No. 15-_____

In the Supreme Court of the United States

MICHAEL RUBIN, MARSHA FEINLAND, CHARLES L. HOOPER, C.T. WEBER, CAT WOODS, GREEN PARTY OF ALAMEDA COUNTY, LIBERTARIAN PARTY OF CALIFORNIA, AND PEACE AND FREEDOM PARTY OF CALIFORNIA,
PETITIONERS,

v.

ALEX PADILLA, SECRETARY OF STATE OF CALIFORNIA, AND INDEPENDENT VOTER PROJECT, *ET AL.*,
RESPONDENTS,

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For almost 50 years this Court's decisions have emphasized the right of voters to cast their ballots effectively, particularly at times of peak voter interest during the electoral season. California has subverted that right by implementing a "top two" primary system that allows every candidate to participate in an open primary from which only the top two advance to the general election.

The new system has dramatically limited voter choice during the general elections. Two statewide election cycles have occurred since Proposition 14 was passed in 2011. In 2012, 5.3 million voted in the June primary, compared to 13.2 million in the November general election. In 2014, 4.5 million voted in the primary, as compared to 7.5 million in the general election.

The question is whether California's "top two" electoral system substantially burdens voter rights of political association, in violation of the First and Fourteenth Amendments, by excluding the great majority of candidates and their diverse messages from the moment of peak political participation.

PARTIES TO THE PROCEEDING

Petitioners Michael Rubin, Marsha Feinland, Charles L. Hooper, C.T. Weber, Cat Woods, Green Party of Alameda County, Libertarian Party of California, and Peace and Freedom Party of California, were the petitioners in the California Supreme Court.

Respondent Alex Padilla, Secretary of State of California, was the respondent in the California Supreme Court.

Respondents Independent Voter Project, David Takashima, Abel Maldonado, and Californians to Defend the Open Primary were interveners in support of respondent in the California Supreme Court.

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PETITION FOR WRIT OF CERTIORARI

Michael Rubin, Marsha Feinland, Charles L. Hooper, C.T. Weber, Cat Woods, the Green Party of Alameda County, the Libertarian Party of California, and the Peace and Freedom Party of California respectfully petition for a writ of certiorari to review the decision of the First District of the California Court of Appeal in this case.

OPINIONS BELOW

The California Supreme Court denied discretionary review of this case on April 29, 2015 (App., *infra*, 1a), in an unreported decision. The January 29, 2015, opinion of the California Court of Appeal, First District (App., *infra*, 2a-37a) is reported at 233 Cal.App.4th 1128. The October 4, 2013, opinion of the Alameda County Superior Court (App., *infra*, 38a-64a) is not reported.

JURISDICTION

The decision of the California Court of Appeal was filed on January 29, 2015. The California Supreme Court denied review on April 29, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. (App., *infra*, 65a-76a.)

STATEMENT OF THE CASE

After voter approval of Proposition 14, California amended its Constitution[1] and Elections Code[2] to implement a "top two" electoral system for statewide elected offices, members of the California Legislature, and Members of Congress.

Previously, candidates for statewide and legislative offices from each of California's qualified political parties competed in June party primary elections, and the top candidate from each contest would advance to the general election in November,

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[1] When a majority of voters approved Proposition 14 on June 8, 2010, they enacted State Constitutional Amendment 4 (SCA 4). The California Legislature had voted on February 19, 2009, to place SCA 4 on the ballot, concurrently with its approval of Senate Bill 6. Calif. SCA 4 (Resolution Chapter 2, Statutes of 2009); fn. 2, *infra*. SCA 4 called for amendments to the California Constitution. It became operative on January 1, 2011. (*See* App. 65a-67a (Cal. Const. Art. II, §§ 5-6.)

[2] California Senate Bill 6 (SB 6) was enacted contingent on voter approval of SCA 4. SB 6 made numerous, specific changes to California's Election Code and Government Code. By petitioners' count, SB 6 altered at least 58 sections of the Election Code, including repealed, amended, and newly added sections. *See* Calif. S.B. 6 (as amended Feb. 19, 2009) (amending Cal. Elec. C. §§ 13, 334, 337, 2150, 2151, 2152, 2154, 8025, 8062, 8068, 8081, 8121, 8124, 8142, 8148, 8150, 8300, 8550, 8600, 8605, 8805, 8807, 10705, 10706, 12108, 13102, 13105, 13110, 13206, 13207, 13208, 13230, 13300, 13302, 13305, 15451, 15452, 15670, 15671, 19300, and 19301; adding §§ 300.5, 325, 332.5, 338.5, 359.5, 8002.5, 8005, 8141.5, 8606, 9083.5, 9084.5, 13109.5, and 14105.1; amending and renumbering § 6000; repealing and adding § 8125; repealing §§ 8802 and 8806; and amending § 88001 of the Government Code). SB 6 became operative on January 1, 2011. (*See* Petitioners' Court of Appeal App. 267-303 (bill text).)

along with certain independent and write-in candidates.

After passage of Proposition 14, elections for statewide and legislative offices are now conducted on a "nonpartisan" basis.[3] This means that all candidates—including party candidates, independents, and write-ins—may participate in an open primary election in June of even-numbered years. The top two vote-receiving candidates advance to the general election in November.

Two statewide election cycles have occurred under Proposition 14. In 2012 and in 2014, candidates from minor, qualified political parties—including the Green Party, Libertarian Party, and Peace and Freedom Party—were almost completely excluded from the general election contest.

In over 98 percent of the statewide and legislative elections under the "top two" system, the general election ballot has featured only candidates from the two major parties, the Democrats and Republicans. In some cases both general election candidates came from the same party. And even in the few remaining cases, the minor party candidate advanced only due to an unusual event, such as the decision by a major party to field no candidate.[4]

Even minor party candidates who attract substantial public support are excluded from the statewide general election process. Numerous candidates who received over five percent of the popular vote, who previously would have advanced to

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[3] Cal. Elec. C. §§ 337, 359.5 (App., *infra*, 69a-70a).

[4]Petitioners' Court of Appeal App. 8 (pleadings), 308-317 (2012 primary results), 321-327 (2012 general election results).

the general election, are now limited to the primary ballot. Minor party candidates who received as much as 18.6 percent of the popular vote were prevented from advancing. [5]

As a result of implementation of California's "top two" system, independent and decline-to-state voters can now vote in primary elections. At the same time, however, the majority of voters are denied the opportunity to vote for candidates who espouse the ideas and viewpoints of minor political parties.

In 2012, over twice as many voters participated in the general election, as compared to the primary election: 5.3 million Californians voted in the June primary, while 13.2 million voted in the November general election. In 2014, 4.5 million Californians voted in the June primary, while 7.5 million voted in the November general election.[6]

Whereas previously California voters could write in a candidate during the general election, under Proposition 14 the write-in is limited to the primary election for every office except President and Vice President.[7]

Petitioners—including minor political parties, minor party candidates, and minor party voters—filed this action on November 21, 2011, seeking to enjoin implementation of Proposition 14 prior to the 2012 statewide election cycle. As stated in their operative, second amended complaint, petitioners' claim is that California's implementation of a "top

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[5] Petitioners' Court of Appeal App. 8-9, 308-317, 321-327.
[6] App., *infra*, 77a (excerpts from Secretary of State reports).
[7] *See* Cal. Elec. C. §§ 8605, 8606 (App., *infra*, 72a-73a).

two" electoral system has substantially burdened voter rights of political association, as guaranteed by the First and Fourteenth Amendments.[8]

The Alameda County Superior Court sustained demurrers to petitioners' second amended complaint and entered judgment on October 4, 2014. (*See* App., *infra*, 39a-65a.) In its order, the trial court relied upon *dicta* in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), for the proposition that a "top two" electoral system does not unconstitutionally infringe on voters' rights of political association. (*See* App., *infra*, 55a-57a.) The trial court also ruled that *Anderson v. Celebrezze*, 460 U.S. 780 (1983)—which invalidated an early filing deadline for independent political candidates that denied them the opportunity to access voters at the moment of peak political participation—does not apply to petitioners' claims that they, too, have been denied effective participation in the political process. (*See id.*, 57a-58a). The trial court reasoned that because all candidates are "treated equally" and channeled into the same primary, *Anderson* does not require states to give voters access to minor political party candidates during the general election (or even, for that matter, access to unsuccessful major party candidates in races where two candidates from the same party advance). (*Id.* 58a-59a.)

Petitioners timely appealed the trial court's order and entry of judgment.

The Court of Appeal, First District, affirmed the trial court. (*See* App., *infra*, 2a-37a.) The Court

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[8] Petitioners' Court of Appeal App. 1-14 (petitioners' second amended complaint).

found that "any burden placed on plaintiffs' expressive rights by the alleged relegation to the primary [is] modest." (*Id.* 26a-27a). Notably, the court declared that, under a "top two" approach, "access to California's primary election is constitutionally indistinguishable from access to the general election." (*Id.* 21a.)

The Court of Appeal held that *Anderson v. Celebrezze*, *supra,* does not support petitioners' claims. While acknowledging that *Anderson* was concerned with state regulation that reduced the range of candidates available to the electorate, the Court held that California's "top two" system avoids *Anderson* concerns by permitting minor party candidates to participate in the primary election. (*Id.* 31a-32a.)

Petitioners timely petitioned for review. The California Supreme Court denied the writ. (App., *infra*, 1a.)

REASONS FOR GRANTING THE PETITION

This Court has long protected "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," a right the Court views as "among our most precious freedoms." *Williams v. Rhodes,* 393 U.S. 23, 30 (1968). Further, "the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." *Id.; Anderson, supra,* 460 U.S. at 787 ("'It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues'" (citing *Lubin v. Panish,* 415 U.S. 709, 716 (1974)).

The California Court of Appeal erred in holding that California's imposition of a "top two" statewide electoral system that bars minor political party and some major party candidates from the moment of peak political participation—the general election—does not substantially burden voter rights of political association.

A. The California Court of Appeal Erred in Holding that California's "Top Two" Electoral System Does Not Substantially Burden Voter Rights.

At issue is the range of ideas American voters may access at the moment that matters most - the general election. The Court of Appeal ruled that a "top two" electoral system is constitutionally sound even if it completely bars general election voters from accessing the ideas and policies of minor party candidates.

This Court has long recognized that voter access to minor party viewpoints is essential to the development of America's political economy. As declared in *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234 (1957):

> Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and

> whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society. 354 U.S. at 250-51.

Yet here the Court of Appeal permitted the continued implementation of Proposition 14, which prevents the participation of minor party candidates in statewide campaigns after the June primary, five months before most voters will cast their ballots.

The decision below is based upon the erroneous premise that, because California's "top two" approach is a "nonpartisan" system, decades of Supreme Court jurisprudence protecting minor party candidates' access to the general election may be disregarded. (*See*, App., *infra*, 20a) ("In applying the Supreme Court decisions addressing the right to ballot access, it is essential to recognize the difference between the electoral system enacted by Proposition 14 and the classic system considered in these decisions").

And in a related conclusion, the Court of Appeal declared that in a "top two" or "nonpartisan" system, participation in a primary election is constitutionally indistinguishable from participation in the general election. (App., *infra*, 21a-25a). The Court of Appeal dismisses the impact that the "top two" system has on the range of choices available to voters in the primary as compared with the general election—even though the record shows a vast difference in participation, between five million voters and 13 million voters.

Petitioners alleged that voter rights are substantially burdened by California's relegation of minor party candidates to a June primary. The trial court took judicial notice of the California Secretary of State's reports summarizing voter participation in the 2012 primary and general elections,[9] which were held following implementation of Proposition 14 and related legislation. The numbers could not be more stark: the "open primary" that minor party candidates could access attracted 5.3 million participating voters, while the general election dominated by the two major parties had 13.2 million voters. Despite these huge and substantial differences in voter participation, the Court of Appeal characterized California's primary election as akin to a general election, and described the November vote as akin to a "runoff." (App., *infra*, 22a-23a.)

The court's inaccurate description trivializes the tremendous burden the "top two" system has placed on voters seeking candidates who share their policy perspectives. The court's decision suggests that decades of meticulous jurisprudence allowing voters to challenge restrictions on their right of political association can be washed away with a change of nomenclature.

In reviewing petitioners' challenge to ballot access restrictions, the Court of Appeal was required

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[9] App., *infra*, 77a. The reports are published by the California Secretary of State at http://elections.cdn.sos.ca.gov/sov/2012-primary/pdf/2012-complete-sov.pdf (Jun. 5, 2012 primary election) and http://elections.cdn.sos.ca.gov/sov/2012-general/sov-complete.pdf (Nov. 6, 2012 general election) (last accessed July 23, 2015).

to "first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Anderson, supra,* 460 U.S. at 789. Next, it was to "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.*

The Court has emphasized that the "right to vote is heavily burdened if that vote may be cast only for one of two parties when other parties are clamoring for a place on the ballot." *Williams, supra,* 393 U.S. at 31; *Anderson*, *supra*, 460 U.S. at 787. *See also, Washington State Republican Party v. Washington State Grange* (9th Cir. 2012) 676 F.3d 784, 794 (discussing minor party right to "appeal to voters at a time when election interest is near its peak").

In *Anderson*, the Court invalidated Ohio rules that required John Anderson's presidential campaign to complete required election paperwork in March, eight months ahead of the November election:

> An early filing deadline may have a substantial impact on independent-minded voters. In election campaigns, particularly those which are national in scope, the candidates and the issues simply do not remain static over time. Various candidates rise and fall in popularity; domestic and international developments bring new issues to center stage and may affect voters' assessments of national problems. 460 U.S. at 790.

When evaluating the constitutionality of ballot access regulations, courts weigh the degree to which the regulations burden the exercise of constitutional rights against the state interests the regulations promote. If the burden is severe, the challenged procedures must be narrowly tailored to achieve a compelling state interest. If the burden is slight, the procedures will survive review as long as they further a state's "important regulatory interests." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

The Court of Appeal sought to justify its conclusion that the burdens imposed by California's "top-two" primary system on voter choice are merely "modest" by construing California's Elections Code to treat the June primary as though it were the first stage of a general election that fulfills the constitutional requirement to provide an opportunity for minor party candidates to participate in the electoral process. (App., *infra*, 20a-21a.) But California's June primary is both nominally and actually a primary election to select the two candidates from which the voters may choose in November. Elections Code §§ 359.5 (App., *infra*, 69a.) *See also* Cal. Elec. C. §§ 1200 ("The statewide general election shall be held on the first Tuesday after the first Monday in November of each even-numbered year"), 1201 ("The statewide direct primary shall be held on the first Tuesday after the first Monday in June of each even-numbered year").

The second election is not a run-off. Even if one candidate receives a majority of the votes cast in June, the top two advance to the November general election. Elections Code § 8141.5. Further, at least as to elections for federal office holders, treating the

June primary as a general election would be unlawful.[10]

Petitioners' concern is not about the labels that are placed on the elections but about the restriction of voter choices at the time of the November election. A true run-off system in which the two elections were held in close temporal proximity to each other would not create the same constitutional problems as the current system.

Regardless of whether an election is termed "primary" or "general," this Court's decisions require that a court reviewing a ballot access restriction determine whether the restriction imposes a "severe" restriction or a lesser burden, and if the burden is severe, whether it is narrowly tailored to serve a compelling state interest. *Burdick*, *supra*, 504 U.S. at 434.

Historically, the Court has declared that state laws that restrict ballot access for minor parties and candidates to those who demonstrate a "modicum" of support are constitutional. *Munro v. Socialist Workers Party*, 479 U.S. 189, 198 (1986) (upholding a requirement that minor party candidates receive at least one percent of the primary vote to appear on the general election ballot). A requirement that independent and minor party candidates submit petitions signed by five percent of eligible voters to be listed on the general election ballot is constitutional (*Jenness v. Fortson*, 403 U.S. 431, 442

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[10] Under federal law the general election for President and Members of Congress must be held on the Tuesday after the first Monday in November. *Foster v. Love*, 522 U.S. 67, 71-72 (1997).

(1971)), but a 15 percent threshold - which creates a "severe" burden - is not. *Williams v. Rhodes*, *supra*, 393 U.S. at 34.

California's top-two primary system denies general election ballot access to candidates who receive well more than what the Court defines as a "modicum" of support. In the June 2012 primary, nine candidates from the Green, Peace and Freedom, and Libertarian parties received five percent or more of the vote. Many other minor party candidates received over two percent of the vote, and a candidate from the Green Party received 18.6 percent of the vote for a seat in the United States Congress. But none of those candidates was permitted to advance to the general election ballot. (App., *infra*, 4a-5a.)

The Court of Appeal's decision is based upon its reading of this Court's precedent that it interprets as concerned only with "minor-party access to the *electoral process*" (emphasis in original), rather than to the general election ballot. (App., *infra*, 19a-20a.) But the Court of Appeal's reading of this Court's decisions is incorrect.

The decision of the Court of Appeal, concluding that restricting minor parties' and candidates' access to a June primary creates merely a "modest" burden on the exercise of constitutional rights, ignores the voter interest issue emphasized by *Williams* and *Anderson*. The Court of Appeal appeared to assume that California's June primary is the equivalent of the August primary approved in *Washington State Grange, supra,* 676 F.3d at 794, which the Ninth Circuit concluded took place at a time of "peak voter interest." But regardless of the

factual basis for the Ninth Circuit's conclusion regarding voter interest in the State of Washington, the evidence here is that California's June primaries do not occur at a time of peak voter interest so that restricting the range of voter choice to the primary creates a severe burden on voters' rights in the general election.

The state's burden is to show that the restriction is both nondiscriminatory and reasonable. *Anderson*, *supra*, 460 U.S. at 788-789. While the Court of Appeal here concluded that the top-two system is nondiscriminatory (App, *infra*, 30a), it did not evaluate the alternative options available to the State to determine whether more narrowly tailored restrictions would also meet the State's asserted interests.

After determining the severity of the burden imposed by Proposition 14, the trial court was required to determine whether the State had met its burden of demonstrating that the ballot restrictions are "properly drawn" and employ the "least drastic means" to achieve the State's ends. *See Illinois Board of Elections v. Socialist Workers* Party, 440 U.S. 173, 184- 185 (1979). "The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity." *Anderson*, supra, 460 U.S. at 793. For example, as in the State of Washington, the primary election could be moved to a date closer to the general election so that it occurs at a time of peak voter interest. Alternatively, a number of candidates greater than two might be allowed access to the general election ballot.

The trial court erred by failing to permit discovery and an evidentiary hearing before evaluating the state's interests. In *California Democratic Party v. Jones*, 530 U.S. 567, 584 (2000), the Court instructed trial courts that an evaluation of state interests "is not to be made in the abstract," but rather, whether, *"in the circumstances of this case"* (emphasis in the original) the state's interests are important or "compelling" or even "legitimate." In *Jones*, the trial court permitted four days of testimony, including extensive expert testimony, before issuing rulings concerning the severity of the burden and the strength of the state's interests. *Id.* at 571; *Democratic Party v. Jones*, 984 F.Supp. 1288, 1292-93 (E.D. Cal. 1996).

Beyond the error of precluding necessary discovery, the trial court also failed to evaluate the two interests asserted by Debra Bowen, California's former Secretary of State. In her demurrer, Bowen asserted the following:

> Proposition 14 has been justified on at least two grounds: increasing voter participation in the selection of candidates, particularly through increased participation by independent voters who previously had limited rights to vote in the primary, and reducing government gridlock by promoting less partisan candidates.[11]

The trial court did not question these asserted interests. Under established precedent, however, both interests should have been ruled insufficient -

[11] Petitioners' Court of Appeals App. 30-31.

or at reserved for resolution following an evidentiary hearing.

First, the state's interest in "increasing voter participation" and "particularly . . . participation by independent voters" in the primary election should be rejected, because any increase in independent voter participation is counterbalanced by the substantial decrease in minor party participation in the general election. *See Jones*, *supra*, 530 U.S. at 581 ("We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired"). As demonstrated above, less than half as many voters participated in the 2012 statewide primary election, as compared to the general election, and no significant minor party candidate advanced to the general election. There is therefore a factual dispute as to whether "voter participation" has been beneficially impacted by Proposition 14. At the very least, the trial court should have permitted discovery and expert testimony on the issue of "voter participation."

Second, the state's interest in "reducing partisan gridlock by promoting less partisan candidates" has already been ruled invalid by the Court. *See Jones*, supra, 530 U.S. at 584 ("This may well be described as broadening the range of choices *favored by the majority*—but that is hardly a compelling state interest, if indeed it is even a legitimate one") (emphasis in original). *Anderson* also reviewed the State's asserted interest in "political stability," but found that an early filing deadline for independent Presidential candidates could not be

justified on such grounds. *Id.*, *supra*, 460 U.S. at 805-806. "For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Id.* (citations omitted).

Here, the State has made no effort to justify why a "top two" system should not be a "top three," "top four," or otherwise. There has been no effort to establish how Proposition 14 represents a "less drastic way" of accomplishing the State's asserted interests.

B. This Case Presents a Question of Exceptional Importance

The most populous state in the Union has ruled that decades of Supreme Court jurisprudence protecting the rights of voters to access diverse political viewpoints at the general election may be discarded, based upon adoption of a system that labels itself "nonpartisan." If allowed to stand, the Court of Appeal holding will severely diminish the protections of *Anderson*, *Williams*, *Jenness*, and other cases that guaranteed voter access to a diverse range of political ideas during the general election.

California's "top two" system goes further than even the Washington State system that was examined by the Court in 2008, in that it bars even write-in votes. *Cf.* Cal. Elec. C. 8606 (banning write-

in votes in "top two" elections), Wash. Rev. C. § 29A.24.311 (permitting write-in votes in "top two" elections"). In previous cases, the Court has noted that some ballot access restrictions can be saved by the availability of write-in votes at the general election. *See, e.g.*, *Jenness*, *supra,* 403 U.S. at 434 (noting that while a Georgia statute imposed a five percent threshold for minor party candidates to have their names printed on the general election ballot, write-in votes would still be counted), 436 (a ban on write-in votes is a separate, considerable burden), 438 (write-in votes provide an alternative form of access to the general election ballot). Here, however, the electoral system at issue is perhaps the most extreme example of an electoral regime that minimizes the reach and impact of political ideas advanced by qualified parties other than the two major parties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 23, 2015

STATEMENT REGARDING WORD LIMIT

The text of this petition for certiorari consists of less than 3,912 words as counted by the Microsoft Word word-processing program used to generate the petition.

Dated: July 23, 2015

DANIEL MARK SIEGEL
Counsel of Record

APPENDICES

APPENDIX A
ORDER OF THE CALIFORNIA SUPREME COURT DENYING REVIEW (APR. 29, 2015)

S224970

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MICHAEL RUBIN et al., Plaintiffs and Appellants,

v.

ALEX PADILLA, as Secretary of State, etc., Defendant and Respondent;

INDEPENDENT VOTER PROJECT et al., Interveners and Respondents.

The petition for review is denied.

/s/ CANTIL-SAKAUYE
Chief Justice

APPENDIX B

ORDER AND OPINION OF THE CALIFORNIA COURT OF APPEAL, FIRST DISTRICT (JAN. 29, 2015)

233 Cal.App.4th 1128
Court of Appeal,
First District, Division 1, California.

Michael RUBIN, et al., Plaintiffs and Appellants,
v.
Alex PADILLA, as Secretary of State, etc., Defendant and Respondent; Independent Voter Project, et al., Interveners and Respondents.

Margulies , J.

Three small political parties and several party members and candidates sought to invalidate California's electoral system for statewide and legislative offices, contending the system, which consists of an open nonpartisan election followed by a runoff between the top-two candidates, deprives them of equal protection and associational and voting rights secured by the state and federal Constitutions. According to plaintiffs, because "minor" party candidates are typically eliminated in the primary election, they are denied the constitutional right to participate in the general election upon a showing of substantial public support. Plaintiffs also contend their associational rights are violated by the effective limitation of their participation to the primary election, when voter participation is typically less than half that of the general election. In addition, plaintiffs claim the electoral system denies them equal protection because they are no longer able to regularly participate in the general election, as they

were under the prior electoral system. Finally, plaintiffs contend the trial court erred in granting a demurrer to their complaint, without permitting them a hearing on the evidentiary support for their claims.

We affirm the trial court's dismissal of the action. Given the structure of California's "top-two" electoral system, minor-party candidates have no right to appear on the general election ballot merely because they have made a showing of significant public support. The role played by the general election under the former partisan system is fulfilled by the primary election in the top-two system, and there is no material barrier to minor-party participation in the primary election. Further, the failure of minor-party candidates to appear on the general election ballot does not substantially burden their members' rights of political association and expression, and California's interest in expanding participation in the electoral process is adequate to justify any burden that may occur. Lastly, because California's electoral system treats all political parties identically, plaintiffs' claim that they are denied equal protection of the laws is groundless.

I. BACKGROUND

In November 2011, plaintiffs filed an action against the Secretary of State (the Secretary) challenging the constitutionality of California's "top-two" system for electing statewide and legislative officeholders, enacted by the passage of Proposition 14 in 2010. The top-two system consists of an open nonpartisan primary followed by a general election runoff between the primary's top-two vote-getters. Plaintiffs consist of three "minor" political parties, the Green

Party of Alameda County, Libertarian Party of California, and Peace and Freedom Party of California, several minor-party members, and four potential minor-party candidates for offices subject to the challenged electoral process.[1]

The operative pleading, plaintiffs' second amended complaint (complaint), alleges two causes of action under the state and federal Constitutions, contending the top-two system denies plaintiffs access to the ballot because it precludes minor-party candidates from participating in the general election, even when they have demonstrated "substantial support" in the primary election, and denies equal protection because it was designed by the drafters of Proposition 14 to accomplish just such exclusion. The trial court permitted several persons and entities to intervene to defend the top-two system, including Abel Maldonado, a former state Senator who was involved in the passage of Proposition 14.[2]

In support of their constitutional claims, plaintiffs allege that in 2012, the most recent election year

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[1] By convention, we use the term "minor party" to refer to any political party other than the Republican and Democratic parties, without intending to demean the importance or standing of such parties. The individual plaintiffs are Michael Rubin, Steve Collett, Marsha Feinland, Charles L. Hooper, Katherine Tanaka, C.T. Weber, and Cat Woods. The complaint identifies Rubin and Tanaka as members of the Green Party of Alameda County and the Green Party of California, Woods as a member of the Peace and Freedom Party of California, Collett and Hooper as members of the Libertarian Party of California and 2012 legislative candidates from that party, and Feinland and Weber as members of the Peace and Freedom Party of California and 2012 legislative candidates from their party.

[2] The other interveners are Californians to Defend the Open Primary, Independent Voter Project, and David Takashima.

prior to the filing of the complaint, nine minor-party candidates in California received 5 percent or more of the primary vote in races governed by the top-two system. Many other minor-party candidates received over 2 percent of the vote. The primary's leading minor-party vote-getter, from the Green Party, received 18.6 percent of the vote for a seat in the United States Congress. Yet none of these candidates appeared on the general election ballot, since they failed to place in the top-two positions. Out of more than 150 races governed by the top-two system in the 2012 election, only three minor-party candidates advanced to the general election. Accordingly, the minor parties were represented by no general election candidate for 98 percent of statewide and legislative offices.

According to the complaint, this placed a substantial limitation on the ability of minor-party candidates to participate in the electoral process because "the California general election ballot is the moment of peak participation by voters, media, and the candidates themselves." Less than half the number of voters statewide participated in the 2012 primary election than the general election—5.3 million voters in the primary compared to 13.2 million in the general election. This effect was accentuated by the scheduling of the primary in June, five months before the general election. After the passage of five months between the primary and general elections, the complaint alleged, "whatever messages the [minor] parties were able to disseminate during their primary election participation had likely dissipated."

The complaint also alleges that, prior to implementing the current process, California's

election laws guaranteed that one candidate from each qualified political party could appear on the general election ballot. In contrast, the current process permits only two candidates on the general election ballot, typically excluding most of the minor-party candidates. According to the complaint, the intent of the drafters of Proposition 14 was to bring about this exclusion, favoring " 'moderate' candidates from the two major parties while excluding those who represent minor party perspectives." The ballot argument in favor of the passage of Proposition 14, included in a mailing to voters, stated, " 'Proposition will help elect more practical officeholders who are more open to compromise.' " Then-state Senator Maldonado was allegedly quoted as stating the purpose of the process was to promote " 'pragmatic' political perspectives." "Pragmatic" and "practical" were, plaintiffs alleged, "code words demonstrating their intent to eliminate varying political perspectives from the statewide general election."

The trial court rejected plaintiff's claims, sustaining a demurrer to the complaint without leave to amend. Stated briefly, the trial court reasoned that the electoral system imposes no restriction on the access of minor-party candidates to the nonpartisan primary ballot and found no right to participate in the subsequent general election ballot, absent a top-two finish. Plaintiffs contend the trial court erred both procedurally, in failing to give them an opportunity to develop the factual basis for their claims, and substantively, in rejecting their constitutional arguments.

II. DISCUSSION

A. Legal Background

1. California's Top–Two System

The top-two system was inserted into the California Constitution by Proposition 14, which was placed on the ballot by the Legislature in 2009 and passed by voters the following year. (Cal. Const., art. 2, § 5; Sen. Const. Amend. No. 4, Stats. 2009 (2009–2010 Reg. Sess.) res. ch. 2, pp. A–1–A–2; *see generally Field v. Bowen* (2011) 199 Cal.App.4th 346, 351 (*Field*).) Under the system, statewide executive offices and state and federal legislative offices are designated "voter-nominated" offices. (Cal. Const., art. II, § 5 , subd. (a); Elec.Code, § 359.5.) Every other year in June, prior to the general election in November, a primary election is held for voter-nominated offices in which all voters and candidates, without regard to their party affiliation, are permitted to participate. (Cal. Const., art. II, § 5, subd. (a); Elec.Code, §§ 359.5, 1200, 1201.) The prerequisites for inclusion on the voter-nominated primary ballot are minimal: the payment of a filing fee and the submission of a declaration of candidacy and nomination papers bearing the signatures of at most 100 nominators. (Elec.Code, §§ 8020, subd. (a), 8040, 8041, 8062, subd. (a), 8103.)[3]

So long as they are affiliated with a "qualified" political party, the primary candidates may list their

[3] A petition with an appropriate number of signatures can be submitted in lieu of the payment of the filing fee. (Elec. Code, § 8106, subd. (a).)

"party preference" on the election ballot.[4] 4 (Cal. Const., art. II, § 5, subd. (b); Elec.Code, §§ 5100 , 13105, subd. (a).) The primary election does not, however, result in the selection of party "nominees," which are defined by statute as party-affiliated candidates "who are entitled by law to participate in the general election for office." (Cal. Const., art. II, § 5, subd. (b); Elec. Code, § 332.5 .) Rather, only the two candidates receiving the most votes in the primary election, regardless of party affiliation, advance to the general election. (Cal. Const., art. II, § 5; Elec.Code, § 8141.5.) Accordingly, no party is entitled to place a candidate on the general election ballot, and two candidates stating the same party preference may appear on the general election for the same voter-nominated office if they are the first and second place finishers. (Elec.Code, § 8141.5 .) The Election Code expressly states the purpose of the primary is not "to determine the nominees of a political party"; rather, it "serves to winnow the candidates for the general election to the candidates receiving the highest or second highest number of votes cast at the primary election." (*Id.*, § 359.5, subd. (a).)

Proposition 14 effected a substantial change in the California electoral process. Prior to its passage, the primary election served to designate the party

[4] To become qualified, a political party must demonstrate significant public support through one of three statutorily prescribed methods. (See Elec.Code, § 5100.) We take judicial notice that the Secretary's Web site lists all three minor-party plaintiffs as qualified political parties <https://www.sos.ca.gov/elections/political-parties/qualified-political-party.htm> (as of January 29, 2015).

nominees for what are now voter-nominated offices. Those nominees were selected by the vote only of members of the party they represented. Each qualified party was entitled to place one, and only one, nominee on the general election ballot. (*See* Elec. Code, former §§ 2151, 15451; *Field*, *supra*, 199 Cal.App.4th at p. 351.) While parties no longer have the right to place a candidate on the general election ballot for voter-nominated offices, the Elections Code allows parties to use "any other lawful mechanism ... for the purposes of choosing the candidate who is preferred by the party for a ... voter-nominated office." (*Id.*, § 332.5.) Political parties may endorse, support, or oppose any candidate for such offices. (Cal. Const., art. II, § 5, subd. (b); Elec.Code, § 332.5.)

2. Constitutional Limitations on State Electoral Regulation

Beginning with *Williams v. Rhodes* (1968) 393 U.S. 23 (*Williams*), the Supreme Court decided a series of cases evaluating electoral laws that had the effect of restricting the access of independent and minor-party candidates to the ballot.[5] Judged largely under

[5] We will be considering federal decisions almost exclusively. The California Supreme Court's decisions in this area have been limited, and the court's most recent decision held that it "has followed closely" the federal First Amendment analysis in evaluating challenges to electoral laws under the free speech provisions of the California Constitution. (*Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 174, 179.) The decision instructs reviewing courts not to depart from the federal analysis unless there are "cogent reasons to do so." (*Id.* at p. 179.) Plaintiffs do not distinguish between the state and federal Constitutions in their arguments and have made no attempt to provide "cogent reasons" for departing from federal authority.

the federal equal protection clause, the laws typically created financial barriers to candidacy or imposed different ballot qualification requirements for such candidates. (*Clements v. Fashing* (1982) 457 U.S. 957, 964–965 (*Clements*).) The court recognized such laws "place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." (*Williams*, at p. 30.)

In the course of these decisions, the court recognized the constitutional protection given to the participation of minor parties and unaffiliated candidates in the electoral process. "A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties. [Citation.] By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. [Citations.] In short, the primary values protected by the First

Amendment—'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' [citation]—are served when election campaigns are not monopolized by the existing political parties." (*Anderson v. Celebrezze* (1983) 460 U.S. 780, 793–794 (*Anderson*).)

Posed against the interest of minor parties and independent candidates in unfettered access to the ballot are the states' "broad powers to regulate voting." (*Williams*, *supra*, 393 U.S. at p. 34.) "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." (*Storer v. Brown* (1974) 415 U.S. 724, 729–730 (*Storer*).) "States have important interests in protecting the integrity of their political processes from frivolous or fraudulent candidacies, in ensuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections." (*Clements*, *supra*, 457 U.S. at p. 965.)

Given these competing, and potentially conflicting, interests, "It has never been suggested that the [Constitution] automatically invalidates every substantial restriction on the right to vote or to associate. Nor could this be the case under our Constitution where the States are given the initial task of determining qualifications of voters who will elect members of Congress." (*Storer*, *supra*, 415 U.S. at p. 729.) "[T]he rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from

those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a 'matter of degree,' [citation], very much a matter of 'consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.'" (*Id.* at p. 730.) The reviewing court "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." (*Anderson*, *supra*, 460 U.S. at p. 789.) "The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.' " (*Clements*, *supra*, 457 U.S. at p. 964,.) Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review. (*Timmons v. Twin Cities Area New Party* (1997) 520 U.S. 351, 358 (*Timmons*).) "[T]he State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." (*Anderson*, at p. 788, fn. omitted.)

3. The Constitutionality of Open Primaries

The top-two system represents a qualitative change in the manner in which general election candidates have traditionally been selected in the United States. The Supreme Court cases from the last century establishing the electoral interests of minor parties generally featured primary elections whose purpose was to permit voters from the participating parties to select the parties' general election nominees, rather than to narrow the range of candidates in a nonpartisan manner. The principle concern of these earlier ballot access decisions was to ensure minor parties did not suffer undue barriers to placing their candidates on the ballot, relative to their major party brethren. In the context of the traditional system, however, the court rejected any absolute right of minor-party candidates to appear on the ballot, finding "an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot —the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." (*Jenness v. Fortson* (1971) 403 U.S. 431, 442 (*Jenness*); *see Munro v. Socialist Workers Party* (1986) 479 U.S. 189, 193–195 (*Munro*).)

The states' electoral approach had begun to evolve by the time of *California Democratic Party v. Jones* (2000) 530 U.S. 567 (*Jones*), in which the court considered a constitutional challenge to a so-called "blanket primary," a variant of the traditional primary. Although the purpose of the blanket primary was to select party nominees, all primary election candidates were listed on a single ballot and

voters were permitted to vote for the candidate of their choice, without regard to their party membership. Because the candidate from each political party receiving the most votes became the party's nominee, each party's nominee was determined, in part, by nonmembers. (*Id.* at p. 569.) In *Jones*, a major party contended the blanket primary violated its rights of association by forcing it to accept the participation of nonmembers in the selection of its nominees. The Supreme Court agreed, noting, "In no area is the political association's right to exclude more important than in the process of selecting its nominee." (*Id.* at p. 575.) Because the court found a significant burden on associational rights, it applied strict scrutiny and found the state's asserted interests in support of the blanket primary, including the selection of more centrist candidates in "safe" districts, less than compelling. (*Id.* at pp. 580, 582, 584.)

In addition to finding the state's asserted interests in the blanket primary not compelling, the court noted there was a more narrowly tailored alternative to accomplish the state's purpose: the nonpartisan open primary, followed by a top-two runoff election. (*Jones*, *supra*, 530 U.S. at p. 585.) As the court held, the top-two system "has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased 'privacy,' and a sense of 'fairness'—all without severely burdening a political party's First Amendment right of association." (*Id.* at pp. 585–586.) The *Jones* court thereby gave its constitutional imprimatur to the top-two system, at least in dictum.

In *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442 (*Washington State Grange I*), the Supreme Court formally addressed the constitutionality of the top-two system, confirming it withstands the type of constitutional challenge asserted in *Jones*. The court rejected the argument at least as a facial challenge, that an open nonpartisan primary was not materially different from a blanket primary because the prevailing candidate affiliated with a particular party in the nonpartisan primary would become the party's "de facto" nominee in the general election. (*Washington State Grange I*, at pp. 452–453.) While *Washington State Grange I* is not dispositive here, since it considered only the impact of the top-two system on parties' interest in selecting their own nominees, *Jones* and *Washington State Grange I* refute any claim that the system necessarily burdens associational and ballot access rights.

Since *Washington State Grange I*, the top-two system has been sustained against a series of other constitutional challenges, although not the precise challenges asserted by plaintiffs here. Following remand in *Washington State Grange I*, the Ninth Circuit rejected a claim by the Libertarian Party that its "fundamental right of access to the ballot" was violated because the top-two system "makes it difficult for a minor-party candidate to progress to the general election ballot." (*Wash. State Republican Party v. Wash. State Grange* (9th Cir.2012) 676 F.3d 784, 793, 794 (*Washington State Grange II*).) In making the argument, the party relied primarily on *Anderson*, which found that a March deadline for the filing of candidacy petitions by independent

candidates for the November general election violated their voting and associational rights because it arose several months before the major parties designated their candidates in the primary. As the Ninth Circuit explained, *Anderson* "held that the early filing deadline placed an unconstitutional burden on voting and associational rights because it prevented independents from taking advantage of unanticipated political opportunities that might arise later in the election cycle and required independent candidates to gather petition signatures at a time when voters were not attuned to the upcoming campaign." (*Washington State Grange II*, at p. 794.) In finding no similar flaw in the top-two system, the court noted the Washington primary occurred in August, not March, and the system treated major- and minor-party candidates alike, in contrast to the electoral law rejected in *Anderson*. (*Washington State Grange II*, at pp. 794–795.)[6]

In *Field*, *supra*, 199 Cal.App.4th 346, the court upheld California's top-two system against the claim

[6] The trial court relied heavily on the Ninth Circuit's decision in *Washington State Grange II* in ruling against plaintiffs, and plaintiffs extensively criticize the decision and distinguish California's top-two system from that of Washington State. While we find the distinctions largely unpersuasive, we conclude the constitutional arguments made by plaintiffs in the present lawsuit are substantively different from those considered by the Supreme Court and Ninth Circuit in the *Washington State Grange* cases. To the extent plaintiffs intend to repeat their claim in the complaint that the gap between the June primary and November general election is significant under *Anderson*, however, we agree with the Ninth Circuit that it does not render the top-two system unconstitutional. (*Washington State Grange II*, *supra*, 676 F.3d at pp. 794–795.)

it violates the constitutional rights of candidates who are not affiliated with a qualified party because it requires such candidates to state "no party preference" on the ballot or to leave their party preference blank, rather than permitting them to designate themselves as independent or aligned with a nonqualified party. (*Id.* at pp. 355–360.) It also rejected a constitutional challenge to the absence of write-in votes in the general election.[7] (*Id.* at pp. 366–370.) Essentially the same arguments were rejected in *Chamness v. Bowen* (9th Cir. 2013) 722 F.3d 1110 at pages 1115, 1116–1121.

B. Plaintiffs' Contentions

Plaintiffs assert a somewhat different series of challenges to the constitutionality of the top-two system. First, they argue the top-two system denies their candidates the constitutional right to appear on the general election ballot if the parties have demonstrated a " 'modicum of support.' " Second, they contend the top-two system's typical elimination of minor-party candidates in the primary election severely burdens their voting and associational rights by restricting their participation in the election process to the primary, when voter attention and participation are substantially less than at the time of the general election.[8] Finally, they contend

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[7] Plaintiffs allude in their briefs to the absence of write-in votes at the general election. To the extent plaintiffs intend to raise that absence as a constitutional claim here, we follow *Field* in rejecting it.

[8] Although plaintiffs appear to articulate the first two arguments separately, their briefs mix them indiscriminately, at times treating the two arguments as aspects of a single argument. This mixing has the effect of confusing the

the top-two system violates their right to equal protection of the laws by "withdrawing [their] access to the general election."[9]

We review independently a trial court's ruling sustaining a demurrer without leave to amend. (*Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1470 (*Arce*).) Normally we would apply the California standard of review for grant of a demurrer, which requires us to "review the allegations of the operative complaint for facts sufficient to state a claim for relief." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 866.) Because plaintiffs' claims are pleaded under section 1983 of title 42 of the United States Code, however, we apply the federal standard for review of the grant of a motion to dismiss. Under that standard, "dismissal is proper only where 'it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims that would entitle him to relief.'" (*Arce*, at p. 1471.) Either way, we "'must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] ... In addition, we give the complaint a reasonable

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constitutional issues raised by the top-two system, and for clarity we analyze them separately.

[9] In arguing their case, plaintiffs make no attempt to distinguish between the impact of Proposition 14 on the rights of the parties, the party members, and the parties' candidates. Rather, they argue their case from the perspective of the party plaintiffs, without articulating any separate arguments on behalf of the individual plaintiffs. We take the same approach, evaluating their arguments from the perspective of the party plaintiffs. We are not persuaded the individuals could make materially different arguments.

interpretation, and read it in context.'" (*Id*. at p. 1470.)

1. The Right to Appear on the General Election Ballot

We find no support for plaintiffs' claim of a constitutional right to have their candidates appear on the general election ballot upon the showing of a modicum of support, as the term "general election" is used in California's top-two system. The minor parties unquestionably have a right to fair and equal participation in the process by which officeholders are selected, but this right is satisfied by participation in an open nonpartisan primary election in which every candidate has an equal opportunity, regardless of party affiliation, to advance to the general election.

In the various ballot access cases, the Supreme Court was required to resolve the balance between the electoral rights of would-be candidates who lacked the support of the major parties with the interest of the state in limiting the complexity of the ballot by screening out candidates who were unable to demonstrate a realistic chance of electoral success. In the end, the court came down largely on the side of the minor-party and independent candidates, ruling they must be permitted on the ballot if they are able to demonstrate a "modicum" of public support. (*Jenness*, *supra*, 403 U.S. at p. 442.) In deciding these cases, the Supreme Court never distinguished doctrinally between access to the primary election and access to the general election. The objective in each, from *Williams*, *supra*, 393 U.S. 23, on, was minor-party access to the *electoral process* — that is, to the process that culminates in election to public

office. A party's participation in a particular election was constitutionally relevant only as the means to the end of placing the party's candidates in a fair and equal position to be elected.

In applying the Supreme Court decisions addressing the right to ballot access, it is essential to recognize the difference between the electoral system enacted by Proposition 14 and the classic system considered in these decisions. In the classic system, the functions of the primary election and the general election were substantively different. The primary election settled "intraparty competition" by reducing the number of contenders within each party to a single nominee. (*American Party of Texas v. White* (1974) 415 U.S. 767, 781.) The general election then allowed the voters to choose among the parties' nominees. With the exception of independent candidates, the candidates in the general election were chosen by the party members, not by voters generally. The general election was therefore the first time the candidates faced the electorate, rather than solely the members of their own party.

While California has retained the designations "primary" and "general" election, the functions of the two elections have changed considerably from the classic system. As the Elections Code confirms, the purpose of the primary election is no longer to determine party nominees, but instead to narrow the slate of candidates. (*Id.*, § 359.5.) Membership in a qualified party is no longer a precondition to participation in the primary election, since the primary election no longer selects party nominees, and political parties therefore no longer play a formal role in determining the slate of candidates at either

election. Rather, the primary election now allows the electorate to reduce the universe of all candidates to two, and the general election reduces those two to a single winner. Both elections are "general" elections, in the sense that the entire electorate votes in both elections and voters can select any of the candidates. In substance, the classic primary election has been eliminated, and the general election has been expanded into a two-step process.[10]

Accordingly, for the purposes of the ballot access cases, access to California's primary election is constitutionally indistinguishable from access to the general election. Under the ballot access cases, there is no doubt that candidates who are able to demonstrate a "modicum of support" are entitled to a spot on the primary election ballot, since participation in the primary election is a necessary first step in the electoral process. In light of existing precedent, which authorizes the states to require a demonstration of the support of as much as 5 percent of the electorate for placement on the primary ballot (*Jenness*, *supra*, 403 U.S. at pp. 438–442), the minimal signature requirements imposed by the Elections Code easily pass constitutional muster.

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[10] The interveners characterize plaintiffs as challenging Proposition 14's elimination of an official role for political parties in the electoral process and argue the long-standing history of California's nonpartisan elections for, among others, judicial offices belies any constitutional claim based on a claimed right of parties to an official electoral role. We have scoured plaintiffs' briefs and find no trace of a challenge to this aspect of Proposition 14. Thus, we do not address such an argument.

Further, and importantly, candidates affiliated with minor parties face exactly the same requirements for participation as those affiliated with the major parties.

Under the top-two system, advancement from the primary election to the general election requires a demonstration, not of a "modicum" of support, but of "top-two" electoral success. There is nothing inherently unconstitutional about this requirement. As the Supreme Court has noted repeatedly, the point of the electoral process is to determine the candidate with the most support among voters and eliminate the remainder. (*See Storer*, *supra*, 415 U.S. at p. 735 [the electoral process "functions to winnow out and finally reject all but the chosen candidates"].) The primary election is the first step in this process. Because Proposition 14 provides a full and fair opportunity for all candidates to compete for election on a materially equal basis, California's decision to split this process in two does not deprive plaintiffs of meaningful access to the ballot.

A hypothetical illustrates the point. Plaintiffs' constitutional objection would appear to be mooted if California simply eliminated the general election and awarded elective office to the winner of the primary election. They could not complain they were unfairly denied access to the general election if elective office was awarded to the person who received the most votes in the primary election, since minor-party candidates would participate in the election with the same opportunity as any other candidate to win elective office. It is therefore difficult to imagine how California violates plaintiffs' electoral rights by deciding to conduct a runoff between the top-two

primary candidates, rather than awarding elective office outright to the winner. On the contrary, plaintiffs are benefited by having a second shot at office in the event their candidate is a primary runner-up. Proposition 14 does nothing more than provide this second chance.

A somewhat similar system for narrowing participation in the general election was approved by the Supreme Court in *Munro*, *supra*, 479 U.S. 189. At the time, minor parties in the State of Washington, rather than choosing their nominee in the primary election, were required to select a nominee at a party convention for placement on the primary ballot. In order to advance to the general election ballot, that nominee was required to obtain at least 1 percent of the votes in a blanket primary, at which voters could cast their ballot for any primary candidate, regardless of party affiliation. (*Id*. at pp. 191–192.) After recognizing that states "may require a preliminary showing of significant support before placing a candidate on the general election ballot" (*id*. at p. 194), the court held: "The primary election in Washington ... is 'an integral part of the entire election process ... [that] functions to winnow out and finally reject all but the chosen candidates.' [Citation.] We think that the State can properly reserve the general election ballot 'for major struggles,' [citation], by conditioning access to that ballot on a showing of a modicum of voter support. In this respect, the fact that the State is willing to have a long and complicated ballot at the primary provides no measure of what it may require for access to the general election ballot. The State of Washington was clearly entitled to raise the ante for ballot access, to simplify the general election ballot, and to avoid the

possibility of unrestrained factionalism at the general election." (*Id.* at p. 196.) The court acknowledged the 1–percent rule had the effect of excluding most minor-party candidates from the general election ballot (*id.* at pp. 196–197), but it found no constitutional deficiency in this exclusion, explaining: "Washington virtually guarantees ... candidate access to a statewide ballot.... It is true that voters must make choices as they vote at the primary, but there are no state-imposed obstacles impairing voters in the exercise of their choices. Washington simply has not substantially burdened the 'availability of political opportunity.'" (*Id.* at p. 199.)

The 1–percent rule approved in *Munro* is constitutionally indistinguishable from the elimination of lesser candidates by the primary election under Proposition 14. In both cases, the primary election provided candidates equal opportunity to demonstrate success with the general electorate, and in both cases the slate of candidates was narrowed solely on the basis of their demonstrated electoral appeal. Just as in *Munro*, the effect is to "reserve the general election ballot 'for major struggles.'" (*Munro*, *supra*, 479 U.S. at p. 196.)

2. Restriction to Participation in the Primary Election

Plaintiffs also contend their rights of political expression are unconstitutionally burdened because the top-two system effectively limits their electoral efforts to the primary election, which occurs several months prior to the general election and ordinarily attracts less attention and voter participation than the general election. This contention is not premised

on any alleged burden placed on the right to "cast their votes effectively." (*Williams*, *supra*, 393 U.S. at p. 30.) That is, plaintiffs neither allege nor argue their candidates' chances to gain elective office are prejudiced by the relative lack of voter participation in primary elections. [11]Rather, plaintiffs' concern is their candidates are excluded from the ballot at the time when they would have the largest audience for their electoral activities.

As discussed above, we resolve such a claim by evaluating the significance of the interests advanced by the plaintiffs and the degree to which those interests are burdened by the electoral regulation, and weighing against this burden the interests advanced by the state to justify it. (*See Anderson*, *supra*, 460 U.S. at p. 789.)

We find any burden placed on plaintiffs' expressive rights by their alleged relegation to the primary to be modest. It is important to recognize that plaintiffs are not excluded from the electoral process altogether. Because minor parties are permitted to promote candidates in the primary election on the same terms as any other party, plaintiffs are fully

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[11] Most obviously, plaintiffs do not allege that their candidates receive a smaller percentage of the vote by virtue of their participation in the primary election, thereby making it more difficult for them to advance to the general election. One could imagine, on the contrary, that minor-party supporters might be more engaged in the political process and therefore would be more likely to vote in the primary election than major-party members. Accordingly, the splitting of the general election into two steps may actually promote the electoral success of minor-party candidates. In any event, there is no allegation their electoral performance suffers under the top-two system.

able to communicate their message through the electoral process at that time. Further, even at the time of the general election, plaintiffs are in no way excluded from many expressive activities associated with the electoral process. Even without a candidate on the ballot in November, plaintiffs may organize their members, communicate their message through advertising and events, support or oppose candidates who are on the ballot, and engage in any other appropriate political activity. The lack of a candidate in no way prevents plaintiffs from participating in the various election-related political activities at the time of the general election. It merely prevents them from using a candidacy as the vehicle for such activities.

Plaintiffs point out that because of the common failure of minor-party candidates to reach the general election under the top-two system, minor parties are generally denied access to certain expressive activities that are available only to parties with a candidate on the general election ballot, notably the opportunity to state their views in the official voter pamphlet and the chance to participate in candidate debates. Even when these opportunities are denied them, however, the minor parties have access to a variety of other political activities and avenues of communication at the time of the general election, as noted above. Further, they can take advantage of the full range of activities at the time of the primary election. The absence of a candidate on the general election ballot therefore places at most a

modest burden on their efforts to communicate their message to the electorate.[12]

Particularly relevant to plaintiffs' claim is *Timmons*, *supra*, 520 U.S. 351, in which the Supreme Court considered a state law that precluded a single candidate from appearing on the ballot as a nominee for more than one political party. Both the *Timmons* respondent, a minor party, and a larger party had nominated the same person for a state legislative office. Because that candidate chose to be listed as the nominee of the larger party, the effect of the law was to preclude the minor party from listing its nominee as such on the ballot. In holding the preclusion did not place a "severe[ ] burden" on the minor-party members' rights of association, the court reasoned the regulation applied equally to all parties, did not interfere in the party's internal affairs, and did not prevent the party from "developing and organizing." (*Id*. at pp. 359, 360–

[12] As noted above, plaintiffs tend to mix the first two claims in making their appellate arguments. For example, they claim without explanation in their reply brief that the top-two system "deprives a large majority of California voters from accessing diverse political viewpoints when they elect candidates for statewide office." Plaintiffs' ambiguous use of the term "accessing ... political viewpoints" could refer to receiving political messages, or it could refer to voting for candidates advocating those messages. Assuming the first meaning, nothing in the top-two system prevents the minor parties from communicating their political views at the time of the general election or voters from "accessing" those views. The top-two system merely precludes the minor parties from using the vehicle of a candidacy for that purpose. To the extent plaintiffs intend the second meaning, we reject their argument for the reasons stated in section II.B.1., *ante*.

361.) As the court noted, even without a candidate on the ballot, the party was not excluded "from participation in the election process. [Citations.] The ... Party remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen." (*Id*. at p. 361.) In considering the party's claim the ban burdened its right to communicate the identity of its nominee, the court held it was "unpersuaded, however, by the Party's contention that it has a right to use the ballot itself to send a particularized message.... Ballots serve primarily to elect candidates, not as fora for political expression. [Citation.] ... The Party retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and Party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate." (*Id*. at p. 363.) In the same way, plaintiffs remain free at the time of the general election to participate in expressive political activity, whether or not they have a candidate on the ballot.

An argument similar to plaintiffs' was made by the plaintiffs in *Munro*, who protested their exclusion from the general election by the requirement of a 1–percent vote in the primary. In arguing for the significance of the exclusion, the plaintiffs noted voter participation in primary elections was considerably less than in general elections. (*Munro*, *supra*, 479 U.S. at p. 198.) In finding the exclusion from the general election did not impose a severe burden for this reason, the court held: "States are not burdened with a constitutional imperative to reduce voter apathy or to 'handicap' an unpopular candidate

to increase the likelihood that the candidate will gain access to the general election ballot.... [¶] ... It can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election." (*Id.* at pp. 198–199.)

Weighed against the, at most, modest burden imposed on plaintiffs' expression are the state's asserted interests in replacing the partisan primary with a two-step general electoral process. In discussing the state's interests, the Secretary refers us to the official pamphlet distributed by the state to voters at the time of the election. (*See Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901 [court can look to official pamphlet to determine voters' intent in enacting an initiative].) In that pamphlet, the promoters of Proposition 14 argued to the voters it would improve the electoral process by (1) permitting independent voters to participate in the process of narrowing candidates for the general election, (2) allow individual primary election voters a wider range of candidate options, (3) lessen the influence of the major parties in selecting candidates, and (4) "help elect more practical office-holders who are more open to compromise." (Ballot Pamp., Primary Elec. (June 8, 2010) argument in favor of Prop. 14, p. 18.)

The first interest alone is sufficient to justify the limited burden on minor-party associational rights imposed by the top-two system. (*See Washington State Grange I*, *supra*, 552 U.S. at p. 458.) According to records submitted by interveners, independent voters constituted 20.18 percent of the electorate in

2010.[13] Yet so long as the primary election served to select party nominees, the state was precluded by the Supreme Court's decision in *Jones*, *supra*, 530 U.S. 567, from granting independent voters the right to participate in the narrowing of candidates for the general election.[14] In effect, their choices at the general election could be determined for them by the members of the qualified parties. The top-two system, by moving away from a party-based primary election, gives to this substantial bloc of independent voters the right to participate equally in the important first stage of the electoral process. This rational and nondiscriminatory interest alone justifies any modest burden imposed by the top-two system on plaintiffs' associational interests. (*See Anderson*, *supra*, 460 U.S. at p. 788, fn. omitted ["the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions"].)

In discussing the state's interest, plaintiffs choose to focus on the final claim of the Proposition 14 promoters, contending an interest in narrowing the ideological range of candidates was ruled invalid in *Jones*. In that case, which held unconstitutional an open partisan primary, the Supreme Court found

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[13] Plaintiffs have submitted more recent data in a request for judicial notice, filed December 18, 2014, which we grant. According to the new data, the percentage of registered voters in California who state no party preference had increased to 23.29 percent by 2014. We also grant the parties' various requests for judicial notice submitting purported new authority.

[14] Consistent with the Supreme Court's ruling in *Jones*, nonaffiliated voters were permitted to vote in partisan primary elections only if the political parties consented to their participation. (Elec. Code, § 13102, subd. (b).)

insufficient the state's declared interest in "broadening the range of choices favored by the majority " by facilitating the selection of less partisan party nominees. (*Jones*, *supra*, 530 U.S. at p. 584.) That ideological narrowing, however, was imposed by nonparty members on the parties. The Supreme Court quite rightly questioned whether the state had a valid interest in dictating to the parties the ideology of their nominees. By contrast, under the top-two system the electorate narrows its own choices in the general election through its voting in the primary, and any ideological choices are incidental to the process of narrowing the field of candidates. The narrowing process results in the two candidates favored by the largest number of voters and ensures the ultimate winner enjoys the support of a majority of voters. With respect to that interest, the Supreme Court recognized as long ago as *Williams* that "the State does have an interest in attempting to see that the election winner be the choice of a majority of its voters." (*Williams*, *supra*, 393 U.S. at p. 32.)

In their reply brief, plaintiffs lean heavily on *Anderson* to support their argument, but *Anderson* was concerned primarily with access to the ballot, rather than the expressive activities incidental to candidacy. As noted above, the *Anderson* court invalidated a filing deadline that required independent and new-party candidates to file for election well in advance of established party candidates, reasoning the early filing requirement could limit the range of candidates available to the electorate because independent and new-party candidacies often arose in reaction to the activities of the other parties. (*Anderson*, *supra*, 460 U.S. at p.

792.) As the court explained, "The right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.'" (*Id*. at p. 787.) Accordingly, *Anderson* was concerned with a reduction in the range of candidates, rather than the expressive activities associated with candidacy. As discussed at length in the section II.B.1., *ante*, the top-two system provides an equal "place on the ballot" for minor- and major-party candidates. It therefore does not limit the range of candidates available to the voters in the manner that motivated the *Anderson* court.

3. Equal Protection

Plaintiffs' equal protection claim, as articulated in their opening brief, is considerably different from the allegation of impermissible motive in their complaint. Plaintiffs now contend their right to equal protection was violated because, under the top-two system, they no longer have a guaranteed spot on the general election ballot. Perhaps anticipating the argument that they never had a right to appear on the general election ballot, plaintiffs argue, citing *Romer v. Evans* (1996) 517 U.S. 620 (*Romer*), that the equal protection clause "forbids the unjustified withdrawal of an established privilege or protection from a class of disfavored individuals, even if that right may not have been required by the Constitution in the first place."

The equal protection clause "'requires that all persons subjected to ... legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' [Citation.] When those who appear

similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.'" (*Engquist v. Oregon Dept. of Agriculture* (2008) 553 U.S. 591, 602.)

The success of plaintiffs' claim that they are denied equal protection by the top-two system is gravely hampered by the system's manifestly equal treatment of all qualified political parties. All candidates who file the necessary papers are entitled to a place on the primary ballot, regardless of their party preference. No greater requirements are placed on candidates expressing a preference for a minor party. Similarly, all successful primary election candidates are entitled to advance to the general election, regardless of their party preference. Candidates listing a preference for a minor party who appeal to a sufficiently broad swath of the electorate have the same opportunity to advance as similar candidates expressing a preference for a major party. There simply is no distinction, invidious or otherwise, made by Proposition 14 on the basis of party preference.

Taking plaintiffs' characterization of the holding of *Romer* at face value, by plaintiffs' own admission an equal protection violation does not occur under *Romer* unless an established privilege has been withdrawn from "a class of disfavored individuals." In *Romer*, that disfavored group was persons with a same-sex or bisexual orientation. (*Romer*, *supra*, 517 U.S. at p. 624.) At issue was a provision of the Colorado Constitution prohibiting the enactment of

laws to protect persons from discrimination on the basis of " 'homosexual, lesbian or bisexual orientation, conduct, practices or relationships.' " (*Ibid.*) The constitution had no similar ban on the protection of other classes of persons from discrimination. (*Ibid.*) The top-two system, in contrast, makes no analogous distinction among candidates or political parties. The established privilege cited by plaintiffs—the right to place a party nominee on the general election ballot—has been withdrawn from all political parties equally. Under Proposition 14, there is no "disfavored" class of parties.

Plaintiffs base their equal protection argument not on the elements of the electoral system but on its impact, which they contend is more severe for minor-party candidates. While plaintiffs contend the top-two system prevents minor-party candidates from advancing to the general election, it has exactly the same impact on major-party candidates who fail to garner a top-two finish. As statistics provided by the Secretary to the trial court demonstrate, 30 major party candidates in the 2012 primary election received 20 percent or more of the vote and failed to advance to the general election. When precluding access to the general election ballot, the statute makes no distinction on the basis of party affiliation. Plaintiffs allege, nonetheless, that minor-party candidates are more severely disadvantaged by the top-two system because they fail to advance far more often than major-party candidates. The cause of this disparity, however, does not lie in the electoral system. Rather, the differential failure to advance is a direct result of the minor-party candidates' failure to attract the votes of a sizeable portion of the

electorate. The state has no equal protection obligation to compensate for the minor parties' lack of general electoral appeal. (*Munro*, *supra*, 479 U.S. at p. 198.)

In their reply brief, plaintiffs reprise the claim made in the complaint that the voters enacted Proposition 14 with the "improper purpose" of eliminating minor-party candidates from the general election ballot, relying on statements in the voter pamphlet. By failing to raise this argument in their opening brief, plaintiffs waived it. (*Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1426.) In any event, nothing in the ballot pamphlet or the statements pleaded in the complaint suggests an intent, either among the promoters of Proposition 14 or the voters, specifically to disadvantage minor-party candidates. The change in the electoral system may have had the effect of diminishing the minor parties' presence on the general election ballot, but there is nothing to suggest this was an objective of the promoters and the voters.[15]

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[15] Because we find no substance to plaintiffs' "improper purpose" argument, we deny the interveners' motion to strike this portion of plaintiffs' reply brief. We also deny the separate motions for judicial notice submitted by plaintiffs and interveners. Plaintiffs' motion seeks judicial notice of voter statistics that do not add materially to the evidence and allegations already in the record. Interveners' request addresses a legal argument plaintiffs made below, that Proposition 14 makes it more difficult for minor parties to remain qualified by obtaining a 2–percent vote in the gubernatorial general election. Plaintiffs have not raised that argument on appeal.

4. The Trial Court's Grant of a Demurrer

Plaintiffs argue that the trial court was required to permit them "to investigate the historical record, analyze statistical data, and develop expert testimony" before it could evaluate the nature of the burden imposed on their constitutional rights and weigh that burden against the state's asserted interests. In order to earn the right to make an evidentiary record, however, plaintiffs were first required to satisfy Code of Civil Procedure section 425.10, by pleading facts sufficient to support their causes of action. For the reasons explained above, we agree with the trial court that, after two opportunities to amend their initial complaint, plaintiffs failed to plead facts demonstrating the unconstitutionality of Proposition 14. Nor does it appear plaintiffs could prove such facts. Plaintiffs suggest no different set of facts they would have pleaded if granted leave to amend. The demurrer was, therefore, properly sustained.

Plaintiffs argue a demurrer was inappropriate because they intend to make an "as applied" challenge to Proposition 14, rather than a facial challenge. (*See generally Washington State Grange I*, *supra*, 552 U.S. at pp. 449–451.) Generally, a facial challenge to the constitutionality of legislation "considers only the text of the measure itself, not its application to the particular circumstances of an individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145.) In contrast, an "as applied" challenge to the constitutionality of legislation involves an otherwise facially valid measure that has been applied in a constitutionally impermissible manner. This type of

challenge "contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the [measure] has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." (*Ibid.*)

Plaintiffs' argument confuses pleading with proof. A plaintiff who asserts an as applied constitutional challenge is not excused from procedural pleading requirements. As discussed above, to avoid dismissal on demurrer, plaintiffs were required to plead facts supporting the elements of their claims. This is equally true of as applied and facial constitutional challenges. (*See Stone v. Board of Election Com'rs for City of Chi* (7th Cir.2014) 750 F.3d 678, 686 ["there is nothing remarkable about granting a motion to dismiss in an election-law case if careful consideration of the complaint shows that the plaintiff has not stated a claim"].)

III. DISPOSITION

The judgment of the trial court is affirmed.

Margulies, J.

We concur:
Humes , P.J.
Banke, J.

APPENDIX C

ORDER AND JUDGMENT OF THE ALAMEDA COUNTY SUPERIOR COURT (OCT. 4, 2013)

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

MICHAEL RUBIN, STEVE COLLETT, MARSHA FEINLAND, CHARLES L. HOOPER, KATHERINE TANAKA, C.T. WEBER, CAT WOODS, GREEN PARTY OF ALAMEDA COUNTY, LIBERTARIAN PARTY OF CALIFORNIA, and PEACE AND FREEDOM PARTY OF CALIFORNIA, Plaintiffs,

vs.

DEBRA BOWEN, in her official capacity as California Secretary of State, Defendant.

INDEPENDENT VOTER PROJECT, DAVID TAKASHIMA, ABEL MALDONADO & CALIFORNIANS TO DEFEND THE OPEN PRIMARY, Intervener-Defendants.

Case No.: RGl1605301

ORDER OF DISMISSAL AND FINAL JUDGMENT UPON SUSTAINING OF DEMURRER WITHOUT LEAVE TO AMEND [C.C.P. § 581d]

Pursuant to the Court's Amended Order, filed September 23, 2013, which sustained Defendant's and Interveners' demurrers as to all the causes of action in the Second Amended Complaint without leave to amend as to any of them (attached as Exhibit A),

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. This case is dismissed in its entirety, with prejudice.

2. Judgment is hereby entered in favor of DEFENDANT SECRETARY OF STATE DEBRA BOWEN ("Defendant") and Intervener-Defendants CALIFORNIANS TO DEFEND THE OPEN PRIMARY, INDEPENDENT VOTER PROJECT, ABEL MALDONADO, and DAVID TAKASHIMA ("Interveners"), and against Plaintiffs MICHAEL RUBIN, STEVE COLLETT, MARSHA FEINLAND, CHARLES L. HOOPER, KATHERINE TANAKA, C. T. WEBER, CAT WOODS, GREEN PARTY OF ALAMEDA COUNTY, LIBERTARIAN PARTY OF CALIFORNIA, AND PEACE AND FREEDOM PARTY OF CALIFORNIA ("Plaintiffs"), on all causes of action.

3. Plaintiffs shall take nothing by their complaint.

4. Upon filing a memorandum of costs, and subject to any motion to tax said costs permitted by law, Defendant and Interveners shall have their costs of suit.

5. Any claim for attorney's fees in this action and upon any appeal shall be determined by separate motion or by agreement of the parties.

/s/ LAWRENCE JOHN APPEL
Hon. Lawrence John Appel
Judge, Alameda County Superior Court

* * *

EXHIBIT [A]

Amended Order Filed September 23, 2013

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Michael Rubin, et al.,
plaintiffs,

vs.

Debra Bowen, in her official capacity
as Secretary of State of California,
defendant.

Independent Voter Project, et al.,
Intervener-Defendants.

Case No. RG 11605301

ORDER
[Amended-Corrected]

I. Introduction.

This case challenges the constitutionality of Article 2, section 5(a) of the California Constitution ("Top Two Candidates Open Primary Act" or "Prop. 14") and is presently before the court on demurrers to the second amended complaint (the "SAC").

Plaintiffs jointly request that the court enter a judgment declaring that "Prop. 14 violates the rights of minor political parties and registered members of minor political parties under the First and Fourteenth Amendments of the United States Constitution, 42 U.S.C. section 1983, and Article 1, sections 2, 3, and 7 and Article IV, section 16 of the California Constitution by barring minor political parties and voters registered with such parties from effective participation in general elections;" and

declaring that "Prop. 14 violates the rights of plaintiffs under the Equal Protection Clause of the Fourteenth Amendment and the equal protection rights of the California Constitution, by withdrawing established rights and privileges from minor political parties, their candidates, and their supporters. Prop 14 converted plaintiff minor parties into 'second class' parties which, unlike the major political parties are denied the ability to access voters at the moment of peak political participation, the statewide general election." (SAC, Prayer for Relief, ¶¶ l(a) and l(b).)

II. Pertinent Law-Selected.

As background, the court sets forth the various constitutional provisions cited in the SAC. Article 2, section 5(a) provides: "A voter-nomination primary election shall be conducted to select the candidates for congressional and state offices in California. All voters may vote at a voter-nominated primary election for any candidate for congressional and state elective office without regard to the political party preference disclosed by the candidate or the voter, provided that the voter is otherwise qualified to vote for candidates for the office in question. The candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office shall, regardless of party preference, compete in the ensuing general election."

The First Amendment to the Constitution of the United States of America states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of

the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourteenth Amendment provides in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, section 2 of the Constitution of the State of California provides in part: "(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

Article 1, section 3 of the Constitution of the State of California provides: "The people have the right to instruct their representatives, petition for the redress of grievances, and assemble freely to consult for the common good."

Article 1, section 7 of the Constitution of the State of California provides in part: "(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws ... (b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked."

Article IV, section 16 of the Constitution of the State of California provides: "(a) All laws of a general nature have uniform operation. (b) A local or special

statute is invalid in any case if a general statute can be made applicable."

Ill. Procedural Background.

On November 21, 2011, plaintiffs filed a verified complaint for declaratory, injunctive, and other relief and named Debra Bowen in her official capacity as Secretary of State of California (the "Secretary") as defendant. The complaint asserts that Article 2, section 5 of the California Constitution (referred to as the "Top Two Candidates Open Primary Act" and "Prop. 14") is unconstitutional, and purports to plead three causes of action: a "First Claim For Relief: Ballot Access," a "Second Claim For Relief: Violation Of Rights To Freedom Of Speech And Association," and a "Third Claim For Relief: Elections Clause."

While the initial complaint employs the phrase "by implementing an electoral process," and makes passing reference to Elections Code sections 2150, 1930 and 5100 et seq., the complaint centers on the alleged unconstitutionality of Article 2, section 5(a) without reference to any statute or other law. The complaint does not allege the creation or imposition of any burden or restriction on candidate access to the ballot for primary elections or on the ability of voters to cast their vote for the candidates of their choice at primary elections. Rather, the complaint focuses on the general ballot and alleges: "[I]n June 2010, California voters approved Proposition 14, an electoral scheme which prevents general election voters from selecting their candidate of choice. Under Proposition 14, voters in a general election may select from only two candidates for most political offices." (Complaint, ¶ 1; *see also id.*, ¶¶ 21-22, 25.)

On January 11, 2012, the Independent Voter Project, David Takashima, Abel Maldonado & Califomians to Defend the Open Primary ("Interveners") filed a complaint in intervention, stating that they intervene "as defendants, and do hereby seek an order of this Court denying any relief to Plaintiffs." (Signed Complaint In Intervention, ¶ 1.) The complaint in intervention makes specific reference to the complaint filed on November 11, 2011, and alleges: "Plaintiffs seek[] an order enjoining Defendant Secretary of State from implementing and enforcing Proposition 14, California's new Top Two Candidate Open Primary law, and S.B. 6, a statutory scheme enacted by the California Legislature on February 19, 2009 to implement Proposition 14." (*Id.*, ¶¶ 2, 6, 8 and 10.) It is not at all clear to the court that the original complaint filed by plaintiffs challenged "S.B. 6," and the SAC does not do so. On February 10, 2012, plaintiffs filed an answer and thereby generally denied each and every allegation of the complaint in intervention.

On April 24, 2012, the court issued and served orders granting interveners' application for joinder in the Secretary's demurrer and sustaining demurrers to the initial complaint. Based on the record before it, leave to amend was granted. For example, with regard to the first cause of action (ballot access) the court granted leave to amend "to plead facts sufficient to state a cognizable cause of action challenging the Proposition 14 ("Prop 14") laws based on the United States Constitution, Amendments 1 and 14, and/or the California Constitution, Article 1, sections 2 and 3, based on a restriction to access to

the ballot or otherwise." (*See* Order Demurrer to Complaint Sustained, April 24, 2013.) By separate order issued the same date, the court denied plaintiffs' motion for preliminary injunction.

On May 10, 2012, plaintiffs filed a first amended complaint. The first amended complaint purported to plead the same three causes of action ("claims") contained in the original complaint, but added a "Fourth Claim For Relief: Equal Protection Clause." Like the original complaint, the first amended complaint was laden with conclusion, assertion, and legal argument, including citation and quotation of case authorities. (*See* Order on Demurrers to First Amended Complaint, filed January 25, 2013,16:9-15.)

On January 25, 2013, the court issued and filed an order sustaining demurrers to the first cause of action (ballot access) and the fourth cause of action (equal protection clause) of the first amended complaint with leave to amend, and sustaining demurrers to the second cause of action (freedom of speech and association) and the third cause of action (elections clause) of the first amended complaint without leave to amend. With regard to the first cause of action, the court granted leave to amend to seek to state an "as applied" challenge to Proposition 14. (Order, 8:19-10:2.)

IV. The Second Amended Complaint.

On February 14, 2013, plaintiffs filed the second amended complaint (sometimes referred to as the "SAC"). The SAC is filed on behalf of ten named plaintiffs and purports to plead two causes of action,

a "First Claim For Relief: Ballot Access" and a "Second Claim For Relief: Equal Protection Clause."

Two of the plaintiffs named in the SAC identify themselves as being "a statewide political party that qualified for the ballot in 2012," the phrase "the ballot" apparently being a reference to the general ballot for an elective office in California. One plaintiff alleges it is a geographic division of a qualified political 25 party. (*Id.*, ¶¶ 14-15.)

Seven of the plaintiffs identify themselves as individuals who are members of one of the plaintiff political parties and allege they regularly support and vote for candidates of one such political party. (*Id.*, ¶¶ 7-13.) Of the seven individual plaintiffs, two (Charles L. Hooper and C.T. Weber) allege that in 2012 they ran a campaign as a candidate for state elective office in California, and two (Steve Collett and Marsha Feinland) allege that in 2012 they ran a campaign as a candidate for congressional elective office. (*Id.*, ¶¶ 8-10 and 12.)

The second amended complaint alleges "Plaintiffs bring this action based upon defendant Bowen's implementation of Proposition 14," and asserts that, as implemented, Article 2, section 5 of the California Constitution violates various provisions of the California and United States constitutions. In a nutshell, plaintiffs complain that defendant Bowen's implementation of Prop. 14 prevented minor political parties, minor party voters, and minor party candidates from participating in the November 6, 2012 statewide general election, despite the fact that many minor party candidates received substantial voter support in the June 5, 2012 primary election." (*Id.*, ¶¶ 1-3.)

As was the case with the original complaint and the first amended complaint, the second amended complaint does not allege creation or imposition of a burden or restriction on opportunity to participate in a primary election. Rather, the allegation is that Prop. 14 has imposed an unconstitutional burden in connection with plaintiffs' participation in the statewide general election. (*See id.*, ¶¶ 2-3, 19-37, 40, 42-44.)

In support of their allegation that many minor party candidates received substantial voter support in the 2012 primary election, plaintiffs allege: "During last year's [2012] statewide election, nine minor party candidates – including plaintiff Charles L. Hooper, candidate for state assembly - received 5% or more of the vote [in the primary election] but were not permitted to advance to the general election." (*Id.*, ¶ 2.) The SAC alleges: "Dozens of minor party candidates, receiving as much as 18% of the vote, were limited to participation in the June primary." (*Id.*, ¶ 3.) The SAC alleges that in the 2012 statewide primary Green Patty candidate Anthony W. Vieyra received 18.6% of the vote, alleges that Libertarian Patty candidate John H. Webster received 15.4% of the vote, and alleges that plaintiff Charles L. Hooper received 5.4% of the vote. (*Id.*, ¶¶ 29-31.)

V. Demurrers -Second Amended Complaint.

On March 11, 2013, the Secretary filed a demurrer to second amended complaint and memorandum of points and authorities. On the same date, the Secretary filed a request for judicial notice. Also on March 11, 2013, the Interveners filed a

demurrer and memorandum of points and authorities and a request for judicial notice. On May 21, 2013, plaintiffs filed a memorandum of points and authorities in opposition to the demurrers and a request for judicial notice. On May 28, 2013, the Secretary filed a reply and a further request for judicial notice and Interveners filed a reply and supplemental request for judicial notice.

The aforementioned requests for judicial notice, all of which are unopposed, are GRANTED. (*See* Evid. Code § 452, subds. (c), (d) and (h), and Evid. Code § 453.) Nevertheless, the court does not take judicial notice of the truth of factual matters asserted in the attached exhibits. For example, as to Interveners' supplemental request filed on May 28, 2013, the court takes judicial notice of the reporting of certain statements purportedly made and published in connection with the debate on Prop. 14 but does not take judicial notice of the truth of such statements. Also, the court notes some matters subject to the requests are of marginal relevance to the issues presently before the court[.]

On June 7, 2013, the court published a tentative ruling. On June 10, 2013, the parties appeared for hearing on the demurrers and the court entertained oral argument. On June 18, 2013, the parties separately filed further papers as requested by the court, which the court has considered.

On June 19, 2013, the clerk of the court filed a nine-page letter dated June 18, 2013 addressed directly to the undersigned judge by a person identifying himself as an attorney for the Libertarian Party of Washington State. Interveners filed an objection to that letter communication on July 25,

2013, which objection is SUSTAINED. The court did not grant leave for the submission of such additional communication by a purported "amicus."

On June 21, 2013, the court issued an order taking both demurrers under submission. On September 5, 2013, the court issued an order which order is amended by the instant order.

VI. Discussion and Disposition.

1. Standards on Demurrer.

The demurrers filed on March 11, 2013 assert that neither of the claims contained in the second amended complaint states facts sufficient to constitute a cause of action. (*See* C.C.P. § 430.10(e); *see also* C.C.P. §§ 430.30-430.60.)

Interveners cite authority to the effect that the court "should apply federal law to determine whether a complaint pleads a cause of action under section 1983 sufficient to survive a general demurrer." (*See* Memo., p. 2, *citing Catsouras* v. *Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 891, quoting *Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 563). Plaintiffs do not dispute the applicability of such authority. (Opp., p. 5.)

Accordingly, the court has considered the demurrers in light of federal pleading standards, which are not fundamentally different from state pleading standards, including that "the allegations of the complaint are generally taken as true," and that a demurrer may be sustained "only if it 'appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (*Catsouras*, *supra*, 181 Cal.App.4th at p.

891.) "Furthermore, a pleading is insufficient to state a claim ... if the allegations are mere conclusions," and "[s]ome particularized facts demonstrating a constitutional deprivation are needed to sustain a cause of action ...." (*Id.*) Nevertheless, as discussed below, the court's determination would be the same regardless of whether state pleading standards are applied.

2. Voting Rights and Standard Governing Election Law Challenges.

"Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections ... The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." (*Reynolds v. Sims*, 377 U.S. 533, 554-555 (1964).) And see: (*William v. Rhodes*, 393 U.S. 23, 29-31, 38-39 (1968); (*Storer v. Brown*, 415 U.S. 724 (1974)

"The right of suffrage, everywhere recognized as one of the fundamental attributes of our form of government, is guaranteed and secured by the Constitution of this state to all citizens who are within the requirements therein provided.... This constitutional right of the individual citizen includes the right to vote ... at primary elections." (*Communist Party v. Peek* (1942) 20 Cal.2d 536, 542; *see also* Cal. Const. Art. 2, §§ 2 and 5; Elections Code § 2000.)

In *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), the Court stated: "A court considering a challenge to a state election law must weigh 'the

character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiffs rights. ", (*Id.* [citations omitted.]) "The rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First Amendment and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulations must be 'narrowly drawn to advance a state interest of compelling importance.' [Citation.] But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." (*Id.* [citation omitted]; *see*, *e.g.*, *Williams v. Rhodes*, *supra*, 393 U.S. at pp. 30-31; *Storer v. Brown*, 415 U.S. 724 (1974); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-196 (1986); *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 174.)

3. Ballot Access.

Plaintiffs do not allege that, on its face or as applied, Prop.14 imposes any restriction or burden on the opportunity of any candidate or voter to participate in a primary election. Plaintiffs do not (and cannot) dispute that Article 2, section 5(a) provides all candidates with easy and equal access to the primary election ballot, and provides all voters

with the same opportunity to vote for the primary election candidate(s) of their choice. Rather, plaintiffs allege that, while they "still have the opportunity to participate in a primary election," Prop. 14 as applied "unconstitutionally burdened the rights of minor party voters, minor party candidates, the minor parties themselves from effective participation in California's *general* elections, even when those parties and candidates demonstrated substantial support in the primary election." (SAC, ¶ 40 [italics supplied.]) Plaintiffs' allegations that certain minor-party candidates received more than 5% and as much as 18.6% of the primary election votes cast for particular offices and yet did not qualify for the general election ballot are insufficient to set forth a constitutionally cognizable burden on ballot access.

It is well settled that States have the right to require candidates to make "a preliminary showing of substantial support" in order to qualify for a place on the general election ballot. (*Munro*, *supra*, 479 U.S. at p. 194, and cases cited; *see also California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) ["in order to avoid burdening the general election ballot with frivolous candidacies, a State may require parties to demonstrate 'a significant modicum of support' before allowing their candidates a place on that ballot"].')

Under California law, the purpose of a primary election is to provide the machinery for the selection of candidates to be voted for in the ensuing general election. (*Cummings v. Stanley* (2009) 177 Cal. App. 4th 493,510.) As observed by the Supreme Court: "[I]t is now clear that States may condition

access to the general election ballot by a minor party candidate or independent candidate upon a showing of a modicum of support among the potential voters for the office." (*Munro*, *supra*, 479 U.S. at pp. 193-194.) But it does not follow that any and every candidate who receives some percentage of the votes cast in a given primary election thereby obtains a constitutional right to compete in the ensuing general election. Plaintiffs cite no law expressing or supporting such a right. In any event, Article 2, section 5(a) does not restrict access to the general election ballot based on a specified percentage of votes cast in the primary election but instead allows the top two primary election vote-getters, with any percentage of votes, to advance to the general election.

In *Munro*, *supra*, 479 U.S. 189, the Supreme Com1 addressed a state statute which required that a minor-party candidate for partisan office receive 1 % of all votes cast for that office in the primary election before the candidate's name would be placed on the general election ballot. The Court stated: "The question for decision is whether this statutory requirement, as applied to candidates for statewide offices, violates the First and Fourteenth Amendments to the United States Constitution." (*Id*., at pp. 190-191.) The Court observed that, as with Prop. 14, "Washington conducts a 'blanket primary' at which registered voters may vote for any candidate of their choice, irrespective of the candidates' political party affiliation." (*Id.*, p. 192.) The Court further observed: "The primary election in Washington, like its counterpart in California, is 'an integral part of the entire electoral process … [that] functions to winnow out and finally reject all but the

chosen candidates.'" (*Id.*, p. 196.) After review of pertinent authority, the Court held that the challenged "winnowing" structure was constitutionally permissible. (*Id.*, pp. 194-195, citing, *inter alia*, *Storer v. Brown*, *supra*, 415 U.S. at p. 736.) In doing so, the Court pointed out: "States are not burdened with a constitutional imperative to reduce voter apathy or to 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general ballot." (*Id.*, at p. 198.) Similarly, "[i]t can hardly be said that ... voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election ...." (*Id.*, p. 199.)

Plaintiffs are correct that the Supreme Court has not yet squarely addressed whether a "top two" primary system such as established by Article 2 section 5(a) affects or could affect ballot access rights in a manner that would be constitutionally impermissible. (*See*, *e.g.*, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 452, 452 (2008) ["Petitioners are correct that we assumed that the non-partisan primary we described in *Jones* would be constitutional"]; *id.*, p. 458, n. 11.)

Nevertheless, in a recent decision the United States Court of Appeals for the Ninth Circuit that held that a similar system enacted in the State of Washington did not impose a "severe burden" on the rights of minor parties (or their voters or candidates) regarding access to the general election ballot. (*See Washington State Republican Party v. Washington State Grange* (9th Cir. 2012) 676 F.3d 784, 794-795.) Relying on *Munro* and other Supreme Court cases,

the court held, among other things, that "because [the law] gives major-and minor-party candidates equal access to the primary and general election ballots, it does not give the 'established parties a decided advantage over any new parties struggling for existence. '" (*Id.*, at p. 795, quoting *Williams v. Rhodes* (1968) 393 U.S. 23, 31; *see also id.*, quoting *Munro*, *supra*, 479 U.S. at p. 199.) Because the law did not impose a "severe" burden on constitutional rights, the court held that it survived review because it furthered Washington's "important regulatory interests." (*Id.*, at pp. 794-795.)

In *Washington State Republican Party v. Washington State Grange*, *supra*, the court cited *California Democratic Party v. Jones*, *supra*, in which the Supreme Court held that California's then existing blanket primary (Proposition 198) violated a political party's First Amendment right of association because it involved a partisan primary in which a party was required to permit non-party members to participate in selecting the party's candidate for the general election, which involved "forced association." (530 U.S. at pp. 578-582.)* In evaluating the State's interests, the Supreme Court noted that the First Amendment infringement could be avoided by "resorting to a nonpartisan blanket primary," under which each voter, "regardless of party affiliation, may then vote for any candidate,

* With regard to non-partisan elections, *see Communist Party v. Peek*, *supra*, 20 Cal.2d at p. 544 ["in a non-partisan election the party system is not an integral part of the elective machinery and the individual's right of suffrage is in no way impaired by the fact that he cannot exercise his right through a party organization."])

and the top two vote getters (or however many the State prescribes) then move on to the general election." (*Id.*, p. 585.) The Supreme Court stated that under such a system, "a State may ensure more choice, greater participation, increased 'privacy,' and a sense of 'fairness' - all without severely burdening a political party's First Amendment right of association." (*Id.*, p. 586.)

Plaintiffs are correct that the above statements made by the Court in *Jones* are *dicta* as to whether a "top two" non-partisan voter-nomination primary would or could constitute an unconstitutional infringement on ballot access. Nonetheless, such statements provide some indication that the Supreme Court would not consider such a hypothesized system to impose a severe burden on voting and associational rights. *Washington State Republican Party*, *supra*, 676 F.3d at p. 795 ["the Supreme Court has expressly approved of top two primary systems"]; *see* also *Coeur D'Alene Tribe of Idaho v. Hammond* (9th Cir. 2004) 384 F.3d 674, 683 ["our precedent requires that we give great weight to dicta of the Supreme Court"]; *California Amplifier, Inc. v. RLI Ins. Co.* (2001) 94 Cal.App.4th 102, 114 ["legal pronouncements by the Supreme Court are highly probative and, generally speaking, should be followed even if dictum"]; *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Ca1.4th 257, 287.)

Plaintiffs are correct that, notwithstanding the apparently plenary power of the States recognized by Article I, section 4 of the Constitution, the Supreme Court of the United States has invalidated certain state-imposed restrictions on ballot access. However,

the Court has not done so in the context of a non-partisan election such as is required by Article 2 section 5(a.)

For example, while Article 2 section 5(a) is limited to selection of candidates for congressional and state elective offices in California, in *Anderson v. Celebrezze,* 460 U.S. 780 (1983), the Court held that an Ohio "early filing deadline" statute which required that an independent candidate for President file a statement of candidacy and nominating petition in March in order to appear on the general election ballot in November imposed an unconstitutional burden on voting and associational rights: "A [statutory] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." *Id.*, 793-794. Likewise, in *Williams v. Rhodes*, *supra*, 393 U.S. at pp. 24-25, the Court invalidated a statute requiring a new party to obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last preceding gubernatorial election in order to have any access to the election. That statute imposed a requirement applicable only to new parties and prevented any access to the ballot unless it was met. In contrast, Prop. 14 provides easy (and unchallenged) access to the primary ballot and allows voters to vote for candidates of any (or no) party affiliation or preference in the primary process at the same time and on the same terms as major party candidates. (And see: *Washington State Republican Party*, *supra*, 676 F.3d at p. 794.)

Plaintiffs do not dispute that Article 2, section 5 gives all candidates equal access to the primary election ballot. Article 2, section 5 does not, on its face or as applied, give any "established" candidate or party an advantage over plaintiffs, or over any other political party, candidate, or voter. The circumstance that a candidate does not receive enough votes in a primary election to be one of the top two vote-getters cannot be equated or conflated with an absence of access to a ballot.

The court concludes that the primary election required by Article 2 section 5 must be considered as an integral part of the entire election process. (*See*, *e.g.*, *Donnellan v. Hite* (1956) 139 Cal.App.2d 43, 47 ["The primary election is an integral part of the election process"]; *Munro*, *supra*, 479 U.S. at p. 196; *Cummings*, *supra*, 177 Cal.App.4th 493, 509-510.) The court further concludes that because California affords all candidates easy access to the primary election ballot and the opportunity for the candidates to wage a ballot-connected campaign, the effect of Prop. 14 (Article 2, section 5(a)) on plaintiffs' constitutional rights is slight, and any resulting burden or restriction does not violate any constitutionally guaranteed right. (*See Munro*, *supra*, 479 U.S. at p. 196 ["We think that the State can properly reserve the general election ballot 'for major struggles'"; "The State of Washington was clearly entitled to raise the ante for ballot access, to simplify the general election ballot, and to avoid the possibility of unrestrained factionalism at the general election"]); *Burdick v. Takushi*, *supra*, 504 U.S. at p. 434 ["when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth

Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."]

Without limiting the generality of the foregoing, with regard to the allegation that as part of the implementation of Article 2, section 5 the Secretary decided to hold the primary in June, the court notes the June date was set by the Legislature in 2007, well prior to and independent of Prop. 14. Indeed, the second amended complaint alleges as much. (SAC, ¶ 18.) In any event, plaintiffs have failed to cite (and the court has been unable to find) any law tending to support a conclusion that plaintiffs (or candidates, voters, and/or political parties in general) have a constitutionally guaranteed right to require the State to set primary election or general election dates at times and places thought by certain candidates, voters, and/or political parties as conducive to their success at the ballot.

The court determines that, whether the second amended complaint is considered under the rules governing pleading in federal courts or the rules of pleading in California courts, the demurrers to the "First Claim for Relief: Ballot Access" must be sustained without leave to amend. The court's decision is made on the ground that the "First Claim For Relief: Ballot Access" does not state facts sufficient to constitute a cause of action. (See C.C.P. § 430.10(e).)

Although plaintiffs' opposition includes a request that leave to amend be permitted if the demurrer is sustained, they have not met their burden of demonstrating how they could amend the cause of action to overcome the deficiencies. (*See*

Goodman v. Kennedy (1976) 18 Cal.3d 335, 349.) The court has sustained two previous demurrers with leave to amend and plaintiffs have not stated a sufficient constitutional claim. Under the circumstances, permitting a further opportunity to amend would be futile. (*Cf. Hills Transp. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702,713-714.)

4. Equal Protection.

The court further determines that the demurrers to the "Second Claim For Relief: Equal Protection Clause" must be sustained without leave to amend.

In this claim, plaintiffs allege in relevant paJi that Prop. 14 "withdrew an established right from plaintiffs, namely, the right of minor political parties, their voters, and their candidates to participate in statewide general elections" and that "[b]ecause Prop. 14 drafters were motivated by an invidious purpose when they enacted electoral reform, and because Secretary Bowen's implementation of Prop. 14 in 2012 denied numerous well-supported minor party candidates from participating in the general election, plaintiffs' equal protection rights have been violated.... " (SAC, ¶ 43.) In its order of January 25, 2013, the court sustained a demurrer to a similar claim based on similar allegations in the first amended complaint with leave to amend to plead facts sufficient to state a constitutional equal protection challenge. Plaintiffs have not remedied the deficiencies.

The court's decision is made on the ground that the cause of action as amended does not state facts sufficient to constitute a cause of action (C.C.P. § 430.10(e)), and is based on the points recited in the papers filed by defendants in support of their demurrers. In so ruling, the court concludes that plaintiffs have failed to identify "an established right" which was withdrawn from plaintiffs (or any of them) by the implementation of Prop. 14, have failed to sufficiently allege any instance of invidious intent or conduct, and have failed to meet their burden to show how they could amend this cause of action to overcome the deficiencies pointed to by defendants. (*Goodman*, *supra*, 18 Ca1.3d at p. 349.)

Among other things, and as the court stated in its prior order, Prop. 14 on its face does not appear to be directed to any classification or group. (*See*, *e.g.*, Cal. Const. Art II, § 5; Nowak & Rotunda, Constitutional Law [5th ed.],§ 14.4 [and cases cited therein.]) Nor is there anything in Prop. 14 that "withdraws" an "established right" from a particular group of people. It appears the claim is based largely on principles set forth in *Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052, 1083-1084, vacated and remanded in *Hollingsworth v. Perry* (2013) 133 S.Ct. 2652. Plaintiffs' theory is not supported by *Perry*, in which the court held that "the Equal Protection Clause requires the state to have a legitimate reason for withdrawing a right or benefit from one group but not others, whether or not it was required to confer that right or benefit in the first place." (671 F.3d at pp. 1083-1084.)

Here, in contrast to *Perry*, the challenged law does not on its face or in its application "target" one

group or another for disparate treatment. Instead, it allows broad access to candidates identifying with any party (or no party) to participate in the primary election and then permits the top two vote-getters of whatever (or no) party affiliation to advance to the general election. In contrast to circumstances such as those in *Valle Del Sol Inc. v. Whiting* (9th Cir. 2013) 708 F.3d 8O8, 819, or *Moss v. U.S. Secret Service* (9th Cir. 2012) 675 F.3d 1213, 1224-1225, there are no allegations that the Secretary applied the law in a discriminatory way to deny rights to any particular group or persons with a particular viewpoint as compared to others.

Further, there are insufficient allegations to support a violation of the Equal Protection Clause based on discriminatory intent. "[O]fficial action will not be held unconstitutional solely because it results in a ... disproportionate impact.... Proof of ... discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." (*Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 264-265.)

First, Plaintiffs' allegations regarding the intent of the "drafters" of Prop. 14 are irrelevant because "such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent." (*Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm'n* (1990) 51 Cal.3d 744, 765 n.l0.) This applies equally to the materials included in Plaintiffs' Request for Judicial Notice, upon which they base an argument that the manner in which the legislature decided to place Prop. 14 on the ballot reflects an invidious purpose. Regardless of how the

legislature decided to place it on the ballot, however, such circumstances do not show that the voters lacked ample time to consider and vote on the measure or that they had any discriminatory intent in doing so.

Second, Plaintiffs' selected quotation of an argument against Prop. 14 in the voter guide materials is an insufficient basis on which to support a finding of voter discriminatory intent. (*See*, *e.g.*, *Legislature v. Eu* (1991) 54 Ca1.3d 492, 505; *NLRB v. Fruit & Vegetable Packers & Warehousemen* (1964) 377 U.S. 58, 66; Ross v. *RagingWire Telecommuns., Inc.* (2008) 42 Cal.4th 920, 929 [rejecting opponents' ballot arguments as a guide to voter intent].) As a whole, the statements in the voter guide do not reflect that the proposition was aimed at depriving a particular group of established rights. (*See* Interveners' Request for Judicial Notice, Exh. F.)

To the extent the cause of action is based on a violation of the California Constitution as opposed to the United States Constitution, it is deficient for the same reasons. "In analyzing constitutional challenges to election laws, [the California Supreme Court] has followed closely the analysis of the United States Supreme Court." (*Edelstein*, *supra*, 29 Ca1.4th at p. 179.) Also, Prop. 14 is itself part of the California Constitution and is accorded equal dignity with other provisions. (*Strauss v. Horton* (2009) 46 Ca1.4th 364, 465-469.)

VII. Conclusion.

The second amended complaint is dismissed. The September 20, [2]013 dismissal of the entire action is vacated. The parties shall appear for case management conference on October 4, 2013 at 9 o'clock a.m. and will address the status of the case, including the complaint in intervention and entry of judgment.

The foregoing order augments, amends, and corrects the orders issued and filed herein on September 5, 2013 and September 20, 2013.

IT IS SO ORDERED.

Date: September 23, 2013

/s/ Lawrence John Appel
Lawrence John Appel
Superior Court Judge

APPENDIX D

RELEVANT PROVISIONS OF THE CALIFORNIA CONSTITUTION AND ELECTION CODE

CALIFORNIA CONSTITUTION

Article II, Section 5

§ 5. Voter-nominated primary elections for congressional and state elective offices; indication of political party preference on ballot; prohibition on nomination by political parties or party central committees; partisan elections for presidential candidates, political parties, and party central committees; open presidential primary; right to participate in general election

Sec. 5. (a) A voter-nomination primary election shall be conducted to select the candidates for congressional and state elective offices in California. All voters may vote at a voter-nominated primary election for any candidate for congressional and state elective office without regard to the political party preference disclosed by the candidate or the voter, provided that the voter is otherwise qualified to vote for candidates for the office in question. The candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office shall, regardless of party preference, compete in the ensuing general election.

(b) Except as otherwise provided by Section 6, a candidate for a congressional or state elective office may have his or her political party preference, or lack of political party preference, indicated upon the ballot for the office in the manner provided by

statute. A political party or party central committee shall not nominate a candidate for any congressional or state elective office at the voter-nominated primary. This subdivision shall not be interpreted to prohibit a political party or party central committee from endorsing, supporting, or opposing any candidate for a congressional or state elective office. A political party or party central committee shall not have the right to have its preferred candidate participate in the general election for a voter-nominated office other than a candidate who is one of the two highest vote-getters at the primary election, as provided in subdivision (a).

(c) The Legislature shall provide for partisan elections for presidential candidates, and political party and party central committees, including an open presidential primary whereby the candidates on the ballot are those found by the Secretary of State to be recognized candidates throughout the nation or throughout California for the office of President of the United States, and those whose names are placed on the ballot by petition, but excluding any candidate who has withdrawn by filing an affidavit of noncandidacy.

(d) A political party that participated in a primary election for a partisan office pursuant to subdivision (c) has the right to participate in the general election for that office and shall not be denied the ability to place on the general election ballot the candidate who received, at the primary election, the highest vote among that party's candidates.

Article II, Section 6

§ 6. Nonpartisan offices

Sec. 6. (a) All judicial, school, county, and city offices, including the Superintendent of Public Instruction, shall be nonpartisan.

(b) A political party or party central committee shall not nominate a candidate for nonpartisan office, and the candidate's party preference shall not be included on the ballot for the nonpartisan office.

CALIFORNIA ELECTION CODE

§ 13. Legally qualified candidate; write-in candidate; legislative intent

(a) A person shall not be considered a legally qualified candidate for an office, for party nomination for a partisan office, or for nomination to participate in the general election for a voter-nominated office, under the laws of this state unless that person has filed a declaration of candidacy or statement of write-in candidacy with the proper official for the particular election or primary, or is entitled to have his or her name placed on a general election ballot by reason of having been nominated at a primary election, or having been selected to fill a vacancy on the general election ballot as provided in Section 8807, or having been selected as an independent candidate pursuant to Section 8304.

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

section be construed as preventing or prohibiting a person from standing or campaigning for an elective office by means of a "write-in" campaign. However, nothing in this section shall be construed as an exception to the requirements of Section 15341 or to permit a person to be a write-in candidate contrary to Sections 8600 and 8606.

* * *

§ 300.5. Affiliated with a political party

"Affiliated with a political party" as used in reference to a voter or to a candidate for a voter-nominated office means the party preference that the voter or candidate has disclosed on his or her affidavit of registration.

§ 332.5. Nominate

"Nominate" means the selection, at a state-conducted primary election, of candidates who are entitled by law to participate in the general election for that office, but does not mean any other lawful mechanism that a political party may adopt for the purposes of choosing the candidate who is preferred by the party for a nonpartisan or voter-nominated office.

§ 334. Nonpartisan office

"Nonpartisan office" means an office, except for a voter-nominated office, for which no party may nominate a candidate. Judicial, school, county, and municipal offices, including the Superintendent of Public Instruction, are nonpartisan offices.

§ 337. "Partisan office" or "party-nominated office" defined

"Partisan office" or "party-nominated office" means any of the following offices:

(a) President of the United States, Vice President of the United States, and the delegates therefor.

(b) Elected member of a party committee.

§ 359.5. Voter-nominated office

(a) "Voter-nominated office" means a congressional or state elective office for which a candidate may choose to have his or her party preference or lack of party preference indicated upon the ballot. A political party or party central committee shall not nominate a candidate at a state-conducted primary election for a voter-nominated office. The primary conducted for a voter-nominated office does not serve to determine the nominees of a political party but serves to winnow the candidates for the general election to the candidates receiving the highest or second highest number of votes cast at the primary election. The following offices are voter-nominated offices:

(1) Governor.
(2) Lieutenant Governor.
(3) Secretary of State.
(4) Controller.
(5) Treasurer.
(6) Attorney General.
(7) Insurance Commissioner.
(8) Member of the State Board of Equalization.
(9) United States Senator.

(10) Member of the United States House of Representatives.
(11) State Senator.
(12) Member of the Assembly.

(b) This section does not prohibit a political party or party central committee from endorsing, supporting, or opposing a candidate for an office listed in subdivision (a).

§ 8002.5. Candidates for voter-nominated office; indication of party preference

(a) A candidate for a voter-nominated office shall indicate one of the following upon his or her declaration of candidacy, which shall be consistent with what appears on the candidate's most recent affidavit of registration:

(1) "Party Preference: _____ (insert the name of the qualified political party as disclosed upon your affidavit of registration)."

(2) "Party Preference: None (if you have declined to disclose a preference for a qualified political party upon your affidavit of registration)."

(b) The selection made by a candidate pursuant to subdivision (a) shall appear on the primary and general election ballot in conjunction with his or her name, and shall not be changed between the primary and general election.

(c) Regardless of the party preference, or lack of party preference, of the candidate or the voter, any qualified voter may vote for any candidate for a voter-nominated office if the voter is otherwise entitled to vote for candidates for the office to be filled. Nothing in Section 2151, 3006, 3007.5, 3205, or

13102 shall be construed to limit the ability of a voter to cast a primary election ballot for any candidate for a voter- nominated office, regardless of the party preference, or lack of party preference, designated by the candidate for inclusion upon the ballot pursuant to this section, provided that the voter is otherwise qualified to cast a ballot for the office at issue.

(d) A candidate designating a party preference pursuant to subdivision (a) shall not be deemed to be the official nominee of the party designated as preferred by the candidate. A candidate's designation of party preference shall not be construed as an endorsement of that candidate by the party designated. The party preference designated by the candidate is shown for the information of the voters only and may in no way limit the options available to voters.

(e) All references to party preference or affiliation shall be omitted from all forms required to be filed by a voter-nominated candidate pursuant to this division in the same manner that such references are omitted from forms required to be filed by nonpartisan candidates pursuant to Section 8002, except that the declaration of candidacy required by Section 8040 shall include space for the candidate to list the party preference disclosed upon the candidate's most recent affidavit of registration, in accordance with subdivision (a).

§ 8141.5. Voter-nominated office; candidates at ensuing election

Except as provided in subdivision (b) of Section 8142, only the candidates for a voter-nominated office who

receive the highest or second highest number of votes cast at the primary election shall appear on the ballot as candidates for that office at the ensuing general election. More than one candidate with the same party preference designation may participate in the general election pursuant to this subdivision. Notwithstanding the designation made by the candidate pursuant to Section 8002.5, no candidate for a voter-nominated office shall be deemed to be the official nominee for that office of any political party, and no party is entitled to have a candidate with its party preference designation participate in the general election unless that candidate is one of the candidates receiving the highest or second highest number of votes cast at the primary election.

§ 8605. Persons whose names may be placed on ballot

No person whose name has been written in upon a ballot for an office at the direct primary may have his or her name placed upon the ballot as a candidate for that office for the ensuing general election unless one of the following is applicable:

(a) At that direct primary he or she received for a partisan office votes equal in number to 1 percent of all votes cast for the office at the last preceding general election at which the office was filled. In the case of an office that has not appeared on the ballot since its creation, the requisite number of votes shall equal 1 percent of the number of all votes cast for the office that had the least number of votes in the most recent general election in the jurisdiction in which the write-in candidate is seeking office.

(b) He or she is an independent nominee for a partisan office pursuant to Part 2 (commencing with Section 8300).

(c) At that direct primary he or she received for a voter-nominated office the highest number of votes cast for that office or the second highest number of votes cast for that office, except as provided by subdivision (b) of Section 8142 or Section 8807.

§ 8606. Voter-nominated offices

Notwithstanding any other provision of law, a person may not be a write-in candidate at the general election for a voter-nominated office.

§ 9083.5. Partisan, voter-nominated, and nonpartisan offices; explanation of election procedure; inclusion in state ballot pamphlet

(a) If a candidate for nomination or election to a partisan office will appear on the ballot, the Secretary of State shall include in the state ballot pamphlet a written explanation of the election procedure for such offices. The explanation shall read substantially similar to the following:

PARTY-NOMINATED/PARTISAN OFFICES

Under the California Constitution, political parties may formally nominate candidates for party-nominated/partisan offices at the primary election. A candidate so nominated will then represent that party as its official candidate for the office in question at the ensuing general election and the ballot will reflect an official designation to that effect. The top votegetter for each party at the primary election is entitled to participate in the

general election. Parties also elect officers of official party committees at a partisan primary.

No voter may vote in the primary election of any political party other than the party he or she has disclosed a preference for upon registering to vote. However, a political party may authorize a person who has declined to disclose a party preference to vote in that party's primary election.

(b) If any candidate for nomination or election to a voter-nominated office will appear on the ballot, the Secretary of State shall include in the state ballot pamphlet a written explanation of the election procedure for such offices. The explanation shall read substantially similar to the following:

VOTER-NOMINATED OFFICES

Under the California Constitution, political parties are not entitled to formally nominate candidates for voter-nominated offices at the primary election. A candidate nominated for a voter-nominated office at the primary election is the nominee of the people and not the official nominee of any party at the following general election. A candidate for nomination or election to a voter-nominated office shall have his or her party preference, or lack of party preference, reflected on the primary and general election ballot, but the party preference designation is selected solely by the candidate and is shown for the information of the voters only. It does not constitute or imply an endorsement of the candidate by the party designated, or affiliation between the party and candidate, and no candidate nominated by the qualified voters for any voter-nominated office shall be deemed to be the officially nominated candidate of

any political party. The parties may list the candidates for voter-nominated offices who have received the official endorsement of the party in the sample ballot.

All voters may vote for any candidate for a voter-nominated office, provided they meet the other qualifications required to vote for that office. The top two vote getters at the primary election advance to the general election for the voter-nominated office, even if both candidates have specified the same party preference designation. No party is entitled to have a candidate with its party preference designation participate in the general election unless such candidate is one of the two highest vote getters at the primary election.

(c) If any candidate for nomination or election to a nonpartisan office, other than judicial office, shall appear on the ballot, the Secretary of State shall include in the state ballot pamphlet a written explanation of the election procedure for such offices. The explanation shall read substantially similar to the following:

NONPARTISAN OFFICES

Under the California Constitution, political parties are not entitled to nominate candidates for nonpartisan offices at the primary election, and a candidate nominated for a nonpartisan office at the primary election is not the official nominee of any party for the office in question at the ensuing general election. A candidate for nomination or election to a nonpartisan office may NOT designate his or her party preference, or lack of party preference, on the primary and general election ballot. The top two vote

getters at the primary election advance to the general election for the nonpartisan office.

(d) Posters or other printed materials containing the notices specified in subdivisions (a) to (c), inclusive, shall be included in the precinct supplies pursuant to Section 14105.

§ 15452. Plurality of votes elects or nominates; exceptions

The person who receives a plurality of the votes cast for any office is elected or nominated to that office in any election, except:

(a) An election for which different provision is made by any city or county charter.

(b) A municipal election for which different provision is made by the laws under which the city is organized.

(c) The election of local officials in primary elections as specified in Article 8 (commencing with Section 8140) of Part 1 of Division 8.

(d) The nomination of candidates for voter-nominated office at the primary election to participate in the general election for that office as specified in Article 8 (commencing with Section 8140) of Part 1 of Division 8.

APPENDIX E

EXCERPTS CALIFORNIA SECRETARY OF STATE VOTER PARTICIPATION REPORTS FOR 2012 AND 2014 PRIMARY AND GENERAL ELECTIONS

The following excerpts are derived from publicly available "Statement of Vote" reports published by the California Secretary of State and judicially noticed by the courts below:

June 5, 2012 Primary Election

Registered Voters	Total Voters	Turnout Registered
17,153,699	5,328,296	31.06%

November 6, 2012 General Election

Registered Voters	Total Voters	Turnout Registered
18,245,970	13,202,158	72.36%

June 3, 2014 Primary Election

Registered Voters	Total Voters	Turnout Registered
17,722,006	4,461,346	25.17%

November 4, 2014 General Election

Registered Voters	Total Voters	Turnout Registered
17,803,823	7,513,972	42.20%