the Elections Clause without violating any other constitutional provision. *U.S. Term Limits, supra* note 42, 514 U.S. at 829-30.

waived<sup>100</sup> the opportunity to rebut Petitioners’ claim, Respondent erred when it denied Petitioners’ Election Clause claim. Thus, because SB 6’s party-preference ban is unconstitutional, the Court should direct Respondent to enjoin RPIs from implementing and enforcing it.

H. It is Beyond Dispute That SB 6’s Party-Preference Ban Is Not Severable

Furthermore, Respondent should have declared the entirety of SB 6 unenforceable, for SB 6’s party-preference ban is not severable. To be sure, SB 6 Defendants insist that SB 6’s severability clause would allow SB 6’s unlawful parts to be severed. However, the California Supreme Court has repeatedly held that severability clauses are not conclusive. Instead, “[t]he final determination depends on whether the remainder [of the statute] ... would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute[.]”<sup>101</sup>

Significantly, SB 6 Defendants concede that, to salvage a statute, its unlawful parts must, inter alia, be “volitionally” separable; that is, it must be “clear that the Legislature would

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<sup>100</sup> During oral argument on Petitioners’ Motion for Preliminary Injunction, Intervenor stated that they did not “concede the Election Clause issue.” Transcript, Exh. 15, at 33:14-16. Tellingly, Intervenor cited no legal authority to support their assertion. *Id.*

<sup>101</sup> *E.g., Gerken v. FPCC* (1993) 6 Cal.4<sup>th</sup> 707, 714 (*quoting Calfarm v. Deukmejian* (1989) 48 Cal.3d 805, 821)(emphases added); *see also Santa Barbara Sch. Dist v. Superior Court* (1975) 13 Cal.3d 315, 331.

have enacted the measure without” the offending parts.<sup>102</sup> SB 6 Defendants further concede that it is highly unlikely that the Legislature would have passed SB 6 without its unlawful party-preference ban. In fact, it is undisputed that the Legislature passed SB 6’s party-preference ban in order to implement Proposition 14.<sup>103</sup> Thus, since SB 6’s party-preference provision is not volitionally separable, it is not severable as a matter of law. Therefore, the Court must direct Respondent (1) to declare that the entirety of SB 6 is unenforceable, and (2) to enjoin RPIs from implementing or enforcing any part of SB 6.

I. Since SB 6 Is Unenforceable, Prop 14 Is Inoperative As a Matter of Law

Equally important, SB 6 Defendants have cited no authority to refute yet another of Plaintiffs’ core legal theories. Namely, if SB 6 is struck down, Prop 14 must be declared inoperative, for it would then need a new statute to implement it.<sup>104</sup> Thus, since the entirety of SB 6 is unenforceable, the Court must direct Respondent to declare that Prop 14 is inoperative as a matter of law.

J. The Importance of Write-In Voting

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<sup>102</sup> *E.g., Sonoma County v. Superior Ct.* (2009) 173 Cal.App.4<sup>th</sup> 322, 352 (citation omitted, emphases added).

<sup>103</sup> Plaintiffs’ Moving Papers for Preliminary Injunction, Exh. 1, at 13:8-23.

<sup>104</sup> *Id.* at 13:24-14:8 (citing *In Re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, 75, 389 P.2d 538; *Denninger v. Recorder’s Court* (1904) 145 Cal. 629, 635, 79 P.360). SB 6 Defendants have conceded that Proposition 14 is not self-executing, and thus needs a statute to implement it.

*[T]he 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*<sup>105</sup>

Ironically, by attacking write-in voting, SB 6 seeks to kill off a vital safety valve that would have made its election system stronger. With SB 6, only two candidates would appear on the November general-election ballot.<sup>106</sup> To illustrate this point, let us assume that Democrat Jerry Brown and Republican Meg Whitman were the only two candidates to qualify for the Nov. 2014 gubernatorial election.

What if Brown suddenly suffered a stroke and became paralyzed a few weeks before the November general election? Under SB 6's rules, Democratic voters would face a double bind. First, SB 6 would ban the Democratic Party from replacing Brown. Worse yet, if voters wrote in the name of another Democrat, the plain language of SB 6 would force election officials to throw away their votes.<sup>107</sup>

Write-in voting has played a visible and critical role in state and national politics. In 1999, write-in candidate Tom

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<sup>105</sup> *Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 718 (emphasis added)(quoting *Thompson v. Willson* (1967) 223 Ga. 370, 155 S.E.2d 401, 404), subsequently overruled on other grounds, *Edelstein v. San Francisco* (2002) 29 Cal.4<sup>th</sup> 164.

<sup>106</sup> FAC, Exh. 16 §30.

<sup>107</sup> SB 6, FAC, Exh. 16 (at Exh. 1) §35 Pt. 8606.

Ammiano finished second in the San Francisco mayoral election, and qualified for the runoff against Willie Brown.<sup>108</sup> In 2004, write-in candidate Donna Frye nearly won the San Diego mayoral election.<sup>109</sup> And only two weeks ago, U.S. Senator Lisa Murkowski announced that she would seek re-election as a write-in candidate.<sup>110</sup>

In light of the critical role that write-in candidates have played in politics, one should exercise great caution before concluding that SB 6 banned voters from casting write-in ballots.

K. SB 6 Illegally Bans Lawfully Cast Write-In Votes from Being Counted

*The right to vote includes the right to have the ballot counted.*

-- *Reynolds v. Sims*<sup>111</sup>

SB 6's write-in provisions violate both the U.S. and California Constitutions, for they (1) allow voters to cast write-in votes, then (2) bans their votes from being counted. Specifically, Section 35 orders election officials not to count

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<sup>108</sup> *Edelstein, supra* note 105, 29 Cal.4<sup>th</sup> at 182.

<sup>109</sup> "The San Diego Surfer Murkowski Should Read Up On", *Atlantic Monthly*, Sept. 2010, Motion To Intervene, Exh. D, at 1.

<sup>110</sup> *Id.*

<sup>111</sup> *Reynolds v. Sims* (1964) 377 U.S. 533, 555 n.29.

any write-in votes cast in the general election.<sup>112</sup> Yet the U.S. Supreme Court, California Supreme Court, and California Constitution have all made one constitutional right resoundingly clear: If a vote has been lawfully cast, it must be counted.<sup>113</sup>

1. California Law Protects the Right To Cast a Write-In Vote

To begin with, Elections Code Section 15340 – which SB 6 does not amend – expressly guarantees every voter the right to cast a vote for a write-in candidate at every election:

“Each voter is entitled to write the name of any public office ... on the ballot of any election.”<sup>114</sup>

Significantly, the plain language of SB 6 re-affirms that right. Specifically, Section 1 of SB 6 purports to protect not only the right to cast a write-in vote, but the right to run as a write-in candidate:

Nothing in this section shall be construed as preventing or prohibiting any qualified voter of this state from casting a ballot for any person by writing the name of that person on the ballot, or from having that ballot counted and tabulated, nor shall any provision of this section be construed as

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<sup>112</sup> “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 §35 (Pt. 8606) (emphases added).

<sup>113</sup> Moving Papers, at 5:15-17 & n.32 (*quoting U.S. v. Classic* (1941) 303 U.S. 299, 315 & *Gould v. Grubb* (1975) 14 Cal.3d 661, 671 n.10, 536 P.2d 1337, 1343); Moving Papers, at 4:1-3 (*quoting* CAL.CONST art. II § 2.5).

<sup>114</sup> Election Code §15340 (emphasis added).

preventing or prohibiting any person from standing or campaigning for any elective office by means of a “write-in” campaign.<sup>115</sup>

What is more, Section 50 of SB 6 requires that ballots have sufficient space so that voters can cast votes 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.<sup>116</sup>

Therefore, both the Election Code and SB 6 expressly give voters the right to cast write-in votes in every state and federal election.

2. Since California Law Allows Write-In Votes To Be Cast, They Must Be Counted

*A refusal to count an elector’s vote completely ignores it and is tantamount to a refusal to allow him to cast it.*

-- California Supreme Court, *Canaan v. Abdelnour*<sup>117</sup>

Since both the Election Code and SB 6 expressly permit voters to cast write-in votes, they must be counted. As a starting point, the California Constitution (Article II, Section 2.5) requires that every lawfully cast vote be counted:

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<sup>115</sup> SB 6, FAC, Exh. 16 (at Exh. 1) §1, Pt. 13 (emphases added).

<sup>116</sup> *Id.* §50, Pt. 13207(a)(2) (emphasis added).

<sup>117</sup> *Canaan, supra* note 105, 40 Cal.3d at 719.

“A voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted.”<sup>118</sup>

Furthermore, Elections Code 15342 – which SB 6 does not amend – requires that all-write in votes that have been cast for eligible candidates be counted:

Any name written upon a ballot for a qualified write-in candidate ... shall be counted for the office[.]<sup>119</sup>

### 3. SB 6 Violates the California Constitution

Yet rather than comply with the California Constitution, SB 6 expressly bans all write-in ballots 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.”<sup>120</sup>

Equally startling, SB 6 induces voters to cast write-in votes, but does not even tell them that their write-in votes will not count. What is more, SB 6 compels election officials to add a write-in section to all ballots.<sup>121</sup>

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<sup>118</sup> CAL.CONST. art. II §2.5 (emphases added).

<sup>119</sup> Election Code §15342 (emphases added). Elections Code §15341 sets forth the requirements for a write-in candidate to be deemed “qualified.”

<sup>120</sup> SB 6, *supra* note 12, §35 Pt. 8606 (emphases added).

<sup>121</sup> “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.” *Id.* §50 Pt. 13207(a)(2) (emphases added).

A state may not change vote-counting rules without giving fair and adequate notice to voters.<sup>122</sup> Remarkably, a public statement from RPI Secretary Bowen's office admits that SB 6 will trick voters into throwing away their votes – the heart of Petitioners' Due Process claim:

Since ... SB 6 precludes [write-in] votes from being counted, it makes no sense to give voters the **illusion** that they can write in a candidate's name and have it counted. Making these conforming changes is only controversial because there is a lawsuit on this issue that essentially states "SB 6 says don't count the votes, so it's misleading to let people think they can write in a candidate's name and have it counted." The way to solve the lawsuit is to make the [elections] code read one way – which we've done as SB 6 intended.<sup>123</sup>

By publicly admitting that SB 6 gives voters the "illusion" that their write-in votes will count, Defendant Bowen has made a binding party admission<sup>124</sup> as to all of Write-In

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<sup>122</sup> See, e.g., *Griffin v. Burns* (1st Cir. 1978) 570 F.2d 1065, 1074.

<sup>123</sup> Declaration of Sean Welch, Exh. 5 (at Exh. B), at 1 (emphases added). The public statement released by Defendant Bowen "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Yamaha v. BOE* (1998) 19 Cal.4<sup>th</sup> 1, 14 (quotation and citation omitted, emphases added). See also Plaintiffs' Moving Papers, Exh. 1, at 7:17-8:3 (Plaintiffs' Due Process claim).

<sup>124</sup> Party admissions are admissible under the exception to the hearsay rule. Govt. Code §1220. The statement made by Defendant Bowen's staff is admissible and not subject to the hearsay rule, because (a) the staff member was authorized by Defendant Bowen to make the statement on her behalf, and (b)

Plaintiffs' Claims for Relief.<sup>125</sup> Therefore, because SB 6 bans all lawfully cast write-in votes from being counted, it violates the California Constitution.

L. SB 6's Counting Ban Violates the First Amendment and the Free Speech Clause

Despite RPI Bowen's remarkable public admission, SB 6 Defendants insist that SB 6's write-in provisions are constitutional. However, SB 6's ban on counting write-in votes flatly violates the First Amendment of the United States Constitution and the Free Speech Clause of the California Constitution, for it foists on voters an unlawful, content-based restriction on their right to core political speech.

1. Turner v. D.C. Election Bd. Controls

*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. D.C. Election Board* (D.D.C. 1999)<sup>126</sup>

*Turner v. D.C. Board of Elections* provides the Court with persuasive guidance with regard to SB 6's write-in

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the staff member made the statement within the scope of her official duties. *Id.* §1222 (authorized-party exception to hearsay rule) & 1280 (public-records exception to hearsay rule); *see also Lake v. Reed* (1997) 16 Cal.4<sup>th</sup> 448, 461-62.

<sup>125</sup> Claim I and II invoke the California Constitution (art. ii §2.5 & the Free Speech Clause); Claim III, the First Amendment; Claim IV, the Elections Clause; and Claims V and VI, the Due Process Clause.

<sup>126</sup> *Turner v. District of Columbia Bd. of Elections* (D.D.C. 1999) 77 F.Supp.2d 25, 33 (emphases added).

provisions.<sup>127</sup> In *Turner*, a federal judge quashed an attempt to prevent lawfully cast votes from being counted. There, the District of Columbia’s elections board refused to count the votes cast in an election, because it believed that doing so would violate federal law. The Court emphatically disagreed: “Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted.”<sup>128</sup>

As the United States Supreme Court recently noted in *Doe v. Reed*, “the expression of a political view implicates a First Amendment right.”<sup>129</sup> *Turner* held that not counting lawfully cast votes automatically triggers strict scrutiny. At the outset, the Court held that the very act of voting constitutes protected symbolic speech.<sup>130</sup> *Turner* also concluded that counting lawful votes and certifying the results constituted core political speech.<sup>131</sup> Furthermore, the *Turner* Court held that suppressing the counting of votes imposed a content-based restriction on speech, for “keeping a veil over the results”

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<sup>127</sup> *Id.* at 25.

<sup>128</sup> *Id.* at 33 (emphasis in original) (quoting *United States v. Classic*, 303 U.S. 299, 315 (1941); accord, *Gould*, *supra* note 51, 14 Cal.3d at 671 n.10 (“There is more to the right to vote than the right to mark a piece of paper and drop it in a box or a right to pull a lever in a voting booth. It also includes the right to have the vote counted at full value without dilution or discount.”)(emphases added, citations and quotations omitted).

<sup>129</sup> *Doe*, *supra* note 1, 561 U.S. \_\_\_\_, t 6 (emphases added).

<sup>130</sup> *Turner*, *supra* note 126, 77 F.Supp.2d at 31.

<sup>131</sup> *Id.* at 32 (citing *McIntyre v. Ohio Elections Comm’n* (1995) 514 U.S. 334, 346 (emphasis added)).

would “cut short public expression” about both issues and candidates.<sup>132</sup>

Finally, *Turner* concluded that refusing to count votes would impose a “severe” restriction on the vote: “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.”<sup>133</sup> The Court concluded that no compelling government interest could justify a ban on counting legally cast votes.

*Turner*’s analysis applies here with equal vigor. As in *Turner*, California voters have an absolute constitutional right to have their votes counted in every election. Therefore, SB 6’s write-in count ban automatically triggers strict scrutiny – and no party here has identified any compelling government interest to overcome it.<sup>134</sup>

Because California law gives voters the right to cast votes for write-in candidates, all votes cast for eligible write-in candidates must be counted.<sup>135</sup> Consequently, SB 6 violates the

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<sup>132</sup> *Turner, supra* note 126, 77 F.Supp.2d at 33.

<sup>133</sup> *Id.* at 33 (emphases added).

<sup>134</sup> *Turner, supra* note 126, 77 F.Supp.2d at 32-34.

Defendant Bowen claims that the State may ban the counting of write-in votes in order to limit political competition in the general election. RPI Bowen’s opposition papers, Exh. 8 at 9:23-24. Such a dubious rationale does not constitute a compelling government interest.

<sup>135</sup> Elections Code §15340 (all voters have the right to cast write-in votes); CAL.CONST. Art. II §2.5 (all lawfully cast votes must be counted).

First Amendment and the Free Speech Clause of the California Constitution.<sup>136</sup>

2. Respondent Misconstrued SB 6’s Counting Ban

*Since ... SB 6 precludes [write-in] votes from being counted, it makes no sense to give voters the **illusion** that they can write in a candidate’s name and have it counted.*

– Secretary of State Debra Bowen’s office<sup>137</sup>

In its ruling, Respondent Superior Court held that SB 6 banned voters from casting votes for write-in candidates. In so doing, Respondent sidestepped weighty constitutional questions at issue, for the law does allow the State to ban voters from casting write-in votes.<sup>138</sup> Furthermore, by ignoring the plain language of SB 6, Respondent effectively rewrote several provisions of the Election Code. Finally, Respondent’s misreading of SB 6 gutted three-quarters of Petitioners’ causes of action, for those theories take SB 6’s Vote-Counting Ban at face value.

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<sup>136</sup> “[T]he California liberty of speech clause is broader and more protective than the free speech clause of the First Amendment.” *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4<sup>th</sup> 352, 366 (citations omitted).

<sup>137</sup> Sean Welch Declaration, Exh. 5 (at Exh. B), at 1 (emphases added).

<sup>138</sup> See *Burdick v. Takushi* (1992) 504 U.S. 428 (state may ban write-in votes from being cast); *Edelstein, supra* note 105, 29 Cal.4<sup>th</sup> at 169 (state may ban write-in votes from being cast in the general election).

3. No Statutory Provision Cited by Respondent Bans Write-In Votes from Being Cast

In its ruling, Respondent concluded that Parts 8606 and 8141.5 of SB 6 ban write-in votes from being cast:

When Election Code 8141.5 [SB 6 Pt. 8141.5] and 8606 [SB 6 Pt. 8606] are read together, it is apparent that the Legislature intended to ban write-ins in the general election. (*See also* comments of the Secretary of State and the Assembly Bill Analysis.)<sup>139</sup>

However, neither Part 8606 nor 8141.5 bans voters from casting write-in votes – a right that SB 6 expressly purports to protect.<sup>140</sup>

“When statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it.”<sup>141</sup> Significantly, the plain language of Part 8606 of SB 6 (the “Counting Ban”) does not ban write-in votes from being cast. Instead, as RPI Bowen freely admits,<sup>142</sup> SB 6 explicitly bans write-in votes from being counted:

“A person whose name has been written on the ballot as a write-in candidate at the general election ... shall not be counted.”<sup>143</sup>

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<sup>139</sup> Ruling, Exh. A, at 1.

<sup>140</sup> See discussion at Section V.K.1, *supra*.

<sup>141</sup> *Boyd, supra* note 98, 24 Cal.3d at 294 (emphases added, citations and quotation marks omitted).

<sup>142</sup> “SB 6 precludes counting write-in votes cast in the general election[.]” RPI Bowen’s opposition papers, Exh. 8, at 5:3-4 (emphasis added).

<sup>143</sup> SB 6, FAC, Exh. 16 (at Exh. 1) §35 Pt. 8606 (emphases added).

Similarly, the plain language Part 8141.5 of SB 6 (the “Top Two Rule”) does not even mention whether write-in votes should be counted. Instead, that provision specifies the two candidates whose names may be printed on the general-election ballot:

Only the two candidates ... who receive the highest and second-highest numbers of votes cast at the primary shall appear on the ballot as candidates for that office at the general election.<sup>144</sup>

“If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.”<sup>145</sup> Here, the plain language of the provisions cited by Respondent (a) does not ban write-in votes from being cast, and (b) expressly bans write-in votes from being counted. Therefore, Respondent had no basis to conclude that SB 6 banned write-in votes from being cast.

4. Respondent Mistakenly Based Its Ruling on Inaccurate Legislative History

In response, Intervenors-Defendants will insist that the Secretary of State’s public statements and legislative history

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<sup>144</sup> *Id.* §27 Pt. 8141.5.

<sup>145</sup> *Arterberry v. County of San Diego* (2010) 182 Cal.App.4<sup>th</sup> 1528, 1533 (emphases added) (*quoting Diamond Multimedia Systems v. Superior Court* (1999) 19 Cal.4<sup>th</sup> 1036); *see also Olson v. Automobile Club* (2008) 42 Cal.4<sup>th</sup> 1142, 74 Cal.Rptr.3d 81, 84 (emphases added) (“If the statute’s text evinces an unmistakable plain meaning, we need go no further.”) (emphases added) (*quoting Beal Bank v. Arter & Hadden* (2007) 42 Cal.4<sup>th</sup> 503, 508).

require the Court to disregard SB 6’s Vote-Counting Ban.<sup>146</sup> In so doing, Respondent cast aside a cardinal rule of statutory interpretation. Namely, unless a statute “is susceptible of more than one reasonable interpretation,” a court may not consider legislative history and “the wider historical circumstances” of a statute’s enactment.<sup>147</sup> In any event, neither source cited by Respondent<sup>148</sup> would compel the Court to airbrush SB 6’s plain language.

To begin with, Secretary of State Bowen has flatly contradicted Respondent’s reading of SB 6. Indeed, her office has publicly stated that SB 6’s Vote-Counting Ban will trick voters into disenfranchising themselves.<sup>149</sup> Moreover, at oral argument, RPI Bowen’s counsel reiterated that SB 6’s plain language does give voters the right to cast write-in votes. Specifically, he noted that SB 6 requires “corrective legislation”, because it “still provides for write-in lines under

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<sup>146</sup> Ruling, Exh. A, at 1.

<sup>147</sup> *Dyna-Med v. Fair Employment & Housing Comm’n* (1987) 43 Cal.3d 1379, 1387; *see also Wolski v. Fremont Investment & Loan* (2005) 127 Cal.App.4<sup>th</sup> 347, 353 (legislative intent may not be considered unless the statutory language at issue is “ambiguous, uncertain or unclear.”).

<sup>148</sup> “*See also* comments of the Secretary of State and the Assembly Bill Analysis.” Ruling, Petition Exh. 1, at 1.

<sup>149</sup> “Since ... SB 6 precludes [write-in] votes from being counted, it makes no sense to give voters the illusion that they can write in a candidate’s name and have it counted.” Sean Welch Declaration, Exh. 5 (at Exh. B), at 1 (emphases added).

the candidates' names.”<sup>150</sup> Thus, RPI Bowen's public statements undermine Respondent's interpretation of SB 6.

To be sure, Intervenors-Defendants will assert that SB 6's Assembly Bill Analysis compels the Court to rewrite the plain language of the Vote-Counting Ban. Specifically, that Analysis claims that SB 6 bans voters from casting write-in votes.<sup>151</sup> As the outset, that evidence should be disregarded, because Intervenors-Defendants belatedly introduced it ten days after they had filed their opposition papers.<sup>152</sup> Equally important, if legislative analysis “directly conflict[s]” with a statute's plain language, it must be “disregarded.”<sup>153</sup>

Here, the legislative analysis at issue “directly conflicts with” several Election Code provisions that expressly give

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<sup>150</sup> Transcript, Exh. 15, at 20:11-14 (emphases added). In addition, the Secretary of State's office has also noted this same problem: “The requirement that general election **ballots contain spaces for write-ins** should be deleted, since ... SB 6 ... specifies that a name written on the ballot at a general election ... shall not be counted.” Sean Welch Declaration, Exh. 5 (at Exh. A, Attach. 1), at 3.

<sup>151</sup> Plaintiffs' Opposition to Intervenors' Written Objections to Plaintiffs' Evidence, Exh. 6 ¶4.

<sup>152</sup> See discussion of Intervenors-Defendants' unauthorized sur-reply papers at note 69 *supra*. To justify their belated proffer of evidence, Intervenors-Defendants brazenly misquoted Petitioners' Reply Brief. Plaintiffs' Opposition to Intervenors' Written Objections to Plaintiffs' Evidence ¶ 6 (emphases added).

<sup>153</sup> *In re Barry W.* (1993) 21 Cal.App.4<sup>th</sup> 358, 26 Cal.Rptr.2d 161, 166; see also *Calif. Teachers' Ass'n v. Governing Bd.* (1983) 141 Cal.App.3d 606, 614 (“If a law is clear the [legislative analysis] must be disregarded.”).

voters the right to cast write-in votes. Specifically, Election Code Section 15340 guarantees the right to cast a write-in vote in every election, while another section of SB 6 itself<sup>154</sup> requires that every ballot provide space where voters can write in the names of candidates. What is more, the election system that SB 6 and Proposition 14 were modeled after<sup>155</sup> – Washington State’s election system – gives voters the right to cast write-in votes and to have them counted.<sup>156</sup>

Moreover, Respondent’s reading of SB 6 violates several other canons of construction. First, it renders SB 6’s Vote-Counting Ban superfluous. As a general rule, courts must “give significance to every word of a statute, when possible, and avoid a construction that renders a word surplusage.”<sup>157</sup> Here, why did the Legislature expressly ban the counting of write-in ballots, if it had actually meant to ban the casting of write-in votes?

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<sup>154</sup> SB 6, FAC, Exh. 16 (at Exh. 1) § 13207(a)(2).

<sup>155</sup> “Legal experts have modeled [Prop 14] after Washington State’s primary system”. “Q&A”, website of Intervenor Yes on 14, Plaintiffs’ Reply Brief, at 7:14-15 (emphases added).

<sup>156</sup> RCW §29a.60.021(1), Exh. C. Significantly, Washington State allows the names of only two candidates to appear on the general-election ballot (like Part 8141.5 of SB 6), while also allowing voters to cast votes for write-in candidates. RCW §29A.52.112, Petition Exh. D.

<sup>157</sup> *Arterberry*, *supra* note 145, 182 Cal.App.4<sup>th</sup> at 1534 (emphases added) (*quoting Home Depot v. Contractors’ State License Bd.* (1996) 41 Cal.App.4<sup>th</sup> 1592, 1602); *see also Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22.

What is more, the California Supreme Court assumes “that the Legislature has in mind existing laws when it passes a statute”:

The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.<sup>158</sup>

Tellingly, although it made nearly 60 amendments to the Election Code,<sup>159</sup> SB 6 did not abolish the Election Code Section 15340, which guarantees voters the right to vote for a write-in candidate in every election. Thus, it must be “assumed” that the Legislature did not intend to take away the right to cast a write-in vote.

Finally, as the California Supreme Court has made clear, a court cannot rewrite a statute in order to save it:

There are limits, however, to the ability of a court to save a statute through judicial construction. [T]his court cannot ... in the exercise of its power to interpret, rewrite the statute. If this court were to insert in the statute all or any of the qualifying provisions required to render it constitutional, it would in no sense be interpreting the statute as written, but would be rewriting the statute in accord with the presumed legislative intent. That is a legislative and not a judicial function.<sup>160</sup>

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<sup>158</sup> *Estate of McDill* (1975) 14 Cal.3d 831, 837-38 (citations omitted, emphases added).

<sup>159</sup> FAC, Exh. 16 ¶4 n.2.

<sup>160</sup> *Metromedia v. City of San Diego* (1982) 32 Cal.3d 180, 187 (citations and quotations omitted, emphases added).

Unlike its Washington State model, SB 6’s election regime expressly invites voters to cast write-in votes, but then unlawfully bans elections officials from counting them. Thus, SB 6’s plain language cannot be interpreted in a way that does not violate either the U.S. or California Constitution.

Accordingly, the Court must direct Respondent (1) to declare SB 6’s Vote-Counting Ban unconstitutional, and (2) to enjoin RPIs from implementing and enforcing SB 6’s Vote-Counting Ban.

M. SB 6 Defendants Concede That SB 6’s Vote-Counting Ban Violates the Due Process Clause

Strikingly, SB 6 Defendants have conceded Petitioners’ claim that SB 6’s Vote-Counting Ban violates the Due Process Clause of the U.S. and California Constitutions. Namely, by inviting voters to cast write-in votes and then refusing to count them, SB 6 perpetrates “fraud on the voters” by “stripping them of their vote[.]”<sup>161</sup> Significantly, SB 6 Defendants’ opposition papers did not challenge Petitioners’ Due Process claim.<sup>162</sup> Since Petitioners’ Due Process claims are uncontested, the

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<sup>161</sup> *Griffin v. Burns*, *supra* note 122, 570 F.2d at 1074; *see also Nolles v. State Cmte. for the Reorganization of School Dists.* (8<sup>th</sup> Cir. 2008) 524 F.3d 892, 899; *Bennett v. Yoshina* (9<sup>th</sup> Cir. 1998) 140 F.3d 1218, 1226; Plaintiffs’ Moving Papers, Exh. 1, at 7:7-8:30.

<sup>162</sup> In their opposition papers, Intervenor-Defendants asserted that Petitioners did not have standing to bring their Due Process claims. However, as Respondent ruled, Plaintiffs do have standing to bring all of their Claims for Relief under *Storer v. Brown* (1974) 415 U.S. 724, 737 n.8 (“capable of repetition, yet evading review” doctrine for election cases).

Court must direct Respondent to (1) grant Plaintiffs’ Fifth and Sixth Claims for Relief, and (2) enjoin RPIs from implementing SB 6’s Vote-Counting Ban.

N. SB 6 Defendants Concede That SB 6’s Vote Counting Ban Violates the Elections Clause

What is more, SB 6 Defendants have also conceded Petitioners’ claim that SB 6’s Vote-Counting Ban violates the Elections Clause of the U.S. Constitution. As the California Supreme Court has made clear, “any point not appearing in a party’s brief will ordinarily be deemed waived.”<sup>163</sup>

SB 6 explicitly invalidates all votes cast for write-in candidates. Thus, SB 6 was “plainly designed to favor” candidates whose names appear on the ballot, and it was designed to “disfavor” and “handicap” candidates who receive write-in votes.<sup>164</sup> Because SB 6 places its political targets at a disadvantage, it unlawfully attempts to “dictate electoral outcomes.”<sup>165</sup>

Here, as Petitioners’ Reply Brief noted, SB 6 Defendants’ opposition papers barely discussed the Election Clause, and failed to cite any legal authority relating to the Elections Clause.<sup>166</sup> Therefore, because SB 6 Defendants waived the opportunity to rebut Petitioners’ claim, Respondent

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<sup>163</sup> *Boyd, supra* note 98, 24 Cal.3d at 294 n.6 (*citing Utz v. Aureguy* (1952) 109 Cal.App.2d 803, 807)(emphases added).

<sup>164</sup> *Gralike, supra* note 22, at 523-25.

<sup>165</sup> *Id.* at 525.

<sup>166</sup> Plaintiffs’ Reply Brief, Exh. 3, at 7:22-8:4; Transcript, Exh. 15, at 33:14-17 & 20:27-21:1.

erred when it denied Petitioners' Election Clause claim. Thus, because SB 6's Vote-Counting Ban is unconstitutional, the Court should direct Respondent to enjoin RPIs from implementing and enforcing it.

O. Petitioners Have Shown Likelihood of Success on the Merits

Simply put, there is more than a "reasonable probability" that Petitioners will prevail on the merits in this case.<sup>167</sup> First, as this Petition has shown, SB 6's Party-Preference Ban must be struck down, for it violates the California Constitution's Equal Protection Clause, the U.S. Constitution's Election Clause, and the First and Fourteenth Amendments. Second, because SB 6's Party-Preference Ban is not severable, the entirety of SB 6 must be struck down as unconstitutional. Third, SB 6's Vote-Counting Ban violates the California Constitution, the First and Fourteenth Amendments, the Due Process Clauses of the U.S. and California Constitutions, and the U.S. Constitution's Elections Clause. Consequently, Petitioners have compellingly shown a "reasonable probability of success."

**VI. Petitioners Have Shown Imminent Harm**

Respondent erred when it held that Petitioners had not made a "sufficient" showing of imminent harm. SB 6 will become operative no later than January 1, 2011. Unless this

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<sup>167</sup> *Huong Que*, *supra* note 32, 150 Cal.App.4<sup>th</sup> 400, 58 Cal.Rptr.3d at 533 (*citing Robbins v. Superior Court* (1985) 38 Cal.3d 199).

Petition is swiftly granted, SB 6 will inflict irreparable harm on voters and candidates on January 4, 2011, during the Senate District 1 special election. Voters (like Intervenor Applicant Linda Hall) who seek to cast votes for write-in candidates may be banned from doing so, while write-in candidates (like Intervenor Applicant David Misso) will be shut out of the election.<sup>168</sup>

Equally important, one cannot predict when the next special election will be called. (Indeed, if Assemblymember Ted Gaines wins the Jan.4, 2011 election in Senate District 1, it will immediately trigger another special election to fill his current Assembly seat.) Consequently, Petitioners and voters and candidates from Senate District 1 – including Intervenor Applicants Misso and Hall – all face imminent, irreparable harm “that cannot be corrected on appeal.”<sup>169</sup>

A. Petitioners May Bring Their Claims on Behalf of Senate District 1 Voters and Candidates

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<sup>168</sup> The Governor set the first-round (primary) election for Nov. 2, 2010. To win in the primary election, a candidate must receive a majority of the vote. Since no candidate is expected to win a majority, it is virtually certain that the race will advance to a Jan. 4, 2011 “general” (runoff) election. *See* “Editorial: Lawmakers’ Lag Hits Locals With Big Election Bill,” *Sacramento Bee*, Sept. 4, 2010 (“If no candidate wins a clear majority – and that seems highly likely – the top vote-getter from each party will move on to the Jan. 4 ballot.”). *See also* FAC, Exh. 16 ¶33 n.19. For the past two decades, there has been at least one special election every year (except for 2002-04). *Id.*

<sup>169</sup> *Omaha*, *supra* note 1, 209 Cal.App.3d at 1273-74; *Half Moon Bay*, *supra* note 1, 106 Cal.App.4<sup>th</sup> at 803.

During the hearing on Petitioners' Motion for Preliminary Injunction, Respondent stated that it saw no showing of imminent harm. In Respondent's view, SB 6's new election rules would not kick in until 2012:

This is going to come up in 2012. There is plenty of time to have this resolved in due course through the courts, and I don't think that there has been a sufficient showing that something might happen beforehand.<sup>170</sup>

In so doing, Respondent committed error, because it failed to consider U.S. Supreme Court jurisprudence and "important record evidence" on how the Jan. 4, 2011 special election threatens candidates and voters with imminent and irreparable harm.<sup>171</sup>

To show imminent harm, litigants must show that they are "likely to suffer greater injury from a denial of the injunction than the defendants are likely to suffer from its grant".<sup>172</sup> Significantly, under its "capable of repetition, yet evading review doctrine", the U.S. Supreme Court has repeatedly admonished courts to swiftly resolve facial constitutional challenges before the election at issue is held:

The "capable of repetition, yet evading review" doctrine, in the context of election cases, is

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<sup>170</sup> Transcript, Exh. 15, at 16:17-20.

<sup>171</sup> See, e.g., *O'Connell*, *supra* note 33, 141 Cal.App.4<sup>th</sup> at 1471 (trial judge committed error by failing to consider "important record evidence").

<sup>172</sup> *Huong Que*, *supra* note 32, 150 Cal.App.4<sup>th</sup> 400, 58 Cal.Rptr.3d 527, 533 (citing *Robbins v. Superior Court* (1985) 38 Cal.3d 199).

appropriate when there are “as applied” challenges as well as in the more typical case involving only facial attacks. The construction of a statute ... will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.<sup>173</sup>

Furthermore, as the High Court has made clear, litigants are entitled to immediate relief if there is a “realistic danger” that a law will harm their constitutional rights.<sup>174</sup> That is, one need not show that he or she will actually be harmed.<sup>175</sup>

Based on Respondent’s mistaken reading of SB 6, Petitioners, Intervenor Applicants Hall, and other voters may be denied their fundamental right to cast votes for write-in candidates, and to have their votes counted – starting with the Jan. 4, 2011 Senate District 1 election. Equally chilling for a democracy, Intervenor-Applicant Misso and others may be denied their fundamental right to run for office as write-in

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<sup>173</sup> *Storer v. Brown* (1974) 415 U.S. 724, 737 n.8; *see also Gralike, supra* note 22, 531 U.S. at 517 n.8; *accord, Edelstein, supra* note 105, 29 Cal.4<sup>th</sup> at 172 (“If a pending case poses an issue of broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot.”) (emphases added); *Eu, supra* note 21, 28 Cal.3d at 539-40.

<sup>174</sup> *Babbitt, supra* note 26, 442 U.S. at 299; *see also Sandusky, supra* note 26, 387 F.3d at 574 (voters challenging an election law need only show that it threatens them with “real and imminent” harm); *Santillanes, supra* note 26, 546 F.3d at 1318-19 (same).

<sup>175</sup> *Id.*

candidates, starting with the Jan. 4, 2011 Senate District 1 election. In this light, Intervenor Applicants Misso and Hall and similarly situated voters and candidates all face a “realistic danger” of imminent, irreparable harm.<sup>176</sup>

B. It Is Unclear Whether SB 6 Will Apply to the January 4, 2011 Senate District 1 Election

Although SB 6 and Proposition 14 both become operative on Jan. 1, 2011, RPI Bowen will argue that SB 6’s new rules will not apply to the Jan. 4, 2011 special election.<sup>177</sup> In this manner, she will claim that no one’s constitutional rights will be harmed on Jan. 4, 2011. Yet it is at best unclear which set of rules should apply for that election: the “old rules” of the existing Election Code (which allows write-in votes to be counted), or the “new rules” of SB 6 (whose plain language bans write-in votes from being counted). Here, the Legislature did not provide any guidance on whether SB 6 should apply for an election called under the “old” rules, yet conducted under the “new” rules.

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<sup>176</sup> Even without the participation of Intervenor-Applicant Hall, the U.S. Supreme Court’s “capable of repetition, yet evading review” doctrine gives Petitioners standing to assert their legal claims with respect to the Jan. 4, 2011 special election. Indeed, the High Court has admonished courts to adjudicate “timely filed cases ... before an election is held.” *Storer v. Brown* (1974) 415 U.S. 724, 737 n.8 (emphasis added); *see also Gralike, supra* note 22, 531 U.S. at 517 n.8.

<sup>177</sup> RPI raised that argument for the first time during the hearing on Petitioners’ Motion for Preliminary Injunction. Transcript, Exh. 15, at 20:8-11.

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.<sup>178</sup> Moreover, case law casts doubt on RPI Bowen’s interpretation. As noted earlier, the Legislature could have banned SB 6 from being implemented for elections called before January 1, 2011, but it chose not to do so.<sup>179</sup>

Unless the Legislature has specified otherwise, the State must give effect to new election laws to the extent possible – even if it is not yet possible to fully comply with that law.<sup>180</sup> Here, SB 6 becomes operative no later than January 1, 2011. Thus, the State may be legally bound to enforce SB 6’s Vote-Counting Ban for the January 4, 2011 special election.

What is more, SB 6 “new” rules could control over the Election Code’s “old” rules, because it is the more specific statute that was passed later in the time.<sup>181</sup> Under existing law, write-in voting was permitted for state and federal elections. However, SB 6 – the most recent amendment to the Election Code – contains an express provision that specifically bans write-in ballots from being counted (the Vote-Counting Ban).

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<sup>178</sup> *E.g., Tidewater Marine Western v. Bradshaw* (1996) 14 Cal.4<sup>th</sup> 557, 576.

<sup>179</sup> *See Estate of McDill, supra* note 157, 14 Cal.3d at 837-38.

<sup>180</sup> *E.g., State v. City of Hinton* (1915) 77 W.Va. 266, 270.

<sup>181</sup> *Wells v. One2One Learning Foundation* (2006) 39 Cal.4<sup>th</sup> 1164, 1208.

Thus, it remains at best unclear whether SB 6 will control the Jan. 4, 2011 special election. Furthermore, based on Respondent’s interpretation of SB 6, it is possible that a candidate in that race might file a lawsuit to prevent write-in candidates from qualifying for that election.<sup>182</sup> In this light, voters and candidates (including Intervenor Applicants Misso and Hall) face a “realistic danger” that their fundamental rights will be violated on Jan. 4, 2011.<sup>183</sup>

C. Intervenor Applicants Will Suffer Irreparable Harm Unless This Court Issues a Writ

Respondent erred as a matter of fact and law, when it held that Petitioners had not made a “sufficient” showing of imminent harm. First, Supreme Court jurisprudence (a) urges courts to resolve facial challenges to election laws before an election is held, and (b) enables Petitioners to bring their claims on behalf of Senate District 1 voters. Second, Intervenor

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<sup>182</sup> If a Republican candidate does not win the November 2, 2010 special primary (first-round) election for Senate District 1, he or she may choose to run as a write-in candidate for the January 4, 2011 special general (runoff) election. In that event, the candidate who wins the Republican nomination on November 2, 2010 may sue to bar all write-in candidates from qualifying for the January 4, 2011 ballot. *See* Motion to Intervene, at 9.

<sup>183</sup> *Babbitt*, *supra* note 26, 442 U.S. at 299; *see also Sandusky*, *supra* note 26, 387 F.3d at 574 (voters challenging an election law need only show that it threatens them with “real and imminent” harm); *Santillanes*, *supra* note 26, 546 F.3d at 1318-19 (same).

Applicants Misso and Hall face a “realistic danger” of irreparable harm in the looming Jan. 4, 2011 special election.

In stark contrast, not one SB 6 Defendant will be disenfranchised or denied the right to run for office if a Writ is issued. Instead, all RPIs can continue to administer elections pursuant to existing law, while each SB 6 Defendant can continue to litigate this case until it is resolved. Therefore, Petitioners have made a sufficient showing that SB 6 threatens them with imminent, irreparable harm.

## **VII. Petitioners Are Entitled to a Preliminary Injunction**

Petitioners have painstakingly shown that Respondent erred when it denied them a preliminary injunction. To secure a preliminary injunction, one must show (1) there is a “reasonable probability” they will prevail on the merits, and (2) he or she faces the “realistic danger” of imminent, irreparable harm. Equally important, under California’s sliding-scale analysis for injunctive relief, “the greater the plaintiff’s showing on one [factor], the less must be shown on the other [factor] to support an injunction.”<sup>184</sup>

Here, Petitioners have shown that it is a certainty they will prevail on the merits. What is more, Petitioners have shown that SB 6 threatens California voters and candidates – including Intervenor Applicants Misso and Hall – with a

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<sup>184</sup> *O’Connell, supra* note 33, 141 Cal.App.4<sup>th</sup> at 1463 (quoting *Butt, supra* note 33, 4 Cal.4<sup>th</sup> 668).

“realistic danger”<sup>185</sup> of imminent, irreparable harm.

Consequently, Respondent should direct Respondent to grant Petitioners’ Motion for Preliminary Injunction.

### VIII. Conclusion

*In short, I see grave risks in legislation, enacted by incumbents of the major political parties, which distinctly disadvantages minor parties or independent candidates.*

-- Former Chief Justice Burger, *Buckley v. Valeo*<sup>186</sup>

In our democracy, we entrust our elected officials with the power to pass fair and just laws. To be sure, the lawmaking process is far from tidy (Otto von Bismarck famously compared it to sausage-making). Yet at the same time, we must constantly guard against political overreaching by entrenched political elites. As constitutional scholar John Hart Ely put it: “We cannot trust the ins to decide who stays out[.]”<sup>187</sup> For this reason, courts must take action when the Legislature tramples on the rights of political outsiders in the middle of the night, with no public scrutiny or accountability.

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<sup>185</sup> *Babbitt, supra* note 26, 442 U.S. at 299; *see also Sandusky, supra* note 26, 387 F.3d at 574 (voters challenging an election law need only show that it threatens them with “real and imminent” harm); *Santillanes, supra* note 26, 546 F.3d at 1318-19 (same).

<sup>186</sup> *Buckley v. Valeo* (1976) 424 U.S. 1, 251 (concurring in part, dissenting in part) (emphases added)(*quoted by Bachrach, supra* note 49, 382 Mass. 268, 415 N.E.2d 832, 839 n.26).

<sup>187</sup> John Hart Ely, *Democracy and Distrust* 120 (Harvard 1980) (emphases added).

SB 6 does violence to the most sacred right of our democracy: the right to a “fair and honest”<sup>188</sup> election in which no candidate is silenced and every vote is counted. In light of the looming January 4, 2011 special election, Petitioners urge this Court to speedily issue a Writ of Mandate that directs Respondent to (1) enjoin SB 6 from being implemented, and (2) declare that Proposition 14 is inoperative as a matter of law, because it needs a new statute to implement it.

An unjust law that deprives Californians of their fundamental rights cannot stand.

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<sup>188</sup> *Gralike, supra* note 22, 531 U.S. at 524.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately 1.5-spaced, 14-point Times New Roman typeface. According to the Word Count feature in my Microsoft Word for Windows software, this brief contains 12,825 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on Sept. 29, 2010.

GAUTAM DUTTA

By: \_\_\_\_\_

Gautam Dutta

*Attorneys for Petitioners*

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) Petition for Writ of Mandate,
- (2) Bound Writ of Mandate Exhibits

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., 9<sup>th</sup> 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.

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Gautam Dutta