Case No. S224970

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**IN THE SUPREME COURT**

**OF THE STATE OF CALIFORNIA**

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MICHAEL RUBIN, MARSHA FEINLAND, CHARLES L. HOOPER, C.T. WEBER, CAT WOODS, GREEN PARTY OF ALAMEDA COUNTY, LIBERTARIAN PARTY OF CALIFORNIA, and PEACE AND FREEDOM PARTY OF CALIFORNIA,

Plaintiffs and Appellants,

vs.

ALEX PADILLA, Secretary of State of California, Defendant and Respondent, and INDEPENDENT VOTER PROJECT, *et al.*,

Interveners and Respondents.

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After Decision by the Court of Appeal
First Appellate District, Division One, Case No. A140387

On Appeal from an Order of the Superior Court of Alameda,
Case No. RG11605301
Honorable Lawrence John Appel

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# REPLY TO ANSWERS TO PETITION FOR REVIEW

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# REPLY TO THE ANSWERS TO PETITION FOR REVIEW

## I. INTRODUCTION

Petitioners Michael Rubin, *et al.*, urge this Court to grant review of their challenge to Proposition 14, most importantly because it severely restricts the rights of California voters to cast ballots for the candidates of their choice in the general election, and the State has failed to justify its limitations on voter choice. (Petition, p. 1)

Respondent Secretary of State Alex Padilla and Intervener/Respondents Independent Voter Project, *et al.*, deflect rather than confront petitioners' claims, resting their opposition to review on Proposition 14's purportedly equal and lawful treatment of political parties and candidates. They fail to analyze its severe impact on the rights of voters.

It is correct that the United States Supreme Court's election law jurisprudence has often addressed the rights of political parties and candidates, but it is equally true that the Court has separately affirmed the rights of voters to consider a range of candidates during election season--at the time of "peak" voter interest. *Williams v. Rhodes* (1968) 393 U.S. 23,

31; *Anderson v. Celebrezze* (1983) 460 U.S. 780, 787-788 (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....")). From the perspective of California's voters, the fact that Proposition 14 treats all parties and candidates alike does nothing to mitigate the radical decrease in the choices available to them in the general election. Yet respondents carefully downplay this issue.[1]

In concluding that Proposition 14 creates merely a "modest" restriction on ballot access, the Court of Appeal relied heavily on the Ninth Circuit's approval of Washington State's top two system. *Washington State Republican Party v. Washington State Grange* (9th Cir. 2012) 676 F.3d 784, *cert. denied* 568 U.S. ____, 133 S.Ct. 110 (2012) (*Washington II).* But *Washington II* is clearly distinguishable from the present case, because the Ninth Circuit upheld Washington's restriction on the candidate choices available in the general election on the grounds that an almost unlimited choice of candidates was

[1] Both Respondent and Intervener/Respondents argue that federal substantive law and pleading standards apply to the issues presented here. Petitioners agree.

available in Washington's August primary. The Ninth Circuit determined - by a process that it did not explain - that the August primary occurred "at a time when election interest is near its peak." No such holding can justify restricting California voters' choice to the June primary, when the interest of California's voters is decidedly not at its peak. In 2012 13.2 million California voters participated in the November election compared with just 5.3 million in the June primary; in 2014 the numbers were 7.5 and 4.5 million respectively. No argument can defeat the reality that Proposition 14 creates a severe burden on voter choice, and the State must be required to establish a compelling burden for this restriction.

Petitioners submit that the impact of Proposition 14 on California's voters presents important, unresolved questions of law worthy of this Court's review; that dicta in U.S. Supreme Court decisions considering far different legal issues does not compel the conclusion that Proposition 14 is constitutional; and that the Ninth Circuit's decision to uphold Washington State's two top law is distinguishable, if not incorrect.

## II. ARGUMENT

### I. THE U.S. SUPREME COURT'S COMMENTS ON THE LEGALITY OF A TOP TWO PRIMARY SYSTEM DO NOT REQUIRE THIS COURT TO REJECT PETITIONERS' ARGUMENTS.

Respondents argue that petitioners do not present "an important question of law" because the issues they raise have been resolved by decisions of the U.S. Supreme Court. Not so.

The Supreme Court has never ruled on the issues presented by petitioners' challenge to Proposition 14, but instead has twice commented on the legality of a top two system while ruling in cases that raised far different issues. The Court first commented on the top two issue in *California Democratic Party v. Jones* (2000) 530 U.S. 567. The issue in *Jones* was whether California's "blanket primary" system in which a voter could vote in a political party's primary election, regardless of the voter's party affiliation, unconstitutionally burdened the party's associational rights.

The Supreme Court ruled that allowing non-party members to choose a party's candidate violated the party's First Amendment right of political association. 530 U.S. at p. 577, 582. Concluding that the blanket primary system imposed a

severe burden on the associational rights of political parties, the Court then considered the interests that the supporters of the blanket primary system argued were compelling. *Id.* at 582-586. In rejecting all of the alleged compelling interests, the Court stated:

> Finally, we may observe that even if all these state interests were compelling ones, Proposition 198 is not a narrowly tailored means of furthering them. Respondents could protect them all by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot—which may include nomination by established parties and voter-petition requirements for independent candidates. Each 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. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness"—all without severely burdening a political party's First Amendment right of association. *Id*. 585-586.

It is apparent that the Supreme Court's decision in *Jones* is not an endorsement of Proposition 14, nor does it address or even anticipate the arguments made by petitioners here. Instead, the Court merely indicated that California could

accomplish the interests it believed justified the unconstitutional blanket primary system by establishing a "*nonpartisan* blanket primary."

In *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442 (*Washington I*), the Supreme Court was asked to determine whether the provision of Washington State's top two primary system that allowed candidates to designate their "party preferences" on the ballot violated the associational rights of political parties by creating confusion over whether statements of party preference would be mistaken for party endorsements. The Court concluded that the voter confusion issue could not be resolved as a facial challenge and remanded the case for factual findings. *Id.* at 444, 457-458.

The *Washington I* Court discussed its prior decision in *Jones*, which led to a Ninth Circuit decision forcing Washington to abandon its own blanket primary system. *Id.* at 446-447. It discussed the impact of its decision in *Jones* on the issue before it:

> In *Jones* we noted that a nonpartisan blanket primary, where the top two vote getters proceed to the general election regardless of their party, was a

> less restrictive alternative to California's system because such a primary does not nominate candidates. 530 U.S., at 585-586, 120 S.Ct. 2402, (The nonpartisan blanket primary "has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee"). Petitioners are correct that we assumed that the nonpartisan primary we described in *Jones*, would be constitutional. But that is not dispositive here because we had no occasion in *Jones* to determine whether a primary system that indicates each candidate's party preference on the ballot, in effect, chooses the parties' nominees. 552 U.S. at 452.

It is apparent from the express language of *Washington I* that the Supreme Court did not intend its comments in *Jones* to foreclose challenges to a top two primary system based on issues and arguments different from those resolved in those two cases.

## II. THE NINTH CIRCUIT'S DECISION IN *WASHINGTON II* DOES NOT REQUIRE THE REJECTION OF PETITIONERS' CLAIMS.

Washington's top two system returned to the Ninth Circuit following proceedings in the district court. *Washington II*. The Court first addressed the voter confusion issue remanded by the Supreme Court, affirming the district's court's conclusion on summary judgment that Washington's design of the election ballot was unlikely to lead to voter conclusion on

whether a candidate's stated party preference should be equated with party endorsement. 676 F.3d at 791-93.

The Court then turned to the Libertarian Party's ballot access argument and rejected the claim, similar to that made by petitioners here, that restriction to the primary ballot as opposed to the general election ballot placed an unconstitutional burden on "voting and associational rights" in light of the Supreme Court's decision in *Anderson*. *Id.* at 794.

The Ninth Circuit gave some credence to the Libertarians' claims: "By giving minor-party candidates access to the August primary ballot rather than the November general election ballot, I–872 poses, albeit to a lesser extent, some of these same concerns." *Id.* The Court then rejected the claims, first, because the Washington State primary occurred in August "at a time when election interest is near its peak," and second, because the Washington top two system treats all parties and candidates the same. As a result, the Court concluded, the top two system "does not impose a severe burden on the Libertarian Party's rights."

*Washington II* is not controlling here because its conclusion that the Washington August primary occurred at a

time "when election interest is near its peak" is inapplicable to California's June primary, and second because it addressed only the interest of the Libertarian Party, not of voters.

The *Washington II* decision actually supports petitioners' contention that their challenges must be aired at an evidentiary hearing. The *Washington II* decision is based largely on the Court's conclusion that the top two system does not impose a severe burden on the Libertarian Party's rights because the party can compete in an August primary "at a time when election interest is near its peak." The implication of the decision is that the party's rights would be severely burdened if it did not have an opportunity to compete at a time of peak voter interest.

*Washington II* suggests that in determining whether Proposition 14 severely burdens the rights of California's voters, a court must decide whether California's June primary election occurs a time of peak voter interest. Figures comparing voter turnout in 2012 and 2014 suggest that the June primary occurs at a time of voter indifference. As a result, if the issue is to be decided as a matter of law, petitioners should prevail.

## III. BALLOT ACCESS REQUIREMENTS ARE NOT MET BY MERELY ALLOWING CANDIDATES AND PARTIES ACCESS TO THE "ELECTORAL PROCESS."

Respondents, following the lead of the Court of Appeal here, suggest that ballot access requirements are met as long as candidates and parties are allowed to compete in the "electoral process." If that were actually the law, many of the decisions upon which both parties rely would be irrelevant and moot. *Washington II's* conclusions regarding the adequacy of access to the primary ballot under the facts of that case (the August primary at the time of peak voter interest) would have been unnecessary if mere participation in the primary would have foreclosed the challenge resolved by the Ninth Circuit.

Likewise, *Munro v. Socialist Workers Party* (1986) 479 U.S. 189, a case upon which respondents heavily rely, would scarcely have attracted the Supreme Court's attention if participation in the "electoral process" represented the beginning and the end of ballot access inquiries. The issue in *Munro* was whether Washington State's requirement that a candidate for partisan office receive at least one percent of the vote in the primary election to advance to the general election

constituted a severe burden on that party. *Id.* at 190-191. The Court explained the test for determining whether a State must allow a candidate to advance from the primary to the general election: "it is now clear that States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office." *Id.* at 193. The Court concluded that the one percent requirement did not present a severe burden. Here, petitioners seek only what *Munro* allows - a system which conditions access to the general election ballot on a candidate's ability to marshal a reasonable "modicum" of support in the primary election.

## IV. CASES REQUIRING A "MODICUM" OF SUPPORT FOR PLACMENT ON THE BALLOT DO NOT UNDERMINE PETITIONERS' CLAIMS.

Respondents argue that their position is bolstered by cases that condition ballot placement on timely and reasonable signature gathering requirements. However, none of their cited cases apply here, where candidates who demonstrate well more than what the Supreme Court has required as a modicum of support are kept off the general election ballot and relegated to

a primary election that attracts far less voter interest than does the general election.

For example, in *Stone v. Board of Election Commissioners for the City of Chicago* (7th. Cir. 2014) 750 F.3d 678, the Court upheld a requirement that candidates for city-wide offices collect nominating petitions signed by 12,500 voters - just under one percent of registered voters - within a ninety-day window, to have their names printed on the ballot. A voter may sign only one candidate petition within each election cycle. The Seventh Circuit affirmed that its review would be guided by the principles set out in *Anderson*. *Id.* at 681. It concluded that the signature requirement did not create a severe burden, comparing it to similar requirements challenged in many cases, including the five percent requirement upheld in *Jenness v. Fortson* (1971) 403 U.S. 431, 442, which it viewed as setting the "outer limit" for signature requirements. 750 F.3d at 683-84. Finding the requirement reasonable, the Seventh Circuit emphasized that it applied to all candidates, and that even one of the plaintiffs in the case before it had met the requirement in a previous election. *Id.* at 685.

The Sixth Circuit's decision in *Lawrence v. Blackwell* (6th. Cir. 2005) 430 F.3d 368, is to the same effect. Plaintiff there challenged an Ohio statute that required independent candidates for Congress to file a statement of candidacy and a nominating petition with a number of signatures equal to at least one percent of the voters in the candidate's congressional district by the day before the primary election in order to appear on the general election ballot. The primary is held either during the first week in March or the first week in May, depending upon whether it is a presidential election year. *Id.* at 370.

The *Lawrence* Court found that the deadline was not discriminatory, because candidates who wish to participate in the primary election must announce their intention 60 days before the primary, and did not create a severe burden because independent candidates had no right to delay their decision to run until after they learned who the major party candidates would be. *Id.*, at 373-74.

Finally, respondents' citation of *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, does little to bolster their argument. There the Court considered a San

Francisco charter provision prohibiting write-in votes during a mayoral run-off election. *Id.* at 167. Significantly, in the system under challenge in *Edelstein*, the regular election was to be held in November - when write-in votes were allowed - and, if no candidate received a majority of the votes, a run-off election would be held in December. *Id.*, at 171. The case therefore never raised the issue of peak voter interest.

The Court's decision in *Edelstein* was that the ban on write-in votes in the run-off did not create a severe restriction on voters' rights, in part because they could cast write-in votes during the general election and in part because the purpose of the runoff election was to assure that the winning candidate receive a majority of the votes cast. *Id.* at 182-183. Unlike Proposition 14 the San Francisco system allowed for a wide range of choices in the general election.

## CONCLUSION

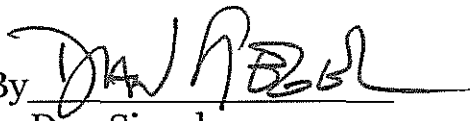
Petitioners demonstrate that Proposition 14 severely burdens the rights of California voters to choose among a diverse group of candidates in the general November elections, when voter interest is at its peak. Whether these restrictions can

be justified requires the State to show that Proposition 14 serves a compelling interest that cannot be met by less drastic restrictions on voters' rights.

The Court should grant a hearing to resolve these important issues.

Dated: April 8, 2015

SIEGEL & YEE

By 
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CERTIFICATE OF WORD COUNT

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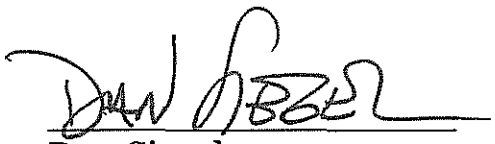
Dated: April 8, 2015



Dan Siegel

PROOF OF SERVICE

I, MICAH CLATTERBAUGH, 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 499 14th Street, Suite 300, Oakland, CA, 94612.

On April 9, 2015, I served copies of:

1. **APPELLANTS' REPLY TO THE ANSWERS TO PETITION FOR REVIEW**

on the parties in this action, the Court of Appeal, and the Superior Court, by placing true copies thereof in sealed envelopes with first class postage thereof fully prepaid and depositing the same in the United States mail at Oakland, California, addressed to:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 9, 2015, at Oakland, California.

Micah Clatterbaugh