No. 15-135

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 CALIF., AND PEACE AND FREEDOM PARTY OF CALIF.,

Petitioners,

v.

ALEX PADILLA, CALIFORNIA SECRETARY OF STATE AND CALIFORNIANS TO DEFEND THE OPEN PRIMARY, *et al*.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, First Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS CALIFORNIANS TO DEFEND THE OPEN PRIMARY, INDEPENDENT VOTER PROJECT, ABEL MALDONADO, AND DAVID TAKASHIMA

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RESTATEMENT OF QUESTION PRESENTED

The question presented herein, fairly re-stated, is:

Should this Court consider petitioners' claim that California's Proposition 14, adopting a "top-two" election system for state and congressional office, unduly infringes voters' associational rights, where:

1. All candidates have easy access to the primary election ballot on equal terms, and an equal opportunity to advance to the general election;

2. This Court indicated, in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), that such a nonpartisan top-two system would be constitutional;

3. This Court already denied certiorari of an essentially identical claim, in *Wash. State Republican Party v. Wash. State Grange*, 676 F.3d 784 (9th Cir.), *cert. denied*, 568 U.S. ___, 133 S. Ct. 110 (2012);

4. The only differences petitioners identify between California's top-two system and Washington's are (a) California prohibits write-in votes at the general (but not primary) election, and (b) Washington's primary is in August, while California's is in June;

5. This Court held, in *Burdick v. Takushi*, 504 U.S. 428 (1991), that write-in voting can be barred;

RESTATEMENT OF QUESTION PRESENTED – Continued

6. *Burdick* held that voters have a "limited interest in waiting until the eleventh hour to choose his preferred candidate," *id*. at 439;

7. This Court also held, in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), that "[i]t can hardly be said that [a State]'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," even when there is lower turnout at the primary, *id*. at 198-99; and

8. California's top-two primary supports interests this Court has characterized as "compelling"?

PARTIES

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 plaintiffs in the California Superior Court; the appellants in the California Court of Appeal; and the petitioners in the California Supreme Court.

Respondent Alex Padilla, Secretary of State of California, was the defendant in the California Superior Court, a respondent in the California Court of Appeal, and a respondent in the California Supreme Court.

Respondents Californians to Defend the Open Primary, Independent Voter Project, Abel Maldonado, and David Takashima were intervenor-defendants in the California Superior Court, respondents in the California Court of Appeal, and respondents in the California Supreme Court.

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

Neither Californians to Defend the Open Primary nor Independent Voter Project – the two corporate respondents herein – have a parent corporation or a publicly held company owning 10% or more of the corporation's stock.

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INTRODUCTION

This case concerns the constitutionality of California's Proposition 14, the Top Two Candidate Open Primary Act, adopted by the voters in 2010.

That system was closely modeled on the State of Washington's top-two system, which was upheld by this Court in *Washington State Grange v. Washington Republican Party*, 552 U.S. 442 (2008) ("*Washington State Grange I*"). California gives every candidate equal, easy access to a primary ballot in June, and provides that all candidates for a given office run against each other, but only the top two vote-getters proceed to a general election in November, regardless of their political party preference. CAL. CONST. art. II, § 5(a).

Proposition 14 also broadens voter eligibility for participation in primary elections. Whereas under the prior, partisan system, voters could only vote in the primary for the party with which they were registered (and unaffiliated voters could choose a party's primary to vote in, if the party permitted it), Proposition 14 provides that "[a]ll 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." *Id*.

As the Ninth Circuit has characterized the measure, Proposition 14 "fundamentally changes the

California election system by eliminating party primaries and general elections with party-nominated candidates, *and substituting a nonpartisan primary and a two-candidate runoff*." *Chamness v. Bowen*, 722 F.3d 1110, 1112 (9th Cir. 2013) ("*Chamness*") (rejecting prior challenge to Proposition 14). *See also Rubin v. Padilla*, 233 Cal. App. 4th 1133, 1145-47 (2015) ("*Rubin*") (Pet. App. at 20a-23a) (similarly characterizing the measure); Petitioners' Court of Appeal Appx., Vol. I, p. 88 (*Washington Grange* district court opinion, holding "there can be no doubt that the 'top-two' aspect of I-872 would be permissible if the 'primary' were renamed a 'general election,' and the 'general election' were renamed a 'runoff.' Yet the constitutionality of the election statute cannot turn on the identifiers used for its various provisions.").

Proposition 14's companion legislation[1] also substantially eased the requirements for candidates seeking to obtain a position on the primary election ballot, compared to the State's prior partisan primary system, so that now any candidate may appear on the primary ballot if he or she (1) pays the filing fee (or submits sufficient signatures in lieu thereof), and (2) submits a declaration of candidacy and nomination papers bearing the signatures of at most 100 registered voters – requirements that the California Court of Appeal characterized as "minimal." *Rubin*, 233 Cal. App. 4th at 1138 (Pet. App. at 7a).

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[1] *See* Senate Bill 6 (2009-2010 Reg. Sess.), *codified at* 2009 Cal. Stats., ch. 1 (2009 Cal. Legis. Serv. 1).

Several of California's smaller political parties and their associated candidates and voters[2] have alleged that Proposition 14 violates the associational rights of voters, because several minor party candidates for state and congressional offices were not among the top two vote-getters, and thus did not advance to the general elections in 2012 and 2014, despite receiving between 5% and 18.6% of the primary vote. (Pet. App. at 4a-5a.) The trial court and California Court of Appeal held that Proposition 14 did not violate the voters' associational rights. (Pet. App. at 2a-64a.)

The California Court of Appeal's unanimous, well-reasoned opinion correctly held that petitioners could not state a claim for a violation of voters' associational rights as a matter of law, holding "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." *Rubin*, 233 Cal. App. 4th at 1135 (Pet. App. at 3a).

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[2] Like the Court of Appeal (*see* Pet. App. at 4a n.1) and petitioners (*see, e.g.*, Pet. at 3-4), respondents herein adhere to the convention used in this case of referring to qualified parties other than the Democratic and Republican Parties as "minor parties," though California law recognizes no distinction between "major" and "minor" parties.

The California Supreme Court denied review of the Court of Appeal's decision. (Pet. App. at 1a.)

SUMMARY OF ARGUMENT

The petition for certiorari should be denied.

In concluding that Proposition 14 does not unconstitutionally burden the rights of voters, the Court of Appeal did not break any new ground. Rather, it followed, and correctly applied, established precedents of this Court, especially *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) ("*Munro*"); *Burdick v. Takushi*, 504 U.S. 428 (1991) ("*Burdick*"); *Storer v. Brown*, 415 U.S. 724 (1974) ("*Storer*"); and *California Democratic Party v. Jones*, 530 U.S. 567, 585 (2000) ("*Jones*") (expressing the view that a nonpartisan top-two system would be constitutional). Accordingly, there is no need for further review to settle an important question of law.

Nor is there any need for review to secure uniformity of decision. Petitioners identify no case holding that voters' associational rights are violated by top-two primaries. In fact, the Court of Appeal's decision aligns with the decision of the only other court to decide such a question: that of the Ninth Circuit in *Washington State Republican Party v. Washington State Grange*, 676 F.3d 784 (9th Cir. 2012) ("*Washington State Grange II*"), in which this Court already denied certiorari. *See Libertarian Party v. Wash. State Grange*, 568 U.S. ___, 133 S. Ct. 110

(Oct. 1, 2012); *Wash. State Democratic Cent. Comm. v. Wash. State Grange*, 568 U.S. ___, 133 S. Ct. 110 (Oct. 1, 2012). The *Washington State Grange II* decision affirmed the dismissal, as a matter of law, of a virtually *identical* ballot access claim, brought against Washington State's top-two primary law by the Libertarian Party in that State. This fact is significant because, in all material respects, Proposition 14 was consciously modeled on Washington's law.

Petitioners attempt to distinguish the *Washington State Grange II* decision solely on the grounds that (1) Washington conducts its primaries in August, whereas California conducts its primaries in June, and (2) California bans write-in voting at the general (though not primary) election. Noting that voter turnout at the 2012 and 2014 primaries has been approximately half the turnout at those years' subsequent general elections, petitioners contend that California's earlier election date deprives them of access to a ballot at a time of "peak voter interest." But petitioners' contention that these distinctions turn California's top-two system into one that "severely" burdens their rights, when Washington's was held not to, *see Washington State Grange II*, 676 F.3d at 794, is inconsistent with this Court's precedents, especially:

- *Burdick*, which (1) upheld the constitutionality of prohibiting write-in voting, at the primary as well as the general election, and (2) held that voters have, at most, a "limited" and "slight" interest in

"waiting until the eleventh hour to choose [their] preferred candidate," 504 U.S. at 439;

- *Storer*, which – in upholding a California statute requiring would-be "independent" candidates to have disassociated themselves from political parties no later than 17 months prior to the general election – likewise gave little weight to "the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status," 415 U.S. at 736; and
- *Munro*, which (1) held that "[i]t can hardly be said that [a State]'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," *even when there is substantially lower turnout at the primary*, 479 U.S. at 198-99, and (2) distinguished the decisions of this Court on which petitioners' "peak political interest" test relies on the ground that the ballot access requirements at issue in those cases – unlike Proposition 14 – precluded candidates from appearing on *any* ballot, including the primary ballot, 479 U.S. at 198-99.

Finally, the Court of Appeal rightly concluded that the burdens faced by petitioners are "modest," 233 Cal. App. 4th at 1148 (Pet. App. at 25a), and "limited,"

id. at 1150 (Pet. App. at 29a). Thus, California's reasonable, nondiscriminatory interests readily justify the imposition of those modest burdens. *Id*. at 1151 (Pet. App. at 29a-30a). Petitioners' arguments to the contrary rely on (1) the implicit assumption that strict scrutiny applies,[3] and (2) an incorrect view – properly rejected by the Court of Appeal – that this Court's decision in *Jones* rules some of the interests that support Proposition 14 out of bounds. (*See* Pet. at 15-17, Pet. App. at 30a-31a.)

Simply put, the trial court and the Court of Appeal rightly held that petitioners' ballot access claims fail to state a claim as a matter of law. The California Supreme Court saw no need to second-guess that conclusion, and there is likewise no need for further review by this Court.

REASONS FOR DENYING THE PETITION

This case does not present an important issue of law warranting review by this Court, because the unanimous, well-reasoned decision of the California Court of Appeal merely applied established case law in rejecting petitioners' ballot access claim. Moreover,

[3] *See* Pet. at 14 (citing *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184-85 (1979), which applied strict scrutiny, for the premise that the trial court in this case failed to properly consider whether the provisions of Proposition 14 are "'properly drawn' and employ the 'least drastic means' to achieve the State's ends.").

there is no division of authority, as the only other case to consider a ballot access claim in the context of a top-two system reached the same conclusion as the Court of Appeal below. *See Washington State Grange II*, 676 F.3d at 793-95.

I. There Is No Division Of Authority; The California Court Of Appeal's Decision Is Consistent With The Ninth Circuit's Rejection Of A Virtually Identical Claim In *Washington State Republican Party v. Washington State Grange*, 676 F.3d 784 (9th Cir. 2012), In Which This Court Already Denied A Petition For Certiorari.

In *Washington State Grange II*, the Ninth Circuit held that political parties and their affiliated candidates have no constitutional right to be on the general election ballot in a top-two system if they are not among the top two vote-getters at the primary. 676 F.3d at 793-95.

Following remand by this Court in *Washington State Grange I*, the Libertarian Party contended that Washington's top-two system violates its fundamental right of access to the ballot by making it difficult for a minor-party candidate to qualify for the general election ballot." *Id*. at 793 (emphasis added). That claim is essentially identical to petitioners' ballot access claim in this case. (*See* Pet. at 3.) Notably, the United States district court in *Washington State Grange II* rejected this claim *as a matter of law* under Federal Rule of Civil Procedure 12(b)(6).

In *Washington State Grange II*, the Ninth Circuit affirmed the district court's dismissal. 676 F.3d at 793-95. Like the district court, the Ninth Circuit "recognize[d] the possibility that [a top-two system] makes it more difficult for minor-party candidates to qualify for the general election ballot than regulations permitting a minor-party candidate to qualify for a general election ballot by filing a required number of petition signatures. This additional burden, however, is an inherent feature of any top two primary system, and the Supreme Court has expressly approved of top two primary systems." *Id*. at 795. Again, this Court denied a petition for certiorari. 568 U.S. ___, 133 S. Ct. 110 (Oct. 1, 2012).

The Ninth Circuit's reference to this Court having "expressly approved of top two primary systems" is followed by a citation to this Court's decision in *Jones*. In *Jones*, this Court invalidated California's earlier *blanket* primary, in which voters could vote for any candidate at the primary without regard to party affiliation, but unlike Proposition 14 the top vote-getter from each party advanced to the general election *as the party's nominee*. The Court's reasoning was based in part on the conclusion that the blanket primary system severely infringed the parties' associational rights by forcing an official standard-bearer, not of the Party's choosing, upon the Party, and that the blanket primary was not narrowly tailored to the State's asserted interests. But this Court further noted that the State could meet those interests by adopting a system in which:

> the State determines what qualifications it requires for a candidate to have a place on the primary ballot – which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election.

530 U.S. at 585.

This is, essentially, the top-two system subsequently adopted by Washington and California. In *Washington State Grange I*, this Court further held that the fact that candidates may disclose their personal "party preference" on the ballot does not alter the conclusion in *Jones* that such a system is constitutional. 552 U.S. at 452-54 & n.7.

II. Faithfully Applying This Court's Precedents Compels The Conclusion That Petitioners Have Identified No Interest Affected By Proposition 14 That Would Trigger Strict Scrutiny.

This Court has held that "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." *Burdick*, 504 U.S. at 434 (quoting

Anderson v. Celebrezze, 460 U.S. 780 (1983) ("*Anderson*"), and *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986)). Only election laws imposing a "severe" burden on voting or associational rights face strict scrutiny. *Id*. at 434. As the Ninth Circuit has noted, under the *Burdick* standard "voting regulations are rarely subject to strict scrutiny." *Chamness*, 722 F.3d at 1116. Applying this standard, petitioners have not identified any substantially-burdened interest that would trigger strict scrutiny.

A. No Group of Voters' Rights Are Substantially Burdened By Proposition 14.

Faced with (1) the ruling in *Washington State Grange II* that political parties and party candidates have no right to access the general election ballot in a top-two system; (2) the fact that nonpartisan election systems are undeniably constitutional, and thus political parties have no absolute constitutional right to access the ballot at all;[4] and (3) the fact that all candidates and parties are treated identically under

[4] Not only is there no mention of political parties in the Constitution, but the Founders' distrust of political parties is well-known. *See Rutan v. Republican Party*, 497 U.S. 62, 82 n.3 (1990) (Stevens, J., concurring) (discussing the Founders' skepticism of political parties); Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 813 (2001) ("Political parties are absent from the constitutional text, and it would be an activist judge indeed who would suggest that the Constitution obligates states to provide a formal role for parties in their nomination processes.").

California's nonpartisan system, petitioners focus their claim of harm exclusively on the rights of *voters*. Specifically, they frame the question presented by the petition for certiorari as whether Proposition 14 "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." (Pet. at i (Question Presented) (emphasis added); *see also* Pet. at 9 ("Petitioners alleged that voter rights are substantially burdened by California's relegation of minor party candidates to a June primary").)

When carefully considered from the perspective of the voters, however, petitioners' claim of harm rings hollow. It is important to note that under Proposition 14, the *only* thing preventing a registered voter of any party from participating in an election – either primary or general – is his or her voluntary decision not to do so. Affiliation with a political party is no longer a prerequisite for participation at the primary, and a voter may vote for any candidate he or she chooses in the primary for each office, independent of the political party affiliation, if any, of the candidates. This is in contrast to the pre-Proposition 14 partisan system.

Proposition 14 enfranchises a great many voters, by broadening their eligibility to participate at the primary election. Under the prior, partisan system many elections were effectively decided in the primary of the district's dominant party, in which other

party voters could not participate, and independent voters could participate only if that dominant party voluntarily deigned to permit it. In such circumstances, voters other than those registered with the dominant party had the nominal ability to have a broad range of candidates at the general election, but at a high price. Their general election choice was primarily symbolic, because the crucial electoral contest had already taken place in a closed electorate. *See Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 363 (1997) ("Ballots serve primarily to elect candidates, not as fora for political expression.").

Moreover, even in other, more competitive regions, a voter might be able to participate in one key primary, by registering with a specific party, but be excluded from another. For example, the crucial primary for governor in a given year might be the Democratic primary, while the crucial primary for U.S. Senate is the Republican primary. Voters could not have participated in both.

Proposition 14 relieved voters of such Hobson's choices, by forcing all candidates to run against one another at the primary, and allowing all voters to vote for whomever they wished at that primary, without regard to party affiliation.

Finally, in a given election year, registered voters will fall into one of four categories:

- voters who choose not to vote at all, in either the primary or the general election;

- voters who vote in both the primary and the general elections;
- voters who vote at the primary election but do not vote at the general election; and
- voters who do not vote at the primary election, but do vote at the general election.

None of these groups of voters can credibly claim to be significantly harmed by Proposition 14.

1. Voters who choose not to vote at all, in either the primary or the general election, cannot claim to be harmed.

These voters' rights are not impacted by the exclusion of minor party candidates from the general election ballot at all, because they never choose to "tune in." For them, the general election apparently does not represent a moment of "voter interest" at all, much less "peak voter interest." Moreover, this Court has held that "[s]tates 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." *Munro*, 479 U.S. at 198.

2. Voters who vote in both the primary and the general elections are not deprived of access to minor party viewpoints, and so do not suffer the harm petitioners complain of.

These voters are not deprived of access to minor party candidates or viewpoints; they simply receive them at the primary election. The Constitution does not require that they be given two bites at the apple.[5]

In *Munro*, this Court held – in language highly pertinent to this case – that if minor parties are given equal access to compete in a statewide primary, "[i]t 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." *Munro*, 479 U.S. at 199. Most importantly, *Munro* held that "because Washington afford[ed] a minor-party candidate easy access to the primary election ballot and the opportunity for the candidate to wage a ballot-connected campaign," the burden on minor parties of being kept off the *general* election ballot was "slight." 479 U.S. at 199. This phrasing is significant, because under *Burdick* a "slight" burden is

[5] *See Storer*, 415 U.S. at 735 (the "primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers." (footnote omitted)).

sustained by any reasonable regulatory interest. *Burdick*, 504 U.S. at 439.

3. Voters who vote at the primary election but do not vote at the general election are not deprived of access to minority party viewpoints either.

These voters either have no interest in the general election, meaning that they *did* have access to minor party views at the time of their "peak" interest; or they are simply displeased that their preferred candidate did not advance to the general election, whether they espoused a "minority-party" viewpoint or not. But this Court has already rejected the notion that dissatisfaction with the candidates advancing to the general election deprives voters of a constitutionally-protected interest, so long as all candidates are given easy and equal access to the primary. *See Munro*, 479 U.S. at 198 ("We perceive no more force to this argument than we would with an argument by a losing candidate that his supporters' constitutional rights were infringed by their failure to participate in the election.").

4. Voters who choose not to vote in the primary, but wait until the general election to engage, have – at most – a "limited" or "slight" interest in waiting until the eleventh hour to choose their preferred candidate.

Essentially, petitioners' claim boils down to the asserted right of voters to wait until the last minute to tune into the electoral process, and to then have a broad spectrum of options remaining available to them. Whatever burden Proposition 14 places on this asserted right, to the extent it even exists, it does not remotely trigger strict scrutiny.

Petitioners' claim is very similar to that rejected by this Court in *Burdick*. In that case, a voter claimed he had a constitutional right to cast a write-in vote in Hawaii's elections. The Court held, in language equally applicable here:

> Although Hawaii makes no provision for write-in voting in its primary or general elections, the system outlined above provides for easy access to the ballot until the cutoff date for the filing of nominating petitions, two months before the primary. Consequently, any burden on voters' freedom of choice and association is borne only by those who fail to identify their candidate of choice until days before the primary. But in *Storer* v. *Brown*, we gave little weight to "the interest the candidate and his supporters may have in making a late rather than an early decision

> to seek independent ballot status." 415 U.S., at 736. Cf. *Rosario* v. *Rockefeller*, 410 U.S. 752, 757, 36 L. Ed. 2d 1, 93 S. Ct. 1245 (1973). We think the same reasoning applies here and therefore conclude that any burden imposed by Hawaii's write-in vote prohibition is a very limited one.

Id. at 436-37 (footnote omitted).

This Court further concluded that the plaintiff in *Burdick* had a "limited interest in waiting until the eleventh hour to choose his preferred candidate." *Id*. at 439; *see also id.* at 438 ("Reasonable regulation of elections . . . require[s voters] to act in a timely fashion if they wish to express their views in the voting booth."). Likewise, here, voters have a limited interest in being able to disregard the political process until the last minute, and then tune in, expecting to have all options available to them.

B. Petitioners' Proposed "Peak Political Interest" Test Misapplies This Court's Precedents In *Williams v. Rhodes* And *Anderson v. Celebrezze*, Which Held That Minor Parties And Independent Candidates May Not Be Subjected To Special Burdens That Major Party Candidates Are Not Subject To, When The Result Would Be To Exclude Those Candidates From The Electoral Process Altogether.

Petitioners base their argument that voters have the right to access minority party viewpoints at the

general election – at the time of "peak political interest" – on this Court's decisions in *Williams v. Rhodes*, 393 U.S. 23 (1968), and its progeny, especially *Anderson v. Celebrezze*, 460 U.S. at 780. (Pet. at 13.) Petitioners' reliance on these cases is simply misplaced.

In *Williams*, this 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 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. 393 U.S. at 24-25. And in *Anderson*, this Court struck down a March filing deadline for independent presidential[6] candidates to appear on the November

[6] As the *Anderson* Court itself observed in the context of the presidential election, "state-imposed restrictions implicate a uniquely important national interest." 460 U.S. at 794-95 (footnote omitted). *See also Lawrence v. Blackwell*, 430 F.3d 368 (6th Cir. 2005), *cert. denied*, 547 U.S. 1178 (2006) ("Plaintiff's citation of the *Anderson* case to support its argument is also inapplicable because that case involved a presidential election. The Supreme Court held that a state has less of an interest in regulating a national election than one which takes place solely within its borders such as the congressional election at issue here."); *Wood v. Meadows*, 207 F.3d 708 (4th Cir. 2000) ("Wood recognizes, as he must, that the Virginia statute, unlike the statute challenged in *Anderson*, does not apply to candidates for national office, but only to statewide and local candidates; he does not, however, acknowledge the significance of this distinction. In fact, the *Anderson* Court not only repeatedly noted that the statute before it interfered with the national electoral process, *see, e.g.*, 460 U.S. at 790, 794-95, 804, 806, but also explained that a state 'has a less important interest in regulating

(Continued on following page)

general election ballot as unduly burdensome, when the deadline in question was months before the qualified party deadlines. 460 at 793-94.

In the first place, in *Munro* this Court recognized that there is unquestionably a qualitative difference between the restrictions at issue in *Anderson* and *Williams* – a filing deadline and a petitioning requirement – and a primary election, at issue here. The restrictions invalidated in *Williams* and *Anderson* precluded *any* "opportunity for the candidate to wage a ballot-connected campaign," *Munro*, 479 U.S. at 539, whereas Proposition 14 gives candidates that opportunity at the primary election. In other words, under the restrictions considered in *Williams* and *Anderson* minor-party and independent candidates were deprived of access to the electoral process *in toto*. Indeed, the *Munro* Court made precisely this same distinction in upholding the requirement that candidates receive at least 1% of the primary vote to advance to the general election:

> We also observe that § 29.18.110 is more accommodating of First Amendment rights and values than were the statutes we upheld in *Jenness, American Party*, and *Storer.* Under each scheme analyzed in those cases, if a candidate failed to satisfy the qualifying criteria, the State's voters had no opportunity to cast a ballot for that candidate, and the

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Presidential elections than statewide or local elections.' *Id*. at 795.").

> candidate had no ballot-connected campaign platform from which to espouse his or her views; *the unsatisfied qualifying criteria served as an absolute bar to ballot access. . . . Here, however, Washington virtually guarantees what the parties challenging the Georgia, Texas, and California election laws so vigorously sought – candidate access to a statewide ballot. This is a significant difference.*

479 U.S. at 198-99 (emphasis added).[7]

The Court then proceeded to make its critical observation that "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 199. Because the laws challenged in *Williams* and *Anderson* precluded *any* ballot-connected campaign, those cases are simply inapposite. *See Rubin*, 233 Cal. App. 4th at 1151-52 (Pet.

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[7] Petitioners attempt to distinguish *Munro* on the ground that the vote threshold in that case was only 1%, whereas a candidate who receives more than that may still be excluded from the ballot; they seek to draw the line at 5%. (Pet. at 12-13.) Tellingly, however, they decline to cite to the Ninth Circuit's rejection of this very position in *Erum v. Cayetano*, 881 F.2d 689, 694 (9th Cir. 1989) (upholding a 10% vote requirement, and noting, "[T]he linchpin of *Munro* is not the smallness of the vote percentage required in the primary election. Rather, in upholding the Washington statute, the Court relied most heavily on the fact that while Washington – like Hawaii – imposes restrictions on access to the general election ballot, it also – like Hawaii – virtually assured access to the primary ballot.").

App. at 31a-32a) ("*Anderson* was concerned primarily with access to the ballot," and "the top-two system provides an equal 'place on the ballot' for minor and major party candidates. [Citation.] It therefore does not limit the range of candidates available to the voters in the manner that motivated the *Anderson* court.").[8]

Furthermore, even to the extent that *Williams* and *Anderson* would apply to primary elections, those cases are still inapposite to Proposition 14; they merely stand for the unremarkable proposition that if candidates nominated by the major political parties are given access to the ballot, minor party and independent candidates cannot be subjected to additional and unreasonable burdens. In other words, they stand for a principle of non-discrimination. *See Storer*, 415 U.S. at 729 (*Williams* "ruled that the *discriminations* against new parties and their candidates had to be justified by compelling state interests." (emphasis added)).

As the California Court of Appeal held, Proposition 14 is nondiscriminatory. *Rubin*, 233 Cal. App. 4th at 1146 (Pet. App. at 22a). All parties, candidates and voters are treated the same: *no* party or candidate, major or minor, has a right to access the general

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[8] *See also McLain v. Meier*, 851 F.2d 1045, 1050 (8th Cir. 1988) (upholding April deadline for minor party candidates to file nomination papers, in part because June primary "may serve to heighten interest" in electoral process at an earlier date).

election ballot for voter-nominated office unless he or she is one of the top two vote-getters at the general election, and all candidates are subject to identical deadlines and requirements for accessing the primary ballot. Consequently, *Williams* and *Anderson* do not support the notion that the rights of California voters are burdened by Proposition 14.

C. The Fact That California Holds Its Primary In June, Rather Than August, Does Not Render Proposition 14 Invalid.

Ultimately, petitioners' complaint boils down to timing. They acknowledge that it is not unconstitutional to keep them from the general election ballot if they are not among the top two vote-getters, but contend that if the primary and general "were held in close temporal proximity to each other [it] would not create the same constitutional problems as the current system." (Pet. at 12.)

This contention echoes one raised – and rejected – in *Washington State Grange II*. In that case, the Libertarian Party argued that Washington's top-two system was unconstitutional because the State's primary was "held in mid-August, when voter interest is minimal, and the general election is held in

early November."[9] Like petitioners herein, they based this argument on *Anderson v. Celebrezze*. Noting that Washington's August primary was far closer to the general election than the March filing deadline for independent candidates struck down in *Anderson*, the Ninth Circuit affirmed the dismissal of the Libertarian Party's ballot access claims in *Washington State Grange II* – again, *as a matter of law*.

California's primary election is in June, *see* Cal. Elec. Code § 1201, and Plaintiffs rely on this fact in a futile effort to distinguish *Washington State Grange II*.

First, as noted above, petitioners' proposed "peak political interest" test is a misapplication of this Court's precedents. Those precedents (1) address restrictions that preclude minor party candidates from running a "ballot-connected campaign" at all, *see Munro*, 479 U.S. at 198, and (2) merely hold that minor parties must be treated equally, and cannot be subjected to discriminatory ballot access requirements. Notably, the Ninth Circuit in *Washington State Grange II* relied on this non-discrimination principle as well, noting, "unlike the system challenged in *Anderson*, in which independent candidates were required to file petitions before the major parties selected their nominees, the Libertarian Party participates in a primary at the same time, and on

[9] Petitioners' Court of Appeal Appx., Vol. I, pp. 152-53 (Libertarian Party's 9th Cir. Reply Brief, pp. 18-19), 211-12 (Libertarian Party's 9th Cir. Opening Brief, pp. 40-41).

the same terms, as major party candidates." 676 F.3d at 794. In California, all candidates qualify for, and participate in, the June primary on the exact same terms and conditions.

But even if the "peak political interest" test did apply, numerous courts applying *Anderson* have upheld filing deadlines in June, or even earlier, to access the general election ballot, when minor and independent candidates faced the same deadlines as major party candidates. *See, e.g.*, *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64 (3d Cir. 1999) (June deadline); *Wood v. Meadows*, 207 F.3d at 708 (June); *Texas Indep. Party v. Kirk*, 84 F.3d 178, 185 (5th Cir. 1996) (late May); *McLain*, 851 F.2d at 1050 (8th Cir. 1988) (April); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Bd.*, 844 F.2d 740, 747 (10th Cir. 1988) (May 31); *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007) (June); *see also Jenness v. Fortson*, 403 U.S. 431, 433-34 (1971) (pre-*Anderson* case, upholding ballot access petition requirement with deadline of second Wednesday in June). In other words, June falls on the "constitutional" side of the line drawn by *Anderson*, so long as major-party, minor-party, and independent candidates are treated equally.

In fact, the Sixth Circuit upheld Ohio's *March* filing deadline *as a matter of law*, where all candidates were subject to the same deadline, though *Anderson* had struck down a March filing deadline. In *Lawrence v. Blackwell*, the Sixth Circuit found it to be a "vital distinction" that the deadline in *Anderson*

applied only to independent candidates, whereas party candidates had an additional five months to file papers. 430 F.3d at 373-75. This Court denied certiorari of that case as well. *See* 547 U.S. 1178. Under Proposition 14, all candidates are subject to the same rules, just as in *Lawrence*.

Also instructive – again – is this Court's decision in *Burdick*. In that case, the Court's conclusion that Hawaii's ban on write-in voting was constitutional turned largely on the fact that voters had, at most, a limited right to wait until "the eleventh hour" to decide which candidate to support. The Court noted that

> Although Hawaii makes no provision for write-in voting in its primary or general elections, the system outlined above provides for easy access to the ballot until the cutoff date for the filing of nominating petitions, two months before the primary. Consequently, any burden on voters' freedom of choice and association is borne only by those who fail to identify their candidate of choice until days before the primary.

504 U.S. at 436-37.

At the time, Hawaii's primary was in September, *id*. at 431 n.1, so the cut-off for voters to focus on the electoral process was July – two months before the Hawaii primary, and a mere month later than Proposition 14's cut-off. In the case of Proposition 14, given

the ease with which candidates can access the primary ballot,[10] voters need not tune in until the primary itself to support candidates in an effort to help them appear on the general election ballot; in *Burdick*, by contrast, they had to tune in months earlier, by signing a petition due two months before the primary.

Perhaps even more significantly, in support of the foregoing discussion, the *Burdick* court cited this Court's earlier decision in *Storer v. Brown*. In *Storer*, this Court upheld a provision of California law that prevented candidates from appearing on the general election ballot as an independent candidate unless that candidate had disaffiliated him- or herself from the qualified political parties at least 12 months prior to the primary election. California's primary, then as now, was in June, *see* 415 U.S. at 742 n.12, so independent candidates had to be "independent" of the parties for at least *17 months* prior to the general election. However, because this requirement "involve[d] no discrimination against independents" vis-à-vis party candidates, the Court upheld the lower courts' dismissal of this claim. *Id*. at 733-34. Again,

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[10] Under Proposition 14, "[t]he 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.)." *Rubin*, 233 Cal. App. 4th at 1138 (Pet. App. at 7a). Also, "[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).)" *Id*. at n.3.

the Court "gave little weight to 'the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status.'" *Burdick*, 504 U.S. at 437 (quoting *Storer*, 415 U.S. at 736).

D. In *Munro v. Socialist Workers Party*, this Court already rejected a claim that lower turnout at the primary makes it an inadequate substitute for the general election.

Petitioners allege that voters' rights are burdened by the fact minor party candidates might not make it to the general election because more voters turned out at the 2012 general election (13,202,158) than at the 2012 primary election (5,328,296), and at the 2014 general election than at the 2014 primary. (Pet. at 4; Pet. App. at 77a.)

A virtually identical claim was raised by the plaintiffs in *Munro*. In that case, the minor parties argued that their rights were burdened by the fact that turnout was higher at the general election than at the primary, and that the 1% requirement kept them from reaching the broader pool of voters. The Court squarely rejected this argument:

> Appellees argue that voter turnout at primary elections is generally lower than the turnout at general elections, and therefore enactment of § 29.18.110 has reduced the pool of potential supporters from which Party candidates can secure 1% of the vote. We

> perceive no more force to this argument than we would with an argument by a losing candidate that his supporters' constitutional rights were infringed by their failure to participate in the election. . . . *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.* . . .

479 U.S. at 198 (emphasis added).

III. Limiting The General Election To The Top Two Vote-Getters From The Primary Serves Important – Indeed, Compelling – Governmental Interests.

Given the lack of a "severe" burden on the parties' rights, the State need only show that Proposition 14 furthers an "important regulatory interest." The Court of Appeal correctly held that this standard was met.[11]

First, as the Court of Appeal noted, *see* 233 Cal. App. 4th at 1147 (Pet. App. at 23a), Proposition 14 is consistent with past Supreme Court case law holding that the primary election system in California, is "'an

[11] Petitioners claim the trial court did not address the interests that support Proposition 14. That is incorrect, but even if true, it would be irrelevant. The Court of Appeal was entitled to consider governmental interests not considered by the trial court. *See Timmons*, 520 U.S. at 366 n.10 (upholding election law based on interests first raised at Supreme Court oral argument).

integral part of the entire election process . . . [that] functions to winnow out and finally reject all but the chosen candidates[,]'" and that the State may therefore "properly reserve the general election ballot 'for major struggles[.]'" *Munro*, 479 U.S. at 196 (quoting *Storer*, 415 U.S. at 735). Notably, this Court has characterized the State's interest in using a primary to "winnow" the field of candidates to "the serious few" as "compelling." *Morse v. Republican Party*, 517 U.S. 186, 205 (1996); *see also Munro*, 479 U.S. at 195-96; *Storer*, 415 U.S. at 735-36.

Second, the Court of Appeal held that the interest in giving independent voters, comprising a fifth of the electorate, a right to participate in the primary, where elections are often effectively decided, is an interest that – standing alone – sustains Proposition 14. *Rubin*, 233 Cal. App. 4th at 1150 (Pet. App. at 29a-30a). Though some parties have historically permitted independent voters to participate in their primaries, they are not required – and constitutionally cannot be required (under *Jones*) – to do so, meaning that prior to the adoption of Proposition 14 independent voters' ability to participate in the primaries was always at the sufferance of the parties and subject to revocation.[12]

Third, the Court of Appeal correctly rejected petitioners' position (*see* Pet. at 16) that the interest identified in the Proposition 14 ballot pamphlet of

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[12] *See Rubin*, 233 Cal. App. 4th at 1151 n.14 (Pet. App. at 30a).

electing more practical, compromise-minded, less partisan candidates was rejected by this Court in *Jones*. As the Court of Appeal recognized, *see* 233 Cal. App. 4th at 1150-51 (Pet. App. at 30a-31a), the *Jones* court held that the State did not have a legitimate interest in *altering the ideological views of private associations*. But that is not what Proposition 14 does. Plus, the *Jones* court expressly affirmed that the State's legitimate interests could be adequately protected "by resorting to a nonpartisan blanket primary" like Proposition 14. *Jones*, 530 U.S. at 585.

And finally, as the Ninth Circuit has noted, the general election under Proposition 14 is closely analogous to a runoff election in a typical nonpartisan system. *See Chamness*, 722 F.3d at 1112. Limiting a runoff to the top two vote-getters at the primary serves the interest in ensuring that the person who is ultimately elected to office receives a majority of the vote – an interest this Court has acknowledged as legitimate. *See Williams*, 393 U.S. at 32 ("Concededly, the State does have an interest in attempting to see that the election winner be the choice of a majority of its voters.").

Petitioners' proposal that the State conduct a top-three or top-four primary would undermine this interest. It also raises the question as to where a principled line could be drawn. Why stop at four? Does the fifth-place candidate then have a right to insist that the State conduct a top-five primary? Top-ten? Top-twenty? Top-100? *Cf. Holder v. Hall*, 512 U.S. 874, 881 (1994) (minority voters could not challenge

the size of a jurisdiction's governing body under the federal Voting Rights Act, because there as "no principled reason why one size should be picked over another").

CONCLUSION

The appellate court's decision upholding the constitutionality of California's Proposition 14, the Top Two Candidate Open Primary Act, faithfully applied the precedents of this Court, and raises no new issues that demand further review. The petition for certiorari should be denied.

Respectfully submitted,

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August 28, 2015