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17 PRIMARY

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

20 MICHAEL RUBIN, STEVE COLLETT,
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23 WEBER, CAT WOODS, GREEN PARTY OF
24 ALAMEDA COUNTY, LIBERTARIAN PARTY
25 OF CALIFORNIA, and PEACE AND
26 FREEDOM PARTY OF CALIFORNIA,

27 *Plaintiffs,*

28 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
UNVERIFIED SECOND
AMENDED COMPLAINT;
MEMO OF POINTS &
AUTHORITIES**

DATE: June 4, 2013
TIME: 9:00 a.m.
DEPT: 16
RESERVATION#: R-1377385

BY FAX

1 NOTICE OF DEMURRER & DEMURRER

2 PLEASE TAKE NOTICE that on June 4, 2013, at 9:00 a.m., or as soon thereafter as the
3 matter may be heard, in Department 16 of the above-entitled court, located at 1221 Oak Street,
4 Oakland, California, Intervener-Defendants INDEPENDENT VOTER PROJECT, DAVID
5 TAKASHIMA, ABEL MALDONADO & CALIFORNIANS TO DEFEND THE OPEN
6 PRIMARY shall and hereby do demur, to the Plaintiffs' unverified Second Amended Complaint,
7 and to each and every cause of action therein. The grounds on which the demurrers are based are:

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

11 (2) To the second cause of action, designated as the "Second Claim for Relief: Equal
12 Protection Clause," on the ground that the cause of action does not state facts sufficient to state a
13 cause of action. Cal. Code Civ. Proc. § 430.10, subd. (e).

14 The demurrers, and each of them, shall be based on this notice of demurrer and the
15 demurrers stated herein, on the accompanying memorandum of points and authorities, on the
16 pleadings and papers on file in this action, and upon such further evidence and argument as may be
17 offered at the time of the hearing.

18 Dated: March 11, 2013

NIELSEN MERKSAMER
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19
20 By: 

21 Christopher E. Skinnell
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1 MEMORANDUM OF POINTS & AUTHORITIES

2 I. INTRODUCTION.

3 Plaintiffs have now had three opportunities to try to state a constitutional claim against
4 Proposition 14. The Second Amended Complaint (“SAC”), which seeks to reframe the previous
5 ballot access and equal protection challenges as as-applied claims, still fails to state a viable claim.

6 Plaintiffs’ ballot access claim fails because political parties have no right of ballot access at
7 all in a nonpartisan system like that established by Proposition 14, much less a specific right to
8 participate in the general election. Indeed, nonpartisan elections, in which political parties have no
9 right to have candidates on the general election (or any other) ballot, have a long history in
10 California. The California Constitution has expressly provided for nonpartisan elections for city,
11 county, school and judicial elections since 1926, *see* CAL. CONST. art. II, § 6, and state statutes were
12 to the same effect even earlier. Nonpartisan elections have been used for local, judicial and school
13 offices for more than 100 years, and political parties play no official role in such elections. In all
14 material respects, Proposition 14 works just like the nonpartisan system by which many local
15 officials and all judicial officers have long been elected in California.

16 Plaintiffs’ claim is virtually identical to the ballot access claim rejected by the Ninth Circuit
17 in *Wash. State Republican Party v. Wash. State Grange*, 676 F.3d 784 (9th Cir.), *cert. denied*, 133
18 S. Ct. 110 (U.S. 2012) (“*Washington I*”). Plaintiffs attempt to state an “as-applied” claim, to
19 distinguish *Washington II*, by alleging that:

- 20 (1) In 2012 nine minor party candidates received at least 5% of the primary vote but did
21 not advance to the general election;
- 22 (2) Turnout in California’s 2012 primary was half the general election turnout; and
- 23 (3) Holding the primary in June (rather than in August, like in Washington) accentuates
24 the exclusion of minor parties from the general election process.

25 All of these arguments have been made in other cases, and all have been rejected. They do
26 not cure the defects in the Second Amended Complaint, or rescue it from demurrer.

27 Plaintiffs’ second claim—the equal protection claim—is equally defective. Plaintiffs fail to
28 allege that the voters enacted Proposition 14 with an invidious purpose. Furthermore, judicially

1 noticeable facts demonstrate that the voters enacted Proposition 14 for wholly legitimate reasons.
2 And Plaintiffs' allegation that the word "practical" connotes invidious purpose does not come close
3 to establishing the requisite level of "facial plausibility" needed to survive demurrer.

4 Finally, Proposition 14 *itself* is in the Constitution, and under controlling California
5 Supreme Court decisions other provisions of the California Constitution cannot be used to strike it
6 down. And even were that not the case, the California Supreme Court has held that election law
7 challenges under the state constitution are to be addressed under the same standard applicable to
8 such claims under the federal constitution.

9 In short, both of Plaintiffs' claims are defective as a matter of law, and cannot be cured by
10 further amendment. Accordingly, this demurrer should be sustained, without leave to amend.

11 **II. APPLICABLE LEGAL STANDARDS.**

12 **A. Federal Pleadings Standards Apply To This Demurrer.**

13 While California courts typically apply state pleading rules, even with respect to claims
14 under federal law, claims brought under 42 U.S.C. § 1983 are an exception; a demurrer to a claim
15 under that statute—like Plaintiffs' claims here—is judged under federal pleading rules. *Catsouras v.*
16 *Dept. of Cal. Hwy. Patrol*, 181 Cal. App. 4th 856, 891 (2010), *rev. den.*, 2010 Cal. LEXIS 3456
17 (Cal. Apr. 14, 2010); *Bach v. County of Butte*, 147 Cal. App. 3d 554, 563 (1983).

18 Under federal law, a motion to dismiss is properly granted if one or more causes of action in
19 the complaint fail to state a claim as a matter of law. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989).
20 While the factual allegations of a complaint are generally accepted as true, in ruling on a 12(b)(6)
21 motion, the court is "not, however, required to accept as true allegations that contradict . . . matters
22 properly subject to judicial notice . . ." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th
23 Cir. 2010). Additionally, the U.S. Supreme Court has held that factual allegations of wrong-doing
24 must be "plausible," rather than merely "conceivable" or "speculative" to survive demurrer:

25 [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.
26 [Citation]. Determining whether a complaint states a plausible claim for relief will, as the
27 Court of Appeals observed, be a context-specific task that requires the reviewing court to
28 draw on its judicial experience and common sense. [Citation]. But where the well-pleaded
facts do not permit the court to infer more than the mere possibility of misconduct, the
complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief."

1 *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S.
2 544, 556-57 & 570 (2007), & Fed. R. Civ. Proc. 8(a)(2)) (cursory allegations of “invidious
3 discrimination” were not sufficiently “plausible” to avoid dismissal under FRCP 12(b)(6)).

4 **B. Substantive Standard Governing Election Law Challenges.**

5 The U.S. Supreme Court has held that “when a state election law provision imposes only
6 ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of
7 voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.”
8 *Burdick v. Takushi*, 504 U.S. 428, 434 (1991) (“*Burdick*”) (quoting *Anderson v. Celebrezze*, 460
9 U.S. 780 (1983), and *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986)). Only election
10 laws imposing a “severe” burden on voting or associational rights face strict scrutiny. 504 U.S. at
11 434. The California Supreme Court has adopted this same standard for election law claims under
12 the California Constitution. *Edelstein v. City & County of San Francisco*, 29 Cal. 4th 164 (2002)
13 (“*Edelstein*”).

14 **III. THE FIRST CAUSE OF ACTION, ALLEGING VIOLATION OF THE**
15 **PLAINTIFFS’ PURPORTED RIGHT TO APPEAR ON THE GENERAL**
16 **ELECTION BALLOT, FAILS TO STATE A CLAIM AS A MATTER OF LAW.**

17 **A. Political Parties Do Not Have Any Right To Appear On The Ballot In A**
18 ***Nonpartisan* System Like Proposition 14’s.**

19 The essence of Plaintiff’s first claim is that political parties have a constitutional “right”
20 under the First and Fourteenth Amendments to have their candidates on the general election ballot,
21 even in a nonpartisan electoral system like California’s top-two, so long as those candidates obtain
22 a “modicum of support” at the primary (which Plaintiffs define as at least 5% of the primary vote).¹
23 (SAC, ¶¶ 1-2.) That is incorrect. In *Washington II*, the Ninth Circuit squarely rejected an identical
24 claim, and no case anywhere holds otherwise.

25 It is beyond debate that Proposition 14 established a nonpartisan electoral system for voter-
26 nominated offices. A nonpartisan system is one for which no political party may nominate a
27 candidate. *Unger v. Superior Court*, 37 Cal. 3d 612, 617 (1984); *Cal. Democratic Party v. Jones*,

28 ¹ Plaintiffs allege that in 2012 nine minor party candidates received at least 5% of the
primary vote but did not advance to the general election. (SAC ¶¶ 2, 27.)

1 530 U.S. 567, 585 (2000) (referring to top two as a “nonpartisan primary”); *Wash. State Republican*
2 *Party v. Wash. State Grange*, 552 U.S. 442, 452 (2008) (“*Washington I*”). Proposition 14 is such a
3 system. CAL. CONST. art. II, § 5(b). Under Proposition 14, the political parties no longer control
4 the primary as they previously did, and the primary does not choose any party’s nominee. Instead,
5 any candidate may run in the primary for congressional or state elective office (now called “voter-
6 nominated” offices), and any voter may vote at the primary election for any candidate. *Id.* See also
7 Elec. Code § 8002.5(b). The two candidates receiving the highest vote totals for each office at the
8 primary then compete for the office at the ensuing general election, regardless of party affiliation or
9 “preference.” CAL. CONST. art. II, § 5; see also Elec. Code §§ 8141.5 and 15452.

10 In *Washington II*, the Ninth Circuit held that political parties have no right to be on the
11 general election ballot in such a system. Following remand by the Supreme Court in *Washington I*,
12 the Libertarian Party contended that Washington’s top-two system was unconstitutional because
13 “any candidate showing at least a ‘modicum of support’ may not constitutionally be excluded from
14 the general election ballot.”² That claim is *identical* to Plaintiffs’. (See SAC, ¶ 3.) Notably, the
15 district court rejected this claim as a *matter of law*, noting that a top-two system would, “*by*
16 *definition* exclude many parties from the general election ballot[.]” but that the Supreme Court had
17 nevertheless endorsed top-two systems. The district court further held that any ballot access
18 concerns were negated by the fact that Washington (like California) “‘virtually guarantees’ minor
19 parties access to a statewide primary ballot.”³ And finally, the district court held:

20 Indeed, in [Washington’s top-two system], the general election becomes, for all intents and
21 purposes, a runoff election between the top-two vote getters of the primary. Putting aside the
22 issue of “party preference” and forced association, *there can be no doubt that the “top-two”*
23 *aspect of I-872 would be permissible if the “primary” were renamed a “general election,”*
24 *and the “general election” were renamed a “runoff.” Yet the constitutionality of the*
25 *election statute cannot turn on the identifiers used for its various provisions.*⁴

26 In *Washington II*, the Ninth Circuit affirmed this dismissal as a matter of law, 676 F.3d at
27 793-95. Like the district court, the Ninth Circuit “recognize[d] the possibility that [a top-two

28 ² See Req. for Jud’l Notice, filed herewith (“RJN”), Exhibit A (8/20/09 order dismissing
ballot access claims in *Wash. State Rep. Party v. Wash. State Grange*, Case 05-cv-00927-JCC
(W.D. Wash.)), p. 11.

³ *Id.* at 12 (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986) (“*Munro*”).

⁴ *Id.* at 13 (emphasis added).

1 system] makes it more difficult for minor-party candidates to qualify for the general election ballot
2 than regulations permitting a minor-party candidate to qualify for a general election ballot by filing
3 a required number of petition signatures. This additional burden, however, is an inherent feature of
4 any top two primary system, and the Supreme Court has expressly approved of top two primary
5 systems.” *Id.* at 795. The Supreme Court denied a petition for certiorari. 133 S. Ct. at 110.

6 Nor is *Washington II* exceptional. Nonpartisan elections have been used throughout the
7 country for decades—including in California for local and judicial office, for over 100 years⁵—and
8 many courts have held that political parties have no constitutional right to access the ballot in such a
9 system. *See, e.g., Carpenter v. Cobb*, 387 S.E.2d 858, 861 n.6 (W. Va. 1989) (“The right to have
10 nonpartisan elections to certain offices does not appear to violate equal protection principles”
11 (citing cases)); *Dade County v. Young Democratic Club*, 104 So. 2d 636, 639-40 (Fla. 1958) (“The
12 non-partisan election of officers is a question of policy involving no constitutional determination.
13 The electors of Dade County determined that county commissioners should be elected on a non-
14 partisan ballot. We think their determination was final and that the courts have no right to interfere
15 with it.”); *Whitney v. Skinner*, 241 S.W. 350 (Ky. 1922) (nonpartisan general/runoff system
16 constitutional); *Sarlls v. State*, 166 N.E. 270, 277 (Ind. 1929) (people have the right to form parties,
17 but parties have no constitutional right to designate nominees on the ballot).

18 Indeed, the California Supreme Court, in a ballot access case, distinguished between
19 partisan and nonpartisan systems, and held that “in a non-partisan election the party system is not an
20 integral part of the elective machinery and the individual’s right of suffrage is in no way impaired
21 by the fact that he cannot exercise his right through a party organization.” *Communist Party of*
22 *United States v. Peek*, 20 Cal. 2d 536, 543-44 (1942) (emphasis added). No case is to the contrary.⁶

23
24 ⁵ *Unger*, 37 Cal. 3d at 617.

25 ⁶ Nor should this be surprising. Not only is there no mention of political parties in the
26 Constitution, but the Founders’ distrust of political parties is well-known. *See Rutan v. Republican*
27 *Party*, 497 U.S. 62, 82 n.3 (1990) (Stevens, J., concurring) (discussing the Founders’ skepticism of
28 political parties); Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76
N.Y.U.L. REV. 750, 813 (2001) (“Political parties are absent from the constitutional text, and it
would be an activist judge indeed who would suggest that the Constitution obligates states to
provide a formal role for parties in their nomination processes.”).

1 **B. The Burden On The Minor Parties' Associational Rights Is Not Severe: Minor**
2 **Party Candidates Have Broad Access To The Primary Election And The Same**
3 **Opportunity As All Other Candidates To Advance To The General.**

4 Applying the *Burdick* standard, the Ninth Circuit held that the top two system does not
5 impose a “severe” burden on the parties’ right, because (1) every party in Washington—major and
6 minor—has “broad access to the I-872 primary” and (2) all candidates compete at that primary on
7 equal terms and I-872 thereby “gives minor party candidates the same opportunity as major-party
8 candidates to advance to the general election.” *Washington II*, 676 F.3d at 485-86. In support of
9 these points, the Ninth Circuit quoted the Supreme Court’s holding from *Munro v. Socialist*
10 *Workers Party*, 479 U.S. 189 (1986), that if minor parties are given equal access to compete in a
11 statewide primary, “[i]t can hardly be said that Washington’s voters are denied freedom of
12 association because they must channel their expressive activity into a campaign at the primary as
13 opposed to the general election.” *Washington II*, 646 F.3d at 794 (quoting *Munro*, 479 U.S. at 199).
14 *Munro* rejected a challenge to Washington’s prior blanket primary system, holding that the burden
15 on minor parties of being kept off the *general* election ballot is “slight.” 479 U.S. at 199.

16 As for “broad access” to the primary, the requirements for a candidate to participate in the
17 California primary are basically the same as in Washington.⁷ And regarding the point that all
18 qualified parties participate in the primary election on equal terms, and have an equal opportunity to
19 advance to the general election, the same is true of Proposition 14. The top two candidates at the
20 primary proceed to the general *without regard to their party preference*. CAL. CONST. art. II, § 5(a).

21 Consistent with *Munro* is *Edelstein*, in which several voters challenged San Francisco’s ban
22 on write-in voting at the general/runoff election for citywide office, but not the primary election.
23 The Supreme Court rejected the challenge, holding, “We conclude that San Francisco’s prohibition
24 against write-in voting in the mayoral runoff election was not a *severe* restriction on voting rights,

25 ⁷ Compare *Washington II*, 676 F.3d at 794 (summarizing Washington’s requirements) with
26 Elec. Code §§ 8002.5, 8020, 8040-8041, 8103, 8106. There are two slight differences. First,
27 California candidates must file a nomination petition signed by a specified number of registered
28 voters, but that requirement is minimal: between 65 and 100 voters in the case of a statewide office,
 with even fewer required for other offices. See Elec. Code § 8062. Also, the filing fee for a
 statewide office (*i.e.*, Governor, etc.) is 2% of the annual salary. Elec. Code § 8103(a)(1). For all
 other offices it is 1%, like Washington.

1 but rather that it imposed only a *limited burden* on voters' rights to make free choices and to
2 associate politically through the vote. [Citation.] After all, voters were not denied an opportunity to
3 cast a write-in ballot for the candidate of their choice. They were only denied the opportunity to cast
4 a write-in ballot *twice*." 29 Cal. 4th at 182. Likewise, under Proposition 14 voters were not denied
5 the opportunity to vote for minor party candidates in 2012; they were only denied the opportunity to
6 do so twice.

7 **C. Limiting The General Election To The Top Two Vote-Getters From The**
8 **Primary Serves Important Governmental Interests.**

9 Given the lack of a "severe" burden on the parties' rights, the State need only show that
10 Proposition 14 furthers an "important regulatory interest." It furthers several.

11 First, Proposition 14 is consistent with past Supreme Court case law holding that the
12 primary 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 State may
14 therefore "properly reserve the general election ballot 'for major struggles[.]'" *Munro*, 479 U.S. at
15 196 (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)); *Edelstein*, 29 Cal. 4th at 183. Also, as the
16 district court in *Washington II* noted, the general election under Proposition 14 is closely analogous
17 to a runoff election in a typical nonpartisan system. Numerous courts have held that limiting a
18 runoff to the top two vote-getters at the primary serves the legitimate interest in ensuring that the
19 person who is ultimately elected to office receives a majority of the vote. *See, e.g., Edelstein*, 29
20 Cal. 4th at 183. Indeed, to ensure that such a majority is received, SB 6 bans write-in voting at the
21 general election, just as the system upheld in *Edelstein* did. *See Elec. Code* § 8606.

22 **D. *Munro* And *Washington II* Control, And Plaintiffs' Attempts To Plead Around**
23 **Them Fail.**

24 Attempting to avoid the holdings of *Munro* and *Washington II*, Plaintiffs allege (1) that
25 several minor party candidates—including Plaintiff Hooper—obtained at least 5% of the primary
26 election vote in 2012, but still did not advance to the general election; (2) turnout was substantially
27 lower at the 2012 primary than at the 2012 general election; and (3) holding the primary in June,
28 instead of later, "further diminished" the minor parties' ability to influence the political debate.

1 None of these allegations saves Plaintiffs' claim from demurrer.

2 **1. "The linchpin of *Munro* is not the smallness of the vote percentage**
3 **required in the primary election," but equal access to the primary ballot.**

4 Plaintiffs have attempted to distinguish *Munro* on the ground that, in that case, a candidate
5 needed only to obtain 1% of the vote at the primary election to advance to the general, whereas in
6 this case, candidates who obtained more than 5% of the primary vote were excluded. (See SAC, ¶
7 2.) But, as the Ninth Circuit has held—in upholding a Hawaii statute that required independent
8 candidates to obtain 10% of the vote at the primary to advance—this focus on percentages misreads
9 *Munro*: “[T]he linchpin of *Munro* is not the smallness of the vote percentage required in the
10 primary election. Rather, in upholding the Washington statute, the Court relied most heavily on the
11 fact that while Washington—like Hawaii—imposes restrictions on access to the general election
12 ballot, it also—like Hawaii—virtually assured access to the primary ballot.” *Erum v. Cayetano*,
13 881 F.2d 689, 694 (9th Cir. 1989). “[T]he effect on a candidate’s constitutional rights is ‘slight’
14 when a state affords a candidate easy access to the primary election ballot and the opportunity to
15 wage a ballot-connected campaign.” *Id.* at 693. Like the systems upheld in *Munro*, *Erum*, and—
16 most relevantly—*Washington II*, Proposition 14 gives all candidates such an opportunity.

17 Indeed, based on past election results the Libertarian Party argued in *Washington II* that
18 under Washington’s system a candidate was required to receive an average of 30% of the primary
19 vote to place second and advance to the general election.⁸ Yet the district court still dismissed the
20 Party’s ballot access claims, as a matter of law, and the Ninth Circuit affirmed.

21 **2. In *Munro*, the Supreme Court rejected a claim that lower turnout at the**
22 **primary makes it an inadequate substitute for the general election.**

23 Plaintiffs allege that their rights are burdened by the fact they might not make it to the
24 general election because more voters turned out at the 2012 general election (13,202,158) than at
25 the 2012 primary election (5,328,296). (SAC ¶¶ 2, 33, 40.) A virtually identical claim was rejected
26 by the Supreme Court in *Munro*. The minor parties argued that their rights were burdened by the
27

28 ⁸ RJN, Exhibit B (Libertarian Party’s motion for summary judgment), pp. 15-19; RJN,
Exhibit C (Libertarian Party’s 9th Cir. Reply Brief), p. 14.

1 fact that turnout was higher at the general election than at the primary, and that the 1% requirement
2 kept them from reaching the broader pool of voters. The Court squarely rejected this argument:

3 Appellees argue that voter turnout at primary elections is generally lower than the turnout at
4 general elections, and therefore enactment of § 29.18.110 has reduced the pool of potential
5 supporters from which Party candidates can secure 1% of the vote. We perceive no more
6 force to this argument than we would with an argument by a losing candidate that his
7 supporters' constitutional rights were infringed by their failure to participate in the election.
8 Washington has created no impediment to voting at the primary elections; every supporter
9 of the Party in the State is free to cast his or her ballot for the Party's candidates. As was the
10 case in *Jenness 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.
*States are not burdened with a constitutional imperative to reduce voter apathy or to
"handicap" an unpopular candidate to increase the likelihood that the candidate will gain
access to the general election ballot. . . .*

11 479 U.S. at 198 (emphasis added). Several federal courts of appeal have followed *Munro's* lead,
12 holding that "despite the traditionally lower interest in primary elections than general elections, the
13 burden is appropriately placed on the candidate to generate support and rally voters to vote in order
14 to make it to the general election ballot. It is not the state's obligation to find or create an easier
15 forum for establishing voter support." *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 699-700
16 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1932 (U.S. 2012). *See also Rainbow Coalition of Okla. v.*
17 *Okla. State Elec. Bd.*, 844 F.2d 740 (10th Cir. 1988) (rejecting minor parties' challenge to
18 qualification statues based on votes cast at past presidential elections, where turnout at such
19 elections was higher than at gubernatorial elections).

20 It is also worth noting that similar turnout patterns characterize Washington's elections.
21 3,071,578 voters cast ballots at the 2008 general election in Washington; only 1,455,756 voters—
22 53% fewer—cast ballots at the 2008 primary.⁹

23 3. California's June primary does not render Proposition 14 invalid.

24 Relying on *Anderson v. Celebrezze*, which struck down a March filing deadline for
25 independent presidential candidates to appear on the November general election ballot as unduly
26 burdensome, 460 U.S. at 780—the Libertarian Party in *Washington II* argued that Washington's
27

28 ⁹ RJN, Exhibit D. These election results are judicially-noticeable, *Edelstein*, 29 Cal. 4th at
171 n.3, so (as noted) the Court may consider them in ruling on this motion.

1 top-two system was unconstitutional because the State’s primary was “held in mid-August, when
2 voter interest is minimal, and the general election is held in early November.”¹⁰ Noting that
3 Washington’s August primary was far closer to the general election than the March filing deadline
4 for independent candidates struck down in *Anderson*, the Ninth Circuit affirmed the dismissal of the
5 Libertarian Party’s ballot access claims—again, *as a matter of law*.

6 California’s primary election is in June, *see* Elec. Code § 1201, and Plaintiffs rely on this
7 fact to try to distinguish *Washington II*. But numerous courts, applying *Anderson*, have upheld June
8 filing deadlines to access the general election ballot. *See, e.g., Council of Alternative Political*
9 *Parties v. Hooks*, 179 F.3d 64 (3d Cir. 1999); *Wood v. Meadows*, 207 F.3d 708 (4th Cir. 2000);
10 *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007). *See also Jenness v. Fortson*, 403 U.S. 431, 433-
11 34 (1971) (pre-*Anderson* case, upholding ballot access petition requirement with June deadline).

12 In fact, in *Lawrence v. Blackwell*, 430 F.3d 368 (6th Cir. 2005), *cert. denied*, 547 U.S. 1178
13 (2006), the Sixth Circuit upheld Ohio’s *March* filing deadline *as a matter of law*, where all
14 candidates were subject to the same deadline. Though *Anderson* had struck down a March filing
15 deadline, the *Lawrence* court found it to be a “vital distinction” that the deadline in *Anderson*
16 applied only to independent candidates, whereas party candidates had an additional five months to
17 file papers. *Id.* at 373-75. Under Proposition 14, all candidates are subject to the same rules.

18 It would also seem to be a “vital distinction” that the filing deadline at issue in *Anderson*
19 precluded any “opportunity for the candidate to wage a ballot-connected campaign,” *Munro*, 479
20 U.S. at 539, whereas Proposition 14 gives candidates that opportunity at the primary election.

21 **IV. THE SECOND CAUSE OF ACTION, ALLEGING A VIOLATION OF EQUAL**
22 **PROTECTION, ALSO FAILS TO STATE A CLAIM.**

23 The key allegations of Plaintiffs’ Second Cause of Action are that: Proposition 14 withdrew
24 the established rights of minor parties, voters, and candidates to participate in the statewide general
25 election (SAC ¶ 3); that the ballot argument in favor of Proposition 14 expressed an intention to
26 elect more “practical” candidates, and that Proposition 14’s drafter likewise indicated (two years
27

28 ¹⁰ RJN, Exhibit C (Reply Brief), pp. 18-19; RJN, Exhibit E (Libertarian Party’s 9th Cir. Opening Brief), pp. 40-41.

1 after it passed) that the purpose of the measure was to elect more “pragmatic” candidates (SAC ¶
2 22); that these were “code words” denoting a desire to exclude minor party political perspectives
3 from the statewide general election (SAC ¶ 23); and that dozens of minor party candidates were, in
4 fact, excluded from the 2012 general election by Proposition 14 (SAC ¶¶ 3, 24-27). These
5 allegations fail to state a claim as a matter of law.

6 **A. The *Burdick* Balancing Test Governs, Regardless Of The Constitutional Basis**
7 **Of The Challenge.**

8 Any claim raised under the equal protection clause must fail for all the same reasons that a
9 claim raised under the First Amendment must fail. Election law challenges employ the “single
10 basic mode of analysis” regardless of the constitutional provision on which they are based. *Partnoy*
11 *v. Shelley*, 277 F. Supp. 2d 1064, 1072 (S.D. Cal. 2003) (quoting *LaRouche v. Fowler*, 152 F.3d
12 974, 987-88 (D.C. Cir. 1998)).¹¹ The balancing test laid out by *Burdick v. Takushi* governs, and
13 Plaintiffs’ claims fail under that test. This Court (following the guidance from the Ninth Circuit)
14 has already held that Proposition 14 does not impose a “severe” burden on Plaintiffs’ rights. Given
15 the lack of a “severe” burden on the parties’ rights, the State need only demonstrate that Proposition
16 14 furthers an “important regulatory interest.” It furthers several, as discussed above.

17 **B. Plaintiffs’ Allegation That Proposition 14 Was Enacted With An “Invidious**
18 **Purpose” To Exclude Minor Party Candidates From The Ballot Fails Too.**

19 **1. Plaintiffs do not allege that the voters intended to discriminate against**
20 **minor parties in enacting Proposition 14.**

21 Plaintiffs allege that the drafter of Proposition 14, Abel Maldonado, “intended” to exclude
22 minor parties from the ballot, but they nowhere allege that the voters who adopted Proposition 14
23 had any such intention, and it is the voters’ intention that is relevant. *Perry v. Brown*, 671 F.3d
24 1052, 1094 n.26 (9th Cir.), cert. granted, 133 S. Ct. 786 (U.S. 2012). “The opinion of drafters or of
25 legislators who sponsor an initiative is not relevant since such opinion does not represent
26 the intent of the electorate and we cannot say with assurance that the voters were aware of the
27 drafters’ intent.” *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm’n*, 51 Cal.

28 ¹¹ See also *Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011) (same); *Republican Party v. Faulkner County*, 49 F.3d 1289, 1293 n.2 (8th Cir. 1995); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 643 (3d Cir. 2003); *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992).

1 3d 744, 765, fn. 10 (1990). This rule seems particularly apt here, where Plaintiffs not only allege
2 that Mr. Maldonado expressed his “intent” through exceedingly cryptic “code” words (“pragmatic”
3 and “practical”), but where (1) one of the two instances of those code words’ use came in 2012,
4 nearly two years after Proposition 14 was enacted,¹² and (2) the other example appears in the ballot
5 argument in favor of Proposition 14, *which Mr. Maldonado did not even sign*.

6 **2. Proposition 14 was enacted for legitimate purposes.**

7 Discriminatory intent “implies that the decision maker . . . selected or reaffirmed a particular
8 course of action at least in part ‘because of’ not merely ‘in spite of’ its adverse effects upon an
9 identifiable group.” *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979). In making this
10 determination in the context of a ballot measure enacted by the voters, the courts must judge the
11 voters’ intent on the basis of objective, extrinsic evidence—such as campaign materials, like the
12 ballot pamphlet. *Perry*, 671 F.3d at 1094. In this case, the ballot pamphlet—which is judicially-
13 noticeable,¹³ and therefore properly considered by this Court in connection with this motion—
14 reveals only legitimate purposes. Those materials reflect that Proposition 14 contained an express
15 purpose clause, according to which the measure was “adopted by the People of California to protect
16 and preserve the right of every Californian to vote for the candidate of his or her choice.” (RJN,
17 Exhibit F, p. 9; *see also* SAC, ¶ 21.) The measure, “along with legislation already enacted by the
18 Legislature to implement [it], [we]re intended to implement an open primary system in
19 California...” *Id.* The ballot materials also indicate that the measure was enacted to:

- 20 • “Reduce gridlock by electing the best candidates to state office and Congress, regardless of political party;
- 21 • “Give independent voters an equal voice in primary elections;
- 22 • “END THE BICKERING AND GRIDLOCK AND FIX THE SYSTEM;
- 23 • “[L]essen the influence of the *major* parties, which are now under control of the
24 special interests;¹⁴ and
- 25 • Implement a “[n]on-partisan measure[.]” to “push our elected officials to begin
26 working together for the common good.”

27 ¹² *See Armstrong v. County of San Mateo*, 146 Cal. App. 3d 597, 618 (1983)
28 (“[d]isregarding, as we must, the postelection declarations of the drafters” regarding intent).

¹³ *In re Varnell*, 30 Cal. 4th 1132, 1144 n.7 (2003).

¹⁴ This particularly undermines Plaintiffs’ claim that the intent was to target *minor* parties.

1 (RJN, Exhibit F, pp. 7-8 (emphasis added).)

2 Moreover, when campaign materials disclose multiple possible motivations, the courts will
3 not delve further into the voters' intent so long as some of the purposes are clearly legitimate. *So.*
4 *Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291, 295 (9th Cir. 1970);¹⁵ *Arthur v.*
5 *Toledo*, 782 F.2d 565, 574 (6th Cir. 1986) ("We hold that absent a referendum that facially
6 discriminates racially, or one where although facially neutral, the only possible rationale is racially
7 motivated, a district court cannot inquire into the electorate's motivations in an equal protection
8 clause context."). *See also Bd. of Trustees v. Garrett*, 531 U.S. 356, 367 (2001) (noting that even
9 where animus is a motivating factor, a law survives where there is also a conceivable legitimate
10 purpose behind it); *Soto-Padró v. Public Bldgs. Auth.*, 675 F.3d 1, 6 (1st Cir. 2012) (in a case
11 alleging that unconstitutional political discrimination was a motivating factor in public employee's
12 termination, claim rejected where there are both "lawful" and "unlawful" reasons for the adverse
13 employment action, and "the lawful reason alone would have sufficed to justify the [action][.]"
14 (quoting *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 359 (1995)).

15 **3. Plaintiffs' allegations of an illicit purpose are not "facially plausible."**

16 And finally, as demonstrated above, the Plaintiffs' allegation of intentional discrimination
17 must be "plausible" to withstand a motion to dismiss. It is not. Plaintiffs allege that Proposition 14
18 supporters' use of a single word ("practical") in their ballot argument means that Mr. Maldonado
19 (who did not even sign that argument) had a grand purpose to keep *minor* parties off the general
20 election ballot. Based on that already-implausible allegation, they implicitly ask this Court to
21 further infer: that (1) Mr. Maldonado used his leverage in the 2009 budget deal to achieve that
22 purpose; that (2) the voters understood that to be the purpose of Proposition 14, based on that single
23 word in the ballot argument; that (3) the voters approved Proposition 14 "because of" rather than
24 "in spite of" this purpose; and that (4) Mr. Maldonado, IVP and CDOP devoted millions of dollars
25 and hundreds of hours campaigning to fulfill that purpose. This piling of improbable conjecture
26 upon surmise, based on a single word in a lengthy ballot pamphlet, fails the test of "facial

27 ¹⁵ In *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme Court criticized *So. Alameda*
28 *Spanish Speaking Org.*, to the extent the Ninth Circuit nevertheless permitted a cause of action to
proceed without a showing of discriminatory intent. 426 U.S. at 244-45.

1 plausibility.” It is not plausible that this single “code word” led Prop 14 voters to discriminate
2 against minor parties, or that voters sought to discriminate against minor party candidates given the
3 infrequency with which they were ever elected under the old partisan system. Indeed, when read in
4 context, the ballot pamphlet’s reference to more “practical” officeholders has an “obvious
5 alternative explanation” (*Iqbal*, 556 U.S. at 682 (quoting *Twombly*, 550 U.S. at 567))—that
6 Proposition 14’s sponsors were addressing (and the voters understood them as addressing) partisan
7 gridlock between the two *major* parties, which the measure’s supporters believed to characterize
8 California’s Legislature. *See* note 14, *supra*.

9 **V. THE CALIFORNIA CONSTITUTION DOES NOT PROVIDE AN INDEPENDENT**
10 **BASIS FOR NULLIFYING PROPOSITION 14.**

11 Yet again, Plaintiffs allege that Proposition 14 violates various provisions of the California
12 Constitution. And yet again, these allegations provide no basis for enjoining Proposition 14.

13 **A. Proposition 14 Is *Itself* Part of the California Constitution.**

14 First of all, Proposition 14 amended Article II, sections 5 and 6, *of the California*
15 *Constitution*. In other words, it is itself a part of the Constitution, and as a constitutional provision
16 it is accorded equal dignity to all other provisions of the State Constitution, including those cited by
17 Plaintiffs. *Strauss v. Horton*, 46 Cal. 4th 364, 465-69 (2009) (rejecting Attorney General’s attempt
18 to invalidate a constitutional amendment on the ground that other constitutional provisions are “of a
19 higher order than—and thus exempt from—the people’s right to ‘alter or reform’ the Constitution
20 through either the legislative or the initiative constitutional amendment process.”). It even prevails
21 over constitutional provisions that were earlier adopted, to the extent there is a conflict between
22 them. *Id.* Thus, only federal law—and not the various state constitutional provisions cited by
23 Plaintiffs—could ever serve as the basis for invalidating Proposition 14. *See id.* at 411-12
24 (recognizing that by amending the state constitution, Proposition 8 trumped the state equal
25 protection clause as previously interpreted, with respect to the specific subject matter addressed).

26 **B. Election Law Challenges Under The California Constitution Apply The Same**
27 **Standard As That Applied Under Federal Law.**

28 Moreover, as this Court has already recognized, “in analyzing constitutional challenges to

1 election laws, [the California Supreme C]ourt has followed closely the analysis of the United States
2 Supreme Court.”¹⁶ Strict scrutiny therefore does not apply under the California Constitution either;
3 the more deferential standard set forth in *Burdick v. Takushi* does. *Id.*

4 **VI. LEAVE TO AMEND SHOULD BE DENIED.**

5 When a Rule 12(b)(6) motion to dismiss is granted, leave to amend is properly denied where
6 the trial “court could reasonably conclude that further amendment would be futile.” *Rutman Wine*
7 *Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). “Where the plaintiff has previously
8 filed an amended complaint . . . the district court’s discretion to deny leave to amend is ‘particularly
9 broad.’” *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004) (quoting *Chodos v. W.*
10 *Publ’g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002)). Plaintiffs have the burden of showing that
11 amendment is proper. *Johnson v. Mammoth Recreations*, 975 F.2d 604, 608 (9th Cir. 1992).

12 In this case, Plaintiffs have been given multiple opportunities to amend, to permit them to
13 cure the deficiencies in their complaint. They have failed to do so, and it is now clear that they
14 cannot do so, because their claims are defective as a matter of law. Consequently, further
15 amendment is futile and should be denied.

16 **VII. CONCLUSION.**

17 For the foregoing reasons, the demurrer should be sustained and the Second Amended
18 Complaint dismissed without further leave to amend.

19 Respectfully submitted,

20 Dated: March 11, 2013

21 NIELSEN MERKSAMER
22 PARRINELLO GROSS & LEONE LLP



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

26
27 ¹⁶ Order–Demurrer to Complaint Sustained (Apr. 24, 2012), p. 3 (quoting *Edelstein*, 29 Cal.
28 4th at 179). See also *Kunde v. Seiler*, 197 Cal. App. 4th 518, 535 n.12 (2011), rev. denied, 2011
Cal. LEXIS 10995 (Cal., Oct. 26, 2011).

1 **PROOF OF SERVICE**

2 I am employed in the County of Marin, State of California. I am over the age of 18 and not
3 a party to the within cause of action. My business address is, 2350 Kerner Boulevard, Suite 250,
4 San Rafael, California 94901.

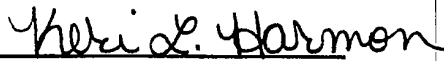
5 On March 11, 2013, I caused the foregoing document described as **INTERVENER-**
6 **DEFENDANTS' NOTICE OF DEMURRER & DEMURRER TO UNVERIFIED SECOND**
7 **AMENDED COMPLAINT; MEMORANDUM OF POINTS & AUTHORITIES** to be served
8 on the individuals listed below as follows:

9 Dan Siegel, Esq. 10 Michael Siegel, Esq. 11 Siegel & Yee 12 499 14th Street, #220 13 Oakland, CA 94612 14 Ph: (510) 839-1200 Email: danmsiegel@gmail.com Email: michaeljwsiegel@gmail.com (Attorneys for Plaintiffs)	Mark Beckington, Esq. Deputy Attorney General Office of the Attorney General 300 South Spring St., Suite 1702 Los Angeles, CA 90013-1230 Ph: (213) 897-1096 Email: mark.beckington@doj.ca.gov (Attorney for Defendant Debra Bowen)
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15 **BY FEDERAL EXPRESS:** By following ordinary business practices and placing for
16 pickup by FEDERAL EXPRESS at 2350 Kerner Boulevard, Suite 250, San Rafael,
17 California 94901 on March 11, 2013, copies of the above documents in an envelope or
package designated by FEDERAL EXPRESS with delivery fees paid or provided for.

18 **BY ELECTRONIC SERVICE:** By transmitting by email to the above party(ies) at the
19 above email addresses.

20 Executed in San Rafael, California on March 11, 2013. I declare under penalty of perjury,
21 under the laws of the State of California, that the foregoing is true and correct.

22 
23 Keri L. Harmon