In the Supreme Court of the State of California

MICHAEL RUBIN, et al.,

Plaintiffs and Appellants,

v.

ALEX PADILLA, in his official capacity as California Secretary of State,

Defendant and Respondent,

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

Intervenors and Respondents.

Case No. S224970

Appellate District, Case No. A140387
Alameda County Superior Court, Case No. RG11605301
Honorable Lawrence John Appel, Judge

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Court should deny the petition for review. Petitioners seek this Court's review under California Rules of Court 8.500(b)(1).[1] There is, however, no split in appellate authority to be reconciled and no unsettled question of law to be resolved. Rather, state and federal courts in California, relying on well-developed U.S. Supreme Court precedents, have uniformly upheld Proposition 14 and its implementing legislation

The Court of Appeal correctly affirmed the trial court's dismissal of Petitioners' claims, which challenged Proposition 14, California's top two primary election system, based on a straightforward and unremarkable application of U.S. Supreme Court precedents. Indeed, Proposition 14 is modeled on a primary election system first suggested by the U.S. Supreme Court itself, and this case involves application of federal election case law only. In analyzing constitutional challenges to election law, this Court follows closely the analysis of the U.S. Supreme Court unless there are cogent reasons not to do so. Here, Petitioners offer no reason to deviate from application of the governing federal law.

California's top two system treats all political parties and candidates the same, and provides a full and fair opportunity for all candidates to compete for election on an equal basis. Under this system, Petitioners have the same "availability of political opportunity" as every other political party and candidate. Thus, there was no error suggesting further review of Petitioners' claims is warranted.

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[1] Under California Rules of Court, rule 8.500(b)(1), "[t]he Supreme Court may order review of a Court of Appeal decision: (1) When necessary to secure uniformity of decision or to settle an important question of law."

STATEMENT OF THE CASE

I. FACTS

In 2010, California voters enacted Proposition 14, which amended the California Constitution to replace a closed partisan primary with an open nonpartisan primary leading to a "top two" runoff general election. (*Rubin v. Padilla* (2015) 233 Cal.App.4th 1128, 1137-1138 [Slip Op. at pp. 4-5](hereafter *Rubin*).) Under Proposition 14's top two primary system, "[a]ll voters may vote at a voter-nominated primary election for any candidate for congressional and state elective office without regard to the political party preference disclosed by the candidate or the voter." (Cal. Const., art. II, § 5, subd. (a).) "The candidates who are the top two vote-getters at a voter-nominated primary election . . . shall, regardless of party preference, compete in the ensuing general election." (*Ibid.*)

Unlike a partisan primary system, Proposition 14 provides that a candidate "may have his or her political party preference, or lack of political preference, indicated upon the ballot for the office," but a political party "shall not nominate a candidate for any congressional or state elective office at the voter nominated primary," and "shall not have the right to have its preferred candidate participate in the general election for a voter-nominated office other than a candidate who is one of the two highest vote-getters at the primary election." (Cal. Const., art. II, § 5, subd. (b).) Proposition 14 leaves in place partisan elections for presidential candidates, political party committees and party central committees, and preserves the right of political parties to participate in the general election for the office of president. (*Id.* at subds. (c), (d).)

According to Petitioners, only three candidates preferring minor parties advanced to the general election in the 2012 primary. (Petition at p. 2.) In that primary, however, candidates preferring minor parties ran in

only 20 of the 154 non-presidential races.[2] Also according to Petitioners, one candidate preferring a minor party received 18.6 percent of the vote but did not finish in the top two and did not qualify for the general election. (*Id.* at pp. 7-8.) This result, however, was not unique to candidates preferring minor parties. In the 2012 primary, 30 candidates preferring *major* parties received over 20 percent of the primary votes, and yet failed to qualify for the general election as one of the top two vote getters.[3] In two races, candidates preferring major parties received over 30 percent of the votes and failed to qualify for the general election.[4]

II. PROCEDURAL HISTORY

Petitioners' original complaint challenging the constitutionality of Proposition 14 pled three causes of action based on ballot access, freedom of speech and association, and the Elections Clause. The trial court sustained Respondent's demurrer with leave to amend and denied Petitioners' motion for preliminary injunction. In their first amended complaint, Petitioners alleged the same three causes of action and added a fourth cause of action based on violation of equal protection. The trial court sustained demurrers to the ballot access and equal protection causes of action with leave to amend, and sustained demurrers to the remaining causes of action without leave to amend.

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[2] See Statement of Vote, June 5, 2012, prepared by California Secretary of State at pp. 14-23 <http://elections.cdn.sos.ca.gov/sov/2012-primary/pdf/2012-complete-sov.pdf>(as of March 26, 2015)(hereafter Statement of Vote).

[3] See results for United States Representative Districts 21, 24, 31, 38 and 52; State Senator Districts 5 and 31; and State Assembly Member Districts 1, 3, 6, 10, 23, 25, 32, 36, 38, 47, 46, 50, 51, 57, 58, 60, 66, 67, 69, 71, 74, and 76. (Statement of Vote at pp. 15-22.)

[4] See results for Senate Assembly Member Districts 6 (31.1%) and 36 (32%). (Statement of Vote at pp. 19-20.)

In a second amended complaint, Petitioners alleged denial of ballot access and violation of equal protection under the First and Fourteenth Amendments, and Articles I and IV of the California Constitution. The trial court sustained demurrers to both causes of action and dismissed the second amended complaint without leave to amend. Petitioners appealed. On appeal, Petitioners argued only that the court's rulings concerning their ballot access and equal protection claims were in error.

The Court of Appeal affirmed the trial court's dismissal of the action. The court held that Petitioners' right to fair and equal participation in the electoral process is satisfied by their 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. (*Rubin, supra*, 233 Cal.App.4th at p. 1144 [Slip Op. at p. 13].)

The Court of Appeal further examined the state's interest in an open, nonpartisan primary and held that the state's "rational and nondiscriminatory" interest in permitting independent voters to participate in the process of narrowing candidates for the general election alone justifies any modest burden imposed on Petitioners by the top two primary system. (*Rubin*, *supra*, 233 Cal.App.4th at pp. 1150-1151 [Slip Op. at p. 21] citing *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, 458 (hereafter *Washington I*); *Anderson v. Celebrezze* (1983) 460 U.S. 780, 788.)

Finally, the Court of Appeal held that the trial court's order sustaining the demurer without leave to amend was appropriate because, after being provided two opportunities to do so, Petitioners still failed to plead facts sufficient to demonstrate the unconstitutionality of Proposition 14 and failed also to suggest any different set of facts that could be alleged if they were granted a third opportunity to amend. (*Rubin*, *supra*, 233 Cal.App.4th at p. 1154 [Slip Op. at p. 25].)

REASONS TO DENY THE PETITION

I. THERE IS UNIFORMITY OF DECISION IN THIS AREA AND NO UNSETTLED QUESTION OF LAW.

As an initial matter, there is no dispute that federal law governs Petitioners' claims. In analyzing constitutional challenges to election laws, the California Supreme Court has followed closely the analysis of the U.S. Supreme Court and does not depart from that court's construction of similar federal provisions unless there are cogent reasons to do so. (*Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 179 [citation and quotation omitted].) At no point have Petitioners suggested that any departure from federal law is warranted in this matter.

Turning to the relevant law, there is no conflict among California courts and no unsettled question of law involving Proposition 14. Proposition 14 and its implementing legislation have been challenged numerous times in state and federal courts in California and have uniformly been upheld as a matter of law under U.S. Supreme Court jurisprudence.

A. The Top Two Primary System Has Been Recognized as a Constitutionally Valid Election Process by the U.S. Supreme Court and Ninth Circuit

The top two primary system was recognized as valid in concept by the U.S. Supreme Court in 2000, and was specifically upheld as constitutional by the Ninth Circuit in 2012, in a matter involving Washington State's electoral system.

In *California Democratic Party v. Jones*, the U.S. Supreme Court stated in dictum that a top two primary system that allows a voter to vote for any candidate at the primary and in which the top two vote-getters advance to the general election, avoids constitutional infirmity. (*California Democratic Party v. Jones* (2000) 530 U.S. 567, 585-586.) The plaintiff in *Jones* had challenged California's then existing primary system in which

any voter could select a party's nominee to the general election. (*Id.* at pp. 570-571.) Although the U.S. Supreme Court invalidated that system, it nonetheless suggested it would be permissible for a state to determine the qualifications for a candidate to be placed on the primary ballot, and then "[e]ach voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election." (*Id.* at pp. 585-586.) "Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased 'privacy,' and a sense of 'fairness'—all without severely burdening a political party's First Amendment right of association." (*Id.* at p. 586.) Thus, although *Jones* did not directly address ballot access for minor political parties, it supports the conclusion that a top two primary system is a constitutional method for selecting general election candidates.

The U.S. Supreme Court refused to disavow or distance itself from the dictum in *Jones* when it considered a subsequent case involving Washington's top two system, and instead affirmed that "we assumed that the nonpartisan primary we described in *Jones* would be constitutional." (*Washington I*, *supra*, 552 U.S. at p. 452.) And while *Washington I* did not decide a ballot access claim, it did reject a facial challenge to the Washington top two primary system. (*Id.* at pp. 456-457.)

The ballot access claim *was* squarely addressed, however, by the Ninth Circuit at a subsequent stage of that same litigation. After remand, the Ninth Circuit upheld Washington's top two primary system against a claim that the system interfered with ballot access rights, rejecting the notion that a top two primary system is flawed solely because that 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." (*Washington State Republican Party v. Washington State Grange* (9th Cir. 2012) 676 F.3d 784, 795, cert denied, 133 S.Ct. 110 (hereafter *Washington II*).) "This additional burden . . . is an inherent feature of any top two primary system, and the Supreme Court has expressly approved of top two primary systems." (*Id.*, citing *California Democratic Party v. Jones*, *supra*, 530 U.S. at pp. 585-586.)

In *Washington II*, the Ninth Circuit evaluated a top two system very similar to California's system whereby each candidate indicates his or her party preference on the primary ballot and voters may select any candidate listed on the ballot, regardless of the party preference of the voter or the candidate, with the top two vote-getters advancing to the general election. (*Washington II*, *supra*, 676 F.3d at p. 788.)[5] The Ninth Circuit held that, given the features of a top two system, including broad access to the primary ballot by minor party candidates, the minor parties failed to show that the system "impermissibly 'limit[ed] the field of candidates from which voters might choose.'" (*Id.* at p. 794, quoting *Anderson v. Celebrezze*, *supra*, 460 U.S. at p. 786.) And "because [the top two primary law] gives major and minor party candidates equal access to the primary and general election ballots, it does not give the 'established parties a decided advantage over any new parties struggling for existence.'" (*Washington II*, *supra*, at p. 795, quoting *Williams v. Rhodes* (1968) 393 U.S. 23, 31.) The Ninth Circuit therefore affirmed dismissal of a ballot

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[5] The only arguable distinction between the two systems is that Washington's primary takes place in August, while California's primary is held in June. The Court of Appeal considered and rejected petitioners' argument that this two-month distinction rendered the California system unconstitutional. (*Rubin*, *supra*, 233 Cal.App.4th at p. 1143 fn. 6 [Slip Op. at p. 11, fn. 6].)

access claim nearly identical to the one presented by Petitioners in this action. (*Washington II*, *supra*, at pp. 794-795.)

B. State and Federal Courts in California Have Uniformly Rejected Challenges to Proposition 14 and Its Implementing Legislation

There is no conflict among California courts regarding Proposition 14 that would suggest a basis for this Court to grant review. The decision below directly addressed the constitutionality of the top two primary system. A separate Court of Appeal decision upheld two aspects of Senate Bill No. 6, the legislation adopted to implement Proposition 14; one that precludes a candidate from stating on the ballot a preference for a nonqualified political party and another that prohibits the counting of write-in votes at the general election. (*Field v. Bowen* (2011) 199 Cal.App.4th 346, 350.)

Federal courts in California have also uniformly upheld Proposition 14 and Senate Bill No. 6. For example, the Ninth Circuit upheld a part of Senate Bill 6 that prohibits a candidate from using the ballot label "Independent." (*Chamness v. Bowen* (9th Cir. 2013) 722 F.3d 1110.) A federal district court upheld Proposition 14 against a ballot access claim. (*Brown v. Bowen* (C.D. Cal. Oct. 9, 2012, 12-cv-05547, Dkt. No. 34)[granting motion to dismiss complaint alleging Proposition 14 violated First and Fourteenth Amendments, among other claims].) Another district court upheld the general election write-in vote ban set forth in Senate Bill No. 6 which was previously addressed in *Field*. (*Milonopoulos v. Bowen* (C.D. Cal. Dec. 24, 2014, 14-cv-05973, Dkt. No. 53)[granting motion to dismiss and upholding ban on write-in votes at general election].)

As this summary shows, there has been a consistent application and interpretation of U.S. Supreme Court case law by state and federal courts in

California in upholding Proposition 14 and its implementing legislation. No conflict exists requiring this Court's intervention.

II. THE COURT OF APPEAL CORRECTLY APPLIED SETTLED FEDERAL LAW TO PETITIONERS' CLAIMS

Petitioners make two arguments that their ballot access (and other) rights are severely burdened by Proposition 14. The Court of Appeal correctly determined that both arguments fail under U.S. Supreme Court precedent, which holds that "[w]hen a state election law imposes only 'reasonable, non-discriminatory 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* (1992) 504 U.S. 428, 434, quoting *Anderson v. Celebrezze*, *supra*, 460 U.S. at p. 788; see *Chamness v. Bowen*, *supra*, 722 F.3d at p. 1116 ["voting regulations are rarely subject to strict scrutiny"].)

First, Petitioners argue that any candidate who shows a "modicum" of support must be guaranteed a place on the general election ballot. (Petition at pp. 6-7.) In resolving the electoral rights of minor party and independent candidates, the U.S. Supreme Court examines access to the *electoral process*, rather than access to either the primary or general election in particular. (*Rubin*, 233 Cal.App.4th at p. 1145 [Slip Op. at p. 13], citing *Williams*, *supra*, 393 U.S. at p. 89.) And here, "[b]ecause 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 [electoral] process in two does not deprive plaintiffs of meaningful access to the ballot." (*Rubin*, 233 Cal.App.4th at p. 1146 [Slip Op. at p. 15].) "As the U.S. 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." (*Ibid.*, citing *Storer v. Brown* (1974) 415

U.S. 724, 735 [the electoral process "functions to winnow out and finally reject all but the chosen candidates"].)

The Court of Appeal further determined the Proposition 14 top two system of eliminating lesser candidates by primary election is constitutionally indistinguishable from a system that required candidates to receive a certain percentage of votes at the primary election, a system that has been upheld by the U.S. Supreme Court. (*Rubin*, *supra*, 233 Cal.App.4th at p. 1147 [Slip Op. at p. 17], citing *Munro v. Socialist Workers Party* (1986) 479 U.S. 189, 199.) As the Court of Appeal observed, in both systems, "the primary election provided candidates equal opportunity to demonstrate success with the general electorate, and in both cases the slate of candidates was narrowed solely on the basis of their demonstrated electoral appeal. Just as in *Munro*, the effort is to reserve the general election ballot for major struggles." (*Rubin*, *supra*, 233 Cal.App.4th at p. 1147 [Slip Op. at p. 17][internal quotation marks omitted], citing *Munro v. Socialist Workers Party*, *supra*, 479 U.S. at 196.)

Second, Petitioners argue that the top two system eliminates the ability of diverse political voices to express their choices at the time of peak voter interest. (Petition at pp. 2 & 8.) Even though Petitioners had waived the appeal of their previous freedoms of speech and association claim, asserting only a ballot access claim,[6] the Court of Appeal nonetheless considered and rejected Petitioners' arguments based on their speech rights. (See *Rubin*, *supra*, 233 Cal.App.4th at p. 1144 fn.8 & p. 1149 fn. 12 [Slip Op. at pp. 12, fn. 8 & p. 19, fn. 12].) The Court of Appeal correctly held that any burden Proposition 14 places on Petitioners' right of political

[6] The trial court had sustained a demurrer dismissing Petitioners' claim in their original and first amendment complaint based on speech and association rights without leave to amend. Petitioners did not appeal the ruling on that demurrer.

expression is modest. (*Id.*, at pp. 1148-1150 [Slip Op. at pp. 18-20], citing *Timmons v. Twin Cities Area New Party* (1997) 520 U.S. 351, 363.)

Consistent with this approach, the Court of Appeals also correctly held that the time between California's June primary and November elections does not render the top two system unconstitutional. (*Rubin*, 233 Cal.App.4th at p. 1143 fn. 6 [Slip Op. at p. 11, fn. 6].) Petitioners' proposition that they must express their political voice at the time of peak voter interest is not supported by U.S. Supreme Court precedents. Petitioners rely on *Anderson*, which addressed an Ohio law that required independent candidates to file nomination petitions five months before the major parties selected their nominees. (*Anderson v. Celebrezze*, *supra*, 460 U.S. at pp. 790-791.) The U.S. Supreme Court found that this restriction imposed a significant burden on the electoral process because it discriminated against those independent candidates. (*Id.* at p. 794.) In contrast, as the Court of Appeal held, Proposition 14 does not discriminate against Petitioners, and Petitioners have the same "availability of political opportunity" as every other political party and candidate. (*Rubin*, *supra*, 233 Cal.App.4th at p. 1152 [Slip Op. at p. 22], distinguishing *Anderson v. Celebrezze*, *supra*, 460 U.S. at p. 792.)

The Court of Appeal also held that the state's interest in permitting independent voters to participate in the process to narrow candidates for the general election is "rational and nondiscriminatory," and alone justifies any modest burden imposed on Petitioners by the top-two primary system.

(*Rubin*, 233 Cal.App.4th at p. 1151 [Slip Op. at p. 21],[7] citing *Washington I*, *supra*, 552 U.S. at p. 458, and *Anderson*, *supra*, 460 U.S. at p. 788.)

Petitioners' argument that any increase in independent voter participation is counterbalanced by decrease in minor party voter participation in the general election is without merit on its face. (Petition at p. 22.) Under Proposition 14's top two system, all qualified voters, including Petitioners' members and supporters, are free to cast their vote for any candidate, including candidates affiliated with or supported by Petitioners.

III. THE PROCEDURAL ISSUE OF WHETHER TO CONDUCT AN EVIDENTIARY HEARING IS NOT A BASIS FOR GRANTING REVIEW

Petitioners' argument for an evidentiary proceeding fails on two grounds. First, Petitioners' desire for an evidentiary proceeding is not an appropriate basis to grant review, and Petitioners do not suggest any reason why this issue, standing apart from their substantive arguments, warrants review. Second, the Court of Appeal correctly held that the trial court properly sustained the demurrer because Petitioners failed to satisfy Code of Civil Procedure section 425.10, by pleading facts sufficient to support their causes of action. (*Rubin*, *supra*, 233 Cal.App. 4th at p. 1154 [Slip Op. at p. 25].)

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[7] The Court of Appeal needed not reach the other states interests but acknowledged that they are to (1) allow individual primary election voters a wider range of candidate options, (2) lessen the influence of the major parties in selecting candidates, and (3) help elect more practical office-holders. (*Rubin*, *supra*, 233 Cal.App. 4th at 1150 [Slip Op. at p. 20], citing Ballot Pamp., Primary Elec. (June 8, 2010) argument in favor of Prop. 14, at p. 18.)

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Dated: March 30, 2015

Respectfully submitted,

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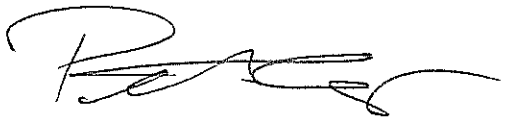

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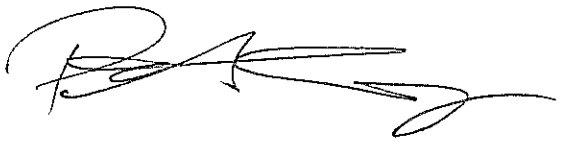
CERTIFICATE OF COMPLIANCE

I certify that the attached Answer to Petition for Review uses a 13 point Times New Roman font and contains 3,552 words.

Dated: March 30, 2015

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Rubin, Michael et al. v. Debra Bowen**
No.: **A140387**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 30, 2015, I served the attached:

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 30, 2015, at San Francisco, California.

V. Sanchez
Declarant

Signature

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