

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

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

7
8 CALIFORNIA SUPERIOR COURT
9 COUNTY OF SAN FRANCISCO
10

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

14 *Plaintiffs,*

15 vs.

16 DEBRA BOWEN, in only her official
capacity as California Secretary of State;
17 JOHN ARNTZ, in only his official
capacity as Director of Elections of the
City and County of San Francisco; DAVE
18 MACDONALD, in only his official
capacity as Registrar of Voters of the
County of Alameda; JESSE DURAZO, in
19 only his official capacity as Registrar of
Voters of the County of Santa Clara;
20 DEAN LOGAN, in only his official
capacity as Registrar-Recorder / County
21 Clerk of the County of Los Angeles; NEAL
22 KELLEY, in only his official capacity as
Registrar of Voters of the County of
23 Orange; RITA WOODARD, in only her
official capacity as Registrar of Voters of
24 the County of Tulare; and DOES 1-20;

25 *Defendants.*
26
27
28

CASE NO. CGC-10-502018

**PLAINTIFFS' OPPOSITION TO NON-
PARTIES' EX PARTE MOTION TO
INTERVENE; SUPPORTING
MEMORANDUM OF POINTS AND
AUTHORITIES; SUPPORTING
DECLARATION OF GAUTAM DUTTA
[REQUEST FOR JUDICIAL NOTICE FILED
CONCURRENTLY]**

HEARING DATE: Aug. 17, 2010
HEARING TIME: 11 am
JUDGE: Hon. Charlotte Woolard
DEPARTMENT: 302 (Law & Motion) & 212

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. Introduction**

3 Haste makes waste. Tomorrow morning, after waiting for nearly three weeks, three non-
4 parties – Lieutenant Governor Abel Maldonado,¹ California Independent Voter Project, and “Yes
5 on 14 – Californians for an Open Primary” – will ask the Court to install them *ex parte* as
6 intervenors in this litigation.² Respectful of the pressing demands made on this Court, Plaintiffs
7 had invited those three non-parties (collectively, “Movants”) to submit an *amicus* brief.³ In this
8 way, Movants’ perspective on Plaintiffs’ legal claims could have been promptly heard, without
9 potentially prejudicing Plaintiffs’ constitutional rights.
10

11 Regrettably, Movants have chosen to burden this Court with a needless, meritless Motion
12 to Intervene (“Movants’ Motion”). As of 11 am today, Movants had not shared their moving
13 papers with any of the parties.⁴ Nevertheless, as this Opposition will show, the law absolutely
14 forbids Movants from receiving intervenor status. Consequently, Movants’ Motion to Intervene
15 must be denied.
16

17 **II. Background**

18 This case presents a legal question that California courts have been asked before.
19 Namely, does a specific Legislature-passed implementing statute comply with the United States
20 and California Constitutions?⁵ On February 19, 2009, between 3:40 am and 6:55 am, the
21 California Legislature passed Senate Bill 6 (SB 6), which had been authored by Movant
22
23

24 ¹ At this time, Plaintiffs do not know whether Movant Maldonado seeks to intervene in his personal or official
25 capacity.

26 ² Declaration of Gautam Dutta in Support of Plaintiffs’ Opposition to Non-Parties’ *Ex Parte* Motion to
27 Intervene (“Dutta Declaration”) ¶5.

28 ³ *Id.* ¶4.

⁴ *Id.* ¶6. As a result, Plaintiffs reserve the right to supplement this Memorandum as needed.

⁵ *See, e.g., City of Rancho Cucamonga v. Mackzum*, 228 Cal.App.3d 929, 946-47, 279 Cal.Rptr. 220
(Cal.App.Ct. 1991) (examining whether a Legislature-passed implementing statute complied with the Equal
Protection Clause of the United States and California Constitutions).

1 Maldonado.⁶ SB 6 was intended to implement Proposition 14 – a newly passed constitutional
2 amendment that Movants strongly support.

3 On July 29, 2010, Plaintiffs filed their Motion for Preliminary Injunction (“Plaintiffs’
4 Motion”) to stop SB 6 from being implemented. Unless it is enjoined, SB 6 will violate the
5 constitutional rights of California voters and candidates in two ways. First, SB 6 will
6 disenfranchise thousands of voters, by banning all write-in votes from being counted during every
7 general election. Second, SB 6 will also censor minor-party candidates from stating their party
8 preference on the ballot.

9
10 Significantly, Plaintiffs’ Motion does not challenge the constitutionality of Proposition 14
11 (“Prop 14”). Indeed, if Plaintiffs’ lawsuit against SB 6 succeeds, Prop 14 will not be invalidated.
12 Instead, Prop 14 will become operative as soon as a new statute has been passed to implement it.⁷

13
14 Although they have neither received nor reviewed Movants’ papers,⁸ Plaintiffs assume
15 that Movants seek to defeat Plaintiffs’ Motion.⁹ For purposes of this *ex parte* hearing, Plaintiffs
16 further assume that:

- 17 1. Movant Maldonado may seek permissive intervention because he
18 supported the Prop 14 campaign and authored SB 6.
- 19 2. Movant California Independent Voter Project (“CIVP”) may seek
20 permissive intervention because it supported the Prop 14 campaign.
- 21 3. Movant “Yes on 14 – Californians for an Open Primary” (“Yes on 14”)
22 may seek permissive intervention because it supported and played a visible
23

24
25 ⁶ Complaint ¶ 18.

⁷ See, e.g., *In re Redevelopment Plan for Bunker Hill*, 61 Cal.2d 21, 75, 389 P.2d 538 (Cal. 1964); *Denninger v. Recorder’s Court*, 145 Cal. 629, 635, 79 P.36 (Cal. 1904).

26 ⁸ Dutta Decl. ¶¶ 5-6.

27 ⁹ Only hours after Plaintiffs filed their Motion, Movant Maldonado assailed Plaintiffs for bringing this
28 lawsuit: “This lawsuit is yet another attempted power grab by party bosses trying to continue the manipulation of
legislators and deny the people of California their choice to vote for whomever they want.” S.F. CHRONICLE, July
29, 2010, 4:33 pm, Dutta Declaration, Exh. A, RJN (emphases added).

1 role in the Prop 14 campaign.

2 Although SB 6 was passed to implement Prop 14, Movants did not include a summary or the text
3 of SB 6 on the June 8, 2010 Official Voter Information Guide for Prop 14.¹⁰

4 **III. Legal Argument**

5 A. Movants Must Be Denied Permissive Intervention

6 Legal authority bars the Court from granting permissive intervention to Movants. To
7 qualify for permissive intervention, a non-party must first make a “timely” application to
8 intervene.¹¹ As a starting point, Movants’ Motion must be denied, because they did not file it on
9 a timely basis. A motion to intervene must be brought within a “reasonable time”; that is, the
10 would-be intervenor “must not be guilty of an unreasonable delay after knowledge of the suit.”¹²
11 Furthermore, a motion to intervene must also be denied if it would “retard the principal suit ... or
12 delay the trial of the action[.]”¹³

13
14
15 Only hours after Plaintiffs’ Motion had been filed, Movant Maldonado sharply criticized
16 this lawsuit.¹⁴ Nevertheless, Movants inexplicably waited nearly three weeks before seeking to
17 intervene in Plaintiffs’ Motion for Preliminary Injunction. (As Movants’ counsel should well
18 know, such motions for injunctive relief are often decided within four weeks.) Unless they are
19 granted a preliminary injunction, Plaintiffs’ fundamental rights to vote and run for office could be
20 irreparably harmed in as early as January 1, 2011.¹⁵ By failing to file their Motion to Intervene
21 sooner, Movants threaten to prejudice Plaintiffs’ constitutional rights, because the Court may now
22

23 ¹⁰ Complaint ¶¶ 24-25 & Exh. 4-7.

24 ¹¹ Code of Civil Procedure §387(a). Plaintiffs assume that Movants are not seeking mandatory intervention
under Code of Civil Procedure §387(b). Plaintiffs are not aware of any California law that confers on Movants “an
unconditional right to intervene.” *Id.* §387(b).

25 ¹² *Pacific Gas & Electric Co. v. Calif. Coastal Zone Conservation Comm’n*, 53 Cal.App.3d 661, 668
(Cal.App.Ct. 1975) (citation omitted).

26 ¹³ *Id.* (citation omitted).

27 ¹⁴ *See supra* note 9.

28 ¹⁵ This is no theoretical matter. For the past two decades, there has been at least one special election every
year, except for 2002-04. Complaint ¶33 n. 19. Only three weeks ago, the Governor called a special election to
replace a State Senator who had died of cancer. *Id.*

1 need to devote additional time to evaluate Movants’ Motion. Since Movants are thus “guilty of
2 an unreasonable delay”, their tardy Motion must be denied.¹⁶

3 Even if Movants had brought a timely Motion to Intervene, they cannot satisfy all four
4 conditions required of successful intervenors:¹⁷

- 5 1. The proper procedures have been followed;
- 6 2. The non-party has a direct and immediate interest in the action;
- 7 3. The intervention will not enlarge the issues in the litigation; and
- 8 4. The reasons for the intervention outweigh any opposition by the parties
9 presently in the action.¹⁸

10 As our Court of Appeal held in *San Francisco v. State of California*,¹⁹ Movants must show a
11 “direct and immediate” interest in this action. This stringent requirement “means that the interest
12 must be of such a direct and immediate nature that the moving party ‘will either gain or lose by
13 the direct legal operation and effect of the judgment.’”²⁰ Put another way, a motion to intervene
14 must be denied if the results of the litigation at issue will only “indirectly benefit or harm” the
15 would-be intervenor.²¹

16
17
18 B. *San Francisco v. State of California* Controls Movants’ Motion

19 *San Francisco* controls Movants’ Motion, because it resolved an intervention issue
20 analogous to the one here. In *San Francisco*, the campaign supporters of Proposition 22 (a voter-
21 passed statute) sought to intervene in a lawsuit that challenged Prop 22’s constitutionality.²²

22
23
24 ¹⁶ *Pacific Gas & Electric Co.*, *supra* note 12, 53 Cal.App.3d at 668.

25 ¹⁷ *City and County of San Francisco v. State of California*, 128 Cal.App.4th 1030, 27 Cal.Rptr. 722
(Cal.App.Ct. 2005), *review denied*, 27 Cal.Rptr.3d 724.

26 ¹⁸ *San Francisco*, *supra* note 17, 128 Cal.App.4th at 1036 (citations omitted, emphases added).

27 ¹⁹ *Id.*

28 ²⁰ *Id.* at 1038 (quoting *Jersey Maid Milk Prods. Co. v. Brock*, 13 Cal.2d 661, 91 P.2d 599 (Cal. 1939))
(emphasis added).

²¹ *San Francisco*, *supra* note 17, 128 Cal.App.4th at 1037 (quoting *Continental Vinyl Prods. Corp. v. Mead Corp.*, 27 Cal.App.3d 543 (Cal.App.Ct. 1972) (emphasis added)).

²² Prop 22 banned gay marriage. *San Francisco*, *supra* note 17, 128 Cal.App.4th at 1033.

1 Specifically, they claimed that they had a direct interest in that litigation, “as a result of investing
2 their personal reputation and considerable time and effort” towards passing Prop 22.²³ The Prop
3 22 backers thus claimed that a judgment adverse to them “would effectively nullify their efforts
4 and harm their reputation.”²⁴

5
6 *San Francisco* roundly rejected the Prop 22 backers’ motion to intervene. Toward that
7 end, the Court emphatically rejected the notion that California initiative proponents have a
8 “routine” right to intervene when the “measures they helped enact are challenged”.²⁵ The Court
9 ruled that, if Prop 22 were invalidated, the Prop 22 backers would not suffer any injury to a
10 “direct and immediate” interest.²⁶ Furthermore, the Court pointedly noted that the Prop 22
11 backers would suffer no “diminution in legal rights, property rights or freedoms that an
12 unfavorable judgment might impose[.]”²⁷

13
14 At most, the Prop 22 backers would suffer an injury to a “bare political interest”²⁸ –
15 neither “an appropriate basis for intervention”²⁹ nor “an injury Proposition 22 was specifically
16 designed to prevent.”³⁰ Thus, the Court held it was “far too speculative” to consider whether the
17 litigation would harm the Prop 22 backers’ reputation.³¹ In this light, Prop 22 backers were
18 merely “individuals who support enforcement of the law after it was enacted.”³² Since they
19 lacked a “direct and immediate” interest in the Prop 22 litigation, their motion to intervene was
20 denied.
21

22 ²³ *Id.* at 1037-38.

23 ²⁴ *Id.* at 1037-38.

24 ²⁵ *Id.* at 1042.

25 ²⁶ *Id.* at 1038.

26 ²⁷ *Id.* at 1039.

27 ²⁸ *Id.* at 1039 (citing *Socialist Workers v. Brown*, 53 Cal.App.3d 879, 891-92 (Cal.App.Ct. 1975)).

28 ²⁹ *San Francisco*, *supra* note 17, 128 Cal.App.4th at 1040 (citing *People ex rel. Rominger v. County of Trinity*,
147 Cal.App.3d 655 (Cal.App.Ct. 1983)).

29 ³⁰ *San Francisco*, *supra* note 17, 128 Cal.App.4th at 1041 (citing *Rominger v. County of Trinity*, *supra* note 29,
147 Cal.App.3d 662; *Jersey Maid*, *supra* note 20, 13 Cal.2d at 664; *Simpson Redwood Co. v. State of California*, 196
30 Cal.App.3d 1192, 1201 (Cal.App.Ct. 1987)).

31 ³¹ *San Francisco*, *supra* note 17, 128 Cal.App.4th at 1043.

32 ³² *Id.* at 1041.

1 As a starting point, Movants Yes on 14 and CIVP must be denied permissive intervention
2 for a simple reason: they never waged a ballot campaign for SB 6, which was passed by the
3 Legislature and not by the voters. Tellingly, Movants chose not to include a summary or the text
4 of SB 6 on the June 8, 2010 Official Voter Information Guide for Prop 14.³³ Consequently, Yes
5 on 14 and CIVP could not have “invest[ed] their personal reputation and considerable time and
6 effort” towards passing SB 6.³⁴

8 Equally important, like the Prop 22 backers in *San Francisco*, no Movant (or its members)
9 will suffer any “diminution in legal rights, property rights or freedoms” if Plaintiffs’ Motion
10 succeeds.³⁵ At most, Movants will suffer harm to a “bare political interest”,³⁶ which SB 6 was
11 not “specifically designed to prevent.”³⁷ But if Plaintiffs’ Motion fails, thousands of voters will
12 be disenfranchised, while minor-party candidates will be censored from stating their political
13 preference on the ballot.³⁸ Finally, it is “far too speculative” for any Movant to claim that
14 Plaintiffs’ litigation could harm their reputation.³⁹ Since Movants cannot show any direct harm
15 that could result from Plaintiffs’ Motion, their Motion to Intervene must be denied.

17 C. Role of the Attorney General

18 In order to create for themselves a “direct and immediate” interest, Movants may make
19 one of two claims regarding the Attorney General, who represents Defendant Bowen in this
20 litigation. Movants may claim that their intervention will help the Attorney General defend SB 6
21 against Plaintiffs’ lawsuit. Yet as our Court of Appeal has held, simply agreeing with the State’s
22

24 ³³ Complaint ¶¶ 24-25 & Exh. 4-7.

25 ³⁴ *San Francisco*, *supra* note 17, 128 Cal.App.4th at 1037-38.

26 ³⁵ *Id.* at 1039.

27 ³⁶ *Id.* at 1039

28 ³⁷ *San Francisco*, *supra* note 17, 128 Cal.App.4th at 1041 (*citing Rominger v. County of Trinity*, *supra* note 29, 147 Cal.App.3d 662; *Jersey Maid*, *supra* note 20, 13 Cal.2d at 664; *Simpson Redwood Co. v. State of California*, *supra* note 30, 196 Cal.App.3d at 1201.

³⁸ Plaintiffs’ Motion for Preliminary Injunction, at 1:11-15.

³⁹ *San Francisco*, *supra* note 17, 128 Cal.App.4th at 1043.

1 position in a lawsuit “is an insufficient basis for intervention.”⁴⁰ Alternatively, Movants may
2 claim that the Attorney General might not fully defend SB 6 during an election year.⁴¹ However,
3 as the “chief law officer of the State” under the California Constitution,⁴² the Attorney General is
4 “presumed to represent the interests” of all State residents, including Movants.⁴³ What is more,
5 mere differences in litigation strategy will not justify intervention.⁴⁴ Consequently, Movants
6 cannot use the Attorney General as a means to create a “direct and immediate” interest in this
7 litigation.
8

9 D. Movant Maldonado Is Barred From Gaining Intervenor Status

10 Movant Maldonado may still claim the right to intervene, because he authored SB 6 when
11 he was a State Senator. However, Movant Maldonado is barred from intervening as a matter of
12 law. First, he is no longer a lawmaker. Furthermore, even if he were still serving in the State
13 Senate, the U.S. Supreme Court bars sitting lawmakers from defending the constitutionality of a
14 state statute.⁴⁵ Therefore, the Court is barred from granting Movant Maldonado intervenor status.
15

16 E. Movants Have No Standing To Appeal An Adverse Decision

17 Even if the Court grants Movants’ Motion, they may only gain a Pyrrhic victory, because
18 Movants likely lack standing to appeal any ruling in this case (other than their *ex parte* motion).
19 Presumably, Movants are seeking intervenor status so they can unilaterally appeal an adverse
20 decision in this litigation. However, the U.S. Supreme Court “has expressed ‘grave doubts’ on
21 whether initiative proponents have independent Article III standing to defend the constitutionality
22

23 ⁴⁰ *Simpson Redwood*, *supra* note 30, 196 Cal.App.3d at 1201 (citation omitted).

24 ⁴¹ On June 15, 2010, the Attorney General expressed support for Prop 14 (which SB 6 was intended to
implement). “Capitol Alert: Jerry Brown hopeful about Proposition 14,” *Sacramento Bee*, June 15, 2010, Dutta
Decl. Exh. B.

25 ⁴² CAL.CONST. art. 5 §13.

26 ⁴³ *Delaware Valley Citizens’ Council for Clean Air v. Commonwealth of Pennsylvania*, 674 F.2d 970, 973 (3rd
Cir. 1982).

27 ⁴⁴ *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009).

28 ⁴⁵ *Karcher v. May*, 484 U.S. 72, 82 (1987) (individual lawmakers cannot defend the constitutionality of a state
statute, unless authorized by state statute). Plaintiffs are not aware of any California law that authorizes individual
lawmakers to defend the constitutionality of state statutes.

1 of the initiative.”⁴⁶ As a result, our Court of Appeal found it “doubtful” that any putative
2 intervenors like Movants could either intervene or gain standing.⁴⁷

3 F. Movants Can Protect Their Interests Through Other Means

4 Significantly, as savvy political insiders, Movants have other means to protect their
5 (indirect) interest in this litigation – which are not always available to other prospective
6 intervenors.⁴⁸ First, as a number of courts have noted, rejected intervenors may file *amicus* briefs
7 to ensure that their perspective is heard.⁴⁹ Plaintiffs remain amenable to an *amicus* brief from
8 Movants, provided that its Motion for Preliminary Injunction is not delayed. Additionally,
9 Movants are free to discuss their legal priorities with any of the parties in this action. Finally, if
10 the outcome of this litigation proves unfavorable to Movants, they can always ask the Legislature
11 to pass a new statute to implement SB 6, or even sponsor a ballot measure to do so.
12

13 **III. Conclusion**

14 This hastily called *ex parte* hearing should never have been placed on the Court’s
15 calendar. Regrettably, Movants did not accept Plaintiffs’ invitation to submit an *amicus* brief.
16 Had Movants been more diligent, they would have discovered that binding legal authority (1) bars
17 them from intervening in this lawsuit, and (2) likely bars them from asserting any standing in this
18 litigation. Since Movants insisted on tilting at judicial windmills, Plaintiffs had no choice but to
19 protect their fundamental rights, by proactively filing this *ex parte* Opposition.⁵⁰ Therefore,
20
21

22 _____
23 ⁴⁶ *Perry v. Schwarzenegger*, No. C 09-2292 VRW (N.D. Cal. Aug. 12, 2010), available at
https://ecf.cand.uscourts.gov/cand/09cv2292/files/Final_stay_order.pdf (last visited Aug. 16, 2010), Dutta Decl.,
Exh.C (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)).

24 ⁴⁷ *San Francisco*, *supra* note 17, 128 Cal.App.4th at 1044 (citation and quotation marks omitted).

25 ⁴⁸ *Cf. Rominger v. County of Trinity*, *supra* note 29, 147 Cal.App.3d 662 (Sierra Club gains intervenor status
over its concern for how outcome of pesticide litigation would affect the “health and well-being” of its members);
Simpson Redwood, *supra* note 30, 196 Cal.App.3d at 1203-04 (forestry group granted intervenor status because the
State was not required to preserve an old-growth redwood forest whose ownership was being litigated).

26 ⁴⁹ *See, e.g., San Francisco*, *supra* note 17, 128 Cal.App.4th at 1044; *Jersey Maid*, *supra* note 20, 13 Cal.2d at
27 665; *Lewis-Westco & Co v. Alcoholic Beverage Control Appeals Bd.*, 136 Cal.App.3d 829, 186 Cal.Rptr. 552, 555
n.4 (Cal.App.Ct. 1982).

28 ⁵⁰ *San Francisco*, *supra* note 17, 128 Cal.App.4th at 1036 (citations omitted, emphases added).

1 Plaintiffs ask this Court to (1) deny Movants’ Motion to Intervene, and (2) consider Movants’ *ex*
2 *parte* papers as *amicus curiae*.⁵¹

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

28 ⁵¹ See *Lewis-Westco & Co.*, *supra* note 49, 186 Cal.Rptr. at 555 n.4.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: August 16, 2010

Respectfully submitted,

By: _____
GAUTAM DUTTA, ESQ.

Attorney for Plaintiffs

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