This Tentative Ruling is issued by Judge Lawrence John Appel On the Demurrer to Unverified Second Amended Complaint ("SAC"), filed by Intervener-Defendants Independent Voter Project, David Takashima, Abel Maldonado and Californians to Defend the Open Primary ("Interveners") on March 11, 2013, and the Demurrer to Second Amended Complaint filed by Defendant Debra Bowen, as California Secretary of State (the "Secretary") on March 11, 2013, COUNSEL ARE TO APPEAR at the hearing at 9:00 a.m. on June 10, 2013, in Dept. 16, Administration Building, 3rd Floor, 1221 Oak Street, Oakland. The court is inclined to order as follows: (1) The Secretary's and Interveners' demurrers to the First Claim for Relief (ballot access) are OVERRULED. Plaintiffs Michael Rubin et al. ("Plaintiffs") consist of supporters of and regular voters for candidates of the Green Party, Peace and Freedom Party or Libertarian Party, including several individuals who ran as candidates for a state or federal office in the 2012 primary election, and the three political parties themselves. (SAC, ¶¶ 7-16.) Proposition 14 ("Prop. 14"), approved by California voters on June 8, 2010, initiated amendments to the California Constitution such that candidates for various state and federal offices run in a single primary election open to all registered voters and the top two vote-getters (regardless of party preference) advance to the general election. (Id., ¶¶ 19-20; see also Cal. Const. Art. II, § 5.) Plaintiffs allege that, prior to Prop. 14, a minor party candidate could appear on the general election ballot if the party "either (1) obtained total registrations equal to one percent of the total vote in the state at the most recent gubernatorial election or (2) polled two percent in any statewide race during the previous gubernatorial election." (SAC, ¶ 25.) Plaintiffs further allege: "As a result of Prop. 14, candidates representing minor political parties have been, de facto, precluded from consideration on the general election ballot." (Id., ¶ 24.) For example, in the 2012 general election, "[n]ine candidates from the Green, Peace and Freedom, and Libertarian parties received more than 5% of the vote [but] were [not] permitted to advance to the general election ballot," including candidates receiving as much as 18% of the vote. (Id., ¶¶ 3 and 27.) Plaintiffs allege: "Because the California general election ballot is the moment of peak participation by voters, media, and the candidates themselves, defendant Bowen's implementation of Prop. 14 excluded voters from minor political parties from effective civic engagement at the most important stage of the electoral process. California's decision to hold the primary election in June, five months before the general election, accentuates the exclusion of the minor parties from participation at times when voters' interest in the political process is at its highest." (Id., ¶ 32.) Plaintiffs allege that "California does not possess regulatory interests that are sufficiently compelling to justify Prop. 14's intrusion on voter, candidate, and minor party rights." (Id., ¶ 35.) The court determines that Plaintiffs' allegations in the SAC are sufficient, for pleading purposes, to state a cause of action for violation of ballot access rights under the 1st and 14th Amendments to the United States Constitution. "Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively, Williams v. Rhodes, 393 U.S. 23, 30 (1968), and may not survive scrutiny under the First and Fourteenth Amendments." (Munro v. Socialist Workers Party (1986) 479 U.S. 189, 193.) "In Williams v. Rhodes, for example, [the Supreme Court] held unconstitutional the election laws of Ohio insofar as in combination they made it virtually impossible for a new political party to be placed on the ballot, even if the party had hundreds of thousands of adherents. These associational rights, however, are not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively. Storer v. Brown, 415 U.S. 724, 730 (1974)." (Id.) "While there is no 'litmus-paper test' for deciding a case like this, ... 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.) For example, in Jenness v. Fortson (1971) 403 U.S. 431, 442, the Supreme Court rejected a challenge to Georgia's election statutes that required independent and minor party candidates to submit petitions signed by at least 5% of the eligible voters, observing that "[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot - the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." Here, Plaintiffs allege that, despite the fact that there were nine candidates identifying with the Green, Peace and Freedom and Libertarian parties who received more than 5% of the vote in the June 2012 primary election, those candidates were excluded from the November 2012 general election ballot by the State's application of Prop. 14. (SAC, ¶ 27.) While the court agrees with the State and Interveners that obtaining 5% (or some higher number) of the vote (or petition signatures) does not automatically entitle a candidate to a "ticket" to the general election ballot under constitutional principles, such principles do require that regulations resulting in such a restriction from the general election ballot be subjected to a level of "scrutiny" to ensure that they are supported by a sufficient state interest. (Munro, supra, 479 U.S. at p. 193.) In so doing, the court "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," and then "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." (Anderson v. Celebrezze (1983) 460 U.S. 780, 789.) The court does not believe this balancing process can be resolved at the pleading stage in this case under the applicable authority. The Secretary and Interveners strongly rely on the recent decision in Washington State Republican Party v. Washington State Grange (9th Cir. 2012) 676 F.3d 784, 794-795 ("Washington II"), which was addressed in the court's prior orders in this case. That decision considered and rejected at the pleading stage a constitutional challenge to a similar but not identical "top

two" primary system in Washington State. The court first acknowledged that the constitutional principles require a court to "weigh the degree to which the regulations burden the exercise of constitutional rights against the state interests the regulations promote." (Id., p. 793.) "If the burden is severe, the challenged procedures must be narrowly tailored to achieve a compelling state interest," but if "the burden is slight, the procedures will survive review as long as they further a state's 'important regulatory interests." (Id., pp. 793-794.) "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.'" (Id., p. 794.) The court then noted that (as is the case with Prop. 14) the challenged Washington statute ("I-872") gives all candidates broad access to the primary ballot but makes it difficult for a minor party candidate to progress to the general election ballot as one of the "top two" vote-getters. (Id., p. 794.) The court acknowledged that this "poses, albeit to a lesser extent, some of the[] same concerns" reflected in Anderson, supra, 460 U.S. 780, in which the Supreme Court struck down a law requiring an independent candidate to file a nominating petition in March to qualify for a November general election including because it imposed a severe burden by requiring the gathering of signatures at a time when voters were not as attuned to the upcoming campaign as they would be closer to the general election. (Id.) Nevertheless, the court distinguished I-872 from that law on two bases: (1) "the I-872 primary is in August, not March"; and (2) under I-872, minor party candidates "participate[] in a primary at the same time, and on the same terms, as major party candidates" and "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." (Id.) Despite the similarities between I-872 and Prop. 14, the court does not find Washington II dispositive of the First Cause of Action at the pleading stage, for several reasons. First, the California primary is held in June, five months before the general election, rather than August. Such an early primary could have an impact on independent or minor party candidates greater than its impact on major party candidates. (See, e.g., Anderson, supra, 460 U.S. at p. 791 ["If the State's filing deadline were later in the year, a newly-emergent independent candidate could serve as the focal point for a grouping of Ohio voters who decide, after mid-March, that they are dissatisfied with the choices within the two major parties."]) Second, while it is true that Prop. 14 (like I-872) allows all candidates, whether affiliating with a minor, major or no party, to participate in the primary election at the same time and on the same terms, the Washington II court's statement that minor party candidates "thus have an opportunity to appeal to voters at a time when election interest is near its peak" may or may not be true in this case, with the earlier June primary. Given these distinctions, it is not clear at the pleading stage that the top two system as applied by the Secretary "does not impose a severe burden" on the rights of minor party candidates and voters as the Washington II court found as to I-872. (676 F.3d at p. 794.) Third, it does not appear that the Washington II court completed the required constitutional analysis after finding that the law did not impose a "severe burden" on the Libertarian Party's rights. (Id.) As the court stated earlier in its decision, "[i]f the burden is slight, the procedures will survive review as long as they further a state's 'important regulatory interests.'" (Id., pp. 793-794; see also Burdick v. Takushi (1992) 504 U.S. 428, 434 ["when a state election law 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.]) Nevertheless, while "important regulatory interests" may "generally" be sufficient, this does not mean that such interests are not to be subjected to some (albeit lesser) scrutiny to determine if they justify the restriction. It does not appear that the Washington II court did so. (Id., p. 795.) Instead, while the court "recognize[d] the possibility that I-872 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," the court concluded its analysis by stating that "[t]his 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., p. 795, citing Cal. Democratic Party v. Jones (2000) 530 U.S. 567, 585-586.) This conclusion overstates the significance of the dicta in Jones and fails to complete the required constitutional scrutiny of the state's regulatory interests. In Jones, the Court did not address a ballot access claim or the constitutionality of a "top two" non-partisan primary system. Instead, it addressed a partisan primary system in which the State permitted voters not affiliated with a particular party to vote on that party's candidates. (530 U.S. at pp. 569-570.) The Court found that such law impermissibly burdened the political party's First Amendment rights of association. (Id., p. 577.) In discussing the state interests proffered to support the law, the Court noted in dictum that the State could accomplish most or all of the same objectives by having a "nonpartisan blanket primary" in which "[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., p. 585.) The Court's discussion was in the context of whether such a system would satisfy the state's interests without infringing a political party's associational rights rather than whether such a system would impose a burden on a party's or candidate's access to the general election ballot. Further, the Court used "top two vote getters" only as an example and indicated that a state could prescribe a higher number of candidates to advance to the general election. (Id.) Here, the court has an insufficient record at the pleading stage to determine whether the Secretary's interests justify the restriction on access pled in the First Claim for Relief, whether the interests are subjected to "strict" or lesser scrutiny. Among other things, the allegations and matters of which judicial notice is taken do not sufficiently address or explain why the state interests require or warrant limiting the

number of candidates advancing to the general election to two for each office. (See, e.g., Secretary's Request for Judicial Notice, Exh. 1 [addressing increased participation and choices in the primary and "help[ing] elect more practical officeholders who are more open to compromise" but not addressing the above matter].) (2) The Secretary's and Interveners' demurrers to the Second Claim for Relief (equal protection clause) are SUSTAINED, pursuant to C.C.P. § 430.10(e), WITHOUT LEAVE TO AMEND. Plaintiffs allege, among other things, that Prop. 14 "withdrew an established right from plaintiffs, namely, the right of minor political parties, their voters, and their candidates to participate in statewide general elections" and that "[b]ecause Prop. 14 drafters were motivated by an invidious purpose when they enacted electoral reform, and because Secretary Bowen's implementation of Prop. 14 in 2012 denied numerous well-supported minor party candidates from participating in the general election, plaintiffs' equal protection rights have been violated...." (SAC, ¶ 43.) In its order of January 25, 2013, the court sustained a demurrer to a similar claim based on similar allegations in the FAC, with leave to amend to plead facts sufficient to state a constitutional equal protection challenge. Plaintiffs have not remedied the deficiencies. As the court stated in its prior order, Prop. 14 on its face "does not appear to be directed to any classification or group. (See, e.g., Cal. Const. Art II, § 5; Nowak & Rotunda, Constitutional Law [5th ed.], § 14.4 [and cases cited therein.])" (Order, p. 14.) Nor is there anything in Prop. 14 that "withdraws" an "established right" from a particular group of people. (Id.) As the court stated in its prior order, it appears the claim is based largely on principles set forth in Perry v. Brown (9th Cir. 2012) 671 F.3d 1052, 1083-1084, as to which the Supreme Court granted certiorari on December 7, 2012. (See Hollingsworth v. Perry (2012) 133 S.Ct. 786.) The court agrees with the Secretary and Interveners that Plaintiffs' theory is not supported by Perry, in which the court held that "the Equal Protection Clause requires the state to have a legitimate reason for withdrawing a right or benefit from one group but not others, whether or not it was required to confer that right or benefit in the first place." (671 F.3d at pp. 1083-1084.) Here, in contrast to Perry, the challenged law does not on its face or in its application "target" one group or another for disparate treatment. Instead, it allows broad access to candidates identifying with any party (or no party) to participate in the primary election and then permits the top two vote-getters of whatever (or no) party affiliation to advance to the general election. In contrast to circumstances such as those in Valle Del Sol Inc. v. Whiting (9th Cir. 2013) 708 F.3d 808, 819, or Moss v. U.S. Secret Service (9th Cir. 2012) 675 F.3d 1213, 1224-1225, there are no allegations that the Secretary applied the law in a discriminatory way to deny rights to any particular group or persons with a particular viewpoint as compared to others. Further, there are insufficient allegations to support a violation of the Equal Protection Clause based on discriminatory intent. "[O]fficial action will not be held unconstitutional solely because it results in a ... disproportionate impact.... Proof of ... discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." (Village of Arlington Heights v. Metropolitan Housing Development Corp. (1977) 429 U.S. 252, 264-265.) First, Plaintiffs' allegations regarding the intent of the "drafters" of Prop. 14 are irrelevant because "such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent." (Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm'n (1990) 51 Cal.3d 744, 765 n.10.) This applies equally to the materials included in Plaintiffs' Request for Judicial Notice, upon which they base an argument that the manner in which the legislature decided to place Prop. 14 on the ballot reflects an invidious purpose. Regardless of how the legislature decided to place it on the ballot, however, such circumstances do not show that the voters lacked ample time to consider and vote on the measure or that they had any discriminatory intent in doing so. Second, Plaintiffs' selected quotation of an argument against Prop. 14 in the voter guide materials is an insufficient basis on which to support a finding of voter discriminatory intent. (See, e.g., Legislature v. Eu (1991) 54 Cal.3d 492, 505; NLRB v. Fruit & Vegetable Packers & Warehousmen (1964) 377 U.S. 58, 66; Ross v. RagingWire Telecommuns., Inc. (2008) 42 Cal.4th 920, 929 [rejecting opponents' ballot arguments as a guide to voter intent].) As a whole, the statements in the voter guide do not reflect that the proposition was aimed at depriving a particular group of established rights. (See Interveners' Request for Judicial Notice, Exh. F.) To the extent the cause of action is based on a violation of the California Constitution as opposed to the United States Constitution, it is deficient for the same reasons. "In analyzing constitutional challenges to election laws, [the California Supreme Court] has followed closely the analysis of the United States Supreme Court." (Edelstein v. City & County of San Francisco (2002) 29 Cal.4th 164, 179.) Also, Prop. 14 is itself part of the California Constitution and is accorded equal dignity with other provisions. (Strauss v. Horton (2009) 46 Cal.4th 364, 465-469.) (3) The Secretary's Request for Judicial Notice, filed on March 11, 2013, Interveners' Request for Judicial Notice, filed on March 11, 2013, Plaintiffs' Request for Judicial Notice, filed on May 21, 2013, Interveners' Supplemental Request for Judicial Notice, filed on May 28, 2013, and Secretary's Request for Judicial Notice, filed on May 28, 2013, are GRANTED. Nevertheless, the court does not take judicial notice of the truth of any matters in the attached exhibits. Also, the court's taking judicial notice does not reflect a determination that all of the exhibits are relevant to these demurrers. (4) The Second Claim for Relief is DISMISSED. The State and Interveners have until June 28, 2013, to file and serve an answer to the SAC (as to the First Claim for Relief).