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 10 INDEPENDENT VOTER PROJECT, DAVID
 11 TAKASHIMA, ABEL MALDONADO &
 12 CALIFORNIANS TO DEFEND THE OPEN
 13 PRIMARY

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

16 MICHAEL RUBIN, MANJA ARGUE, STEVE
 17 COLLETT, MARSHA FEINLAND, CHARLES
 18 L. HOOPER, KATHERINE TANAKA, C.T.
 19 WEBER, CAT WOODS, GREEN PARTY OF
 20 ALAMEDA COUNTY, LIBERTARIAN PARTY
 21 OF CALIFORNIA, and PEACE AND
 22 FREEDOM PARTY OF CALIFORNIA,

Plaintiffs,

vs.

23 DEBRA BOWEN, in her official capacity as
 24 California Secretary of State,

Defendant.

25 INDEPENDENT VOTER PROJECT, DAVID
 26 TAKASHIMA, ABEL MALDONADO &
 27 CALIFORNIANS TO DEFEND THE OPEN
 28 PRIMARY,

Intervener-Defendants.

Case No.: RG11605301

ASSIGNED FOR ALL
PURPOSES TO JUDGE
LAWRENCE JOHN APPEL

**INTERVENER-
 DEFENDANTS"
 MEMORANDUM OF
 POINTS & AUTHORITIES
 IN OPPOSITION TO
 PLAINTIFFS' MOTION
 FOR PRELIMINARY
 INJUNCTION**

DATE: February 7, 2012
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1 **I. INTRODUCTION.**

2 The lateness of this suit, and this motion, is inexcusable. Proposition 14 was adopted more
3 than 18 months ago, and its constitutionality has been litigated thoroughly for most of the
4 intervening months. Yet Plaintiffs have inexplicably waited until the electoral machinery for the
5 2012 primary election is already moving to seek an injunction against the use of the top-two
6 system. Courts routinely, and rightly, reject such belated efforts to interfere with elections.

7 Moreover, two of Plaintiffs' three claims—that voters in a top two system are “confused” as
8 to the relationship between candidates and parties, and that the minor parties' rights are violated by
9 difficulties they may face in having their preferred candidates advance to the general election—
10 were unanimously rejected by the Ninth Circuit last week in a virtually identical challenge to the
11 Washington top-two system on which Proposition 14 is modeled. *Wash. State Republican Party v.*
12 *Wash. State Grange*, ___ F.3d 467, Case No. 11-35122 (9th Cir. Jan. 19, 2012) (attached). For all
13 the reasons the claims of the political parties in Washington failed, Plaintiffs' must as well.

14 With respect to the third claim—that minor parties will have difficulty retaining their
15 qualified status in future years—that claim is (1) unrelated to the 2012 elections, because no party
16 can be disqualified until at least 2015 based on the results of the 2014 election, (2) without merit,
17 and (3) would improperly force the Constitution (where Proposition 14 is enshrined) to conform to
18 mere statutes governing party qualification, rather than statutes conforming to the Constitution.

19 Finally, the balance of hardships heavily favors denying the requested injunction.

20 **II. FACTUAL & PROCEDURAL BACKGROUND.**

21 **A. Proposition 14 (The Top Two Candidate Open Primary Act) & SB 6.**

22 Proposition 14 is one of a series of reforms adopted by California voters in an effort to fix
23 their dysfunctional government, which is plagued with extreme partisanship. It is a matter of public
24 record that virtually the entire political establishment—including the leadership of both parties in
25 the Legislature and most of the minor parties—opposed Proposition 14. *See* Maldonado Decl., filed
26 herewith, ¶¶ 5-9. Nevertheless, Californians voted on June 8, 2010, to adopt Proposition 14.

27 Proposition 14 amended the state Constitution to abolish political party primaries and
28 replace them with a type of open primary election known as “top two,” or “voter-nominated”

1 primary election. Under the prior system, only candidates and voters registered with a qualified
2 political party could participate in that party's primary election; the top vote-getter in each party's
3 primary became the party's official nominee, and each qualified party was guaranteed a place on
4 the general election ballot for its nominee. Decline-to-State ("DTS") voters and those affiliated
5 with non-qualified parties were prohibited from participating in the primary, where the election was
6 often effectively decided.¹ And, candidates unaffiliated with a qualified party were excluded from
7 the primary, and could access the general election ballot only through the more stringent
8 "independent" nomination process (*see* Elec. Code §§ 8300-8304), or write-in candidacies.

9 Under Proposition 14 and its implementing legislation, SB 6,² the political parties no longer
10 control the primary. Instead, any candidate, may run in the primary for congressional or state
11 elective office (now called "voter-nominated" offices), and any voter may vote at the primary
12 election for any candidate. *See* CAL. CONST. art. II, § 5 (as amended by Proposition 14); Elec.
13 Code § 8002.5(b).³ The two candidates receiving the highest vote totals for each office at the
14 primary then compete for the office at the ensuing general election. *See* CAL. CONST. art. II, § 5;
15 Elec. Code §§ 8141.5 and 15452. Though the candidates may list their personal party "preference"
16 on the ballot, the candidate is not the party's nominee, and no party is guaranteed a place on the
17 general election ballot unless its preferred candidate is one of the top two vote-getters. *Id.* Except
18 for the candidate's ability to list his or her party "preference" on the ballot, this system works much
19 like the nonpartisan general/runoff system by which many local officials in California are elected.

20 **B. Proposition 14 Was Consciously Modeled On Washington State's Top-Two**
21 **System, Which Has Been Upheld Against Both Facial & As-Applied Challenges.**

22 **1. *Wash. State Grange v. Wash. Republican Party*, 552 U.S. 442 (2008).**

23 California's "blanket primary" law, in which voters could vote for any candidate at the
24

25 ¹ DTS voters are voters who decline to register with any political party. DTS voters could vote in a
26 party's primary under the former system, but only if the party permitted it. *See* Elec. Code § 2151. Voters
affiliated with a non-qualified party (or "political body") could not participate.

27 ² Senate Bill 6 (2009-2010 Reg. Sess.), *codified at* Stats. 2009, ch. 1.

28 ³ "Voter-nominated offices" include: (1) Governor; (2) Lieutenant Governor; (3) Secretary of State;
(4) State Treasurer; (5) Controller; (6) State Insurance Commissioner; (7) Member of the Board of
Equalization; (8) Attorney General; (9) State Senator; (10) Member of the Assembly; (11) United States
Senator; (12) Member of the U.S. House of Representatives. Elec. Code § 359.5

1 primary without regard to party affiliation and in which the top vote-getter from each party
2 advanced to the general election as the party's nominee, was struck down in *Cal. Democratic Party*
3 *v. Jones*, 530 U.S. 567 (2000), on the ground that it violated the political parties' associational
4 rights by forcing them to accept—as the party's official nominee and “standard-bearer”—
5 candidates chosen by other parties' voters, with whom the party might not even wish to associate.
6 At the time, Washington had an identical system, which was also enjoined.⁴

7 In response, and based on language in *Jones* itself, in 2004 the voters of Washington
8 adopted a top-two primary system, known as I-872. Several of Washington's political parties
9 immediately challenged I-872, claiming it violated *Jones*. In *Wash. State Grange v. Wash.*
10 *Republican Party*, 552 U.S. 442 (2008) (“*Grange*”), the Supreme Court rejected the plaintiffs'
11 facial challenge to Washington's system, distinguishing *Jones* on the ground that—unlike the
12 blanket primary—under the top-two system the primary does not actually choose party nominees.
13 Though candidates may express a *personal* preference for a party on the ballot, as a means of giving
14 information to the voters, those candidates are not the parties' nominees; the parties are free to
15 endorse the candidates they support, and to publicize their choice to the voters.

16 Proposition 14 was explicitly modeled on the Washington system, taking its cue from the
17 Court's ruling in *Grange*. See Req. for Judicial Notice, filed herewith (“RJN”), Exh. A (Prop. 14),
18 p. 65. Like the Washington system, under Proposition 14 the primary does not choose the parties'
19 nominees, though candidates may share their party “preference” with the voters. The parties,
20 however, remain free to endorse candidates, and Proposition 14 even permits the parties to print a
21 list of their endorsements in the sample ballot. See Elec. Code § 13302(b).

22 **2. As-Applied Claims Just Like Plaintiffs' Were Rejected In *Wash. State***
23 ***Republican Party v. Wash. State Grange*, 2011 U.S. Dist. LEXIS 2448**
24 **(W.D. Wash. Jan. 11, 2011), *aff'd*, ___ F.3d 467 (9th Cir. Jan. 19, 2012).**

25 The claim rejected by the Supreme Court was a facial challenge to I-872. Left undecided by
26 the Supreme Court's opinion was an as-applied constitutional challenge, based on the premise that
27 Washington voters might be confused as to whether candidates who express a “preference” for the
28 party are the party's nominee. The Plaintiffs in this case raise an identical claim. Though the Court

⁴ *Democratic Party v. Reed*, 343 F.3d 1198 (9th Cir. 2003).

1 remanded the case for further proceedings on the as-applied claim, the Supreme Court's opinion
2 discussed in detail how such a claim might be resolved. Noting that "whether voters will be
3 confused by the party-preference designations will depend in significant part on the form of the
4 ballot[.]" *Grange*, 552 U.S. at 455, the Court stated, "It is not difficult to conceive of such a ballot"
5 that would "be printed in such a way as to eliminate the possibility of widespread voter confusion
6 and with it the perceived threat to the First Amendment." *Id.* at 456. The Court further continued:

7 For example, petitioners propose that the actual I-872 ballot could include prominent
8 disclaimers explaining that party preference reflects only the self-designation of the
9 candidate and not an official endorsement by the party. They also suggest that the ballots
10 might note preference in the form of a candidate statement that emphasizes the candidate's
11 personal determination rather than the party's acceptance of the candidate, such as "my
12 party preference is the Republican Party." Additionally, the State could decide to educate
13 the public about the new primary ballots through advertising or explanatory materials
14 mailed to voters along with their ballots. We are satisfied that there are a variety of ways in
15 which the State could implement I-872 that would eliminate any real threat of voter
16 confusion. And without the specter of widespread voter confusion, respondents' arguments
17 about forced association and compelled speech fall flat. . . . [¶] . . . *Our conclusion that these*
18 *implementations of I-872 would be consistent with the First Amendment is fatal to*
19 *respondents' facial challenge."*

20 *Id.* at 456-57 (emphasis added; footnotes omitted).

21 Washington subsequently implemented I-872 following the Supreme Court's suggestions.
22 The State printed a disclaimer on the primary and general election ballots, informing voters of the
23 absence of association between the candidate and the preferred party; it denoted the candidates'
24 party preference as "(Prefers ___ Party)," rather than just "D" or "R," or with the words
25 "Democrat" or "Republican"; the State required explanatory materials to be mailed to voters; and it
26 conducted an educational campaign to inform voters about the function of the top two primary, and
27 the relationship of candidates and parties. *Wash. State Republican Party*, ___ F.3d at 481.

28 Proposition 14 and SB 6 likewise implement the Supreme Court's suggestions. They
prescribe disclaimers on the ballot that inform the voters of the absence of an association between
the candidate and the preferred party. Elec. Code § 13206(b). They denote the candidate's party
preference on the ballot as "My party preference is the ___ Party." Elec. Code § 13105.⁵ They

⁵ Presidential candidates will only have the party name next to theirs in 2012, emphasizing the
difference between partisan office and voter-nominated offices. Elec. Code § 13105(b).

1 require the distribution of explanatory materials in the Voter Information Guide distributed to every
2 household. Elec. Code § 9083.5. They require additional explanatory materials to be posted at the
3 polling places. Elec. Code § 14105.1. And they require the Secretary of State to “conduct public
4 voter education campaigns, using existing resources, for the purpose of publicly disseminating
5 information regarding the roles of the parties in primary elections for party-nominated offices,
6 voter-nominated offices, and nonpartisan offices.” Elec. Code § 8005. And Proposition 14 goes
7 even further than the Supreme Court’s suggestions—it permits the qualified parties to print their list
8 of “endorsed” candidates in the sample ballot.

9 On remand, the Washington plaintiffs advanced (1) their as-applied “confusion”/forced
10 association claims, and (2) a challenge alleging that minor parties may have difficulty advancing to
11 the general election. (Plaintiffs in this case raise identical claims.⁶) On August 20, 2009, the
12 federal district court granted the State’s motion to dismiss the ballot access claim. *See* RJN, Exhibit
13 B (Aug. 20, 2009, order in *Wash. State Republican Party v. Wash. State Grange*, Case No. 05-cv-
14 00927-JCC (W.D. Wash.)). The plaintiffs and defendants then filed cross-motions for summary
15 judgment on the as-applied confusion claim. The district court granted summary judgment in favor
16 of the State and the Grange. *Wash. State Republican Party v. Wash. State Grange*, 2011 U.S. Dist.
17 LEXIS 2448 (W.D. Wash. Jan. 11, 2011). The plaintiff political parties appealed both rulings.

18 Just last week, on January 19, 2012, the Ninth Circuit unanimously affirmed the trial court’s
19 rulings, holding that (1) the minor parties’ associational rights were not unconstitutionally infringed
20 by the difficulties their preferred candidates may face in advancing to the general election ballot,
21 and (2) the plaintiffs had failed to create a triable issue of fact with respect to the as-applied
22 “confusion” issue. *Wash. State Republican Party*, ___ F.3d at 467.

23 **C. History of Unsuccessful Litigation Against Proposition 14.**

24 Proposition 14 has been subject to sustained (and unsuccessful) legal attack since 2010.

25 **1. Prior state court proceedings (*Field v. Bowen*).**

26 In July 2010, six plaintiffs brought a challenge to Proposition 14 and SB 6 in San Francisco
27

28 ⁶ The Washington plaintiffs also brought trademark claims and claims related to election of party officers. Those claims are not echoed here.

1 Superior Court, arguing that (1) it is unconstitutional to allow candidates to state a preference only
2 for “qualified” political parties; and (2) it is unconstitutional to prevent voters from casting write-in
3 ballots at the general election. Based on those contentions, the plaintiffs argued that Proposition 14
4 and SB 6 must be enjoined in their entirety, and the pre-Proposition 14 partisan system should be
5 reinstated. Plaintiffs unsuccessfully sought a preliminary injunction from the trial court, and from
6 the First Appellate District and the California Supreme Court on writ petitions.⁷

7 On September 19, 2011, the Court of Appeal issued a unanimous, published, thirty-page
8 opinion affirming the trial court’s denial of a preliminary injunction, and rejecting plaintiffs’ claims
9 on the merits as a matter of law. *Field v. Bowen*, 199 Cal. App. 4th 346 (1st Dist. 2011).

10 **2. Parallel federal court proceedings (*Chamness v. Bowen*).**

11 In February 2011, while the appeal in *Field* was pending, a new case was filed in the Central
12 District of California, raising claims very similar to those in *Field*. *Chamness v. Bowen*, Case No.
13 11-cv-01479-ODW-FFM (C.D. Cal. filed Feb. 17, 2011). Following unsuccessful attempts, in both
14 the district court and Ninth Circuit,⁸ to get a preliminary injunction against the use of Proposition 14
15 at the 2012 election, the federal plaintiffs moved for summary judgment. On August 23, 2011, the
16 district court denied Plaintiffs’ motion and *sua sponte* granted summary judgment on behalf of
17 Defendants and Interveners. *Chamness v. Bowen*, 2011 U.S. Dist. LEXIS 94876 (C.D. Cal. Aug.
18 23, 2011).⁹ The *Chamness* plaintiffs immediately filed an appeal. *Chamness v. Bowen*, Case No.
19 11-56449 (9th Cir. filed Aug. 24, 2011). The Ninth Circuit denied Appellants’ motion to expedite
20 the appeal to resolve it before the 2012 elections; their opening brief is due on January 31, 2012.

21 **III. PLAINTIFFS’ DELAY IN BRINGING THIS SUIT SUPPORTS DENIAL.**

22 The voters adopted Proposition 14 *more than 18 months ago*. The effects of the measure
23 that Plaintiffs object to were apparent at the time, and the Top Two system has been used in six
24 special elections. Moreover, the measure’s constitutionality has been litigated for most of those 18
25 months, and numerous attempts to enjoin its use at the 2012 elections have been rejected. Yet
26

27 ⁷ *Field v. Superior Court*, Case No. A129829 (Cal. Ct. App. 1st Dist.) (writ denied Oct. 14, 2010);
28 *Field v. Superior Court*, Case No. S188436 (Cal.) (writ denied Dec. 15, 2010).

⁸ See *Chamness v. Bowen*, Case No. 11-55534 (9th Cir. filed Mar. 30, 2011).

⁹ Interveners herein intervened in the federal litigation as well.

1 Plaintiffs sat on their hands until last November, filing suit when the 2012 election calendar was
2 ready to start. Then, to compound the injury, Plaintiffs waited another six weeks to file this motion.

3 There is no plausible excuse for Plaintiffs' delay in bringing this suit, and it creates
4 significant prejudice to (1) the public interest, by interfering with an election that is already
5 underway, and (2) prospective candidates who have begun to campaign for the primary. The period
6 for candidates wishing to collect signatures in lieu of filing fees opened January 1 and two thirds of
7 that period will have expired by the time this motion is heard. *See* RJN, Exh. C. Other candidates
8 have already begun to decide whether or not to run for office, and to organize their campaigns, raise
9 funds, and incur campaign costs in reliance on the election rules set down by Proposition 14. *See*
10 Maldonado Decl., ¶¶ 2-3, 11-16. Plaintiffs now propose to change the rules at the very last minute.
11 "Courts have not been shy, under similar circumstances, to deny immediate injunctive relief"
12 against purportedly invalid electoral systems. *Cardona v. Oakland Unified Sch. Dist.*, 785 F. Supp.
13 837, 842-43 (N.D. Cal. 1992) (denying preliminary injunction against malapportioned districts).

14 *Cardona* presents similar circumstances to this case. In *Cardona*, plaintiffs alleged that
15 defendant's electoral districts violated the Constitution. A primary was scheduled for June 2, 1992.
16 Plaintiffs filed their complaint the prior November (as here), and noticed their motion for
17 preliminary injunction for February 1992. The court refused to enjoin the electoral system when
18 Plaintiffs with plenty of time to challenge the district plan, "have done so only now that the election
19 machinery is in gear." *Id.* at 842-43; *see also United States v. Upper San Gabriel Valley Mun.*
20 *Water Dist.*, 2000 U.S. Dist. LEXIS 13353 (C.D. Cal. Sept 8, 2000) (denying motion for
21 preliminary injunction based on reliance interests of candidates and their supporters).

22 **IV. PLAINTIFFS ARE NOT LIKELY TO PREVAIL ON THEIR CLAIMS.**

23 **A. Applicable Legal Standards.**

24 **1. Standard governing preliminary injunctions.**

25 "“To issue an injunction is the exercise of a delicate power, requiring great caution and
26 sound discretion, and rarely, if ever, should [it] be exercised in a doubtful case. . . .” [Citations.]”
27 *Ancora-Citronelle Corp. v. Green*, 41 Cal. App. 3d 146, 148 (1974). The applicable standard for a
28 preliminary injunction in an election law case is the same as in all other cases. *Cardona*, 785 F.

1 Supp. at 839-40. A plaintiff must demonstrate (1) a “reasonable probability” of success on the
2 merits, and (2) a likelihood of an imminent irreparable injury that outweighs the hardships to
3 defendants if the injunction is granted. *Ralphs Grocery Co. v. United Food & Commercial Workers*
4 *Union Local 8*, 186 Cal. App. 4th 1078, 1099 (2010). In balancing the harms, the court must “also
5 consider whether the public interest favors issuance of the injunction.” *S.W. Voter Registration*
6 *Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc) (overruling three-judge
7 panel’s decision granting preliminary injunction against recall election); *O’Connell v. Superior*
8 *Court*, 141 Cal. App. 4th 1452, 1471 (2006) (consideration of public policy is “mandatory”).

9 **2. Substantive standard governing election law challenges.**

10 The Supreme Court has held that “when a state election law provision imposes only
11 ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of
12 voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.”
13 *Burdick v. Takushi*, 504 U.S. 428, 434 (1991) (quoting *Anderson v. Celebrezze*, 460 U.S. 780
14 (1983), and *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986)). Only election laws
15 imposing a “severe” burden on voting or associational rights face strict scrutiny. 504 U.S. at 434.

16 **B. The Ninth Circuit Just Rejected A Challenge To Washington’s Top Two System**
17 **That Was Identical To The Minor Parties’ Ballot Access Claim.**

18 In the post-remand as-applied challenge to Washington’s top two system, the Libertarian
19 Party contended that “its rights are violated because I-872 makes it difficult for a minor-party
20 candidate to progress to the *general* election ballot. A candidate, whether from a major or minor
21 party, can attain a place in the general election only by finishing in the top two in the primary.”
22 *Wash. State Republican Party*, __ F.3d at 485. Plaintiffs in this case make an identical claim. The
23 Ninth Circuit rejected this challenge last week, *id.* at 484-87, and the same result is warranted here.

24 **1. The Supreme Court has already approved top two systems.**

25 The Ninth Circuit recognized that limiting access to the general election ballot is an inherent
26 feature of any top-two system, and the Supreme Court has already “expressly approved of top two
27 primary systems.” *Wash. State Republican Party*, __ F.3d at 487.

28 As discussed above, in *California Democratic Party v. Jones*, the Court invalidated

1 California's blanket primary in part because it was not narrowly tailored to the State's asserted
2 interest. But the Court noted that the State could meet those interests by adopting a system in which:

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

7 530 U.S. at 585; *see also Grange*, 552 U.S. at 452 (“Petitioners are correct that we assumed that the
8 nonpartisan primary we described in *Jones* would be constitutional.”). This is, essentially, the top
9 two system adopted by Washington and California. *Grange*, 552 U.S. at 452 (noting I-872's only
10 difference is that candidates may disclose their personal “party preference” on the ballot).

11 **2. The burden on the parties' associational rights is not severe: minor party
12 candidates have broad access to the primary election and the same
opportunity as all other candidates to advance to the general.**

13 Applying the *Burdick* standard, the Ninth Circuit held that the top two system does not
14 impose a “severe” burden on the parties' right, because (1) every party in Washington—major and
15 minor party alike—has “broad access to the I-872 primary” and (2) all candidates compete at that
16 primary on equal terms and I-872 thereby “gives minor party candidates the same opportunity as
17 major-party candidates to advance to the general election.” *Id.* at 485-86. In support of these
18 points, the Ninth Circuit quoted the Supreme Court's holding from *Munro v. Socialist Workers*
19 *Party*, 479 U.S. 189 (1986), that if minor parties are given equal access to compete in a statewide
20 primary, “[i]t can hardly be said that Washington's voters are denied freedom of association
21 because they must channel their expressive activity into a campaign at the primary as opposed to the
22 general election.” *Washington State Republican Party*, ___ F.3d at 486 (quoting *Munro*, 479 U.S. at
23 199). *Munro* rejected a challenge to Washington's prior blanket primary system, holding that the
24 burden on minor parties of being kept off the *general* election ballot is “slight.” 479 U.S. at 199.¹⁰

25
26 ¹⁰ In connection with this point and in passing, the Ninth Circuit noted that the primary in
27 Washington is in August, far closer to the general election than the March filing deadline for independent
28 candidates struck down in *Anderson v. Celebrezze*, 460 U.S. 780. California's primary election is in June.
Elec. Code § 1201. Numerous courts, applying *Anderson*, have upheld June filing deadlines for independent
and minor party candidates. *See, e.g., Council of Alternative Political Parties v. Hooks*, 179 F.3d 64 (3d Cir.
1999); *Wood v. Meadows*, 207 F.3d 708 (4th Cir. 2000); *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007).

1 Regarding “broad access” to the primary, the requirements for a candidate to participate in
2 the California primary are basically the same as in Washington.¹¹ And regarding the point that all
3 qualified parties participate in the primary election on equal terms, and have an equal opportunity to
4 advance to the general election, the same is true of Proposition 14. The top two candidates at the
5 primary proceed to the general *without regard to their party preference*. CAL. CONST. art. II, § 5(a).

6 Plaintiffs argue it is a severe burden that voters are deprived of the opportunity to vote for a
7 minor party at the general election as a protest against the major parties. But the Court rejected a
8 virtually identical argument in *Burdick* regarding Hawaii’s ban on write-in voting. 504 U.S. at 428.
9 And the Court has further rejected the “contention that [a political party] has a right to use the ballot
10 itself to send a particularized message”; “Ballots serve primarily to elect candidates, not as forums
11 for political expression.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362-63 (1997).

12 **3. Limiting the general election to the top two vote-getters from the**
13 **primary serves important regulatory interests.**

14 Given the lack of a “severe” burden on the parties’ rights, the State need only demonstrate
15 that Proposition 14 furthers an “important regulatory interest.” It furthers several.

16 First, Proposition 14 is consistent with past Supreme Court case law holding that the primary
17 election system in California, is “an integral part of the entire election process . . . [that] functions
18 to winnow out and finally reject all but the chosen candidates[.]” and that the State may therefore
19 “properly reserve the general election ballot ‘for major struggles[.]’” *Munro*, 479 U.S. at 196
20 (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)). Also, the general election under Proposition
21 14 is closely analogous to a runoff election in a typical nonpartisan system. Numerous courts have
22 held that limiting a runoff to the top two vote-getters at the primary serves the legitimate interest in
23 ensuring that the person who is ultimately elected to office receives a majority of the vote. *See, e.g.*,

24
25 *See also Jenness v. Fortson*, 403 U.S. 431, 433-34 (1971) (pre-*Anderson* case, upholding ballot access
petition requirement with June deadline).

26 ¹¹ Compare *Washington State Republican Party*, ___ F.3d at 486 (summarizing Washington’s
27 requirements) with Elec. Code §§ 8002.5, 8020, 8040-8041, 8103, 8106. There are two slight differences.
28 First, California candidates must file a nomination petition signed by a specified number of registered voters,
but that requirement is minimal: between 65 and 100 voters in the case of a statewide office, with even fewer
required for other offices. *See* Elec. Code § 8062. Also, the filing fee for a *statewide* office (*i.e.*, Governor,
etc.) is 2% of the annual salary. Elec. Code § 8103(a)(1). For all other offices it is 1%, like Washington.

1 *Edelstein v. City & County of San Francisco*, 29 Cal. 4th 164, 183 (2002). Indeed, to ensure that
2 such a majority is received, SB 6 bans write-in voting at the general election, just as the system
3 upheld in *Edelstein* did. See *Field*, 199 Cal. App. 4th at 367 and 369; Elec. Code. § 8606.

4 **4. The ballot access cases Plaintiffs cite do not address *nonpartisan* systems.**

5 Plaintiffs' ballot-access argument is based on a line of cases—*Williams v. Rhodes*, 393 U.S.
6 23 (1968), and its progeny—that hold the threshold for minor parties to access the ballot may not be
7 unduly burdensome. They are distinguishable. “The ballot access cases establish that parties with
8 demonstrable and significant public support have a right to ballot access, *at least outside the*
9 *category of nonpartisan elections.*” *Republican Party v. Faulkner County*, 49 F.3d 1289, 1293-94
10 (8th Cir. 1995) (emphasis added). Proposition 14 sets up a *nonpartisan* system, in which *no party* is
11 guaranteed a place on the general election ballot. *Jones*, 530 U.S. at 585 (referring to top two as a
12 “nonpartisan primary”); CAL. CONST. art. II, § 5(b). *Williams* and succeeding cases support the
13 proposition that the major parties cannot receive preferential treatment with respect to their access
14 to the ballot in a partisan system. See 393 U.S. at 31; *Wash. State Republican Party*, ___ F.3d at 486.
15 But no case holds that parties have an *absolute* right to access the general election ballot.

16 **C. Plaintiffs' “Confusion” Claim Is Also Identical To The One Just Rejected By
17 The Ninth Circuit In A Challenge To Washington’s Top Two System.**

18 **1. Like Washington, California has carefully followed the Supreme Court’s
19 guidance regarding the design of ballot materials.**

20 As discussed above, though the Supreme Court did not decide an as-applied “confusion”
21 challenge in *Grange*, it did anticipate that challenge and gave significant guidance as to how it
22 believed the State could structure its ballot materials in a constitutional manner. As also discussed
23 above, Washington closely followed the Supreme Court’s suggestions for implementing I-872.
24 Because it did so, the Ninth Circuit held, “The ‘form of the ballot’ plainly supports the conclusion
25 that I-872 does not impose a severe burden on the plaintiffs’ freedom of association[.]” and that
26 “[t]he form of the ballot thus points to an absence of voter confusion.” *Wash. State Republican*
27 *Party*, ___ F.3d at 481. Proposition 14 and SB 6 also closely track the Supreme Court’s guidance,
28 “point[ing] to an absence of voter confusion.” This is consistent with California case law holding
that voters are presumed to read and understand the ballot materials presented to them. See, e.g.,

1 *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm'n*, 51 Cal. 3d 744, 769 (1990).

2 **2. The Washington district court held Dr. Manweller failed to create a**
3 **triable issue of fact regarding confusion; the Ninth Circuit affirmed.**

4 Plaintiffs attempt to overcome the presumption of constitutionality by submitting a
5 declaration of Mathew Manweller, purporting to show based on surveys he conducted in
6 Washington, *as an expert for the Washington plaintiffs*, that *California* voters are, in fact, confused
7 by top two ballots. That research suffers glaring methodological errors.¹² Even leaving aside the
8 dubiousness of attempting to extrapolate anything about California elections from a survey relating
9 to Washington elections, the Washington district court concluded Dr. Manweller's "evidence" was
10 insufficient to even create a triable issue of fact in the Washington case. The Ninth Circuit affirmed
11 holding, "Manweller's results therefore are not relevant evidence of whether 'a *well-informed*
12 *electorate* will interpret a candidate's party-preference designation to mean that the candidate is the
13 party's chosen nominee or representative or that the party associates with or approves of the
14 candidate.'" *Wash. State Republican Party*, ___ F.3d at 482-83 (quoting *Grange*, 552 U.S. at 454).

15 **D. Plaintiffs' Challenge To The Party Qualification Statutes Provides No Basis For**
16 **Enjoining The 2012 Elections.**

17 **1. Even if Plaintiffs' claim had any merit, it would not be a reason to enjoin**
18 **the 2012 elections, because Plaintiffs have not shown a risk of imminent**
19 **harm; no party can be disqualified until after 2014 at the earliest.**

20 A party's ability to maintain qualification based on receiving 2% of the statewide vote is set
21 by statute and is based on gubernatorial elections, in nonpresidential years. Elec. Code § 5100(a).
22 Based on the results of the 2010 gubernatorial election each of the political parties in this suit will
23 retain its qualification until after the election in *November 2014*, when their qualification will be re-
24 evaluated based on the results of that election. *See* RJN, Exhibit D. The 2012 elections will neither
25 affect, nor be affected by, the party qualification statutes. Thus, Plaintiffs' request to enjoin the
26 2012 election is improper. It is well-settled law that for a preliminary injunction to issue there must
27 be an "imminent" threat of irreparable harm to the movant. *Leach v. City of San Marcos*, 213 Cal.
28 App. 3d 648, 660-61 (1989); *City of Oakland v. Superior Court*, 45 Cal. App. 4th 740, 749 (1996).

¹² *See generally* Declaration of Dr. Jonathan N. Katz, filed herewith.

1 The Legislature is aware of this potential issue, and has expressed an intention to address the
2 minor parties' concern by legislation by 2014. *See* Takashima Decl., ¶¶ 19-21.

3 **2. Plaintiffs have not established that the other methods of maintaining**
4 **party qualification are constitutionally inadequate.**

5 Besides having a candidate obtain 2% of the statewide vote at the gubernatorial election,
6 California law provides two other means by which parties may retain their qualified status: (1)
7 having registration equal to at least 1% of the votes cast at the last gubernatorial election, *see* Elec.
8 Code § 5100(b), or (2) submitting a petition to the Secretary of State containing the signatures of
9 registered voters equaling at least 10% of the votes cast at the last gubernatorial election, *see* Elec.
10 Code § 5100(c). Both are constitutional, and Plaintiffs have made no effort to argue otherwise.
11 Indeed, each of the qualified parties has met one of these requirements in the past, because they are
12 the only way to become qualified; the 2% statewide vote option only *maintains* qualification.

13 Regarding the first option—registration equal to 1% of the statewide vote at the last
14 gubernatorial election—the Supreme Court has already suggested (without so holding) that this
15 option meets constitutional muster. *See Storer*, 415 U.S. at 745 (citing *Am. Party of Texas v. White*,
16 415 U.S. 767 (1974)). And Plaintiffs own “expert,” Richard Winger, indicated in his declaration on
17 plaintiffs’ behalf in the Washington suit that the 1% registration option makes California’s law
18 constitutional. *See* RJN, Exh. E, p. 68. In fact, two of the four “minor” qualified parties in
19 California—the American Independent Party and one of the Plaintiffs here, the Green Party—
20 already meet this standard. *See* Winger Decl., ¶ 32. The Libertarians have met this standard as
21 recently as 2006. *See* Skinnell Decl., filed herewith, ¶ 12; RJN, Exhs. F & H. But they have not
22 kept a sufficient “modicum of support” to remain qualified.

23 Regarding the second option, Mr. Winger opines that getting a petition signed by registered
24 voters equal to 10% of the statewide vote at the last gubernatorial election—“is prohibitive, as it
25 would require over 1,000,000 signatures.” *Id.* Conspicuously unnoted, however, is the fact that a
26 new political party—Americans Elect—just became qualified in California using the petition
27 method in December of 2011. *See* RJN, Exhibit I. Mr. Winger’s omission of this fact was clearly
28 deliberate. He published an article noting the party’s qualification on his blog, *Ballot Access News*,

1 on December 19, 2012—the very same day it qualified. *See* Skinnell Decl., Exhibit A.

2 Plaintiffs complain that after the enactment of Proposition 14 their candidates are not likely
3 to be among the top two vote-getters in the statewide election and so they may no longer take
4 advantage the “easiest” means of maintaining their qualified party status—having a candidate
5 receive 2% of the vote for any statewide office at a gubernatorial election. Elec. Code § 5100(a).
6 But Plaintiffs have cited no case holding that they are entitled to the “easiest” means of maintaining
7 their qualification. To the contrary, that rule would be inconsistent with Supreme Court case law
8 holding that “[t]here is surely an important state interest in requiring some preliminary showing of a
9 *significant* modicum of support before printing the name of a political organization’s candidate on
10 the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the
11 democratic process at the general election.” *Jeness*, 403 U.S. at 442 (emphasis added).¹³

12 **3. Enjoining Proposition 14—which is grounded in the Constitution—**
13 **based on purported defects in elections statutes, would be inappropriate.**

14 Finally, Plaintiffs’ request to enjoin Proposition 14 based on the alleged unconstitutionality
15 of the party qualification statutes is improper. The Top Two primary is prescribed by California’s
16 Constitution. The qualification provisions are mere statutes (which Proposition 14 and SB 6 did not
17 amend). If a problem did exist with the qualification statutes, the proper approach would be to
18 enjoin the Secretary from disqualifying the existing parties’ but to enforce Proposition 14. “[A]
19 judicial remedy must be tailored to the harm at issue. [Citations.] A court should always strive for
20 the least disruptive remedy adequate to its legitimate task.” *Butt v. Cal.*, 4 Cal. 4th 668, 696 (1992);
21 *O’Connell*, 141 Cal. App. 4th at 1473-82 (reversing overly-broad preliminary injunction).

22 **V. THE BALANCE OF HARDSHIPS FAVORS DENYING THE INJUNCTION.**

23 Plaintiffs’ lack of diligence in bringing this suit undermines any claim of irreparable harm.¹⁴
24 On the other hand, Interveners *and the public interest* face grave harm if a preliminary injunction

25 ¹³ The 10% petition option is less onerous than the one addressed in *Jeness v. Fortson*, in which the
26 Court upheld a requirement that a minor party or independent candidate submit a petition with the signatures
27 of 5% of *all registered voters* to appear on the ballot. 403 U.S. at 440. In California, the petition
28 requirement is 10% of all votes *actually cast* at the last gubernatorial election. Elec. Code § 5100(c).
Turnout at gubernatorial elections has been less than 50% of registered voters (meaning the “petition”
requirement has been under 5% of registered voters) for the past 30 years. *See* RJN, Exhibit J.

¹⁴ *See Nutro Prods. v. Cole Grain Co.*, 3 Cal. App. 4th 860, 866-67 (1992).

1 issues, suspending Proposition 14. First, California's voters adopted Proposition 14 to reform their
2 dysfunctional government. RJN, Exhibit K (Rebuttal To Argument Against Proposition 14), p. 19.
3 An injunction against the measure will frustrate that purpose. Judicial restraint is warranted, where
4 the Court is faced with a reform measure opposed by virtually the entire political establishment in
5 Sacramento (and probably in Washington). *See* Maldonado Decl., ¶¶ 5-10; *Legislature v. Eu*, 54
6 Cal. 3d 492, 511-12 (1991) (to invalidate a voter-enacted legislative reform measure, term limits,
7 risked "insulat[ing] the Legislature from any severe reform measures directed at that branch . . .").

8 Second, Proposition 14 gives unaffiliated/DTS voters new constitutional rights to participate
9 in primary elections. An injunction would deprive 3.4 million independent voters (like Intervener
10 Takashima) of their newly-won constitutional rights. *See* Takashima Decl. at ¶¶ 1-2, 4-5 and 7-12.

11 Third, Proposition 14 gives many voters who *are* registered with the qualified parties new
12 rights as well. Under the pre-Proposition 14 system, in districts heavily dominated by one party
13 (*e.g.*, Democrats in San Francisco, Republicans in Orange County), voters of the other parties often
14 had no meaningful opportunity to participate in the electoral process; the election was decided in
15 the dominant party's primary, in which voters registered with other parties could not vote. *See* §§
16 2151, 13102; Maldonado Decl., ¶ 14. Proposition 14 gives those voters the ability to cast a
17 meaningful ballot in the primary, giving them the prospect of actually affecting elections.
18 Enjoining enforcement of Proposition 14 would again relegate these voters to insignificant status.

19 Fourth, an injunction against Proposition 14 would deprive candidates who are not affiliated
20 with qualified parties of the ability to participate in the primary election. The only way for such
21 candidates to have their name placed on the general election ballot would be to proceed as an
22 independent candidate, with requirements that are more stringent than under Proposition 14.¹⁵

23 And finally, an injunction would disrupt the election process already underway.

24 **VII. CONCLUSION.**

25 For the foregoing reasons, the motion for preliminary injunction should be denied.

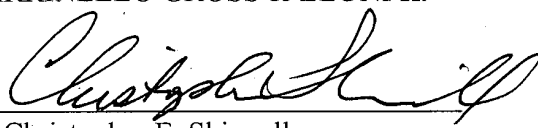
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28 ¹⁵ Compare § 8062 (65 to 100 signatures required to seek nomination of qualified party for statewide
office) with § 8400 (1% of registered voters statewide—currently 173,041 voters—must sign nomination
papers for an independent candidate to run statewide); *see also* § 8403(a)(1) (only 60 days to collect
signatures on independent nomination papers for statewide office).

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Respectfully submitted,

Dated: January 25, 2012

NIELSEN MERKSAMER
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