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August 6, 2014

Via Electronic Filing
The Honorable Jim Humes
California Court of Appeal
First Appellate District, Division 1
350 McAllister Street
San Francisco, CA 94102-4712

Re: Request to File Amicus Letter
(*Rubin v. Bowen*, Case No. A140387)

Dear Presiding Justice Humes and Associate Justices:

On behalf of the Green Party of California, we respectfully ask the Court's permission to file this Amicus Letter.

Our Amicus Letter asks the Court to reverse the trial court's ruling and remand this case to the trial court, for Plaintiffs-Appellants properly pleaded that Proposition 14 violates fundamental rights guaranteed to minor-party voters under the U.S. Supreme Court's seminal case *Anderson v. Celebrezze*.[1] Because those fundamental rights implicate a matter of great "public concern", the Court may exercise "great liberality" in admitting this Amicus Letter.[2]

The Green Party of California (the "Green Party")[3] was founded in 1990 and became a ballot-qualified party under state law in 1991, when more than 103,000 California voters filed voter registrations in which they affiliated with the Green Party. Proposition 14 has severely harmed the Green Party of California, for it has seriously impaired the Green Party's ability to recruit and support candidates for state and federal office. In this manner, Proposition 14 has deprived voters of their longstanding right to vote for Green Party and other minor-party candidates in the November general election.

## I. A Proven Record of Electoral Success

"All politics is local," as Tip O'Neill was wont to say. Indeed, the "farm team" of any party's candidates for state and federal office typically comes from locally elected officials like county supervisors and city councilmembers. Contrary to the Secretary of State's claims,[4] the Green Party has posted an impressive track record on the local level.

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1 *Anderson v. Celebrezze* (1983) 460 U.S. 780.

2 3B C.J.S. Amicus Curiae §3; *see also* 4 Am.Jur.2d Amicus Curiae §3; *State v. Medicine Bird Black Bear White Eagle* (Tenn.Ct.App. 2001) 63 S.W.3d 734.

3 While the Green Party of Alameda County is a party to this litigation, the Green Party of California (which is represented by different counsel) brings a critical, statewide perspective on how Proposition 14 has adversely affected the Green Party and minor parties as a whole across the State.

4 *Cf.* Secretary of State's Answering Brief, at 14.
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Since its founding, over 800 Green Party members have run for office. Significantly, 302 of the 647 members running for local office have been elected – a success rate of 47 percent. Among other leaders, Green Party member Gayle McLaughlin was elected Mayor of Richmond in 2006 and 2010; and Green Party member Dan Hamburg was elected County Supervisor of Mendocino County in 2010 and 2014. In even-year elections in 2010 and 2014, Green Party candidates contested a combined 97 local seats and won 39 of them, for a success rate of 40 percent. In odd-year elections in 2011 and 2013 (when there are fewer local races), Green Party candidates contested 43 local seats and won 28 of them – a success rate of 65 percent.

Moreover, Green Party candidates have not only made strong showings in, but have won elections for state office. In 1999, Green Party member Audie Bock won a State Assembly seat in a special election. In 2012, a Green Party Congressional candidate (Anthony W. Vieyra) earned 19 percent of the vote, but was denied access to the November 2012 ballot.[5] Citing the example of Ross Perot, election scholar Rick Hasen noted that minor-party candidates can alter the dynamics of a campaign even if they do not win. As Professor Hasen put it, "Losing minor parties does make the debate *less rich*."[6]

## II. Proposition 14's Partisan Election Regime

At the outset, we wish to touch upon a few key aspects of Proposition 14. *First*, contrary to Defendants' claims, Proposition 14 spawned a *partisan* election regime, not a non-partisan one. The Elections Code defines "nonpartisan office" to mean judicial and local offices, and *expressly excludes* federal offices and state executive and legislative offices.[7] Because Proposition 14 dictates how elections for federal and state offices must be held, its election regime is not non-partisan as a matter of law.[8]

Furthermore, as the Ninth Circuit has noted,[9] Proposition 14's election regime *requires* partisan ballots. Instead of banning all party labels from the ballot – the hallmark of a nonpartisan primary – Proposition 14 only allows candidates from one of the six State-recognized parties to list their party's name on the ballot.[10] All other

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5 Plaintiffs' Opening Brief, at 7 (giving 2012 results for Congressional District 35).

6 LA TIMES, Apr. 15, 2014, "Top-two primary might be bad for small-party candidates" (italics added), *available at* http://www.latimes.com/local/la-me-small-parties-20140415-story.html#axzz2ysoyNURh (last visited Aug. 5, 2014). Hasen, a law professor at the University of California-Irvine, publishes the influential Election Law Blog (*available at* electionlaw.org).

7 Elections Code §334 (excluding "voter-nominated" offices from definition of "nonpartisan") & *id.* §359.5 ("voter-nominated" offices defined as all federal offices and state legislative and executive offices).

8 Elections Code §359.5 (Proposition 14 applies to all "voter-nominated" offices: i.e., federal offices and state legislative and executive offices).

9 *Chamness v. Bowen* (9th Cir. 2013) 722 F.3d 1110, 1113.

10 Currently, California's "ballot-qualified" (State-recognized) parties are the American Independent, Democratic, Green, Libertarian, Peace and Freedom, and Republican Parties.

candidates are forced to state that they have "No Party Preference", even if they *do* belong to a political party.[11] Just as one example, a candidate from the Socialist Party (which is not a State-recognized party) must falsely state that he or she has "No Party Preference".

*Second*, beyond party labels, Proposition 14's partisan regime differs from nonpartisan elections in another critical aspect. Typically, nonpartisan elections are decided in the first round (the primary), if one candidate receives a majority (50 percent plus 1).[12] However, under Proposition 14's regime, no contest can be decided in the June "primary", even if a candidate receives a majority[13] – and for good reason. As the U.S. Supreme Court made clear in *Foster v. Love*,[14] the Tuesday after the first Monday of November in even-numbered years is the earliest date on which a State may hold a regularly scheduled election – and declare a winner – for any federal office.

*Third*, Proposition 14's regime eliminated a critical safety valve in our elections, by banning write-in candidates from running in the general election.[15] As the California Supreme Court has noted, "[T]he availability of a write-in candidacy provides the *flexibility to deal with unforeseen political developments* and may help ensure that the voters are given meaningful options on election day."[16] In contrast, the State of Washington – which employs another type of "top two" primary – does permit write-in voting.[17]

Needless to say, and contrary to Defendants' insinuations, Proposition 14's regime was not the only way to conduct a two-round, non-party-controlled election system. For instance, FairVote has proposed a two-round "Top 4" election system, whereby voters in November can choose from the top 4 finishers from the June primary by means of Ranked Choice Voting.[18]

The case of one elected official who until last spring represented part of the First Judicial District underscores a compelling need for write-in voting. Shortly before the

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[11] In *Chamness*, the Ninth Circuit expressly reserved judgment on whether it is unconstitutional to force minor-party candidates to falsely state that they have "No Party Preference". *Chamness*, *supra*, 722 F.3d at 1116 & n.4. *See also* Elections Code §13105(a).

[12] *See, e.g.,* LOS ANGELES CITY CHARTER §425 (general election held only if one candidate does not receive majority of votes cast in the primary election).

[13] CAL.CONST. art. ii §5(a).

[14] *Foster v. Love* (1997) 522 U.S. 67, 68-69.

[15] Elections Code §8606 (enacted by AB 1413 [Fong 2012] as implementing legislation to Proposition 14).

[16] *Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 718 (italics added) (*quoting Thompson v. Willson* (1967) 223 Ga. 370, 155 S.E.2d 401, 404), subsequently overruled on other grounds, *Edelstein v. San Francisco* (2002) 29 Cal.4th 164.

[17] Revised Code of Wash. (RCW) §29a.24.311, *available at* *http://apps.leg.wa.gov/RCW/default.aspx?cite=29a.24.311* (last visited Aug. 5, 2014).

[18] Fairvote, "Top 4 Elections", *available at* http://www.fairvote.org/reforms/instant-runoff-voting/top-four-elections/ (last visited Aug. 6, 2014).

June 2014 primary, then-State Senator Leland Yee – a leading candidate for Secretary of State – was arrested and indicted on federal arms trafficking and corruption charges.[19]

Suppose Yee had finished in the top two in the June 3, 2014 primary, but was not arrested and indicted until two weeks *after* the primary. Under state law, a candidate's name cannot be removed from an election's ballot, if he or she has qualified for that election.[20] California voters would then have faced the startling prospect of a Soviet-style "election": with only one viable candidate for Secretary of State, and without the option of writing in the name of any other candidate.

## II. Proposition 14's Harmful Effect on Voter Choice

Contrary to the Secretary of State's claims,[21] Proposition 14 has made it substantially – and often, prohibitively – more costly for minor-party candidates to run for public office. Before Proposition 14 was implemented, Green Party and other minor-party candidates could qualify for the ballot *without paying any filing fee*, provided that they collected 150 valid voter "signatures in lieu".[22] But after Proposition 14 was implemented, the amount of required signatures has increased by up to nearly 7,000 percent.

Instead of 150 signatures, a minor-party candidate must now collect a prohibitive quantity of signatures by February – nearly 9 months before the November general election.[23] Under Proposition 14, a minor-party candidate must now collect 10,000 valid signatures to run for statewide office without paying a filing fee (e.g., Secretary of State); 3,000 signatures for State Senate; and U.S. House of Representatives; and 1,500 signatures for State Assembly.[24]

If, like the vast majority of minor-party candidates, a candidate cannot collect those signatures, he or she must pay a filing fee of $1,740.00 to run for U.S. House of Representatives; $952.91 for State Senator; $952.91 for State Assembly; and from $2,783.78 (Insurance Commissioner) to $3479.74 (Governor) for statewide office.[25]

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[19] Associated Press, "California lawmaker faces gun, corruption charges", Mar. 26, 2014, http://bigstory.ap.org/article/fbi-california-state-sen-leland-yee-arrested (last visited Aug. 4, 2014).

[20] State law makes one narrow exception for judicial candidates. *See* Elections Code §8800 & §8801.

[21] *See* Secretary of State's Answering Brief, at 18 (claiming that it is "eas[y]" for minor-party candidates to qualify for the ballot under Proposition 14).

[22] Former Elections Code §8106(a)(6).

[23] Secretary of State's website, *available at* p. 3-6 of http://www.sos.ca.gov/elections/statewide-elections/2014-primary/section-3-candidate-filing.pdf (last visited Aug. 6, 2014) (signatures-in-lieu due 103 days before June primary).

[24] Elections Code §8106(a)(1)(2)(3) (as amended by Proposition 14's implementing legislation).

[25] Federal candidates must pay a filing fee equal to 1 percent of the salary for the position; state candidates, a filing fee equal to 2 percent of the salary for the position. *See* Elections Code

Moreover, taking out space in the voter guide has become critical for Green Party candidates, for they cannot afford to reach voters by means of costly mailers or media advertisements. Thus, appearing in the voter guide offers them the best – if not the *only* – opportunity to reach all voters, finish in the top two, and appear on the ballot of the November general election.

Currently, the fee for including a candidate's statement in the state voter guide ranges from $25.00 (for 1 word) to $6,250.00 (for the 250-word maximum).[26] Thus, the combined cost for a minor-party candidate to appear on the ballot and publish a full ballot statement under Proposition 14 ranges from $7,202.91 (State Assembly or Senate) to $9,729.74 (Governor) – raising potential constitutional issues.[27]

Adding insult to injury, minor-party candidates must now spend more for less time on the ballot. If they qualify for the ballot in early March, minor-party candidates will most likely be on the ballot until only June, not November: five months fewer than before, when voter interest (and media coverage) is not "near its peak".[28]

Due to the troubling rise in candidate costs, it has become significantly more difficult for the Green Party to recruit and support candidates across the State. Unlike the two major parties, the Green Party does not have a large fundraising base. Before Proposition 14 was implemented, the Green Party did not need to help candidates qualify for the ballot, because its candidates could do so by collecting 150 signatures. The Green Party could then focus its modest financial resources on (1) helping candidates publish a statement in the voter guide, and (2) supporting their grassroots campaigns.

However, after Proposition 14 was implemented, the Green Party's ability to recruit and support candidates was severely hamstrung. As we have shown earlier, a significant number of Green Party members have won contests at the local level, and comprise the Green Party's "farm team" of state and federal candidates. Yet because its candidates must now effectively pay to qualify for the ballot, the Green Party's already stretched resources have been foisted with a *triple* burden: (1) helping candidates pay

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§8103(a) (setting forth formulas used to compute filing fees); *see also* Secretary of State's Summary of Filing Fees, *available at* http://www.sos.ca.gov/elections/statewide-elections/2014-primary/section-3-candidate-filing.pdf (last visited Aug. 5, 2014). If a candidate does not collect the full number of required signatures, the filing fee will be prorated based on the number of signatures collected. *See* Elections Code §8106(b)(3).

[26] Pursuant to Gov't Code §85601, candidates who accept voluntary spending limits eligible to publish statement in state voter guide at $25.00 per word, up to a maximum of 250 words. *See* Secretary of State's website, *available at* http://www.sos.ca.gov/elections/elections_cand_stat.htm (last visited Aug. 5, 2014)

[27] *See Bullock v. Carter* (1972) 405 U.S. 134, 144 (State barred from imposing onerous candidate filing fees that "fall[] with unequal weight on *voters*, as well as candidates, according to their economic status." (italics added).

[28] *See Washington State Republican Party v. Washington State Grange* (9th Cir. 2012) 676 F.3d 784, 794 (*"Washington II"*).

onerous filing fees, (2) helping candidates publish a statement in the voter guide, and (3) supporting their grassroots campaigns.

To no surprise, voter choice has dropped to a historic low due to the financial hardships imposed by Proposition 14's regime. Between 1992 and 2010, the Green, Libertarian, Peace and Freedom, and American Independent Parties fielded, on average, a total of 127 primary ballot candidates for state and federal office (excluding President) in each election cycle. But in 2012, when Proposition 14 was first implemented, those parties were able to qualify only 21: the fewest since 1966, when *only* Democrats and Republicans were on the ballot.

Similarly, in 2010 (i.e., before Proposition 14 was implemented), voters could choose from 33 minor-party candidates for statewide office. However, in 2014, voters could choose from only 10 minor-party candidates for statewide office[29] – a nearly 70 percent decline. Equally troubling, no minor-party candidate will appear on the ballot for any statewide office in the November 2014 general election.[30]

The experience of Green Party candidates for state and federal legislative (e.g., State Assembly, U.S. House of Representatives) office only underscores this troubling trend. In 2010 (before Proposition 14 was implemented), there were 19 Green Party candidates for state and federal office. This year (2014), there were only 10 such candidates – a reduction of nearly 50 percent. Against this stark backdrop, there can no question that Proposition has harmed minor-party candidates.

## IV. Legal Analysis

As Plaintiffs properly pleaded, Proposition 14 has violated the fundamental rights of California's voters under *Anderson v. Celebrezze*, for its ballot-access restrictions have, in their totality, "limit[ed] the field of candidates from which voters might choose."[31] Simply put, the State may not "discriminate[] against those candidates and – of particular importance – against those *voters*" whose preferences "lie outside" the political mainstream.[32]

Here, there can be no question that Proposition 14 has "limited the field of candidates from which voters might choose", both in the June primary and November general election. *First*, although the Green Party has a potent "farm team" of local

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[29] Statewide offices are elected every four years.

[30] Secretary of State's June 3, 2014 Statement of Vote Summary Pages, *available at* http://www.sos.ca.gov/elections/sov/2014-primary/pdf/20-summary.pdf (last visited Aug. 6, 2014).

[31] *Anderson*, *supra*, 460 U.S. at 787 (*quoting Bullock*, *supra*, 405 U.S. at 143).

[32] *Anderson*, *supra*, 460 U.S. at 794 (italics added). As the U.S. Supreme Court explained, "The exclusion of candidates … burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate *serves as a rallying point for like-minded citizens*[.] *Id.* at 787-88 (italics added).

elected officials, Proposition 14's onerous filing fees have severely impaired the Green Party's ability to recruit and support candidates for state and federal office.

As a direct result, the number of Green Party and other minor-party candidates has plummeted to a historic low. This year, no minor-party candidate will appear on the November ballot for Governor or other statewide office, and the number of Green Party candidates running for state or federal office has fallen from 19 (in 2010) to 10 (in 2014). Against this backdrop, it is beyond dispute that Proposition 14 has "limited the field of candidates from which voters might choose."

*Second*, by banning write-in candidates in the November general election, Proposition 14's regime has not only removed a critical political safety valve, but eliminated an alternative means for minor-party candidates to qualify for the general-election ballot. As a result, voters face a Hobson's choice if they learn unfavorable information *after* the June primary about a candidate whose name *cannot be removed* from the November election.[33] By banning write-in voting in the general election, Proposition 14 has "limited the field of candidates from which voters might choose."

*Third*, as Plaintiffs have shown, Proposition 14 violates the precepts of *Jenness v. Fortson*,[34] for it requires minor-party candidates to secure more than 5 percent of the vote in the primary. In 2012, a Green Party Congressional candidate (Anthony W. Vieyra) earned 19 percent of the vote, but was denied access to the November 2012 ballot. In response, the Secretary of State discounts Mr. Vieyra's example, and notes that major-party candidates have lost elections under Proposition 14 despite garnering more than 19 percent of the vote.[35]

At the outset, the Secretary of State misses the point: the constitutional question is not how major-party candidates have fared, but whether the voters have been deprived of the opportunity to vote for minor-party candidates in the general election. Tellingly, the Secretary of State also omits a critical fact. Namely, in *any* "top two" regime currently in place,[36] no minor-party candidate has *ever* advanced to the general election in any race where at least 2 major-party candidates were also running. By barring minor-party candidates from participating in the general election, Proposition 14 has "limited the field of candidates from which voters might choose."

*Finally*, as Plaintiffs have shown, the five-month gap between the June primary and the November general election is unconstitutional, when combined with the other onerous handicaps imposed by Proposition 14 upon minor-party candidates and voters. As the Ninth Circuit has explained, *Anderson* made it clear that minor-party candidates

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33 *See* Elections Code §8800 & §8801.

34 *Jenness v. Fortson* (1971) 403 U.S. 431.

35 Secretary of State's Answering Brief, at 15.

36 "Top two" election regimes are currently used in Washington, California, and Louisiana.

have the right to "an opportunity to appeal to voters at a time when election interest is *near its peak*[.]"[37]

Here, if minor-party candidates seek to run for office without paying a fee, Proposition 14's regime now forces them to collect up to 10,000 signatures 9 months before the general election – a time when voter interest is *not* "near its peak". Moreover, according to the Secretary of State, voter turnout under Proposition 14's regime has fallen to a historic low: last June, barely one-quarter of California voters participated in the primary.[38] By denying minor-party candidates the "opportunity to appeal to voters at a time when election interest is near its peak", Proposition 14 has "limited the field of candidates from which voters might choose."

## V. Conclusion

*Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike*[.]

-- U.S. Supreme Court, *Jenness v. Fortson*[39]

Simply put, Proposition 14's partisan election regime has unlawfully forced minor-party candidates and the voters who support them into a one-size-fits-all, Procrustean bed – the exact outcome that the U.S. Supreme Court has *forbidden*. Accordingly, the Green Party of California asks the Court to reverse the trial court's ruling, and thus enable the parties to develop a full, factual record on remand.

Sincerely,

/s/

***Gautam Dutta, Esq.***
Managing Partner

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[37] *Washington II*, *supra*, 676 F.3d at 794 (italics added).

[38] Secretary of State, "June Primary Results Certified, Showing Record Low Turnout and Record High Vote-by-Mail Rate," July 11, 2014, *available at* http://www.sos.ca.gov/admin/press-releases/2014/db14-057.htm (last visited Aug. 6, 2014.)

[39] *Jenness*, *supra*, 403 U.S. at 442.

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PROOF OF SERVICE

I, Gautam Dutta, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above entitled action.

On Aug. 6, 2014, at approximately 10 pm, I served the following document(s) via electronic filing:

Green Party of California's Request to File Amicus Letter in Support of Appellants and Amicus Letter

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

Michael Siegel, Siegel & Yee; Michael@siegelyee.com

Peter Chang, Office of the Attorney General; Peter.Chang@doj.ca.gov

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A copy was also mailed to:

Clerk, Superior Court

Appeals Division

1225 Fallon Street

Oakland, CA 94612-4293

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

Clerk, Supreme Court of California

350 McAllister St.

San Francisco, CA 94102
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed in San Jose, California.

/s/_____

Gautam Dutta