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INDEPENDENT VOTER PROJECT, DAVID
TAKASHIMA, ABEL MALDONADO &
CALIFORNIANS TO DEFEND THE OPEN
PRIMARY

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

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

Plaintiffs,

vs.

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

Defendant.

INDEPENDENT VOTER PROJECT, DAVID
TAKASHIMA, ABEL MALDONADO &
CALIFORNIANS TO DEFEND THE OPEN
PRIMARY,

Intervener-Defendants.

Case No.: RG11605301
ASSIGNED FOR ALL
PURPOSES TO JUDGE
LAWRENCE JOHN APPEL

**INTERVENER-
DEFENDANTS' NOTICE OF
DEMURRER &
DEMURRER TO VERIFIED
FIRST AMENDED
COMPLAINT;
MEMORANDUM OF
POINTS & AUTHORITIES**

DATE: August 28, 2012
TIME: 9:00 a.m.
DEPT: 16

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Dated: May 30, 2012

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By: _____
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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. INTRODUCTION.**

3 Plaintiffs' First Amended Complaint is most striking for its *lack* of significant
4 amendments. Except for the addition of a novel (and defective) new equal protection
5 claim under *Perry v. Brown*, 651 F.3d 1052 (9th Cir. 2012) (striking down Proposition 8),
6 the amendments to the complaint are minimal. Most are essentially house-keeping
7 changes—updating verbs to the past tense, removing a plaintiff, incorporating additional
8 citations to the California Constitution (though this Court has already ruled that the fate of
9 Plaintiffs' challenges will be the same under the California Constitution as under the
10 analogous provision of the U.S. Constitution).

11 Tellingly, Plaintiffs have not still not articulated a “challenge to some manner in
12 which the Prop. 14 framework is being implemented or applied in practice in a
13 discriminatory or unreasonable way[.]” which this Court previously deemed to be the only
14 way for Plaintiffs to distinguish their ballot access claims from the facial ballot access
15 claims rejected by the Ninth Circuit in *Wash. State Republican Party v. Wash. State*
16 *Grange*, ___ F.3d ___, 2012 U.S. App. LEXIS 1050 (9th Cir. Jan. 19, 2012) (“*Washington*
17 *II*”).¹ See Order – Demurrer to Complaint Sustained, filed Apr. 24, 2012, p. 1.

18 Plaintiffs also have not alleged any new facts *at all* to support an as-applied claim
19 for violation of their associational rights based on voter “confusion,” and in fact they
20 cannot -do so because the Supreme Court and Ninth Circuit have recognized that such a
21 claim can be precluded by proper design of the relevant ballot materials. The Supreme
22 Court in *Wash. State Republican Party v. Wash. State Grange*, 552 U.S. 442 (2008)
23 (“*Washington I*”), provided extensive guidance regarding how such materials might be
24 designed, and the Court majority expressly stated that implementing a top-two primary in
25 the manner laid out in that opinion “would be consistent with the First Amendment.” *Id.* at
26 457. Washington State closely followed that guidance, and the Ninth Circuit accordingly

27 ¹ The Washington Democratic and Libertarian Parties have filed petitions for
28 certiorari in this case (Case Nos. 11-1263 and 11-1266). The Respondents have until June
22 to file responses.

1 rejected the political parties' "confusion" claim in *Washington II*. Proposition 14, and its
2 implementing legislation, likewise follow the guidance of the Supreme Court and have—if
3 anything—prescribed materials that go even further beyond those adopted by Washington
4 State's. Accordingly, the confusion claim is precluded as a matter of law.

5 With respect to the third claim—that Proposition 14 violates the Elections Clause of
6 the U.S. Constitution—Plaintiffs have alleged no additional facts *whatsoever* to
7 supplement the "conclusory" allegations that led this Court to sustain a demurrer to this
8 claim the first time around.

9 Plaintiffs' fourth claim—the equal protection claim based upon *Perry v. Brown*—is
10 entirely defective. First of all, that claim rests on a false premise: that minor parties are
11 somehow treated differently from the "major" parties by Proposition 14. In fact, however—
12 as this Court has previously recognized—all parties are given equal access to the primary
13 ballot, and all are able to advance to the general election on equal terms: if their preferred
14 candidate is one of the top-two vote-getters at the primary. Moreover, *Perry* actually
15 applied an extremely deferential standard of review—rational basis review—that
16 Proposition 14 easily survives.

17 And finally, the defects in Plaintiffs' claims under the U.S. Constitution doom it
18 under the California Constitution as well. In the first place, Proposition 14 *itself* is in the
19 Constitution, meaning that under relevant California Supreme Court case law, other
20 provisions of the California Constitution cannot be used to strike it down. And second,
21 even were that not the case, the California Supreme Court has held that election law
22 challenges under the state constitution are to be addressed under the same standard laid
23 down by the U.S. Supreme Court for resolving such claims under the federal constitution.

24 In short, all of Plaintiffs' claims are defective as a matter of law, and cannot be cured
25 by further amendment. Accordingly, demurrers against all of Plaintiffs' claims should be
26 sustained, without further leave to amend.

27 ///

28

1 **II. PROCEDURAL BACKGROUND.**

2 **A. Prior Ruling Sustaining Demurrers In This Case.**

3 This suit was filed in late-November 2011, and on January 13, 2012, Plaintiffs filed a
4 motion to preliminarily enjoin the use of Proposition 14 at the 2012 elections. The
5 Secretary of State filed a demurrer, in which Intervener-Defendants joined, and the
6 Secretary and Interveners both opposed the motion for preliminary injunction. On April
7 24, 2012, this Court denied the motion for preliminary injunction and sustained
8 demurrers, with leave to amend, as to each of the three causes of action alleged in the
9 original complaint, based largely on the rulings in *Washington I* and *Washington II*.

10 Plaintiffs' first claim alleged that Proposition 14 will make it more difficult for minor
11 parties to have their preferred candidates advance to the general election, and that
12 Proposition 14 thereby unduly burdened the rights of minor parties and their supporters to
13 ballot access at the general election. In sustaining the demurrer, this Court construed that
14 claim as raising a "facial" challenge to Proposition 14 and concluded that: (1) such a claim
15 was foreclosed by *Washington II*, which held that "because [the law] gives major- and
16 minor-party candidates equal access to the primary and general election ballots, it does not
17 give the "established parties a decided advantage over any new parties struggling for
18 existence." 2012 U.S. App. LEXIS 1050 at *24 (quoting *Williams v. Rhodes*, 393 U.S. 23, 31
19 (1968)); (2) that prior statements by the Supreme Court in *California Democratic Party v.*
20 *Jones*, 530 U.S. 567 (2000), which expressly approved top-two systems, were dicta, but
21 "they nevertheless provide a good indication that the Supreme Court would not consider a
22 'top two' primary system as imposing a severe burden on voting and associational rights of
23 supporters of independent or minor-party candidates[;]" and (3) that Plaintiffs' challenge
24 is distinguishable from prior cases striking down laws restricting minor parties' access to
25 the general election, because under Proposition 14 all parties compete on identical terms at
26 the primary. The only barrier to a minor party reaching the general election is its own
27 inability to persuade voters to support its candidates at the primary.

28 Plaintiffs' second claim alleged that voters were likely to be "confused" by the fact

1 that candidates may indicate their party “preference” on the ballot into thinking such
2 candidates are the parties’ “standard-bearer.” This Court held (and Plaintiffs conceded)
3 that the cause of action was also a “facial” challenge to Proposition 14. Accordingly, the
4 Court held that the claim was squarely foreclosed by the Supreme Court’s opinion in
5 *Washington I*.

6 Plaintiffs’ third claim alleged that Proposition 14 violates the Elections Clause of the
7 U.S. Constitution. This Court held that the claim was entirely conclusory, and that no facts
8 had been pled to support such a claim.

9 And finally, this Court rejected Plaintiffs’ arguments that a different result was
10 warranted under the California Constitution, because it recognized that the California
11 Supreme Court reviews election law challenges under the California Constitution using the
12 same standard the U.S. Supreme Court has adopted for such challenges under the federal
13 constitution.

14 **B. Plaintiffs’ First Amended Complaint.**

15 The Court granted the foregoing demurrers with leave to amend to state a cause of
16 action, and Plaintiffs filed a First Amended Complaint (“FAC”) on May 10, 2012. The FAC,
17 however, leaves the allegations of the original complaint substantially unaltered. The only
18 changes are:

- 19 • Multiple minor changes to alter the tense of verbs, from future tense to past
20 tense, in recognition that (1) Proposition 14 has already been administered in
21 several special elections, (2) several of the individual Plaintiffs have now
22 completed the actions—which were only anticipated at the time the original
23 complaint was filed—necessary to run for office, and (3) the political party
24 plaintiffs have now completed the processes—which were only anticipated at
25 the time the original complaint was filed—of settling on party endorsements
26 at the primary;
- 27 • Removing Manja Argue as a plaintiff;
- 28 • Alleging that more voters cast ballots at 2010 general election than at 2010

gubernatorial primary election, see Paragraphs 37-38;

- Adding additional citations to provisions of the California Constitution, see, e.g., Paragraphs 56-57; and
- Adding a new claim alleging a violation of equal protection, based on allegations that the parties have been deprived of “established rights” in violation of *Perry v. Brown*, 651 F.3d 1052 (9th Cir. 2012) (striking down Proposition 8). See Paragraphs 6-7, 21, 52-55.

III. APPLICABLE LEGAL STANDARDS.

A. Standard Governing Demurrers.

A demurrer is properly granted if one or more causes of action in the complaint fail to state a cause of action as a matter of law, assuming the truth of all facts pled in the complaint. *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1153-54 (2011). In ruling on the demurrer, the court may also take into account matters which may be judicially noticed. *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985). Leave to amend will be denied where there is no reasonable probability that the plaintiff(s) could cure the legal defects in the challenged causes of action, and the “plaintiff has the burden of proving that an amendment would cure the defect.” *Id.* (quoting *Schifando v. City of Los Angeles*, 31 Cal. 4th 1074, 1081 (2003)).

B. Substantive Standard Governing Election Law Challenges.

The Supreme 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 v. Takushi*, 504 U.S. 428, 434 (1991) (quoting *Anderson v. Celebrezze*, 460 U.S. 780 (1983), 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. 504 U.S. at 434.

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1 **IV. THE FIRST AMENDED COMPLAINT STILL FAILS TO STATE A CLAIM.**

2 **A. Plaintiffs Have Alleged No New Facts In Their First Amended**
3 **Complaint That Distinguish Their First Cause of Action (Ballot**
4 **Access) From That Already Rejected By This Court In The First**
5 **Demurrer.**

6 Following the Ninth Circuit's lead in *Washington II*, this Court rejected Plaintiffs'
7 facial challenge to Proposition 14, holding that it does not impose a severe burden on the
8 "minor" parties' rights, and does not violate the Constitution, because (1) every party in
9 California—major and minor party alike—has broad access to the primary and (2) all
10 candidates compete at that primary on equal terms and Proposition 14 thereby gives minor
11 party candidates the same opportunity as major-party candidates to advance to the general
12 election. This Court also recognized that the Supreme Court spoke approvingly of top-two
13 systems like Proposition 14, in *California Democratic Party v. Jones*. See 530 U.S. at
14 585.²

15 Recognizing, however, that the claim asserted in the original complaint was a
16 "facial" challenge to Proposition 14, this Court granted Plaintiffs leave to add allegations
17 stating a "challenge to some manner in which the Prop. 14 framework is being
18 implemented or applied in practice in a discriminatory or unreasonable way." (Emphasis
19 added.) This is an invitation that Plaintiffs ignored entirely. They have not added any new
20 allegations of discriminatory or unreasonable application of Proposition 14.

21 The *only* amendments that appear to have any bearing on this cause of action
22 whatsoever are (1) speculation that Proposition 14 will "likely" deny minor party
23 candidates access to the general election ballot in 2012 (see ¶ 2), and (2) that more voters
24 cast ballots at the 2010 general election than at the 2010 primary election (¶¶ 37-38).
25 These do not turn the lead from Plaintiffs' original complaint into gold.

26 Regarding the first of these allegations—the supposedly "likely" prospect of a minor

27 ² See also *Washington I*, 552 U.S. at 452 ("Petitioners are correct that we assumed
28 that the nonpartisan primary we described in *Jones* would be constitutional" and noting
that I-872's only difference is that candidates may disclose their personal "party
preference" on the ballot).

1 party candidate being denied access to the general election ballot—that prospect was
2 always the gravamen of Plaintiffs’ claim. And—as this Court held—“[t]he fact that only the
3 top two vote-getters advance to the general election *is not a discriminatory restriction* but
4 instead a result of the voting process.” Order – Demurrer to Complaint Sustained, filed
5 Apr. 24, 2012, p. 3 (emphasis added). As such, an allegation that Proposition 14 will be
6 enforced at the next general election according to its express statutory terms can hardly be
7 said to alter the analysis contained in this Court’s prior order and in *Washington II*. In
8 other words, this claim is still not an “as-applied” challenge at all, however Plaintiffs may
9 try label it. They simply object to, and challenge, the *facial* workings of Proposition 14,
10 rather than any detail of its application by state officials.

11 Regarding the second allegation—that the minor parties’ rights are burdened by the
12 fact they might not make it to the general election because more voters turned out at the
13 2010 general election than at the 2010 primary election—a virtually identical claim was
14 already rejected by the Supreme Court in *Munro v. Socialist Workers Party*, 479 U.S. 189
15 (1986). *Munro* rejected a challenge to Washington’s prior blanket primary system, holding
16 that the burden on minor parties of being kept off the *general* election ballot if they failed
17 to achieve 1% of the vote at the primary, but where those parties had ready access to the
18 *primary* election ballot, is “slight.” 479 U.S. at 199. Among other things, the minor parties
19 argued that their rights were burdened by the fact that turnout was higher at the general
20 election than at the primary, and that the 1% requirement kept them from reaching the
21 broader pool of voters. The Court squarely rejected this argument:

22 Appellees argue that voter turnout at primary elections is generally lower than the
23 turnout at general elections, and therefore enactment of § 29.18.110 has reduced the
24 pool of potential supporters from which Party candidates can secure 1% of the vote.
25 We perceive no more force to this argument than we would with an argument by a
26 losing candidate that his supporters’ constitutional rights were infringed by their
27 failure to participate in the election. Washington has created no impediment to
28 voting at the primary elections; every supporter of the Party in the State is free to
cast his or her ballot for the Party’s candidates. As was the case in *Jeness v.*
Fortson, 403 U.S. 431 (1971), “candidates and members of small or newly formed
political organizations are wholly free to associate, to proselytize, to speak, to write,
and to organize campaigns for any school of thought they wish. . . .” *Id.*, at 438.

1 States are not burdened with a constitutional imperative to reduce voter apathy or
2 to “handicap” an unpopular candidate to increase the likelihood that the candidate
will gain access to the general election ballot. . . .

3 479 U.S. at 198. The Court further held that “[i]t can hardly be said that [a State]’s voters
4 are denied freedom of association because they must channel their expressive activity into
5 a campaign at the primary as opposed to the general election.” 479 U.S. at 199. (This
6 Court expressly quoted this latter language in sustaining the demurrers to the First
7 Amended Complaint, and the Ninth Circuit likewise quoted it in rejecting the challenge to
8 Washington’s system in *Washington II.*)^{3,4}

9 Simply put, Plaintiffs have alleged no new facts that give life to their ballot access
10 claims—for the same reasons the demurrer to that claim was previously sustained, it
11 should be here as well.⁵

12 **B. Plaintiffs Have Added No New Allegations Whatsoever To Support**
13 **Their “Confusion” Claim, And Cannot State Such A Claim As A**
14 **Matter Of Law Because, Like Washington, California Has**
15 **Carefully Followed The Supreme Court’s Guidance in “Applying”**
16 **The Top-Two System.**

17 Plaintiffs were also given leave to amend their complaint to state an “as applied”

18 ³ See also *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 699-700 (8th Cir.
19 2011), cert. denied, ___ U.S. ___, 2012 U.S. LEXIS 2955 (Apr. 16, 2012) (“despite the
20 traditionally lower interest in primary elections than general elections, the burden is
21 appropriately placed on the candidate to generate support and rally voters to vote in order
22 to make it to the general election ballot. It is not the state’s obligation to find or create an
23 easier forum for establishing voter support.”); *Rainbow Coalition of Okla. v. Okla. State*
24 *Elec. Bd.*, 844 F.2d 740 (10th Cir. 1988) (rejecting minor parties’ challenge to qualification
25 statutes based on votes cast at past presidential elections, where turnout at such elections
26 was higher than at gubernatorial elections).

27 ⁴ It is also worth noting that the June 2010 primary was a closed primary, in which
28 voters were restricted in their choices. Decline-to-State voters could not participate in all
parties’ primaries—including some of Plaintiffs’—and in circumstances where the major
offices were virtually uncontested, such as the Democratic primaries for governor and U.S.
Senator, many voters may have felt less incentive to turn-out. Proposition 14 allows all
voters to vote at the primary, as a matter of right, and does not limit voting only to a single
party. Increased turnout between the June 2010 primary and November 2010 general
election, therefore, provides no evidence regarding how the top-two system will work.

⁵ Intervener-Defendants note that Plaintiffs have not made any amendments to
further bolster their indirect attack—rejected by this Court’s prior order—on the party
qualification statutes. As Intervener-Defendants have previously noted, such an attack is
precluded by *Peace & Freedom Party v. Shelley*, 114 Cal. App. 4th 1237 (2004).

1 challenge to Proposition 14 based on the prospect of widespread voter “confusion” in the
2 implementation of the measure. Here again, they have made no effort to bolster the
3 factual allegations of the original complaint on this score. Indeed, there is not a single new
4 factual allegation that appears to go to this claim. Adding the words, “as applied”, does no
5 special magic.

6 The truth is that Plaintiffs are unable to state a “confusion” claim *as a matter of*
7 *law*, because California will “apply” Proposition 14 in accordance with statutory guidelines
8 regarding the ballot materials that directly track the Supreme Court’s guidance in
9 *Washington I*, and which preclude such a claim.

10 Though the Supreme Court did not decide an as-applied “confusion” challenge in
11 *Washington I*, it did anticipate that challenge and gave a roadmap as to how it believed the
12 State could structure its ballot materials in a manner that would result in Washington’s
13 top-two system being “applied” in a constitutional matter. Noting that “whether voters will
14 be confused by the party-preference designations will depend in significant part on the
15 form of the ballot[,]” *Washington I*, 552 U.S. at 455, the Court stated, “It is not difficult to
16 conceive of such a ballot” that would “be printed in such a way as to eliminate the
17 possibility of widespread voter confusion and with it the perceived threat to the First
18 Amendment.” *Id.* at 456.

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

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

1 Washington closely followed the Supreme Court's suggestions for implementing I-
2 872. Because it did so, the Washington district court rejected the political parties' as-
3 applied challenge, and the Ninth Circuit affirmed, holding, "The 'form of the ballot' plainly
4 supports the conclusion that I-872 does not impose a severe burden on the plaintiffs'
5 freedom of association[.]" and that "[t]he form of the ballot thus points to an absence of
6 voter confusion." *Washington II*, 2012 U.S. App. LEXIS 1050, *14-*15.

7 Proposition 14 and its implementing legislation also closely track the Supreme
8 Court's guidance. They prescribe disclaimers on the ballot that inform the voters of the
9 absence of an association between the candidate and the preferred party. Elec. Code §
10 13206(b); *see also* Request for Judicial Notice, filed herewith ("RJN"), Exhibit A (2012
11 Primary Ballot). They denote the candidate's party preference on the ballot as "My party
12 preference is the ____ Party." *Id.* Elec. Code § 13105.⁶ They require the distribution of
13 explanatory materials in the Voter Information Guide distributed to every household.
14 RJN, Exhibit B; Elec. Code § 9083.5. They require additional explanatory materials to be
15 posted at the polling places. Elec. Code § 14105.1. They require the Secretary of State to
16 "conduct public voter education campaigns, using existing resources, for the purpose of
17 publicly disseminating information regarding the roles of the parties in primary elections
18 for party-nominated offices, voter-nominated offices, and nonpartisan offices." Elec. Code
19 § 8005. And Proposition 14 goes even further than the Supreme Court's suggestions: it
20 permits the qualified parties to print their list of "endorsed" candidates in the sample
21 ballot, so they have the power to indicate, in official materials sent to each voter at
22 taxpayer expense—exactly whom the parties favor as their official "standard-bearers."
23 Elec. Code § 13302(b); *see also* RJN, Exhibit C (2012 Sample Ballot), p. 14.

24 In sum, Plaintiffs' confusion claim is defective as a matter of law because, under
25 *Washington I* and *Washington II*, the ballot materials effectively preclude any claim that a
26 "reasonable, well-informed electorate" will be confused.

27
28 ⁶ 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 **C. Plaintiffs Have Added No New Allegations Whatsoever To Support**
2 **Their Third Cause of Action (Elections Clause).**

3 This Court previously held that Plaintiffs' allegation that Proposition 14 violates the
4 Elections Clause was conclusory and failed to allege any manner in which Proposition 14
5 dictates electoral outcomes as opposed to prescribing the time place and manner of those
6 elections. That remains the case in the First Amended Complaint. Plaintiffs have not
7 included any new allegations in the First Amended Complaint that "set forth factual
8 allegations regarding any manner in which the Prop. 14 laws, either on their face or as
9 specifically applied, dictate electoral outcomes as opposed to prescribing the "Times, Places
10 and Manner of holding Elections for Senators and Representatives" See Order –
11 Demurrer to Complaint Sustained, filed Apr. 24, 2012, p. 3.

12 In *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002), *cert. denied*, 538 U.S. 908
13 (2003), several members of the Libertarian Party of Georgia challenged Georgia's
14 requirement that candidates get signatures equal to 5% of the voters in the last statewide
15 election to appear on the ballot, unless they were members of qualified parties. The
16 *Cartwright* plaintiffs brought this challenge under the Elections Clause and Qualifications
17 Clause, because they challenged the application of that statute with respect to
18 congressional elections. The plaintiffs in *Cartwright* contended that restrictions on minor
19 party candidates was unconstitutional under *Cook v. Gralike*, 531 U.S. 510 (2001)—the
20 same case upon which Plaintiffs rely in this case. The Eleventh Circuit characterized that
21 argument as "frivolous." *Cartwright*, 304 F.3d at 1142 n.4.

22 **D. Plaintiffs' New "Equal Protection" Claim (The Fourth Cause Of**
23 **Action) Suffers From Numerous Fundamental Defects.**

24 **1. Under federal law, election law challenges are analyzed**
25 **under the *Burdick* balancing test regardless of the**
26 **constitutional provision on which the challenge is based.**

27 Any claim raised under the equal protection clause must fail for all the same reasons
28 that a claim raised under the First Amendment, due process or the Elections Clause must
 fail. The courts have held that election law challenges employ the "single basic mode of
 analysis" regardless of the constitutional provision on which they are based. *Partnoy v.*

1 *Shelley*, 277 F. Supp. 2d 1064, 1072 (S.D. Cal. 2003) (quoting *LaRouche v. Fowler*, 152
2 F.3d 974, 987-88 (D.C. Cir. 1998)). See also *Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15
3 (9th Cir. 2011) (same); *Republican Party v. Faulkner County*, 49 F.3d 1289, 1293 n.2 (8th
4 Cir. 1995) (“In election cases, equal protection challenges essentially constitute a branch of
5 the associational rights tree.”). The balancing test laid out by *Burdick v. Takushi* governs,
6 and Plaintiffs’ claims fail under that test.

7 As noted above, this Court (following the guidance from the Ninth Circuit) has
8 already held that Proposition 14 does not impose a “severe” burden on Plaintiffs’ rights.
9 Given the lack of a “severe” burden on the parties’ rights, the State need only demonstrate
10 that Proposition 14 furthers an “important regulatory interest.” It furthers several. First,
11 Proposition 14 is consistent with past Supreme Court case law holding that the primary
12 election system in California, is “an integral part of the entire election process . . . [that]
13 functions to winnow out and finally reject all but the chosen candidates[,]” and that the
14 State may therefore “properly reserve the general election ballot ‘for major struggles[.]’”
15 *Munro*, 479 U.S. at 196 (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)). Also, the
16 general election under Proposition 14 is closely analogous to a runoff election in a typical
17 nonpartisan system. Numerous courts have held that limiting a runoff to the top two vote-
18 getters at the primary serves the legitimate interest in ensuring that the person who is
19 ultimately elected to office receives a majority of the vote. See, e.g., *Edelstein v. City &*
20 *County of San Francisco*, 29 Cal. 4th 164, 183 (2002). Indeed, to ensure that such a
21 majority is received, SB 6 bans write-in voting at the general election, just as the system
22 upheld in *Edelstein* did. See *Field v Bowen*, 199 Cal. App. 4th 346, 367 and 369 (2011);
23 Elec. Code. § 8606.

24 **2. Plaintiffs’ reliance on *Perry v. Brown* is entirely misplaced.**

25 Relying on *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), in which the Ninth
26 Circuit recently invalidated Proposition 8, Plaintiffs assert that because they were
27 previously entitled to a place on the general election ballot, the withdrawal of that “right”
28 violates equal protection. This argument, while novel, has no more merit than the others.

1 *Perry* held that “the Equal Protection Clause requires the state to have a legitimate
2 reason for withdrawing a right or benefit *from one group but not others*, whether or not it
3 was required to confer that right or benefit in the first place.” 671 F.3d at 1083-84
4 (emphasis in original). In other words, when a change in the law is enacted, and that
5 change in the law withdraws benefits previously conferred on a discrete group of persons,
6 there must be a legitimate reason for the change in the law—if there is not, it will be
7 deemed unconstitutional. There are two main problems with the application of the *Perry*
8 standard to this case.

9 First, Proposition 14 does not “withdraw[] a right or benefit from one group but not
10 others[.]” Whereas Proposition 8 specifically distinguished between opposite-sex couples
11 (who could marry), and same-sex couples (who could not), Proposition 14 treats all
12 political parties alike. Its provision that “[a] political party or party central committee
13 shall not have the right to have its preferred candidate participate in the general election
14 for a voter-nominated office other than a candidate who is one of the two highest vote-
15 getters at the primary election, as provided in subdivision (a)” does not depend on the size
16 of the party. “The candidates who are the top two vote-getters at a voter-nominated
17 primary election for a congressional or state elective office shall, regardless of party
18 preference, compete in the ensuing general election.” CAL. CONST. art. II, § 5, subd. (a). If
19 minor party-preferred candidates do not proceed to the general election, it is only because
20 other candidates are more popular. “States are not burdened with a constitutional
21 imperative to reduce voter apathy or to ‘handicap’ an unpopular candidate to increase the
22 likelihood that the candidate will gain access to the general election ballot. . . .” *Munro*,
23 479 U.S. at 198.

24 Moreover, though *Perry* struck down Proposition 8, the standard of review it
25 applied was the most lenient possible: rational basis review. Under that standard, a
26 change in the law will be upheld “so long as it bears a rational relation to some legitimate
27 end.” *Perry*, 671 F.3d at 1082 (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)). As
28 already discussed—and as this Court previously held—Proposition 14 advances several

1 interests of the State, “similar or identical to those found to suffice as ‘important regulatory
2 interests’ in *Washington II*.” See Order – Motion for Preliminary Injunction Denied, filed
3 Apr. 24, 2012, p. 2. It therefore easily survives rational basis review.

4 **E. The California Constitution Does Not Provide An Independent**
5 **Basis For Striking Down Proposition 14.**

6 Obviously recognizing the weakness of their case under federal law, Plaintiffs have
7 added additional citations to the California Constitution to the First Amended Complaint,
8 and allege that these provisions are violated by Proposition 14. These new allegations
9 provide no basis for enjoining Proposition 14.

10 **1. Proposition 14 is itself part of the California Constitution.**

11 First of all, Proposition 14 amended Article II, sections 5 and 6, of the *California*
12 *Constitution*. In other words, it is itself a part of the Constitution, and as a constitutional
13 provision it is accorded equal dignity to all other provisions of the State Constitution,
14 including those cited by Plaintiffs. *Strauss v. Horton*, 46 Cal. 4th 364, 465-69 (2009)
15 (rejecting Attorney General’s attempt to invalidate a constitutional amendment on the
16 ground that other constitutional provisions are “of a higher order than—and thus exempt
17 from—the people’s right to ‘alter or reform’ the Constitution through either the legislative
18 or the initiative constitutional amendment process.”). It even prevails over constitutional
19 provisions that were earlier adopted, to the extent there is a conflict between them. *Id.*
20 Thus, only federal law—and not the various state constitutional provisions cited by
21 Plaintiffs—could ever serve as the basis for invalidating Proposition 14. See *id.* at 411-12
22 (recognizing that by amending the state constitution, Proposition 8 trumped the state
23 equal protection clause as previously interpreted, with respect to the specific subject
24 matter addressed by the later-adopted measure); *Hi-Voltage Wire Works, Inc. v. City of*
25 *San Jose*, 24 Cal. 4th 537, 561-62 (2000) (upholding Proposition 209, which prohibited
26 affirmative action programs in governmental hiring, contracting and employment, though
27 the equal protection clause of California’s Constitution, as interpreted by the state
28 Supreme Court, permitted such programs).

1 **2. Election law challenges under the California Constitution**
2 **apply the same standard as that applied under federal law.**

3 Moreover, as this Court has already recognized in granting the demurrer to the
4 original complaint,⁷ “in analyzing constitutional challenges to election laws, [the
5 California Supreme C]ourt has followed closely the analysis of the United States Supreme
6 Court.” *Edelstein v. City & County of San Francisco*, 29 Cal. 4th 164, 179 (2002) (quoting
7 *Canaan v. Abdelnour*, 40 Cal. 3d 703, 710 (1985)).⁸ Strict scrutiny therefore does not
8 apply under the California Constitution either; the more deferential standard set forth in
9 *Burdick v. Takushi* does. *Id.*

10 **V. CONCLUSION.**

11 For the foregoing reasons, the demurrer should be sustained and the first amended
12 complaint dismissed without leave to amend.

13 Respectfully submitted,

14 Dated: May 30, 2012

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17 

18 By: _____
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20 Attorneys for Intervener-Defendants

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26 ⁷ Order – Demurrer to Complaint Sustained, filed Apr. 24, 2012, p. 3.

27 ⁸ See also *Kunde v. Seiler*, 197 Cal. App. 4th 518, 535 n.12 (2011), *rev. denied*, 2011
28 Cal. LEXIS 10995 (Cal., Oct. 26, 2011) (rejecting election law challenge under the federal
constitution and then noting, citing *Edelstein*, that “the analysis would be substantially the
same as under the federal Constitution in this context.”).