

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' MOTION TO STRIKE A
PORTION OF APPELLANTS' REPLY BRIEF THAT RAISES
A NEW ARGUMENT FOR THE FIRST TIME OR,
ALTERNATIVELY, FOR PERMISSION TO FILE SURREPLY**

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

NIELSEN MERKSAMER

PARRINELLO GROSS & LEONI LLP

James R. Parrinello, SBN 63415

Marguerite Mary Leoni, SBN 101696

Christopher E. Skinnell, SBN 227093

2350 Kerner Boulevard, Suite 250

San Rafael, California 94901

Tel: (415) 389-6800; Fax: (415) 388-6874

Attorneys for Interveners and Respondents

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

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I.

SECTION II.B OF APPELLANTS' REPLY BRIEF, WHICH IMPROPERLY BRIEFS A NEW ARGUMENT THAT WAS NOT RAISED IN APPELLANTS' OPENING BRIEF, SHOULD BE STRICKEN, AND THE ARGUMENT RAISED THEREIN SHOULD BE DEEMED WAIVED.

“Points raised for the first time in the reply brief are generally not considered, out of fairness to the respondent.” *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.*, 158 Cal. App. 4th 1061, 1072 (1st Dist., Div. 1, 2008) (Marchiano, J.). The arguments contained in Section II.B of Appellants’ Reply Brief (at pages 20 to 24) were not presented in their opening brief in this appeal, and should thus be disregarded by the Court.

In their opening brief, Plaintiffs (Appellants herein) contended—relying on the Supreme Court case of *Romer v. Evans*, 517 U.S. 620 (1996)—that Proposition 14 violates equal protection, because the measure purportedly “withdraws” an established right from the so-called “minor” parties¹ to appear on the general election ballot. (Appellants’ Opening Brief [“AOB”], pp. 30-33.)

However, as Interveners and Defendant Bowen pointed out in their opposition briefs, *Romer* is inapposite because it dealt with a facially-discriminatory law—*on its face*, the challenged measure

¹ In footnote 2 of their Reply Brief, Plaintiffs note that Intervener-Respondents’ Brief places quotation marks around references to the “minor parties,” but does so “[w]ithout speculating as to [Interveners’] intent.” Thereby, Plaintiffs are apparently insinuating that that this usage reflects some nefarious intent on the part of Interveners. Not so. Interveners’ use of quotation marks simply reflects the fact that a distinction between “major” and “minor” parties finds no basis in California law, which subjects all qualified political parties to the same rules. The distinction it is merely a convention adopted by Plaintiffs.

singled out a specific class of citizens for disparate treatment. Proposition 14, by contrast, is facially-neutral; it makes no distinctions or “classifications” amongst the various qualified political parties in the State, but instead treats them all identically.² With respect to a facially-neutral law like Proposition 14, a mere showing of disparate impact is insufficient to demonstrate a violation of equal protection; Plaintiffs also bear the burden of establishing that the law was also enacted with an improper *purpose*, which “implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part ‘because of’ not merely ‘in spite of’ its adverse effects upon an identifiable group.” *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979).³

In their opening brief to this Court, Plaintiffs made no effort *whatsoever* to demonstrate that any disparate impact that Proposition 14 may have was the result of a conscious purpose to achieve that result. In light of that conspicuous omission, Interveners expressly noted that Plaintiffs had waived their equal protection claim based on intentional, invidious discrimination, and refrained from burdening this Court with unnecessary briefing on an

² Indeed, Plaintiffs expressly admit that “Proposition 14 treated minor parties and major parties ‘exactly alike,’” and claim that “it is this new policy that constitutes the deprivation of equal protection.” (See AOB at p. 32.) See also *Chamness v. Bowen*, 722 F.3d 1110, 1121 (9th Cir. 2013) (Proposition 14 “does not dictate political outcomes or invidiously discriminate against a class of candidates”).

³ See also *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (states are permitted “to enact reasonable election regulations that may, in practice, favor the traditional two party system.”); *Chamness*, 722 F.3d at 1117 (same, upholding Proposition 14 against constitutional challenge).

issue that Plaintiffs had declined to raise. (See Intervener/Respondents' Answering Brief, pp. 44, 45-46.)

Now, however, in apparent, belated recognition of *Romer's* ill fit,⁴ Plaintiffs seek to resurrect their far-fetched claim from the trial court that Proposition 14—though facially-neutral—was adopted with the *purpose* of discriminating against the “minor” parties. Plaintiffs' delay in raising this contention is improper. As the courts have widely recognized, it is inappropriate and unfair to present new arguments on appeal in a reply brief:

Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time *will not be considered*, unless good reason is shown for failure to present them before.

Neighbours v. Buzz Oates Enterprises, 217 Cal. App. 3d 325, 335 n.8 (1990) (quoting 9 Witkin, *Cal. Proc.* (3d ed. 1985) § 496, p. 484) (emphasis added); *see also Varjabedian v. City of Madera*, 20 Cal. 3d 285, 295 n.11 (1977).

Obviously cognizant of the thin ice on which they skate, Plaintiffs contend—in footnote 14, on page 23 of their Reply Brief—that their “intentional discrimination” argument was not waived because they purportedly discussed “facts giving rise to a reasonable

⁴ Interveners refer to Plaintiffs' “apparent” recognition of this fact, because Appellants' Reply Brief actually seems to exhibit some continuing confusion regarding the distinction between a facially-discriminatory measure on the one hand, and a facially-neutral measure that may have a disparate impact on some person or group on the other hand. (See ARB at pp. 21-22, 23.)

inference of intentional discrimination” on pages 31-32 of their Opening Brief. There are two problems with this.

First, as a purely factual matter it is simply incorrect. The only facts discussed on the cited pages relate exclusively to the purportedly disparate *impact* Proposition 14 is alleged to have, not the *intent* that led to the measure’s adoption. Those pages—and the Opening Brief more generally—discuss no facts *whatsoever* suggesting that California’s voters adopted Proposition 14 “because of” not merely “in spite of” its adverse effects upon” minor parties.

Moreover, to preserve an issue in reply, it is not sufficient to merely make passing references to relevant facts. Litigants may not skirt the above-quoted basic rules of fairness by raising an argument in cursory fashion in their opening brief and then fleshing out the argument in a reply brief, once the opposing party’s opportunity to respond has passed. *See Hahn v. Diaz-Barba*, 194 Cal. App. 4th 1177, 1186 n.3 (2011) (contention raised in cursory fashion in opening brief, and then elaborated in reply brief, deemed waived).

Particularly instructive on this point is *People v. Spector*, 194 Cal. App. 4th 1335 (2011). In that case, a criminal defendant contended on appeal that the prosecution improperly displayed three pictures of the trial judge to the jury during its closing argument “as a party who had provided evidence of guilt.” *See id.* at 1372 n.12. But the Court of Appeal deemed the argument forfeited, because “Spector did not properly raise this as an independent issue in his opening brief[.]” *Id.* Significantly, for purposes of this motion, the Court of Appeal acknowledged that “Spector briefly referred to these still pictures in the statement of facts relating to his videotape claim, and then in an argument about harmless error relating to the videotape claim”—just as Appellants herein claim to

have “describe[d] the facts giving rise to a reasonable inference of intentional discrimination.” But the Court deemed this inadequate to preserve Spector’s argument: “This cursory treatment in Spector’s opening brief does not constitute an adequate presentation of the issue.” *Id.*

Simply put, Appellants failed to present any argument in their Opening Brief to support a claim that intentional, invidious purpose motivated California’s voters to adopt Proposition 14. Then, realizing the weakness of their equal protection claim in the absence of such a showing, they belatedly and improperly sought to plug the hole, in violation of well-established rules of appellate briefing. This wholly new argument—contained in Section II.B of Appellants’ Reply Brief—should be stricken by this Court, and the claim of intentional discrimination should be deemed waived.

II.

AT A MINIMUM, BASIC PRINCIPLES OF FAIRNESS AND DUE PROCESS REQUIRE THAT INTERVENERS SHOULD BE PERMITTED TO FILE A SURREPLY TO ADDRESS APPELLANTS’ NEW ARGUMENT.

In those rare circumstances where arguments raised for the first time in a reply brief are considered, it is also well-established that basic principles of fairness and due process at least require that opposing parties be given the chance to respond to the new argument. *See Reichardt v. Hoffman*, 52 Cal. App. 4th 754, 765 (1997) (“If the practice [of considering issues raised for the first time in reply] were allowed without any substantial reason, it would lead to great irregularity and delay. In such event the respondent, of course, could justly demand the right to file an additional brief, and

the course of the argument by brief would be radically changed.”)
(quoting *Kahn v. Wilson*, 120 Cal. 643, 644 (1898)).

Intervenors therefore respectfully request that, if the Court intends to consider the Plaintiffs’ new argument, it grant Intervenors permission to file a Surreply addressing that argument, along with a Supplemental Appendix containing materials contained in the record below that were not previously provided to the Court because they are pertinent only to the arguments belatedly raised in Appellants’ Reply Brief.

A proposed Surreply and Supplemental Appendix are lodged herewith.

August 1, 2014

Respectfully submitted,

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

By:



Marguerite Mary Leoni
Christopher E. Skinnell

Attorneys for Intervenors/Respondents
CALIFORNIANS TO DEFEND THE OPEN
PRIMARY, INDEPENDENT VOTER PROJECT,
ABEL MALDONADO, AND DAVID
TAKASHIMA

PROOF OF SERVICE

I, KERI L. HARMON, 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 August 1, 2014, at approximately 11:00 a.m., I electronically served a copy of the:

1. **Intervener/Respondents' Motion To Strike A Portion Of Appellants' Reply Brief That Raises A New Argument For The First Time Or, Alternatively, For Permission To File Surreply;**
2. **Intervener/Respondents' [Proposed] Order Striking Appellants' Belated Reply Argument [Or Granting Permission To File Surreply];**
3. **Intervener/Respondents' [Proposed] Surreply Addressing A Portion Of Appellants' Reply Brief That Raises A New Argument For The First Time;**
4. **Intervener/Respondents' [Proposed] Supplemental Appendix;**
5. **Intervener/Respondents' Objection To Appellants' Request For Judicial Notice;**
6. **Intervener/Respondents' [Proposed] Order Denying Appellants' Request For Judicial Notice; and**
7. **Request for Oral Argument.**

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:

Dan Siegel
dan@siegelyee.com; danmsiegel@gmail.com
Michael Siegel
michael@siegelyee.com
SIEGEL & YEE

Kari Krogseng
Kari.Krogseng@doj.ca.gov
Peter Chang
Peter.Chang@doj.ca.gov; pchang@kirkland.com
OFFICE OF THE STATE ATTORNEY GENERAL

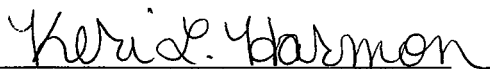
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And an electronic copy sent via the First District Court of Appeal's
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350 McAllister Street
San Francisco, California 94102

I declare under penalty of perjury under the laws of the State
of California that the foregoing is true and correct. Executed on
August 1, 2014, at San Rafael, California.


KERI L. HARMON

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NIELSEN MERKSAMER

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James R. Parrinello, SBN 63415

Marguerite Mary Leoni, SBN 101696

Christopher E. Skinnell, SBN 227093

2350 Kerner Boulevard, Suite 250

San Rafael, California 94901

Tel: (415) 389-6800; Fax: (415) 388-6874

Attorneys for Interveners and Respondents

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

[Alternative 1]: The motion of Intervener-Respondents to strike Section II.B of Appellants' Reply Brief is improper. *See Crowley Maritime Corp. v. Boston Old Colony Ins. Co.*, 158 Cal. App. 4th 1061, 1072 (1st Dist., Div. 1, 2008) (Marchiano, J.) ("Points raised for the first time in the reply brief are generally not considered, out of fairness to the respondent.").

[Alternative 2]: Permission to file the proposed Surreply of Intervener-Respondents and accompanying Supplemental Appendix, lodged with this Court on August 1, 2014, is GRANTED. *See Reichardt v. Hoffman*, 52 Cal. App. 4th 754, 765 (1997) ("If the practice [of considering issues raised for the first time in reply] were allowed without any substantial reason, it would lead to great irregularity and delay. In such event the respondent, of course, could justly demand the right to file an additional brief, and the course of the argument by brief would be radically changed.") (quoting *Kahn v. Wilson*, 120 Cal. 643, 644 (1898)).

Dated: _____

Justice, Court of Appeal

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Dan Siegel
dan@siegelyee.com; danmsiegel@gmail.com
Michael Siegel
michael@siegelyee.com
SIEGEL & YEE

Kari Krogseng
Kari.Krogseng@doj.ca.gov
Peter Chang
Peter.Chang@doj.ca.gov; pchang@kirkland.com
OFFICE OF THE STATE ATTORNEY GENERAL

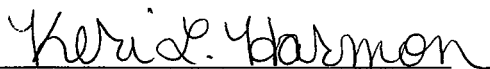
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Marguerite Mary Leoni, SBN 101696

Christopher E. Skinnell, SBN 227093

2350 Kerner Boulevard, Suite 250

San Rafael, California 94901

Tel: (415) 389-6800; Fax: (415) 388-6874

Attorneys for Interveners and Respondents

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I.

THE TRIAL COURT PROPERLY DISMISSED THE SECOND CAUSE OF ACTION IN PLAINTIFFS' SECOND AMENDED COMPLAINT, ALLEGING THAT PROPOSITION 14 WAS ADOPTED WITH AN INVIDIOUSLY-DISCRIMINATORY PURPOSE, BECAUSE THAT CAUSE OF ACTION FAILED TO STATE A CLAIM ON WHICH RELIEF COULD BE GRANTED.

The material allegations of the Second Amended Complaint underlying Plaintiffs' claim that Proposition 14 violates equal protection (the Second Cause of Action) are that: Proposition 14 withdrew from minor parties, and their voters and candidates, the "right" to participate in the statewide general election, guaranteed to them by the pre-Proposition 14 partisan primary system (SAC ¶ 3 [AA 2-3]); that the ballot argument in favor of Proposition 14 expressed an intention to elect more "practical" candidates, and that Proposition 14's principle drafter, Abel Maldonado, likewise indicated (two years after the measure passed) that the purpose of the measure was to elect more "pragmatic" candidates (SAC ¶ 22 [AA 7]); that these were "code words" denoting a desire to exclude minor party political perspectives from the statewide general election (SAC ¶ 23 [AA 7]); and that dozens of minor party candidates were, in fact, excluded from the 2012 general election by Proposition 14 (SAC ¶¶ 3, 24-27 [AA 7-8]).

These allegations fail to state a claim as a matter of law, and the demurrer was therefore properly granted. And because no amendment could cure the defects contained in that cause of action—because judicially-noticeable ballot materials conclusively demonstrate that legitimate purposes underlay Proposition 14's adoption, leave to amend was properly denied.

Under the federal pleading standard, which is applicable to Plaintiffs' equal protection claim,¹ while the factual allegations of a complaint are generally accepted as true, 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)). In *Iqbal* itself, the Court held that cursory allegations of "invidious discrimination" were not sufficiently "plausible" to avoid dismissal under FRCP 12(b)(6).

Applying this standard, the trial court properly sustained the demurrers against the second cause of action in Plaintiffs' Second Amended Complaint. Plaintiffs' allegation that cryptic "code words" (*i.e.*, "practical" and "pragmatic") reflect an intention on the part of Proposition 14's drafters to suppress minor parties fails to state a "plausible" claim for relief within the meaning of *Iqbal*.

¹ *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).

A. The Second Amended Complaint Failed To Allege That The Voters Who Adopted Proposition 14 Did So With The Invidious Purpose Of Discriminating Against “Minor” Political Parties.

With respect to a facially-neutral law like Proposition 14, a mere showing of disparate impact is insufficient to demonstrate a violation of equal protection; Plaintiffs also bear the burden of establishing that the law was also enacted with an improper *purpose*, which “implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part ‘because of’ not merely ‘in spite of’ its adverse effects upon an identifiable group.” *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979).²

1. The intent of a ballot measure’s drafters is irrelevant; it is *the voters’* intent that counts.

In support of its claim that Proposition 14 “invidiously” discriminates against minor parties, the Second Amended Complaint alleged that the principal drafter of Proposition 14, then-State Senator Abel Maldonado, “intended” to exclude minor parties from the ballot. But the SAC nowhere alleged that the *voters who adopted Proposition 14* shared any such intention, and it is the *voters’* intention that is relevant to the constitutionality of a ballot measure. *Perry v. Brown*, 671 F.3d 1052, 1094 n.26 (9th Cir.), *cert. granted*, 133 S. Ct. 786 (U.S. 2012). As the California Supreme Court has noted, “[t]he opinion of drafters or of legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the

² See also *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (states are permitted “to enact reasonable election regulations that may, in practice, favor the traditional two party system.”); *Chamness v. Bowen*, 722 F.3d 1110, 1117 (9th Cir. 2013) (same, upholding Proposition 14 against constitutional challenge).

voters were aware of the drafters' intent." *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm'n*, 51 Cal. 3d 744, 765 n.10 (1990) (emphasis added).

The foregoing rule seems particularly apt here, where Plaintiffs not only alleged that Mr. Maldonado expressed his "intent" through exceedingly cryptic "code" words ("pragmatic" and "practical"), but where (1) one of the two instances of those code words' use came in 2012, nearly two years after Proposition 14 was enacted,³ and (2) the other example appears in the ballot argument in favor of Proposition 14, *which Mr. Maldonado did not even sign*.⁴

2. Even accepting at face value the Second Amended Complaint's far-fetched allegations about Mr. Maldonado's purported intention to harm the "minor" parties, they do not support a facially "plausible" inference of discrimination by the voters.

Plaintiffs alleged that Proposition 14 supporters' use of a single word ("practical") in their ballot argument means that Mr. Maldonado (who did not even sign that argument) had a grand purpose to keep *minor* parties off the general election ballot. This allegation is implausible enough in its own right,⁵ but Plaintiffs didn't stop there. Based on that fanciful allegation, they implicitly asked the trial court to further infer: that (1) Mr. Maldonado used his considerable leverage in the 2009 budget deal to achieve that narrow purpose; that (2) the voters understood that to be the purpose of

³ See *Armstrong v. County of San Mateo*, 146 Cal. App. 3d 597, 618 (1983) (disregarding postelection statements of intent).

⁴ See AA 40 (Argument in Favor of Proposition 14).

⁵ Plaintiffs never explain why, given the minor parties' historical lack of success in being elected under the old partisan system, anyone would devote substantial energy and political muscle to keeping them off the ballot.

Proposition 14, based on that single word in the ballot argument; that (3) the voters approved Proposition 14 “because of” rather than “in spite of” this purpose;⁶ and that (4) Mr. Maldonado, IVP and CADOP devoted millions of dollars and hundreds of hours campaigning to fulfill that quixotic purpose.

This piling of improbable conjecture upon surmise, based on a single word in a lengthy ballot pamphlet, fails the test of “facial plausibility.” It is not plausible that this single, cryptic “code word” demonstrates an intention by voters favoring Proposition 14 to discriminate against minor parties. In fact, when read in context, the ballot pamphlet’s reference to more “practical” officeholders has an “obvious alternative explanation” (*Iqbal*, 556 U.S. at 682 (quoting *Twombly*, 550 U.S. at 567))—that Proposition 14’s sponsors were addressing (and the voters understood them as addressing) partisan gridlock between the two *major* parties, which the measure’s supporters believed to characterize California’s Legislature. (See AA 44 [Argument in Favor of Proposition 14].)

Perhaps the clearest evidence of the far-fetched nature of the allegations contained in the Second Amended Complaint is that they have made no effort whatsoever in this Court—even in their belated argument on this point—to advance their claim of “invidious” discrimination on the basis of Mr. Maldonado’s purported intent. Instead, they shift gears and advance a different theory that was not even alleged in the Second Amended Complaint: that the fact voters were “warned” about Proposition 14’s possible impacts on minor parties is evidence of an intention to harm those parties. As discussed below, that theory is equally flawed.

⁶ *Feeney*, 442 U.S. at 279.

3. Allegations regarding Proposition 14's purportedly disparate effect do not give rise to an inference of discriminatory intent.

Finally, much of Plaintiffs' contention that they were "targeted" by Proposition 14 proceeds in *post hoc* fashion—they cite statistics regarding a relative lack of success by minor parties in advancing to the general election in 2012 and 2014 (*i.e.*, the effect of Proposition 14), and reason backwards from that effect to a conclusion that such a result was the *intent* of the measure. But facially neutral laws that merely have a disparate impact on a certain class of persons do not support an inference of improper motive sufficient to survive a demurrer under federal pleading standards. *PMG Int'l Div., L.L.C. v. Rumsfeld*, 303 F.3d 1163, 1172-73 (9th Cir. 2002). A contrary rule would undermine the well-established principle that "[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)].)

On this point it is worth contrasting *Moss v. United States Secret Serv.*, 572 F.3d 962 (9th Cir. 2009) ("*Moss I*"), and *Moss v. U.S. Secret Service*, 675 F.3d 1213 (9th Cir. 2012) ("*Moss II*"). In *Moss I*, the plaintiffs alleged that the Secret Service moved the two groups of demonstrators (pro-Bush and anti-Bush) the same distance from a venue at which the President was to appear, but that the Secret Service acted with impermissible motive. The Court of Appeal held that in light of the fact that the two groups were treated the same, the allegation of improper motive was not "facially

plausible,” and could not withstand demurrer. 572 F.3d at 970-71. In *Moss II*, by contrast, the plaintiffs survived demurrer by alleging that Secret Service moved anti-Bush protestors farther from a venue at which the President was to appear than pro-Bush demonstrators were moved—a policy decision that was discriminatory on its face.

In this case, Proposition 14 is not facially-discriminatory; as in *Moss I*, the challenged policy is facially-neutral, and the plaintiffs have only a conclusory, implausible allegation of discriminatory motive. Just as that allegation was insufficient to avoid a demurrer in *Moss I*, the trial court properly sustained the demurrers to the Second Amended Complaint in this case.

B. Plaintiffs Cannot Amend The Second Amended Complaint To Adequately Allege “Invidious” Discriminatory Purpose On The Part Of The Voters, Because Such An Allegation Would Be Refuted By The Ballot Pamphlet, Which Is Judicially-Noticeable And Therefore Properly Considered On Demurrer.

As Plaintiffs themselves acknowledge in their Reply Brief,⁷ in the context of a ballot measure enacted by the voters, the courts must judge the voters’ intent on the basis of objective, extrinsic evidence like the ballot pamphlet, which is judicially-noticeable.⁸ Because the ballot pamphlet for Proposition 14 reflects legitimate purposes for its adoption, the demurrers were properly sustained. And because, under the federal pleading standard, 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). Plaintiffs would,

⁷ ARB at p. 23; *see also Perry*, 671 F.3d at 1094.

⁸ *In re Varnell*, 30 Cal. 4th 1132, 1144 n.7 (2003).

therefore, be unable to successfully amend their complaint to allege an intention other than those reflected in the voter pamphlet.

1. The ballot pamphlet shows that Proposition 14 was enacted for legitimate purposes.

When evaluating claims of intentional discrimination by a facially-neutral law in the ballot measure context, the courts have held that a challenged law will be upheld unless “[t]he only ‘conceivable’ purpose [of the measure], judged by wholly objective standards” was to engage in impermissible discrimination. *So. Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291, 295 (9th Cir. 1970).⁹ When the official ballot materials disclose multiple possible motivations for the enactment of a facially-neutral law, the courts will not delve further into the voters’ intent, but will uphold the law so long as some of the purposes are clearly legitimate. *Id.*; *Arthur v. Toledo*, 782 F.2d 565, 574 (6th Cir. 1986) (“We hold that absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate’s motivations in an equal protection clause context.”).¹⁰

⁹ In *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme Court criticized *So. Alameda Spanish Speaking Org.*, to the extent the Ninth Circuit nevertheless permitted a cause of action to proceed without a showing of discriminatory intent. 426 U.S. at 244-45.

¹⁰ See also *Bd. of Trustees v. Garrett*, 531 U.S. 356, 367 (2001) (noting that even where animus is a motivating factor, a law survives where there is also a conceivable legitimate purpose behind it); *Soto-Padró v. Public Bldgs. Auth.*, 675 F.3d 1, 6 (1st Cir. 2012) (in a case alleging that unconstitutional political discrimination was a motivating factor in public employee’s termination, claim rejected where there are both “lawful” and “unlawful” reasons for the adverse employment action, and “the lawful reason alone would have sufficed to justify the [action].”) (quoting *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 359 (1995)).

In this case, the ballot pamphlet reveals only legitimate purposes. Those materials reflect that Proposition 14 contained an express purpose clause, according to which the measure was “adopted by the People of California to protect and preserve the right of every Californian to vote for the candidate of his or her choice.” (AA 235 [text of Proposition 14]; *see also* AA 7 [SAC, ¶ 21].) To that end, the measure, “along with legislation already enacted by the Legislature to implement [it], [we]re intended to implement an open primary system in California...” *Id.* The ballot arguments in favor of the measure also indicate that the measure was enacted to:

- “Reduce gridlock by electing the best candidates to state office and Congress, regardless of political party”;
- “Give independent voters an equal voice in primary elections”;
- “END THE BICKERING AND GRIDLOCK AND FIX THE SYSTEM”;
- “[L]essen the influence of the **major** parties, which are now under control of the special interests”;¹¹ and
- Implement a “[n]on-partisan measure[]” to “push our elected officials to begin working together for the common good.”

(AA 233-234 [Argument in Favor of Proposition 14 and Rebuttal to Argument Against Proposition 14 [emphasis added].])

In essence, while voters are perfectly free to band together into political parties to advance their ideological and political interests, the voters of California legitimately concluded that they no longer wished to permit political parties, which are putatively private associations, to effectively monopolize the State’s electoral

¹¹ This particularly undermines Plaintiffs’ claim that the intent was to target *minor* parties.

machinery for that purpose to the detriment of those voters who do not affiliate with those private associations.

Nor does the State have a constitutional obligation to establish such a forum for political parties to advertise their political beliefs. “Ballots serve primarily to elect candidates, not as fora for political expression.” *Timmons*, 520 U.S. at 363. And again, it is beyond cavil that a State may properly adopt a nonpartisan method of electing public officers, as California has done with Proposition 14. “[I]n 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). Plaintiffs have never cited any case to the contrary.

Plaintiffs suggest that the purposes identified in the Proposition 14 ballot pamphlet were rejected by the Supreme Court in *California Democratic Party v. Jones*, 530 U.S. 567 (2002).¹² That simply misstates *Jones*. The Court held that interests in ensuring more voter choice and greater participation, an increased sense of fairness, and increasing the representativeness of elected officials were insufficient to justify the “severe” burden of letting non-party-members select a party’s official nominee, with all the associational burdens that entailed. In other words, the state did not have a legitimate interest in *altering the ideological views of private associations*. But that is not what Proposition 14 does. Political parties remain perfectly free to choose their nominees and political positions; but they are no longer given a formal mechanism for institutionalizing those positions through the electoral process, and

¹² See ARB at pp. 18-19.

there is no constitutional requirement that political parties be given such a formal mechanism.

Indeed, the *Jones* Court further expressly affirmed that the State's legitimate interests could be adequately protected "by resorting to a *nonpartisan* blanket primary" like Proposition 14. *Jones*, 530 U.S. at 585 (italics in original). The Court explained:

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. ... [¶] ... **Respondents' legitimate state interests** and petitioners' First Amendment rights are not inherently incompatible. To the extent they are in this case, the State of California has made them so by forcing political parties to associate with those who do not share their beliefs.

Id. at 585-86 (boldface added).

In light of the plainly-expressed, non-discriminatory purposes for Proposition 14 that are revealed in the ballot pamphlet, Plaintiffs cannot plausibly state a claim for invidious discrimination by the electorate in enacting Proposition 14, and the trial court's sustaining of the demurrers was proper and correct.

2. The fact that Proposition 14's *opponents* warned that minor parties might be harmed by its adoption does not support the inference that the voters adopted the measure with the purpose of causing any such harm.

Alternatively, Plaintiffs claim that because an opposing ballot argument contained in the voter pamphlet in connection with Proposition 14 stated that minor parties would likely be kept from

the general election ballot, the voters intended that purpose. (ARB at p. 23.) They cite no case in support of this proposition, and the law is to the contrary.

First, Plaintiffs conveniently gloss over the fact that it was the *opponents* of Proposition 14—not its supporters—that predicted dire effects for the minor parties in their “Rebuttal to Argument In Favor Of Proposition 14.”¹³ There is no reason to assume that the voters accepted this doomsday prediction. The California Supreme Court has held, “We are mindful of the fact that ballot measure opponents frequently overstate the adverse effects of the challenged measure, and that their ‘fears and doubts’ are not highly authoritative in construing the measure.” *Legislature v. Eu*, 54 Cal. 3d 492, 505 (1991), *cert. denied*, 503 U.S. 919 (1992). *See also NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 66 (1964) (“[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. ‘The fears and doubts of the opposition are no authoritative guide to the construction of legislation.’”); *Ross v. RagingWire Telecommuns., Inc.*, 42 Cal. 4th 920, 929 (2008) (rejecting opponents’ ballot arguments as a guide to voter intent).¹⁴

¹³ See AA 234 (Rebuttal to Argument Against Proposition 14).

¹⁴ In *Legislature v. Eu*, the Supreme Court made an exception to this rule because the Court found it significant that the proponents of the measure did not use their rebuttal to respond to the opponents’ argument in the ballot pamphlet. 54 Cal. 3d at 505. In this case, however, Proposition 14’s supporters had no opportunity to respond to the opponents’ argument in the ballot pamphlet, because this argument regarding minor parties was raised for the first time in the opponents’ rebuttal. *See Monette-Shaw v. San Francisco Bd. of Supervisors*, 139 Cal. App. 4th 1210, 1223 n.15 (2006) (making this very distinction). The principal argument in

The voters may, instead, have credited the public statements of Proposition 14's *supporters*, disputing the claim that minor parties would be harmed by Proposition 14. (See Interveners-Respondents' Supplemental Appendix, filed herewith ["IRSA"], pp. 9-26.)¹⁵

Second, even if the voters did believe the opponents' predictions, their adoption of Proposition 14 is not proof of a discriminatory intent. It is black letter law that discriminatory intent "implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279. It is precisely because courts have no manageable way of determining which of the purposes expressed in a ballot pamphlet motivated the voters' support that they have adopted the rule set forth above, that when the official ballot materials disclose multiple possible motivations for the enactment of a facially-neutral law, the courts will not delve further into the voters' intent, but will uphold the law so long as some of the purposes are clearly legitimate.

opposition claimed instead that voters would not know whether they are choosing a Democrat, Republican, Libertarian, or Green Party candidate, because "CANDIDATES WILL BE ALLOWED TO CONCEAL THEIR PARTY AFFILIATION FROM VOTERS." (See AA 234.) Proposition 14's proponents did publicly dispute the opponents' premise elsewhere. (See IRSA 9-26.)

¹⁵ Judicial notice may be taken of relevant newspaper articles under Evidence Code § 452(h). *People v. Hardy*, 2 Cal. 4th 86, 175 n.24 (1992). The California Supreme Court has looked to pre-election press in considering the intent underlying a ballot measure. *Cal. Housing Fin. Agency v. Patitucci*, 22 Cal. 3d 171, 178 (1978); *Carlos v. Superior Court*, 35 Cal. 3d 131, 144 n.12 (1983), *overruled on other grounds by*, *People v. Anderson*, 43 Cal. 3d 1104 (1987).

II.

CONCLUSION.

For the foregoing reasons, the trial court properly sustained the demurrers to Plaintiffs' equal protection claim in the Second Amended Complaint, and Plaintiffs cannot plausibly amend their complaint to state a legally-sufficient claim for invidious discrimination under the equal protection clause.

The judgment should therefore be AFFIRMED.

Respectfully submitted,

August 1, 2014

NIELSEN MERKSAMER

PARRINELLO GROSS & LEONI LLP

By:



Marguerite Mary Leoni
Christopher E. Skinnell

Attorneys for Interveners/Respondents
CALIFORNIANS TO DEFEND THE OPEN
PRIMARY, INDEPENDENT VOTER PROJECT,
ABEL MALDONADO, AND DAVID
TAKASHIMA

PROOF OF SERVICE

I, KERI L. HARMON, 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 August 1, 2014, at approximately 11:00 a.m., I electronically served a copy of the:

1. **Intervener/Respondents' Motion To Strike A Portion Of Appellants' Reply Brief That Raises A New Argument For The First Time Or, Alternatively, For Permission To File Surreply;**
2. **Intervener/Respondents' [Proposed] Order Striking Appellants' Belated Reply Argument [Or Granting Permission To File Surreply];**
3. **Intervener/Respondents' [Proposed] Surreply Addressing A Portion Of Appellants' Reply Brief That Raises A New Argument For The First Time;**
4. **Intervener/Respondents' [Proposed] Supplemental Appendix;**
5. **Intervener/Respondents' Objection To Appellants' Request For Judicial Notice;**
6. **Intervener/Respondents' [Proposed] Order Denying Appellants' Request For Judicial Notice; and**
7. **Request for Oral Argument.**

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:

Dan Siegel
dan@siegelyee.com; danmsiegel@gmail.com
Michael Siegel
michael@siegelyee.com
SIEGEL & YEE

Kari Krogseng
Kari.Krogseng@doj.ca.gov
Peter Chang
Peter.Chang@doj.ca.gov; pchang@kirkland.com
OFFICE OF THE STATE ATTORNEY GENERAL

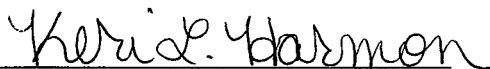
And (copy of brief only) mailed to:

Clerk, Superior Court
Appeals Division
1225 Fallon Street
Oakland, California 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, 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
August 1, 2014, at San Rafael, California.


KERI L. HARMON

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'
[Proposed] SUPPLEMENTAL APPENDIX**

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

NIELSEN MERKSAMER

PARRINELLO GROSS & LEONI LLP

James R. Parrinello, SBN 63415

Marguerite Mary Leoni, SBN 101696

Christopher E. Skinnell, SBN 227093

2350 Kerner Boulevard, Suite 250

San Rafael, California 94901

Tel: (415) 389-6800; Fax: (415) 388-6874

Attorneys for Interveners and Respondents

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

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NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP
JAMES R. PARRINELLO (SBN 63415)
MARGUERITE MARY LEONI (SBN 101696)
CHRISTOPHER E. SKINNELL (SBN 227093)
2350 Kerner Boulevard, Suite 250
San Rafael, California 94901
TELEPHONE: (415) 389-6800
FACSIMILE: (415) 388-6874
Email: jparrinello@nmgovlaw.com
Email: mleoni@nmgovlaw.com
Email: cskinnell@nmgovlaw.com

Attorneys for Intervener-Defendants
INDEPENDENT VOTER PROJECT, DAVID
TAKASHIMA, ABEL MALDONADO &
CALIFORNIANS TO DEFEND THE OPEN
PRIMARY

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

MICHAEL RUBIN, STEVE COLLETT,
MARSHA FEINLAND, CHARLES L.
HOOPER, KATHERINE TANAKA, C.T.
WEBER, CAT WOODS, GREEN PARTY OF
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FREEDOM PARTY OF CALIFORNIA,

Plaintiffs,

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ENDORSED
FILED
ALAMEDA COUNTY
MAY 28 2013
CLERK OF THE SUPERIOR COURT
By Angela Yamsuan

Case No.: RG11605301

ASSIGNED FOR ALL
PURPOSES TO JUDGE
LAWRENCE JOHN APPEL

**INTERVENERS'
SUPPLEMENTAL
REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF
DEMURRER TO
UNVERIFIED SECOND
AMENDED COMPLAINT;
MEMO OF POINTS &
AUTHORITIES**

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

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Date: 5/28 Int. SA

1 NIELSEN MERKSAMER
2 PARRINELLO GROSS & LEONI LLP
3 JAMES R. PARRINELLO (SBN 63415)
4 MARGUERITE MARY LEONI (SBN 101696)
5 CHRISTOPHER E. SKINNELL (SBN 227093)
6 2350 Kerner Boulevard, Suite 250
7 San Rafael, California 94901
8 TELEPHONE: (415) 389-6800
9 FACSIMILE: (415) 388-6874
10 Email: jparrinello@nmgovlaw.com
11 Email: mleoni@nmgovlaw.com
12 Email: cskinnell@nmgovlaw.com

13 *Attorneys for Intervener-Defendants*
14 INDEPENDENT VOTER PROJECT, DAVID
15 TAKASHIMA, ABEL MALDONADO &
16 CALIFORNIANS TO DEFEND THE OPEN
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2 PARRINELLO GROSS & LEONI LLP
3 JAMES R. PARRINELLO (SBN 63415)
4 MARGUERITE MARY LEONI (SBN 101696)
5 CHRISTOPHER E. SKINNELL (SBN 227093)
6 2350 Kerner Boulevard, Suite 250
7 San Rafael, California 94901
8 TELEPHONE: (415) 389-6800
9 FACSIMILE: (415) 388-6874
10 Email: jparrinello@nmgovlaw.com
11 Email: mleoni@nmgovlaw.com
12 Email: cskinnell@nmgovlaw.com

13 *Attorneys for Intervener-Defendants*
14 INDEPENDENT VOTER PROJECT, DAVID
15 TAKASHIMA, ABEL MALDONADO &
16 CALIFORNIANS TO DEFEND THE OPEN
17 PRIMARY

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

20 MICHAEL RUBIN, STEVE COLLETT,
21 MARSHA FEINLAND, CHARLES L.
22 HOOPER, KATHERINE TANAKA, C.T.
23 WEBER, CAT WOODS, GREEN PARTY OF
24 ALAMEDA COUNTY, LIBERTARIAN PARTY
25 OF CALIFORNIA, and PEACE AND
26 FREEDOM PARTY OF CALIFORNIA,

27 *Plaintiffs,*

28 vs.

DEBRA BOWEN, in her official capacity as
California Secretary of State,

Defendant.

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

Intervener-Defendants.

Case No.: RG11605301

ASSIGNED FOR ALL
PURPOSES TO JUDGE
LAWRENCE JOHN APPEL

**INTERVENERS'
SUPPLEMENTAL
REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF
DEMURRER TO
UNVERIFIED SECOND
AMENDED COMPLAINT;
MEMO OF POINTS &
AUTHORITIES**

DATE: June 4, 2013

TIME: 9:00 a.m.

DEPT: 16

RESERVATION#: R-1377385

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on June 4, 2013, at 9:00 a.m., in Department 16 of the
3 above-captioned Court, located at 1221 Oak Street, Oakland, California 94612, Intervener-
4 Defendants herein, INDEPENDENT VOTER PROJECT (“IVP”), DAVID TAKASHIMA, ABEL
5 MALDONADO and CALIFORNIANS TO DEFEND THE OPEN PRIMARY (“CADOP”), will
6 request the Court to take judicial notice of the following documents:

7 Exhibit B: Editorial, “Endorsements 2010: Don’t Fear An Open Primary; Political
8 Parties, Major and Minor, Are Overstating the Effect of Proposition 14,”
9 LOS ANGELES TIMES (May 26, 2010), p. A20.

10 Exhibit C: John Marelius, “Proposition 14 Holds Promise to Change Primaries,” SAN
11 DIEGO UNION-TRIBUNE (Feb. 7, 2010), p. A-1.

12 Exhibit D: George Skelton, “Capitol Journal: Give Open Primary a Chance; It
13 Wouldn’t End Partisanship—But It Would Be A Start,” LOS ANGELES
14 TIMES (Feb. 11, 2010), p. A2.

15 Exhibit E: Editorial, “Vote Yes on Proposition 14,” SAN JOSE MERCURY-NEWS (Apr. 5,
16 2010).


17 Exhibit F: Torey Van Oot, “Minor Parties Fear Extinction under Proposition 14,”
18 SACRAMENTO BEE (May 18, 2010), p. A1.

19 Exhibit G: Editorial, “We Like Possibilities of Open-Primary System,” FRESNO BEE
20 (Sept. 14, 2009), p. B3.

21 This Request is supported by the Declaration of Christopher E. Skinnell, attached hereto as
22 Exhibit A, and the Points and Authorities attached hereto.

23 Dated: May 28, 2013

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

24
25
26 By: 
27 Christopher E. Skinnell
Attorneys for Intervener-Defendants

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POINTS AND AUTHORITIES

Judicial notice may be taken of relevant newspaper articles under Evidence Code § 452(h). *People v. Hardy*, 2 Cal. 4th 86, 175 n.24 (1992). The California Supreme Court has looked to pre-election press in considering the intent underlying a ballot measure. *Cal. Housing Fin. Agency v. Patitucci*, 22 Cal. 3d 171, 178 (1978); *Carlos v. Superior Court*, 35 Cal. 3d 131, 144 n.12 (1983), *overruled on other grounds by, People v. Anderson*, 43 Cal. 3d 1104 (1987).

Respectfully submitted,

Dated: May 28, 2013

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

By: 
Christopher E. Skinnell
Attorneys for Intervener-Defendants

1 **PROOF OF SERVICE**

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

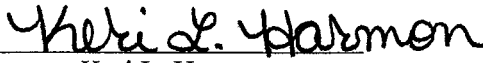
5 On May 28, 2013, I caused the foregoing document described as **INTERVENERS'**
6 **SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEMURRER**
7 **TO UNVERIFIED SECOND AMENDED COMPLAINT; MEMO OF POINTS &**
8 **AUTHORITIES** to be served on the individuals listed below as follows:

| | |
|---|--|
| 9 Dan Siegel, Esq. 10 Michael Siegel, Esq. 11 Siegel & Yee 12 499 14th Street, #220 13 Oakland, CA 94612 14 Ph: (510) 839-1200 Email: danmsiegel@gmail.com Email: michaeljwsiegel@gmail.com (Attorneys for Plaintiffs) | Kari Krogseng, Esq. Deputy Attorney General Office of the Attorney General 1300 I Street Sacramento, CA 95814 Ph: (916) 322-1067 Email: kari.krogseng@doj.ca.gov (Attorney for Defendant Debra Bowen) |
|---|--|

15 **BY U.S. MAIL:** By following ordinary business practices and placing for pickup by the
16 United States Postal Service at 2350 Kerner Boulevard, Suite 250, San Rafael, California
17 94901 on May 28, 2013, copies of the above documents in an envelope or package
designated by U.S. MAIL with postage paid or provided for.

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

20 Executed in San Rafael, California on May 28, 2013. I declare under penalty of perjury,
21 under the laws of the State of California, that the foregoing is true and correct.

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23 Keri L. Harmon

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EXHIBIT A

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I, CHRISTOPHER E. SKINNELL, declare under penalty of perjury:

1. I am over 18 years of age. I make this declaration of my personal knowledge.
2. I am one of the attorneys for Interveners in this action.
3. On or about May 28, 2013, I downloaded the following newspaper articles from

Lexis-Nexis:

- Editorial, “Endorsements 2010: Don’t Fear An Open Primary; Political Parties, Major and Minor, Are Overstating the Effect of Proposition 14,” LOS ANGELES TIMES (May 26, 2010), p. A20.
- John Marelius, “Proposition 14 Holds Promise to Change Primaries,” SAN DIEGO UNION-TRIBUNE (Feb. 7, 2010), p. A-1.
- George Skelton, “Capitol Journal: Give Open Primary a Chance; It Wouldn’t End Partisanship—But It Would Be A Start,” LOS ANGELES TIMES (Feb. 11, 2010), p. A2.
- Editorial, “Vote Yes on Proposition 14,” SAN JOSE MERCURY-NEWS (Apr. 5, 2010).
- Torey Van Oot, “Minor Parties Fear Extinction under Proposition 14,” SACRAMENTO BEE (May 18, 2010), p. A1.
- Editorial, “We Like Possibilities of Open-Primary System,” FRESNO BEE (Sept. 14, 2009), p. B3.

4. True and correct copies of those articles are attached hereto as Exhibits B-G, respectively.

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

Executed this 28th day of May, 2013, in San Rafael, California.



Christopher E. Skinnell

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EXHIBIT B



1 of 1 DOCUMENT

Copyright 2010 Los Angeles Times
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Los Angeles Times

May 26, 2010 Wednesday
Home Edition

SECTION: MAIN NEWS; bad desk code; Editorial Desk; Part A; Pg. 20

LENGTH: 561 words

HEADLINE: ENDORSEMENTS 2010;

Don't fear an open primary;

Political parties, major and minor, are overstating the effect of Proposition 14.

BODY:

California politics are enlarged and enlivened by the presence of minor parties. They rarely succeed in electing a candidate to office, but they broaden political debate and thus test mainstream assumptions. So when those parties, most notably the Greens, claim that some new development threatens their existence, it's worth listening.

What to do, however, when the Greens jump into bed with Democrats and Republicans to oppose a ballot measure intended to shake up major party domination of California politics? It's then that the wise voter should proceed with hearty skepticism.

In recent days, the debate over Proposition 14, which would abolish California's partisan primaries for most offices and replace them with a system similar to Los Angeles' process for electing its leaders, has turned into a debate over whether it would hurt the viability of third parties. On Saturday, Green Party supporters argued that the measure would go so far as to "destroy" the smaller parties. On Monday, a coalition of opponents raised the level of hyperbole with the bold claim that it would "end democracy in California." It wouldn't. Proposition 14 would allow voters to select their favorite candidate in a primary, just as they do today. The top two finishers would then advance to a general election. The winner would get the office. That's hardly revolutionary. The only difference from today's system is that the primary would include all candidates from all parties, and that the top two finishers in that contest could both be Democrats or Republicans -- or Greens, for that matter. In the end, to win the office, a candidate would still need to win the support of a majority of voters.

So why are Greens so exercised over this measure? Because it would mean that minor party candidates would not make it to the second round of elections in many districts. That would deny the Green Party publicity, and that's their fear. It wouldn't deny them offices in any part of the state where they enjoy strong support, and it wouldn't help them elect their candidates in those areas where they've failed to convince a majority of voters that they have more to offer than the big parties. For the most part, they would go on losing in June just as they now lose in November.

What ought to reveal this campaign as a sham is that the state Democratic and Republican parties are supporting the Greens in their opposition and crying crocodile tears over the fate of minor parties should Proposition 14 pass. Let's be clear: Neither the state GOP nor the state Democratic Party cares about the Green Party. Indeed, they'd be perfectly happy to see the Greens "destroyed." The major parties are opposing Proposition 14 because it upends rules that they have mastered and used to protect safe seats for their members -- and to protect them from challenges by organizations such as the Green Party.

ENDORSEMENTS 2010; Don't fear an open primary; Political parties, major and minor, are overstating the effect of Proposition 14. Los Angeles Times May 26, 2010 Wednesday

Proposition 14 won't solve all of California's political problems. As we have said before, it's a modest step that, in combination with redistricting reform, will remove some of today's incentive for elected officials to cater merely to the most partisan elements of their base. If that drives state Democratic and Republican leaders a little bit crazy, that's reason enough to vote for it -- and more than enough for the Greens to take a second look at their bedfellows in this campaign.

LOAD-DATE: May 26, 2010

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EXHIBIT C



1 of 1 DOCUMENT

Copyright 2010 The San Diego Union-Tribune
The San Diego Union-Tribune

February 7, 2010 Sunday

SECTION: Main News; Pg. A-1

LENGTH: 1023 words

HEADLINE: Proposition 14 holds promise to change primaries

BYLINE: By John Marelius, STAFF WRITER

BODY:

California voters will have the opportunity in June to replace partisan primaries with a system in which candidates of all parties will be listed on the same ballot and the top two vote-getters would advance to the general election, regardless of party.

Proposition 14 was placed on the ballot at the insistence of state Sen. Abel Maldonado, a Santa Maria Republican who extracted the concession from reluctant legislators in exchange for his decisive vote to pass the budget last year.

If the measure is approved, it would take effect for the 2012 elections. Congressional and state races would be conducted in much the same way that nonpartisan city, county and school district elections have been conducted in California. It would not affect presidential primary elections.

Maldonado, whom Gov. Arnold Schwarzenegger has nominated for lieutenant governor, contends that the "top-two open primary" system would make the Legislature less partisan and more productive.

"If you like the way you elect your board of supervisors, you'll love the open primary," he said in a recent conference call with reporters. "And if you love dysfunction and you love the idea of Abel Maldonado sleeping under his desk at 3:30 in the morning to vote on the budget, then you'll hate the open primary."

Parties hate the idea, but leaders say they feel their money is better spent electing Democrats and Republicans, so they're not inclined to mount an all-out effort to defeat it.

"This measure will contribute to the further political Balkanization of California. It will limit voter choice. It will not have the result its proponents claim. Other than that, it's a fine idea," said Ron Nehring, chairman of the California Republican Party.

John Burton, chairman of the California Democratic Party, agreed with his GOP counterpart: "Despite what all these good-government types say, it increases the cost of campaigns because you have to mail to all voters. And that'll give lobbyists more influence than they have now."

Because the top two vote-getters in the primary would advance to the general election, that sets up the potential for both candidates to be from the same party, especially in areas where one party has a substantial majority of the registered voters -- Democrats in San Francisco or west Los Angeles; Republicans in north or east San Diego County.

Democratic strategist Garry South, a supporter of the open primary, said the dynamic will benefit voters.

Proposition 14 holds promise to change primaries The San Diego Union-Tribune February 7, 2010 Sunday

"If you're a Republican in a heavily Democratic district and you vote for somebody in the Republican primary who moves forward to the general and is going to get 23 percent of the vote, you can make yourself feel good by voting for that person in the general election, but they're not going to win," South said.

"At least in an open primary with the top two candidates moving forward, if you live in a Democratic district, it is very possible if not probable that the final two candidates will be Democrats. But at least if it's a competitive race, you as a Republican have the option of voting for whichever one you find least objectionable."

California tried the open primary during the 1990s, but the U.S. Supreme Court struck it down as an infringement on political parties' right to free association because that system allowed the entire electorate to choose party nominees. Backers of Proposition 14 believe they have gotten around the court's objection because the top-two system does not result in party nominations.

Three states have variations on the top-two primary system -- Alaska, Louisiana and Washington.

Lara Brown, a professor of political science at Villanova University, said she has changed her mind about the merits of the open primary.

"I have in the past believed in closed primaries and the importance of party members being able to choose their nominees," said Brown, a native Californian. "But California has such a partisan, incumbent-protection redistricting plan that for most districts in California, the general election doesn't matter."

Allan Hoffenblum, publisher of the California Target Book, which analyzes state campaigns, said because congressional and legislative districts were drawn to favor a particular party, it results in candidates being elected, for all practical purposes, in low-turnout primaries rather than high-turnout general elections.

"There are legislators who get elected who receive less than 5 percent of the votes of registered voters in their districts," he said.

Hoffenblum said the open primary could have a moderating influence by forcing candidates to tailor their messages to the entire electorate, rather than the most ideologically driven members of their own party.

But Bruce Cain, director of the Washington program for the University of California Berkeley, doesn't buy it.

"Louisiana has it, and nobody would argue that their politics are more moderate," he said. "Washington has had various versions of it, and nobody would argue that they're less partisan. I think the whole thing is oversold."

Ivan Kenneally, a professor of political science at the Rochester Institute of Technology, agreed.

"If you look at congressional elections in Washington and Louisiana, the tone of the campaigns hasn't changed," he said.

"You're still going to have powerful issues that have incredibly intractable fault lines. By moving to an open primary, you're not going to make that magically disappear."

Richard Winger, publisher of Ballot Access News, opposes Proposition 14 because it would virtually exclude minor party and independent candidates from general elections.

"I'm a proponent of minor parties and independents," Winger said. "I think they add a lot to our election campaigns. They can say what they want, because they know most of the time they're not going to win."

Former state Sen. Steve Peace, who sponsored an initiative after which Proposition 14 is patterned, said he believes it would be possible for a minor-party candidate to crack the top two.

"In Duncan Hunter's district, you could have a contest between a Republican and a Libertarian," the San Diego Democrat said. "In San Francisco, you could get a Democrat and a Green."

LOAD-DATE: February 9, 2010

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EXHIBIT D



1 of 1 DOCUMENT

Copyright 2010 Los Angeles Times
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Los Angeles Times

February 11, 2010 Thursday
Home Edition

SECTION: MAIN NEWS; Metro Desk; Part A; Pg. 2

LENGTH: 902 words

HEADLINE: CAPITOL JOURNAL;
Give open primary a chance;
It wouldn't end legislative partisanship -- but it would be a start

BYLINE: GEORGE SKELTON

DATELINE: FROM SACRAMENTO

BODY:

Paralytic party partisanship in Sacramento can't be cured by an open primary system alone, but it could commence the treatment.

That's the conclusion one can glean from a report released Wednesday night by the nonpartisan Public Policy Institute of California.

"An open primary doesn't guarantee that we're going to have a more moderate Legislature, but it's more likely," says the report's author, Eric McGhee, a research fellow at the institute.

"People should temper their expectations. It's not a panacea for partisanship."

McGhee analyzed the arguments for and against Prop. 14 on the June ballot. The measure would create an open primary system -- called a "top-two" primary -- that would replace party nominating elections, except for president.

Starting in 2012, there would be only one primary ballot, and it would be open to all candidates and voters. The top two vote-getters, regardless of party, would advance to the general election, similar to the way local officials are elected in California.

In a heavily Democratic legislative district, it's possible that the runoff could pit two Democrats against each other -- one a liberal, the other more moderate. Ditto a district dominated by GOP voters -- a conservative against a centrist. It's not inconceivable that a Green Party candidate could wind up in a San Francisco runoff, or a Libertarian in an Orange County general election.

But the vast majority of runoffs would involve a traditional matchup between a Democrat and a Republican. Third-party candidates would take their shot in the primary instead of the general election. Candidates could designate a party "preference" on the ballot -- placing, for example, a "D" or "R" beside their names.

The goal is to force candidates to appeal to a wider range of voters than they currently do in party primaries dominated by ideologues. The idea is to elect more pragmatic moderates, especially to the frequently gridlocked Legislature.

CAPITOL JOURNAL; Give open primary a chance; It wouldn't end legislative partisanship -- but it would be a start
Los Angeles Times February 11, 2010 Thursday

Under the current semi-closed primary system, people registered Decline to State -- independents -- are allowed to cast either a Democratic or Republican ballot, but relatively few do.

Party officials despise any form of open primary because they fear losing power, as if they've ever had much in California anyway. But party conventions still could endorse candidates.

Researcher McGhee examined top-two state primary systems in Washington and Louisiana. And he reviewed California's brief experiment with another form of open primary -- a "blanket ballot" system -- in the 1998 and 2000 elections.

Under the blanket system, there was one ballot that listed all candidates of every party. Any registered voter could weigh in. A Democratic voter, for example, could help select the Republican nominee.

The parties sued and won. The U.S. Supreme Court agreed that each party had a right to bar nonmembers from their nominating process. The new top-two version gets around that by eliminating nominations altogether. It's identical to the Washington state system that has been approved by the Supreme Court.

Prop. 14's "constitutionality is not in serious doubt," the institute report says.

McGhee recalls that California's adoption of the blanket primary "sent shock waves through the political community."

It didn't last long enough, however, to have much impact. The researcher found only "a slight advantage" for moderate legislative candidates. "Moderates were more likely to be elected to the Assembly [and] voting in the Assembly was more bipartisan during those years."

But "there was no comparable effect in the state Senate."

There are two explanations that come to mind: The Senate has fewer elections and less turnover. And in that era, liberal John Burton of San Francisco was the Senate leader.

Nonpartisan primaries, such as proposed by Prop. 14, "do sometimes have a moderating effect," the researcher writes.

McGhee assessed the claim of open primary opponents that one party might engage in mischief by orchestrating a vote for the rival party's weakest candidate. But that wasn't common on California's blanket ballots, the researcher found.

Supporters contend that open primaries produce larger turnouts, McGhee notes, "because voters who feel left out under the current system would have a reason to show up at the polls." He concludes, "there is some evidence to support this claim" based on the blanket primaries.

Opponents argue that an open primary would increase the cost of campaigning -- and thus the influence of bank-rolling special interests -- because candidates would need to reach more voters. The researcher disputes that theory. Expenses did increase during blanket primaries, he says, "but at a rate consistent with the broader trend in campaign spending."

One current example of the need for an open primary and less party partisanship is the Assembly Democrats' lining up against the confirmation of Gov. Arnold Schwarzenegger's nominee for lieutenant governor, Republican Sen. Abel Maldonado of Santa Maria.

Ironically, Maldonado is responsible for pushing Prop. 14 onto the ballot. And that's particularly offensive to Democratic politicians.

An open primary "will be unlikely to change California politics overnight," McGhee writes. "There may be a long period of adjustment before the state arrives at a new, potentially more moderate equilibrium."

Fine. The body politic is sick and suffering. Let the healing begin.

--

george.skelton@latimes.com

LOAD-DATE: February 11, 2010

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EXHIBIT E



1 of 1 DOCUMENT

Copyright 2010 San Jose Mercury News
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San Jose Mercury News (California)

April 5, 2010 Monday

SECTION: NEWS; Opinion; Editorials

LENGTH: 521 words

HEADLINE: Editorial: Vote Yes on Proposition 14

BYLINE: Mercury News Editorial

BODY:

Voters are fed up with the ineffectiveness of their elected representatives. And yet few realize that our political system perpetuates the dysfunction — rewarding those who stake out extreme ideological positions rather than encouraging pragmatic solutions to complex problems.

Proposition 14 on the June 8 ballot would create a "top-two" primary system to help reverse those incentives. If it passes, all candidates for statewide office and Congress, regardless of party, will appear on the same primary ballot. Voters of all persuasions will choose among them, like they do in most local elections. The top two finishers will appear on the November ballot, even if they turn out to be from the same party.

The result, we believe, will be a broader electorate choosing more results-oriented representatives — people who respond to the needs of all constituents, not just the small slice who dominate primary elections.

California had open primaries in 1998 and 2000 after the adoption of Proposition 198. According to a study by the reform group California Forward, those elections had higher turnouts, and voters felt they were more fair and offered more choice.

"Budgets were more often passed on time and there were more bipartisan coalitions," the study said.

A few moderate legislators from both parties were sent to Sacramento in those years. One of them, Republican Abel Maldonado, says he wouldn't have survived a typical Republican primary. Now a senator, he forced the Democratic leadership in Sacramento to put the open primary back on the ballot in exchange for his vote on the budget last year.

The U.S. Supreme Court had struck down Proposition 198 in 2000, saying the two political parties have a right to choose their own nominees. Proposition 14 is modeled after a system used in Washington, which the Court upheld because it does not specifically select party nominees.

This spring, the Republican primary for governor shows much of what's wrong with the current system. Candidates Steve Poizner and Meg Whitman once were regarded as moderates, but they have raced to the right to get the nomination. Voters in November will just have to guess what the GOP nominee really believes.

Proposition 14 would end that ridiculous game. Successful candidates would have to appeal to the broadest number of voters, not the most extreme.

Editorial: Vote Yes on Proposition 14 San Jose Mercury News (California) April 5, 2010 Monday

The top-two primary system is opposed by both major parties, since it would diminish their power. They also say it would exclude third parties from the general election but the only member of the Green Party ever sent to the Assembly, Audie Bock of Oakland, was elected after an open primary.

One of Proposition 14's strongest supporters is the Silicon Valley Leadership Group, whose CEO members Democrats and Republicans ranked its passage among their top priorities. They worry that California's dysfunction will further erode the state's competitiveness.

No one, not even Maldonado, believes Proposition 14 will quickly change Sacramento. But combined with the citizens' redistricting process now under way, it should help promote problem-solving over rigid partisanship. Vote yes.

GRAPHIC:

LOAD-DATE: January 26, 2012

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EXHIBIT F



1 of 2 DOCUMENTS

Copyright 2010 Sacramento Bee (California)
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Sacramento Bee (California)

May 18, 2010 Tuesday

SECTION: A; Pg. 1

LENGTH: 973 words

HEADLINE: Minor parties fear extinction under Proposition 14

BYLINE: Torey Van Oot; tvanoot@sacbee.com

DATELINE: May 18 2010

BODY:

For registered members of California's minor parties, Proposition 14 isn't just about winning or losing elections. It's a matter of survival.

"It pretty much wipes us out," said John Reiger, former congressional candidate for the Peace and Freedom Party.

Proposition 14 would create a "top two" primary in which candidates of all party affiliations run on one primary ballot. The two candidates who win the most votes, regardless of party, would face off in the general election. The system would not apply to presidential primaries.

Supporters say the change would let voters choose the best candidate and give the 20 percent of voters registered as decline-to-state a greater say in elections.

The proposal to eliminate party primaries has drawn criticism from the state Democratic and Republican parties. But it's also opposed by members of California's qualified minor parties, who say they would be locked out of the new political process.

Candidates who are neither Republican nor Democratic don't exactly thrive under the current system.

The last one elected to the Legislature was the Green Party's Audie Bock of Oakland, who made it to the state Assembly in a 1998 special election. Bock lost a bid for a full term the next year after re-registering as a decline-to-state voter.

Minor-party leaders readily admit they represent a slim fraction of Californians. A combined 4.5 percent of the state's registered voters sign up with the American Independent, Green, Libertarian and Peace and Freedom parties. But they fear that Proposition 14 could strip some parties of their ballot-qualified status altogether.

"There's no question that any of the third parties represent a minority viewpoint. That's just the reality," Reiger said. "That doesn't mean that we should not have a legitimate place in the political structure in this country, in this state."

Under current law, parties seeking state recognition must register about 100,000 voters or win 2 percent of the vote in a general election held for statewide office in a non-presidential year. Without a guaranteed spot on the November ballot, minor party officials say they would have little shot at qualifying.

Maldonado pushes plan

Proponents say exposure to a broader base would give minor parties a boost. Voters currently restricted from participating in most of their primaries, including Republicans, Democrats and decline-to-state voters, could choose minor-party candidates.

They also point to higher election rates among third-party candidates running in local, nonpartisan elections.

"Under the system we have today, (minor party candidates) can't get their message out," said Lt. Gov. Abel Maldonado, who pushed to put Proposition 14 on the ballot. "The people are smarter than people think, than the politicians give them credit for. They'll choose the best candidates."

But Green Party gubernatorial candidate Laura Wells said even compared to the current hurdles, the challenge of running against establishment-backed candidates in the primary and the cost of running campaigns targeting a broader cross section of voters "would be virtually impossible to overcome."

"In the primary, the (candidates) with the greatest opportunity to win the top two would be the ones that have celebrity, but primarily they have a lot more funding," said Wells, a Green Party activist since the early 1990s.

Molly Milligan, a senior fellow with the nonpartisan Center for Governmental Studies, said cases where a third-party candidate emerged as one of the top two candidates would be "few and far between" under current legislative and congressional districts.

"It's perhaps an unintended consequence that you would be quieting their voices, but it's certainly a consequence," she said.

Milligan wrote a recent analysis arguing that with Proposition 14 in place, more than one-third of the state's legislative and congressional primaries over the last several election cycles would have resulted in either two Democrats or two Republicans facing each other in the general election. Each minor-party candidate in those races won on average just 5 percent of the vote in the 2008 general election when going head to head with Democrats and Republicans.

Though the makeups of some districts could shift after the upcoming redistricting process, Milligan said she could envision a Green Party candidate winning enough votes in San Francisco or a libertarian prevailing in some Orange County districts.

Minor-party activists say those odds aren't good enough.

"We will not be ghettoized to one county or two counties," said Green Party archivist Hank Chapot. "We want to run all out, we want to run in a fair campaign."

A nearly identical primary system approved by Washington state voters in 2004 has hurt minor parties.

Third parties recognized before the measure passed saw a significant drop in candidates for state and federal office. "It takes all the energy and enthusiasm out of the sails of minor parties," said Richard Winger, a Libertarian who advocates for greater ballot access. "People just give up, drop out."

But Jason Olson, executive director of IndependentVoice.org, said Proposition 14 would give the minor parties "significantly more clout" in a time when their registration numbers are dropping.

Instead of casting a "protest vote," he said, the minor parties could issue endorsements between the top two candidates in the general election, leveraging their votes to ensure their top issues and concerns are addressed by the campaigns.

"The question is, do they want to go the way of the dinosaurs and hold on to being able to run some candidates in a handful of races that get a small percentage of the vote ... (or) do something new that responds to the fact that voters are moving away to parties all together and exercise their power as a voting bloc to make new change," he said.

LOAD-DATE: May 18, 2010

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Fresno Bee (California)

September 14, 2009 Monday
FINAL EDITION

SECTION: MAIN NEWS; Pg. B3

LENGTH: 367 words

HEADLINE: We like possibilities of open-primary system

BYLINE: The Fresno Bee

BODY:

The California Republican Party is considering a proposal to bar independent voters from participating in the party's primary elections. The thinking of party leaders is that Republican nominees in partisan elections should be selected by the party's voters and nobody else.

That strikes us as a recipe for being the minority party in California for a long time. Even with the dysfunctional Democrats in the Legislature, the GOP can't cut into the big majority the Democrats hold in both legislative houses.

But the closed primary system could change in California next year, and that could help Republicans, even if they don't want to reach out to a broader constituency.

A measure on the June 2010 ballot called for an "open primary." Under that proposal, voters would choose from among all candidates in the first round of an election. Any voter could vote for any candidate, regardless of party. The top two finishers in the first round would then advance to a run-off to select the eventual winner.

Under such a system, there would be no official party nominees, so the Republicans' complaint about independents meddling in their affairs would not be an issue.

In most statewide races, as long as we have two viable major parties, the final two finishers would probably still be one candidate from each party.

But in legislative districts where the party registration is lopsided, you might see two Republicans in the run-off, or two Democrats. You might even get one major party member and one from a minor party, such as the Greens in a left-leaning district or the Libertarians in a district whose voters are more supportive of free markets and individual rights.

This kind of system would change the dynamics of California's electoral system and, eventually, its government. Candidates in the primaries would have to appeal not only to their fellow partisans but also to independent voters and, perhaps, even to members of the opposite party.

The eventual winners could legitimately claim they represented all district voters. That would certainly be an improvement on the current system.

Tell us what you think. Comment on this editorial by going to fresnobee.com/opinion, then click on the editorial.

We like possibilities of open-primary system Fresno Bee (California) September 14, 2009 Monday

NOTES: EDITORIALS

LOAD-DATE: September 14, 2009

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I, KERI L. HARMON, 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 August 1, 2014, at approximately 11:00 a.m., I electronically served a copy of the:

1. **Intervener/Respondents' Motion To Strike A Portion Of Appellants' Reply Brief That Raises A New Argument For The First Time Or, Alternatively, For Permission To File Surreply;**
2. **Intervener/Respondents' [Proposed] Order Striking Appellants' Belated Reply Argument [Or Granting Permission To File Surreply];**
3. **Intervener/Respondents' [Proposed] Surreply Addressing A Portion Of Appellants' Reply Brief That Raises A New Argument For The First Time;**
4. **Intervener/Respondents' [Proposed] Supplemental Appendix;**
5. **Intervener/Respondents' Objection To Appellants' Request For Judicial Notice;**
6. **Intervener/Respondents' [Proposed] Order Denying Appellants' Request For Judicial Notice; and**
7. **Request for Oral Argument.**

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Dan Siegel
dan@siegelyee.com; danmsiegel@gmail.com
Michael Siegel
michael@siegelyee.com
SIEGEL & YEE

Kari Krogseng
Kari.Krogseng@doj.ca.gov
Peter Chang
Peter.Chang@doj.ca.gov; pchang@kirkland.com
OFFICE OF THE STATE ATTORNEY GENERAL

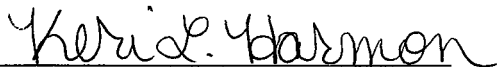
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KERI L. HARMON