No. A140387

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, as Secretary of State, *et al.*,

Defendants and Respondents,

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

Interveners and Respondents.

INTERVENER/RESPONDENTS' ANSWERING BRIEF

From Order of the Superior Court of Alameda County
The Honorable John Lawrence Appel, Presiding
Superior Court Case No. RG11605301

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, First **APPELLATE DISTRICT, DIVISION** One	Court of Appeal Case Number: A140387
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Christopher E. Skinnell (SBN 227093) NIELSEN MERKSAMER PARRINELLO GROSS & LEONI, LLP 2350 Kerner Boulevard, Suite 250 San Rafael, California 94901 TELEPHONE NO.: 415/389-6800 FAX NO. *(Optional):* 415/388-6874 E-MAIL ADDRESS *(Optional):* cskinnell@nmgovlaw.com ATTORNEY FOR *(Name):* Intervener-Resp. Cal to Defend the Open Primary, et al	Superior Court Case Number: RG11605301 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: Michael Rubin, et al. RESPONDENT/REAL PARTY IN INTEREST: Sec'y of State Debra Bowen	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Californians to Defend the Open Primary

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)		
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: June 18, 2014

Christopher E. Skinnell
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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1. This form is being submitted on behalf of the following party (*name*): Independent Voter Project

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1. This form is being submitted on behalf of the following party (*name*): Abel Maldonado

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

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Date: June 18, 2014

Christopher E. Skinnell
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1. This form is being submitted on behalf of the following party (*name*): David Takashima

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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I.

INTRODUCTION.

Plaintiffs had three separate opportunities to try to state a constitutional claim against Proposition 14, the nonpartisan Top Two Candidate Open Primary Act, adopted by the voters of California in June 2010. They did not, however, allege concrete facts sufficient to state any cause of action on which relief could be granted. Nor could they. The trial court properly sustained demurrers to all of Plaintiffs' causes of action without leave to amend, and judgment was properly granted in favor of Defendant Secretary of State Debra Bowen and Intervener-Defendants.

Though Plaintiffs essentially alleged six causes of action over the course of their three complaints, they have abandoned all but two of them in this appeal: a claim that the rights of so-called "minor" political parties (*i.e.,* parties other than Democrats and Republicans), and candidates associated with them, are unconstitutionally burdened by the fact that only the top two candidates at the primary election advance to the general election, and in most cases that will not include candidates registered with the minor parties; and a claim that Proposition 14 deprives the minor parties of equal protection by withdrawing a right that they previously had—to automatically advance to the general election ballot. Both of these claims are defective as a matter of law.

Plaintiffs' ballot access claim fails because political parties—major and minor—have no right of ballot access *at all* in a nonpartisan system like that established by Proposition 14, much less a specific right to participate in the general election. Indeed, nonpartisan elections, in which political parties have no right to have candidates on the general election (or any other) ballot, have a long

history in California. The California Constitution has expressly provided for nonpartisan elections for city, county, school and judicial elections since 1926, *see* CAL. CONST. art. II, § 6, and state statutes were to the same effect even earlier. Nonpartisan elections have been used for local, judicial and school offices for more than 100 years, and political parties play no official role in such elections, and their candidates/nominees have no right to appear on the general election or other ballot. In all material respects, Proposition 14 works just like the nonpartisan system by which thousands of local officials and all judicial officers have long been elected in California.

Moreover, Plaintiffs' claim is virtually identical to the ballot access claim rejected by the Ninth Circuit in *Wash. State Republican Party v. Wash. State Grange,* 676 F.3d 784 (9th Cir.), *cert. denied,* 568 U.S. __, 133 S. Ct. 110 (Oct. 1, 2012) ("*Washington II*"). That case held that Washington's top-two system, which is virtually identical to Proposition 14, does not severely burden the minor parties rights, that it serves important governmental interests, and that it is constitutional.

Plaintiffs attempt to state an "as-applied" claim, to distinguish *Washington II*, by alleging that:

(1) In 2012 nine minor party candidates received at least 5% of the primary vote but did not advance to the general election;

(2) Turnout in California's 2012 primary was half the general election turnout; and

(3) Holding the primary in June (rather than in August, like in Washington) accentuates the exclusion of minor parties from the general election process.

All of these arguments have been made in other cases, and all squarely foreclosed as a matter of law.

Plaintiffs' second claim—the equal protection claim—is equally defective. First, an equal protection challenge to an election law is subject to the same analysis as any other challenge to such a law, so this claim should be rejected for all the same reasons that the ballot access claim should be rejected. Second, Plaintiffs rely on case law striking down facially discriminatory statutes, but—unlike the statutes in those cases—Proposition 14 is facially-neutral, and mere disparate impact (which is what Plaintiffs have alleged) is not sufficient to establish a cause of action. And finally, the cases that Plaintiffs rely upon—most notably *Romer v. Evans*, 517 U.S. 620 (1996)—apply the most lenient standard possible: rational basis review. Proposition 14 easily survives that standard.

In short, both of Plaintiffs' claims are defective as a matter of law, and cannot be cured by further amendment. Accordingly, the demurrers were properly sustained, without leave to amend, and the trial court's judgment should be affirmed.

II.

FACTUAL & PROCEDURAL BACKGROUND.

A. Proposition 14 (The Top Two Candidate Open Primary Act).

Proposition 14 is one of a series of reforms adopted by California voters in an effort to attempt to fix their dysfunctional government, which is plagued with extreme partisanship. It was no secret that virtually the entire political establishment—including the leadership of both parties in the Legislature and most of the minor

parties—opposed Proposition 14. Nevertheless, Californians voted on June 8, 2010, to adopt Proposition 14.

Proposition 14 amended the state Constitution to abolish political party primaries and replace them with a type of open primary election known as "top two," or "voter-nominated" primary election. Under the prior system, only candidates and voters registered with a qualified political party could participate in that party's primary election; the top vote-getter in each party's primary became the party's official nominee, and each qualified party was guaranteed a place on the general election ballot for its nominee. Decline-to-State ("DTS") voters and those affiliated with non-qualified parties were prohibited from participating in the primary, where the election was often effectively decided.[1] And, candidates unaffiliated with a qualified party were excluded from the primary, and could access the general election ballot only through the more stringent "independent" nomination process (*see* Elec. Code §§ 8300-8304), or write-in candidacies.

Under Proposition 14 and its implementing legislation, Senate Bill 6 ("SB 6"),[2] the political parties no longer control the primary. Instead, any candidate may run in the primary for congressional or state elective office (now called "voter-nominated" offices), and any voter may vote at the primary election for any candidate. *See* CAL.

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[1] As of January 2010, there were more than 3.4 million DTS voters in the State, according to the Secretary of State, comprising more than 20% of total registered voters. (Intervener-Respondents' Appendix [hereafter "IRA"], p. 78.) DTS voters are voters who decline to register with any political party. DTS voters were barred from voting in a party's primary under the former system, unless the party permitted it. *See* Elec. Code § 2151. Voters affiliated with a non-qualified party (or "political body") could not participate.

[2] Senate Bill 6 (2009-2010 Reg. Sess.), *codified at* Stats. 2009, ch. 1.

CONST. art. II, § 5 (as amended by Proposition 14); Elec. Code § 8002.5(b).[3] The two candidates receiving the highest vote totals for each office at the primary then compete for the office at the ensuing general election. *See* CAL. CONST. art. II, § 5; Elec. Code §§ 8141.5 and 15452. Though the candidates may list their personal party "preference" on the ballot, the candidate is not the party's nominee, and *no party* is guaranteed a place on the general election ballot unless its preferred candidate is one of the top two vote-getters. *Id*. Except for the candidate's ability to list his or her party "preference" on the ballot, this system works much like the nonpartisan general/runoff system by which many local officials in California are elected. As the Ninth Circuit has characterized the measure, Proposition 14 "fundamentally changes the California election system by eliminating party primaries and general elections with party-nominated candidates, *and substituting a nonpartisan primary and a two-candidate runoff*." *Chamness v. Bowen*, 722 F.3d 1110, 1112 (9th Cir. 2013).

B. Proposition 14 Was Consciously Modeled On Washington State's Top-Two System, Which Was Upheld Against A Facial Challenge In *Washington State Grange v. Washington Republican Party*, 552 U.S. 442 (2008) ("*Washington I*").

In 2000, the United States struck down California's Proposition 198—the "blanket primary" law—enacted by the voters in 1996. *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

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[3] "Voter-nominated offices" include: (1) Governor; (2) Lieutenant Governor; (3) Secretary of State; (4) State Treasurer; (5) Controller; (6) State Insurance Commissioner; (7) Member of the Board of Equalization; (8) Attorney General; (9) State Senator; (10) Member of the Assembly; (11) United States Senator; (12) Member of the U.S. House of Representatives. Elec. Code § 359.5

Under that law, voters could vote for any candidate at the primary without regard to party affiliation, but unlike Proposition 14 the top vote-getter from each party advanced to the general election *as the party's nominee*. The Supreme Court held that the "blanket primary" violated the political parties' associational rights by forcing them to accept—as the party's official nominee and "standard-bearer"—candidates chosen by other parties' voters, with whom the party might not even wish to associate. At the time, Washington had an identical "blanket primary" system, which was also enjoined.[4]

In response, and based on language in *Jones* itself, the voters of Washington adopted a top-two primary system in 2004, known as I-872. Several of Washington's political parties immediately challenged I-872, claiming it violated *Jones*. In *Washington State Grange v. Washington Republican Party*, 552 U.S. 442 (2008) ("*Washington I*"), the Supreme Court rejected the plaintiffs' facial challenge to Washington's system, distinguishing *Jones* on the ground that—unlike the blanket primary—under the top-two system the primary does not actually choose party nominees and the top two vote-getters in the primary run in the general election, regardless of party.

Proposition 14 was explicitly modeled on the Washington system, taking its cue from the Court's ruling in *Washington I*. (*See* Appellants' Appendix [hereafter "AA"] 235 [text of Prop. 14 from ballot pamphlet].) Like the Washington system, under Proposition 14 the primary does not choose the parties' nominees, though candidates may share their personal party "preference" with the voters. The parties, however, remain free to endorse candidates, and

[4] *Democratic Party v. Reed*, 343 F.3d 1198 (9th Cir. 2003).

Proposition 14 even permits the parties to print a list of their endorsements in the sample ballot. *See* Elec. Code § 13302(b).

C. History Of Other Unsuccessful Litigation Against Proposition 14.

This is not the first lawsuit attacking Proposition 14. Indeed, the measure has been subject to sustained (and unsuccessful) legal attack since its adoption in 2010.

1. Prior state court challenge in this Court (*Field v. Bowen*).

In July 2010—barely a month after the measure was enacted—six plaintiffs brought a challenge to Proposition 14 and SB 6 in San Francisco Superior Court, arguing that (1) it is unconstitutional to allow candidates to state a preference only for "qualified" political parties; and (2) it is unconstitutional to prevent voters from casting write-in ballots at the general election. Based on those contentions, the plaintiffs argued that Proposition 14 and SB 6 must be enjoined in their entirety, and the pre-Proposition 14 partisan system should be reinstated. Plaintiffs unsuccessfully sought a preliminary injunction from the trial court, from this Court and from the California Supreme Court on writ petitions.[5]

On September 19, 2011, Division Three of this Court issued a unanimous, published, thirty-page opinion affirming the trial court's denial of a preliminary injunction, and rejecting plaintiffs' claims on the merits as a matter of law. *Field v. Bowen*, 199 Cal. App. 4th 346 (1st Dist. 2011). The Court expressly held that Proposition 14 was constitutional insofar as it allowed candidates to state a party

[5] *Field v. Superior Court*, Case No. A129829 (Cal. Ct. App. 1st Dist.) (writ denied Oct. 14, 2010); *Field v. Superior Court*, Case No. S188436 (Cal.) (writ denied Dec. 15, 2010).

preference only for "qualified" political parties (including several Plaintiffs herein), and insofar as it permitted write-in voting at the primary election but prohibited it at the general election. Judgment was entered in favor of defendant Bowen and interveners (who are also intervener-defendants herein) in January 2012.

2. Parallel federal court challenge (*Chamness v. Bowen*).

In February 2011, while the appeal in *Field* was pending, a new case was filed in the Central District of California, raising claims very similar to those in *Field*. *Chamness v. Bowen*, Case No. 11-cv-01479-ODW-FFM (C.D. Cal. filed Feb. 17, 2011). Following unsuccessful attempts, in both the district court and Ninth Circuit,[6] to get a preliminary injunction against the use of Proposition 14 at the 2012 election, the federal plaintiffs moved for summary judgment. On August 23, 2011, the district court denied plaintiffs' motion and *sua sponte* granted summary judgment on behalf of defendant Bowen and interveners (who are also intervener-defendants herein). *Chamness v. Bowen*, 2011 U.S. Dist. LEXIS 94876 (C.D. Cal. Aug. 23, 2011). The Ninth Circuit affirmed that ruling in *Chamness v. Bowen*, 722 F.3d 1110 (9th Cir. 2013).

3. Unsuccessful challenge under the federal Voting Rights Act (*Brown v. Bowen*).

Proposition 14 was also challenged under the federal Voting Rights Act in a suit filed in the United States District Court in Los Angeles in 2012. That case also unsuccessfully sought a preliminary injunction against the measure, after which the district court dismissed the first amended complaint without leave to amend.

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[6] *See Chamness v. Bowen*, Case No. 11-55534 (9th Cir. filed Mar. 30, 2011).

That case was not appealed. *Brown v. Bowen*, Case No. 12-cv-05547-PA-SPx (C.D. Cal.) (judgment entered October 9, 2012).

D. Procedural History of This Case.

1. A demurrer to the original complaint is sustained, and Plaintiffs' motion for preliminary injunction is denied, based largely on the Supreme Court's ruling in *Washington I* and the Ninth Circuit's decision in *Washington State Republican Party v. Washington State Grange*, 676 F.3d 784 (9th Cir. 2012) ("*Washington II*"), which rejected claims virtually identical to Plaintiffs'.

This suit was filed in late-November 2011 (AA 445). The original complaint alleged four causes of action:

(1) A claim that Proposition 14 will make it more difficult for the so-called "minor" parties to have their preferred candidates advance to the general election, and that Proposition 14 thereby unduly burdened the rights of such parties and their supporters to ballot access at the general election;

(2) A claim alleged that voters were likely to be "confused" by the fact that candidates may indicate their party "preference" on the ballot into thinking such candidates are the parties' "standard-bearer" (an as-applied claim that the Supreme Court declined to decide in rejecting the facial challenge to Washington's law in the 2008 *Washington I* decision);

(3) A claim that Proposition 14 violates the Elections Clause of the U.S. Constitution (Article I, § 4, cl. 1); and

(4) A claim that even if the foregoing challenges failed as a matter of federal law, an injunction was proper under

> the California Constitution, on the premise that the two are not always co-extensive.

(IRA 1-18.)

On January 13, 2012, Plaintiffs filed a motion to preliminarily enjoin the use of Proposition 14 at the 2012 elections (AA 445). Several days after the Plaintiffs filed their motion, the Ninth Circuit handed down its decision in *Washington State Republican Party v. Washington State Grange*, 676 F.3d 784 (9th Cir. 2012) ("*Washington II*"). That decision, issued following remand from the Supreme Court in *Washington I*, rejected several challenges to I-872 that had not been addressed by the Supreme Court.

First of all, the Ninth Circuit affirmed the district court's holding that "minor" political parties could not state a claim as a matter of law, based on difficulties that those parties might face in advancing from the primary to the general election under a top-two system (*id*. at 793-95)—a claim identical to Claim Number 1 in Plaintiffs' original complaint in this case and identical in all material respects to one of the two causes of action at issue in this appeal.

The Ninth Circuit also affirmed the district court's rejection of an as-applied claim based on alleged voter "confusion" over whether parties stating a "preference" for a party are that party's "nominee." While the Supreme Court rejected an "associational rights" claim as a facial matter in *Washington I*, it left open the possibility of an as-applied challenge based on such "confusion." The Ninth Circuit affirmed the district court's holding that the plaintiffs had failed to create a triable issue of fact with respect to the as-applied

"confusion" issue in *Washington II*.[7] The Plaintiffs in this case raised a similar "confusion" claim in their original and first amended complaints (IRA 14 & 104), but abandoned that claim in this appeal.

The Supreme Court denied a petition for certiorari in *Washington II*. *See* 568 U.S. __, 133 S. Ct. 110 (Oct. 1, 2012).

The Secretary of State filed a demurrer to the original complaint in this action, in which Intervener-Defendants joined, and the Secretary and Interveners both opposed the motion for preliminary injunction (AA 445-46). On April 24, 2012—relying largely on *Washington I* and *Washington II*—the trial court denied the motion for preliminary injunction and sustained the demurrers to all causes of action with leave to amend. (AA 446.)

2. Demurrers are sustained as to all causes of action in Plaintiffs' first amended complaint; leave to amend is denied as to two of those causes of action but granted as to the other two.

Plaintiffs filed a First Amended Complaint ("FAC") on May 10, 2012. (AA 446). The FAC, however, left the allegations of the original complaint substantially unaltered. The only substantive changes were:

- Alleging that more voters cast ballots at 2010 general election than at 2010 gubernatorial primary election, *see* Paragraphs 37-38; and
- Adding a new claim alleging a violation of equal protection, based on allegations that the parties have been deprived of "established rights" in violation of

[7] The Washington plaintiffs also brought trademark claims and claims related to election of party officers. Those claims are not echoed in this case.

Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (striking down Proposition 8). *See* Paragraphs 6-7, 21, 52-55.

(IRA 90-111.)

The Secretary and Interveners again demurred to each of Plaintiffs' causes of action. (AA 446.)

The trial court sustained amendments to the first and fourth causes of action (ballot access and equal protection, respectively) with leave to amend, in recognition of the fact that the FAC was filed prior to the 2012 primary. (IRA 113-121, 124-128.) The trial court therefore gave Plaintiffs a final opportunity to allege facts to establish an as-applied challenge, based on the actual implementation of Proposition 14, rather than the manner in which it could hypothetically be applied.

The court sustained the demurrer to Plaintiffs' "confusion" cause of action, and their Elections Clause claim, without leave to amend. (IRA 121-124.)

And finally, the court again rejected the contention that the California Constitution warranted a different result. (IRA 123.)[8]

3. Successful demurrers to Plaintiffs' second amended complaint and entry of judgment.

Plaintiffs filed the second amended complaint on February 14, 2013, setting forth a ballot access cause of action and a claim for violation of equal protection. (AA 1, 447.)

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[8] *See Edelstein v. City & County of San Francisco*, 29 Cal. 4th 164, 179 (2002) ("'[I]n analyzing constitutional challenges to election laws, [the California Supreme C]ourt has followed closely the analysis of the United States Supreme Court.'") (quoting *Canaan v. Abdelnour*, 40 Cal. 3d 703, 710 (1985)).

In an attempt to state an as-applied cause of action on their ballot access claim, and distinguish this case from *Washington II*, Plaintiffs essentially alleged three basic facts:

(1) In 2012 nine minor party candidates received at least 5%—and one as much as 18%—of the primary vote but did not advance to the general election (AA 2 [SAC ¶ 2]; *see also* AA 2-3 [SAC ¶ 3] & 8-9 [SAC ¶¶ 29-31]);

(2) Turnout in California's 2012 primary was half the general election turnout (AA 10 [SAC ¶ 33]; and

(3) Holding the primary in June (rather than in August, like in Washington) "accentuates the exclusion of minor parties" from the general election process (AA 10 [SAC ¶ 32]).

With respect to the equal protection cause of action, the key allegations of the Second Amended Complaint were that: Proposition 14 withdrew the established rights of minor parties, voters, and candidates to participate in the statewide general election (AA 2-3 [SAC ¶ 3]); that the ballot argument in favor of Proposition 14 expressed an intention to elect more "practical" candidates, and that Proposition 14's drafter likewise indicated (two years after it passed) that the purpose of the measure was to elect more "pragmatic" candidates (AA 7 [SAC ¶ 22]); that these were "code words" denoting a desire to exclude minor party political perspectives from the statewide general election (AA 7 [SAC ¶ 23]); and that dozens of minor party candidates were, in fact, excluded from the 2012 general election by Proposition 14 (AA 2-3, 7-8 [SAC ¶¶ 3, 24-27]).

The Secretary and Interveners demurred yet again. (AA 15-239.) The trial court initially issued a tentative ruling overruling the demurrer as to the ballot access cause of action, while sustaining it

as to the equal protection claim. (AA 396-98.) After extensive oral argument on June 7, 2013 (*see* AA 421), and an additional round of briefing on issues pertaining to the ballot access claim at the request of the court (AA 399-408, 421), the trial court sustained the demurrers as to both causes of action, this time without leave to amend. (AA 409-35.) Regarding the ballot access claim, the trial court held that Plaintiffs' new allegations remained insufficient to state a cause of action; that in light of ease of access to the primary, and the fact that all parties compete under the same rules, they could not complain of their inability to reach the general election; that no case supports the notion that a candidate receiving a specified numeric level of support at the primary has an automatic right to advance to the general election; that Proposition 14 does not impose a "severe burden" on the Plaintiffs' rights sufficient to trigger strict scrutiny (following the holding of *Washington II*); and that the fact California conducts its primary in June does not raise a constitutionally-cognizable issue. (AA 423-31.)

Regarding the equal protection cause of action, the trial court held that Plaintiffs' allegations regarding the purportedly invidious intent of the measure's sponsors were (1) irrelevant, because it is the intent of the voters—not the sponsors of a ballot measure—that is relevant, and (2) judicially-noticeable ballot pamphlet materials demonstrated that legitimate purposes underlay the voters' adoption of the measure. The court also held that since Proposition 14 is facially neutral, allegations that the measure may affect different parties differently did not state a cause of action. (AA 431-34.)

Judgment was entered in favor Defendant Bowen and Intervener-Defendants on October 4, 2013. (AA 436.) This appeal followed.

III.

STANDARD OF REVIEW.

A. Federal Pleadings Standards Apply To Plaintiffs' Claims, Which Are Brought Under 42 U.S.C. § 1983.

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

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

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

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

In reviewing a judgment of dismissal following the grant of a demurrer without leave to amend, this Court's review is de novo. *Maxton v. Western States Metals*, 203 Cal. App. 4th 81, 87 (2012); *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011).**.** Thus, a reviewing court is not limited to considering the reasons given by the trial court; it will affirm the dismissal if any of the grounds stated in the demurrer are well-taken. *E. L. White, Inc. v. Huntington Beach*, 21 Cal. 3d 497, 504 & n.2 (1978); *Davis v. HSBC Bank*, 691 F.3d 1152, 1159 (9th Cir. 2012).

B. Substantive Standard Governing Election Law Challenges.

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

scrutiny." *Chamness*, 722 F.3d at 1116 (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011)).

IV.

THE FIRST CAUSE OF ACTION, ALLEGING VIOLATION OF THE PLAINTIFFS' PURPORTED RIGHT TO APPEAR ON THE GENERAL ELECTION BALLOT, FAILS TO STATE A CLAIM AS A MATTER OF LAW.

A. The U.S. Supreme Court Has Already Expressed Its Approval Of Top Two Systems.

As discussed above, in *California Democratic Party v. Jones*, the Supreme Court invalidated California's blanket primary in part because it was not narrowly tailored to the State's asserted interests. But the Court further noted that the State could meet those interests by adopting a system in which:

> [T]he State determines what qualifications it requires for a candidate to have a place on the primary ballot—which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election.

530 U.S. at 585. This is, essentially, the top two system subsequently adopted by Washington and California. *Washington I*, 552 U.S. at 452 (noting I-872's only difference is that candidates may disclose their personal "party preference" on the ballot) & 453-54 & n.7 (holding this is a distinction of no constitutional significance).[9]

[9] "The party preference designated by the candidate is shown for the information of the voters only..." Elec. Code § 8002.5(c). In this respect, it is like the provisions of the Elections Code permitting

In upholding Washington's top-two system in *Washington II*, the Ninth Circuit pointed directly to the foregoing discussion in *Jones*, holding that the Supreme Court in *Washington I* had already "expressly approved of top two primary systems." 676 F.3d at 795. *See also Washington I*, 552 U.S. at 452 ("Petitioners are correct that we assumed that the nonpartisan primary we described in *Jones* would be constitutional.").

Though the trial court below concluded that the discussion in *Jones* was dicta, it nevertheless determined that "[n]onetheless, such statements provide some indication that the Supreme Court would not consider such a hypothesized system to impose a severe burden on voting and associational rights." (AA 427.) The trial court also cited *California Amplifier, Inc. v. RLI Ins. Co.*, 94 Cal. App. 4th 102 (2001), which holds that "legal pronouncements by the Supreme Court are highly probative and, generally speaking, should be followed even if dictum." *Id*. at 114.

And, indeed, the Supreme Court denied a petition for certiorari in the *Washington II* case, which dismissed a ballot access claim just like Plaintiffs' as a matter of law.

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candidates to identify their occupation on the ballot. *See* Elec. Code § 13107. But the fact that a candidate may identify himself as a "lawyer" on the ballot does not mean that the legal profession has access to the ballot, or that candidates engaged in all other professions must therefore be given access to the general election ballot if they obtain 5% of the vote at the primary.

B. Political Parties, Whether Major or Minor, Have No Constitutional "Right" To Appear On The General Election Ballot In A *Nonpartisan* System Like Proposition 14's.

It is beyond debate that Proposition 14 established a *nonpartisan* electoral system for voter-nominated offices.[10] The essence of Plaintiffs' ballot access claim is that political parties nevertheless have a constitutional "right" under the First and Fourteenth Amendments to have their candidates on the general election ballot, even in a nonpartisan electoral system like California's top-two, so long as those candidates obtain a "modicum of support" at the primary (which Plaintiffs define as at least 5% of the primary vote).[11] (AA 2 [SAC] ¶¶ 1-2.)

For Plaintiffs to prevail on their ballot access claim, they must establish that the State has an affirmative obligation to create a role for political parties in the electoral process. In other words, they must establish that nonpartisan elections—which have been used throughout the country for more than a century—are *per se* unconstitutional. This is a radical proposition, and one that is simply incorrect as a matter of law. Certainly, no case so holds. Moreover, in *Washington II*, the Ninth Circuit squarely rejected a claim

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[10] A nonpartisan system is one for which no political party may nominate a candidate. *Unger v. Superior Court*, 37 Cal. 3d 612, 617 (1984); *Jones*, 530 U.S. at 585 (referring to top two as a "nonpartisan primary"); *Washington I*, 552 U.S. at 452. Proposition 14 is such a system. CAL. CONST. art. II, § 5(b); *Chamness*, 722 F.3d at 1112 ("California's Proposition 14 (Prop. 14), fundamentally changes the California election system by eliminating party primaries and general elections with party-nominated candidates, *and substituting a nonpartisan primary and a two-candidate runoff*.") (emphasis added).

[11] Plaintiffs allege that in 2012 nine minor party candidates received at least 5% of the primary vote but did not advance to the general election. (AA 2 & 8 [SAC], ¶¶ 2, 27.)

identical to Plaintiffs', and many other cases have likewise rejected the notion that political parties have an absolute right to access the ballot in a nonpartisan system.

1. Many courts—including the Ninth Circuit in *Washington II*—have rejected claims that political parties have a right to access to the general election ballot in nonpartisan systems.

In *Washington II*, the Ninth Circuit held that political parties have no right to be on the general election ballot in a top two system.

Following remand by the Supreme Court in *Washington I*, the Libertarian Party contended that Washington's top-two system was unconstitutional because "any candidate showing at least a 'modicum of support' may not constitutionally be excluded from the general election ballot." (AA 86.) That claim is *identical* to Plaintiffs' ballot access claim in this case. (*See* AA 2 [SAC] ¶ 3.) Notably, the United States district court in *Washington II* rejected this claim *as a matter of law*, noting that a top-two system would, "*by definition* exclude many parties from the general election ballot[,]" but that the Supreme Court had nevertheless endorsed top-two systems in *Washington I*. The district court further held that any ballot access concerns were negated by the fact that Washington (like California) "'virtually guarantees' minor parties access to a statewide primary ballot." (AA 87.) And finally, the district court held:

> Indeed, in [Washington's top-two system], the general election becomes, for all intents and purposes, a runoff election between the top-two vote getters of the primary. Putting aside the issue of "party preference" and forced association, ***there can be no doubt that the "top-two" aspect of I-872 would be permissible if the "primary" were renamed a "general election," and the "general election"***

> ***were renamed a "runoff." Yet the constitutionality of the election statute cannot turn on the identifiers used for its various provisions.***

(AA 88 [emphasis added].)

In *Washington II*, the Ninth Circuit affirmed the district court's dismissal as a matter of law. 676 F.3d at 793-95. Like the district court, the Ninth Circuit "recognize[d] the possibility that [a top-two 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. This additional burden, however, is an inherent feature of any top two primary system, and the Supreme Court has expressly approved of top two primary systems." *Id*. at 795. Again, the Supreme Court denied a petition for certiorari. 568 U.S. __, 133 S. Ct. 110 (Oct. 1, 2012).

Nor is *Washington II* exceptional. Nonpartisan elections have been used throughout the country for decades—including in California for local and judicial office, for over 100 years[12]—and many courts have held that political parties have no constitutional right to access the ballot in such a system. *See, e.g., Carpenter v. Cobb*, 387 S.E.2d 858, 861 n.6 (W. Va. 1989) ("The right to have nonpartisan elections to certain offices does not appear to violate equal protection principles" (citing cases)); *Dade County v. Young Democratic Club*, 104 So. 2d 636, 639-40 (Fla. 1958) ("The non-partisan election of officers is a question of policy involving no constitutional determination. The electors of Dade County determined that county commissioners should be elected on a non-partisan ballot. We think their determination was final and that the

[12] *Unger*, 37 Cal. 3d at 617.

courts have no right to interfere with it."); *Whitney v. Skinner*, 241 S.W. 350 (Ky. 1922) (nonpartisan general/runoff system constitutional); *Sarlls v. State,* 166 N.E. 270, 277 (Ind. 1929) (people have the right to form parties, but parties have no constitutional right to designate nominees on the ballot).

Indeed, the California Supreme Court, in a ballot access case cited by the trial court below (AA 427 n.1), specifically distinguished between partisan and nonpartisan systems, and held that "in a non-partisan election the party system is not an integral part of the elective machinery and the individual's right of suffrage is in no way impaired by the fact that he cannot exercise his right through a party organization." *Communist Party of United States v. Peek*, 20 Cal. 2d 536, 543-44 (1942) (emphasis added).

2. Plaintiffs cite *no case* holding that political parties have a constitutional right to access the general election ballot in nonpartisan systems, and make no effort to distinguish the cases upholding nonpartisan systems.

Plaintiffs do not dispute the nonpartisan nature of Proposition 14, nor do they cite any case holding that political parties have a constitutional right to access nonpartisan ballots. This is because no such case exists.[13]

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

Instead, Plaintiffs' rely—as they did in the trial court—on *Williams v. Rhodes*, 393 U.S. 23 (1968), and its progeny (including *Jenness v. Fortson*, 403 U.S. 431 (1971), *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979)), for the proposition that political parties have an absolute right to access the general election ballot if they receive a "modicum of support" at the primary.

But—as the trial court correctly noted (*see* AA 428-29)—given the nonpartisan nature of Proposition 14, those cases are wholly inapposite. Each of those cases was decided in the context of a *partisan* electoral system, and each addressed laws restricting access to the ballot when other parties or candidates already had such access. Those cases do not hold that political parties have an absolute right to ballot access in a *nonpartisan* system. *See Republican Party v. Faulkner County*, 49 F.3d 1289, 1293-94 (8th Cir. 1995) ("The ballot access cases establish that parties with demonstrable and significant public support have a right to ballot access, at least outside the category of nonpartisan elections.").

Plaintiffs' cases stand for the unremarkable proposition that if candidates nominated by the major political parties are given access to the ballot, other parties' candidates who receive a "modicum of support" cannot be unreasonably burdened or excluded. In other words, they stand for a principle of non-discrimination. Under Proposition 14 all parties are treated the same: *no* party has a right to access the general election ballot for voter-nominated office—only candidates do, and that right is entirely independent of their party "preference." Consequently, political parties and their adherents have no "right" of ballot access to be impaired.

C. Under *Washington II* And *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), The Burden On The Minor Parties' Associational Rights Of Being Kept Off The General Election Ballot Is "Slight," Where They Have Broad Access To The Primary Election And The Same Opportunity As All Other Candidates To Advance To The General Election.

As noted above, under the Supreme Court's decision in *Burdick v. Takushi*, a voting regulation is only subject to strict scrutiny if it imposes a "severe" burden on voting rights, and—as the Ninth Circuit has repeatedly noted—"'voting regulations are rarely subject to strict scrutiny.'" *Chamness*, 722 F.3d at 1112 (citing *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008)).[14]

Applying the *Burdick* standard, the Ninth Circuit in *Washington II* held that the top two system does not impose a "severe" burden on the minor parties' rights, because (1) every party in Washington—major and minor—has "broad access to the I-872 primary" and (2) all candidates compete at that primary on equal terms and I-872 thereby "gives minor party candidates the same opportunity as major-party candidates to advance to the general election." *Washington II*, 676 F.3d at 485-86. The trial court's ruling below rests on essentially the same reasoning as the Ninth Circuit's. (AA 423-31.)

As for "broad access" to the primary, the requirements for a candidate to participate in the California primary are basically the same as in Washington.[15] And regarding the point that all qualified

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[14] In *Burdick*, the Supreme Court held that Hawaii's ban on write-in voting imposed a "slight" burden on voting and associational rights, was therefore not subject to strict scrutiny, and that it accordingly passed constitutional muster.

[15] *Compare Washington II*, 676 F.3d at 794 (summarizing Washington's requirements) *with* Elec. Code §§ 8002.5, 8020,

parties participate in the primary election on equal terms, and have an equal opportunity to advance to the general election, the same is true of Proposition 14. The top two candidates at the primary proceed to the general *without regard to their party preference*. CAL. CONST. art. II, § 5(a).

In support of these points, the Ninth Circuit and the trial court below relied directly on the Supreme Court's holding from *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). In *Munro*, minor party candidates challenged a provision of Washington State's prior (*i.e.*, pre-top two) blanket primary law that prohibited a candidate who received less than 1% of the total votes cast at the primary from advancing to the general election, even if he or she was the top vote-getter in their party at the primary. The Supreme Court rejected the challenge, holding—in language highly pertinent to this case—that if minor parties are given equal access to compete in a statewide primary, "[i]t can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election." *Washington II*, 646 F.3d at 794 (quoting *Munro*, 479 U.S. at 199). Most importantly, *Munro* held that "because Washington afford[ed] a minor-party candidate easy access to the primary election ballot and the opportunity for the candidate to wage a ballot-connected campaign," the burden on minor parties of being

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8040-8041, 8103, 8106. There are two slight differences. First, California candidates must file a nomination petition signed by a specified number of registered voters, but that requirement is minimal: between 65 and 100 voters in the case of a statewide office, with even fewer required for other offices. *See* Elec. Code § 8062. Also, the filing fee for a *statewide* office (*i.e.*, Governor, etc.) is 2% of the annual salary. Elec. Code § 8103(a)(1). For all other offices it is 1%, like Washington.

kept off the *general* election ballot was "slight." 479 U.S. at 199. Under *Burdick*, a "slight" burden is sustained by any reasonable regulatory interest. *Burdick*, 504 U.S. at 439.

Consistent with *Munro* is *Edelstein v. City & County of San Francisco,* cited *supra* at note 8, in which several voters challenged San Francisco's ban on write-in voting at the general/runoff election for citywide office, but not the primary election. The Supreme Court rejected the challenge, holding, "We conclude that San Francisco's prohibition against write-in voting in the mayoral runoff election was not a *severe* restriction on voting rights, but rather that it imposed only a *limited burden* on voters' rights to make free choices and to associate politically through the vote. [Citation.] After all, voters were not denied an opportunity to cast a write-in ballot for the candidate of their choice. They were only denied the opportunity to cast a write-in ballot *twice*." 29 Cal. 4th at 182. Likewise, under Proposition 14 voters were not denied the opportunity to vote for minor party candidates in 2012; they were only denied the opportunity to do so twice.

D. Plaintiffs' Attempts To Plead Around *Munro* And *Washington II* Failed As A Matter Of Law.

Attempting to avoid the holdings of *Munro* and *Washington II*, Plaintiffs alleged (1) that several minor party candidates—including Plaintiff Hooper—obtained at least 5% of the primary election vote in 2012 (and another candidate, who is not a party to this lawsuit, received 18.6% of the primary vote), but still did not advance to the general election; (2) turnout was substantially lower at the 2012 primary than at the 2012 general election; and (3) holding the primary in June, instead of later, "further diminished"

the minor parties' ability to influence the political debate. None of these allegations could save Plaintiffs' claim from demurrer.

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

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

Indeed, based on past election results the Libertarian Party argued in *Washington II* that under Washington's system a candidate was required to receive an average of 30% of the primary

vote to place second and advance to the general election.[16] Yet the district court still dismissed the Party's ballot access claims, as a matter of law, and the Ninth Circuit affirmed.

Plaintiffs suggest that because several of their preferred candidates who received more than 5% of the primary vote did not qualify for the general election ballot, that they are severely burdened. But it major party candidates who receive more than 5% of the primary vote will also be excluded from the general election, if they are not among the top two vote-getters at the primary.[17]

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

Plaintiffs allege that their rights are burdened by the fact they might not make it to the general election because more voters turned out at the 2012 general election (13,202,158) than at the 2012

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[16] *See* AA 120-24 (Libertarian Party's motion for summary judgment), pp. 15-19; AA 148 (Libertarian Party's 9th Cir. Reply Brief), p. 14.

[17] In 2012, this was true for many more major party candidates than minor party candidates. For example, in Assembly District 1, Democrat Robert Meacher got 25.8% of the vote and did not advance; Republican Bob Williams got 25.1% of the primary vote in Assembly District 3; Democrats Tim Fitzgerald and Marc Boyd got 17.7% and 13.3% of the primary vote, respectively, in Assembly District 5; Democrat Regy Bronner got 31.1% of the primary vote in Assembly District 6; Republican Barbara Ortega got 20% in Assembly District 8; three candidates got more than 10% of the primary vote (15.5%, 12.7% and 10.5%) in Assembly District 9; three "major" party candidates got 21.4%, 10.7% and 6.2% in Assembly District 10, without advancing; and on and on. *See* Cal. Sec'y of State, *Statement of the Vote: June 2012 Presidential Primary Election*, *online at* http://www.sos.ca.gov/elections/sov/2012-primary/pdf/2012-complete-sov.pdf (last visited May 20, 2014). If Plaintiffs' theory is correct (which it is not), all of these candidates were entitled to be on the general election ballot.

primary election (5,328,296). (AA 2, 10-12 [SAC ¶¶ 2, 33, 40].) A virtually identical claim was rejected by the Supreme Court in *Munro*. The minor parties argued that their rights were burdened by the fact that turnout was higher at the general election than at the primary, and that the 1% requirement kept them from reaching the broader pool of voters. The Court squarely rejected this argument:

> Appellees argue that voter turnout at primary elections is generally lower than the turnout at general elections, and therefore enactment of § 29.18.110 has reduced the pool of potential supporters from which Party candidates can secure 1% of the vote. We perceive no more force to this argument than we would with an argument by a losing candidate that his supporters' constitutional rights were infringed by their failure to participate in the election. Washington 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. As was the case in *Jenness* v. *Fortson*, 403 U.S. 431 (1971), "candidates and members of small or newly formed political organizations are wholly free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish. . . ." *Id*., at 438. ***States are not burdened with a constitutional imperative to reduce voter apathy or to "handicap" an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot. . . .***

479 U.S. at 198 (emphasis added).

Several federal courts of appeal have followed *Munro*'s lead, holding that "despite 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 N.D. v. Jaeger*, 659 F.3d 687, 699-

700 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1932 (U.S. 2012). *See also Rainbow Coalition of Okla. v. Okla. State Elec. Bd.*, 844 F.2d 740 (10th Cir. 1988) (rejecting minor parties' challenge to qualification statutes based on votes cast at past presidential elections, where turnout at such elections was higher than at gubernatorial elections).

It is also worth noting that similar turnout patterns characterize Washington's elections. 3,071,578 voters cast ballots at the 2008 general election in Washington; only 1,455,756 voters—53% fewer—cast ballots at the 2008 primary.[18]

3. The fact that California holds its primary in June does not render Proposition 14 invalid.

In *Washington II*, the Libertarian Party argued that Washington's top-two system was unconstitutional because the State's primary was "held in mid-August, when voter interest is minimal, and the general election is held in early November."[19] They based this argument on *Anderson v. Celebrezze*, 460 U.S. 780 (1983), which struck down a March filing deadline for independent presidential candidates to appear on the November general election ballot as unduly burdensome. Noting that Washington's August primary was far closer to the general election than the March filing deadline for independent candidates struck down in *Anderson*, the Ninth Circuit affirmed the dismissal of the Libertarian Party's ballot access claims in *Washington II*—again, *as a matter of law*.

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[18] AA 160-63 (election results). These election results are judicially-noticeable, *Edelstein*, 29 Cal. 4th at 171 n.3, so the trial court could properly consider them in ruling on the demurrers.

[19] AA 152-53 (Libertarian Party's 9th Cir. Reply Brief, pp. 18-19); AA 211-12 (Libertarian Party's 9th Cir. Opening Brief, pp. 40-41).

California's primary election is in June, *see* Elec. Code § 1201, and Plaintiffs rely on this fact to try to distinguish *Washington II*. However, *Anderson* is readily distinguishable from this case.

Perhaps the most significant distinction is the fact that the filing deadline at issue in *Anderson* precluded any "opportunity for the candidate to wage a ballot-connected campaign," *Munro,* 479 U.S. at 539, whereas Proposition 14 gives candidates that opportunity at the primary election. Indeed, the *Munro* court made precisely this same distinction in upholding the 1% vote requirement challenged in that case:

> We also observe that § 29.18.110 is more accommodating of First Amendment rights and values than were the statutes we upheld in *Jenness*, *American Party*, and *Storer*. Under each scheme analyzed in those cases, if a candidate failed to satisfy the qualifying criteria, the State's voters had no opportunity to cast a ballot for that candidate, and the candidate had no ballot-connected campaign platform from which to espouse his or her views; **the unsatisfied qualifying criteria served as an absolute bar to ballot access**. Undeniably, such restrictions raise concerns of constitutional dimension, for the "exclusion of candidates . . . burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day...." *Anderson v. Celebrezze*, 460 U.S. at 787-788. **Here, however, Washington virtually guarantees what the parties challenging the Georgia, Texas, and California election laws so vigorously sought—candidate access to a statewide ballot. This is a significant difference.**

479 U.S. at 198-99 (emphasis added).[20] The Court then proceeded to make its critical observation that "It can hardly be said that

[20] Even if the June primary could be said to render the Top Two system problematic, that is no basis for invalidating Proposition

Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election." *Id*. at 199. Because the law challenged in *Anderson* precluded any ballot-connected campaign, the holding of that case is simply inapposite.

But even if it did apply, numerous courts applying *Anderson*, have upheld June filing deadlines to access the general election ballot. *See, e.g., Council of Alternative Political Parties v. Hooks*, 179 F.3d 64 (3d Cir. 1999); *Wood v. Meadows*, 207 F.3d 708 (4th Cir. 2000); *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007). *See also Jenness v. Fortson*, 403 U.S. 431, 433-34 (1971) (pre-*Anderson* case, upholding ballot access petition requirement with June deadline). In other words, June falls on the "constitutional" side of the line drawn by *Anderson*.

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

Finally, Interveners would note that there are good reasons to prefer an early June primary to one held in August, when many voters may be on vacation.

14, which does not require a June primary. The primary date, prescribed by statute, must yield to the Top Two primary, which is constitutionally grounded.

4. Proposition 14's restriction on write-in votes at the general election does not create a severe burden either.

Finally, Plaintiffs raise, for the first time in this Court, a new basis for attempting to distinguish *Washington II*: the fact that Washington allows write-in votes at the general election while California does not. This distinction no more supports Plaintiffs' claim that Proposition 14 imposes a "severe" burden on their rights than any of the other attempted distinctions raised in the trial court.

First of all, as discussed above, in *Edelstein* the California Supreme Court expressly held that a San Francisco law permitting write-in voting at the City's mayoral general election, but prohibiting it at the run-off election, imposed only a slight burden. With respect to write-in voting, that San Francisco system is indistinguishable from the scheme imposed by Proposition 14. 29 Cal. 4th at 182.

Moreover, *Burdick* itself held that a Hawaii law banning write-in voting entirely—at all elections—also imposed only a "slight" burden on associational rights, and was not subject to strict scrutiny. 504 U.S. at 428.

Relying on *Edelstein* and *Burdick*, two different courts of appeal—the Ninth Circuit *and this very Court*—have already upheld Proposition 14's restriction on write-in voting at the general election against constitutional challenge, and rejected the application of strict scrutiny to them. *See Field*, 199 Cal. App. 4th at 367-68; *Chamness*, 722 F.3d at 1115.

E. Limiting The General Election To The Top Two Vote-Getters From The Primary Serves Important Governmental Interests.

Given the lack of a "severe" burden on the parties' rights, the State need only show that Proposition 14 furthers an "important

regulatory interest." Plaintiffs claim that the trial court did not address the interests that support Proposition 14, but that is incorrect.[21]

First, Proposition 14 is consistent with past Supreme Court case law holding that the primary election system in California, is "'an integral part of the entire election process . . . [that] functions to winnow out and finally reject all but the chosen candidates[,]'" and that the State may therefore "properly reserve the general election ballot 'for major struggles[.]'" *Munro*, 479 U.S. at 196 (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)); *Edelstein*, 29 Cal. 4th at 183. On page 17 of its decision, the trial court quoted *Munro*'s statement that the State has a legitimate interest in reserving the general election ballot for "major struggles," and also *Munro*'s statement that the State has an interest in restricting access to the general election ballot to "avoid the possibility of unrestrained factionalism." (AA 429.)

Additionally, on page 15 of its decision the trial court cited the Supreme Court's discussion in *Jones* of the interests served by a top two primary: "The Supreme Court stated that under such a system, 'a State may ensure more choice, greater participation, increased

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[21] Even if true, it would also be irrelevant. In resolving this appeal, this Court is not limited to considering the governmental interests considered by the trial court. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366 n.10 (1997) (upholding election law based on interests raised for the first time at oral argument in the Supreme Court); *E. L. White, Inc.*, 21 Cal. 3d at 504 & n.2 (in reviewing a judgment of dismissal following the grant of a demurrer without leave to amend, the reviewing court is not limited to considering the reasons given by the trial court; it will affirm the dismissal if any of the grounds stated in the demurrer are well-taken).

"privacy," and a sense of "fairness"—all without severely burdening a political party's First Amendment right of association.'" (AA 427.)

As to greater choice and participation and a sense of fairness, the abandonment of the former partisan primary system, and implementation of the top two system, guarantees more than 3.4 million DTS voters a role in determining which candidates advance to the general election—a role they were not previously guaranteed. That alone should suffice as an important regulatory purpose.

And finally, as the district court in *Washington II* noted, the general election under Proposition 14 is closely analogous to a runoff election in a typical nonpartisan system. Numerous courts have held that limiting a runoff to the top two vote-getters at the primary serves the legitimate interest in ensuring that the person who is ultimately elected to office receives a majority of the vote. *See, e.g.*, *Edelstein*, 29 Cal. 4th at 183. Indeed, to ensure that such a majority is received, SB 6 bans write-in voting at the general election, just as the system upheld in *Edelstein* did. *See* Elec. Code § 8606.

F. To Be Entitled To An Evidentiary Hearing, Plaintiffs First Had To Adequately *Plead* A Constitutional Violation, But They Did Not.

1. As-applied challenges to election laws can properly be resolved on demurrer where they fail to plead an adequate cause of action.

Plaintiffs spill ample ink in an effort to have this Court believe that an as-applied challenge to an election law can never be subject to a successful demurrer, because resolving such a challenge requires a full evidentiary record. That is simply not the law. As-applied claims are routinely resolved on demurrer, under the *Burdick* standard, when the facts pled in the complaint are inadequate to state a cause of action. *See, e.g., Rubin v. City of Santa Monica*, 308

F.3d 1008 (9th Cir. 2002), *cert. denied*, 540 U.S. 875 (2003) (affirming district court's granting of a 12(b)(6) motion against plaintiff's facial and as-applied challenges to ballot regulations); *Libertarian Party of N.D.*, 659 F.3d at 687 (affirming motion to dismiss as-applied ballot access claim); *Libertarian Party of Mich. v. Johnson*, 905 F. Supp. 2d 751 (E.D. Mich. 2012) (dismissing facial and as-applied challenges to presidential ballot access statutes), *aff'd*, 714 F.3d 929 (6th Cir.), *cert. denied*, 571 U.S. __, 134 S. Ct. 825 (Dec. 16, 2013); *Protect Marriage Ill. v. Orr*, 458 F. Supp. 2d 562 (N.D. Ill.) (granting motion to dismiss facial and as-applied challenges to petitioning requirements for advisory ballot measure), *aff'd*, 463 F.3d 604 (7th Cir. 2006), *cert. denied*, 549 U.S. 1208 (2007); *Ulrich v. Mane*, 383 F. Supp. 2d 405 (E.D.N.Y. 2005) (dismissing as-applied challenge to ballot access laws); *Libertarian Party of Va. v. Va. State Bd. of Elections*, 2010 U.S. Dist. LEXIS 97177 (E.D. Va. Sept. 16, 2010), *aff'd*, 434 Fed. Appx. 174 (4th Cir. Va. 2011).

Indeed, as the Seventh Circuit held just a few weeks ago, "there is nothing remarkable about granting a motion to dismiss in an election-law case if careful consideration of the complaint shows that the plaintiff has not stated a claim." *Stone v. Bd. of Election Comm'rs for Chi.*, __ F.3d__, 2014 U.S. App. LEXIS 7825, *20-*21 (7th Cir. Apr. 25, 2014). In *Stone*, the Seventh Circuit rejected a claim just like the one Plaintiffs make here; in that case "plaintiffs' counsel stressed that, because th[at] case was dismissed at such an early stage, judgments about what might or might not be burdensome [we]re premature. He urged [the Court of Appeal] to send the case back to the district court, so his clients could build a record on the signature requirement's severity" under *Burdick*. The

Court declined, and affirmed the motion to dismiss. *Id*. at *20-*21. As in many cases, the Court of Appeals decision does not discuss whether the claim therein was facial or as-applied, but a review of the trial court decision shows that it was the latter. *See Stone v. Bd. of Elections Comm'rs for City of Chi.*, 955 F. Supp. 2d 886, 897 (N.D. Ill. 2013) ("Plaintiffs must demonstrate that the application of § 10-3 of the Election Code to nominating petitions for Chicago's municipal offices contributed to a constitutionally impermissible ballot access burden.").

Fundamentally, Plaintiffs' position confuses two distinct concepts: adequacy of *pleading*, and adequacy of *proof*. Naturally, a plaintiff who seeks to establish that a given election law "severely" burdens him, her or it, must *prove* that fact to ultimately prevail, and such proof will often require testimonial, documentary and expert evidence. That is the unremarkable holding of the cases relied upon by Plaintiffs: *Democratic Party v. Nago*, 2013 U.S. Dist. LEXIS 162258 (D. Haw. 2012), *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277 (9th Cir. 2003), and *Jones*. But that is true in any case; a plaintiff *always* has the burden of proving his or her allegations to prevail. That obligation to *prove* a severe burden, however, does not relieve the plaintiff of the preceding obligation to adequately *plead* a severe burden. Until the latter hurdle is cleared, the former does not come into play. Plaintiffs have failed to adequately plead concrete facts that—if proven—would establish a severe burden in this case. Nor, given the holdings in *Washington I* and *Washington II*, can they do so. Their objections to the top two primary system are not cognizable injuries, as a matter of law.

Neither *Democratic Party v. Nago*, *Bayless* nor *Jones* addressed the proper standard on a motion to dismiss.

In *Nago*, the Democratic Party of Hawaii alleged a *facial* challenge (and not an as-applied challenge, *see* 2013 U.S. Dist. LEXIS 162258, *15-*17) to the State's open primary law, based on the holding in *Jones*. The primary challenged in *Nago* was like the open primary struck down in *Jones*, in which voters chose parties' nominees, and in that regard was unlike the top two primary in which parties' nominees are not chosen. *See id*. at *23-*26. The district court granted summary judgment for the State based on the plaintiffs' failure to provide sufficient evidence to create a triable issue of fact on their as-applied challenge to the State's open primary law. In other words, the Democratic Party plaintiff adequately pled a case of action—in light of the holding in *Jones* it hardly could have been otherwise—but failed to prove the facts necessary to establish their claim (*e.g.*, that there was "a 'clear and present danger' that a party's nominee could be 'determined by adherents of an opposing party,'" *id.* at *25, or that the primary system would force parties' nominees to "change their message and views," *id*.).

In *Bayless*, the plaintiffs did prove a constitutional violation regarding Arizona's statutes governing the selection of committee precinctmen, as to the Libertarian Party. On appeal, the Ninth Circuit affirmed that ruling as to the Libertarians, but held that the trial court erred in holding that the rights of the Democratic and Republican Parties were severely harmed, because those entities were not parties to the suit and the record did not prove a violation as to them. Again, however, the question was the adequacy of the plaintiff's proof—not the adequacy of its pleading. 351 F.3d at 1281-82.

And finally, in *California Democratic Party v. Jones*, 984 F. Supp. 1288 (E.D. Cal. 1998), the district court held that the political

parties had failed to provide adequate *proof* to establish their cause of action; that decision again did not address the adequacy of the parties' pleading.

Simply put, Plaintiffs were required to adequately plead an as-applied constitutional claim, and only once they had done so would they have been entitled to establish an evidentiary record to prove that claim. The trial court below properly held that the Plaintiffs did not clear the pleading hurdle—that they had not alleged sufficient concrete facts to state a claim upon which relief should be granted—so the granting of the demurrer was proper.

2. Given the breadth of the relief they seek, Plaintiffs' claims are really a facial challenge, and the fact that they have labeled their challenge "as-applied" does not change that fact.

The foregoing assumes that Plaintiffs' claim was truly an as-applied challenge. In fact, that is not the case. Just because a claim is *labeled* "as applied" does not *make* it as-applied.

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

The Court of Appeal rejected the plaintiffs' characterization of their suit as an "as-applied" challenge, noting—among other things—that the plaintiffs sought to "invalidate the initiative as a whole." 160

Cal. App. 4th at 1319. Plaintiffs in this case likewise seek to invalidate Proposition 14 "as a whole" rather than in a particular, unique application of the measure. (AA 14.) *See also Doe v. Reed*, 561 U.S. 186, 194 (U.S. 2010) (to the extent plaintiffs sought relief that reached beyond their own unique circumstances, their claim was facial); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) (distinguishing facial and as-applied challenges by "the breadth of the remedy employed by the Court"); *Alaska Independence Party v. Alaska*, 545 F.3d 1173, 1179 n.3 (9th Cir. 2008) (refusing to accept plaintiffs' attempt to "refashion" their claims as "as-applied" challenges, in part due to the nature of the relief sought).

V.

THE SECOND CAUSE OF ACTION, ALLEGING A VIOLATION OF EQUAL PROTECTION, ALSO FAILS TO STATE A CLAIM AS A MATTER OF LAW.

A. Election Law Challenges Are Analyzed Under The *Burdick* Balancing Test, Regardless Of The Constitutional Provision On Which The Challenge Is Based.

Any claim raised under the Equal Protection Clause must fail for all the same reasons that a claim raised under the First Amendment, due process or the Elections Clause must fail. The courts have held that election law challenges employ the "single basic mode of analysis" regardless of the constitutional provision on which they are based. *Partnoy v. Shelley*, 277 F. Supp. 2d 1064, 1072 (S.D. Cal. 2003) (quoting *LaRouche v. Fowler*, 152 F.3d 974, 987-88 (D.C. Cir. 1998)). *See also Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011) (same); *Republican Party v. Faulkner County*, 49 F.3d at

1293 n.2 ("In election cases, equal protection challenges essentially constitute a branch of the associational rights tree."). The balancing test laid out by *Burdick v. Takushi* governs, and Plaintiffs' claims fail under that test, for the reasons discussed above.

B. Plaintiffs' Reliance On *Romer v. Evans* Is Entirely Misplaced, Because (1) That Case Struck Down A Facially Discriminatory Law, Whereas Proposition 14 Is Facially Neutral, And (2) *Romer* Applied Rational Basis Review, Which Proposition 14 Easily Survives.

In *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court invalidated a Colorado ballot measure (Amendment 2) that prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect homosexual persons. Relying on *Romer*, Plaintiffs assert that because they were previously entitled to a place on the general election ballot, the withdrawal of that "right" violates equal protection. This novel argument has no more merit than the others.

First of all, Plaintiffs' argument conflicts with *Washington I* and *Washington II*, which both upheld the Washington top two system despite the fact that it "withdrew" the previously-held right of minor parties to have candidates on the general election ballot.

Second, *Romer* invalidated a measure that was *facially* discriminatory; it drew a distinction between homosexuals and all other citizens in the text of the measure itself. *See id*. at 632 ("the amendment has the peculiar property of imposing a broad and undifferentiated disability *on a single named group*, an exceptional and, as we shall explain, invalid form of legislation.") (emphasis added). Proposition 14, by contrast, makes no such distinction in its text. All parties are subject to the exact same ballot access rules. (*See* AA 432 [Order Sustaining Demurrer to Second Amended Complaint]

["Here, in contrast to *Perry*, the challenged law does not on its face or in its application 'target' one group or another for disparate treatment."].)[22] Indeed, Plaintiffs implicitly admit that is the case, by arguing that "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." (AOB at 32.)[23]

Proposition 14's provision that "[a] political party or party central committee 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, as provided in subdivision (a)" does not depend on the size of the party. "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). If minor party-preferred candidates do not proceed to

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[22] In the trial court, Plaintiffs relied upon *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), rather than *Romer*, to support this argument. In *Perry* the Ninth Circuit recently invalidated Proposition 8. Since the judgment was entered in this case, however, the Supreme Court vacated the Perry decision on standing grounds. *See Hollingsworth v. Perry*, 570 U.S. __, 133 S. Ct. 2652 (June 26, 2013). Plaintiffs' reliance on *Romer* now does nothing to alter the trial court's conclusion, however, because *Perry* itself relied on *Romer*.

[23] *Police Dept. of the City of Chicago v. Mosely*, 408 U.S. 92 (1972)—which Plaintiffs cite for the proposition that viewpoint discrimination is unconstitutional—also invalidated a statute that was facially discriminatory. The text of the statute itself treated peaceful labor picketing differently from all other forms of picketing. *Id.* at 93-94. *Jenness v. Fortson*, 403 U.S. 431 (1971), likewise addressed a statute that distinguished between "political parties" and "political bodies," though the Court upheld the facial distinction in that case.

the general election, it is only because other candidates receive more votes. "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. . . ." *Munro*, 479 U.S. at 198.

Moreover, though *Romer* struck down Amendment 2, the standard of review it applied was the most lenient possible: rational basis review. Under that standard, a change in the law will be upheld "so long as it bears a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. As already discussed, Proposition 14 advances several important interests of the State. It therefore easily survives rational basis review.

C. The Mere Fact That A Facially-Neutral Law May Affect The So-Called "Minor" Parties Differently From The "Major" Parties Does Not Result In A Violation Of Equal Protection.

Ultimately, the claim of the Plaintiffs in this case is that Proposition 14 has a *disparate impact* on them. (*See* AOB at 31.) Though Plaintiffs alleged that this impact was the result of purposeful discrimination by Proposition 14's proponents, the trial court properly found that (1) the purpose of the measure's proponents was irrelevant, because it is the voters' intent that is relevant in considering the constitutionality of a ballot measure, and (2) judicially noticeable[24] ballot pamphlet materials—which are the best guide to voter intent[25]—"do not reflect that the proposition was aimed at depriving a particular group of established rights." (AA

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[24] Because these materials are judicially-noticeable, *see People v. Snyder*, 22 Cal. 4th 304, 309 n.5 (2000), they are properly considered in connection with Interveners' demurrer.

[25] *Board of Supervisors v. Lonergan*, 27 Cal. 3d 855, 866 (1980).

433.) *See also Chamness*, 722 F.3d at 1121 (Proposition 14 "does not dictate political outcomes or invidiously discriminate against a class of candidates").

Plaintiffs have not renewed the argument, in their opening brief to this Court, that Proposition 14 is the product of intentional, invidious discrimination against minor parties, and have therefore waived any such contention in this appeal. *See Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co.*, 156 Cal. App. 4th 1469, 1486 (2007) ("Arguments cannot properly be raised for the first time in an appellant's reply brief, and accordingly we deem them waived in this instance.").

In the absence of invidious intent, or a severe burden on voting or associational rights, "'[o]fficial action will not be held unconstitutional solely because it results in a ... disproportionate impact.... Proof of ... discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.'" (AA 432-33 [Order Sustaining Demurrers to Second Amended Complaint] [quoting *Village of Arlington Heights v. Metropolitan Housing Devel. Corp.*, 429 U.S. 252, 264-65 (1977)].) As the Supreme Court held in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), States <u>are</u> permitted "*to enact reasonable election regulations that may, in practice, favor the traditional two party system.*" *Id.* at 367. *See also Chamness*, 722 F.3d at 1117 (same); *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) ("When a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters, we review the claim using the "flexible standard" outlined in *Anderson v. Celebrezze*, 460 U.S. 780,

103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).").[26]

VI.

APPELLANTS HAVE WAIVED ANY BASIS FOR CHALLENGING THE JUDGMENT INSOFAR AS IT DISMISSED WITH PREJUDICE CLAIMS RAISED BELOW BUT NOT ADDRESSED IN APPELLANTS' OPENING BRIEF IN THIS COURT.

Over the course of their three complaints, Plaintiffs essentially alleged six causes of action:

1. The "ballot access" claim based on the "minor" parties' alleged difficulty in reaching the November ballot (all three complaints);
2. An as-applied right-of-association claim based on purported "confusion" among the voters as to whether candidates are parties' "nominees" (original and first amended complaint).
3. Claims under the Elections Clause (original and first amended complaint).
4. An equal protection claim based on the theory that Proposition 14 withdrew an "established privilege" of ballot access at the general election from the minor parties (all three complaints);

[26] A State may not purposely "insulate political parties from minor parties' or independent competition," *Timmons*, 520 U.S. at 367, but the Ninth Circuit has already held "There does not appear to be any legitimate argument that [Proposition 14] seeks to insulate any political party or parties from competition." *Chamness*, 722 F.3d at 1121.

5. A separate equal protection claim contending that Proposition 14 was adopted with the invidious purpose of preventing minor parties from accessing the November general election ballot (second amended complaint); and

6. Claims that Proposition 14 violated the California Constitution (all three complaints)

Causes of Action 1 and 4 are addressed above.

In their opening brief in this appeal, Plaintiffs fail to provide any argument that the trial court erred in sustaining demurrers to Nos. 2-3 and 5-6.

In an appeal challenging a judgment entered following the sustaining of a demurrer without leave to amend, a plaintiff's failure to offer any argument or authority in support of a dismissed cause of action in his or her opening brief waives any challenge to the trial court's dismissal of that cause of action. *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 780, 799 (2013), *rev. denied*, 2013 Cal. LEXIS 5801 (Cal., July 10, 2013).

Plaintiffs have therefore waived any challenge to the judgment in connection with Causes of Action 2-3 and 5-6. *Id*.

VII.

LEAVE TO AMEND WAS PROPERLY DENIED.

When a Rule 12(b)(6) motion to dismiss is granted, leave to amend is properly denied where the trial "court could reasonably conclude that further amendment would be futile." *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). "Where the plaintiff has previously filed an amended complaint . . . the district court's discretion to deny leave to amend is 'particularly

broad.'" *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004) (quoting *Chodos v. W. Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002)). Plaintiffs have the burden of showing that amendment is proper. *Johnson v. Mammoth Recreations*, 975 F.2d 604, 608 (9th Cir. 1992).

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

VIII.

CONCLUSION.

For the foregoing reasons, the judgment in this action should be AFFIRMED.

Respectfully submitted,

June 18, 2014

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By: 

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

CERTIFICATION OF BRIEF LENGTH

Christopher E. Skinnell, Esq., declares:

1. I am licensed to practice law in the State of California, and am one of the attorneys of record for Intervener/Defendants and Respondents CALIFORNIANS TO DEFEND THE OPEN PRIMARY, INDEPENDENT VOTER PROJECT, ABEL MALDONADO, AND DAVID TAKASHIMA in this action. I make this declaration to certify the word length of the Intervener/Respondents' Answering Brief.

2. I am familiar with the word count function within the Microsoft Word software program by which this Answering Brief was prepared. Applying the word count function to the Answering Brief, I determined and hereby certify pursuant to California Rules of Court, Rule 8.204, that this Answering Brief contains 13,141 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and of my own personal knowledge except for those matters stated on information and belief and, as to those matters, I believe them to be true. If called as a witness, I could competently testify thereto.

Executed on June 18, 2014, at San Rafael, California.

Christopher E. Skinnell, Declarant

PROOF OF SERVICE

I, PAULA A. SCOTT, 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 2350 Kerner Boulevard, Suite 250, San Rafael, California 94901, and my electronic service address is kharmon@nmgovlaw.com.

On June 18, 2014, at approximately 10:15 a.m., I electronically served a copy of the:

1. **Intervener-Respondents' Answering Brief; and**
2. **Intervener-Respondents' Appendix**

on the parties in this action by filing the document 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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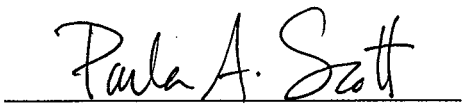
San Francisco, California 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 18, 2014, at San Rafael, California.



PAULA A. SCOTT