IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

MICHAEL RUBIN, et al., Plaintiffs and Appellants, **v.** **DEBRA BOWEN, in her official capacity as California Secretary of State,** Defendant and Respondent, **INDEPENDENT VOTER PROJECT, et al.**, Interveners and Respondents.	Case No. A140387

Alameda County Superior Court, Case No. RG11605301
Hon. Lawrence John Appel, Judge

BRIEF OF RESPONDENT DEBRA BOWEN

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CERTIFICATE OF INTERESTED PARTIES OR PERSONS

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

Dated: June 18, 2014

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INTRODUCTION

With the enactment of Proposition 14 in 2010, California voters amended the California Constitution to overhaul the system the state uses to select candidates for statewide, legislative, and congressional offices. Proposition 14 replaced a closed partisan primary with an open nonpartisan primary leading to a "top two" runoff general election. The United States Supreme Court and other courts of review have recognized the open nonpartisan primary as a constitutional means for choosing general election candidates. The California Supreme Court has also recognized that runoff elections serve the chief function of the election process: to winnow out and finally reject all but the chosen candidates.

Despite this, Appellants, who include minor political parties, candidates, and their supporters, claim that California is constitutionally prohibited from adopting the open nonpartisan primary system even though the new runoff system is neutral with respect to political parties and treats all candidates and political parties alike. At heart, Appellants allege that minor political parties must be guaranteed the right to have their candidates participate in a general election because a general election typically has higher voter turnout and thus generates more public interest than a primary election held several months earlier. But neither political parties nor candidates have a constitutional right to participate in elections with high voter turnouts, or to be provided a statewide platform on which they might garner maximum public attention.

Appellants also fail to sufficiently allege an equal protection claim. On its face, Proposition 14 treats all parties and candidates identically, and Appellants fail to sufficiently allege any basis to find that California voters acted with invidious intent to discriminate against minor political parties when they approved the measure.

Therefore, the Court should affirm the trial court's judgment on its order sustaining the demurrers to Appellants' ballot access and equal protection claims without leave to amend.

SUMMARY OF PROPOSITION 14

In 2009, the California Legislature placed Senate Constitutional Amendment 4, officially known as the "Top Two Candidates Open Primary Act," on the June 2010 election ballot. (AA[1] 228-229, 235.) Designated as Proposition 14 by the Secretary of State, the measure was approved by California voters by a margin of 53.8 to 46.2 percent.[2]

Proposition 14 replaced the former partisan primary process for state and congressional offices with "[a] voter-nomination primary election . . . to select the candidates for congressional and state elective offices in California." (Cal. Const., art. II, § 5, subd. (a); see *Field v. Bowen* (App. 1 Dist. 2011) 199 Cal.App.4th 346, 351 ["Proposition 14 replaced party (partisan) primaries with one open primary" for state and congressional offices].) Under this system, also known as a nonpartisan blanket primary system, "[a]ll 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." (Cal. Const., art. II, § 5, subd. (a).)

This process leads to a general election between the two candidates receiving the most votes in the primary election: "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,

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[1] Citations to "AA" refer to Appellants' Appendix.

[2] See <http://www.sos.ca.gov/elections/sov/2010-primary/ssov/ballot-measures-summary.pdf>, at p. 303.

compete in the ensuing general election." (Cal. Const., art. II, § 5, subd. (a).)

Unlike the partisan primary system, Proposition 14 provides that while a political party may endorse, support or oppose a candidate, it "shall not nominate a candidate for any congressional or state elective office at the voter nominated primary," and "shall not have the right to have its preferred candidate participate in the general election for a voter-nominated office other than a candidate who is one of the two highest vote-getters at the primary election . . . ." (Cal. Const., art. II, § 5, subd. (b).) Proposition 14, however, leaves in place partisan elections for presidential candidates, political party committees and party central committees and preserves the right of political parties to participate in the general election for the office of president. (Cal. Const., art. II, § 5, subds. (c), (d).) Proposition 14 became operative on January 1, 2011. (AA 236 [SCA 4, Fifth Clause].)

PROCEDURAL HISTORY

Appellants comprise minor political parties and also candidates and voters who are affiliated with those parties or support their candidates.[3] (AA 4-5.) On November 21, 2011, Appellants filed their original complaint for declaratory, injunctive and other relief, challenging the constitutionality of Proposition 14 based upon its alleged effect on minor parties and their supporters. (AA 416.) Appellants pled three causes of action based on ballot access, violation of rights to freedom of speech and

[3] The political party appellants are the Green Party of Alameda County, the Libertarian Party of California, and the Peace and Freedom Party of California. Appellants Steve Collett, Marsha Feinland, Charles L. Hooper, C.T. Weber, Michael Rubin, Katherine Tanaka, and Cat Woods are voters, and each supports one of the Appellant political parties. Appellants Collett, Feinland, Hooper, and Weber were also candidates for various offices in the 2012 election. (AA 4-5.)

association, and the Elections Clause of the United States Constitution. (*Ibid.*)

On January 11, 2012, the Interveners Independent Voter Project, David Takashima, Abel Maldonado, and Californians to Defend the Open Primary filed a complaint in intervention. (AA 47 & 417.)

On April 24, 2012, the trial court sustained the Secretary of State's demurrer to the complaint with leave to amend, and denied Appellants' motion for preliminary injunction. (*Ibid.*) In their subsequent first amended complaint, Appellants alleged the same three causes of action and an additional cause of action for violation of equal protection. (AA 418.) The trial court sustained demurrers to the ballot access and equal protection causes of action of the first amended complaint with leave to amend and sustained demurrers to the remaining causes of action without leave to amend. (*Ibid.*)

In response to that ruling, Appellants filed a second amended complaint alleging: (1) denial of ballot access by Proposition 14, as applied, and (2) violation of equal protection by Proposition 14, both on its face and as applied. (AA 11-12.) Appellants' denial of ballot access claim is based on the First and Fourteenth Amendments, 42 U.S.C. § 1983, and article 1 of the California Constitution. (AA 14.) Appellants' equal protection claim is based on the Equal Protection Clause of the Fourteenth Amendment and the guarantees of equal protection in articles 1 and 4 of the California Constitution. (*Ibid*.)

On September 23, 2013, the trial court sustained the Secretary of State's and Interveners' demurrers to both causes of action without leave to amend and dismissed the second amended complaint. (AA 434.) Specifically, with regard to Appellants' ballot access claim, the trial court found that "the primary election required by Article 2 section 5 must be considered an integral part of the entire election process," and held that

"because California affords all candidates easy access to the primary election ballot and the opportunity for the candidates to wage a ballot-connected campaign, the effect of Prop. 14 (Article 2, section 5(a)) on plaintiffs' constitutional rights is slight, and any resulting burden or restriction does not violate any constitutionally guaranteed right." (AA 429.)

With regard to Appellants' equal protection claim, the trial court held that Appellants failed to "state facts sufficient to constitute a cause of action." (AA 431.) As the trial court found, Appellants "have failed to identify 'an established right' which was withdrawn from plaintiffs (or any of them) by the implementation of Prop. 14, have failed to sufficiently allege any instance of invidious intent or conduct, and have failed to meet their burden to show how they could amend this cause of action to overcome the deficiencies pointed to by the defendants." (*Ibid*.)

The trial court entered judgment in favor of the Secretary of State and Interveners. (AA 436.) On November 26, 2013, Appellants filed a Notice of Appeal. (AA 438-439.)

STANDARD OF REVIEW

In an appeal from a dismissal after a trial court order sustaining a demurrer, a court should review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*McCall v. PacifiCare of California, Inc*. (2001) 25 Cal.4th 412, 415.) The demurrer is treated as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Judicially noticed matters may also be considered. (*Ibid.*, citation omitted.) When a demurrer is sustained without leave to amend, the plaintiff bears the burden to prove a reasonable possibility exists that the defect can be cured by amendment. (*Ibid.*, citation omitted.)

In evaluating a section 1983 claim, California state courts apply federal law to determine whether a complaint pleads the cause of action sufficiently to survive a demurrer. (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 563.) Under the federal standard, an action may be dismissed for failure to state a claim 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* (2010) 181 Cal.App.4th 856, 891.) A pleading is insufficient to state a claim if the allegations are mere conclusions. (*Ibid.*, citation omitted.)

ARGUMENT

I. THE TOP TWO PRIMARY SYSTEM DOES NOT IMPOSE A SEVERE BURDEN ON APPELLANTS' BALLOT ACCESS RIGHTS AND IS JUSTIFIED BY IMPORTANT INTERESTS OF THE STATE OF CALIFORNIA

Courts have long recognized that states may regulate the elections process: "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" (*Burdick v. Takushi* (1992) 504 U.S. 428, 433 (*Burdick*), quoting *Storer v. Brown* (1974) 415 U.S. 724, 730.) "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." (*Timmons v. Twin Cities Area New Party* (1997) 520 U.S. 351, 358 [upholding Minnesota's ban on multiple-party candidacies for elected office].)

As the trial court correctly found, Proposition 14 does not impose a "severe burden" on Appellants because under Proposition 14, "California affords all candidates easy access to the primary election ballot and the opportunity for the candidates to wage a ballot-connected campaign . . . ."

(AA 429.) Thus, "the effect of Prop. 14 (Article 2, section 5(a)) on plaintiffs' constitutional rights is slight, and any resulting burden or restriction does not violate any constitutionally guaranteed right." (AA 429.)

And because there is no "severe burden" on Appellants' ballot access rights, California's important regulatory interests in, among other things, increasing voter participation and providing voters increased options in the primary, sufficiently justify Proposition 14.

A. Legal Standard Applicable to Evaluating Constitutionality of State Election Laws

In examining challenges to ballot access, the United States Supreme Court[4] focuses on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. (*Clements v. Fashing* (1982) 457 U.S. 957, 964.) "The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" (*Ibid.*, quoting *Lubin v. Panish* (1974) 415 U.S. 709, 716.)

Review of voting laws does not automatically require heightened scrutiny, but instead follows a flexible balancing standard: A court considering a challenge to a state election law must weigh "the character and magnitude" of the asserted injury against the "interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration the extent to which the State interests make the burden necessary. (*Burdick*, *supra*, 504 U.S. at p. 434.)

Under this standard, when a state election law imposes only "'reasonable, non-discriminatory restrictions' upon the First and Fourteenth

[4] All references to "Supreme Court" hereafter are to the United States Supreme Court, unless otherwise distinguished.

Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." (*Burdick*, *supra*, 504 U.S. at p. 434, quoting *Anderson v. Celebrezze* (1983) 460 U.S. 780, 788.) Accordingly, the Supreme Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." (*Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, 452, quoting *Burdick*, *supra*, 504 U.S. at p. 438 (*Washington I*).) But when those rights are subject to "severe restrictions," the law must be "narrowly drawn to advance a state interest of compelling importance." (*Burdick*, *supra*, 504 U.S. at 434.) The Ninth Circuit Court of Appeals has "noted that 'voting regulations are rarely subject to strict scrutiny.'" (*Chamness v. Bowen* (9th Cir. 2013) 722 F.3d 1110, 1116, citing *Dudum v. Arntz* (9th Cir. 2011) 640 F.3d 1098, 1106.)

The same balancing test used by the United States Supreme Court in elections cases has been followed by the California Supreme Court: "[I]n analyzing constitutional challenges to election laws, [the California Supreme Court] has followed closely the analysis of the United States Supreme Court." (*Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 179.) When interpreting the California Constitution, the California Supreme Court also does not depart from the United States Supreme Court's interpretation of a similar federal provision unless there are cogent reasons to do so.[5] (*Ibid.*) Thus, like the federal courts,

[5] Appellants' arguments on appeal are not based on the second amended complaint's causes of action under the various provisions of the California Constitution. In any event, the analysis is the same as under the federal standard since Appellants have provided no cogent reasons for interpreting the California Constitution differently from the United States Constitution.

California courts assess an election law by determining whether it imposes a "limited burden" on voting rights or a "severe restriction" on those rights, and then weighing the interests advanced by the law. (See *id*. at pp. 182-183 [applying balancing test to voting regulation challenged under California's free speech clause].)

B. Federal and State Authorities Have Approved the Top Two Primary As a Constitutional Method of Choosing General Election Candidates

Appellants' ballot access argument boils down to a complaint that Proposition 14 violates their right of access to the ballot by making it more difficult for a minor party candidate to qualify for the general election. This complaint, however, has been rejected by the Supreme Court and other courts, either expressly or impliedly, as a basis on which to declare a top two system unconstitutional.

In *California Democratic Party v. Jones*, the Supreme Court opined that a top two primary, which it referred to as a nonpartisan blanket primary, avoids constitutional infirmity by allowing each voter to vote for any candidate and the top two vote getters to advance to the general election. (*California Democratic Party v. Jones* (2000) 530 U.S. 567, 585-586.) In that case, the Supreme Court found that California's *partisan* blanket primary system, in which any voter, regardless of party affiliation, can vote for any candidate at the primary election, and the candidate of each party who wins the most votes becomes the party nominee at the general election, placed a heavy burden on a political party's associational freedom. (*Id.* at p. 581.) The court further found that the state's interests were not "*in the circumstances of this case,* compelling," and that the system was not a narrowly tailored means of furthering the asserted interests. (*Id.* at pp. 585-86, emphasis in original.)

Importantly, the Supreme Court suggested that the state could protect all of its asserted interests with a *nonpartisan* blanket primary. (*California Democratic Party v. Jones*, *supra*, 530 U.S. at p. 585.) Under a nonpartisan blanket primary, the state determines the qualifications for a candidate to be placed on the primary ballot, and then "[e]ach voter, regardless of party affiliation, may then vote for any candidate, and the top two voter getters (or however many the State prescribes) then move on to the general election." (*Id*. at pp. 585-586.) The nonpartisan blanket primary differs from the partisan blanket primary in a way that is "the constitutionally crucial one: primary voters are not choosing a party's nominee." (*Ibid.*) Thus, "[u]nder a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased 'privacy,' and a sense of 'fairness'—all without severely burdening a political party's First Amendment right of association." (*Id.* at p. 586.) Thus, although *Jones* did not directly address ballot access for minor political parties, it plainly stands for the conclusion that a top two primary system is constitutional.

The Supreme Court's approval of the nonpartisan blanket primary in *Jones* is dictum; nonetheless, it provides weight and guidance as to what the Supreme Court would hold. (See *Coeur D'Alene Tribe of Idaho v. Hammond* (9th Cir. 2004) 384 F.3d 674, 683 ["Even if it could be considered a dictum, however, that would be of little significance because our precedent requires that we give weight to dicta of the Supreme Court"]; *California Amplifier, Inc. v. RLI Ins. Co.* (2001) 94 Cal.App.4th 102, 114 ["legal pronouncements by the [California] Supreme Court are highly probative and, generally speaking, should be followed even if dictum"].)

Indeed, in a later case construing Washington's top two system, the Supreme Court had an opportunity to disavow its earlier dictum, but instead affirmed that "we assumed that the nonpartisan primary we described in *Jones* would be constitutional." (*Washington I*, 552 U.S. at p. 452.) While

that opinion did not decide the parties' ballot access claim, it nonetheless concluded that a nonpartisan blanket primary ballot could be designed that would eliminate any threat to associational rights and rejected a facial challenge to the Washington top two primary on that basis. (*Id*. at pp. 456-457.) Thus, *Washington I*, like *Jones* before it, recognizes that a top two primary system is not for any reason in and of itself an unconstitutional method for nominating general election candidates.

The Ninth Circuit also rejected the notion that a top two primary is flawed solely because that system "makes it more difficult for minor-party candidates to qualify for the general election ballot than regulations permitting a minor-party candidate to qualify for a general election ballot by filing a required number of petition signatures." (*Washington State Republican Party v. Washington State Grange* (9th Cir. 2012) 676 F.3d 784, 795 (*Washington II*).) "This additional burden . . . is an inherent feature of any top two primary system, and the Supreme Court has expressly approved of top two primary systems." (*Id*., citing *California Democratic Party v. Jones*, 530 U.S. at pp. 585-586.)

In *Washington II*, the Ninth Circuit evaluated a top two system very similar to California's system whereby each candidate indicates his or her party preference on the primary ballot and voters may select any candidate listed on the ballot, regardless of the party preference of the voter or the candidate, with the top two vote getters advancing to the general election. (*Washington II*, *supra*, 676 F.3d at p. 788.) The Ninth Circuit found that the ballot access rights of minor political parties were not severely burdened under Washington's top two system. (*Id.* at p. 794.) Given the features of a top two system, including broad access to the primary ballot by minor party candidates, the minor parties failed to show that the system "impermissibly 'limit[ed] the field of candidates from which voters might choose.'" (*Ibid*., quoting *Anderson v. Celebrezze*, *supra*, 460 U.S. at

p. 786.) And "because [the top two primary law] gives major and minor party candidates equal access to the primary and general election ballots, it does not give the 'established parties a decided advantage over any new parties struggling for existence.'" (*Washington II*, *supra*, 676 F.3d at p. 795, quoting *Williams v. Rhodes* (1968) 393 U.S. 23, 31.) The Ninth Circuit therefore affirmed dismissal of a ballot access claim nearly identical to the one presented by Appellants in this action. (*Washington II*, *supra*, 676 F.3d at pp. 794-795.)

Additionally, Senate Bill 6 (SB 6), the separate legislative measure implementing Proposition 14, has been upheld by both this Court and the Ninth Circuit in two separate cases. (Sen. Bill No. 6 (2009-2010 Reg. Sess.).) First, in a case implicating the larger question of Proposition 14's validity, this Court upheld the constitutionality of two aspects of SB 6 relating to party preference ballot designations and write-in voting. (*Field v. Bowen*, *supra*, 199 Cal.App.4th 346.) This Court found no basis in the implementing statutes to enjoin enforcement of Proposition 14. (*Id*. at pp. 350, 372.) Although this Court did not expressly pass on the constitutionality of Proposition 14 itself, it recognized that the two implementing statutes were constitutional, a holding fundamentally consistent with the recognition that a top two primary system may be validly implemented by the voters—and fundamentally inconsistent with Appellants' claims in this matter. (*Ibid*.) Second, in *Chamness v. Bowen*, *supra*, 722 F.3d 1110, the Ninth Circuit upheld the party preference designation requirement of SB 6, rejecting the plaintiff's contention that that SB 6 severely burdened his First Amendment rights. In upholding the constitutionality of SB 6, the Ninth Circuit viewed the implementing legislation as "reasonably related to furthering the state's important interests in efficiently regulating elections." (*Id.* at p. 1116.)

C. Proposition 14 Does Not Impose a Severe Burden on Appellants' Participation in the Elections Process

The proper inquiry to be conducted in a ballot access case is whether the challenged restriction unfairly or unnecessarily burdens "the availability of political opportunity." (*Clements v. Fashing*, *supra*, 457 U.S. at p. 964.) Here, as the trial court recognized, California affords all candidates the same access to the primary election ballot and the political opportunity to wage a campaign. (AA 429.) The trial court thus found that the effect of Proposition 14 on Appellants' constitutional rights is "slight," and that "any resulting burden or restriction does not violate any constitutionally guaranteed right." (*Ibid*.)

The First Amendment guarantees political parties the opportunity to gain access to state ballots so that voters may cast their votes effectively. (*Munro v. Socialist Workers Party* (1986) 479 U.S. 189, 193 (*Munro*)). It does not, however, guarantee minor parties a place on a general election ballot when their candidates have easy access to a primary election ballot that affords them the same opportunity to campaign for and advance to the general election as every other candidate listed on that ballot. (*Id*. at p. 199 [a law's "effect on a candidate's constitutional rights is slight" when state "affords a minor-party candidate easy access to the primary election ballot and the opportunity to wage a ballot-connected campaign"].) Primary election systems are not unconstitutional merely because "voters must make choices as they vote at the primary," where "there are no state-imposed obstacles impairing voters in the exercise of their choices." (*Ibid*.)

The California top two primary fits squarely within the framework approved by federal and state courts. The voter nomination primary is open to candidates regardless of their preference for a political party or their lack of party preference. (See Elec. Code, § 13105 [political party preference designation].) And because there is no constitutional right to participate in

a runoff general election when all candidates have equal and easy access to the primary election that precedes it, Appellants' second amended complaint fails to sufficiently allege that Proposition 14 imposes any restrictions on their constitutional rights. (See *Burdick*, *supra*, 504 U.S. at p. 434.)

1. Appellants Have Not Alleged Any Unique Burden from the Way Proposition 14 Is Applied to Them

Appellants failed to allege that Proposition 14 imposes a "severe burden" as applied to them, because they have not alleged—indeed, could not allege—any harm unique to minor parties or minor party candidates and their supporters. The harms that Appellants allegedly suffer are merely inherent consequences of a top two system that apply equally to all political parties and candidates. (See *Rubin v. City of Santa Monica* (9th Cir. 2002) 308 F.3d 1008, 1014) [restrictions are not severe when they are "generally applicable, even-handed, (and) politically neutral"]; see *also Lindsay v. Bowen* (9th Cir. May 6, 2014) --- F.3d ---, 2014 WL 1778036 at *1 [any burden on plaintiff's rights is "minimal" where distinction made does not limit political participation by identifiable political group whose members share particular viewpoint, associational preferences or economic status].)

As evidence of the harm Appellants purportedly suffered in the June 2012 primary, Appellants allege that, out of over 150 primary races, three minor party candidates reached the general election; minor party candidates were thus denied access to "98%" of the general election ballot. (AA 8, ¶ 26.) This, however, is belied by the fact that minor party candidates *did not run* in the vast majority of the primary races. As the documents Appellants rely on also show, candidates preferring minor parties ran in only 20 of the 154 non-presidential races. (AA 308-317 [candidates expressing preference for minor party competed in only 11 of 54 congressional primary races and 9 of 100 state legislative primary races].)

Appellants' as-applied ballot access claim is thus based on largely misleading factual allegations in which they claim denials of access to the general election ballot even in races where no minor party candidates attempted to compete in the primary election in the first place.

Appellants further rely on the fact that minor party candidates who received between 1.2 percent and 18.6 percent of the vote in non-presidential primary races did not make the general election ballot. (AA 8-9, ¶¶ 28-31.) These statistics, however, say nothing about the constitutionality of Proposition 14. In a top two primary system, it is virtually inevitable that in some races, some candidates, regardless of party preference, will receive double-digit percentages of the primary vote and not reach the general election. Indeed, in the 2012 primary, 30 candidates preferring major parties received over 20 percent of the primary votes, and yet failed to qualify for the general election.[6] (AA 309-316.) In two races, candidates preferring major parties received over 30 percent of the votes and failed to qualify for the general election.[7] (AA 313-314.) Therefore, Appellants fail to allege facts sufficient to support a finding that Proposition 14 imposes a unique burden on them.

2. Demonstration of a Modicum of Support Does Not Guarantee Access to the General Election Ballot

Appellants' appeal is also based on the erroneous premise that any candidate who demonstrates a "modicum of support" is constitutionally guaranteed access to the general election. Appellants' proposition misconstrues and turns Supreme Court precedent on its head. In *Jones*, on

[6] See results for United States Representative Districts 21, 24, 31, 38 and 52; State Senator Districts 5 and 31; and State Assembly Member Districts 1, 3, 6, 10, 23, 25, 32, 36, 38, 47, 46, 50, 51, 57, 58, 60, 66, 67, 69, 71, 74, and 76. (AA 309-316.)

[7] See results for Senate Assembly Member Districts 6 (31.1%) and 36 (32%). (AA 313-314.)

which Appellants rely for their flawed premise, the Supreme Court found that, "in order to avoid burdening the general election ballot with frivolous candidacies, a State *may* require parties to demonstrate 'a significant modicum of support' before allowing their candidates a place on the ballot." (*California Democratic Party v. Jones*, *supra*, 530 U.S. at p. 572, emphasis added.) The Supreme Court did not, as Appellants argue, thereby *require* states to place a candidate on the general election ballot simply because the candidate showed a "modicum of support." The cited language describes a permissible requirement states may impose *upon minor parties*, not a sufficient condition for triggering a requirement *upon states*. The trial court below reached the same conclusion in finding that even though states may condition access to the general election ballot upon a showing of a modicum of support, "it does not follow that any and every candidate who receives some percentage of the votes cast in a given primary election thereby obtains a constitutional right to compete in the ensuing general election." (AA 424-425.)

Appellants cite no authority that stands for the proposition that candidates—whether representing or preferring a major party or minor party—who receive a "modicum of support" must be allowed into a runoff race, or that all candidates who receive a "modicum of support" in a primary election must advance to a general election. Instead, Appellants erroneously rely on cases in which election laws were struck down because they placed heavier burdens on new or minor parties than more established parties. For example, Appellants rely on *Williams v. Rhodes*, *supra*, to suggest that a State cannot restrict anyone who receives 15 percent of votes from being placed on the general election ballot. But this misconstrues the Supreme Court's holding. In *Williams*, the Supreme Court struck down a number of laws that, among other things, required a new party to qualify for the ballot with petitions signed by 15 percent of the voters. (393 U.S. at

pp. 24-25.) But the Supreme Court did not consider whether 15 percentage points is a constitutional threshold. Rather, it found that the statute violated equal protection because the burden was placed only on new parties, not the Republican and Democratic Parties, which faced "substantially smaller burdens" because they were allowed to retain their positions on the ballot simply by obtaining 10 percent of the vote in the last gubernatorial election and were not subject to a petition signature requirement. (*Id.* at pp. 25-26.) These concerns have no application here since, under Proposition 14, all candidates, regardless of party preference, have equal access to the primary ballot and equal opportunity to reach the general election ballot.

Similarly, *Anderson v. Celebrezze*, *supra*, upon which Appellants rely heavily, struck down a law that required an independent presidential candidate who wished to appear on the November general election ballot to file a statement of candidacy and nominating petition in March, even though party candidates who wished to appear on the general election ballot would not be nominated by their parties until late summer conventions. (460 U.S. 780, 783.) The March deadline did not apply equally to all candidates, and the earlier deadline for independent candidates prevented them from taking advantage of unanticipated political opportunities and voter interest later in the election cycle that was available to party candidates. (*Id.* at pp. 786, 790-792 [candidates and supporters within major parties have political advantage of flexibility given their later nomination deadline].) Proposition 14, unlike the law at issue in *Anderson v. Celebrezze*, applies equally to all candidates, whether independent or preferring major or minor parties, and provides them with the same political opportunities.

The "modicum of support" standard proposed by Appellants is thus of little value when it is applied to an election system in which all candidates—whether preferring a major party or a minor party, or running

as an independent candidate or a write-in candidate—are subject to the exact same requirements. Under Proposition 14, regardless of party status, any candidate for statewide, legislative, or congressional offices may be placed on the primary election ballot merely by filing a declaration of candidacy and nomination papers with up to 100 voter signatures, and paying a filing fee of 1 percent (2 percent for United States Senator and statewide candidates) of the office's salary. (Elec. Code, §§ 8062, 8103.) In lieu of a filing fee, any candidate may submit a petition with 1,500 to 10,000 signatures, depending on the office sought. (Elec. Code, § 8106.) Given the ease with which all candidates may appear on the primary ballot and compete in the top two primary, Appellants have not stated a constitutional claim to a place on the general election ballot merely because some minor party candidates received a modicum of support in the primary. (See *Burdick*, *supra*, 504 U.S. at p. 436 [finding that, given the easy access for filing of nomination petitions, "any burden imposed by Hawaii's write-in vote prohibition is a very limited one."].)

3. Lower Voter Participation at Primary Election Is Not Relevant to Appellants' Ballot Access Claim

Appellants argue that the top two format imposes special burdens because voter turnout at primary elections is traditionally lower than the turnout at general elections. This same argument, however, was made by the minor political party in *Munro* and the Supreme Court there found "no more force to this argument than . . . with an argument by a losing candidate that his supporters' constitutional rights were infringed by their failure to participate in the election." (*Munro*, *supra*, 479 U.S. at p. 198.)

The primary election is "not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers." (*Storer v. Brown*, *supra*, 415 U.S. at 735, fn. omitted.) "It

functions to winnow out and finally reject all but the chosen candidates." (*Ibid.*) Appellants, of course, do not dispute that minor party candidates have full and equal access to the primary ballot. As the trial court below recognized, "[Appellants] do not allege that, on its face or as applied, Prop. 14 imposes any restriction or burden on the opportunity of any candidate or voter to participate in a *primary* election." (AA 423, italics in original.)

As the trial court below correctly pointed out, the Supreme Court has held that "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." (AA 425-426, quoting *Munro*, *supra*, 479 U.S. at p. 198.) "[D]espite the traditionally lower interest in primary elections than general elections, the burden is appropriately placed on the candidate to generate support and rally voters to vote in order to make it to the general election ballot. It is not the state's obligation to find or create an easier forum for establishing voter support." (*Libertarian Party of North Dakota v. Jaeger* (8th Cir. 2011) 659 F.3d 687, 700, cert. den., 132 S. Ct. 1932 (2012).) In this case, as in *Munro*, California "has created no impediment to voting at the primary elections; every supporter of the Party in the State is free to cast his or her ballot for the Party's candidates." (*Munro*, *supra*, 479 U.S. at p. 198.)

No candidate or party can be guaranteed access to higher voter turnout elections, and there is no legal or historical expectation that they should. General elections held in non-presidential election years historically have had lower voter turnout than presidential general elections. (AA 343-344.) An even lower percentage of voters have turned out for special elections to fill vacancies in legislative and congressional seats. (AA 346-349.) Voter turnout has also slipped in recent high profile local races held in odd years. (See, e.g., AA 351 [Los Angeles mayor elected in runoff general election

on May 21, 2013 with 19% voter turnout].) But low voter turnout in these types of elections does not pose a constitutional problem for the obvious reason that all candidates are competing under the same conditions and for the same pool of voters. The same is true under Proposition 14—all candidates compete in the same primary, with the same pool of voters, to advance to the general election.

The Ninth Circuit has explicitly affirmed the dismissal of a ballot access claim in which the Libertarian Party argued—just as Appellants do here—that the top two primary made it difficult for a minor party candidate to qualify for the general election ballot. (*Washington II*, *supra*, 676 F.3d at p. 795.) In doing so, the Ninth Circuit distinguished the Supreme Court's decision in *Anderson v. Celebrezze*. In addition to noting that Washington's primary was in August, as opposed to the March independent candidate petition deadline at issue in *Anderson*, the Ninth Circuit observed that "unlike the system challenged in *Anderson*, in which independent candidates were required to file petitions before the major parties selected their nominees, the Libertarian Party *participates in a primary at the same time, and on the same terms, as major party candidates*," and furthermore, that the top two primary system "gives minor-party candidates the *same opportunity* as a major-party candidate to advance to the general election." (*Washington II*, *supra*, 676 F.3d at p. 794, emphasis added.) The same, of course, is true under the California top two system. While the California primary is held in June and the Washington primary in *Washington II* was held in August, all political parties and candidates have the same political opportunity to advance to the general election.

The Ninth Circuit in *Washington II* also found that because the system "gives major- and minor-party candidates equal access to the primary and general election ballots, it does not give the 'established parties a decided advantage over any new parties struggling for existence,'" a traditional

concern in ballot access cases involving minor parties. (*Washington II*, *supra*, 676 F.3d at p. 795, quoting *Williams v. Rhodes*, *supra*, 393 U.S. at p. 31.) The Ninth Circuit's reasoning is squarely on point and requires dismissal of Appellants' ballot access claim.[8]

D. California's Interests Sufficiently Justify Any Burden Imposed By Proposition 14

1. California's Interest in Increasing Voter Choice and Voter Participation Justifies Any Burden Imposed by Proposition 14

As shown above, Proposition 14 does not impose a severe burden on Appellants' ballot access rights under the First and Fourteenth Amendment. Because there is no "severe burden" to Appellants, California's important regulatory interests are "generally sufficient" to justify the restrictions. (See *Burdick*, *supra*, 504 U.S. at pp. 434, 441.) Appellants thus bear a "heavy constitutional burden" in challenging the validity of Proposition 14. (*Rubin v. City of Santa Monica*, *supra*, 308 F.3d at p. 1017.)

Proposition 14 has been justified on at least three grounds: (1) 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, (2) providing voters increased options in the primary by allowing all voters to choose any candidate, and (3) reducing government gridlock by electing the best candidates, regardless of

[8] Appellants' attempt to distinguish *Washington II* on the basis that the Washington system permitted write-in votes at the general election also fails. (Compare Elec. Code § 8605 [prohibiting write-in votes in general elections].) The Supreme Court has held that states may prohibit write-in voting in general elections. (*Burdick*, *supra*, 504 U.S. at pp. 441-442.)

political party. (AA 229, 233-234 [Official Voter Information Guide][9].) For example, in the Official Voter Information Guide, the measure's title and summary states that Proposition 14 would "encourage[] increased participation in elections for congressional, legislative, and statewide offices by changing the procedure by which candidates are selected in primary elections." (AA 229.) The title and summary further states that the measure would "give[] voters increased options in the primary by allowing all voters to choose any candidate regardless of the candidate's or voter's political party preference." (*Ibid*.)

In their arguments in favor of the measure, the proponents of Proposition 14 echoed these points, asserting that Proposition 14 "will open up primary elections" and allow Californians "to vote for any candidate [they] wish for state and congressional offices, regardless of political party preference." (AA 233.) The proponents argued that this would "reduce gridlock by electing the best candidates." (*Ibid*.) Proposition 14 was also seen as "giv[ing] independent voters an equal voice in primary elections," whereas under the partisan system, independent voters cannot participate in the primary process. (AA 229 & 233.)

As a further benefit, the proponents claimed that Proposition 14 would "help elect more practical office-holders who are more open to compromise." (*Ibid*.) The proponents expressed the concern that "partisanship is running our state into the ground" and argued that Proposition 14 would "push our elected officials to begin working together for the common good." (*Ibid*., emphasis omitted.)

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[9] For a voter-approved enactment, a court may refer to the analysis and arguments contained in the official ballot pamphlet as indicia of the voters' intent. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.)

These interests are sufficient for Proposition 14 to pass muster as a "reasonable, nondiscriminatory" election regulation justified by the State's important regulatory interests. As the Supreme Court opined, under a nonpartisan blanket primary, state interests such as increasing voter choice and voter participation may be implemented without severely burdening a political party's right of association. (*California Democratic Party v. Jones*, *supra*, 530 U.S. at p. 586.) In any event, the measure has been narrowly drawn to achieve the interests promoted by a top two primary.

While Appellants argue that they have made an as-applied claim for violation of the First and Fourteenth Amendments, notwithstanding these justifications for the top two system, they have not done so. The facts alleged in Appellants' ballot access cause of action merely recite the inherent consequences of a top two system, or do not concern the constitutionality of Proposition 14. (See, *ante*, at p. 15; AA 309-316.)

Appellants' assertion that an evidentiary hearing is required to determine the merits of California's interests and effects of Proposition 14 must also fail. California is not required to make a "particularized showing of the existence" of the basis for the state interest prior to imposition of reasonable restrictions on ballot access or a showing as to the effects of Proposition 14. (*Munro*, *supra*, 479 U.S. at p. 195 [noting that in *Storer v. Brown*, *supra*, "[t]here is no indication that we held California to the burden of demonstrating empirically the objective effects on political stability that were produced by the 1-year disaffiliation requirement"].) To do so as a "predicate to the imposition of reasonable ballot access restriction would invariable lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate." (*Munro*, *supra*, 479 U.S. at p. 195.) Appellants have not alleged an as-applied claim for violation of their ballot access rights.

2. The Trial Court Properly Considered California's Interests

Appellants argue that the trial court erred by not evaluating any state interests that would justify the burden imposed by Proposition 14. But the record shows that the court gave full consideration to the state interests advanced by the Secretary of State. After oral arguments on the demurrer to the second amended complaint, the trial court specifically requested supplemental briefing "on the question of whether case law supports a state interest in plurality and the inclusion of a greater number of candidates on the general election ballot." (AA 404.) The parties filed supplemental briefs and the trial court order expressly states that the court had considered the parties' supplemental briefing on the matter. (AA 399-408, 421 ["On June 18, 2013, the parties separately filed further papers as requested by the court, which the court has considered"].)

In any event, in reviewing an order sustaining a demurrer, the appellate court reviews only the validity of the order, not the reasoning. The "fundamental precept" of appellate practice is that an appellate court reviews the trial court's ruling, not its rationale. (*Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1149.) "[I]t is the validity of the lower court's action in sustaining the demurrer which is reviewable and not the court's statement of reasons for its action." (*Patton v. Board of Harbor Commissioners* (1970) 13 Cal.App.3d 536, 544, fn. 7.) Here, the record shows that the Secretary of State has identified sufficient justifications for the minimal burden, if any, that Proposition 14 imposes on minor political parties and their supporters.

E. No Discovery Is Warranted Because the Complaint Does Not State a Plausible Ballot Access Claim and Is Defective As a Matter of Law

Appellants' second amended complaint fails to allege an as-applied ballot access claim and must be dismissed as a matter of law. No discovery is warranted or needed. Appellants erroneously rely on two cases in which the courts opined that the severity of a law's burden on a party's associational rights is a fact issue. Those cases, however, did not address whether the plaintiffs had sufficiently pled their causes of action but rather involved the adjudication of summary judgment motions, which are properly granted only when there are no genuine issues of material fact. (See *Democratic Party of Hawaii v. Nago* (D. Hawaii Nov. 14, 2013) 2013 WL 6038018, at *1, 4; *Arizona Libertarian Party, Inc. v. Bayless* (9th Cir. 2003) 351 F.3d 1277, 1283.) In contrast, here, as the trial court properly found, Appellants failed to sufficiently allege a plausible ballot access claim as a matter of law.

Furthermore, discovery will not permit Appellants to establish their ballot access claim any more than they have already alleged in the second amended complaint. Statistics regarding Proposition 14's impact, beyond what has already been alleged, will not be probative to Appellants' claim. (See *Munro*, *supra*, 479 U.S. at p. 197 ["Comparing the actual experience before and after (the statute's enactment) tells us nothing about how minor parties would have fared in those earlier years had (the State) conditioned ballot access to the maximum extent permitted by the constitution."].)

II. PROPOSITION 14 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BECAUSE IT TREATS ALL CANDIDATES AND PARTIES ALIKE AND APPELLANTS FAIL TO ALLEGE DISCRIMINATION OF ANY TYPE AS A MATTER OF LAW

Under the Fourteenth Amendment of the United States Constitution, "[n]o State shall . . . deny to any person within its jurisdiction the equal

protection of the laws." (U.S. Const., amend. XIV, § 1.) The equal protection clause prohibits "discriminatory classifications" of persons or groups. (*Kim v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 1357, 1361.) The clause also applies to laws that in operation have a disproportionate impact on certain groups. (*Ibid.*) "But neither explicit discrimination nor discrimination by 'disparate impact' is unconstitutional unless motivated at least in part by purpose or intent to harm a protected group." (*Ibid*.)

As a neutral measure, Proposition 14 does not violate the Equal Protection Clause on its face for the same reasons discussed above with respect to the ballot access claim. Furthermore, since major parties and minor parties are treated identically under the terms of Proposition 14, Appellants' as-applied claim must fail as well, as a matter of law.

Appellants nonetheless assert that prior to Proposition 14, minor parties were guaranteed access to the general election, whereas after Proposition 14, minor parties lost that guarantee. The right of minor parties, however, to participate in general elections through nomination of preferred candidates bearing the party label was a function of the now-defunct partisan primary system. When California switched to the top two system, both minor and major parties lost the guarantee that their chosen candidates would reach the general election. This allegation supports neither a facial nor an as-applied equal protection violation when minor parties and candidates preferring minor parties are compared to major parties, other voters, or other candidates.

This is not a case where major parties are allowed to nominate and place their preferred candidates on the general election ballot while minor parties must qualify by placing in the top two in the primary election. As a matter of law, and in actual practice, all candidates, regardless of party

preference, compete equally in the primary election for the right to compete in the general election.

Appellants assert that through further development of factual record, a reasonable fact finder could "draw the inference" that Appellants were subject to "invidious discrimination." Appellants, however, allege no facts to support an inference that California voters were motivated by animus against minor political parties when they approved Proposition 14. As a matter of law, Appellants' conclusory allegation is insufficient to allege a claim for violation of the Equal Protection Clause. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318 [demurrer is treated as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law].) The trial court below properly sustained the demurrer to Appellants' equal protection claim.

For reasons briefed earlier, Proposition 14 is easily explainable for reasons other than an invidious discriminatory purpose. The voter pamphlet and the measure itself do not disclose any intent to harm the unique interests of minor parties. (See AA 229-234.) If anything, the voters' ire appears to have been directed at the major parties, not the minor parties. (*Ibid*.) For example, the proponents of Proposition 14 argued in the Official Voter Information Guide that "[t]he best part of the open primary is that it would lessen the influence of the major parties, which are now under control of the special interests." (AA 233, quoting Fresno Bee (Feb. 22, 2009).)

As a practical matter, the materials in the record are the only materials available to discern the voters' intent. In construing a voter-approved initiative, "the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language." (*Amador Valley*

Joint Union High Sch. Dist. v. State Bd. of Equalization (1990) 22 Cal.3d 208, 245-246.) These relevant materials are already in the record here.

In the absence of supporting allegations, Appellants have failed to set forth any basis to find an equal protection violation under the United States Constitution, and the trial court correctly sustained the demurrer on Appellants' equal protection claim.

CONCLUSION

For all the reasons stated above, the trial court properly sustained the Secretary's demurrers to the second amended complaint without leave to amend. Appellants' ballot access claim must fail as a matter of law because the top two primary system, which has been approved by the Supreme Court and other courts, provides all candidates with easy access to the primary election ballot and equal opportunity to reach the general election ballot. Appellants' equal protection claim also fails as a matter of law because Proposition 14 is a facially neutral measure and is applied identically to all political parties and candidates. Appellants fail to sufficiently allege any basis to find invidious intent or conduct on the part of California voters in approving the measure. This Court should thus affirm the trial court's judgment.

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Dated: June 18, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached DEFENDANT RESPONDENT BOWEN'S RESPONSIVE BRIEF uses a 13 point Times New Roman font and contains 8374 words.

Dated: June 18, 2014

KAMALA D. HARRIS
Attorney General of California

/S/ PETER H. CHANG

PETER H. CHANG
Deputy Attorney General
Attorneys for Defendant and Respondent Debra Bowen, as California Secretary of State

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Rubin, Michael et al. v. Debra Bowen**
No.: **A140387**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 18, 2014, I served the attached **BRIEF OF RESPONDENT DEBRA BOWEN** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Alameda County Superior Court
Administration Building
1221 Oak Street
Department 16
Oakland, CA 94612

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 18, 2014, at San Francisco, California.

V. Sanchez	/s/V. Sanchez
Declarant	Signature

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