

u res



FILED
ALAMEDA COUNTY

SEP 18 2012

1 NIELSEN MERKSAMER
 2 PARRINELLO GROSS & LEONI LLP
 3 JAMES R. PARRINELLO (SBN 63415)
 4 MARGUERITE MARY LEONI (SBN 101696)
 5 CHRISTOPHER E. SKINNELL (SBN 227093),
 6 2350 Kerner Boulevard, Suite 250
 7 San Rafael, California 94901
 8 TELEPHONE: (415) 389-6800
 9 FACSIMILE: (415) 388-6874
 10 Email: jparrinello@nmgovlaw.com
 11 Email: mleoni@nmgovlaw.com
 12 Email: cskinnell@nmgovlaw.com

CLERK OF THE SUPERIOR COURT
 Deputy

13 *Attorneys for Intervener-Defendants*
 14 INDEPENDENT VOTER PROJECT, DAVID
 15 TAKASHIMA, ABEL MALDONADO &
 16 CALIFORNIANS TO DEFEND THE OPEN
 17 PRIMARY

BY FAX

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

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

Plaintiffs,

vs.

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

Defendant.

29 INDEPENDENT VOTER PROJECT, DAVID
 30 TAKASHIMA, ABEL MALDONADO &
 31 CALIFORNIANS TO DEFEND THE OPEN
 32 PRIMARY,

Intervener-Defendants.

Case No.: RG11605301

ASSIGNED FOR ALL
 PURPOSES TO JUDGE
 LAWRENCE JOHN APPEL

**INTERVENER-
 DEFENDANTS' REPLY IN
 SUPPORT OF DEMURRER
 TO VERIFIED FIRST
 AMENDED COMPLAINT**

DATE: September 25, 2012
 TIME: 9:00 a.m.
 DEPT: 16

TABLE OF CONTENTS

1			
2			<u>Page</u>
3	I.	INTRODUCTION	1
4	II.	ARGUMENT	2
5		A. Merely Labeling A Claim “As-Applied,” Without Changing The	
6		Allegations, And While Continuing To Seek Invalidation Of	
7		Proposition 14 In Its Entirety, Does Not Cure The Defects In	
8		The Original Complaint	2
9		B. Plaintiffs’ First Cause Of Action (Ballot Access) Fails To State	
10		A Claim; It Is The Same Claim Against Which A Demurrer Was	
11		Sustained In The Original Complaint	3
12		C. Plaintiffs’ “Confusion” Claim Is Precluded By The Form Of	
13		Ballot Materials Prescribed By California Law	5
14		D. Plaintiffs Have Failed To State A Claim As A Matter Of Law	
15		Under The Elections Clause (Third Cause Of Action)	6
16		E. Plaintiffs’ Fourth Cause Of Action (“Equal Protection”) Fails	
17		To State A Claim As A Matter Of Law	8
18		F. Plaintiffs Have Abandoned Their Claim That The California	
19		Constitution Provides An Independent Basis For Striking	
20		Down Proposition 14	9
21	III.	CONCLUSION	9
22		PROOF OF SERVICE	10
23			
24			
25			
26			
27			
28			

TABLE OF AUTHORITIES

	Page(s)
CASES	
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	
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	4
<i>Bates v. Jones</i> , 131 F.3d 843 (9th Cir. 1997) (en banc), cert. denied, 523 U.S. 1021 (1998).....	6
<i>Board of Supervisors v. Lonergan</i> , 27 Cal. 3d 855 (1980).....	9
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1991)	8
<i>California Demo. Party v. Jones</i> , 530 U.S. 567 (2000)	3
<i>Cartwright v. Barnes</i> , 304 F.3d 1138 (11th Cir. 2002), cert. denied, 538 U.S. 908 (2003)	2, 7
<i>Cook v. Gralike</i> , 531 U.S. 510 (2001).....	7
<i>Council of Alternative Political Parties v. Hooks</i> , 179 F.3d 64 (3d Cir. 1999)	4
<i>Daar v. Yellow Cab Co.</i> , 67 Cal. 2d 695 (1967)	6
<i>Doe v. Reed</i> , 130 S. Ct. 2811 (U.S. 2010)	3
<i>Dudum v. Arntz</i> , 640 F.3d 1098 (9th Cir. 2011).....	8
<i>Fed. Commun. Comm'n v. Beach Communs.</i> , 508 U.S. 307 (1993)	9
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971)	4
<i>Legislature v. Eu</i> , 54 Cal. 3d 492 (1991)	3
<i>Libertarian Party of Illinois v. Rednour</i> , 108 F.3d 768 (7th Cir. 1997)	7

1	<i>Libertarian Party of N.D. v. Jaeger,</i>	
2	659 F.3d 687 (8th Cir. 2011), <i>cert. denied</i> , ___ U.S. ___, 2012 U.S. LEXIS 2955	
	(Apr. 16, 2012)	4
3	<i>Munro v. Socialist Workers Party,</i>	
4	479 U.S. 189 (1986).....	1, 4, 9
5	<i>People v. Snyder,</i>	
6	22 Cal. 4th 304 (2000)	9
7	<i>Perry v. Brown,</i>	
8	671 F.3d 1052 (9th Cir. 2012)	2, 8, 9
9	<i>Rainbow Coalition of Okla. v. Okla. State Elec. Bd.,</i>	
10	844 F.2d 740 (10th Cir. 1988)	4
11	<i>Rippon v. Bowen,</i>	
12	160 Cal. App. 4th 1308 (2008), <i>rev. den.</i> , 2008 Cal. LEXIS 6975 (Cal. June 11,	
13	2008).....	3
14	<i>Romer v. Evans,</i>	
15	517 U.S. 620 (1996).....	9
16	<i>Swanson v. Worley,</i>	
17	490 F.3d 894 (11th Cir. 2007)	4
18	<i>Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm'n,</i>	
19	51 Cal. 3d 744 (1990)	6
20	<i>Van Susteren v. Jones,</i>	
21	331 F.3d 1024 (9th Cir. 2003), <i>cert. denied</i> , 540 U.S. 1106 (2004)	7
22	<i>Wash. State Republican Party v. Wash. State Grange,</i>	
23	552 U.S. 442 (2008) (“ <i>Washington I</i> ”)	<i>passim</i>
24	<i>Wash. State Republican Party v. Wash. State Grange,</i>	
25	676 F.3d 784 (9th Cir. 2012) (“ <i>Washington II</i> ”).....	<i>passim</i>
26	<i>Wood v. Meadows,</i>	
27	207 F.3d 708 (4th Cir. 2000)	4
28		
	OTHER AUTHORITIES	
	Elections Clause of the U.S. Constitution.....	2, 6, 7, 8
	First Amendment.....	1, 5, 6

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

Qualifications Clause of the U.S. Constitution 7
California Constitution 2, 9
Federal Rule 12(b)(6)..... 7

1 **I. INTRODUCTION.**

2 Plaintiffs' Opposition to the Interveners' demurrer is characterized by a failure to
3 address, much less distinguish, many of the cases that Interveners cited, which support the
4 conclusion that each of the causes of action in the First Amended Complaint are properly
5 subject to demurrer.

6 For example, Plaintiffs seek to distinguish their ballot access claims from those
7 rejected by the Ninth Circuit as a matter of law in *Wash. State Republican Party v. Wash.*
8 *State Grange*, 676 F.3d 784 (9th Cir. 2012) ("*Washington II*"),¹ on two main grounds: (1)
9 that Washington's primary is in August, while California's is in June, and (2) that turnout
10 at California's primaries is lower than at its general elections. But Plaintiffs simply *ignore*
11 the many cases—previously cited by Interveners—upholding June deadlines for minor
12 parties to seek access to the general election ballot; and regarding the issue of relative
13 turnout, Plaintiffs simply *ignore* the cases cited by Interveners—including *Munro v.*
14 *Socialist Workers Party*, 479 U.S. 189 (1986)—which rejected virtually identical claims.

15 Plaintiffs also have also ignored guidance from the Supreme Court in *Wash. State*
16 *Republican Party v. Wash. State Grange*, 552 U.S. 442 (2008) ("*Washington I*"), which
17 stated that voter "confusion" is an objective inquiry to be assessed based on how a
18 reasonable, "well-informed" electorate would interpret the official ballot materials, and
19 further holding that confusion—and the resulting threat to First Amendment values—can
20 be precluded by proper design of the relevant ballot materials. The Supreme Court
21 provided extensive guidance regarding how such materials might be designed in the
22 manner that "would be consistent with the First Amendment[,]" *id.* at 457, and California
23 has followed that guidance. Though the Ninth Circuit discussed defects in the subjective
24 evidence of voter confusion submitted by the plaintiffs in *Washington II*, it did not endorse
25 a subjective standard of confusion, or hold that such evidence would be sufficient to
26 support a claim for relief in the absence of the evidentiary defects. Because California has

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 Court has circulated those
petitions for conference on September 24.

1 designed its ballot materials following the guidelines laid down by the Supreme Court, the
2 confusion claim is precluded as a matter of law.

3 Regarding Plaintiffs claim that Proposition 14 violates the Elections Clause of the
4 U.S. Constitution, Plaintiffs simply ignore *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir.
5 2002), *cert. denied*, 538 U.S. 908 (2003), which rejected a similar claim, and which held
6 that procedural election regulations like those challenged here (as opposed to substantive
7 qualifications for office), are not subject to challenge under the Elections Clause.

8 Plaintiffs' defense of its fourth claim—the equal protection claim based upon *Perry*
9 *v. Brown*—simply ignores the fact, previously recognized by this Court, that all parties are
10 given equal access to the primary ballot, and all are able to advance to the general election
11 on equal terms if their preferred candidate is one of the top-two vote-getters at the
12 primary. Instead, Plaintiffs simply repeat their mistaken premise that minor parties are
13 somehow treated differently from the “major” parties. Plaintiffs also ignore the fact that
14 *Perry* applied the deferential rational basis standard, which Proposition 14 easily survives.

15 And finally, Plaintiffs have made no effort to defend their contention that the
16 California Constitution provides an independent basis for striking down Proposition 14,
17 thereby conceding that it does not.

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

21 **II. ARGUMENT.**

22 **A. Merely Labeling A Claim “As-Applied,” Without Changing The**
23 **Allegations, And While Continuing To Seek Invalidation Of**
24 **Proposition 14 In Its Entirety, Does Not Cure The Defects In The**
25 **Original Complaint.**

26 The primary difference between Plaintiffs' original complaint, and the First
27 Amended Complaint, is Plaintiffs' use of the “as-applied” label. But the same defects that
28 led the Court to sustain the demurrer to the original complaint continue to exist here; just
because a claim is *labeled* “as applied” does not *make* it as-applied.

1 For example, in *Rippon v. Bowen*, 160 Cal. App. 4th 1308 (2008), *rev. den.*, 2008
2 Cal. LEXIS 6975 (Cal. June 11, 2008), plaintiffs challenged the constitutionality of
3 Proposition 140, which imposed term limits on state offices. They sought to distinguish
4 *Legislature v. Eu*, 54 Cal. 3d 492 (1991), in which California Supreme Court had already
5 upheld Proposition 140, on the ground that *their* claim was an “as-applied” challenge to
6 the measure, based on the detrimental effects that Proposition 140 had actually had on the
7 California Legislature in the 18 years since the measure’s adoption by the voters.

8 The Court of Appeal rejected the plaintiffs’ characterization of their suit as an “as-
9 applied” challenge, noting—among other things—that the plaintiffs sought to “invalidate
10 the initiative as a whole.” 160 Cal. App. 4th at 1319. Plaintiffs in this case likewise seek to
11 invalidate Proposition 14 “as a whole” rather than in a particular, unique application of the
12 measure. *See also Doe v. Reed*, 130 S. Ct. 2811, 2817 (U.S. 2010) (to the extent plaintiffs
13 sought relief that reached beyond their own unique circumstances, their claim was facial).

14 **B. Plaintiffs’ First Cause Of Action (Ballot Access) Fails To State A**
15 **Claim; It Is The Same Claim Against Which A Demurrer Was**
16 **Sustained In The Original Complaint.**

17 Plaintiffs acknowledge that this Court has already held that it is a *legal*—rather than
18 factual—question, as to whether (1) the timing of California’s primary (June vs. August),
19 and the (2) lower turnout at those primaries vis-à-vis the general election, give rise to a
20 viable cause of action against Proposition 14. Because it is a legal, rather than factual,
21 question, the viability of this claim can properly be resolved on demurrer.

22 Following the Ninth Circuit’s lead in *Washington II*, this Court rejected Plaintiffs’
23 facial challenge to Proposition 14, holding that it does not impose a severe burden on the
24 “minor” parties’ rights, and does not violate the Constitution, because (1) every party in
25 California—major and minor party alike—has broad access to the primary and (2) all
26 candidates compete at that primary on equal terms and Proposition 14 thereby gives minor
27 party candidates the same opportunity as major-party candidates to advance to the general
28 election. This Court also recognized that the Supreme Court spoke approvingly of top-two
systems like Proposition 14, in *California Demo. Party v. Jones*, 530 U.S. 567 (2000).

1 Plaintiffs seek to distinguish *Washington II* on the ground that the Washington
2 primary is in August, whereas in California the primary is two months earlier, in June.
3 This is a distinction without legal significance. *Washington II* upheld that state's top two
4 primary on the ground that August is far closer to the general election than the March
5 filing deadline for independent candidates struck down in *Anderson v. Celebrezze*, 460
6 U.S. 780 (1983). But numerous courts, applying *Anderson*, have upheld June filing
7 deadlines for independent and minor party candidates. See, e.g., *Council of Alternative*
8 *Political Parties v. Hooks*, 179 F.3d 64 (3d Cir. 1999); *Wood v. Meadows*, 207 F.3d 708
9 (4th Cir. 2000); *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007). See also *Jeness v.*
10 *Fortson*, 403 U.S. 431, 433-34 (1971) (pre-*Anderson* case, upholding ballot access petition
11 requirement with June deadline). In other words, June falls on the "constitutional" side of
12 the line drawn by *Anderson*. Interveners cited these cases in their opposition to the
13 motion for preliminary injunction; Plaintiffs simply ignore them.

14 Regarding the second allegation—that the minor parties' rights are burdened
15 because more voters turned out at the 2010 general election than at the 2010 primary
16 election—Plaintiffs simply ignore the lengthy discussion of *Munro v. Socialist Workers*
17 *Party* in Interveners' demurrer. In that case, a virtually identical claim was already
18 rejected by the Supreme Court. 479 U.S. at 198-99. Plaintiffs fail to even cite *Munro*,
19 much less distinguish it, nor do they attempt to distinguish the other cases cited in
20 Interveners' demurrer, which also hold that "despite the traditionally lower interest in
21 primary elections than general elections, the burden is appropriately placed on the
22 candidate to generate support and rally voters to vote in order to make it to the general
23 election ballot. It is not the state's obligation to find or create an easier forum for
24 establishing voter support." *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 699-700
25 (8th Cir. 2011), cert. denied, ___ U.S. ___, 2012 U.S. LEXIS 2955 (Apr. 16, 2012). See also
26 *Rainbow Coalition of Okla. v. Okla. State Elec. Bd.*, 844 F.2d 740 (10th Cir. 1988)
27 (rejecting minor parties' challenge to qualification statutes based on votes cast at past
28 presidential elections, instead of gubernatorial elections where turnout was lower).

1 Finally, the fact that the California Legislature recently voted to consolidate all
2 ballot measures at November elections has no significance here. That was a policy choice
3 that the Legislature *could* make—but was not constitutionally-*required* to make. A
4 different policy choice was made in Proposition 14, and that choice was also constitutional.

5 **C. Plaintiffs’ “Confusion” Claim Is Precluded By The Form Of Ballot**
6 **Materials Prescribed By California Law.**

7 Plaintiffs make no effort to dispute the fact that California—like Washington—will
8 “apply” Proposition 14 by using ballot materials that directly track the Supreme Court’s
9 guidance in *Washington I*, which the Court stated would “be printed in such a way as to
10 eliminate the possibility of widespread voter confusion and with it the perceived threat to
11 the First Amendment.” 522 U.S. at 456. The Supreme Court further held, “Our conclusion
12 that these implementations of I-872 **would be consistent with the First**
13 **Amendment** is fatal to respondents’ facial challenge.” *Id.* at 457 (emphasis added).

14 *Washington II* does not contradict the Supreme Court’s conclusion that such ballot
15 materials are “consistent with the First Amendment.” In *Washington II*, the Ninth Circuit
16 held that “The ‘form of the ballot’ plainly supports the conclusion that I-872 does not
17 impose a severe burden on the plaintiffs’ freedom of association[,]” and “[t]he form of the
18 ballot thus points to an absence of voter confusion.” 676 F.3d at 791-92. Though the Court
19 also discussed defects in the evidence of “actual confusion” that plaintiffs presented, it did
20 not hold that such evidence, absent those defects, could have overcome the form of ballot.

21 Moreover, such a holding would have been inconsistent with the Supreme Court
22 opinion, which prescribes an objective assessment of what a reasonable “well-informed
23 electorate” would understand in light of the official election materials, rather than a
24 subjective inquiry into voters’ actual state of mind. As Chief Justice Roberts’ concurring
25 opinion confirmed, the question is not whether any voter might be confused, but whether a
26 “*reasonable voter* in Washington State will regard the listed candidates as members of, or
27 otherwise associated with, the political parties the candidates claim to prefer.” *Id.* at 461
28 (emphasis added). Stated differently, the political parties’ allegations regarding voter

1 confusion must be judged from the point of view of the reasonable, well-informed voter,
2 not based on subjective impressions of individual voters. *See id.* at 462 (Roberts, C.J.,
3 concurring) (consideration of a challenge to the implementation of I-872 would depend on
4 “what the ballot says” rather than upon subjective evidence or studies). *See also*
5 *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm’n*, 51 Cal. 3d 744,
6 768 (1990) (voters are presumed to understand ballot measures upon which they vote);
7 *Bates v. Jones*, 131 F.3d 843, 854-55 (9th Cir. 1997) (en banc) (O’Scannlain, J.,
8 concurring), *cert. denied*, 523 U.S. 1021 (1998) (“To engraft a due process ‘notice’
9 requirement on popular legislation is to invite the federal courts to look behind initiatives
10 to ensure that voters were capable of understanding the potential consequences of their
11 actions and acted accordingly. This is simply beyond our province. . .”).

12 The existence of voter confusion is not—cannot be—a matter for unending court
13 battles to determine election by election, or voter by voter, whether sufficient subjective
14 “voter confusion” exists at a particular time to justify judicial intervention into the State’s
15 chosen process for electing its officers. Rather, the question must be simply whether the
16 State’s implementing actions viewed objectively would create the risk of real confusion in a
17 reasonable, well-informed voter. As the Court’s opinion in *Washington I* indicated,
18 California’s ballot materials are designed to “eliminate the possibility of widespread voter
19 confusion and with it the perceived threat to the First Amendment.” 522 U.S. at 456.

20 In sum, Plaintiffs’ confusion claim is defective as a matter of law because, under
21 *Washington I* and *Washington II*, the ballot materials effectively preclude any claim that a
22 “reasonable, well-informed electorate” will be confused.

23 **D. Plaintiffs Have Failed To State A Claim As A Matter Of Law Under**
24 **The Elections Clause (Third Cause Of Action).**

25 This Court already held that Plaintiffs’ Elections Clause cause of action failed to
26 plead facts—rather than legal conclusions—sufficient to state a cause of action. *See Daar*
27 *v. Yellow Cab Co.*, 67 Cal. 2d 695, 713 (1967) (“A demurrer admits all material and issuable
28 facts properly pleaded. [Citations.] However, it does not admit contentions, deductions or

1 conclusions of fact or law alleged therein.”). The cause of action in the First Amended
2 Complaint contains no material differences from the claim in the original complaint.
3 Because the claim is essentially identical, the result should be identical as well. The
4 demurrer should be sustained.

5 Plaintiffs simply ignore *Cartwright v. Barnes*, cited by Interveners, which
6 dismissed a similar challenge as a matter of law, holding requirements that are procedural
7 in nature, which do not impose substantive qualifications for office, do not violate
8 the Qualifications and Elections Clauses of the U.S. Constitution. 304 F.3d at 1138. See
9 also *Van Susteren v. Jones*, 331 F.3d 1024, 1027 (9th Cir. 2003), *cert. denied*, 540 U.S.
10 1106 (2004) (upholding “procedural regulation” that required independent candidates to
11 have disaffiliated from any major party at least 13 months before the election); *Libertarian*
12 *Party of Illinois v. Rednour*, 108 F.3d 768, 777 (7th Cir. 1997). Proposition 14 is a
13 procedural regulation, and is not subject to challenge under the Elections Clause.

14 In *Cartwright*, members of the Libertarian Party of Georgia challenged Georgia’s
15 requirement that candidates get signatures equal to 5% of the voters in the last statewide
16 election to appear on the ballot, unless they were members of qualified parties. The
17 *Cartwright* plaintiffs contended that the 5% signature threshold was an unconstitutionally
18 burdensome condition to appearing on the general election ballot, because no minor party
19 candidate had been able to meet the test in recent years. The Plaintiffs brought their
20 challenge under the Elections Clause and Qualifications Clause, because they challenged
21 the application of that statute with respect to congressional elections.² The federal district
22 court granted a motion to dismiss the claim under Federal Rule 12(b)(6)—*i.e.*, the federal
23 analogue of a demurrer under the CCP—and the 11th Circuit affirmed, holding that,
24 notwithstanding the hurdles that minor party candidates had to clear to qualify for the

25
26 ² The plaintiffs in *Cartwright* also contended that restrictions on minor party
27 candidates were unconstitutional under *Cook v. Gralike*, 531 U.S. 510 (2001), which struck
28 down a “scarlet letter” on the ballot for those candidates who refused to endorse a
constitutional amendment imposing term limits on congressional candidates. The
Eleventh Circuit characterized the analogy between the 5% signature requirement and that
Scarlett Letter as “frivolous.” *Cartwright*, 304 F.3d at 1142 n.4.

1 ballot, the 5% threshold was not subject to challenge under the Elections Clause because it
2 as a procedural regulation. It contrasted that procedural regulation to term limits, which
3 automatically exclude certain candidates—those who have previously served a fixed
4 number of terms in the office—from even seeking the office.

5 Proposition 14 also does not impose a substantive qualification for office—it merely
6 governs the procedure for seeking office. Thus, Plaintiffs’ Elections Clause claim fails.

7 **E. Plaintiffs’ Fourth Cause Of Action (“Equal Protection”) Fails To**
8 **State A Claim As A Matter Of Law.**

9 Interveners have noted—and Plaintiffs have made no effort to dispute—that Equal
10 Protection challenges to election laws are subject to the same “basic mode of analysis” as
11 any other challenge to an election law. *Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir.
12 2011). The balancing test laid out by *Burdick v. Takushi*, 504 U.S. 428 (1991), governs,
13 and Plaintiffs’ claims fail under that test. Plaintiffs have also made no effort whatsoever to
14 dispute this conclusion.

15 Instead, Plaintiffs focus completely on their new claim under *Perry v. Brown*, 671
16 F.3d 1052 (9th Cir. 2012), in which the Ninth Circuit recently invalidated Proposition 8.
17 Plaintiffs assert that because they were previously entitled to a place on the general
18 election ballot, the withdrawal of that “right” violates equal protection.

19 But *Perry* simply does not fit this case. *Perry* held that “the Equal Protection
20 Clause requires the state to have a legitimate reason for withdrawing a right or
21 benefit *from one group but not others*, whether or not it was required to confer that right
22 or benefit in the first place.” 671 F.3d at 1083-84 (emphasis in original). Contrary to
23 Plaintiffs’ characterization of it, Proposition 14 does not “withdraw[] a right or benefit from
24 one group but not others[.]” It withdraws the guaranteed right to appear on the general
25 election ballot from all political parties—not just the minor ones. For example, there are a
26 number of congressional districts in California that will have no Democratic candidate on
27 the ballot in November, and a number of districts that will have no Republican candidate.
28 If minor party-preferred candidates do not proceed to the general election, it is only

1 because other candidates are more popular—not because there are legal impediments to
2 their progress. “States are not burdened with a constitutional imperative to reduce voter
3 apathy or to ‘handicap’ an unpopular candidate to increase the likelihood that the
4 candidate will gain access to the general election ballot. . . .” *Munro*, 479 U.S. at 198.

5 Moreover, under *Perry*, even if Proposition 14 did withdraw an “established” right
6 from some parties but not others, the law must *still* be upheld “so long as it bears a rational
7 relation to some legitimate end.” *Perry*, 671 F.3d at 1082 (quoting *Romer v. Evans*, 517
8 U.S. 620, 631 (1996)). The ballot materials (*i.e.*, legislative history)³ for Proposition 14
9 show—and as this Court previously held—that Proposition 14 advances several interests of
10 the State, “similar or identical to those found to suffice as ‘important regulatory interests’
11 in *Washington II*.” See Order – Motion for Preliminary Injunction Denied, filed Apr. 24,
12 2012, p. 2. It therefore easily survives rational basis review.

13 Nor does it change the result that Plaintiffs have included a conclusory statement
14 that “intentional discrimination” against minor parties is a purpose underlying Proposition
15 14. First, judicially-noticeable legislative history (which can be considered in connection
16 with this demurrer) shows otherwise; but even leaving that aside, in applying rational basis
17 review, a law will be upheld if it serves any legitimate purpose. “Where there are ‘plausible
18 reasons’ for [legislative] action, ‘[the courts]’ inquiry is at an end.” *Fed. Commun.*
19 *Comm’n v. Beach Communs.*, 508 U.S. 307, 313-14 (1993). That is clearly the case here.

20
21 **F. Plaintiffs Have Abandoned Their Claim That The California**
22 **Constitution Provides An Independent Basis For Striking Down**
23 **Proposition 14.**

24 Plaintiffs have apparently abandoned their claim that Proposition 14 violates the
25 California Constitution, making no effort to rebut Interveners’ arguments.

26 **III. CONCLUSION.**

27 For the foregoing reasons, the demurrer should be sustained and the first amended

28 ³ *Board of Supervisors v. Lonergan*, 27 Cal. 3d 855, 866 (1980). Because these
materials are judicially-noticeable, see *People v. Snyder*, 22 Cal. 4th 304, 309 n.5 (2000),
they are properly considered in connection with Interveners’ demurrer.

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

complaint dismissed without leave to amend.

Respectfully submitted,

Dated: September 18, 2012

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP



By: _____
Christopher E. Skinnell
Attorneys for Intervener-Defendants