



ORIGINAL

1 KAMALA D. HARRIS
Attorney General of California
2 PETER A. KRAUSE
Supervising Deputy Attorney General
3 MARK R. BECKINGTON
Deputy Attorney General
4 State Bar No. 126009
300 South Spring Street, Suite 1702
5 Los Angeles, CA 90013
Telephone: (213) 897-1096
6 Fax: (213) 897-1071
E-mail: Mark.Beckington@doj.ca.gov
7 Attorneys for Defendant Debra Bowen, as Secretary
of State

Exempt From Filing Fees Pursuant
to Gov't Code § 6103

FILED
ALAMEDA COUNTY

MAY 30 2012

CLERK OF THE SUPERIOR COURT
By Tally Spang Deputy

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA

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

Case No. RG11605301

NOTICE OF DEMURRERS AND
DEMURRERS TO FIRST AMENDED
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES

17 Plaintiffs,

Date: August 28, 2012
Res. No: R-129165
Time: 9:00 a.m.
Dept: 16
Judge: Hon. Lawrence John Appel
Trial Date: None
Action Filed: November 21, 2011

18 v.

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

21 Defendant,

23 INDEPENDENT VOTER PROJECT,
24 DAVID TAKASHIMA, ABEL
MALDONADO, and CALIFORNIANS TO
25 DEFEND THE OPEN PRIMARY,

26 Intervener-Defendants.

By Fax

TABLE OF CONTENTS

	<u>Page</u>
1	
2	
3 INTRODUCTION	4
4 STATEMENT OF THE CASE.....	5
5 SUMMARY OF FIRST AMENDED COMPLAINT.....	6
6 SUMMARY OF PROPOSITION 14.....	7
7 STANDARD OF REVIEW	8
8 ARGUMENT.....	10
9 I. The First Cause of Action Fails to Allege An As-Applied Violation of 10 Ballot Access Rights of Minor Political Parties and Their Supporters.....	10
11 II. The Second Cause of Action Fails to Allege A Constitutional Violation 12 Based on A Candidate's Party Preference Designation on The Ballot.....	12
13 III. The Third Cause of Action For Alleged Violation of The Elections Clause 14 Does Not Allege A Claim on Which Relief May Be Granted.....	15
15 IV. The Fourth Cause of Action Does Not State A Claim For Alleged Violation 16 of Equal Protection As Guaranteed By The California and United States 17 Constitutions.....	16
18 CONCLUSION.....	18
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

TABLE OF AUTHORITIES

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

Page

CASES

Anderson v. Celebreeze
(1983) 460 U.S. 780 9, 10

Burdick v. Takushi
(1992) 504 U.S. 428 9, 11

California Democratic Party v. Jones
(2000) 530 U.S. 567 11

Canaan v. Abdelnour
(1985) 40 Cal.3d 703 9

Cook v. Gralike
(2001) 531 U.S. 510 15

Edelstein v. City and County of San Francisco
(2002) 29 Cal.4th 164 9, 10, 11

Perry v. Brown
(9th Cir. 2012) 671 F.3d 1052 7, 16, 17

Smiley v. Holm
(1932) 285 U.S. 355 15

Storer v. Brown
(1974) 415 U.S. 724 9

Timmons v. Twin Cities Area New Party
(1997) 520 U.S. 351 9

U.S. Term Limits, Inc. v. Thornton
(1995) 514 U.S. 779 15

Village of Arlington Heights v. Metropolitan Housing Dev. Corp.
(1977) 429 U.S. 252 17, 18

Washington State Grange v. Washington State Republican Party
(2008) 552 U.S. 442 4, 5, 13, 14

Washington State Republican Party
(9th Cir. 2012) 676 F.3d 784 4, 5, 6, 10, 13, 16

Williams v. Rhodes
(1968) 393 U.S. 23 11

TABLE OF AUTHORITIES
(continued)

1		<u>Page</u>
2		
3	CONSTITUTIONAL PROVISIONS	
4		
5	Cal. Const., Article I, § 7(a).....	16
6	Cal. Const., Article II, § 5, new subd. (a).....	8
7	Cal. Const., Article II, § 5, new amended subd. (c).....	8
8	Cal. Const., Article II, § 5, new amended subd. (d).....	8
9	Sen. Const. Amendment No. 4.....	7
10	U.S. Const., Amendment, XIV.....	9, 16
11	U.S. Const., Amendment, XVI, § 1.....	16
12	U.S. Const., Article I, § 4, cl. 1.....	15
13	STATUTES	
14	Election Code:	
15	§ 359.5.....	17
16	§ 359.5, subd. (b).....	14
17	§ 2151, subd. (b)(1).....	14
18	§ 8005.....	15
19	§ 9083.5, subd. (b).....	14
20	§ 9083.5, subd (d).....	14
21	§ 9084.....	14
22	§ 13105, subd. (a).....	8
23	§ 13206, subd. (b).....	14
24	§ 13230.....	14
25	§ 13302, subd. (b).....	14
26	§ 14105.1.....	14
27	Gov. Code, § 88001, subd. (l).....	14
28	OTHER AUTHORITIES	
	Proposition 8.....	16
	Proposition 14.....	4, 5, 6, 8, 10, 11, 12, 16, 17
	///	
	///	

1 KAMALA D. HARRIS
Attorney General of California
2 PETER A. KRAUSE
Supervising Deputy Attorney General
3 MARK R. BECKINGTON
Deputy Attorney General
4 State Bar No. 126009
300 South Spring Street, Suite 1702
5 Los Angeles, CA 90013
Telephone: (213) 897-1096
6 Fax: (213) 897-1071
E-mail: Mark.Beckington@doj.ca.gov
7 *Attorneys for Defendant Debra Bowen, as Secretary
of State*

*Exempt From Filing Fees Pursuant
to Gov't Code § 6103*

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA
11

12
13 **MICHAEL RUBIN, STEVE COLLETT,
MARSHA FEINLAND, CHARLES L.
14 HOOPER, KATHERINE TANAKA, C. T.
WEBER, CAT WOODS, GREEN PARTY
15 OF ALAMEDA COUNTY, LIBERTARIAN
PARTY OF CALIFORNIA, and PEACE
16 AND FREEDOM PARTY OF
CALIFORNIA,**

17 Plaintiffs,

18 v.

19
20 **DEBRA BOWEN, in her official capacity as
Secretary of State of California,**

21 Defendant,
22

23 **INDEPENDENT VOTER PROJECT,
24 DAVID TAKASHIMA, ABEL
MALDONADO, and CALIFORNIANS TO
25 DEFEND THE OPEN PRIMARY,**

26 Intervener-Defendants.
27
28

Case No. RG11605301

**NOTICE OF DEMURRERS AND
DEMURRERS TO FIRST AMENDED
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: August 28, 2012
Res. No: R-129165
Time: 9:00 a.m.
Dept: 16
Judge: Hon. Lawrence John Appel
Trial Date: None
Action Filed: November 21, 2011

1 PLEASE TAKE NOTICE that on August 28, 2012, at 9:00 a.m., or as soon thereafter as the
2 matter may be heard, in Department 16 of the above-entitled court, located at 1221 Oak Street,
3 Oakland, California, Defendant Debra Bowen, in her official capacity as California Secretary of
4 State, shall demur, and hereby does demur, to plaintiffs' verified first amended complaint, and
5 each and every cause of action therein, as set forth herein.

6 The demurrers, and each of them, and the grounds on which they are based, are as follows:

7 (1) To the first cause of action, designated in the first amended complaint as the First Claim
8 for Relief: Ballot Access, on the ground that the cause of action does not state facts sufficient to
9 constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

10 (2) To the second cause of action, designated in the first amended complaint as the Second
11 Claim for Relief: Violation of Rights to Freedom of Speech and Association, on the ground that
12 the cause of action does not state facts sufficient to constitute a cause of action. (Code Civ. Proc.,
13 § 430.10, subd. (e).)

14 (3) To the third cause of action, designated in the first amended complaint as the Third
15 Claim for Relief: Elections Clause, on the ground that the cause of action does not state facts
16 sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

17 (4) To the fourth cause of action, designated in the first amended complaint as the Fourth
18 Claim for Relief: Equal Protection Clause, on the ground that the cause of action does not state
19 facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

20 \\\

21 \\\

22 \\\

23 \\\

24 \\\

25 \\\

26 \\\

27 \\\

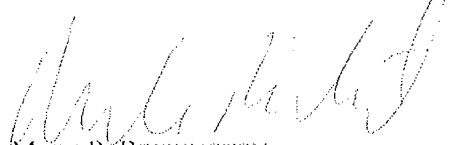
28

1 The demurrers, and each of them, shall be based on this notice of demurrer and the
2 demurrers stated herein, on the accompanying memorandum of points and authorities, on the
3 request for judicial notice, on the pleadings and papers on file in this action, and upon such
4 further evidence and argument as may be offered at the time of the hearing.

5 Dated: May 30, 2012

Respectfully Submitted,

6 KAMALA D. HARRIS
7 Attorney General of California
8 PETER A. KRAUSE
9 Supervising Deputy Attorney General

10 
11 MARK R. BECKINGTON
12 Deputy Attorney General
13 *Attorneys Defendant Debra Bowen, as*
14 *Secretary of State*

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 INTRODUCTION

3 In their first amended complaint ("FAC"), plaintiffs¹ challenge the constitutionality of
4 Proposition 14, the top two primary amendment approved by the voters in June 2010. This Court
5 has previously held that Proposition 14 does not facially violate either the United States or the
6 California Constitutions. In the amended complaint, Plaintiffs attempt to recast their causes of
7 action primarily as as-applied claims. But no facts are alleged that would support a judgment
8 finding that Proposition 14, either facially or as applied, violates the rights of minor political
9 parties and their supporters.

10 In sustaining demurrers to the original complaint, this Court held that Proposition 14 does
11 not facially deprive minor political parties and their supporters of access to the general election
12 ballot or facially violate their speech or association rights. (See Order Sustaining Demurrers,
13 filed April 25, 2012.) Further, the Court held that plaintiffs had not alleged facts to support a
14 claim for violation of the Elections Clause. In so holding, this Court relied heavily on decisions
15 of the United States Supreme Court and the Ninth Circuit Court of Appeals upholding the
16 constitutionality of Washington's top two election system, a system that is substantially similar to
17 California's system. (*Washington State Grange v. Washington State Republican Party* (2008)
18 552 U.S. 442 (hereinafter *Washington I*); *Washington State Republican Party* (9th Cir. 2012) 676
19 F.3d 784 (hereinafter *Washington II*).

20 The Court's reasoning on the previous demurrer applies fully to the amended claims
21 because no substantive allegations supporting an as-applied violation have been added.
22 Proposition 14 provides candidates of all parties, as well as candidates declaring no party
23 preference, with equal access to primary and general election ballots, with the voters determining
24 which two candidates will reach the general election ballot for a given office. In the absence of
25 factual allegations showing that this system in practice deprives minor parties and their members

26 ¹ Plaintiffs are minor qualified political parties or party organizations (the Peace and
27 Freedom Party, the Libertarian Party and the Green Party of Alameda County) and individual
28 party supporters, candidates and voters. One individual plaintiff named in the original complaint,
Manja Argue, is not a party to the first amended complaint

1 of constitutional rights, there is no basis on which to grant plaintiffs the relief sought in the
2 amended complaint.

3 Because the amended pleading fails to state any claim on which relief may be granted, the
4 demurrers to all causes of action should be sustained.

5 **STATEMENT OF THE CASE**

6 This case began with the filing of plaintiffs' verified complaint for declaratory, injunctive
7 and other relief on November 21, 2011. Plaintiffs alleged three causes of action arising out of
8 Proposition 14 and its alleged effect on minor political parties: (1) denial of ballot access;
9 (2) violation of freedom of speech and association; and (3) violation of the Elections Clause of
10 the United States Constitution.

11 In its order sustaining the Secretary of State's demurrers to the complaint, the Court
12 observed that the Ninth Circuit's decision in *Washington II* "considered and rejected the same
13 broad challenge made by Plaintiffs herein—i.e., that an open primary system resulting in the top
14 two vote-getters' advancing to the general election imposed a 'severe burden' on the rights of
15 minor parties (or their voters or candidates) to have access to the ballot." (Order Sustaining
16 Demurrer, filed April 25, 2012, pp. 2-3.) The Court found that plaintiffs, in their first cause of
17 action for denial of ballot access, had failed "to provide a constitutional basis to distinguish their
18 challenge to Prop. 14 to the challenge to the Washington state laws challenged in *Washington II*."
19 (*Ibid.*)

20 With respect to the second cause of action for violation of speech and association rights, the
21 Court relied on the Supreme Court's opinion in *Washington I* in sustaining the Secretary's
22 demurrer. "The challenged provisions of the Prop. 14 laws are indistinguishable from the
23 Washington statute upheld in *Washington I*, and Plaintiffs have not alleged sufficient facts to the
24 effect that Prop. 14 is being applied in a particular manner that compels individuals or political
25 parties to be associated with particular candidates." (Order Sustaining Demurrer, filed April 25,
26 2012, p. 3.)

27 Moreover, in addition to not stating a cause of action for violation of the United States
28 Constitution, neither the first nor the second cause of action made out a claim for violation of the

1 California Constitution. (Order Sustaining Demurrer, filed April 15, 2012, p. 3.) As for the third
2 cause of action, the Court found that the plaintiffs' allegations were conclusory and did not show
3 how Proposition 14, either on its face or as-applied, violated the Elections Clause. (*Ibid.*)

4 On the same day it sustained the demurrers, the Court denied plaintiffs' motion for a
5 preliminary injunction seeking to enjoin enforcement of Proposition 14. (Order Denying
6 Preliminary Injunction, filed April 25, 2012.) The Court found that the plaintiffs had not made a
7 sufficient showing of likelihood of success on the merits or that the balance of interim harms
8 warranted preliminary injunctive relief. (*Id.*, pp. 1-2.)

9 SUMMARY OF FIRST AMENDED COMPLAINT

10 The first amended complaint, filed May 10, 2012, alleges four causes of action. It realleges
11 the three causes of action alleged in the original complaint: (1) denial of ballot access, (2)
12 violation of speech and association rights, and (3) violation of the Elections Clause of the United
13 States Constitutions. It adds a new fourth cause of action for violation of equal protection
14 guaranteed under the United States and California Constitutions.

15 In the first cause of action for ballot access denial, plaintiffs allege that "Prop. 14, as
16 applied, has excluded and will continue to exclude minor party voters, minor party candidates,
17 and the minor parties themselves from participation in California's general elections." (FAC,
18 ¶ 45, p. 14:12-14.) More specifically, they allege that minor party voters have been precluded
19 from supporting candidates of their choice, that minor party candidates have been denied the
20 ability to communicate their message to general election voters, and that minor parties have been
21 denied the ability to reach general election voters. (*Id.*, p. 14:14-21.) On this basis, plaintiffs
22 claim that Proposition 14 violates the First and Fourteenth Amendments to the United States
23 Constitution and sections 2 and 3 of article I of the California Constitution.

24 In the second cause of action for violation of speech and association rights, plaintiffs allege
25 that "Prop. 14, as applied, permits candidates . . . to self-designate a "preferred political party on
26 the electoral ballot, without such party's approval. (FAC, ¶ 48, p. 15:7-10.) Therefore, plaintiffs
27 allege, Proposition 14 has allowed candidates to appropriate the parties' trademarks. (*Id.*,
28 p. 15:10-13, citing *Washington II*, Scalia, J., dissenting.) This has had a "chilling effect" on the

1 parties' rights of expression and association guaranteed by the First Amendment of the United
2 States Constitution and sections 2 and 4 of the California Constitution." (*Id.*, p. 15:13-17.)

3 The third cause of action asserts that "Prop. 14, as applied, violates the rights of minor
4 parties and minor party candidates under the Elections Clause of the United States Constitution
5 by implementing an elections policy that disadvantages smaller political parties and grants further
6 advantage to wealthy parties and candidates." (FAC, ¶ 51, p. 16:1-4.) Specifically, they claim
7 that Proposition 14 has precluded minor party candidates for federal office from participating in
8 general elections, which they characterize as the moment of greatest public interest in the
9 electoral process. (*Id.*, p. 16:4-8.)

10 The new fourth cause of action claims that Proposition 14 violates the Equal Protection
11 Clause of the United States and California Constitutions, both on its face and as applied. (FAC,
12 ¶ 53, p. 16:14-18.) Plaintiffs advance different theories in support of this cause of action. First,
13 they contend that Proposition 14 withdraws "an established right to participate in statewide
14 general elections" from minor parties and their candidates and supporters. (*Id.*, ¶ 54, p. 16:19-22.)
15 They cite the Ninth Circuit's recent decision in *Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052 in
16 support of an equal protection violation "by withdrawing an established right from a discrete and
17 insular minority." (FAC, ¶ 54, p. 17:8-10.) Second, they allege that Proposition 14 was the result
18 of "disapproval or animus" against minor political parties and imposed "a special disability" on
19 those parties. (*Id.*, ¶ 55, p. 17:12-19.) Therefore, they contend that Proposition 14 violates equal
20 protection "because it singles out minor parties, minor party candidates, and minor party voters
21 for a disfavored legal status, thereby creating a category of 'second-class' parties, candidates, and
22 voters." (*Id.*, p. 17:19-27.)

23 SUMMARY OF PROPOSITION 14

24 In February 2009, the Legislature placed Senate Constitutional Amendment 4, officially
25 known as the "Top Two Candidates Open Primary Act," on the June 2010 election ballot. (Sen.
26 Const. Amend. No. 4 ("SCA 4"), stats. 2009 (2009-2010 4th Ex. Sess.) res. ch. 2.) Designated as
27 Proposition 14 by the Secretary of State, the measure was approved by the voters by a margin of
28 53.8 to 46.2 percent. (See <http://www.sos.ca.gov/elections/sov/2010-primary>.)

1 Proposition 14 replaced the former partisan primary process for state and congressional
2 offices with “[a] voter-nomination primary election . . . to select the candidates for congressional
3 and state elective offices in California.” (Cal. Const., art. II, § 5, new subd (a).) Under this
4 system, “[a]ll voters may vote at a voter-nominated primary election for any candidate for
5 congressional and state elective office without regard to the political party preference disclosed
6 by the candidate or the voter, provided that the voter is otherwise qualified to vote for candidates
7 for the office in question.” (*Ibid.*) This leads to a general election between the two candidates
8 receiving the most votes in the primary election: “The candidates who are the top two vote-getters
9 at a voter-nominated primary election for a congressional or state elective office shall, regardless
10 of party preference, compete in the ensuing general election.” (*Ibid.*)

11 Proposition 14 allows a congressional or state candidate for a partisan office to have “his or
12 her political party preference, or lack of political party preference, indicated upon the ballot for
13 the office in the manner provided by statute.” (Cal. Const., art. II, § 5, new subd. (b); see also
14 Elec. Code, § 13105, subd. (a)-[defining methods of designating party preference on the ballot].)

15 A political party or party central committee may endorse, support or oppose a candidate,
16 but it “shall not nominate a candidate for any congressional or state elective office at the voter
17 nominated primary.” (*Ibid.*) In contrast to prior law, Proposition 14 provides that “[a] political
18 party or party central committee shall not have the right to have its preferred candidate participate
19 in the general election for a voter-nominated office other than a candidate who is one of the two
20 highest vote-getters at the primary election” (*Ibid.*) The measure leaves in place partisan
21 elections for presidential candidates, political party committees and party central committees and
22 preserves the right of political parties to participate in the general election for the office of
23 president. (Cal. Const., art. II, § 5, new and amended subds. (c), (d).) Proposition 14 became
24 operative January 1, 2011. (SCA 4, Fifth Clause.)

25 STANDARD OF REVIEW

26 Courts have long recognized that states may regulate the elections process: “Common
27 sense, as well as constitutional law, compels the conclusion that government must play an active
28 role in structuring elections; ‘as a practical matter, there must be a substantial regulation of

1 elections if they are to be fair and honest and if some sort of order, rather than chaos, is to
2 accompany the democratic processes.” (*Burdick v. Takushi* (1992) 504 U.S. 428, 433, quoting
3 *Storer v. Brown* (1974) 415 U.S. 724, 730; accord, *Timmons v. Twin Cities Area New Party*
4 (1997) 520 U.S. 351, 358 [“States may, and inevitably must, enact reasonable regulations of
5 parties, elections, and ballots to reduce election- and campaign-related disorder.”])

6 As such, review of voting regulations under the United States Constitution does not
7 automatically require strict scrutiny, but instead follows a flexible balancing standard:

8
9 A court considering a challenge to a state election law must weigh ‘the character
10 and magnitude of the asserted injury to the rights protected by the First and
11 Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise
12 interests put forward by the State as justifications for the burden imposed by its
13 rule,’ taking into consideration ‘the extent to which those interests make it
14 necessary to burden the plaintiff’s rights.’

15 (*Burdick v. Takushi, supra*, 504 U.S. at p. 434, quoting *Anderson v. Celebrezze* (1983) 460 U.S.
16 780, 788.)

17 Under this standard, “when those rights are subjected to ‘severe’ restrictions, the regulation
18 must be ‘narrowly drawn to advance a state interest of compelling importance.’” (*Burdick v.*
19 *Takushi, supra*, 504 U.S. at p. 434, quoting *Norman v. Reed* (1992) 502 U.S. 279, 289.) “But
20 when a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’
21 upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory
22 interests are generally sufficient to justify’ the restrictions.” (*Ibid.*, quoting *Anderson v.*
23 *Celebrezze, supra*, 460 U.S. at p. 788.)

24 The same balancing test advanced by the United States Supreme Court in elections cases
25 has been followed by the California Supreme Court in cases arising under the California
26 Constitution: “[I]n analyzing constitutional challenges to election laws, [the California Supreme
27 Court] has followed closely the analysis of the United States Supreme Court.” (*Edelstein v. City*
28 *and County of San Francisco* (2002) 29 Cal.4th 164, 179, quoting *Canaan v. Abdelnour* (1985)
40 Cal.3d 703, 710.) Thus, like the federal courts, the California courts assess an election

1 regulation by determining whether it imposes a “severe restriction” on voting rights or only a
2 “limited burden” on those rights, and then weighing the interests advanced by the regulation.
3 (See *Edelstein v. City and County of San Francisco*, *supra*, 29 Cal. 4th at pp. 182-183 [applying
4 balancing test to voting regulation challenged under California’s free speech clause].)

5 **ARGUMENT**

6 **I. THE FIRST CAUSE OF ACTION FAILS TO ALLEGE AN AS-APPLIED VIOLATION OF**
7 **BALLOT ACCESS RIGHTS OF MINOR POLITICAL PARTIES AND THEIR SUPPORTERS.**

8 Plaintiffs’ first cause of action suffers from the same flaws as the version of this claim
9 alleged in the original complaint. The allegations do not establish an unconstitutional denial of
10 ballot access to minor parties and their members. Although plaintiffs have made minor changes
11 in wording that now characterize this cause of action as an as-applied claim instead of a facial
12 claim, none of the alleged facts, including the few new allegations, establish that Proposition 14 is
13 being applied in an unconstitutional manner.

14 As this court found in ruling on the prior demurrer, the Ninth Circuit’s decision in
15 *Washington II* forecloses plaintiffs’ claim that a top two elections system, such as Proposition 14,
16 violates the ballot access rights of minor political parties. Like the Washington top two system,
17 Proposition 14 allows minor party candidates to “participate[] in a primary at the same time, and
18 on the same terms, as major party candidates.” (*Washington II*, *supra*, 676 F.3d at p. 794.) Thus,
19 California candidates who prefer minor parties “have an opportunity to appeal to voters at a time
20 when election interest is near its peak, and to respond to events in the election cycle just as major
21 party candidates do.” (*Ibid.*) And California, like Washington, “gives minor-party candidates the
22 same opportunity as major-party candidates to advance to the general election.” (*Ibid.*)

23 Since California candidates may equally compete in the primary and have an equal
24 opportunity to advance to the general, Proposition 14 does not create a system that
25 “impermissibly ‘limit[s] the field of candidates from which voters might choose.’” (*Washington*
26 *II*, *supra*, 676 F.3d at p. 794, quoting *Anderson v. Celebrezze*, *supra*, 460 U.S. at p. 786.) Nor, for
27 the same reason, does it give “established parties a decided advantage over any new parties
28

1 struggling for existence.” (*Washington II, supra*, 676 F.3d at p. 795, quoting *Williams v. Rhodes*
2 (1968) 393 U.S. 23, 31.)

3 In an apparent attempt to allege an as-applied claim, plaintiffs add an allegation that
4 substantially greater numbers of voters participate in the general election as opposed to the
5 primary election. (FAC, ¶ 37, p. 12:12-18 [alleging that 10.3 million California voters
6 participated in the 2010 general election compared to 5.6 million in the 2010 primary].) They
7 assert that this means that minor parties will be “precluded” from reaching voters during the
8 general election, the peak of voter participation, when substantially greater numbers of voters
9 participate in the electoral process. (*Id.*, ¶ 38, p. 12:20-23.) But this result is merely “an inherent
10 feature of any top two primary system,” an elections system that the Supreme Court “has
11 expressly approved of.” (*Washington II, supra*, 676 F.3d at p. 795, citing *California Democratic*
12 *Party v. Jones* (2000) 530 U.S. 567, 585-586.)

13 Thus, Plaintiffs have not alleged any facts showing that Proposition 14, whether assessed
14 facially or on an as-applied basis, imposes a severe burden on their rights of ballot access. (See
15 *Washington II, supra*, 676 F.3d at p. 794 [holding that Washington top two system did not
16 severely burden minor party’s rights].) It follows that Proposition 14 is valid as long as
17 California can articulate “important regulatory interests” in support of the measure. (See *Burdick*
18 *v. Takushi, supra*, 504 U.S. at p. 434.)

19 Proposition 14 has been justified on at least two grounds: increasing voter participation in
20 the selection of candidates, particularly though increased participation by independent voters who
21 previously had limited rights to vote in the primary, and reducing government gridlock by
22 promoting less partisan candidates. For example, in the Official Voter Information Guide, the
23 measure’s title and summary, approved by the Legislature, stated that Proposition 14 would
24 “encourage[] increased participation in elections for congressional, legislative, and statewide
25 offices by changing the procedure by which candidates are selected in primary elections.”
26 (Request for Judicial Notice, Exh. 1, June 8, 2010 Voter Guide, p. 14.) The title and summary
27 further stated that the measure would “give[] voters increased options in the primary by allowing
28

1 all voters to choose any candidate regardless of the candidate's or voter's political party
2 preference." (*Ibid.*)

3 In their arguments in favor of the measure, the proponents echoed these points, asserting
4 that Proposition 14 "will open up primary elections" and allow Californians "to vote for any
5 candidate [they] wish for state and congressional offices, regardless of political party preference."
6 (Request for Judicial Notice, Exh. 1, June 8, 2010 Voter Guide, Argument in Favor of Prop. 14,
7 p. 18.) The proponents argued that this would "reduce gridlock by electing the best candidates."
8 (*Ibid.*) Proposition 14 was also seen as "giv[ing] independent voters an equal voice in primary
9 elections." (*Ibid.*) As a further benefit, the proponents claimed that Proposition 14 would "help
10 elect more practical office-holders who are more open to compromise." (*Ibid.*) The proponents
11 expressed the concern that "partisanship is running our state into the ground" and argued that
12 Proposition 14 would "push our elected officials to begin working together for the common
13 good." (*Ibid.*, emphasis omitted.)

14 In the absence of any allegations showing that Proposition 14, as actually applied, imposes
15 a severe burden on the rights of minor parties and their members, these interests are sufficient to
16 allow California to implement its top two elections system. Because plaintiffs have not alleged
17 facts supporting a denial of access claim, the Secretary of State's demurrer to the first cause of
18 action should be sustained.

19 **II. THE SECOND CAUSE OF ACTION FAILS TO ALLEGE A CONSTITUTIONAL VIOLATION**
20 **BASED ON A CANDIDATE'S PARTY PREFERENCE DESIGNATION ON THE BALLOT.**

21 As with the first cause of action, plaintiffs have made only minor word changes in the
22 second cause of action for alleged violation of speech and association rights. Plaintiffs have
23 changed the cause of action's introductory sentence to allege that Proposition 14, "as applied,"
24 permits candidates to self-designate their political preference.² (FAC, ¶ 48, p. 15:8-10.) They

25 ² As now written, this sentence reads, "Prop. 14, as applied, permits candidates for various
26 state and federal offices to self-designate a 'preferred' political party on the electoral ballot,
27 without such party's approval." (FAC, ¶ 48, p. 15:8-10.) Formerly, it read, "By virtue of the
28 foregoing, as a result of the passage of Prop. 14 in June 2010, the State of California permits
candidates for various state and federal offices to self-designate a 'preferred' political party on the
electoral ballot, without such party's approval." (Complaint, ¶ 47, p. 14:5-9.)

1 also now allege that candidates “have thus appropriated” the parties’ trademarks. (*Id.*, p. 15:10-
2 12, internal quotation marks omitted.) Formerly, they alleged that candidates “are allowed to
3 appropriate” the trademarks. (Complaint, ¶ 47, p. 14:9-11, internal quotation marks omitted.)

4 Plaintiffs have added an allegation that Proposition 14 was applied in several special
5 elections held in 2011 and will be used in the June and November 2012 elections and in
6 subsequent elections. (FAC, ¶ 8, p. 8:26-9:1-2.) In this allegation, plaintiffs may be alluding to
7 the fact that special election candidates have already utilized the party preference designation
8 provisions.

9 None of this adds up to an as-applied violation of speech or associational rights. In
10 sustaining the demurrer to this cause of action in the original complaint, this Court recognized
11 that “a statute (like Prop. 14) that allows for an open primary in which candidates identify
12 themselves on the ballot by a self-designated party preference does not unconstitutionally
13 interfere with a political party’s rights of association or speech.” (Order Sustaining Demurrers,
14 filed April 25, 2012, p. 3, citing *Washington I*.) No new facts are alleged in the FAC that would
15 support a finding that Proposition 14, as applied, has this effect.

16 In *Washington I*, the Supreme Court recognized that this type of claim depends “on the
17 possibility that voters will be confused as to the meaning of the party-preference designation.”
18 (*Washington I, supra*, 552 U.S. at p. 454.) But “[t]here is simply no basis to presume that a well-
19 informed electorate will interpret a candidate’s party-preference designation to mean that the
20 candidate is the party’s chosen nominee or representative or that the party associates with or
21 approves of the candidate.” (*Ibid.*)

22 Moreover, “there are a variety of ways in which the State could implement [a top two
23 system] that would eliminate any real threat of voter confusion.” (*Washington I, supra*, 552 U.S.
24 at p. 456.) Among other things, “a ballot could include prominent disclaimers explaining that
25 party preference reflects only the self-designation of the candidate and not an official
26 endorsement by the party.” (*Ibid.*) “[T]he ballots might note preference in the form of a
27 candidate statement that emphasizes the candidate’s personal determination rather than the party’s
28 acceptance of the candidate, such as ‘my party preference is the Republican Party.’” (*Ibid.*) A

1 state could also engage in educational efforts through advertising or explanatory ballot materials.
2 (*Ibid.*)

3 The California top two system complies with these standards. For example, in the state
4 ballot pamphlet for a voter-nominated office (i.e., a state or congressional office subject to the top
5 two primary system), the Secretary of State must include a written explanation of the electoral
6 procedure for such offices. (Elec. Code, § 9083.5, subd. (b); Elec. Code, § 9084; Gov. Code,
7 § 88001, subd. (l).) Posters and other printed material containing this explanation must be
8 supplied to voting precincts and conspicuously posted both inside and outside every polling place.
9 (Elec. Code, § 9083.5, subd (d); Elec. Code, § 14105.1.)

10 Moreover, on the nonpartisan part of the direct primary election ballot, there must appear a
11 heading for "Voter-Nominated and Nonpartisan Offices" and below that a statement that explains
12 the process for voter-nominated offices. (Elec. Code, § 13206, subd. (b); cf. Elec. Code, § 13230
13 [allowing heading and statement to be omitted when ballot is larger than may be conveniently
14 handled].) This statement tells voters that they may vote for any voter-nominated candidate, that
15 the candidate's party preference is selected by the candidate and shown for information purposes
16 only, that the party preference designation does not constitute or imply an endorsement by the
17 party indicated, and that no candidate nominated by the voters shall be deemed the officially
18 nominated candidate of any political party. (Elec. Code, § 13206, subd. (b).)

19 A similar notification is provided when a person registers to vote. (Elec. Code, § 2151,
20 subd. (b)(1).) The voter registration card explains that any voter may vote for any candidate at a
21 primary election for state elective or congressional office, regardless of the disclosed party
22 preference of the voter or the candidate. (*Ibid.*)

23 Nothing in Proposition 14 prevents a political party or party central committee from
24 endorsing, supporting or opposing a candidate for a voter-nominated office. (Elec. Code, § 359.5,
25 subd. (b).) A qualified political party may have their endorsements of candidates for voter-
26 nominated offices printed in the sample ballot mailed to voters. (Elec. Code, § 13302, subd. (b).)
27 In addition to these notifications, the Secretary of State has been directed to "conduct public voter
28 education campaigns, using existing resources, for the purpose of publicly disseminating

1 information regarding the roles of the parties in primary elections for party-nominated offices,
2 voter-nominated offices, and nonpartisan offices.” (Elec. Code, § 8005.)

3 Plaintiffs allege no facts that these provisions, as applied, would leave the “well-informed
4 voter” confused as to whether a candidate’s self-designated party preference means that they are
5 endorsed by that party. As such, plaintiffs’ second cause of action fails to allege a claim for
6 violation of speech or association rights.

7 **III. THE THIRD CAUSE OF ACTION FOR ALLEGED VIOLATION OF THE ELECTIONS**
8 **CLAUSE DOES NOT ALLEGE A CLAIM ON WHICH RELIEF MAY BE GRANTED.**

9 Under the Elections Clause of the United States Constitution, “[t]he Times, Places and
10 Manner of holding Elections for Senators and Representatives, shall be prescribed in each State
11 by the Legislature thereof” (U.S. Const., art. I, § 4, cl. 1.) The Elections Clause grants to
12 the States “broad power” to prescribe the procedural mechanisms for holding congressional
13 elections. (*Cook v. Gralike* (2001) 531 U.S. 510, 523.)

14 The Elections Clause does not permit states “to dictate electoral outcomes, to favor or
15 disfavor a class of candidates, or to evade important constitutional restraints.” *U.S. Term Limits,*
16 *Inc. v. Thornton* (1995) 514 U.S. 779, 833.) But it “gives States authority ‘to enact the numerous
17 requirements as to procedure and safeguards which experience shows are necessary in order to
18 enforce the fundamental right involved.’” (*Id.* at p. 834, quoting *Smiley v. Holm* (1932) 285 U.S.
19 355, 366.)

20 Here, Proposition 14 establishes the procedures for primary and general elections in state
21 and congressional offices in California. It governs the “manner” of such elections, falling within
22 the commonsense understanding of procedural regulations authorized by the Elections Clause,
23 “like ‘notices, registration, supervision of voting, protection of voters, prevention of fraud and
24 corrupt practices, counting of votes, duties of inspectors and canvassers, and making and
25 publication of election returns.’” (*Cook v. Gralike, supra*, 531 U.S. at pp. 523-524, quoting
26 *Smiley v. Holm, supra*, 285 U.S. at p. 366.)

27 As with the other causes of action, plaintiffs have amended their allegations to allege that
28 Proposition 14, “as applied,” violates the Elections Clause. (FAC, ¶ 48, p. 15:8-10.) But no new

1 facts are alleged that, if true, would establish that Proposition 14 dictates electoral outcomes.
2 Instead, plaintiffs' repeat their earlier allegations that Proposition 14 favors wealthy parties and
3 candidates by precluding small parties from participating in general elections. (FAC, ¶ 51,
4 p. 16:1-8.) But this Court has previously rejected the sufficiency of these allegations, dismissing
5 them as conclusory. (Order Dismissing Demurrers, filed April 25, 2012, p. 3.)

6 Because no new facts are alleged supporting this cause of action, the demurrer should be
7 sustained.

8 **IV. THE FOURTH CAUSE OF ACTION DOES NOT STATE A CLAIM FOR ALLEGED**
9 **VIOLATION OF EQUAL PROTECTION AS GUARANTEED BY THE CALIFORNIA AND**
10 **UNITED STATES CONSTITUTIONS.**

11 Under the Fourteenth Amendment of the United States Constitution, “[n]o State shall . . .
12 deny to any person within its jurisdiction the equal protection of the laws.” (U.S. Const., amend.,
13 XVI, § 1.) Its counterpart in the California Constitution provides that “[a] person may not be . . .
14 denied equal protection of the laws.” (Cal. Const., art. I, § 7(a).) Plaintiffs’ fourth cause of action
15 fails to allege either a facial or an as-applied violation of either provision.

16 Based on the Court’s prior rulings, it is apparent that the cause of action fails to allege a
17 facial equal protection violation. For the same reasons discussed above with respect to the ballot
18 access claim, Proposition 14, a facially neutral measure, does not violate the equal protection
19 rights of minor parties and their members on this basis.

20 Plaintiffs’ theory that Proposition 14 withdrew “an established right” unique to minor
21 parties is not supported by their allegations. (See FAC, ¶ 54, p. 16:19-17:11.) As discussed
22 above, Proposition 14 applies equally to minor and major parties, establishing a system of voter
23 nominations for top two general elections in place of the former system in which each party
24 nominated its candidate for the ballot. (See *Washington II*, *supra*, 676 F.3d at 794 [recognizing
25 that top two system gives minor party candidates the same opportunity as major party candidates
26 to advance to the general election].)

27 Contrary to plaintiffs’ allegations, this theory is not supported by *Perry v. Brown*, the Ninth
28 Circuit decision that overturned Proposition 8, which had eliminated the right to same-sex
marriage. In *Perry*, the Ninth Circuit held that “the Equal Protection Clause requires the state to

1 have a legitimate reason for withdrawing a right or benefit *from one group but not others*,
2 whether or not it was required to confer that right or benefit in the first place.” (*Perry v. Brown*,
3 *supra*, 671 F.3d at pp. 1083-1084, original emphasis.) In that context, the Equal Protection
4 Clause forbids “the *targeted* exclusion of a group of citizens from a right or benefit that they had
5 enjoyed on equal terms with all other citizens.” (*Id.* at p. 1084, emphasis added.) Proposition 8
6 was not “a law of general applicability” but a measure that “‘carve[d] out’ rights from gays and
7 lesbians alone.” (*Id.* at p. 1085, original brackets.)

8 *Perry* has no application here because Proposition 14 does not target minor parties for
9 disparate treatment. This is not a case where major parties are allowed to nominate and place
10 their preferred candidates on the general election ballot while minor parties are left off the ballot.
11 As a matter of law, and in actual practice, all candidates, regardless of party preference, compete
12 equally in the primary for the right to compete in the general. Plaintiffs fail to allege any manner
13 in which Proposition 14 targets the minor parties or subjects them to disparate treatment.

14 Plaintiffs’ allegation misconstrues Proposition 14 and how it changed the elections process
15 for most state and federal offices. Under Proposition 14, voters, not political parties, now
16 nominate the candidates who will appear on the general election ballot. While it is possible that
17 the two candidates for an office in the general election will be members of the two major parties,
18 it is also possible that they will be members of the same party, the minor parties, or candidates
19 with no party preference. For that reason, these offices are now designated as “voter-nominated
20 offices” in the Elections Code. (See Elec. Code, § 359.5.)

21 Nor is plaintiffs’ bare allegation that Proposition 14 was prompted by disapproval of or
22 animus against politically unpopular groups sufficient to state an equal protection claim. (FAC,
23 ¶ 55, p. 17:12-27.) True, where a facially neutral action has a disproportionate impact on a
24 protected group, the courts will not show judicial deference if “invidious discriminatory purpose
25 was a motivating factor” in the decision. (*Village of Arlington Heights v. Metropolitan Housing*
26 *Dev. Corp.* (1977) 429 U.S. 252, 265-266 [racial discrimination in housing].) But in making this
27 determination, the courts look to “such circumstantial and direct evidence of intent as may be
28 available.” (*Id.* at p. 266.) For example, “[t]he impact of the official action . . . may provide an

1 important starting point[.]” such as when “a clear pattern, unexplainable on grounds other than
2 race, emerges from the effect of the state action even when the governing legislation appears
3 neutral on its face.” (*Id.* at p. 266.) Other evidence may include “the historical background of the
4 decision,” “the specific sequence of events leading up to the challenged decision,” “the legislative
5 or administrative history,” and, in extraordinary instances, the testimony of the members
6 concerning the purposes of the official action. (*Id.*, at pp. 267-268.)


7 Here, plaintiffs allege no facts that would support an inference that California voters were
8 motivated by animus against minor political parties when they approved Proposition 14. For
9 reasons briefed earlier, Proposition 14 is easily explainable for reasons other than invidious
10 discriminatory purpose. Moreover, the voter pamphlet does not disclose any intent to harm the
11 unique interests of minor parties. (See Request for Judicial Notice, Exh. 1.) If anything, the
12 voters’ ire appears to have been directed at the *major* parties, not the *minor* parties. (*Ibid.*)

13 In the absence of supporting allegations, plaintiffs have failed to set forth any basis to find
14 an equal protection violation under either the United States or California Constitutions.
15 Therefore, the demurrer to this cause of action should be sustained.

16 **CONCLUSION**

17 For the foregoing reasons, the Court is requested to sustain the demurrers to the First
18 Amended Complaint.

19 Dated: May 30, 2012

Respectfully Submitted,
KAMALA D. HARRIS
Attorney General of California
PETER A. KRAUSE
Supervising Deputy Attorney General

MARK R. BECKINGTON
Deputy Attorney General
Attorneys Defendant Debra Bowen, as
Secretary of State

27 SA2011103315

28