

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'
OBJECTION TO APPELLANTS' REQUEST FOR
JUDICIAL NOTICE**

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

NIELSEN MERKSAMER

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

Intervener-Respondents oppose Plaintiff/Appellants' Request for Judicial Notice, filed on July 23, 2014, for the following reasons:

1. Appellants contend that the materials of which judicial notice is requested—"excerpts from the Secretary of State's Statement of the Vote concerning the June 3, 2014, statewide primary election in the State of California"—"tends to show that far fewer voters participate in the statewide primary election, as compared to the general election, and thus participation in the primary is an inadequate substitute for participation in the general election." That statement simply mischaracterizes the materials provided, which summarize historical turnout rates at primary elections, but which do not reflect participation rates at general elections that would permit the "comparison" that Appellants claim these materials enable.

2. "[O]nly relevant evidence is subject to judicial notice[.]" *Western States Petroleum Assn. v. Superior Court*, 9 Cal. 4th 559, 574 n.4 (1995). Under controlling United States Supreme Court case law, specifically *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the fact that turnout at a primary election is lower than turnout at the subsequent general election is not relevant to the constitutionality of Proposition 14:

Appellees argue that voter turnout at primary elections is generally lower than the turnout at general elections, and therefore enactment of § 29.18.110 has reduced the pool of potential supporters from which Party candidates can secure 1% of the vote. We perceive no more force to this argument than we would with an argument by a losing candidate that his supporters' constitutional rights were infringed by their failure to participate in the election. Washington has created no impediment to voting at the primary elections; every supporter of the Party in the State is free to cast his or

her ballot for the Party's candidates. As was the case in *Jenness v. Fortson*, 403 U.S. 431 (1971), "candidates and members of small or newly formed political organizations are wholly free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish. . . ." *Id.*, at 438. ***States are not burdened with a constitutional imperative to reduce voter apathy or to "handicap" an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot. . . .***

479 U.S. at 198 (emphasis added). See also *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 699-700 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1932 (U.S. 2012) ("despite the traditionally lower interest in primary elections than general elections, the burden is appropriately placed on the candidate to generate support and rally voters to vote in order to make it to the general election ballot. It is not the state's obligation to find or create an easier forum for establishing voter support."); *Rainbow Coalition of Okla. v. Okla. State Elec. Bd.*, 844 F.2d 740 (10th Cir. 1988) (rejecting minor parties' challenge to qualification statutes based on votes cast at past presidential elections, where turnout at such elections was higher than at gubernatorial elections).

3. Appellants provide no declaration to authenticate the materials provided, nor are they certified public records. See, e.g., *Wolf v. CDS Devco*, 185 Cal. App. 4th 903, 914-15 (2010) (declining to take judicial notice of court pleadings that were not properly authenticated); *E. Bay Asian Local Dev. Corp. v. Cal.*, 24 Cal. 4th 693, 711 n.5 (2000) ("Inasmuch as these documents may be considered legislative history *and are authenticated*, we may take judicial notice of them." (emphasis added)); *Jobe v. City of Orange*, 88 Cal. App. 4th 412, 416 (2001) ("Jobe's request for

judicial notice did not contain declarations attesting to the authenticity of any of the material. ... On January 11, the trial court issued its ruling denying the petition. It denied Jobe's request for judicial notice because the items were not authenticated, and it rejected Jobe's procedural complaints.").

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:

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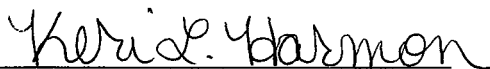
And (copy of brief only) mailed to:

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

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

Plaintiff/Appellants' Request for Judicial Notice, filed on July 23, 2014, is DENIED.

Dated: _____

Justice, Court of Appeal

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.

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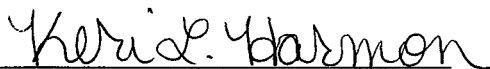
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