

**In the Supreme Court
of the State of California**

MICHAEL RUBIN, et al.,
Plaintiffs and Appellants,

v.

ALEX PADILLA, as Secretary of State, et al.,
Defendants and Respondents,

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

Intervenors and Respondents.

**INTERVENER/RESPONDENTS'
ANSWER TO PETITION FOR REVIEW**

After a Decision of the Court of Appeal
First Appellate District, Division No. 1
Appeal No. A140387

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

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. BACKGROUND.....	6
A. Proposition 14 (The Top Two Candidate Open Primary Act).....	6
B. Proposition 14 Was Consciously Modeled On Washington State’s Top-Two System, Which Was Upheld Against A Facial Challenge In <i>Washington State Grange v. Washington Republican Party</i> , 552 U.S. 442 (2008) (“ <i>Washington I</i> ”)	8
III. STANDARD OF REVIEW.....	10
A. Federal Pleadings Standards Apply To Petitioners’ Claims, Which Are Brought Under 42 U.S.C. § 1983	10
B. Substantive Standard Governing Election Law Challenges	11
IV. THIS CASE DOES NOT PRESENT AN IMPORTANT ISSUE OF LAW WARRANTING REVIEW, BECAUSE THE UNANIMOUS, WELL- REASONED DECISION OF THE COURT OF APPEAL MERELY APPLIED ESTABLISHED CASE LAW IN REJECTING PETITIONERS’ BALLOT ACCESS CLAIM.....	12
A. The Court Of Appeal’s Decision Is Consistent With <i>Washington State Republican Party v. Washington State Grange</i> , 676 F.3d 784 (9th Cir. 2012), <i>cert. denied</i> , 568 U.S. ___, 133 S. Ct. 110 (Oct. 1, 2012) (“ <i>Washington II</i> ”), Which Rejected A Challenge To Washington’s Top-Two System, As A Matter Of Law, That Was Indistinguishable From The Minor Parties’ Ballot Access Claim In This Case	12

B.	The Court of Appeal Correctly Held That The Burden On The Minor Parties' Associational Rights Of Being Kept Off The General Election Ballot Is "Slight," Or "Modest," And That Strict Scrutiny Is Therefore Inapplicable	13
1.	Ample case law from the United States Supreme Court, Ninth Circuit, and this Court, support the Court of Appeal's holding that there is no severe burden where all candidates have broad access to the primary election and the same opportunity as all other candidates to advance to the general election	14
2.	In <i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986), the Supreme Court rejected a claim that a candidate must be given access to the general election ballot due to lower turnout at the primary election	17
3.	The fact that California holds its primary in June does not render Proposition 14 invalid either.....	19
C.	The Court of Appeal Correctly Held That The Trial Court Acted Properly In Sustaining A Demurrer Without Leave To Amend After Giving Petitioners Three Chances To State A Claim	22
D.	Limiting The General Election To The Top Two Vote-Getters From The Primary Serves Important Governmental Interests.....	28
V.	CONCLUSION	30
	CERTIFICATION OF BRIEF LENGTH.....	31
	PROOF OF SERVICE	32

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	<i>passim</i>
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	10
<i>Bergland v. Harris</i> , 767 F.2d 1551 (11th Cir. 1985)	25
<i>Brown v. Bowen</i> , Case 2:12-cv-05547-PA-SPx (C.D. Cal.) (Oct. 9, 2012 judgment)	8
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1991)	<i>passim</i>
<i>Cal. Democratic Party v. Jones</i> , 530 U.S. 567 (2000)	8, 9, 29
<i>California Democratic Party v. Jones</i> , 984 F. Supp. 1288 (E.D. Cal. 1998)	25, 29
<i>Catsouras v. Dept. of Cal. Hwy. Patrol</i> , 181 Cal. App. 4th 856 (2010), <i>rev. den.</i> , 2010 Cal. LEXIS 3456 (Cal. Apr. 14, 2010)	10
<i>Chamness v. Bowen</i> , 722 F.3d 1110 (9th Cir. 2013)	<i>passim</i>
<i>Cook v. Brewer</i> , 637 F.3d 1002 (9th Cir. 2011)	11
<i>Council of Alternative Political Parties v. Hooks</i> , 179 F.3d 64 (3d Cir. 1999)	21
<i>Cruz v. Melecio</i> , 204 F.3d 14 (1st Cir. 2000)	25
<i>Daniels-Hall v. Nat'l Educ. Ass'n</i> , 629 F.3d 992 (9th Cir. 2010)	10

<i>Davis v. HSBC Bank</i> , 691 F.3d 1152 (9th Cir. 2012).....	11
<i>Democratic Party v. Reed</i> , 343 F.3d 1198 (9th Cir. 2003)	9
<i>E.L. White, Inc. v. Huntington Beach</i> , 21 Cal. 3d 497 (1978).....	11
<i>Edelstein v. City & County of San Francisco</i> , 29 Cal. 4th 164 (2002)	<i>passim</i>
<i>Field v. Bowen</i> , 199 Cal. App. 4th 346 (2011).....	8, 23
<i>Galbiso v. Orosi Public Utility Dist.</i> , 182 Cal. App. 4th 652 (2010)	5
<i>Gerawan Farming, Inc. v. Kawamura</i> , 33 Cal. 4th 1 (2004)	25
<i>Holder v. Hall</i> , 512 U.S. 874 (1994)	30
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971)	21
<i>Jones v. City of Phila. Voter Registration</i> , 498 Fed. Appx. 143 (3d Cir. 2012).....	23
<i>LaRouche v. Fowler</i> , 152 F.3d 974 (D.C. Cir. 1998)	23
<i>Lawrence v. Blackwell</i> , 430 F.3d 368 (6th Cir. 2005), <i>cert. denied</i> , 547 U.S. 1178 (2006).....	4, 21, 23
<i>Libertarian Party of N.D. v. Jaeger</i> , 659 F.3d 687 (8th Cir. 2011), <i>cert. denied</i> , 132 S. Ct. 1932 (U.S. 2012).....	19, 23
<i>Libertarian Party of New Hampshire v. William M. Gardner, Sec’y of State</i> , 2014 U.S. Dist. LEXIS 178195 (D.N.H. Dec. 30, 2014).....	25

<i>Lindsay v. Bowen</i> , 750 F.3d 1061 (9th Cir. 2014)	23
<i>Mandel v. Bradley</i> , 432 U.S. 173 (1977).....	25
<i>Maxton v. Western States Metals</i> , 203 Cal. App. 4th 81 (2012)	11
<i>McClure v. Galvin</i> , 386 F.3d 36 (1st Cir. 2004).....	23
<i>Milonopoulos v. Bowen</i> , Case No. 2:14-cv-05973-DOC-VBK (C.D. Cal.) (Dec. 24, 2014 order).....	8
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986).....	<i>passim</i>
<i>Navarro v. Neal</i> , 716 F.3d 425 (7th Cir. 2013)	23
<i>Neitzke v. Williams</i> , 490 U.S. 319 (1989).....	10
<i>Rainbow Coalition of Okla. v. Okla. State Elec. Bd.</i> , 844 F.2d 740 (10th Cir. 1988)	19
<i>Rubin v. Padilla</i> , 233 Cal. App. 4th 1128 (2015).....	<i>passim</i>
<i>Rutman Wine Co. v. E. & J. Gallo Winery</i> , 829 F.2d 729 (9th Cir. 1987).....	5
<i>Stone v. Board of Elec. Comm'rs for City of Chicago</i> , 750 F.3d 678 (7th Cir. 2014).....	22, 23
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	26, 27, 28
<i>Swanson v. Worley</i> , 490 F.3d 894 (11th Cir. 2007)	21
<i>Tashjian v. Republican Party of Conn.</i> , 479 U.S. 208 (1986)	20

<i>Timmons v. Twin Cities Area New Party</i> , 520 U.S. 351 (1997)	28
<i>Wash. State Grange v. Wash. Republican Party</i> , 552 U.S. 442 (2008).....	<i>passim</i>
<i>Wash. State Republican Party v. Wash. State Grange</i> , 676 F.3d 784 (9th Cir. 2012), <i>cert. denied</i> , 568 U.S. ___, 133 S. Ct. 110 (Oct. 1, 2012)	<i>passim</i>
<i>Wood v. Meadows</i> , 207 F.3d 708 (4th Cir. 2000)	21

STATUTES

42 U.S.C. § 1983	10
Federal Voting Rights Act (52 U.S.C. § 10301)	8, 30
Cal. Elec. Code § 1201	19
Cal. Elec. Code § 2151.....	6
Cal. Elec. Code § 8002.5	15
Cal. Elec. Code § 8002.5(b)	7
Cal. Elec. Code § 8020	15
Cal. Elec. Code § 8040	15
Cal. Elec. Code § 8041.....	15
Cal. Elec. Code § 8062	16
Cal. Elec. Code § 8103.....	15
Cal. Elec. Code § 8103(a)(1).....	16
Cal. Elec. Code § 8106.....	15
Cal. Elec. Code § 8141.5.....	7
Cal. Elec. Code §§ 8300-8304	6

Cal. Elec. Code § 8606	30
Cal. Elec. Code § 13302(b)	9
Cal. Elec. Code § 15452	7

CONSTITUTIONAL AUTHORITIES

U.S. CONST. amend. I	1
U.S. CONST. amend. XIV (equal protection).....	11
CAL. CONST. art. II, § 5.....	7

OTHER AUTHORITIES

California Rules of Court, Rule 8.500(b)	1
Fed. R. Civ. Proc. 12(b)(6)	10, 23, 24
Senate Bill 6 (2009-2010 Reg. Sess.), <i>codified at</i> Stats. 2009, ch. 1.....	7

I.

INTRODUCTION.

Review should be denied. No ground for review exists under California Rules of Court, Rule 8.500(b). Petitioners—minor political parties and candidates affiliated with such parties—had three separate opportunities to try to adequately plead facts showing that Proposition 14, the nonpartisan Top Two Candidate Open Primary Act, unconstitutionally deprives them of access to the ballot. The Court of Appeal’s unanimous, well-reasoned opinion correctly affirmed the trial court’s conclusion that Petitioners could not do so, as a matter of law, holding “the failure of minor party candidates to appear on the general election ballot does not substantially burden their members’ rights of political association and expression, and California’s interest in expanding participation in the electoral process is adequate to justify any burden that may occur.” *Rubin v. Padilla*, 233 Cal.App.4th 1128, 1135 (2015).¹

In deciding this case, the Court of Appeal did not break any new ground. Rather, it followed, and correctly applied, established precedents of this Court and the United States Supreme Court. Accordingly, there is no need for review to “settle an important question of law.

Nor is there any need for review to “secure uniformity of decision.” Petitioners have identified no case holding that minor parties’ First Amendment and Equal Protection rights are violated by top-two primaries, and in fact, the Court of Appeal’s decision aligns with the decision in the only other case to decide such a question: the

¹ Petitioners do not request that this Court review the Court of Appeal’s holding that “because California’s electoral system treats all political parties identically, plaintiffs’ claim that they are denied equal protection of the laws is groundless.” 233 Cal. App. 4th at 1135.

decision of the Ninth Circuit in *Washington State Republican Party v. Washington State Grange*, 676 F.3d 784 (9th Cir. 2012) (“*Washington II*”). That decision affirmed the dismissal, as a matter of law, of a virtually identical ballot access claim, brought against Washington State’s top-two primary law by the Libertarian Party in that State. This fact is significant because, in all material respects, Proposition 14 was consciously modeled on Washington’s law. Also significantly, the United States Supreme Court denied certiorari of the *Washington II* decision. 568 U.S. ___, 133 S. Ct. 110 (Oct. 1, 2012).

Both the *Washington II* court and the Court of Appeal below held that the burden a top-two system imposes on candidates who are prevented from advancing to the general election is “slight” where there is easy access to the primary ballot and all candidates and parties are subject to the same rules. Faced with so limited a burden, the *Washington II* court and the Court of Appeal below correctly held that strict scrutiny is inapplicable, and that any reasonable, nondiscriminatory state interest would therefore be sufficient to sustain the system.

Like the *Washington II* decision, the Court of Appeal’s decision below follows the United States Supreme Court’s decision in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). In *Munro*, the Supreme Court held that if minor parties are given equal access to compete in a statewide primary, “[i]t can hardly be said that Washington’s voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election.” *Id.* at 199.

Petitioners attempt to distinguish the *Washington II* and *Munro* decisions on the sole ground that Washington conducts its

primaries in August, whereas California conducts its primaries in June. Noting that voter turnout at the 2012 and 2014 primaries has been approximately half the turnout at those years' subsequent general elections, Petitioners contend that California's earlier election date deprives them of access to a ballot at a time of "peak voter interest." This is a distinction without legal significance.

Crucially, the *Munro* Court squarely rejected the claim that lower turnout at the primary election renders it an inadequate substitute for participation at the general election. *See* 479 U.S. at 198.

Moreover, Petitioners' "peak voter interest" test is based on a misapplication and misreading of the decision of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), which struck down a March filing deadline for independent presidential candidates to appear on the November general election ballot as unduly burdensome. The *Anderson* Court held that the early filing deadline placed an unconstitutional burden on voting and associational rights because it prevented independents from taking advantage of unanticipated political opportunities that might arise later in the election cycle and required independent candidates to gather petition signatures at a time when voters were not attuned to the upcoming campaign, while applying later timelines to candidates affiliated with major parties.

However, the Court of Appeal correctly distinguished *Anderson* from this case. *Rubin*, 233 Cal. App. 4th at 1151-52. After all, in *Munro* the U.S. Supreme Court itself distinguished *Anderson* and other ballot access cases, on the ground that the challenged rules at issue in those cases "operated to foreclose a candidate's access to *any* statewide ballot." 479 U.S. at 199. The *Munro* court concluded that there was a "significant difference," *id.* at 199, between an

absolute bar like the one in *Anderson*, and a system like Proposition 14 that “affords a minor-party candidate easy access to the primary election ballot and the opportunity for the candidate to wage a ballot-connected campaign,” *id.*, notwithstanding that the “ballot-connected campaign” was a primary election.

Moreover, *Anderson* and the other ballot access cases upon which Petitioners rely embody a principle of nondiscrimination; in *Anderson*, for instance, independent candidates were subjected to far earlier deadlines than candidates affiliated with the Democratic and Republican Parties. 460 U.S. 803-04. Applying *Anderson*, courts have repeatedly upheld early election deadlines—even as early as March—when all candidates were subject to the same rules, as is true under Proposition 14. *See, e.g., Lawrence v. Blackwell*, 430 F.3d 368 (6th Cir. 2005), *cert. denied*, 547 U.S. 1178 (2006) (upholding March filing deadline as a matter of law, where all candidates were subject to the same deadline).

Petitioners contend that they must at least be entitled to a trial on the question of whether June is close enough to the time of “peak voter interest” to pass constitutional muster. This contention is wrong for several reasons. First, the “peak voter interest” test, as just discussed, is derived from a line of cases in which candidates were not given access to *any* ballot. Here, the key, constitutionally-significant facts are undisputed and indisputable—minor party candidates have ready access to the primary election ballot, and they are subject to the same rules as every other candidate. As such, their claim fails as a matter of law under *Munro*.

And more broadly, as the Court of Appeal correctly recognized, “there is nothing remarkable about granting a motion to dismiss in an election-law case if careful consideration of the complaint shows

that the plaintiff has not stated a claim.” *Rubin*, 233 Cal. App. 4th at 1155 (quoting *Stone v. Board of Elec. Comm’rs for City of Chicago*, 750 F.3d 678, 868 (7th Cir. 2014)). In fact, the ballot access claim in *Washington II* was decided as a matter of law without a hearing to consider evidence! The Court of Appeal affirmed the district court’s grant of a 12(b)(6) motion. *See Washington II*, 676 F.3d at 793-95.

Finally, the Court of Appeal rightly concluded that because the burdens faced by Petitioners are “modest,” 233 Cal. App. 4th at 1150, and “limited,” *id.*, the State’s reasonable, nondiscriminatory interests readily justify the imposition of those modest burdens. *Id.* at 1151. Petitioners’ arguments to the contrary rely on (1) the incorrect assumption that strict scrutiny applies (*see* Petition at 19-20), and (2) an incorrect view—rejected by the Court of Appeal—that past case law rules some of the interests that support Proposition 14 out of bounds. (*See* Petition at 22-23.)

Simply put, the trial court and the Court of Appeal rightly held that Petitioners’ ballot access claims fail to state a claim as a matter of law. The trial court, having given Petitioners two opportunities to amend their ballot access claim, rightly dismissed the claim on the third time without leave to amend.² There is no need for further review by this Court.

² Though Petitioners made a cursory request for leave to amend in the trial court (AA 255), they failed to meet their burden of identifying specific amendments to cure the defects in the Second Amended Complaint—a failure that was particularly striking given that they had already had two prior chances to amend. *See Galbiso v. Orosi Public Utility Dist.*, 182 Cal. App. 4th 652, 663 (2010) (burden of showing a complaint can be amended to state a cause of action falls on the plaintiff); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) (repeated failure to state a claim supports conclusion that amendment would be futile).

II.

BACKGROUND.

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

California voters adopted Proposition 14 on June 8, 2010. Proposition 14 amended the state Constitution to abolish political party primaries and replace them with a type of open primary election known as “top two,” or “voter-nominated” primary election.

Under the prior partisan primary system, only candidates and voters registered with a qualified political party could participate in that party’s primary election; the top vote-getter in each party’s primary became the party’s official nominee, and each qualified party was guaranteed a place on the general election ballot for its nominee. Decline-to-State (“DTS”) voters and those affiliated with non-qualified parties were prohibited from participating in the primary, where the election was often effectively decided.³ And candidates unaffiliated with a qualified party were excluded from the primary, and could access the general election ballot only through the more stringent “independent” nomination process (*see* Elec. Code §§ 8300-8304), or write-in candidacies.

³ As of January 2010, there were more than 3.4 million DTS voters in the State, according to the Secretary of State, comprising more than 20% of total registered voters. (Intervener-Respondents’ Appendix [hereafter “IRA”], p. 78.) DTS voters are voters who decline to register with any political party. DTS voters were barred from voting in a party’s primary under the former system, unless the party permitted it. *See* Elec. Code § 2151. Voters affiliated with a non-qualified party (or “political body”) could not participate.

Under Proposition 14 and its implementing legislation, Senate Bill 6 (“SB 6”),⁴ the political parties no longer control the primary. Instead, any candidate may run in the primary for congressional or state elective office (now called “voter-nominated” offices), and any voter may vote at the primary election for any candidate. *See* CAL. CONST. art. II, § 5 (as amended by Proposition 14); Elec. Code § 8002.5(b). The two candidates receiving the highest vote totals for each office at the primary then compete for the office at the ensuing general election. *See* CAL. CONST. art. II, § 5; Elec. Code §§ 8141.5 and 15452. Though the candidates may list their personal party “preference” on the ballot, the candidate is not the party’s nominee, and *no party* is guaranteed a place on the general election ballot unless its preferred candidate is one of the top two vote-getters. *Id.* Except for the candidate’s ability to list his or her party “preference” on the ballot, this system works much like the nonpartisan general/runoff system by which many local officials in California are elected. As the Ninth Circuit has characterized the measure, Proposition 14 “fundamentally changes the California election system by eliminating party primaries and general elections with party-nominated candidates, *and substituting a nonpartisan primary and a two-candidate runoff.*” *Chamness v. Bowen*, 722 F.3d 1110, 1112 (9th Cir. 2013). *See also Rubin*, 233 Cal. App. 4th at 11-45-46 (making a similar comparison).

This is not the first time that Proposition 14 has been challenged in the courts. Far from it! Proposition 14 has been perpetually (and unsuccessfully) challenged since its enactment in 2010. Besides this case, four other challenges have been filed; each

⁴ Senate Bill 6 (2009-2010 Reg. Sess.), *codified at* Stats. 2009, ch. 1.

was rejected. *See Chamness*, 722 F.3d at 1110 (rejecting challenges to provisions of Proposition 14’s implementing legislation that (1) prohibit write-in votes for the general election and (2) permit candidates to identify a preference only for “qualified” political parties); *Field v. Bowen*, 199 Cal. App. 4th 346 (2011) (same); *Brown v. Bowen*, Case 2:12-cv-05547-PA-SPx (C.D. Cal.) (Oct. 9, 2012 judgment) (dismissing federal Voting Rights Act challenge); *Milonopoulos v. Bowen*, Case No. 2:14-cv-05973-DOC-VBK (C.D. Cal.) (Dec. 24, 2014 order) (dismissing challenge to limit on write-in voting).

Preliminary injunctions were denied in all five cases, including this one. Consequently, the top-two system was used in 2012 and 2014.

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

In 2000, the United States Supreme Court struck down California’s Proposition 198—the “blanket primary” law—enacted by the voters in 1996. *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000). Under that law, voters could vote for any candidate at the primary without regard to party affiliation, but unlike Proposition 14 the top vote-getter from each party advanced to the general election *as the party’s nominee*. The Supreme Court held that the “blanket primary” violated political parties’ associational rights by forcing them to accept—as the party’s official nominee and “standard-bearer”—candidates chosen by other parties’ voters, with whom the

party might not wish to associate. At the time, Washington had an identical “blanket primary” system, which was also enjoined.⁵

In response, and based on language in *Jones* itself,⁶ Washington’s voters adopted a top-two primary system in 2004, known as I-872. Washington’s political parties immediately challenged I-872, claiming it violated *Jones*. In *Washington State Grange v. Washington Republican Party*, 552 U.S. 442 (2008) (“*Washington I*”), the Supreme Court rejected a facial challenge to Washington’s system, distinguishing *Jones* on the ground that—unlike the blanket primary—the top-two system the primary does not actually choose party nominees and the top two vote-getters in the primary run in the general election, regardless of party.

Proposition 14 was explicitly modeled on the Washington system, taking its cue from the Court’s ruling in *Washington I*. (See Appellants’ Appendix [hereafter “AA”] 235 [text of Prop. 14 from ballot pamphlet].) Like the Washington system, the Proposition 14 primary does not choose parties’ nominees, though candidates may share their personal party “preference” with the voters. The parties, however, remain free to endorse candidates, and Proposition 14 even permits the parties to list their endorsements in the sample ballot. See Elec. Code § 13302(b).

⁵ *Democratic Party v. Reed*, 343 F.3d 1198 (9th Cir. 2003).

⁶ As the Court of Appeal noted, the *Jones* Court “gave its constitutional imprimatur to the top-two system, at least in dictum.” *Rubin*, 233 Cal. App. 4th at 1142.

III.

STANDARD OF REVIEW.

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

While California courts typically apply state pleading rules, even with respect to claims under federal law, claims brought under 42 U.S.C. § 1983 are an exception; a demurrer to a claim under that statute—like Petitioners' claims here—is judged under federal pleading rules. *Catsouras v. Dept. of Cal. Hwy. Patrol*, 181 Cal. App. 4th 856, 891 (2010), *rev. den.*, 2010 Cal. LEXIS 3456 (Cal. Apr. 14, 2010).⁷

Under federal law, a motion to dismiss is properly granted if one or more causes of action in the complaint fail to state a claim as a matter of law. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). While the factual allegations of a complaint are generally accepted as true, in ruling on a 12(b)(6) motion, the court is “not, however, required to accept as true allegations that contradict . . . matters properly subject to judicial notice . . .” *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). Additionally, the U.S. Supreme Court has held that factual allegations of wrong-doing must be “plausible,” rather than merely “conceivable” or “speculative” to survive demurrer. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 & 570 (2007), & Fed. R. Civ. Proc. 8(a)(2)) (cursory allegations of “invidious discrimination” were not sufficiently “plausible” to avoid dismissal under FRCP 12(b)(6)).

⁷ As a practical matter, Interveners do not believe that there is any substantive difference between the state and federal standards with regard to Petitioners' ballot access claim.

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

B. Substantive Standard Governing Election Law Challenges.

The U.S. Supreme Court has held that “when a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1991) (“*Burdick*”) (quoting *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986)). Only election laws imposing a “severe” burden on voting or associational rights face strict scrutiny. 504 U.S. at 434. This Court has adopted this same standard for election law claims under the California Constitution, *Edelstein v. City & County of San Francisco*, 29 Cal. 4th 164 (2002) (“*Edelstein*”), and Petitioners do not argue for another. (See Petition at 6 n.5.) “[V]oting regulations are rarely subject to strict scrutiny.” *Chamness*, 722 F.3d at 1116.

IV.

THIS CASE DOES NOT PRESENT AN IMPORTANT ISSUE OF LAW WARRANTING REVIEW, BECAUSE THE UNANIMOUS, WELL-REASONED DECISION OF THE COURT OF APPEAL MERELY APPLIED ESTABLISHED CASE LAW IN REJECTING PETITIONERS' BALLOT ACCESS CLAIM.

- A. **The Court Of Appeal's Decision Is Consistent With *Washington State Republican Party v. Washington State Grange*, 676 F.3d 784 (9th Cir. 2012), cert. denied, 568 U.S. ___, 133 S. Ct. 110 (Oct. 1, 2012) (“*Washington II*”), Which Rejected A Challenge To Washington's Top-Two System, As A Matter Of Law, That Was Indistinguishable From The Minor Parties' Ballot Access Claim In This Case.**

In *Washington II*, the Ninth Circuit held that political parties and their affiliated candidates have no right to be on the general election ballot in a top-two system if they are not among the top two vote-getters.

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

California) “virtually guarantees’ minor parties access to a statewide primary ballot.” (AA 87.) And finally, the district court held:

Indeed, in [Washington’s top-two system], the general election becomes, for all intents and purposes, a runoff election between the top-two vote getters of the primary. Putting aside the issue of “party preference” and forced association, ***there can be no doubt that the “top-two” aspect of I-872 would be permissible if the “primary” were renamed a “general election,” and the “general election” were renamed a “runoff.” Yet the constitutionality of the election statute cannot turn on the identifiers used for its various provisions.***

(AA 88 [emphasis added].)

In *Washington II*, the Ninth Circuit affirmed the district court’s dismissal as a matter of law. 676 F.3d at 793-95. Like the district court, the Ninth Circuit “recognize[d] the possibility that [a top-two system] makes it more difficult for minor-party candidates to qualify for the general election ballot than regulations permitting a minor-party candidate to qualify for a general election ballot by filing a required number of petition signatures. This additional burden, however, is an inherent feature of any top two primary system, and the Supreme Court has expressly approved of top two primary systems.” *Id.* at 795. Again, the Supreme Court denied a petition for certiorari.

B. The Court of Appeal Correctly Held That The Burden On The Minor Parties’ Associational Rights Of Being Kept Off The General Election Ballot Is “Slight,” Or “Modest,” And That Strict Scrutiny Is Therefore Inapplicable.

As noted above, under the Supreme Court’s decision in *Burdick v. Takushi*, a voting regulation is only subject to strict

scrutiny if it imposes a “severe” burden on voting rights, and “voting regulations are rarely subject to strict scrutiny.” *Chamness*, 722 F.3d at 1112 (citing *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008)).

Applying the *Burdick* standard, the Court of Appeal below (like the Ninth Circuit in *Washington II*) held that the top two system does not impose a “severe” burden on the minor parties’ rights, because “The minor parties unquestionably have a right to fair and equal participation in the process by which officeholders are selected, but this right is satisfied by participation in an open nonpartisan primary election in which every candidate has an equal opportunity, regardless of party affiliation, to advance to the general election.” 233 Cal.App.4th at 1144.

The Court of Appeal’s holding was correct.

- 1. Ample case law from the United States Supreme Court, Ninth Circuit, and this Court, support the Court of Appeal’s holding that there is no severe burden where all candidates have broad access to the primary election and the same opportunity as all other candidates to advance to the general election.**

The Court of Appeal’s holding that the Proposition 14’s burden on the minor parties is “modest” or “limited” relied heavily on the Supreme Court’s holding from *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). In *Munro*, minor party candidates challenged a provision of Washington State’s prior (*i.e.*, pre-top two) blanket primary law that prohibited a candidate who received less than 1% of the total votes cast at the primary from advancing to the general election, even if he or she was the top vote-getter in their party at the primary. The Supreme Court rejected the challenge, holding—in language highly pertinent to this case—that if minor parties are given

equal access to compete in a statewide primary, “[i]t can hardly be said that Washington’s voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election.” *Munro*, 479 U.S. at 199. Most importantly, *Munro* held that “because Washington afford[ed] a minor-party candidate easy access to the primary election ballot and the opportunity for the candidate to wage a ballot-connected campaign,” the burden on minor parties of being kept off the *general* election ballot was “slight.” 479 U.S. at 199. This phrasing is significant, because under *Burdick* a “slight” burden is sustained by any reasonable regulatory interest. *Burdick*, 504 U.S. at 439.

Applying the *Burdick* standard, and following *Munro*, the Ninth Circuit also held in *Washington II* that the top two system does not impose a “severe” burden on the minor parties’ rights, because (1) every party in Washington—major and minor—has “broad access to the I-872 primary” and (2) all candidates compete at that primary on equal terms and I-872 thereby “gives minor party candidates the same opportunity as major-party candidates to advance to the general election.” 676 F.3d at 485-86.

The Court of Appeal followed this same analysis in this case, in concluding that Proposition 14 does not severely burden minor parties’ rights. It noted two key facts: that all candidates have easy access to the primary ballot,⁸ and that “candidates affiliated with

⁸ The requirements for a candidate to participate in the California primary are basically the same as in Washington. Compare *Washington II*, 676 F.3d at 794 (summarizing Washington’s requirements) with Elec. Code §§ 8002.5, 8020, 8040-8041, 8103, 8106. There are two slight differences. First, California candidates must file a nomination petition signed by

minor parties face exactly the same requirements for participation as those affiliated with the major parties.” 233 Cal. App. 4th at 1146. Based on these facts, it held that “access to California’s primary election is constitutionally indistinguishable from access to the general election.” *Id.*

The Court of Appeal’s decision was also consistent with this Court’s own decision in *Edelstein v. City and County of San Francisco*, 29 Cal. 4th 164 (2002) (“*Edelstein*”). In that decision, this Court rejected a challenge to a San Francisco law that permitted write-in votes at the general election for mayor, but prohibited them in the runoff election. This Court held,

We conclude that San Francisco’s prohibition against write-in voting in the mayoral runoff election was not a *severe* restriction on voting rights, but rather that it imposed only a *limited burden* on voters’ rights to make free choices and to associate politically through the vote. [Citation.] After all, voters were not denied an opportunity to cast a write-in ballot for the candidate of their choice. They were only denied the opportunity to cast a write-in ballot *twice*.

Id. at 182 (emphasis in original). This Court further held that the mayoral election and the runoff were “a single *election*, although there were two rounds of voting.” *Id.* at 174 (emphasis in original).

By the same logic, under Proposition 14, there is a single election for each voter-nominated office, with two rounds of voting—one in June and one in November. And voters have free rein to cast a vote for the minor party candidate of their choice in that election

between 65 and 100 registered voters in the case of a statewide office, with even fewer required for other offices. *See* Elec. Code § 8062. Also, the filing fee for a *statewide* office (*i.e.*, Governor, etc.) is 2% of the annual salary. Elec. Code § 8103(a)(1). For all other offices it is 1%, like Washington.

process; they are only denied the opportunity to vote for that candidate twice, unless the candidate in question is one of the top two vote-getters at the primary election, who then proceeds to the general election.

As the Court of Appeal recognized, the principle that undergirds these cases—and the other ballot access cases relied upon by Petitioners—is that minor party candidates must be given “access to the *electoral process*—that is, to the process that culminates in election to public office. A party’s participation in a particular election was constitutionally relevant only as the means to the end of placing the party’s candidates in a fair and equal position to be elected.” *Rubin*, 233 Cal. App. 4th at 1145. However, candidates need not be given access to *every phase* of the electoral process for a given office in a given year. “As the Supreme Court has noted repeatedly, the point of the electoral process is to determine the candidate with the most support among voters and eliminate the remainder. [Citation.] The primary election is the first step in this process. Because Proposition 14 provides a full and fair opportunity for all candidates to compete for election on a materially equal basis, California’s decision to split this process in two does not deprive plaintiffs of meaningful access to the ballot.” *Id.* at 1146.

2. **In *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the Supreme Court rejected a claim that a candidate must be given access to the general election ballot due to lower turnout at the primary election.**

Petitioners nevertheless allege that their rights are severely burdened by the fact they might not make it to the general election because more voters turned out at the 2012 general election (13,202,158) than at the 2012 primary election (5,328,296). (AA 2,

10-12 [SAC ¶¶ 2, 33, 40].) Thus, they are deprived of the opportunity to reach a broader audience. The Court of Appeal correctly rejected this contention as well. 233 Cal. App. 4th at 1149-50. As the Court of Appeal noted, *id.*, a virtually identical claim was rejected by the Supreme Court in *Munro*.

In *Munro*, the minor parties argued that their rights were burdened by the fact that turnout was higher at the general election than at the primary, and that the 1% requirement kept them from reaching the broader pool of voters. The Court squarely rejected this argument:

Appellees argue that voter turnout at primary elections is generally lower than the turnout at general elections, and therefore enactment of § 29.18.110 has reduced the pool of potential supporters from which Party candidates can secure 1% of the vote. We perceive no more force to this argument than we would with an argument by a losing candidate that his supporters' constitutional rights were infringed by their failure to participate in the election. Washington has created no impediment to voting at the primary elections; every supporter of the Party in the State is free to cast his or her ballot for the Party's candidates. ... ***States are not burdened with a constitutional imperative to reduce voter apathy or to "handicap" an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot....***

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

Several federal courts of appeal have followed *Munro*'s lead, holding—like the Court of Appeal below—that “despite the traditionally lower interest in primary elections than general elections, the burden is appropriately placed on the candidate to generate support and rally voters to vote in order to make it to the general election ballot. It is not the state’s obligation to find or create

an easier forum for establishing voter support.” *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 699-700 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1932 (U.S. 2012). *See also Rainbow Coalition of Okla. v. Okla. State Elec. Bd.*, 844 F.2d 740 (10th Cir. 1988) (rejecting minor parties’ challenge to qualification statutes based on votes cast at past presidential elections, where turnout at such elections was higher than at gubernatorial elections).

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

At oral argument in the Court of Appeal, and now in their Petition for Review, Petitioners have refined their argument down to a contention that the holdings of *Munro* and *Washington II* are distinguishable because Washington holds its primary in August, whereas California’s primary election is in June, *see Elec. Code* § 1201. Thus, they contend, unlike in Washington, California’s primary deprives the minor parties to ballot access at the time of “peak voter interest.” They base this argument on *Anderson v. Celebrezze*, 460 U.S. at 780, which struck down a March filing deadline for independent presidential candidates to appear on the November general election ballot as unduly burdensome.

Ironically, plaintiffs in *Washington II*, directed this same argument—unsuccessfully—at Washington’s August primary. The Libertarian Party argued that Washington’s top-two system was unconstitutional because the State’s primary was “held in mid-August, when voter interest is minimal, and the general election is

held in early November.”⁹ Noting that Washington’s August primary was far closer to the general election than the March filing deadline for independent candidates struck down in *Anderson*, the Ninth Circuit affirmed the dismissal of the Libertarian Party’s ballot access claims in *Washington II*—again, *as a matter of law*.

As the Court of Appeal recognized, *Anderson* is readily distinguishable from this case as well.

Perhaps the most significant distinction is the fact that the filing deadline at issue in *Anderson* precluded any “opportunity for the candidate to wage a ballot-connected campaign,” *Munro*, 479 U.S. at 539, whereas Proposition 14 gives candidates that opportunity at the primary election. In other words, under the restrictions considered in *Anderson* independent candidates were deprived of access to the electoral process *in toto*. Indeed, the *Munro* court made precisely this same distinction in upholding the 1% vote requirement challenged in that case:

We also observe that § 29.18.110 is more accommodating of First Amendment rights and values than were the statutes we upheld in *Jeness*, *American Party*, and *Storer*. Under each scheme analyzed in those cases, if a candidate failed to satisfy the qualifying criteria, the State’s voters had no opportunity to cast a ballot for that candidate, and the candidate had no ballot-connected campaign platform from which to espouse his or her views; **the unsatisfied qualifying criteria served as an absolute bar to ballot access. ... Here, however, Washington virtually guarantees what the parties challenging the Georgia, Texas, and California election laws so vigorously sought—candidate access to a statewide ballot. This is a significant difference.**

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

479 U.S. at 198-99 (emphasis added).

The Court then proceeded to make its critical observation that “It can hardly be said that Washington’s voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election.” *Id.* at 199. Because the law challenged in *Anderson* precluded any ballot-connected campaign, the holding of that case is simply inapposite. *See Rubin*, 233 Cal. App. 4th at 1151-52 (“*Anderson* was concerned primarily with access to the ballot, and “the top-two system provides an equal ‘place on the ballot’ for minor and major party candidates. [Citation.] It therefore does not limit the range of candidates available to the voters in the manner that motivated the *Anderson* court.”).

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

In fact, in *Lawrence v. Blackwell*, 430 F.3d at 368, the Sixth Circuit upheld Ohio’s *March* filing deadline *as a matter of law*, where all candidates were subject to the same deadline. Though *Anderson* had struck down a *March* filing deadline, the *Lawrence* court found it to be a “vital distinction” that the deadline in *Anderson* applied only to independent candidates, whereas party candidates had an additional five months to file papers. *Id.* at 373-

75. Under Proposition 14, “California’s electoral system treats all political parties identically[.]” *Rubin*, 233 Cal. App. 4th at 1135.

C. The Court of Appeal Correctly Held That The Trial Court Acted Properly In Sustaining A Demurrer Without Leave To Amend After Giving Petitioners Three Chances To State A Claim.

Much of the Petition for Review (*see pp. 15-21*) is devoted to arguing that dismissal of Petitioners’ ballot access claim was improper because an evidentiary hearing was required to determine the severity of the burden that Proposition 14 places on minor party candidates’ rights, and thus the appropriate standard of review under *Burdick*. Petitioners contend that “a court cannot determine the time of ‘peak voter interest’ as a matter of law.” (Petition at 8 n.5.) The Court of Appeal properly rejected this argument.

In the first place, as discussed above, the “peak voter interest” test is based on *Anderson* and other cases that exclude candidates from the electoral process entirely, and which are therefore inapplicable to this case.

Moreover, as the Court of Appeal rightly held, “A plaintiff who asserts an as-applied constitutional challenge is not excused from procedural pleading requirements. ... [T]o avoid dismissal on demurrer, plaintiffs were required to plead facts supporting the elements of their claims. This is equally true of as applied and facial constitutional challenges.” *Rubin*, 233 Cal. App. 4th at 1155.

In support of its holding, the Court of Appeal cited the recent decision in *Stone v. Board of Elec. Comm’rs for City of Chicago*, 750 F.3d 678 (7th Cir. 2014), a case wholly ignored by Petitioners, in which the Seventh Circuit rejected the very argument that Petitioners make here. In *Stone*, the plaintiffs challenged an Illinois law that conditioned a candidate’s appearance on the ballot upon

submission of a significant number of valid signatures. Citing Supreme and appellate case law, the district court dismissed the action pursuant to FRCP 12(b)(6).¹⁰ On appeal, “plaintiffs’ counsel stressed that, because th[at] case was dismissed at such an early stage, judgments about what might or might not be burdensome [we]re premature. He urged [the court] to send the case back to the district court, so his clients could build a record on the signature requirement’s severity.”

The Seventh Circuit rejected this contention, noting, “there is nothing remarkable about granting a motion to dismiss in an election-law case if careful consideration of the complaint shows that the plaintiff has not stated a claim.” *Id.* at 686. It cited a number of appeals court cases to that effect, including *Navarro v. Neal*, 716 F.3d 425 (7th Cir. 2013), *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687 (8th Cir. 2011), and *Lawrence v. Blackwell*, 430 F.3d at 368, all of which dismissed ballot access challenges as a matter of law. Nor are these cases unusual. A host of other cases likewise confirm the propriety of deciding election law cases, under the *Burdick* standard, on a motion to dismiss.¹¹

¹⁰ As discussed above, the federal pleading standards under Rule 12(b)(6) directly to the demurrer before the trial court.

¹¹ *See, e.g., Field v. Bowen*, 199 Cal. App. 4th 346, 372 (2011) (Court of Appeal resolved a prior challenge to Proposition 14—which alleged the unconstitutionality of the law’s ban on write-in voting at the general election and statutes governing ballot labels—as a matter of law); *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) (affirming 12(b)(6) dismissal of a minor party candidate’s ballot access claim); *Jones v. City of Phila. Voter Registration*, 498 Fed. Appx. 143 (3d Cir. 2012) (affirming 12(b)(6) dismissal of voter’s suit seeking to participate in closed primary); *McClure v. Galvin*, 386 F.3d 36 (1st Cir. 2004) (affirming 12(b)(6) dismissal of independent candidate’s ballot access suit); *LaRouche v. Fowler*, 152 F.3d 974, 987-998 (D.C.

Two cases that are particularly damning to Petitioners' position are the Ninth Circuit's decision in *Washington II*, and this Court's decision in *Edelstein*. In *Washington II*, the Libertarian Party contended that Washington's top-two system was unconstitutional because "any candidate showing at least a 'modicum of support' may not constitutionally be excluded from the general election ballot." (AA 86.) Again, that claim is *identical* to Petitioners' ballot access claim in this case. (See AA 2 [SAC] ¶ 3.) The United States district court rejected this claim *as a matter of law*, granting the State's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), noting that a top-two system would, "*by definition* exclude many parties from the general election ballot[.]" but that the Supreme Court had nevertheless endorsed top-two systems in *Washington I*. The district court further held that any ballot access concerns were negated by the fact that Washington (like California) "virtually guarantees' minor parties access to a statewide primary ballot." (AA 87.)

On appeal, the Ninth Circuit did not remand the case for the presentation of evidence, as Petitioners herein argue is necessary. Instead, the Ninth Circuit affirmed the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6), *Washington II*, 676 F.3d at 793-95, just as the Court of Appeal in this case properly affirmed the trial court's order sustaining demurrers. And, again, the Supreme Court denied a petition for certiorari in *Washington II*. In other words, the Ninth Circuit did exactly what Petitioners claim it was improper for the trial court to do in this case.

Cir. 1998) (affirming 12(b)(6) dismissal of constitutional ballot access claims).

Similarly, in *Edelstein* this Court affirmed the trial court's grant of motion for judgment on the pleadings. 29 Cal. 4th at 170. "A motion for judgment on the pleadings has the same "purpose and effect of a general demurrer."" *Gerawan Farming, Inc. v. Kawamura*, 33 Cal. 4th 1, 32 (2004) (quoting *Smiley v. Citibank*, 11 Cal. 4th 138, 146 (1995)). In other words, this Court itself has recognized the propriety of resolving ballot access claims as a matter of law where the complaint fails to state a claim. That case is especially significant here, because it contains this Court's most extensive treatment of the *Burdick* standard, which Petitioners insist requires an evidentiary hearing.

Nor do the cases that Petitioners rely upon mandate a different result. In *Mandel v. Bradley*, 432 U.S. 173 (1977), the Court did not reverse an order *dismissing* a cause of action; it overruled a judgment in the plaintiffs' favor, holding that Maryland's petitioning requirements were unconstitutional. Likewise, in *Washington I* the Supreme Court overruled a judgment holding Washington's top-two system to be unconstitutional; it was not faced with a dismissal.

In *Cruz v. Melecio*, 204 F.3d 14 (1st Cir. 2000), *Bergland v. Harris*, 767 F.2d 1551 (11th Cir. 1985), *California Democratic Party v. Jones*, 984 F. Supp. 1288 (E.D. Cal. 1998), and *Libertarian Party of New Hampshire v. William M. Gardner, Sec'y of State*, 2014 U.S. Dist. LEXIS 178195 (D.N.H. Dec. 30, 2014), the courts each found that the plaintiffs, based on the facts alleged, had stated a cause of action. It does not therefore follow that no case can be decided on a demurrer when a plaintiff does *not* allege facts that state a cause of action. In this case, the trial court and Court of Appeal properly found that, even if the Petitioners were able to establish the facts alleged in the Second Amended Complaint, "after two opportunities

to amend their initial complaint, plaintiffs failed to plead facts demonstrating the unconstitutionality of Proposition 14.” *Rubin*, 233 Cal. App. 4th at 1154.

Perhaps the most instructive case cited by Petitioners is the Supreme Court’s decision in *Storer v. Brown*, 415 U.S. 724 (1974). In *Storer*, the Court addressed challenges to two different ballot access restrictions imposed on would-be independent candidates seeking to qualify for the general election ballot: (1) a requirement that the candidate have disaffiliated him- or herself from all qualified political parties at least a year before the primary, and (2) a requirement that the candidate file a petition signed by at least five percent of the entire vote cast in the preceding general election in the area for which the candidate seeks to run. All of these signatures had to be obtained during a 24-day period following the primary and ending 60 days prior to the general election, and none of the signatures could be gathered from persons who vote at the primary election. *Id.* at 726-27. Two would-be independent congressional candidates, and two would-be independent presidential candidates challenged these provisions as unduly burdensome. *Id.* at 727-28. A three-judge district court dismissed the challenges, and the plaintiffs appealed to the Supreme Court.

The first fact of significance is that, with respect to the congressional candidates, both of whom had been affiliated with a qualified political party in the year preceding the 1972 primary, the Supreme Court *affirmed the dismissal!* Concluding that the disaffiliation requirement was constitutional, it did not remand the case for further fact-finding. *Id.* at 728-37.

Also of significance is that, while the Court remanded the case for further fact-finding with respect to the burden that the signature

requirement imposed on the presidential candidates, the facts that it identified as needing to be developed were judicially-noticeable facts based on public records: what was the “entire vote” in the last gubernatorial election? What percentage of eligible voters voted in the primary, and were therefore excluded from the pool of voters eligible to sign an independent candidate’s petition? What percentage of that reduced pool of eligible voters were independent candidates required to obtain signatures from? *Id.* at 739. As the Court explained:

Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden. Signatures at the rate of 13,542 per day would be required, but 1,000 canvassers could perform the task if each gathered 14 signers a day. ... ***Before the claim is finally dismissed***, it should be determined whether the available pool is so diminished in size by the disqualification of those who voted in the primary that the 325,000-signature requirement, to be satisfied in 24 days, is too great a burden on the independent candidates for the offices of President and Vice President.

Id. at 740 (emphasis added).

Finally, the Court noted that the district court should examine official records to determine how frequently independent candidates had successfully qualified for the ballot. *Id.* at 742.

In this case, the Second Amended Complaint contained detailed allegations regarding the number of minor party candidates who ran in the 2012 and 2014 primaries under California’s top-two law, and how many of those did, or did not, advance to the general election. (AA 2, 8-9 [SAC ¶¶ 2, 26 & n.1, 27-31].) The SAC also contained detailed allegations regarding the number of voters participating in the primary vs. the general election. (AA 2, 10-12

[SAC ¶¶ 2, 33-34 & 40].) The trial court accepted those allegations as true, and it further had before it—and properly considered¹²—judicially-noticeable public records produced by the parties on each side regarding these pertinent facts. (AA 305-27, 343; IRA 25-78.) In short, the trial court in this case—unlike the district court *Storer*—was presented with the pertinent, undisputed facts that it needed to assess the burden imposed by California’s top-two law, and based on those alleged and judicially-noticeable facts, it correctly concluded that Petitioners failed to state a claim for relief as a matter of law—just as the congressional candidates in *Storer* did.

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

Given the lack of a “severe” burden on the parties’ rights, the State need only show that Proposition 14 furthers an “important regulatory interest.”¹³ The Court of Appeal correctly held that this standard was met.

First, as the Court of Appeal noted, *see* 233 Cal. App. 4th at 1147, Proposition 14 is consistent with past Supreme Court case law holding that the primary election system in California, is “an integral part of the entire election process . . . [that] functions to

¹² As noted, judicially-noticeable materials are properly considered in connection with demurrers, under California and federal law. Petitioners have not contested any materials of which judicial notice has been taken in this case.

¹³ Petitioners claim the trial court did not address the interests that support Proposition 14. That is incorrect, but even if true, it would be irrelevant. The Court of Appeal was entitled to consider the governmental interests not considered by the trial court. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366 n.10 (1997) (upholding election law based on interests first raised at Supreme Court oral argument).

winnow out and finally reject all but the chosen candidates[.]” and that the State may therefore “properly reserve the general election ballot ‘for major struggles[.]’” *Munro*, 479 U.S. at 196 (quoting *Storer*, 415 U.S. at 735); *Edelstein*, 29 Cal. 4th at 183.

Second, the Court of Appeal held that the interest in giving independent voters, comprising a fifth of the electorate, a right to participate in the primary, where elections are often effectively decided, is an interest that—standing alone—sustains Proposition 14. 233 Cal. App. 4th at 1150. Though some parties have historically permitted independent voters to participate in their primaries, they are not required—and constitutionally cannot be required—to do so, meaning that prior to the adoption of Proposition 14 independent voters’ ability to participate in the primaries was always at the sufferance of the parties and subject to revocation.¹⁴

Third, the Court of Appeal correctly rejected Petitioners’ position (see Petition at 22-23) that the interest identified in the Proposition 14 ballot pamphlet of electing more practical, compromise-minded, less partisan candidates was rejected by the Supreme Court in *California Democratic Party v. Jones*. As the Court of Appeal recognized, see 233 Cal. App. 4th at 1150-51, the *Jones* court held that the State did not have a legitimate interest in *altering the ideological views of private associations*. But that is not what Proposition 14 does. Plus, the *Jones* court 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.

And finally, as the Ninth Circuit has noted, the general election under Proposition 14 is closely analogous to a runoff

¹⁴ See 233 Cal. App. 4th at 1151 n.14.

election in a typical nonpartisan system. *See Chamness*, 722 F.3d at 1112. This Court has held that limiting a runoff to the top two vote-getters at the primary serves the legitimate interest in ensuring that the person who is ultimately elected to office receives a majority of the vote. *See Edelstein*, 29 Cal. 4th at 183. Indeed, to ensure that such a majority is received, SB 6 bans write-in voting at the general election, just as the system upheld in *Edelstein* did. *See Elec. Code* § 8606. Petitioners’ proposal that the State conduct a top-three or top-four primary would undermine this interest.¹⁵

V.

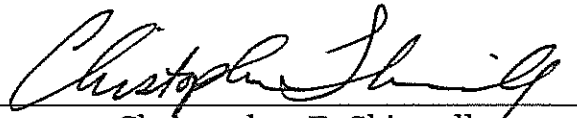
CONCLUSION.

The Petition for Review should be DENIED.

Respectfully submitted,

March 30, 2015

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

By: 
Christopher E. Skinnell

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

¹⁵ It also raises the question as to where a principled line could be drawn. Must the State conduct a top-10 primary? Top-20? Top-100? *Cf. Holder v. Hall*, 512 U.S. 874 (1994) (minority voters could not challenge the size of a jurisdiction’s governing body under the federal Voting Rights Act, because there as “no principled reason why one size should be picked over another”).

CERTIFICATION OF BRIEF LENGTH

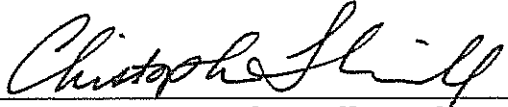
Christopher E. Skinnell, Esq., declares:

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

2. I am familiar with the word count function within the Microsoft Word software program by which this Answer was prepared. Applying the word count function to the Answer, I determined and hereby certify pursuant to California Rules of Court, Rule 8.204, that this Answer contains 8,395 words.

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

Executed on March 30, 2015, at San Rafael, California.



Christopher E. Skinnell, Declarant

PROOF OF SERVICE

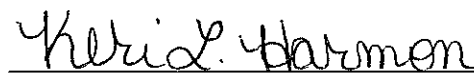
I, KERI L. HARMON, declare as follows:

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.

On March 30, 2015, I served a copy of the “**Intervener-Respondents’ Answer to Petition for Review**” on the parties in this action by **FEDERAL EXPRESS**, by following ordinary business practices and placing for pickup by **FEDERAL EXPRESS** at 2350 Kerner Boulevard, Suite 250, San Rafael, California 94901 on March 30, 2015, copies of the above document in an envelope or package designated by **FEDERAL EXPRESS** with delivery fees paid or provided for, and addressed as follows:

Dan Siegel, Esq. SIEGEL & YEE 499 14th Street, Suite 300 Oakland, CA 94612 <i>Counsel for Petitioners Michael Rubin, et al.</i>	Peter Hsueh-Kang Chang Office of the Attorney General 455 Golden Gate Ave., Ste. 11000 San Francisco, CA 94102 <i>Counsel for Respondent Alex Padilla, Secretary of State</i>
Clerk, Superior Court Appeals Division 1225 Fallon Street Oakland, CA 94612-4293	Clerk, California Court of Appeal, First Appellate District 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 March 30, 2015, at San Rafael, California.


KERI L. HARMON