No. A140387

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

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.

On Appeal from an Order of the Superior Court of Alameda,
Case No. RG11605301

Honorable Lawrence John Appel

APPELLANTS' PETITION FOR REHEARING

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INTRODUCTION

This court's opinion is predicated on the erroneous conclusion that laws which drastically reduce the electoral options available to voters "when election interest is near its peak[1]" and "when other parties are clamoring for a place on the ballot[2]" impose only a "modest[3]" burden on voters' First Amendment rights.

However, the Supreme Court has emphasized that the "right to vote is heavily burdened if that vote may be cast only for one of two parties when other parties are clamoring for a place on the ballot." *Williams v. Rhodes* (1968) 393 U.S. 23, 31. *Anderson v. Celebrezze* (1983) 460 U.S. 780, 787.

This court attempts to justify its conclusion that the burdens imposed by California's "top-two" primary system on voter choice are merely "modest" by re-writing the Elections Code to treat the June primary as though it were a general election that fulfills the constitutional requirement to provide an opportunity for minor party candidates to participate in the

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[1] *Washington State Republican Party v. Washington State Grange* (9th Cir. 2012) 676 F.3d 784, 794.
[2] *Williams v. Rhodes* (1968) 393 U.S. 23, 31.
[3] Slip Opinion at 18.

electoral process. Slip Opinion at 14. But the June primary is both nominally and actually a primary election to select the two candidates from which the voters may choose in November. Elections Code §§ 359.5, 1200, 1201. The second election is not a run-off. Even if one candidate receives a majority of the votes cast in June, the top two advance to the November general election. Elections Code § 8141.5.

ARGUMENT

I. MINOR PARTY CANDIDATES AND INDIVIDUALS WHO DEMONSTRATE A "MODICUM OF SUPPORT" ARE ENTITLED TO A PLACE ON THE BALLOT.

The Supreme Court's election law jurisprudence is based on the principle that "[C]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past." *Williams v. Rhodes, supra,* 393 U.S. at 32. This principle applies to parties and candidates alike. "As we have repeatedly recognized, voters can assert their preferences only through candidates or parties or both. 'It is to

be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues.' *Lubin v. Panish* (1974) 415 U.S. 709, 716. The right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.'" *Anderson v. Celebrezze, supra,* 460 U.S. at 787.

This court recognizes the Supreme Court's decisions requiring states to allow minor party candidates who receive a "modicum" of support to be allowed a place on the ballot. Slip opinion at 13, citing *Jenness v. Fortson* (1971) 403 U.S. 431, 442.

State laws that restrict ballot access for minor parties and candidates to those who demonstrate a "modicum" of support are constitutional. *Munro v. Socialist Workers Party* (1986) 479 U.S. 189, 196 (upholding a requirement that minor party candidates must receive at least one percent of the primary vote to appear on the general election ballot). A requirement that independent and minor party candidates submit petitions signed by five percent of eligible voters to be listed on the

general election ballot is constitutional (*Jenness, supra,* 403 U.S. at 442), but a 15 percent threshold is not. *Williams, supra,* 393 U.S. at 34.

California's top-two primary system denies general election ballot access to candidates who receive well more than what the Supreme Court defines as a "modicum" of support.

II. PLACEMENT ON THE JUNE PRIMARY ELECTION BALLOT DOES NOT SATISFY THE CONSTITUTION'S BALLOT ACCESS REQUIREMENTS.

This court's opinion concludes that participation in California's open nonpartisan primary election satisfies the Constitution's ballot access requirements. Slip Opinion at 13. The court's decision is based upon its reading of Supreme Court precedent that it interprets as concerned only with "minor-party access to the *electoral process*" (emphasis in original), rather than to the general election ballot. Slip Opinion at 13-14. This court's reading of the Supreme Court's decisions is incorrect.

The Supreme Court has emphasized that voters have a right to express their choice at the time of peak voter interest. *Williams, supra*, 393 U.S. at 31*; Anderson, supra*, 460 U.S. at

787. The U.S. Court of Appeals for the Ninth Circuit's decision upholding Washington State's top-two primary election against a challenge similar to that made here is in accord.

In *Washington State Republican Party v. Washington State Grange* (9th Cir. 2012) 676 F.3d 784, 793-794 (*Washington II)*, the Ninth Circuit utilized the ballot access analysis set forth in *Williams* and *Anderson:*

> When evaluating the constitutionality of ballot access regulations, we weigh the degree to which the regulations burden the exercise of constitutional rights against the state interests the regulations promote. *See Libertarian Party of Wash. v. Munro* (9th Cir. 1994) 31 F.3d 759, 761. If the burden is severe, the challenged procedures must be narrowly tailored to achieve a compelling state interest. *See id.* If the burden is slight, the procedures will survive review as long as they further a state's "important regulatory interests." *Nader v. Brewer* (9th Cir. 2008) 531 F.3d 1028, 1035 (quoting *Burdick v. Takushi* (1992) 504 U.S. 428, 434 (internal quotation marks omitted). In determining whether the burden is severe, "[t]he question is whether 'reasonably diligent' minor party candidates can normally gain a place on the ballot, or if instead they only rarely will succeed." *Libertarian Party of Wash.*, 31 F.3d at 762; accord *Nader*, 531 F.3d at 1035.

The Ninth Circuit's decision emphasizes that Washington's elections law (I-872) provides for the primary

election to be held in August, at a time of peak voter interest:

> 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. I–872, however, is distinguishable from the ballot access rules invalidated in *Anderson*. First, the I–872 primary is in August, not March. Second, unlike the system challenged in *Anderson*, in which independent candidates were required to file petitions before the major parties selected their nominees, the Libertarian Party participates in a primary at the same time, and on the same terms, as major party candidates. Libertarian Party candidates thus have an opportunity to appeal to voters at a time when election interest is near its peak, and to respond to events in the election cycle just as major party candidates do.

This court's decision, in concluding that restricting minor parties' and candidates' access to a June primary creates merely a "modest" burden on the exercise of constitutional rights, ignores the voter interest issue emphasized by *Williams*, *Anderson*, and *Washington II*. This court attempts to avoid the impact of California's top-two system by describing the primary election as one of two "general elections" constituting "a two-step process" (Slip Opinion at 14-15), but this effort to change the nomenclature does not address the restrictions on voter choice at the time of peak voter interest. Further, at least as to

elections for federal office holders, treating the June primary as a general election would be unlawful. [4] Plaintiffs' concern is that the top-two system severely limits the choices of California's voters at the time of the November election. A run-off system in which the two elections were held in close temporal proximity to each other would not create the same constitutional problems as the current system.

Regardless of whether an election is termed "primary" or "general," the Supreme Court's decisions require that a court reviewing a ballot access restriction determine whether the restriction imposes a "severe" restriction or a lesser burden, and if the burden is severe, whether it is narrowly tailored to serve a compelling state interest. *Burdick, supra*, 504 U.S. at 434.

The Supreme Court's decisions define a burden as "severe" under circumstances that apply here. In *Williams, supra,* the Court ruled that "the right to vote is heavily burdened" if a vote may be cast only for one of two candidates "at a time when other parties are clamoring for a place on the

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[4] Under federal law the general election for President and Members of Congress must be held on the Tuesday after the first Monday in November. *Foster v. Love* (1997) 522 U.S. 67, 71-72.

ballot." 393 U.S. at 31; *Anderson, supra,* 460 U.S. at 787. The Ninth Circuit has ruled that in determining whether a burden is severe, "[t]he question is whether 'reasonably diligent' minor party candidates can normally gain a place on the ballot, or if instead they only rarely will succeed." *Libertarian Party of Wash., supra,* 31 F.3d at 762; accord *Nader, supra,* 531 F.3d at 1035.

These decisions require the court to answer two questions, neither of which can be resolved without a full evidentiary proceeding:

First, does California June primary election satisfy the requirement that minor parties and candidates be allowed to participate in the electoral process at a time of peak voter interest?

Second, can a reasonably diligent minor party candidate normally gain a place on the ballot?

The limited record before the court created by petitioners' pleadings and requests for judicial notice weigh against any conclusion that the June primary takes place at a time of peak voter interest. In 2012, the first election cycle held after

California's adoption of the top-two system, 5.3 million voters participated in the primary election, compared with 13.2 million in the general election. Slip opinion at 3. In 2014, 4.5 million voted in the primary election, while 7.5 million voted in the general election[5].

The court's opinion addresses but does not resolve the issue of whether a "reasonably diligent" minor candidate can normally gain a place on the general election ballot. Slip opinion at 3. As the court states, nine minor party candidates received five percent or more of the primary vote in 2012, and the leader among them received 18.6 percent of the vote for a seat in the U.S. Congress. In total only three minor party candidates advanced to the general election. *Id.*

The timing of California's primary, the marked difference in the number of voters participating in the June primary as

[5] The court's opinion is unclear as to whether it granted judicial notice of data regarding voter participation in the 2014 general election. In footnote 13 the court indicates that it granted plaintiffs' December 18, 2014, request for judicial notice, which includes the 2014 general election data. (The data regarding the 2014 primary election is part of the request for judicial notice that includes the data addressed by the court at page 3 of the slip opinion.) However, in footnote 15 the court indicates that it denied plaintiffs' request for judicial notice.

compared with the general election, and the inability of minor party candidates to advance to the general election all suggest that the court was incorrect in concluding that candidates' ability to participate in the June primary satisfies the Constitution's ballot access requirements.

III. AN EVIDENTIARY PROCEEDING IS REQUIRED TO RESOLVE CONSTITUTIONAL CHALLENGES TO CALIFORNIA'S TOP TWO PRIMARY SYSTEM.

This court, like the trial court, concluded that the issues framed by plaintiffs' pleading could be resolved without trial based upon its finding that the top-two system imposed at most a "modest" burden on voter choice. Slip Opinion at 8. But as the cases discussed above establish, the top-two system has created extreme limits on voter choice at the time of peak electoral interest and severely burdened ballot access.

Constitutional challenges to state election laws cannot be resolved by a "litmus-paper test" that will separate valid from invalid restrictions. *Storer v. Brown* (1974) 415 U.S. 724, 730. "Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted

injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson, supra,* 460 U.S. at 789.

"In passing judgment, [a court] must not only determine the legitimacy and strength of [the state's] interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Id.*

The Supreme Court has developed a flexible sliding scale for assessing the constitutionality of ballot access restrictions. When the burden imposed is heavy, the provision must be "narrowly tailored to promote a compelling state interest." Restrictions that are both reasonable and nondiscriminatory need only be justified "by legitimate regulatory interests." *Barr v. Galvin* (1st. Cir. 2010) 626 F.3d 99, 109, citing *Timmons v. Twin Cities Area New Party* (1997) 520 U.S. 351, 358.

Which standard of review will ultimately apply, and which side will ultimately prevail, are not issues that can be resolved on the pleadings. Where, as here, a complaint alleges severe restrictions on ballot access that could trigger heightened scrutiny, "[t]he fact-specific nature of the relevant inquiry obviates a resolution . . . on the basis of the complaint alone." *Cruz v. Melecio* (1st Cir. 2000) 204 F.3d 14, 22.

As the New Hampshire federal court recently concluded in *Libertarian Party of New Hampshire v. William M. Gardner, Secretary of State,* Civil No. 14-cv-00322 (2014), an evidentiary hearing is necessary for a court to determine whether a party challenging a ballot access restriction "will be able to prove its claim that the law it challenges imposes a heavy burden on its ability to participate in the electoral process [and] . . . whether the State will succeed in articulating and justifying its interests in the restriction if it is called on to do so." Slip Opinion at 10.

The state's burden is to show that the restriction is both nondiscriminatory and reasonable. *Anderson, supra,* 460 U.S. at 788. While the court here has found that the top-two system

is nondiscriminatory (Slip Opinion at 23), it has not evaluated the alternative options available to the state to determine whether more narrowly tailored restrictions would also meet the state's asserted interests. For example, as in the State of Washington, the primary election could be moved to a date closer to the general election at a time of peak voter interest. Alternatively, a number of candidates greater than two might be allowed access to the general election ballot.

As the federal court determined in *Libertarian Party of New Hampshire, supra,* these are issues that cannot be resolved "solely on the face of the complaint." Slip Opinion at 12.

CONCLUSION

For the reasons set forth above, the court should grant plaintiffs' request for rehearing of this case.

Dated: February 11, 2015

SIEGEL & YEE

By___/s/ *Dan Siegel*_____
Dan Siegel

Attorneys for Appellants
MICHAEL RUBIN, *et al.*

CERTIFICATE OF WORD COUNT

The text of this petition consists of 2414 words as counted by the Microsoft Word word processing program used to generate this petition.

Dated: February 11, 2015

___/s/ *Dan Siegel*_____
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, and my electronic service address is micah@siegelyee.com.

On February 12, 2015 at 12:00 AM/PM, I electronically served copies of:

1. **APPELLANTS' PETITION FOR REHEARING**

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

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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 12, 2015, at Oakland, California.

Micah Clatterbaugh