No. A140387

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

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

Plaintiffs and Appellants,

vs.

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

Interveners and Respondents.

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

Honorable Lawrence John Appel

APPELLANTS' REPLY BRIEF

DAN SIEGEL, SBN 56400
MICHAEL SIEGEL, SBN 269439
SIEGEL & YEE
499 14th Street, Suite 300
Oakland, CA 94612
Telephone: (510) 839-1200
Fax: (510) 444-6698
dansiegel@siegelyee.com
michael@siegelyee.com

Attorneys for Appellants
MICHAEL RUBIN, *et al.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

I. INTRODUCTION

Rubin asks this Court to protect the longstanding rights of California voters to access diverse political views at the moment of peak political participation: the statewide general election.

In response, the Secretary of State and Interveners cite a variety of election law precedent to argue that Rubin's claims must be barred. Although these cases stand for certain propositions—for example, that parties have no right to have their names appear on a ballot; that write-in votes may be precluded; that candidates may be "channeled" into a primary election; and that a primary may be held five months prior to a general election (or "run-off," as Interveners would prefer)—respondents' arguments ignore the primary mandate for this Court: namely, that these restrictions must be considered together, in their totality, to determine the severity of the burden that Proposition 14 imposed on voter rights.

It is the rights of California's voters, of course, that matters most. As the Supreme Court reminds us, "Our primary concern is with the tendency of ballot access restrictions to limit the field of candidates from which voters might choose." *Anderson v. Celebrezze* (1983) 460 U.S. 480, 787. Respondents' arguments concerning the State's authority to limit or completely remove political parties from the ballot should be dismissed as irrelevant,

because the primary concern here is not whether the Green Party or Libertarian Party or Peace and Freedom Party as parties may be denied a place on the ballot, but rather whether a substantial majority of participating voters may be denied access to the diverse political viewpoints that these qualified parties represent.

No court has blessed the California "top two" electoral system. The Supreme Court's decision in *Jones* does not sanctify Proposition 14, as respondents argue, because *Jones* did not consider the issues of voter participation and preclusion of write-in votes that are raised here. And neither *Jones* nor any other decision has considered whether California's restrictions on ballot access, in their totality, "severely burden" voter rights.

Here, Rubin has pled, with allowance for reasonable inferences, that the electoral regime imposed by Proposition 14 beginning in 2012 has impermissibly burdened the rights of millions of California voters. Because the State has not demonstrated any interests that would justify the ballot access restrictions imposed, and because Proposition 14 has not been appropriately tailored to accomplish any valid government interest, Rubin's appeal should be granted.

II. ARGUMENT

A. Proposition 14 Places Multiple Burdens on California Voters that, in their Totality, Violate the First Amendment's Guarantee of Free Association, and the State has Failed to Provide Compelling Justification or a Narrowly Tailored Regime

1. *The result of Proposition 14 is that general election voters are denied access to minor party views.*

At its core, Proposition 14 deprives a large majority of California voters from accessing diverse political viewpoints when they elect candidates for statewide office. In 2012, upwards of 8 million voters participated in the November general election without voting in the June primary.[1] Because of Proposition 14, these general election voters were not given access to a single, well-supported candidate from the California minor parties.[2]

---

[1] In 2012, no less than 7,873,860 voted in the general election without participating in the primary election, comprising nearly 60% of the participating electorate, if not more. (AA 258-259, 306, 320) (5,328,296 voters were counted in June primary, as compared to 13,202,156 voters counted in November general election). Given that some primary voters likely abstained from the general election, the real percentage of voters participating only in the general election could be much higher.

[2] Interveners insist on utilizing quotation marks around the term "minor parties" to describe the Libertarian, Green, and Peace & Freedom parties that challenge the implementation of Proposition 14. Without speculating as to their intent, Appellants use the term minor parties without quotation marks to describe qualified political parties other than the Democrats and Republicans.

In 2014, the results look to be even worse: whereas the electorate consists of nearly 25 million voters, only 4.5 million voted in the June primary.[3] If trends hold true, a much larger percentage of the electorate will vote in the 2014 November primary, but the vast majority of voters will not have access to any minor party political perspectives.

The Supreme Court has made abundantly clear that voters have the right to associate with political parties of diverse viewpoints at or near the moment of peak political participation. *Anderson v. Celebrezze*, *supra*, 460 U.S. 780, 790-792. *Anderson* held that independent candidates must be granted the same opportunity to access the general election ballot as candidates from the major parties – in order to protect the rights of voters. *Anderson*, *supra*, 460 U.S. 780, 805-806.

> "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, and a candidate serves as a rallying point for like-minded systems." *Anderson*, *supra*, 460 U.S. at 787-788.
>
> A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates

[3] "Statement of the Vote, June 3, 2014, Statewide Direct Primary Election," Appellants' Motion for Judicial Notice, Ex. A, at 2 (24,192,752 eligible voters), 3 (4,461,346 primary voters).

> against those candidates and—**of particular importance—against those voters whose political preferences lie outside the existing political parties**. *Id.* at 793-794 (emphasis added).

The Supreme Court's holding in *Jenness v. Fortson* is also based on the voters' right to access diverse viewpoints. In *Jenness*, the Court ruled that a state may not block minor party candidates who demonstrate more than "a modicum of support" from the general election ballot because of the need to guarantee voter access to "the appeal of new political voices." *Jenness v. Fortson* (1970) 403 U.S. 431, 442 (holding that a 5% threshold was not unconstitutional where Georgia did not impose other arbitrary restrictions on ballot access).

Respondents make numerous arguments concerning the rights of political parties to appear on the ballot, but these arguments are inapposite, if not disingenuous, because as Supreme Court precedent makes abundantly clear, the true rights at issue here are the rights of California voters.

Proposition 14 has frustrated the rights of California voters in numerous ways. Principally, it has effectively prevented the minor parties from accessing the general election ballot, and has instead relegated the candidates from these parties to the June primary, a full five months before the deciding election. This

means that the platform and policies of minor parties will not be available to general election voters through the ballot information pamphlet or other means. This means that voters who observe debates prior to the general election will not access perspectives other than those of the two dominant parties. As the Supreme Court noted in *Anderson*:

> Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign. *Anderson*, *supra*, 460 U.S. at 792.

It is undisputed that most California voters who participate in the electoral process only vote in the general election. Because of Proposition 14, these voters are denied access to viewpoints outside of the mainstream.

2. *Anderson v. Celebrezze controls this Court's analysis of Proposition 14.*

Respondents ask this Court to disregard controlling Supreme Court precedent, including the seminal case of *Anderson v. Celebrezze*, arguing that because Proposition 14 is a "nonpartisan primary," prior Supreme Court decisions dealing with early filing deadlines and other ballot access restrictions are inapposite.[4] This contention must be rejected out of hand.

---

[4] Intervener/Respondents' Answering Brief (IB) at 23 (arguing that *Williams v. Rhodes*, *Jenness v. Fortson*, and *Anderson v.*

The Ninth Circuit has made plainly clear that a "top two" electoral system must be considered in light of *Anderson*. *See Washington State Republican Party v. Washington State Grange* ("*Washington II*") (9th Cir. 2012) 676 F.3d 784, 794 . *Washington II* distinguished the Washington State "top two" system on two factual grounds: first, whereas the early filing deadline invalidated in *Anderson* was set for March, the primary in Washington State occurs in August; and second, whereas the filing deadline in *Anderson* occurred long before the peak election cycle, the Washington State top two permits minor party candidates "to appeal to voters at a time when election interest is near its peak." *Washington II, supra*, 676 F.3d at 794. "In light of these distinctions," the Ninth Circuit noted, the Washington State "top two" does not impose a severe burden on minor party rights. *Id*.

Even before *Washington II*, the Ninth Circuit made clear that *Anderson* is the "seminal case" to analyze the severity of the burden that an election law imposes on the exercise of constitutional rights. *Nader v. Brewer* (9th Cir. 2008) 531 F.3d 1028, 1034. In *Nader*, independent presidential candidate Ralph

---

Celebrezze "are wholly inapposite" and citing the trial court's order at 428-29), Brief of Respondent Debra Bowen (RB) at 17, 20 (attempting to distinguish *Anderson*).

Nader challenged Arizona's June deadline to submit nominating petitions in advance of the November general election, arguing that the law violated *Anderson* by depriving him of the opportunity "to respond to developments in the course of the campaigns of the major party candidates." *Id*. at 1038. In the course of striking down Arizona's law as a severe burden on independent candidate rights that was not narrowly tailored to serve a compelling state interest, the Ninth Circuit reiterated the force of *Anderson*. "We conclude that that the concerns expressed in *Anderson* may well remain significant, and in any event, we are not free to disregard them." *Id*.

Thus, contrary to the trial court's order granting demurrer, and contrary to the arguments of respondents, Rubin's challenge to Proposition 14 must be evaluated in light of the Supreme Court's framework established in *Anderson*.

As *Anderson* provides, "Our primary concern is with the tendency of ballot access restrictions to limit the field of candidates from which voters might choose." *Anderson*, *supra,* 460 U.S. at 787. "[T]he right to vote is heavily burdened if that vote may be cast only for major-party candidates at a time when other parties or other candidates are clamoring for a place on the ballot." *Id*. at 787-788. "A burden that falls unequally on new or

small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." *Id*. at 793-794.

3. *Even though precedent indicates a "top two" regime may be constitutional, Proposition 14 imposes multiple burdens on political association that distinguish California's law.*

Perhaps recognizing that *Anderson* is a precedent that seriously impacts the constitutionality of Proposition 14, respondents claim that California's "top two" primary has already been "approved" by the United States Supreme Court.[5] The Secretary of State goes so far as to state that *Jones* "plainly stands for the conclusion that a top two system is constitutional."[6] This assertion flatly ignores the analysis that a court must undertake to scrutinize an electoral regime in the totality of the circumstances. *Willams v. Rhodes* (1968) 393 U.S. 23, 34.

Proposition 14 is not a hypothetical statute, of course; it is a law that has been implemented with specific attributes that burdened minor party participation in the 2012 elections. And it is *Washington II*, which respondents rely upon heavily, that highlights the need for a specific, fact-intensive analysis. For in that case, as discussed above, it was two fact-specific issues that

---

[5] RB at 9-11.
[6] RB at 10.

determined whether the Washington State "top two" should survive constitutional scrutiny: one, the precise timing of the primary election in relation to the general election; and two, whether public interest in the primary election was "at or near its peak." *Washington II*, *supra*, 676 F.3d at 794.

The Supreme Court's decision in *Jones*, of course, did not consider the specific implementation of Proposition 14 in California. In that case, rather, Justice Scalia described a hypothetical "nonpartisan blanket primary" that might pass constitutional muster:

> Generally speaking, under [a nonpartisan blanket primary], the 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. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under 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. *California Democratic Party v. Jones*, 530 U.S. 567, 585-86 (2000).

Given the multiple caveats in this passage—using the phrase "generally speaking," referring to "top two vote getters (or

however many the State prescribes), explaining that "a State *may* ensure more choice" (emphasis added)— *Jones* cannot be construed as a rubber stamp for any possible "top two" approach. And even assuming, *arguendo*, that Scalia's system could be deemed *per se* constitutional without fact-specific analysis, the "top two" system in California is distinguishable from the *Jones* approach in multiple key facets.

i. Less voter choice and less participation.

In California, as described above, Proposition 14 has failed to provide for "greater participation." In fact, a far smaller number of voters are deciding, during the June primary elections, which two candidates will participate in the better-attended November general election. Similarly, there is less "choice" under Proposition 14, at least in regards to the 8,000,000 or so voters who participated in the 2012 general election without voting in the primary.[7] *Cf. Washington II*, *supra*, 676 F.3d at 794 (acknowledging voter interest as a critical issue).

---

[7] Respondents assert that Rubin has not alleged an as-applied claim to Proposition 14. (ROB 23). This argument ignores the fundamental aspects of Rubin's complaint, which distinguish his ballot access claim from the issue in *Washington II*: namely, that several California minor party candidates received more than a "modicum of support" in 2012, but still failed to advance to the primary; that far fewer voters participated in the June 2012 primary, as compared to the November 2012 general election; and

The Secretary of State argues that "lower voter participation at [the] primary election is not relevant to Appellants' ballot access claim."[8] This argument contradicts the articulated motives of the *Jones* Court, as well as other established law.

As the Supreme Court and the Ninth Circuit have made clear, the minor parties' historical evidence of ballot access is highly relevant to a First Amendment ballot access claim. *See Mandel v. Bradley* (1977) 432 U.S. 173, 178; *Nader v. Brewer*, *supra*, 531 F.3d at 1038. Under this same analysis, the fact that the Proposition 14 primary is vastly inferior to the general election is highly relevant: Rubin's proof of lower voter participation shows how ballot access has been burdened.

Nader looked at historical evidence of ballot access to determine that an early filing deadline effectively eliminated the opportunity for independent presidential candidates to access the general election ballot. *Nader*, *supra*, 531 F.3d at 1038.

In *Mandel*, a case that also considered an early filing deadline for independent candidates, the Supreme Court ruled that a trial court erred when it failed to "analyze what the past

---

that as a result, plaintiffs and other similarly-situated participants in minor party politics were denied the ability to effectively participate in the California electoral process.

[8] RB at 18.

experience of independent candidates for statewide office might indicate about the burden imposed on those seeking ballot access." 432 U.S. at 178.

Here, qualified minor parties such as the Green Party, Libertarian Party, and Peace and Freedom Party earned sustained access to the general election ballot through decades of party-building activities. Now, under the massive changes imposed by Proposition 14, they are denied access to the vast majority of voters who only participate in November.

ii. Ban on write-ins.

California has not only implemented a "nonpartisan blanket primary," but it has also prohibited write-in votes, taking the exclusion of minor party and independent candidates one step further than the system imposed in Washington State.

Of critical importance is the fact that Proposition 14 has also blocked independent and minor party candidates from an alternate route, previous available: the write-in campaign. Respondents have cited cases that justify the preclusion of write-in votes, but these cases do not consider such a bar in the context of Rubin's challenge. Here, because Proposition 14 has simultaneously barred minor parties from their traditional route to the general election (i.e., through the party nomination process)

and also removed the possibility of write-in candidacies, the law has placed a manifold burden that has not been considered in prior cases.

iii. Additional advantages for major parties.

Whereas Justice Scalia's nonpartisan system in *Jones* would have removed political parties from the process entirely, Proposition 14 permits candidates to associate with parties by declaring a "party preference." Thus, in the system imposed in California, major political parties benefit at the expense of minor parties in two ways: first, in the primary, major party candidates can claim the mantle of the larger parties as a way to garner credibility and support; and second, in the general election, the major party candidates are spared the critique of minor party candidates.

Because California has not implemented the particular system suggested by Justice Scalia in *Jones*, and instead has implemented an approach that imposes additional burdens on minor parties, Proposition 14 must be subject to strict scrutiny, and respondents required to demonstrate a compelling government interest.

In addition to *Jones* and *Washington II*, respondents (especially Interveners) rely heavily upon *Munro v. Socialist*

Party, arguing that "the burden on minor parties' associational rights of being kept off the general election ballot is 'slight'."[9] Respondents ignore the critical context of *Munro* in making this argument, however, for in *Munro*, the Washington State minor parties were challenging a far less onerous ballot access restriction. In that case, the burden imposed was as follows:

> The State of Washington requires that a minor-party candidate for partisan office receive at least 1% of all votes cast for that office in the State's primary election before the candidate's name will be placed on the general election ballot. *Munro v. Socialist Party* (1986) 479 U.S. 189, 190.

As Rubin's complaint and briefs make clear, the burden imposed by Proposition 14 is of far greater magnitude, as candidates who receive more than 1% (and even more than 18%) of the primary election votes can still be kept off the general election ballot. In addition, *Munro* did not consider factors such as the five-month wait between the California primary and general elections (thus leading to a dramatic diminution in public interest) or the fact that, in California, wrote-in votes have been barred completely.

Respondents also cite to cases that have condoned a June primary, or that have permitted a ban on write-in voting[10], but these precedents do not control, for the simple fact that the

---

[9] IB at 24-29.
[10] RB at 21, fn. 8; IB at 24, fn. 14.

burdens challenged here have been imposed simultaneously, and thus must be weighted as a whole.

Burdick v. Takushi, cited by respondents on the write-in vote issue, did not consider the impact of banning write-in votes in conjunction with some of the other burdens imposed by Proposition 14, including how it almost entirely prohibits minor party access to the general election. *See Burdick v. Takushi* (1992) 504 U.S. 428, 438-439 ("*in light of the adequate ballot access afforded under Hawaii's election code*, the State's ban on write-in voting imposes only a limited burden on voters' rights") (emphasis added). Furthermore, *Burdick* took pains to reaffirm the core precedent that Appellants rely upon, declaring that *Anderson* provides the appropriate inquiry to evaluate ballot access restrictions. *Id*. Here, the inquiry is not whether a June primary or a ban on write-in voting, in and of themselves, are a permissible aspect of a constitutional electoral regime, but rather, in the context of California's electoral changes, in the totality of the circumstances, whether voter rights have been impermissibly burdened.

Rubin's argument is not that a "top two" approach such as Proposition 14 is *per se* unconstitutional, but that it must be justified by compelling state interests. The "channeling" of minor

party candidacies to the June primary should be analogized to the Supreme Court and Ninth Circuit cases that considered early filing deadlines, including *Anderson* and *Nader*. The issue is the same: namely, how voter rights are burdened when minor parties are forced to fight for ballot access at a time when voter interest is not at or near its peak.

4. The State's asserted interest in "increasing voter choice and voter participation" should be dismissed as contrary to the evidence.

Severe burdens on the First Amendment right of political association must be justified by a compelling government interest. *Anderson*, *supra*, 460 U.S. 780; *Nader*, *supra*, 531 F.3d at 1030. Alternatively, a lesser burden on associational rights must still be justified by an important government interest. *Burdick*, *supra*, 504 U.S. at 434.

Here, respondents cannot establish any legitimate government interest that would justify barring minor party candidates from the general election ballot. The State has asserted its interest in "increasing voter choice" and "reducing government gridlock," while Interveners repeat their mantra of encouraging "practical" and "pragmatic" candidates.[11] All of these interests are

[11] RB at 21-22; IB at 13.

illegitimate as a matter of law, and fail to establish an important government interest.

First, the interest in "increasing voter choice" should be dismissed as entirely contrary to the facts established by Rubin's complaint. As the pleadings indicate, far fewer people voted in the 2012 primary election, as compared to the general election.[12] Thus, by no rational measure has Proposition 14 increased voter choice; to the contrary, when the vast majority of voters participate, there are far fewer choices than previously existed.

Second, the State's interest in "reducing partisan gridlock" or promoting "pragmatic" candidacies has already been ruled invalid by the Supreme Court. *See Jones, supra*, 530 U.S. at 584. As the Court warned in the context of Washington State's earlier attempt at a blanket primary:

> As for affording voters greater choice, it is obvious that the net effect of this scheme—indeed, its avowed purpose—is to *reduce* the scope of choice, by assuring a range of candidates who are all more "centrist." This may well be described as broadening the range of choices *favored by the majority*—but that is hardly a compelling state interest, if indeed it is even a legitimate one. The interest in increasing voter participation is just a variation on the same theme (more choices favored by the majority will produce more voters), and suffers from the same defect. *Jones, supra*, 530 U.S. at 584-585 (emphasis in original).

[12] AA 10, SAC ¶ 30.

For the same reason that *Jones* rejected the purported government interests in "voter participation" and "voter choice," this Court should reject the same asserted interests here. As Rubin's complaint demonstrates, the true effect of Proposition 14 has been to prevent general election voters from accessing minor party viewpoints. Because the State's asserted interests are invalid, Rubin's complaint must proceed.

5. *Proposition 14 is not narrowly tailored.*

Finally, even if this Court were to find that respondents had identified compelling (or important) government interests, the appeal should be granted because the State has failed to show how Proposition 14 is appropriately tailored to achieve those interests.

Returning to the *Jones* precedent: in that case, Justice Scalia discussed more than a "top two"; he suggested that a State could decide on a "top three" or "top four" approach. *Jones*, *supra*, 530 U.S. at 585. In cases such as *Nader*, the Ninth Circuit has required the State to explain, in detail, why other less restrictive alternatives were not chosen. *Nader*, *supra*, 531 F.3d at 1039.

Here, the State makes no attempt to explain why it could not "increase voter choice" while also permitting a "top three" and thus allowing at least one minor party to have access to the general election. Similarly, if the stated goal is to encourage

greater participation by "decline to state" voters, as Interveners suggest, there has been no attempt to explain why less burdensome measures were not attempted.

Because Rubin has adequately pled that Proposition 14 imposes a severe burden on minor party ballot access, is not justified by a compelling State interest, and was not narrowly tailored to accomplish its stated ends, the appeal should be granted and plaintiffs permitted to develop their case for trial.

B. Proposition 14 Targets Minor Parties for Disadvantage in Violation of Equal Protection

In *Williams v. Rhodes*, the State of Ohio argued (similar to Respondents here) that it had "absolute power to put any burdens it pleases" on the selection of electors for the United States presidency, citing the authority granted by the Elections Clause of the United States Constitution. *Williams v. Rhodes* (1968) 393 U.S. 23, 28-29. At issue in *Williams* were numerous restrictions that Ohio placed on minor party ballot access, such that taken together, "these various restrictive provisions make it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties." *Id*. at 25. After considering the State's broad assertion of authority, the Supreme Court reflected on the various constitutional limitations on State power,

and ultimately held, "no State can pass a law regulating elections that violates the Fourteenth Amendment's command that 'no state shall **deny to any person** the equal protection of the laws.'" *Id*. at 29 (emphasis in original).

Williams emphasized that election law cases implicate "two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Id*. at 30. "Both of these rights, of course, rank among our most precious freedoms." *Id*. Summing up these rights in the context of the 1968 Ohio election laws that prevented the Socialist Labor Party from competing in the presidential general election, the Court warned, "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." *Id*. at 31.

Here, respondents argue that there can be no violation of equal protection because Proposition 14, on its face, does not single out minor parties for discriminatory treatment.[13] To find Proposition 14 to be "facially neutral," however, is to entirely

[13] *See, e.g.*, RB at 25 ("Proposition 14 . . . treats all candidates and parties alike"), IB at 41 ("Proposition 14 is facially neutral").

ignore California election history. Plaintiff minor parties labored at no small cost over decades to earn their qualified ballot status under the California Election Code, which in turn granted them access to general election voters. As discussed above, the minor parties' historical evidence of ballot access is highly relevant to their ballot access claim. *See Mandel, supra*, 432 U.S. at 178; *Nader, supra*, 531 F.3d at 1038.

The withdrawal of minor parties' access to the general election ballot can be fairly analogized to cases invalidating poll taxes in the South. As *Harper v. Virginia State Bd. of Elections* declared, "For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause." *Harper v. Virginia State Bd. of Elections* (1966) 383 U.S. 663, 665. Justice O'Connor, writing in *Shaw v. Reno*, described "ostensibly race-neutral devices such as 'grandfather clauses' and 'good character' provisos' [that] were devised to deprive black voters of the franchise." *Shaw v. Reno* (1993) 509 U.S. 630, 639 (O'Connor, J., dissenting). Here, just as a "grandfather clause" would bar African-American access to the vote in the Jim Crow era, the "top two" imposes a near complete bar to minor party access to the general election ballot. The invidious intent is apparent by the simple fact that there are 5 or 6

qualified parties, and only two candidates will be permitted access to the general election ballot. Because reasonable inferences permit a court to find that Proposition 14 targeted the class of minor party voters and candidates, and because the law does not fulfill a compelling government interest, Rubin's appeal should be granted, and his case permitted to go to trial.[14]

Even if Proposition 14 should be deemed "facially neutral," however, there is sufficient evidence in the ballot information materials to indicate its improper purpose. Voters were warned:

> The general election will not allow write-in candidates. . .
>
> Voter choice will be reduced because the top two vote getters advance to the general election regardless of political party. . .
>
> Independent and smaller political parties like Greens and Libertarians will be forced off the ballot, further reducing choice.[15]

Interveners concede that "judicially noticeable ballot materials . . . are the best guide to voter intent."[16] Here, the voters were directly notified of the likely effect of Proposition 14, but proceeded to bar

---

[14] Interveners claim that Rubin has waived his argument that Proposition 14 was the product of intentional discrimination (IB at 44), but ignores Appellants' Opening Brief at 31-32, which clearly describes the facts giving rise to a reasonable inference of intentional discrimination.

[15] AA 45 (Voter Information Guide: Argument Against Proposition 14").

[16] IB 43.

minor party access to the general election. The "top two" bar on minor parties is not reasonably related to an important (much less a compelling) government interest, and therefore violates the equal protection rights of voters who wish to associate with minor party views.

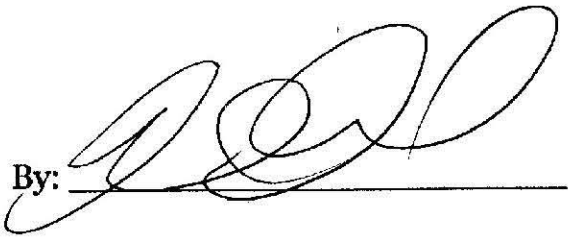
III. CONCLUSION

Rubin's claim, it in its totality, is not barred by any precedent. He has pled that Proposition 14 denied California voters access to diverse political viewpoints by burdening minor party access to the statewide general election. Minor party candidates are not able to appeal to voters at the moment of peak electoral interest, and instead are relegated to an inferior primary contest five months prior to the general election. Candidates who are not from the dominant Democrat and Republican parties are also denied an alternate route to the ballot, because Proposition 14 bars write-in candidacies. In addition to the burdens placed on plaintiffs' rights, the State has failed to assert a valid government interest that would justify the ballot access restrictions. To the contrary, the State's asserted interests have been specifically disproved by the Supreme Court; there is no constitutional justification for emphasizing centrist or "pragmatic" candidates at

the expense of diverse views. For these reasons, as argued above, Rubin's appeal should be granted, and his claims against the Secretary of State reinstated.

Respectfully submitted,

SIEGEL & YEE



By: _____

Dan Siegel
Michael Siegel

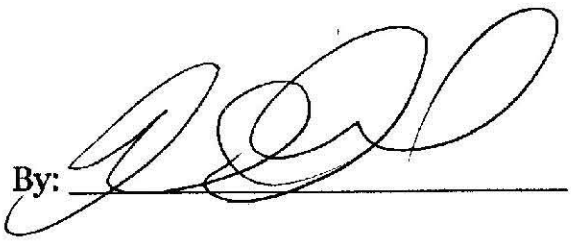
Attorneys for Plaintiffs and Appellants
MICHAEL RUBIN, *et al.*

CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 5,441 words as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: July 23, 2014

By: 

Dan Siegel
Michael Siegel

PROOF OF SERVICE

I, MICAH CLATTERBAUGH, declare as follows:

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

On July 23, 2014. at 1:00 p.m., I electronically served copies of:

1. **Appellants' Reply Brief;**
2. **Appellants' Motion for Judicial Notice;**
3. **Appellants' Proposed Order Taking Judicial Notice.**

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

Kari Lynn Krogseng
Office of the State Attorney General
kari.krogseng@doj.ca.gov

Christopher Skinnell
Nielsen Merksamer Parrinello Gross & Leoni
cskinnell@nmgovlaw.com

And (copy of brief only) mailed to:

Clerk, Superior Court
Appeals Division
1225 Fallon Street
Oakland, CA 94612-4293

And an electronic copy sent via the First District Court of Appeal's electronic filing system, pursuant to Rule 8.212(c)(2), to:

Clerk, Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 23, 2014, at Oakland, California.

Micah Clatterbaugh