No. A140387

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

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

Plaintiffs and Appellants,

vs.

DEBRA BOWEN, Secretary of State of California, Defendant and Respondent, and INDEPENDENT VOTER PROJECT, *et al.*,

Interveners and Respondents.

On Appeal from an Order of the Superior Court of Alameda, Case No. RG11605301

Honorable Lawrence John Appel

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

The Alameda County Superior Court erred when it sustained demurrers to the complaint of Michael Rubin, *et al.*, and prevented plaintiffs from pursuing claims under the First and Fourteenth Amendments against the implementation of Proposition 14, the California initiative requiring a "top two" statewide election. Rubin's second amended complaint adequately alleged that Proposition 14 severely burdened the rights of state residents who vote and associate with minor political parties.

The trial court erred, principally, by making factual determinations on demurrer that should have waited until Rubin was able to develop his record through investigation of historical data, development of expert testimony, and other discovery. Multiple aspects of an election challenge must be evaluated on a factual record: the burden imposed by a new law, considering the "totality" of a State's electoral scheme; the appropriate tailoring of any ballot access restrictions; and the merit, if any, of the State's asserted interests. *See California Democratic Party v. Jones* (2000) 530 U.S. 567. Here, the trial court erroneously determined that the burden of Proposition 14 is "slight" without considering testimonial and expert evidence; the court further erred by failing to analyze whether Proposition 14 was appropriately tailored to

avoid any unnecessary burden on voting and associational rights, or whether the State's asserted interests are legally valid.

The trial court also erred by ruling that existing precedent barred Rubin's ballot access claim against Proposition 14. To the contrary, a myriad of cases establish that a State may not block minor parties from the general election ballot, so long as their candidates demonstrate a "modicum of support." To date, the U.S. Supreme Court has permitted States to exclude minor party candidates from the general election ballot only if they fail to achieve a five percent threshold. *See Jenness v Fortson* (1971) 403 U.S. 431, 442 (upholding a requirement that independent and minor party candidates submit petitions equal to five percent of the electorate); *Williams v. Rhodes* (1968) 393 U.S. 23, 10-11 (invalidating a 15 percent threshold for ballot access). Under Proposition 14, California minor party candidates have demonstrated substantial support, in some cases exceeding 18 percent of the primary vote, but have still found themselves barred from the general election.

The trial court further erred by ruling that recent federal precedent concerning the Washington State "top two" electoral system should bar Rubin's claims against the California system. In order to make this determination, the trial court implicitly found

that the California "top two" regime and the Washington State "top two" regime are sufficiently identical, such that past challenges to the Washington State system should bar Rubin's claims. In fact, California's "top two" system is easily distinguishable from the Washington State approach, both in its application and in its statutory structure, and Rubin deserves a hearing on the merits to make this case.

Finally, the trial court erred by ruling that Proposition 14 did not deprive the plaintiffs of voter and associational rights in violation of the Equal Protection Clause. Here, Rubin alleged that, prior to Proposition 14, the top candidate from each qualified minor party had an established right to participate in the statewide general election. Subsequent to the passage of Proposition 14 in 2012, over 98 percent of minor party candidates were barred from general election. Because Rubin's second amended complaint states a claim under the Equal Protection Clause for withdrawal of an established right to participate in the general election, the demurrer should have been overruled.

For all these reasons, as argued more fully below, the judgment dismissing Rubin's claims should be reversed, and Rubin granted the opportunity to develop his claims for trial.

II. STATEMENT OF FACTS[1]

A. Until 2011, Qualified Minor Party Candidates Had Access to the General Election Ballot

Prior to the imposition of Proposition 14 in California, candidates for statewide political office from each qualified political party were permitted to participate in a June primary election to determine their party's respective standard-bearer. Following the primary, the highest vote-getter from each party was permitted to participate in a November general election.[2]

To qualify as a political party, an organization was required to obtain total registrations equal to one percent of the total vote in the most recent gubernatorial election or poll two percent in any statewide race during the previous gubernatorial election.[3]

B. Under Proposition 14, 98 Percent of Minor Party Candidates Were Excluded from the Statewide General Election

1. The law now permits only two candidates to participate in the general election.

Beginning January 1, 2011, defendant Secretary of State Debra Bowen began implementation of Proposition 14, a voter-

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[1] Based upon allegations of Rubin's Second Amended Complaint for Declaratory, Injunctive, and Other Relief (SAC).
[2] Appellants' Appendix (AA) 6, SAC ¶ 18.
[3] AA 7, SAC ¶ 25.

approved ballot initiative that radically altered the state's electoral process. Prop. 14 initiated amendments to the California Constitution which require that candidates for various state and federal officers run in a single primary open to all registered voters, with only the top two vote-getters meeting in the general election.[4] As the revised Constitution states:

> A voter-nomination primary election shall be conducted to select the candidates for congressional and state elective offices in California. All voters may vote at a voter-nominated primary election for any candidate for congressional and state elective office without regard to the political party preference disclosed by the candidate or the voter, provided that the voter is otherwise qualified to vote for candidates for the office in question. The candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office shall, regardless of party preference, compete in the ensuing general election. Cal. Const. Art. II, § 5(a).[5]

As written, Proposition 14 permits only the top two vote getters in the primary to participate in the general election. A candidate will never be elected in June: even if a candidate receives a majority of voter support, he or she will be one of two who advance to the November ballot.

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[4] AA 6, SAC ¶20.
[5] *Id*.

Proposition 14 also blocked independent write-in candidates from the general election.[6]

2. In 2012, numerous well-supported minor party candidates were blocked from participation in the general election.

Proposition 14 was applied to statewide primary and general elections held in June and November 2012, respectively. That year, numerous minor party candidates garnered substantial support in races for major state and federal political offices. Nine candidates from the Green, Peace and Freedom, and Libertarian parties received more than five percent of the vote. But none of those nine were permitted to advance to the general election ballot.[7]

Among the minor party candidates for United States Senator, Gail K. Lightfoot of the Libertarian Party garnered 2.1 percent of the vote, and was the leading vote-getter from her party. Plaintiff Marsha Feinland of the Peace and Freedom Party garnered 1.2 percent of the vote, and was the leading vote-getter

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[6] AA 234 (mentioned in voter information guide). The Court of Appeal discussed Proposition 14's ban on write-in votes at length in *Field v. Bowen* (App. 1 Dist. 2011) 199 Cal.App.4th 346, 367-368.

[7] AA 8, SAC ¶¶ 26-27.

from her party. Neither candidate was permitted to advance to the general election ballot.[8]

Among the minor party candidates for various open seats for United States Representative, several garnered substantial support. In District 33, plaintiff Steve Collett (Libertarian) earned 4.3 percent of the vote. Anthony W. Vieyra (Green) was the leading minor party vote-getter in 2012, earning 18.6 percent of the vote in District 35. Yet neither Vieyra nor any of the other minor party candidates for U.S. Representative were permitted to advance to the general election.[9]

Among the minor party candidates for State Senator, John H. Webster (Libertarian) earned 15.4 percent of the vote in District 13, but was denied access to the general election ballot. Several minor party candidates for State Assembly also garnered substantial support, but were denied access to the general election ballot. These include plaintiff Charley Hooper (Libertarian), who earned 5.4 percent of the vote in District 1, and plaintiff C. T. Weber (Peace and Freedom), who earned 3.0 percent of the vote in District 9. In June 2012, out of over 150 races that were

[8] AA 8, SAC ¶ 28.
[9] AA 8-9, SAC ¶¶ 28-29.

governed by the Proposition 14, "top two" electoral reform, only three minor party candidates advanced to the general election.[10]

Thus, in 98 percent of the elections, candidates from major parties filled both places on the general election ticket; and in the other two percent, the major parties claimed one out of two places.

3. In 2012, voter participation in the June primary was far lower than the November general election.

As the California Secretary of State described in her 2012 Statements of the Vote, less than half as many voters participated in the June primary election, as compared to the November general election. 5,328,296 voters were counted in June, and 13,202,156 voters were counted in November.[11]

As Rubin's complaint alleges, "[b]ecause the California general election . . . is the moment of peak participation by voters, media, and the candidates themselves, defendant Bowen's implementation of Prop. 14 excluded voters from minor political parties from effective civic engagement at the most important stage of the electoral process.[12]

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[10] AA 9, SAC ¶¶ 30-31.
[11] AA 258-259, 306, 320.
[12] AA 9-10, SAC ¶ 32.

III. PROCEDURAL HISTORY

Rubin filed his Second Amended Complaint ("SAC") on February 14, 2013, setting forth two claims.[13] The first claim is for denial of ballot access in violation of the First and Fourteenth Amendments of the United States Constitution, as well as article 1, sections 2, 3, and 7 and article IV, section 16 of the California Constitution. The second claim is for violation of the Equal Protection Clause of the Fourteenth Amendment.[14]

Both Bowen and the interveners filed demurrers to the SAC, making similar arguments.[15] Prior to the hearing on the demurrers, the trial court issued a tentative decision, indicating that it would sustain demurrers to Rubin's equal protection claim and that it would overrule the demurrers to Rubin's ballot access claim.[16] After oral argument and supplemental briefing, however, the trial court sustained the demurrers to both claims, and eventually issued a final order and judgment dismissing Rubin's complaint.[17]

Rubin timely appealed the adverse judgment.[18]

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[13] AA 1-14.
[14] *Id*.
[15] AA 15-35 (Bowen demurrer), AA 46-69 (intervener demurrer).
[16] AA 396-398.
[17] AA 409-435, 436-437.
[18] AA 438-439.

IV. STATEMENT OF APPEALABILITY

This appeal is from the entry of judgment by the Alameda County Superior Court on October 4, 2013, following the Court's Order of September 23, 2013, sustaining the demurrer of defendant Debra Bowen and granting joinder to interveners Independent Voter Project, *et al.*[19]

The judgment is appealable pursuant to Code of Civil Procedure § 904.1(a)(1).

[19] AA 409-435.

V. STANDARD OF REVIEW

On appeal from a trial court's sustaining of a demurrer, the appellate court should review the complaint *de novo* to determine whether it contains sufficient facts to state a cause of action. *Czajkowski v. Hasjell & White, LLP* (App. 4 Dist. 2012) 208 Cal.App.4th 166, 173. Questions of federal law determined in a ballot access challenge should also be reviewed *de novo*. *Washington State Republican Party v. Washington State Grange* (9th Cir. 2012) 676 F.3d 784, 791.

A demurrer should be sustained "only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Catsouras v. Department of California Highway Patrol* (App. 4 Dist. 2010) 181 Cal.App.4th 856, 891. In reviewing a demurrer, the court should consider both the complaint and judicially noticed matters. *Czajkowski v. Haskell & White, supra*, 208 Cal.App.4th at 173. A pleading is insufficient to state a claim "if the allegations are mere conclusions," but a complaint alleging "some particularized facts demonstrating a constitutional deprivation" should proceed to discovery. *Catsouras, supra*, 181 Cal.App.4th at 856.

VI. LEGAL DISCUSSION

A. Rubin is Entitled to an Evidentiary Hearing to Determine, in the Totality of the Circumstances, the Burden that Proposition 14 Has Imposed on Minor Party Voters and Candidates, Whether the Law is Carefully Tailored to Avoid Unnecessary Burdens on Protected Rights, and the Relative Merit of the State's Asserted Interests

The trial court erred when it deprived Rubin of the opportunity to properly develop his challenge to Proposition 14. First, without holding an evidentiary hearing, the court ruled that Washington State has a "similar system" to Proposition 14 and therefore Ninth Circuit rulings concerning the Washington State system could bar Rubin's claims.[20] Second, without considering testimonial, documentary, or expert evidence, the court ruled that Proposition 14 places only a "slight" burden on plaintiffs' voting and associational rights.[21] And third, even though the court did acknowledge that Proposition 14 posed at least a slight burden, it failed to analyze whether the law was appropriately tailored to minimize any burden on protected rights, or whether the asserted government interests are of sufficient importance to justify the new restrictions.

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[20] AA 426.
[21] AA 429.

California may not impose a ballot access restriction that imposes severe restrictions on ballot access without establishing a compelling government interest. *California Democratic Party v. Jones*, *supra*, 530 U.S. at 581. "Proving a severe burden must be done 'as-applied,' with an evidentiary record." *Democratic Party of Hawaii v. Nago* (D. Hawai'i Nov. 14, 2013) ___F.Supp.3d___, 2013 WL 6038018 at *9 (citing *Washington State Grange v. Washington State Republican Party* ("*Washington I*") (2008) 552 U.S. 442, 457-58).

In considering an election challenge, the trial court must also consider the "totality" of the State's restrictive election laws taken as a whole, and consider the extent of the burden imposed on voting and associational rights. *Williams v. Rhodes*, *supra*, 393 at 34. Given that the impact of a system of election laws is something that relies upon testimonial, documentary, and expert evidence, this inquiry should be conducted after the pleading stage. *See, e.g., Jenness v. Fortson* (1971) 403 U.S. 431, 432 (reviewing court order following defendant's motion for summary judgment).

In *Nago*, the District Court of Hawai'i ruled that in order for a plaintiff to demonstrate a "severe burden," it was appropriate to develop a factual record including expert opinions, surveys, and

statistical data. *Id* at *11. The District Court looked to the record developed by the Supreme Court in *Jones* as its guide:

> [T]he court had data quantifying the percentage and characteristics of likely "cross over" voters, and considered testimony measuring the likely impact of unaffiliated voters. Expert opinions, surveys, and statistical data of prior elections indicated that the blanket primary had the intended effect of "changing the parties' message." And historical evidence revealed that the blanket primary was adopted by voter initiative, "promoted by California largely as a measure that would 'weaken' party 'hard-liners' and ease the way for 'modern problem-solvers.'" *Id*. at *11 (*citing Jones, supra*, 530 U.S. at 570, 578, 580-82) (other citations omitted).

In order to make such relevant factual findings, the District Court in *Jones* heard testimony over four days and received numerous exhibits, including the reports of various experts. *See Jones, supra*, 530 U.S. at 578-582; *California Democratic Party v. Jones* (E.D. Cal. 1997) 984 F.Supp. 1288, 1292-1293.

In another case following *Jones*, the Ninth Circuit in *Arizona Libertarian Party, Inc. v. Bayless* (9th Cir. 2003) 351 F.3d 1277, also held that a challenge to an election law—which requires a determination regarding the severity of the law's burden on a party's associational rights—raises a factual issue that must be proven. 351 F.3d at 1282.

Beyond analyzing the burden placed on a plaintiff's rights, the trial court must also identify and evaluate "the precise

interests put forward by the State as justifications for the burden imposed by its rule." *Anderson v. Celebrezze* (1983) 460 U.S. 780, 789. "In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id*. "Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Id*.

Here, the trial court refused to permit Rubin to conduct discovery and develop a factual record. Under *Jones*, *Bayless*, *Nago*, and other related precedent, Rubin is entitled to investigate the historical record, analyze statistical data, and develop expert testimony concerning the severity of the burden that Proposition 14 has placed on associational rights. The trial court erred by making multiple factual determinations—including the finding of "similarity" between the California and Washington systems, and the finding that the burden of Proposition 14 is "slight"—that should not have been made until reasonable investigation and discovery were permitted and evidence presented at hearing or trial. The trial court also failed to analyze the State's purported interests. For these reasons, and as argued further below, Rubin's appeal should be granted, and the underlying demurrer overruled.

B. In its Totality, Proposition 14 Prevents Minor Party Voters and Candidates from Effective Participation in the General Election

1. The Supreme Court has long guaranteed access to the general election ballot to minor party candidates who demonstrate a "modicum of support."

Small political parties have been a part of the American political landscape for hundreds of years. *Anderson v. Celebrezze*, *supra*, 460 U.S. at 794. "Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream." *Id*; *see also Illinois Board of Elections v. Socialist Workers Party* (1979) 440 U.S. 173, 185-186 (minor parties seek "influence, if not always electoral success"). The values underlying the First Amendment are served "when election campaigns are not monopolized by the existing political parties." *Anderson*, *supra*, 460 U.S. at 794.

In reviewing a ballot access claim by a candidate from a minor political party, the Supreme Court has focused on "the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process." *Id*. at 793. "The inquiry is whether the

challenged restriction unfairly or unnecessarily burdens the availability of political opportunity." *Id*.

"Our primary concern is with the tendency of ballot access restrictions to limit the field of candidates from which voters might choose." *Anderson, supra*, 460 U.S. at 787. "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." *Williams v. Rhodes, supra,* 393 U.S. at 30-31. Additionally, "the right to vote is heavily burdened if that vote may be cast only for major-party candidates at a time when other parties or other candidates are clamoring for a place on the ballot." *Anderson*, 460 U.S. at 787-788; *Williams*, 393 U.S. at 11.

"The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded systems. *Anderson, supra*, 460 U.S. at 787-788 (internal citations omitted).

"A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson, supra*, 460 U.S. at 793-794.

The Supreme Court has consistently held that "only a compelling state interest in the regulation of a subject with the State's constitutional power to regulate can justify limiting First Amendment freedoms. *Williams, supra*, 393 U.S. at 11.

States do have the right to require candidates to make "a preliminary showing of substantial support" in order to qualify for a place on the general election ballot. *Munro v. Socialist Workers Party* (1986) 479 U.S. 189, 194. The states' flexibility in this regard is due to their interest in "winnowing" candidates through a multi-stage election process. *Id*. at 194-195. In 2000, *Jones* clarified that the State could only bar access to those who fail to show "a significant modicum of support." *Jones, supra*, 530 U.S. at 572.

Although there is no "litmus-paper test" that describes the highest permissible threshold for minor party candidate access to the general election, to date the Court has only permitted vote thresholds up to five percent of the electorate.

In *Jenness v. Fortson*, the Court upheld a statute that required independent and minor-party candidates to submit petitions signed by five percent of eligible voters in order to be listed on the general election ballot. *Jenness, supra,* 403 U.S. at 442.

In *Munro*, the Court upheld a restriction that required minor party candidates to receive at least one percent of votes cast in the primary election in order to advance to the general election. *Munro, supra*, 479 U.S. at 198-199. In *American Party of Texas v. White* (1974) 415 U.S. 767, the Court upheld a statute that required minor party candidates to petition signatures numbering at least one percent of the total vote in the preceding gubernatorial election. 415 U.S. at 782.

In *Williams v. Rhodes*, the Court invalided a statute requiring a new party to obtain petitions signed by qualified electors totaling 15 percent of the number of ballots cast in the last proceeding gubernatorial election in order to participate in the election. *Williams, supra*, 493 U.S. at 24-25.

Throughout these cases, the Supreme Court has reinforced the principle that States may not employ ballot access limitations which result in the exclusion of minor parties from the ballot. [22] *Williams v. Rhodes*. "The Constitution requires that access to the

[22] The trial court erroneously called into question the applicability of *Anderson* and *Jenness*, finding that the "non-partisan" nature of Proposition 14 distinguished those cases. AA at 428. This reasoning is flatly contradicted by the oft-repeated maxim of the Supreme Court: "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness, supra*, 403 U.S. at 442.

electorate be real, not merely theoretical." *American Party of Texas*, 415 U.S. at 783; *Jenness v. Fortson*, 403 U.S. at 439.

Here, Rubin alleges that some minor party candidates received substantial percentages of votes during the primary election, ranging as high as 18 percent of the electorate, yet these candidates were nonetheless barred from the general election. Under established precedent, he has adequately pled that Proposition 14 imposed an unlawful burden on voting and associational rights.

2. Rubin's challenge to Proposition 14 is not barred by prior challenges to the Washington State "top two" system because California's system imposes unique burdens on minor party voters and candidates.

The trial court cited the Ninth Circuit's ruling concerning the Washington State "top two" system, *Washington State Republican Party*, *supra*, for the proposition that Proposition 14 has imposed only a "slight" burden on voting and associational rights.[23] As argued above, the trial court's finding that the Washington and California electoral systems are "similar" was a factual determination that should be made only after discovery and an evidentiary hearing. Furthermore, the trial court's order ignores numerous material differences between the California and

[23] AA 428.

Washington State electoral systems--apparent from both Rubin's pleadings and the case law concerning Washington State's "top two" system—that serve to distinguish the Washington cases from the present action.

As the trial court noted, the United States Supreme Court has never considered whether a "top two" primary such as Proposition 14 imposes a "severe burden" on voter and associational rights.[24] In *Jones*, the Court remarked in dicta that some type of "top two" system might survive strict scrutiny. *Jones*, *supra*, 530 U.S. at 585-586. Later, in *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442 ("*Washington I*"), the Court considered a challenge to a "top two" system in Washington State, but that case did not involve a ballot access claim. More recently, in *Washington State Republican Party*, *supra* ("*Washington II*"), the Ninth Circuit reviewed a ballot access claim to the Washington State "top two" system, but the record in support of its ruling was minimal (unlike the present appeal, the ballot access claim there was not an "as applied" challenge"), and therefore should not apply to the record and unique factors at play in California's "top two."

[24] AA 426.

In particular, the Ninth Circuit panel's ruling in *Washington II* was informed by the finding that participation in Washington's August primary election was sufficiently similar to participation in the November general election, such that any burden on associational rights was slight. *See Washington II*, *supra*, 676 F.3d at 794. The Ninth Circuit was compelled to make this finding in order to distinguish the binding precedent of *Anderson v. Celebrezze*, in which the Supreme Court invalidated a March deadline for independent candidates for president to file a statement of candidacy and nominating petition.

> The Court held that the early filing deadline placed an unconstitutional burden on voting and associational rights because it prevented independents from taking advantage of unanticipated political opportunities that might arise later in the election cycle and required independent candidates to gather petition signatures at a time when voters were not attuned to the upcoming campaign. *Washington II*, *supra*, 676 F.3d at 794 (citing *Anderson*, *supra*, 460 U.S. at 786, 790-792).

In the reasoning of the Ninth Circuit, because the Washington State "top two" system provides for an August primary election, minor party voters "have an opportunity to appeal to voters at a time when election interest is near its peak, and to respond to events in the election cycle just as major candidates do." *Washington II*, *supra*, 676 F.3d at 794.

Here, the record establishes multiple ways in which Rubin's challenge to Proposition 14 is distinguishable from *Washington II*.

i. *Washington II was not an "as applied" challenge to ballot access restrictions.*

At the outset, it is important to note that *Washington II* did not include an "as applied" ballot access claim, and therefore did not consider actual election results under the Washington State "top two" system. *See Washington II*, *supra*, 676 F.3d at 793-795.

Rubin's claim, to the contrary, is based upon specific pleadings concerning the vast difference in public participation in California's primary as compared to its general election. Rubin also pleads specific facts concerning the candidacies of minor party candidates who, under the previous regime, would have participated in the November election, but under Proposition 14 were forced to end their campaigns after the June primary. These pleadings, and others, merit further investigation, discovery, and expert analysis, as other cases have required. *See Jones*, *supra*, 530 U.S. at 578-582.

ii. *Voter participation in California's primary is vastly inferior to voter participation in the general election.*

Here, the California primary is in June, a full five months before the general election. Even though minor parties and major

parties alike have access to the primary election, it is not fair to say—in the context of this "as applied" challenge—that California minor party candidates in 2012 had "an opportunity to appeal to voters at a time when election interest is near its peak." *Cf. Washington II*, *supra*, 676 F.3d at 794.

As the California Secretary of State described in her 2012 Statements of the Vote, less than half as many voters participated in the June primary election, as compared to the November general election. She noted that only 5,328,296 voters were counted in June, compared with 13,202,156 voters in November.[25] In California, under Proposition 14, election interest was not "near its peak" when minor party candidates participated in the June primary.

iii. *In 2012, Proposition 14 barred numerous well-supported minor party candidates from the general election.*

Rubin alleges in the SAC that in 2012 at least seventeen minor party candidates received at least two percent of the popular vote during the primary elections, but none of these candidates was permitted to advance to the general election ballot.[26] Additionally, nine candidates from minor political parties

[25] AA 258-259, 306, 320.
[26] AA 8-9, SAC ¶¶ 32-33.

received more than five percent of the vote, but none of these nine was permitted to advance to the general election ballot. The highest minor party vote-getting candidate, Anthony Vieyra of the Green Party, received 18.6 percent of the vote in the primary, but still did not advance to the general election.[27] Because Rubin has pled specific facts establishing the actual burden on minor party candidates under California's Proposition 14, the case is distinguishable from *Washington II*, and his ballot access claim should proceed.

iv. *Washington permits write-in candidates, but California does not.*

Supreme Court cases have looked to the availability of write-in candidacies in determining whether an election law imposes a severe burden on voter and associational rights. *See Jenness*, *supra*, 403 U.S. at 434 (noting that while a Georgia statute imposed a five percent threshold for minor party candidates to have their names printed on the general election ballot, write-in votes would still be counted), 436 (a ban on write-in votes is a separate, considerable burden), 438 (write-in votes provide an alternative form of access to the general election ballot).

[27] AA 8, SAC ¶ 29.

The Washington State "top two" system examined in *Washington II* permits write-in votes. Wash. Rev. C. § 29A.24.311. Proposition 14 does not.[28] *See Field v. Bowen* (App. 1 Dist. 2011) 199 Cal.App.4th 346, 367-368.

Because the facts the Ninth Circuit used to distinguish the Washington State electoral system from *Anderson* are not applicable here in California, *Washington II* does not create binding precedent. Under the binding precedent of *Anderson*, plaintiffs are burdened when they are denied the opportunity to appeal to voters at a time when election interest is near its peak, and to respond to events in the election cycle just as major candidates do. *Anderson, supra*, 460 U.S. at 786. Here, Rubin has pled facts establishing that the June primary is an inadequate substitute for participation in the November general election. Based upon his pleadings, he has stated a claim for unlawful denial of ballot access under the First and Fourteenth Amendments.

3. The trial court did not identify or evaluate any state interest that would justify the burdens imposed by Proposition 14.

After determining the severity of the burden imposed by Proposition 14, the trial court was also required to determine

[28] AA 234 (voter information guide).

whether the State had met its burden of demonstrating that the ballot restrictions are "properly drawn" and employ the "least drastic means" to achieve the State's ends. *See Illinois Board of Elections v. Socialist Workers Party* (1979) 440 U.S. 173, 185. "The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity." *Anderson*, *supra*, 460 U.S. at 793.

As discussed above, the trial court erred by failing to permit discovery and an evidentiary hearing before evaluating the state's interests. In *Jones*, the Supreme Court instructed trial courts that an evaluation of state interests "is not to be made in the abstract," but rather, whether, "in the circumstances of the case," the State's interests are important or compelling. *Jones*, *supra*, 530 U.S. at 584. In that case, the trial court permitted four days of testimony and extensive expert testimony before issuing rulings concerning the severity of the burden and the strength of the state's interests. *See California Democratic Party v. Jones* (2000) 530 U.S. 567, 571; *Jones v. Democratic Party* (E.D. Cal. 1996) 984 F.Supp. 1288, 1292-93.

Beyond the error of precluding necessary discovery, the trial court also failed to evaluate the two interests asserted by

defendant Debra Bowen, California's Secretary of State. In her demurrer, Bowen asserted the following:

> Proposition 14 has been justified on at least two grounds: increasing voter participation in the selection of candidates, particularly through increased participation by independent voters who previously had limited rights to vote in the primary, and reducing government gridlock by promoting less partisan candidates.[29]

The trial court did not question these asserted interests. Under established precedent, however, both interests should have been ruled insufficient – or at least reserved for resolution following an evidentiary hearing.

First, the State's interest in "increasing voter participation" and "particularly . . . participation by independent voters" should be rejected, because any increase in independent voter participation is counterbalanced by the substantial decrease in minor party participation in the general election. *See Jones*, *supra*, 530 U.S. at 581 ("We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired"). As demonstrated above, half as many candidates participated in the 2012 statewide primary election, as compared to the general election, and no significant minor party candidate

[29] AA 30-31.

advanced to the general election. There is a factual dispute as to whether "voter participation" has been beneficially impacted by Proposition 14. At the very least, the trial court should have permitted discovery and expert testimony on the issue of "voter participation."

Second, the State's interest in "reducing partisan gridlock by promoting less partisan candidates" has already been ruled invalid by the U.S. Supreme Court. *See Jones*, *supra*, 540 U.S. at 584 ("This may well be described as broadening the range of choices *favored by the majority*—but that is hardly a compelling state interest, if indeed it is even a legitimate one").

Anderson also reviewed the State's asserted interest in "political stability," but found that an early filing deadline for independent Presidential candidates could not be justified on such grounds. *Anderson*, *supra*, 460 U.S. at 805-806.

> For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. *Anderson*, *supra*, 460 U.S. at 806 (citations omitted).

Here, the State has made no effort to justify why a "top two" system should not be a "top three," "top four," or otherwise. There has been no effort to establish how Proposition 14 represents a "less drastic way" of accomplishing the State's asserted interests.

Because the trial court failed to evaluate the relative merit of the State's asserted interest, and because there is an issue of fact as to whether the State's asserted interests are valid, the trial court erred by sustaining the demurrers, and Rubin's appeal should be granted.

C. Proposition 14 Violated Equal Protection by Withdrawing Access to the General Election from Minor Party Voters and Candidates

The Equal Protection Clause forbids the unjustified withdrawal of an established privilege or protection from a class of disfavored individuals, even if that right may not have been required by the Constitution in the first place. *Romer v. Evans* (1996) 517 U.S. 620, 631-634. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Id*. at 632.

Included under the Equal Protection Clause are those citizens who suffer from viewpoint discrimination. *See Police Dept. of the City of Chicago v. Mosley* (1972) 408 U.S. 92, 96 (the

Equal Protection Clause is violated when the government grants the use of a forum to speakers whose views it finds acceptable, but denies access to those wishing to express disfavored or more controversial views); *Williams v. Rhodes* (1968) 393 U.S. 23, 30 ("invidious distinctions cannot be enacted without a violation of the Equal Protection Clause"). In *Williams v. Rhodes*, the Equal Protection Clause formed the basis of a challenge to a series of election laws that, when taken together, made it "virtually impossible for any party to qualify on the ballot except the Republican and Democratic parties." *Williams*, 393 U.S. at 25.

Here, Rubin pleads that prior to California's implementation of Proposition 14, candidates could participate in primary elections and the top vote-getter from each political party was permitted to participate in a November general election.[30] After the adoption of Proposition 14, in 98 percent of the affected elections, only candidates from the two major parties were able to participate in the general election. And even in the remaining two percent of the elections, the minor party candidate gained access to the general election only after one of the major parties declined to put forward a candidate.[31] These candidates have even been

[30] AA 6, SAC ¶ 18.
[31] AA 8, SAC ¶ 26.

denied a usual alternative route to the ballot, as Proposition 14 has also resulted in the preclusion of write-in votes.

The trial court ruled that despite all of these effects, that Proposition 14 could not be challenged pursuant to the Equal Protection clause because "the challenged law does not on its face or in its application 'target' one group or another for disparate treatment."[32] This ruling is flatly contradicted by Rubin's pleadings: namely, that prior to Proposition 14, the top vote-getting candidates from qualified minor parties were guaranteed access to the general election, whereas after Proposition 14, these candidates did not advance. "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness*, *supra*, 403 U.S. at 442. Here, Proposition 14 treated minor parties and major parties "exactly alike," and it is this new policy that constitutes the deprivation of equal protection. In other words, Proposition 14 targeted minor parties by deleting their long-established access to the general election.

Thus, Rubin can establish that candidates and supporters of minor political parties have been singled out for an extraordinary sanction, as compared to the major political parties, and that

[32] AA 432.

through further development of a factual record, a reasonable fact-finder could draw the inference that they have been subject to invidious discrimination in violation of Equal Protection.

VII. CONCLUSION

Rubin pled the essential elements of a ballot access claim under the First and Fourteenth Amendments: that Proposition 14 has severely burdened the rights of voters and candidates who associate with minor political parties by depriving them of access to the general election ballot and relegating them to a far less consequential primary election; that Proposition 14 is not narrowly tailored to avoid unfair or unnecessary burden on fundamental rights; and that the State has not demonstrated a compelling interest that would justify Proposition 14's impact on voting and associational rights.

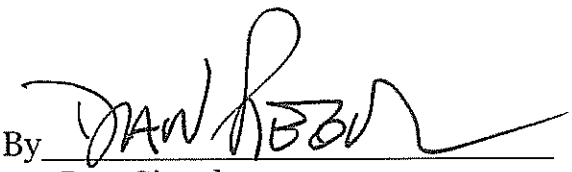
Furthermore, Rubin has pled an Equal Protection claim, based on the fact that defendant's implementation of Proposition 14 withdrew an established privilege from qualified minor political parties by denying them access to the general election.

Accordingly, for all of the above reasons, Rubin's appeal should be granted. The demurrers of defendant and interveners

should be overruled, Rubin's complaint should be re-instated, and the defendant and interveners should be required to answer.

Respectfully submitted,

SIEGEL & YEE

By 

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1)

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Dated: April 2, 2014

Dan Siegel
Michael Siegel

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

There are no interested entities or persons to list in this certificate. Cal Rules of Court, Rule 2.808(e)(3).

Dated: April 2, 2014

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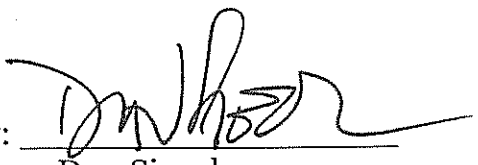
By: 

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PROOF OF SERVICE

I, MICAH CLATTERBAUGH, declare as follows:

I am over eighteen years of age and a citizen of the State of California. I am not a party to the within action. My business address is 499 14th Street, Suite 300, Oakland, CA, 94612, and my electronic service address is micah@siegelyee.com.

On April 2, 2014. at 3:00 pm, I electronically served copies of:

1. **Appellants' Opening Brief**

2. **Appellants' Appendix**

on the parties in this action by filing the documents with the First District Court of Appeal's electronic filing system pursuant to Rule 8.71(f) and First District Court of Appeal Local Rule 16(j). The electronic service addresses for the parties are:

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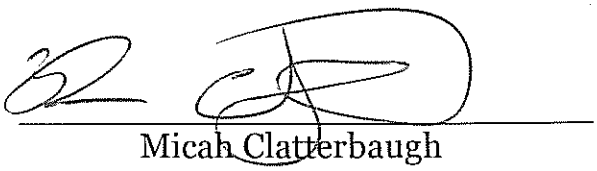
I declare under penalty of perjury that the foregoing is true and correct. Executed on April 2, 2014, at Oakland, California.



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