BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Statutes 2009, Chapter 2 (SCA 4), adopted June 8, 2010 (Proposition 14); Elections Code Sections 13, 300.5, 325, 332.5, 334, 337, 359.5, 9083.5, 13102, 13105, 13110, 13206, 13230, 13302, 14105.1, as added or amended by Statutes 2009, Chapter 1 (SB 6); Elections Code Sections 8002.5, 8040, 8062, 9083.5, 13105, 13206, 13206.5, 13302, as added or amended by Statute 2012, Chapter 3 (AB 1413); Secretary of State County Clerk/Registrar of Voters Memoranda Nos. 11005, effective 1/26/11; 11125, effective 11/23/11; 11126, effective 11/23/11; 12059, effective 2/10/12. Filed on June 11, 2013 By County of Sacramento, Claimant.	Case No.: 12-TC-02 *Top Two Candidates Open Primary Act* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 26, 2014*) (*Served October 1, 2014*)

DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on September 26, 2014. Alice Jarboe appeared on behalf of the claimant, the County of Sacramento; Donna Ferebee and Lee Scott appeared on behalf of the Department of Finance; and Geoffrey Neill appeared for the California State Association of Counties.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the proposed decision to deny the test claim at the hearing by a vote of six to zero, with one member absent.

Summary of the Findings

This test claim alleges reimbursable state-mandated activities arising from amendments to the California Constitution and the Elections Code and the executive orders issued to implement those amendments to provide for a "top-two" primary election system for all statewide and congressional offices. The Commission finds in each case that either the test claim statutes pled

do not impose any new mandated activities; or that the duties imposed by the test claim statutes do not result in costs mandated by the state because they either are expressly included in or necessary to implement the voter-approved ballot measure, Proposition 14 (June 8, 2010, Statewide Primary Election), or are incidental to the ballot measure mandate and produce at most de minimis added costs, pursuant to Government Code section 17556(f). Thus, the test claim statutes and alleged executive orders do not result in a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

COMMISSION FINDINGS

I. Chronology

06/11/2013	The County of Sacramento (claimant) filed this test claim.[1]
07/03/2013	Commission staff issued a Notice of Complete Test Claim Filing and Schedule for Comments.
08/02/2013	The Department of Finance (Finance) requested an extension of time to file comments, which was approved for good cause.
08/30/2013	Finance submitted comments on the test claim.[2]
09/26/2013	Claimant requested an extension of time to file rebuttal comments, which was approved for good cause.
10/28/2013	Claimant submitted rebuttal comments,[3] along with a proposed amendment to the test claim filing.[4]
11/04/2013	Commission staff informed claimant that the proposed amendment was not timely, and therefore must be rejected.[5]
01/21/2014	Claimant submitted a challenge to the executive director's rejection of the proposed test claim amendment.[6]
05/19/2014	Commission staff issued a draft proposed statement of decision on the test claim.[7]

[1] Exhibit A, Test Claim.

[2] Exhibit B, Finance Comments on Test Claim, filed August 30, 2013.

[3] Exhibit C, Claimant Rebuttal Comments, filed October 28, 2013.

[4] Exhibit F, Proposed Test Claim Amendment Filing, filed October 28, 2013.

[5] Exhibit F, Notice of Rejected Proposed Test Claim Amendment, issued November 4, 2013.

[6] Exhibit F, Claimant's Challenge to Rejection of Test Claim Amendment, filed January 21, 2014. This "challenge" to the executive director's decision was not timely, in accordance with Code of Regulations section 1181 (now renumbered at section 1181.1, Register 2014, No. 21), which requires a written appeal submitted "within ten (10) days of first being served written notice of the executive director's action or decision." Therefore, the submission is received and treated as party comments, rather than an appeal of the executive director's decision.

[7] Exhibit D, Draft Proposed Decision, issued May 19, 2014.

06/04/2014	Claimant requested an extension of time to file comments on the draft decision, and postponement of the hearing, both of which were granted for good cause.
07/11/2014	Claimant submitted written comments on the draft decision.[8]
09/10/2014	The California State Association of Counties (CSAC) submitted late comments.

II. Background

The Secretary of State of California is the chief elections officer of the state,[9] and has the authority and the duty to ensure that the election laws are enforced, and that elections are conducted in an orderly manner.[10] Each county or city elections official, usually the county or city clerk or a local registrar,[11] is responsible for overseeing elections within the jurisdiction, and at the direction of the Secretary.[12] Article II of the California Constitution addresses voting, initiatives, and elections. Prior to the adoption of Proposition 14, and the enactment of the test claim statutes, Article II required the Legislature to provide for partisan primary elections for most elective offices.[13] All "expenses authorized and necessarily incurred in the preparation for, and conduct of, elections," are and were required to be paid from county treasuries.[14]

Under prior law, during each primary election cycle, including special primary elections, counties prepared ballots and sample ballots for each qualified party, including the names of *all candidates* affiliated with *each qualified political party* for whom nomination papers had been duly filed.[15] The partisan primary election process required the preparation of as many as seven partisan ballots for each primary election,[16] and a nonpartisan ballot. Each partisan primary ballot was intended to be printed together with the nonpartisan ballot as a single ballot.[17]

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[8] Exhibit E, Claimant's Comments on Draft Proposed Decision, filed July 11, 2014.

[9] Elections Code section 10 (Stats. 1994, ch. 920 (SB 1547)).

[10] Government Code section 12172.5 (Stats. 1975, ch. 1119; Stats. 1977, ch. 1205; Stats. 1978, ch. 847; Stats. 1994, ch. 923 (SB 1546); Stats. 2006, ch. 588 (AB 3059); Stats. 2011, ch. 118 (AB 1412); Stats. 2012, ch. 162 (SB 1171)).

[11] Elections Code section 320 (Stats. 2007, ch. 125).

[12] Elections Code section 11 (Stats. 1994, ch. 920).

[13] California Constitution, article II, section 5 (as amended by Stats. 2004, Res. C. 103 (SCA 18) (Proposition 60, approved November 2, 2004)). See also, article II, section 6 (as amended, June 3, 1986).

[14] Elections Code section 13001 (Stats. 2007, ch. 487 (AB 119); Stats. 2008, ch. 179 (SB 1498)). See also, former Elections Code section 13001 (Stats. 1994, ch. 920 (SB 1547)).

[15] Elections Code sections 13000 (Stats. 1994, ch. 920 (SB 1547); 13102 (Stats. 2007, ch. 515 (AB 1734)); 13300 (Stats. 2003, ch. 425 (AB 177)).

[16] See Exhibit A, Test Claim, at p. 73 ["seven qualified state political parties" participating in 2012 presidential primary election].

[17] Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)).

However, if the county elections official determined that the ballot would be too large to be conveniently handled, the county was permitted to provide for the nonpartisan ballot to be printed separately and provided alongside the partisan ballot to each party-affiliated voter.[18] A voter not registered as intending to affiliate with any of the participating political parties would receive only a nonpartisan sample ballot.[19] The sample ballot materials were mailed to each voter, as appropriate to their registered party affiliation, or lack of party affiliation, between 10 and 40 days prior to the election.[20] On the day of the primary election, voters registered as affiliated with a participating political party received the ballot prepared by the county for their party, which could be printed together with the nonpartisan ballot, or separately from the nonpartisan ballot, if the county elections official determined that a single ballot booklet would be too large to be conveniently handled.[21] Voters with no registered party affiliation would receive only a ballot for nonpartisan offices and ballot measures put before the voters, except that parties could adopt a rule allowing voters with no party affiliation to receive their party's ballot, and thus be treated as partisan voters.[22]

For general elections, including general special elections, only one form of ballot and sample ballot was provided.[23] That ballot contained the title of all offices to be voted for, the names of all candidates, as specified, and the titles and summaries of measures to be voted on.[24] The ballot also included, "immediately to the right of and on the same line as the name of the candidate, or immediately below the name, if there is not sufficient space to the right of the name…the name of the qualified political party with which the candidate is affiliated." In addition, the ballots and sample ballots would include the names of any parties that nominated a candidate, in addition to the candidate's own party.[25] Counties were required to mail sample ballots to registered voters 29 to 40 days prior to a general election, including notice to voters of their polling place.[26] Each political party that participated in the partisan primary had the right,

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[18] Elections Code section 13230 (Stats. 2000, ch. 898 (SB 28)).

[19] *Ibid*.

[20] Elections Code section 13300 (Stats. 2003, ch. 425 (AB 177)).

[21] Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)); Elections Code section 13230 (Stats. 2000, ch. 898 (SB 28)).

[22] Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)).

[23] Elections Code section 13102(Stats. 2007, ch. 515 (AB 1734)) ["There shall be provided, at each polling place, at each election at which public officers are to be voted for, but one form of ballot for all candidates for public office, except that, for partisan primary elections, one form of ballot shall be provided for each qualified political party as well as one form of nonpartisan ballot…"]. Elections Code section 13303 (Stats. 2000, ch. 899 (AB 1094)) [sample ballot shall be identical to the official ballots used in the election].

[24] Elections Code section 13103 (Stats. 1994, ch. 920 (SB 1547)).

[25] Elections Code section 13105 (Stats. 1994, ch. 920 (SB 1547)).

[26] Elections Code section 13303(Stats. 2000, ch. 899 (AB 1094)).

under prior law, to place its successful primary candidate on the ballot as its nominee for the ensuing general election.[27]

Prior law also required county elections officials to furnish precinct supplies to each polling place, including, but not limited to, lists of voters, envelopes, instruction cards, a digest of election laws, an American flag "of sufficient size to adequately assist the voter in identifying the polling place," ballot containers, badges for members of the precinct board, and printed copies of the Voter Bill of Rights.[28]

As amended by Proposition 14 and the test claim statutes and executive orders discussed below, counties now provide for a voter-nominated primary process for all congressional and state elective offices.[29] In primary elections, candidates are placed on the ballot by gathering sufficient signatures to satisfy a nomination petition, but those signatures no longer need to be provided by voters of the same party as the candidate.[30] In a general election, the candidates on the ballot are only those that were the top two "vote-getters" at the primary election.[31] Political parties no longer have any right or entitlement to place their favored candidate on the general election ballot,[32] and party designations on both the primary and general election ballots are chosen by the candidates, and do not reflect the endorsement or support of the party named.[33] The voters are to be made aware of these changes by inclusion of certain instructions and explanatory text in the ballots and sample ballots, and by the posting at polling places of appropriate explanatory signage. Specifically, voters are informed that they may vote for the candidate of their choosing regardless of party preference, except in presidential primary contests, but that the party preference, if any, designated by a candidate is chosen by the candidate, and does not constitute or imply support or endorsement of that political party (again, except in presidential primary contests).[34] The voter-nominated primary process does not require printing as many as seven separate partisan ballots for each qualified political party (as was required under prior law), except in presidential election years,[35] and permits, with the exception of presidential candidates and political party offices in a primary election only, any

[27] California Constitution, article II, section 5 (as amended by Proposition 60, November 2, 2004).

[28] Elections Code section 14105 (Stats. 1994, ch. 920 (SB 1547); Stats. 2003, ch. 425 (AB 177); Stats. 2003, ch. 810 (AB 1679)).

[29] California Constitution, article II, section 5 (as amended by Proposition 14, June 8, 2010).

[30] Elections Code sections 8062; 8068 (Stats. 2009, ch. 1 (SB 6)).

[31] California Constitution, article II, section 5 (as amended by Proposition 14, June 8, 2010).

[32] California Constitution, article II, section 5(b) (as amended by Proposition 14, June 8, 2010).

[33] Elections Code section 9083.5 (Stats. 2009, ch. 1 (SB 6); Stats. 2012, ch. 3 (AB 1413)).

[34] Elections Code sections 13206 (Stats. 2009, ch. 1 (SB 6); Stats. 2012, ch. 3 (AB 1413)); 13206.5 (added, Stats. 2012, ch. 3 (AB 1413)); 9083.5; 14105.1 (added, Stats. 2009, ch. 1 (SB 6)).

[35] Elections Code section 13102 (as amended by Stats. 2009, ch. 1 (SB 6)).

voter to vote for the candidate of his or her choice regardless of the party preference of the candidate or the voter.[36]

Test Claim Statutes and Alleged Executive Orders

Proposition 14/Statutes 2009, Chapter 2

Senate Constitutional Amendment 4 (Stats. 2009, ch. 2) was filed with the Secretary of State on February 19, 2009, and put before the voters as Proposition 14 at the June 8, 2010 Statewide Primary Election.[37] Because SCA 4 had no legal effect until adopted by the voters, the analysis below will refer hereafter to SCA 4, also called Statutes 2009, chapter 2, as Proposition 14.

The text of Proposition 14, section (a) of the findings and declarations, states that "[t]his act, along with legislation already enacted by the Legislature to implement this act, are intended to implement an open primary system in California as set forth below."[38] The "legislation already enacted…to implement" the act was Statutes 2009, chapter 1, discussed below.[39] Proposition 14 amended article II, section 5 of the California Constitution, providing, in pertinent part:

> (a) A voter-nomination primary election shall be conducted to select the candidates for congressional and state elective offices in California. All 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, provided that the voter is otherwise qualified to vote for candidates for the office in question. The candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office shall, regardless of party preference, compete in the ensuing general election.
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> (b) Except as otherwise provided by Section 6, a candidate for a congressional or state elective office may have his or her political party preference, or lack of political party preference, indicated upon the ballot for the office in the manner provided by statute. A political party or party central committee shall not nominate a candidate for any congressional or state elective office at the voter-nominated primary. This subdivision shall not be interpreted to prohibit a political party or party central committee from endorsing, supporting, or opposing any candidate for a congressional or state elective office. A political party or party central committee 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, as provided in subdivision (a).

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[36] California Constitution, article II, section 5 (as amended by Proposition 14, June 8, 2010).

[37] See Exhibit A, Test Claim, at p. 10. See also, Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[38] Exhibit F, Text of Proposition 14.

[39] Statutes 2009, chapter 1 (SB 6) states that it will not become operative unless SCA 4 (Proposition 14) is adopted.

> (c) The Legislature shall provide for partisan elections for presidential candidates, and political party and party central committees, including an open presidential primary whereby the candidates on the ballot are those found by the Secretary of State to be recognized candidates throughout the nation or throughout California for the office of President of the United States, and those whose names are placed on the ballot by petition, but excluding any candidate who has withdrawn by filing an affidavit of noncandidacy.
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> (d) A political party that participated in a primary election for a partisan office pursuant to subdivision (c) has the right to participate in the general election for that office and shall not be denied the ability to place on the general election ballot the candidate who received, at the primary election, the highest vote among that party's candidates.[40]

Proposition 14 also amended article II, section 6 to add the Superintendent of Public Instruction to the list of nonpartisan offices. Judicial, school, county, and city offices were already designated nonpartisan under prior law. The amendments to article II, section 6 also provide that a political party shall not nominate a candidate for *nonpartisan* office, and for *nonpartisan offices* a candidate's party preference shall not be included on the ballot.[41] Proposition 14 was adopted by the voters June 8, 2010, with an operative date of January 1, 2011.[42]

Statutes 2009, Chapter 1

Statutes 2009, chapter 1 effects a number of amendments to the Elections Code to conform to the Top Two Primaries Act, but explicitly states that its provisions "shall become operative only if SCA 4 is approved."[43] The Legislative Counsel's Digest preceding Statutes 2009, chapter 1, states that in addition to the changes proposed in Proposition 14: "[t]his measure would permit a voter, at the time of registration, to choose whether or not to disclose a party preference…[and] provide that a voter may vote for the candidate of his or her choosing in the primary election, regardless of his or her disclosure or non-disclosure of party preference." In addition, the Digest states that the measure would provide for a "voter-nominated primary election" for each state and congressional office, in which a voter may vote for any candidate regardless of the party preference disclosed by either the candidate or the voter. The two candidates receiving the highest vote totals would then compete for the office at the general election. The Digest further states that the measure would not change existing law relating to presidential primaries.[44]

The amendments made to the Elections Code by Statutes 2009, chapter 1 address, among other things, the form of ballots, the registration of voters, and the declaration of candidacy filed by each eligible candidate. The designation of all state and congressional offices as voter-

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[40] California Constitution, article II, section 5 (as amended by Proposition 14, effective June 9, 2010).

[41] Compare California Constitution, article II, section 6 (Amended June 3, 1986) with California Constitution, article II, section 6 (amended by Proposition 14, effective June 9, 2010).

[42] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[43] Statutes 2009, chapter 1 (SB 6), section 67.

[44] Statutes 2009, chapter 1 (SB 6), Legislative Counsel's Digest.

nominated offices pursuant to Proposition 14 required adding the words "voter-nominated office" to a number of Elections Code sections pertaining to qualification of candidates,[45] designation of party preference,[46] and the form of ballots.[47] In addition, the Code was amended in several relevant places to provide for "party preference" in lieu of "party affiliation."[48] Finally, Statutes 2009, chapter 1 required instructions to be added to the ballot and posted at polling places, to explain to voters the changes that had been made.[49]

Secretary of State's Memorandum CC/ROV #11005 (January 26, 2011)

This memorandum from the Secretary of State provides specific direction to county elections officials for special elections conducted during 2011. Most of the memorandum is explanatory of the changes made by Proposition 14 and Statutes 2009, chapter 1, including changes to the declaration of candidacy and nomination forms, additions to the voter information contained in the ballot, and the limitations imposed on write-in and independent nomination processes. The memorandum restates the language required by section 13105(a) to indicate a candidate's party preference, and provides for that information to appear on the ballot in three lines, with the name of the candidate, followed by the party preference designation sentence, followed by a "Ballot Designation."[50] Lastly, the memorandum provides that for special elections, a list of endorsements by qualified political parties shall be considered timely received, and therefore must be printed in the sample ballot booklets, if provided 43 days prior to the special primary election.[51]

Secretary of State's Memorandum CC/ROV #11125 (November, 23, 2011)

Memorandum #11125 addresses the changes made by Proposition 14 and Statutes 2009, chapter 1 as applied to the first full primary election cycle to begin in 2012. To reduce costs, the memorandum provides for shortening the party designation phrase from a complete sentence to "Party Preference: _____." In addition, the memorandum provides that there may be cases in which the shorter party preference designation phrases will not solve "ballot printing and cost challenges," and therefore the memorandum provides party abbreviations that may be used where necessary.[52]

Secretary of State's Memorandum CC/ROV #11126 (November 23, 2011)

Many of the directives of CC/ROV #11126 are similar to those stated in CC/ROV #11005, which applied only to special primary and special general elections, and most of CC/ROV #11126

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[45] Elections Code section 13 (Stats. 2009, ch. 1 (SB 6)).

[46] Elections Code section 8002.5 (Stats. 2009, ch. 1 (SB 6)).

[47] Elections Code sections 13102; 13105; 13110; 13206; 13230; 13302 (Stats. 2009, ch. 1 (SB 6)).

[48] See, e.g., section 13102 (Stats. 2009, ch. 1 (SB 6)).

[49] Elections Code section 9083.5; 14105.1 (Stats. 2009, ch. 1 (SB 6)).

[50] Exhibit A, Test Claim, at p. 54 [CC/ROV #11005].

[51] Exhibit A, Test Claim, at p. 55 [CC/ROV #11005].

[52] Exhibit A, Test Claim, at pp. 56-58.

restates the requirements of the Elections Code, pertaining to the reclassification of most offices to "voter-nominated" offices, the changes to candidate filing and nomination documents, and the instructions to voters to be included in the ballot and furnished to the voting precincts. The memorandum also notes that the June 5, 2012 primary election will not include any nonpartisan offices, and therefore the explanatory text for such offices is not necessary. The memorandum restates the shortened party designation phrases provided in CC/ROV #11125, and adopts for the regular primary election cycle the same "three-line format" called for in CC/ROV #11005 regarding special elections.[53]

Statutes 2012, chapter 3

The Legislative Counsel's Digest for Statutes 2012, chapter 3 states that "[t]his bill would make technical revisions to provisions of the Elections Code to reflect the 'voter-nominated primary election' process."[54] Those technical revisions include a provision *requiring* a candidate's party preference to appear on the primary ballot, and stating that the candidate's preference "shall not be changed between the primary and general election."[55] The amendments include changing the words "party affiliation" to "party preference" on the Declaration of Candidacy form, and changing the words "less than" to "fewer than," with respect to the number of signatures required to nominate a candidate for office.[56] In addition, the amendments require candidates for voter-nominated offices to disclose their voter registration and party preference history for the previous ten years.[57] With respect to the form of ballots, the amendments of Statutes 2012, chapter 3 *eliminated* the requirement that party preference information be printed in "eight point roman lowercase type," and the Code now provides for party preference identification "as specified by the Secretary of State." Amendments to the form of ballots also reflect the change described above, in that if a candidate indicates a party preference on his or her voter registration and declaration of candidacy, that preference shall be printed on the ballot.[58] And, the amendments reflect the fact that presidential primaries are unaffected by Proposition 14 or Statutes 2009, chapter 1, and therefore information relating to party-nominated offices must appear on the ballot in every presidential election year; in all other election years, only voter-nominated and nonpartisan offices will be on the ballot, and therefore the voter information pertaining to party-nominated offices may be omitted.[59]

Secretary of State's Memorandum CC/ROV #12059 (February 10, 2012)

This memorandum addresses the amendments made by Statutes 2012, chapter 3. The memorandum notes that Statutes 2012, chapter 3 now requires a candidate to provide a party preference or lack of party preference "consistent with the preference stated on their voter registration card," and thus the Declaration of Candidacy form has been updated to remove "the

[53] Exhibit A, Test Claim, at pp. 59-64.

[54] Legislative Counsel's Digest, Statutes 2012, chapter 3 (AB 1413).

[55] Elections Code section 8002.5 (as amended, Stats. 2012, ch. 3 (SB 1413)).

[56] Elections Code sections 8040; 8062 (as amended, Stats. 2012, ch. 3 (AB 1413)).

[57] Elections Code sections 8040 (as amended, Stats. 2012, ch. 3 (AB 1413)).

[58] Elections Code sections 13105; 13206 (as amended, Stats. 2012, ch. 3 (AB 1413)).

[59] Elections Code section 13206.5 (as added, Stats. 2012, ch. 3 (AB 1413)).

option for a candidate who disclosed a party preference on their voter registration card to withhold that information from the ballot."[60] As before, "[t]he forms, along with the qualifications and requirements for running for voter-nominated office, were forwarded to all county elections offices."[61] The memorandum further provides that on the sample ballot there are only two options for a candidate's party preference: either the name of a party, or the word "None." And, the memorandum states that "[t]he above-described designations made by the candidates shall appear on both the primary and general election ballots and shall not be changed between the primary and general elections." Finally, the memorandum restates the political party abbreviations that may be used on the ballots, where necessary, and clarifies that no further changes were made by AB 1413 to the requirements of printing a list of endorsements or furnishing voter information to the precincts.[62]

III. Positions of the Parties

A. Position of the Claimant

Claimant has pled Statutes 2009, chapter 2, which was put before the voters by the Legislature and approved in the June 2010 primary election as Proposition 14. Claimant has also pled specific code sections added or amended by Statutes 2009, chapter 1, and Statutes 2012, chapter 3, both of which purport to implement Proposition 14, and four specific memoranda from the Secretary of State's office, which provide for the implementation of the test claim statutes and Proposition 14.[63] Claimant alleges that it first incurred costs in fiscal year 2011-2012 to perform the following activities required by the test claim statutes and executive orders alleged:

i. Reproduce and provide to each polling place the Secretary of State's explanation of electoral procedures for party-nominated, voter-nominated and nonpartisan offices, in all required languages.

ii. Post at each polling place the Secretary of State's explanation of electoral procedures for party-nominated, voter-nominated and non partisan offices.

iii. Include in each ballot and sample ballot the wording "Party Preference" for all voter-nominated candidates.

iv. List all candidates for each voter-nominated office, regardless of party preference or lack thereof.

v. Follow the formatting rules promulgated by the Secretary of State.

vi. Include in each ballot and sample ballot new information regarding partisan offices, and voter-nominated and nonpartisan offices.

vii. Include in each sample booklet authorized party endorsement lists, without cost to the party or central committee.

[60] Exhibit A, Test Claim, at p. 66.

[61] Exhibit A, Test Claim, at p. 67.

[62] Exhibit A, Test Claim, at pp. 70-72.

[63] Exhibit A, Test Claim, at p. 1.

viii. Include in each sample booklet new information regarding partisan offices, and voter-nominated and non partisan offices.

ix. Include in each presidential general election ballot new specified language.

x. Include in each election ballot new specified language.

xi. Include in each ballot, sample ballot, and voter information pamphlet specified party abbreviations; those abbreviations will be posted at each polling place and mailed to vote-by-mail voters.

xii. Collect and report additional specified information from candidates for voter-nominated office.

xiii. Attend meetings and trainings to ensure uniform implementation of the Top Two Candidates Open Primary Act.

xiv. Perform additional In-Lieu of Filing Fee petition signature verification to comply with elimination of lower signature thresholds for minor party candidates to voter-nominated offices.

xv. Perform more complex testing of Voting System Logic and Accuracy to verify vote counting machines programming correctly tabulates lengthy voter-nominated contests.

xvi. Increase the length of the ballot and sample ballot to accommodate lengthy voter-nominated contests.

xvii. Increase the length of the ballot and sample ballot to accommodate lengthy instructions.

xviii. Modify precinct officer training classes and on-line training programs to include changes implementing the Top Two Candidates Open Primary Act, including:

a. Instructions on what documents to post, and where the documents to be posted; and

b. Information on the new contest designations and who is allowed to vote on the contests.

xix. Revise polling place operations manual to include changes resulting from Top Two Candidates Open Primary Act, including:

a. Written instructions on what is to be posted and where it is to be posted; and

b. Written definition and lists of Party Nominated, Voter Nominated, and Nonpartisan contests, including who is eligible to vote on these contests.[64]

Claimant estimated increased costs in fiscal year 2011-2012 in the amount of $33,000, and estimated increased costs in fiscal year 2012-2013 in the amount of $15,000. In addition,

[64] Exhibit A, Test Claim, at pp. 3-4.

claimant alleges that no offsetting non-local funds or fee authority are available to cover the costs of this mandate.[65]

In response to Finance's comments, which assert that the entirety of the test claim should be denied because the statutes and executive orders are necessary to implement a voter-enacted ballot measure, claimant argues:

> Proposition 14 established the minimum requirements for the conduct of certain election activities to be performed by counties. The Legislature enacted statutes and the Secretary of State promulgated executive orders that impose new and higher levels of service related to election activities which are neither contained in, nor required to implement, Proposition 14.[66]

Then, in response to the draft proposed decision issued May 19, 2014, claimant argues that "Proposition 14 contained very clear ballot measure language..." which was "altered and in some cases even superseded by legislative statutes and executive orders that were not necessary to implement or incidental to SCA 4/Proposition 14." Claimant argues that because the Secretary of State "has no ability to conduct an election; issue, process or validate candidate nomination paperwork; prepare official ballots; present voter specific sample ballot pamphlets; or even process affidavits of registration…[a]s such, the Top Two test claim is very much a mandate to Counties who bear the burden of the activities identified in the test claim."[67] Claimant addresses the analysis of each amended code section in turn, and argues that each imposes plain language requirements, and that those requirements are not necessary to implement Proposition 14, and impose more than de minimis costs.[68] Specifically, claimant argues that some of the activities' costs "exceed $1,000 which meets the threshold for mandate claiming and therefore are not de minimus [*sic*]."[69] And, claimant argues, "[e]ven should the Commission find [the alleged activities and costs] are necessary, these methods are not the least burdensome method for providing the information to the voters."[70] Finally, claimant states that it "respectfully requests the Commission find that the activities and costs pled in the test claim and amended test claim are not due to language contained in, incidental to or required to implement SCA 4/Proposition 14." Claimant asks that the Commission "find the test claim statutes and executive orders cited in the test claim and amended test claim do impose new mandated activities and results in costs mandated by the State…"[71]

B. Department of Finance Position

Finance argues that the test claim statutes "were necessary to either put the ballot measure before the voters or to implement the ballot measure once it was approved by the voters." In addition,

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[65] Exhibit A, Test Claim, at p. 5.

[66] Exhibit C, Claimant Rebuttal Comments, at p. 1.

[67] Exhibit E, Claimant Comments on Draft Staff Analysis, at p. 1.

[68] Exhibit E, Claimant Comments on Draft Staff Analysis, at pp. 2-7.

[69] Exhibit E, Claimant Comments on Draft Staff Analysis, at p. 6.

[70] Exhibit E, Claimant Comments on Draft Staff Analysis, at p. 7.

[71] Exhibit E, Claimant Comments on Draft Staff Analysis, at p. 7.

Finance argues that the four memoranda from the Secretary of State's office were necessary to implement the ballot measure approved by the voters. Therefore, "Finance is of the opinion that the Commission on State Mandates (Commission) should deny the test claim, in its entirety, based upon Government Code section 17556(f) which finds that no state mandate exists if 'The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election.'"[72]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates:
>
> (1) Legislative mandates requested by the local agency affected.
>
> (2) Legislation defining a new crime or changing an existing definition of a crime.
>
> (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[73] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[74]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[75]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[76]

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[72] Exhibit B, Finance Comments on Test Claim, at pp. 1-2.

[73] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, at p. 81.

[74] *County of Los Angeles v. State of California* (*County of Los Angeles I*) (1987) 43 Cal.3d 46, at p. 56.

[75] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, at p. 874.

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[77]

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[78]

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[79] The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[80] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[81]

A. Statutes 2009, chapter 2 was adopted by the voters as Proposition 14 in a statewide election, and therefore does not impose a state-mandated local program.

Senate Constitutional Amendment 4 (Stats. 2009, ch. 2) was filed with the Secretary of State on February 19, 2009, and put before the voters as Proposition 14 at the June 8, 2010 Statewide Primary Election.[82] The text of Proposition 14 states that "[t]his act, along with legislation already enacted by the Legislature to implement this act, are intended to implement an open primary system in California as set forth below."[83] The "legislation already enacted…to implement" the Act was Statutes 2009, chapter 1 (SB 6), discussed below. Proposition 14 amended article II, sections 5 and 6 of the California Constitution to provide for voter-nominated primary elections for congressional and state offices, and a "top-two" general election.

Government Code section 17556(f) provides that the Commission "shall not find" costs mandated by the state if:

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[76] *Id*. at 874-875 (reaffirming the test set out in *County of Los Angeles*, *supra*, 43 Cal.3d 46, at p. 56.)

[77] *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, at pp. 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, at p. 835.

[78] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, at p. 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, at p. 1284; Government Code sections 17514 and 17556.

[79] *County of San Diego*, *supra*, 15 Cal.4th 68, at p. 109.

[80] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, at pp. 333-334.

[81] *County of Sonoma*, *supra*, 84 Cal.App.4th 1265, at p. 1281 [citing *City of San Jose v. State of California* (1996) 45 Cal.app.4th 1802, at p. 1817].

[82] See Exhibit A, Test Claim, at p. 10; Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[83] Exhibit F, Text of Ballot Measure, Proposition 14, at p. 1.

> The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.[84]

California School Boards Association v. State of California (*CSBA I*) makes clear that this statutory exclusion from reimbursement is consistent with the subvention requirements of article XIII B, section 6.[85] The court in *CSBA I* reasoned that the subvention requirement applies to mandates imposed by the Legislature, not by the voters; the voters' powers of initiative and referendum are reserved powers, not vested in the Legislature, and are therefore not limited by article XIII B, section 6. *CSBA I* holds that the reimbursement requirement applies only to state-mandated costs, not costs incurred by way of "the people acting pursuant to the power of initiative."[86]

Proposition 14 was put before the voters at the June 8, 2010 primary election, and adopted the exact language as Statutes 2009, chapter 2. Therefore, all requirements of Statutes 2009, chapter 2 are expressly included in a ballot measure approved by the voters in a statewide election, and the Commission shall not find costs mandated by the state, within the meaning of article XIII B, section 6, pursuant to Government Code section 17556(f).

In its response to the draft proposed decision, claimant concedes that "Proposition 14 does not impose the mandate." Rather, claimant argues "[i]t is SB 6 [Stats. 2009, ch. 1] and AB 1413 [Stats. 2012, ch. 3] together that defined a complex and party-centric implementation of the Top Two Candidates Open Primary Act which exceeded the plain language and in some instances changed the intention of SCA 4/Proposition 14 that has produced the mandate."[87]

Based on the foregoing, the Commission finds that Statutes 2009, chapter 2 does not result in a reimbursable state-mandated program and is denied.

B. Many of the code sections, as amended by the test claim statutes, and the executive orders pled, do not impose any new state-mandated activities on local government.

The first element of a reimbursable mandate, as stated above, is that the statute or executive order alleged must require or mandate local agencies to perform an activity. The following code sections and executive orders alleged in this test claim do not impose any new required activities on county election officials, as explained herein, and thus do not constitute state-mandated programs within the meaning of article XIII B, section 6: Elections Code sections 13, 300.5, 325, 332.5, 334, 337, 359.5, and 13230, as amended by Stats. 2009, ch. 1; sections 8002.5, 8040, 8062, as amended by Stats. 2012, ch. 3; and that portion of the Secretary of State's Memorandum CC/ROV #11126 pertaining to nomination papers.

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[84] As amended by Statutes 2010, chapter 719 (SB 856).

[85] *California School Boards Association v. State of California* (*CSBA I*) (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, 1206-1207; 1210.

[86] *Ibid.*

[87] Exhibit E, Claimant's Comments on Draft Proposed Decision, at p. 2.

1. Elections Code section 13, as amended by Statutes 2009, chapter 1, does not impose any new state-mandated activities on local government.

Section 13, prior to amendment by the test claim statutes, provided that no person shall be considered a legally qualified candidate for office or party nomination *for a partisan office* unless that person has filed a declaration of candidacy with the proper official for the particular election or primary, or is entitled to have his or her name placed on the general election ballot by reason of having been nominated at a primary election, or having been selected to fill a vacancy on the general election ballot as provided in Section 8806, or having been selected as an independent candidate pursuant to section 8304. Prior section 13 further provided that nothing in this section prevents or prohibits a voter from casting a ballot by writing in the name of the person, or from having that ballot counted or tabulated.[88]

As amended, section 13 refers to a person being selected to fill a vacancy on the ballot pursuant to section 8807, rather than section 8806, and now clarifies that a person shall not be legally qualified for nomination or to participate in the general election for a *voter-nominated office* unless that person has filed a declaration of candidacy, or was nominated at a primary election. The amendment to section 13 is technical in nature, and is required to conform to the change from a party-nomination to a voter-nomination for congressional and state offices.[89] Moreover, the plain language does not mandate any activities or tasks; it is definitional in nature.

Although the plain language of section 13 does not mandate any activities on counties, claimant alleges more specifically, in response to the draft proposed decision, that "Election Code [*sic*] Section 13 previously allowed write-in candidates for any election." Claimant continues: "With the enactment of SB 6 and AB 1413, write-in candidacy for voter-nominated offices were limited to primary elections only, eliminating this opportunity for write-in candidates in voter-nominated contests in the general election."[90] Claimant, however, does not address how that change to the availability of write-in candidacies constitutes a state-mandated increase in the level of service provided to the public.

Based on the foregoing, the Commission finds that Elections Code section 13, as amended by Statutes 2009, chapter 1, does not impose any state-mandated activities on counties.

2. Elections Code sections 300.5, 325, 332.5, 334, 337, and 359.5, as added or amended by Statutes 2009, chapter 1, do not impose any new state-mandated activities on local government.

Section 300.5, as added, defines the phrase "affiliated with a political party," as used in the code, to mean "the party preference that the voter or candidate has disclosed on his or her affidavit of registration."[91] Claimant alleges that this definition "is contrary to how SCA 4/Proposition 14

[88] Statutes 2003, chapter 810 (AB 1679).

[89] Statutes 2009, chapter 1 (SB 6).

[90] Exhibit E, Claimant's Comments on Draft Proposed Decision, at p. 2.

[91] Elections Code section 300.5 (Stats. 2009, ch. 1 (SB 6)).

defined the word…"[92] However, the Commission is required to presume that statutes are constitutional.[93] The proper place to challenge the constitutionality of a statute is in the courts.

Section 325, as added, defines "independent status" to mean "a voter's indication of 'No Party Preference.'"[94] Section 325 was repealed by Statutes 2012, chapter 3.[95]

Section 332.5, as added, defines the term "nominate" to mean "the selection, at a state-conducted primary election, of candidates who are entitled by law to participate in the general election for that office, but does not mean any other lawful mechanism that a political party may adopt for purposes of choosing the candidate who is preferred by the party for a nonpartisan or voter nominated office."[96]

Section 334, as amended, clarifies that a "nonpartisan office" is one for which no party may nominate a candidate, but does not include a "voter-nominated office," which is defined in section 359.5, discussed below.[97]

Section 337, as amended, defines a "partisan office" to include President and Vice President of the United States, and "the delegates therefor," and an "[e]lected member of a party committee."[98] Prior section 337 provided only that a partisan office "means an office for which a party may nominate a candidate."[99]

Section 359.5, as added by Statutes 2009, chapter 1, defines a voter-nominated office under the open primary provided for by Proposition 14. Section 359.5 provides that a voter-nominated office "means a congressional or state elective office for which any candidate may choose to have his or her party preference or lack of party preference indicated upon the ballot." Section 359.5 further provides that a party "shall not nominate a candidate at a state-conducted primary election for a voter-nominated office," and that "[t]he primary conducted for a voter-nominated office does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election." Section 359.5 goes on to list a number of state and federal offices that shall be voter-nominated, and finally states that the section does not prohibit a political party from endorsing, supporting, or opposing a candidate for a voter-nominated office.[100]

Claimant argues that section 359.5 necessitates additional training and publications "for poll workers, voters, candidates…" and that "transferring the training and information duties to the

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[92] Exhibit E, Claimant's Comments on Draft Proposed Decision, at p. 2.

[93] California Constitution, article III, section 3.5 ["An administrative agency…has no power…[t]o declare a statute unconstitutional…"].

[94] Former Elections Code section 325 (Stats. 2009, ch. 1 (SB 6)).

[95] Statutes 2012, chapter 3 (AB 1413), § 2.

[96] Elections Code section 332.5 (Stats. 2009, ch. 1 (SB 6)).

[97] Elections Code section 334 (Stats. 2009, ch. 1 (SB 6)).

[98] Elections Code section 337 (Stats. 2009, ch. 1 (SB 6)).

[99] Statutes 1994, chapter 920 (SB 1547).

[100] Elections Code section 359.5 (Stats. 2009, ch. 1 (SB 6)).

County is a practical mandate."[101] The plain language of section 359.5 does not impose any requirements on counties. Nor does the plain language of section 359.5 support any inference of training or informational requirements. The duty to educate voters, and to train poll workers, if any such duty is found in law, is altered in scope and extent by the changes to the primary election system effected by Proposition 14, but not by the addition of a definition of "voter-nominated" to the Elections Code.

Nothing in the plain language of sections 300.5, 325, 332.5, 334, 337, or 359.5 imposes any activities or costs on local government. The additions and amendments to the Elections Code effected by Statutes 2009, chapter 1 are definitional in nature.

Based on the foregoing, the Commission finds that Elections Code sections 300.5, 325, 332.5, 334, 337, and 359.5, as added or amended by Statutes 2009, chapter 1 do not impose any state-mandated activities on counties.

3. Elections Code section 13230, as amended by Statutes 2009, chapter 1, does not impose any new state-mandated activities on local government.

Pre-existing law, section 13230, added by Statutes 2000, chapter 898, provided that "[i]f the county elections official determines that, due to the number of candidates and measures that must be printed on the ballot, the ballot will be larger than may be conveniently handled, the county elections official may provide that a nonpartisan ballot shall be given to each partisan voter, together with his or her partisan ballot, and that the material appearing under the heading 'Nonpartisan Offices' on partisan ballots, as well as the heading itself, shall be omitted from the partisan ballots." In addition, prior section 13230 provided that "'[p]artisan voters,' for purposes of this section, includes persons who have declined to state a party affiliation, but who have chosen to vote the ballot of a political party as authorized by that party's rules duly noticed to the Secretary of State."[102]

As amended by Statutes 2009, chapter 1,[103] section 13230 provides that if the county elections official determines that a ballot will be larger than may be conveniently handled, "the county elections official may provide that a nonpartisan ballot shall be given to each partisan voter, together with his or her partisan ballot, and that the material appearing under the heading 'Voter Nominated and Nonpartisan Offices' on partisan ballots, as well as the heading itself, shall be omitted from the partisan ballots."[104] And, amended section 13230 provides that "partisan voters" includes "both persons who have disclosed a party preference pursuant to Section 2151 or 2152 and persons who have declined to disclose a party preference, but who have chosen to vote the ballot of a political party as authorized by that party's rules duly noticed to the Secretary of State."[105]

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[101] Exhibit E, Claimant's Comments on Draft Proposed Decision, at p. 3.

[102] Elections Code section 13230 (Stats. 2000, ch. 898 (SB 28)).

[103] The amendment to section 13230 made by Statutes 2012, chapter 3 (AB 1413) was not properly pled, and the Commission does not have jurisdiction over that amendment.

[104] Elections Code section 13230(a) (Stats. 2009, ch. 1 (SB 6)) [emphasis added].

[105] Elections Code section 13230(c) (Stats. 2009, ch. 1 (SB 6)) [emphasis added].

None of the amendments to section 13230 impose new state-mandated activities on counties. The amended definition of "partisan voter" is merely clarifying of the law as approved by the voters in Proposition 14, and does not impose any activities or tasks on counties. More importantly, the county elections official is not *mandated* to provide separate ballots, but *may* provide separate ballots if he or she determines that a single ballot would be "larger than may be conveniently handled."[106] That determination is a local discretionary decision, and there is no requirement that the county elections official provide for separate ballots even if such a determination is made.[107] Moreover, the provision that a county elections official may provide for separate partisan and nonpartisan ballots is found also in prior law,[108] and is therefore not new.

In response to the draft proposed decision, claimant argues that "giving voters a ballot 'larger than may be conveniently handled' disenfranchises voters and candidates to the extent that down-ballot contests are avoided." Claimant asserts that because most previously partisan offices are now voter-nominated "the ballot is still 'larger than can be conveniently handled,'" and "in reality continues the voter disenfranchisement."[109]

Claimant's concerns are not relevant to the question of whether a test claim statute imposes a reimbursable state mandate, and asserted voter disenfranchisement is not within the Commission's purview. The plain language of amended section 13230 does not impose any mandated activities on county elections officials, and the option to provide a separate partisan ballot is not new, with respect to prior law.

Based on the foregoing, the Commission finds that Elections Code section 13230, as amended by Statutes 2009, chapter 1, does not impose any new state-mandated activities on counties.

4. Elections Code sections 8002.5 and 8040, as amended by Statutes 2012, chapter 3, do not impose any new state-mandated activities on local government.

Prior to the enactment of the test claim statute, section 8002.5 provided that a candidate "may indicate his or her party preference, or a lack of party preference, as disclosed upon the candidate's most recent statement of registration," and if a candidate indicates a party preference, "it shall appear on the primary and general election ballot."[110] The prior version of section 8002.5 also required that all references to party preference or affiliation "shall be omitted from all forms required to be filed by a voter-nominated candidate…except that the declaration of candidacy required by Section 8040 shall include space for the candidate to list the party preference disclosed upon the candidate's most recent affidavit of registration."[111]

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[106] Elections Code section 13230(a) (Stats. 2009, ch. 1 (SB 6)).

[107] See Government Code section 14 ["'Shall' is mandatory and 'may' is permissive."].

[108] See Elections Code section 13230 (Stats. 2000, ch. 898 (SB 28)).

[109] Exhibit E, Claimant Comments on Draft Proposed Decision, at p. 3.

[110] Elections Code section 8002.5 (as added, Stats. 2009, ch. 1). Note that this section as amended by Statutes 2009, chapter 1 was not pled in this test claim. See Exhibit A.

[111] Elections Code section 8002.5 (as added, Stats. 2009, ch. 1 (SB 6)).

As amended by Statutes 2012, chapter 3, section 8002.5 now requires a candidate to indicate either a party preference or no party preference in the candidate's declaration of candidacy, "which shall be consistent with what appears on the candidate's most recent affidavit of registration." The candidate's party preference "shall appear on the primary and general election ballot in conjunction with his or her name, and shall not be changed between the primary and general election."[112]

Section 8040 was also amended by Statutes 2012, chapter 3 to eliminate the reference to party affiliation, in accordance with the implementation of a voter-nominated primary election system. Prior section 8040 provided for the Declaration of Candidacy form which stated "I hereby declare myself a _____ Party candidate for nomination to the office of _____ District Number ____ to be voted for at the primary election…"[113] The amended section omits any reference to party, and instead provides that the form shall state: "I hereby declare myself a candidate for nomination to the office of _____ District Number ____ to be voted for at the primary election…"[114] In addition, amended section 8040 now provides that on the Declaration of Candidacy form a candidate shall certify his or her political party preference as indicated on his or her current affidavit of registration, and certify his or her "party affiliation/preference history" for 10 years prior to the year in which the document is executed.[115]

The 2012 amendments to sections 8002.5 and 8040 therefore consist of (1) a requirement that candidates indicate a party preference or no party preference, and that the statement of party preference be consistent with the candidate's most recent affidavit of registration; (2) a directive that a candidate's party preference shall not be changed between the primary and general election; and (3) an amendment to the language of the Declaration of Candidacy form.

Claimant argues that these amendments require county elections officials to verify that a candidate's indication of party preference or no party preference is consistent with the most recent affidavit of registration. Claimant also argues that if the candidate's designation of party preference does not match the most recent affidavit of registration, county elections officials would be required "to explain the requirement to the candidate and give the candidate the opportunity to change their filing or their affidavit of registration."[116] And finally, Claimant argues that "AB 1413 amended Elections Code [section] 8040 to include new candidate certifications in the candidate's declaration of candidacy." Claimant maintains that "[t]his additional certification is not contained in Proposition 14 and is not required for its implementation." Therefore, claimant reasons, "[t]hese requirements increase costs related to redesigning and reprinting those forms and instructions as well as staff training on these new requirements."[117]

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[112] Elections Code section 8002.5 (as amended, Stats. 2012, ch. 3 (AB 1413)).

[113] Elections Code section 8040 (Stats. 2003, ch. 277 (AB 277)).

[114] Elections Code section 8040 (Stats. 2012, ch. 3 (AB 1413)).

[115] *Ibid.*

[116] See Exhibit C, Claimant Rebuttal Comments, at pp. 1-2.

[117] Exhibit C, Claimant Rebuttal Comments, at p. 2.

The plain language of section 8002.5 does not impose any requirement on counties to verify that the candidate's party preference matches his or her affidavit of registration; nor does the code provide any consequence for the situation in which the candidate's declaration and most recent registration do not match. The requirement is directed to the candidate; the plain language does not require anything of local government. Furthermore, the provision that a stated party preference "shall not be changed" between the primary election and the general election does not impose any affirmative duty on local government officials; this, too, is directed to the candidate.

Similarly, the plain language of amended section 8040 does not impose any state-mandated activities on local government. The plain language of section 8040 does not require training, and does not require counties to update the form, as alleged.[118] Indeed, the test claim executive order CC/ROV #12059, entitled: "Top Two Candidates Open Primary Act of 2010: UPDATED Implementation Guidelines" provides expressly that updated forms that "comply with AB 1413, have been forwarded to all county elections offices."[119] Therefore, any changes required to the Declaration of Candidacy form have been implemented by the Secretary of State and provided to the counties, and no "redesigning and reprinting" is necessary.

In response to the draft proposed decision, claimant argues that section 8040, as amended, "is clearly a mandate put forth by the [L]egislature in AB 1413." And with respect to section 8002.5, claimant argues that "[t]he [L]egislature, by implementing AB 1413, changed the intention of SCA 4/Proposition 14 from a candidate's political party *preference* to a candidate's political party *registration*."[120] Claimant continues: "The change is significant as it voids the candidates 'choice' to declare their party preference and requires the candidate to use only the political party with which they are registered at the time they file for office [*sic*]." Claimant argues that the new form provided for by amended section 8040 "requires information not previously mandated." Claimant asserts that "it is the County election official that is responsible for interacting with the candidates, requesting the newly required information, and ensuring filing paperwork is completed as required by this new law." Claimant argues that if a county fails to "gather this information, the candidate will not be qualified to run for office; the burden is on the County to accept and timely file candidate's paperwork [*sic*]."[121] Claimant concludes: "This legislation is not necessary to implement nor incidental to [Proposition 14]," and that "[t]he cost is not de minimus [*sic*]."[122]

Claimant's argument is not persuasive. The plain language of section 8002.5 does not impose an activity or task on counties. The language, as explained above, is directed toward candidates, and counties are not made responsible for ensuring compliance. Finally, the Commission is

[118] Exhibit C, Claimant Rebuttal Comments, at pp. 1-2.

[119] Exhibit A, Test Claim, at p. 67.

[120] Exhibit E, Claimant Comments on Draft Proposed Decision, at p. 4 [Emphasis in orginial].

[121] Exhibit E, Claimant Comments on Draft Proposed Decision, at p. 4.

[122] Exhibit E, Claimant Comments on Draft Proposed Decision, at p. 4.

required to presume that statutes are constitutional.[123] If the claimant wishes to challenge the constitutionality of section 8002.5, it must do so in the courts.

With respect to section 8040, claimant argues, without basis, that the form, to be filled out and certified by a candidate, imposes new mandated activities or costs on counties. The plain language of section 8040 does not impose any burden on claimant to ensure that the form is completed correctly, accurately, or truthfully; the plain language of amended section 8040 *only* describes the content of the form, and no other provision of the Elections Code requires a county to verify any of the information on the form. If any new burden exists, it is on candidates. Finally, the claimant continues to focus on whether section 8040 is necessary to implement or incidental to Proposition 14, while the analysis above is confined to whether the plain language of section 8040 imposes any requirements at all on counties.

Based on the foregoing, the Commission finds that Elections Code sections 8002.5 and 8040, as amended by Statutes 2012, chapter 3 (AB 1413) do not impose any state-mandated activities on counties.

5. Elections Code section 8062, as amended by Statutes 2012, chapter 3; and the portion of the Secretary of State Memorandum CC/ROV #11126 relating to signatures on nomination papers, do not impose any new state-mandated activities on local government.

Section 8062 provides the number of registered voters required to sign a nomination paper for a candidate for a primary election for specified offices. Statutes 2012, chapter 3 amended section 8062 as follows in underline and strikeout:

> (a) The number of registered voters required to sign a nomination paper for the respective offices are as follows:
>
> (1) State office or United States Senate, not ~~less~~fewer than 65 nor more than 100.
>
> (2) House of Representatives in Congress, State Senate or Assembly, State Board of Equalization, or any office voted for in more than one county, and not statewide, not ~~less~~fewer than 40 nor more than 60.
>
> (3) Candidacy in a single county or any political subdivision of a county, other than State Senate or Assembly, not ~~less~~fewer than 20 nor more than 40.
>
> (4) With respect to a candidate for a political party committee, if any political party has ~~less~~fewer than 50 voters in the state or in the county or district in which the election is to be held, one-tenth the number of voters of the party.
>
> (5) ~~When~~If there are fewer than 150 voters in the county or district in which the election is to be held, not ~~less~~fewer than 10 nor more than 20.
>
> (b) The provisions of this section are mandatory, not directory, and no nomination paper shall be deemed sufficient that does not comply with this section. However, this subdivision shall not be construed to prohibit withdrawal of signatures pursuant to Section 8067. This subdivision also shall not be

[123] California Constitution, article III, section 3.5 ["An administrative agency…has no power…[t]o declare a statute unconstitutional…"].

> construed to prohibit a court from validating a signature which was previously rejected upon showing of proof that the voter whose signature is in question is otherwise qualified to sign the nomination paper.[124]

The 2012 amendments are technical and clarifying in nature and do not impose any new state-mandated activities or costs on local government.[125]

Nevertheless, claimant alleges that "SB 6 [Stats 2009, ch. 1] and AB 1413 [Stats 2012, ch. 3] amended Election Code 8062 [*sic*] changing the number of nomination signatures required for certain political parties and candidates for political party committees." Claimant further alleges that section 8068, which was not pled, results in increased costs related to nomination petitions:

> SB 6 [Stats 2009, ch. 1] amended Elections Code Section 8068 to allow voters of any party affiliation to sign a candidate's nomination forms. While this makes sense to do in the wake of Proposition 14, it is not necessary for its implementation. This change resulted in changes to counties' Election Management Systems (EMS). Any change to the EMS results in costs for training staff.[126]

The changes to sections 8062 and 8068 to which claimant refers were not pled in this test claim.[127] Sections 8062 and 8068, as amended by Statutes 2009, chapter 1 were included in the claimant's proposed amendment to the test claim, which was rejected based on untimely filing.[128] It may be true that sections 8062 and 8068, as amended by Statutes 2009, chapter 1, together require counties to review a greater number of nomination petitions, but the only amendment to section 8062 properly pled in this test claim is that made by Statutes 2012, chapter 3, which changed the words "less than" to "fewer than," with respect to signatures needed to file nomination papers, added the word "State" before "Board of Equalization," and changed "when" to "if," in paragraph (a)(5). These technical changes do not impose any mandated activities on counties.

Claimant also alleges that CC/ROV #11126 imposed new activities related to review of nomination petitions. The Memorandum states:

> Signatures in-lieu - Prior to the Top Two Candidates Open Primary Act, only a voter of the same political party as a candidate could sign the candidate's nomination paper. Additionally, any voter could sign an in-lieu petition, but only the signature of a voter who was of the same political party could be counted toward the number of voters required to sign a nomination paper. Now any registered voter, regardless of party preference, can sign a nomination paper. As a result, all signatures on an in lieu petition can be counted toward the number of

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[124] Elections Code section 8062 (as amended, Stats. 2012, ch. 3 (AB 1413)).

[125] Compare Elections Code section 8062, as amended by Statutes 2009, chapter 1 (SB 6) with section 8062 as amended by Statutes 2012, chapter 3 (AB 1413).

[126] Exhibit C, Claimant Rebuttal Comments, at p. 2.

[127] Exhibit A, Test Claim, at p. 1.

[128] See Exhibit F, Proposed Test Claim Amendment, October 28, 2013; Rejection of Proposed Test Claim Amendment, November 4, 2013.

voters required to sign a candidate's nomination paper. (Elec. Code§§ 8061, 8068.)[129]

The plain language of this paragraph of the memorandum does not impose any new mandated activities on counties; it merely clarifies that all signatures of registered voters may be counted on a nomination paper or an "in-lieu petition" pursuant to the amendments made by the Top Two Candidates Open Primary Act. The memorandum is explanatory in this respect, not mandatory.

In response to the draft proposed decision, claimant argues that "the amendment put forth by Claimant references Section 8106 in place of Section 8062." Claimant states that "AB 1413 changed the number of signatures required from minor party candidates…" which "significantly increases the amount of work County election officials must do to validate these minor party candidate filings."[130] However, claimant's proposed amendment to the test claim was not timely, in accordance with Government Code section 17551 and section 1183 of the Commission's regulations, and section 8106 is therefore not before the Commission.[131]

Based on the foregoing, Elections Code section 8062, as amended by Statutes 2012, chapter 3, and CC/ROV #11126 do not impose any state-mandated activities on counties.

C. Some of the code sections, as amended, and the executive orders alleged require counties to perform some new activities, but the required activities do not impose costs mandated by the state because they are necessary to implement Proposition 14 or are intended to implement and incidental to Proposition 14 and impose at most de minimis added costs in the context of the Top Two Primary program.

The remaining code sections and executive orders pled (Elec. Code §§ 9083.5, 13102, 13105, 13110, 13206, 13206.5, and 14105.1 as added or amended by Stats. 2009, ch. 1, and Stats. 2012, ch. 3; Secretary of State's Memoranda CC/ROV# 11005, 11125, 11126, and 12059), as explained below, require counties to perform some new activities. However, the costs of these activities are not mandated by the state pursuant to Government Code section 17556(f).

1. The courts have interpreted the "necessary to implement" clause of Government Code section 17556(f) to preclude a finding of cost mandated by the state if the activities or costs are required "even in the absence of" the test claim statute; and when the state has no "true choice" as to the manner of implementation; and, if duties imposed by the statute or executive order are *incidental to the ballot measure* and produce at most *de minimis added costs*.

Section 17556(f) states that the Commission "shall not find costs mandated by the state" if, after a hearing, the Commission finds that "[t]he statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election."[132] The plain language of the statute provides that when the state imposes requirements that are not expressly contained in a ballot measure approved by the

[129] Exhibit A, Test Claim, at p. 60.

[130] Exhibit E, Claimant Comments on Draft Proposed Decision, at p. 5.

[131] See Exhibit F, Proposed Test Claim Amendment, October 28, 2013; Rejection of Proposed Test Claim Amendment, November 4, 2013.

[132] Government Code section 17556(f) (Stats. 2010, ch. 719 (SB 856)).

voters, but are necessary to implement the ballot measure, the excess activities required by the state do not impose costs mandated by the state and are not reimbursable within the meaning of article XIII B, section 6.

The courts have analyzed the "necessary to implement" language of section 17556(f), pertaining to ballot measure mandates, in the same manner as section 17556(c),[133] which proscribes a finding of costs mandated by the state if the state statute or executive order "imposes a requirement that is mandated by a *federal* law or regulation."[134]

Two early court of appeal decisions in which underlying *federal* law was at issue in a test claim analysis are *Hayes v. Commission on State Mandates*[135] *and County of Los Angeles v. Commission on State Mandates* (*County of Los Angeles II*).[136] In *Hayes*, the test claim statute addressed special education services required of school districts, and the court considered whether federal special education law on point constituted a federal mandate. The court found, in this respect, that "[t]he alternatives were to participate in the federal program and obtain federal financial assistance and the procedural protections accorded by the act, or to decline to participate and face a barrage of litigation with no real defense and ultimately be compelled to accommodate the educational needs of handicapped children in any event." The court concluded that the federal Education of the Handicapped Act did indeed constitute a federal mandate, relevant to the test claim statutes, and therefore held:

> When the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations. This should be true even though the state has adopted an implementing statute or regulation pursuant to the federal mandate *so long as the state had no "true choice" in the manner of implementation of the federal mandate*.[137]

In *County of Los Angeles II*, the test claim statute at issue required counties to provide for indigent defendants "investigators, experts, and others for the preparation or presentation of the defense."[138] The court found that these requirements were not state mandated, but were required by the Sixth Amendment to the United States Constitution, and therefore "even in the absence of [the test claim statute], appellant and other counties would be responsible for providing ancillary services under the constitutional guarantees of due process."[139]

Then, the California Supreme Court, relying in part on *County of Los Angeles II*, analyzed Government Code section 17556(c) in *San Diego Unified School District v. Commission on State*

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[133] *California School Boards Association v. State of California* (*CSBA I*) (2009) 171 Cal.App.4th 1183, at p. 1214 ["[T]here is no difference in the effect" of sections 17556(c) and 17556(f).].

[134] Government Code section 17556(c) (Stats. 2010, ch. 719 (SB 856)).

[135] (1992) 11 Cal.App.4th 1564.

[136] (1995) 32 Cal.App.4th 805.

[137] *Hayes*, *supra*, 11 Cal.App.4th, at pp. 1592-1594 (Emphasis added.).

[138] 32 Cal.App.4th at p. 812, fn. 3 [quoting Penal Code section 987.9].

[139] *Id*, at p. 815.

Mandates, (*San Diego Unified*),[140] and the Third District Court of Appeal later applied that analysis to section 17556(f) in *California School Boards Association v. State of California* (*CSBA I*) with respect to activities required by the state that exceed the requirements of a ballot measure mandate.[141] In *San Diego Unified*, the Court considered whether due process procedures which were required to be provided to a public school student facing possible expulsion constituted a reimbursable state-mandated program. Specifically, the Court considered whether certain notice and recordkeeping requirements, and requirements pertaining to an expulsion hearing required by the statute, were sufficiently tied to a student's due process rights as to render the state-specified requirements a non-reimbursable federal mandate. The Court noted that "[t]he District recognizes, of course, that…it is not entitled to reimbursement to the extent Education Code section 48918 *merely implements federal due process law*."[142] The requirements of the Education Code that "merely implement[ed]" federal due process requirements were considered *adopted to implement* a federal mandate, and nonreimbursable pursuant to Government Code section 17556(c). However, with respect to those requirements "attributable to hearing procedures that *exceed* federal due process requirements,"[143] the Court reasoned that "challenged state rules or procedures that are *intended to implement* an applicable federal law – and whose costs are, in context, de minimis – should be treated as part and parcel of the underlying federal mandate."[144] The activities that "exceeded" the plain language of federal law, but that the Court found to be "incidental" to the federal mandate were listed in a footnote, and included adopting rules and regulations, preparing and sending notices to parents, and maintaining records, as follows:

> …(i) adoption of rules and regulations pertaining to pupil expulsions; (ii) inclusion in the notice of hearing of (a) a copy of the disciplinary rules of the District, (b) a notice of the parents' obligation to notify a new school district, upon enrollment, of the pupil's expulsion, and (c) a notice of the opportunity to inspect and obtain copies of all documents to be used at the hearing; (iii) allowing, upon request, the pupil or parent to inspect and obtain copies of the documents to be used at the hearing; (iv) sending of written notice concerning (a) any decision to expel or suspend the enforcement of an expulsion order during a period of probation, (b) the right to appeal the expulsion to the county board of education, and (c) the obligation of the parent to notify a new school district, upon enrollment, of the pupil's expulsion; (v) maintenance of a record of each expulsion, including the cause thereof; and (vi) the recording of expulsion orders and the causes thereof in the pupil's mandatory interim record (and, upon request, the forwarding of this record to any school in which the pupil subsequently enrolls).[145]

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[140] (2004) 33 Cal.4th 859.

[141] (2009) 171 Cal.App.4th 1183.

[142] 33 Cal.4th at p. 885 [emphasis added].

[143] *Ibid* [emphasis in original].

[144] *Id*, at p. 890.

[145] *Id*, at p. 873, fn. 11 [citing Education Code section 48918]; 890.

The Court found that these "assertedly 'excessive due process' aspects of Education Code section 48918 for which the District seeks reimbursement…fall within the category of matters that are merely incidental to the underlying federal mandate, and that produce at most a de minimis cost."[146]

The Third District Court of Appeal reasoned in *CSBA I* that "there is no difference in the effect" of sections 17556(c) and 17556(f).[147] The court determined that "the 'necessary to implement' language of [section 17556(f)] is consistent with article XIII B, section 6 because it denies reimbursement only to the extent that costs imposed by a statute are necessary to implement the ballot measure."[148] In addition, the court in *CSBA I* stated: "We also conclude that statutes imposing duties on local governments do not give rise to reimbursable costs if the duties are incidental to the ballot measure mandate and produce at most de minimis added costs."[149] The court explained:

> In *San Diego Unified*, the court considered whether costs resulting from statutes that were not adopted to implement federal due process requirements were reimbursable under article XIII B, section 6, and Government Code section 17556, subdivision (c). The court determined that "the Legislature, in adopting *specific statutory procedures* to comply with the general federal mandate, *reasonably articulated various incidental procedural protections*." It also determined that the statutes, "viewed singly or cumulatively, [ ] did not significantly increase the cost of compliance with the federal mandate." The court concluded that, "for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, de minimis—should be treated as part and parcel of the underlying federal mandate."
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> There is no reason not to apply this practical holding similarly to ballot measure mandates. Thus, the Commission must consider the holding of *San Diego Unified* in determining whether costs are reimbursable for ballot measure mandates.[150]

Therefore, based on the holdings of *Hayes*,[151] *County of Los Angeles II*,[152] *San Diego Unified*,[153] and *CSBA I*,[154] two possible tests for the exception to reimbursable costs under section 17556(f)

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[146] *Ibid*.

[147] *California School Boards Association v. State of California* (*CSBA I*) (2009) 171 Cal.App.4th 1183, at p. 1214.

[148] *Id*, at p. 1213.

[149] *Id*., at p. 1216.

[150] *CSBA*, *supra*, at p. 1217 [citing *San Diego Unified*, *supra*, 33 Cal.4th at pp. 889-890] [emphasis added].

[151] (1992) 11 Cal.App.4th 1564.

[152] (1995) 32 Cal.App.4th 805.

[153] (2004) 33 Cal.4th 859, at pp. 889-890.

arise, either of which will proscribe a finding of costs mandated by the state within the meaning of section 17514. Section 17556(f) proscribes reimbursement if:

- The activities and costs required by a statute are *necessary to implement* a relevant ballot measure mandate, meaning they would be required or compelled "even in the absence of" the test claim statute, or the state has no "true choice" as to the manner of implementation; or
- The duties imposed by the statute or executive order are *incidental to the ballot measure mandate* and produce at most *de minimis added costs*. This includes "specific statutory procedures to comply with the general federal [or ballot measure] mandate, [which] reasonably articulated various incidental [additional requirements]," so long as those specific procedures or incidental requirements "viewed singly or cumulatively, [ ] did not significantly increase the cost of compliance with the federal [or ballot measure] mandate."[155]

2. Government Code section 17556(f) applies here.

Here, as discussed in more detail below, the activities required by the remaining test claim statutes and alleged executive orders address the amendments to the form and content of ballots and sample ballots, and require additional information be provided to educate voters about the new top two primary system and voter-nominated offices. Although the activities required to be performed may exceed the plain language of Proposition 14, they are necessary to implement Proposition 14, or are incidental to the implementation of Proposition 14, and produce at most de minimis added costs, and are, therefore, not eligible for reimbursement within the meaning of article XIII B, section 6 and Government Code section 17556(f).

a) Prior court decisions and the Proposition 14 findings and declarations approved by the voters support the finding that the required activities imposed by the test claim statutes and executive orders are necessary to implement Proposition 14 or are incidental to the ballot measure mandate, and produce at most de minimis added costs in the context of the Top Two Primary program.

Before the adoption of Proposition 14, existing statutes and case law made clear that ballots must be written and prepared in a way that avoids confusing the voters, or providing inaccurate or misleading information. One of the cases described below, *Washington State Grange,*[156] specifically addressed a similar top-two primary system in another state, and that case was expressly acknowledged and identified in the voter materials for Proposition 14.

Under existing California law, avoidance of electoral confusion is an expected feature of the ballots to be prepared by counties. The Government Code requires the Attorney General to prepare a title and summary of every ballot measure,[157] which the Elections Code states "must be

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[154] (2009) 171 Cal.App.4th 1183, at pp. 1212-1217.

[155] *CSBA, supra,* at p. 1217 [citing *San Diego Unified, supra,* 33 Cal.4th at pp. 889-890].

[156] *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442.

[157] Government Code section 88002; Elections Code section 9002; 9050; 9051 (Stats. 1994, ch. 920 (SB 1547)).

true and impartial, and not argumentative or likely to create prejudice for or against the measure."[158] In addition, the courts have held that the title and summary prepared by the Attorney General "must reasonably inform the voter of the character and real purpose of the proposed measure."[159] The goal "is to avoid misleading the public with inaccurate information."[160]

In 2008, the United States Supreme Court heard a challenge to a top-two primary system in the State of Washington, and the Court acknowledged that the top-two primary, which had not yet been implemented and for which ballots had not yet been printed, could mislead the public with inaccurate information, in that candidates' party preference designations could be viewed as an endorsement by the party named, which could result in a First Amendment violation. As described in the *Washington State Grange* case, the voters in the State of Washington enacted a top-two primary system, similar to that enacted by Proposition 14 in California, wherein party preferences on the primary election ballots are chosen by the candidates, and do not reflect the endorsement or support of the party named. The voter initiative was brought in response to the Ninth Circuit Court of Appeal having invalidated the prior *blanket primary* system, based on impairment of the political parties' associational rights under the First Amendment.[161] A facial constitutional challenge was immediately brought by the Washington State Republican Party based on a perceived impairment of the political parties' associational rights resulting from the top-two primary. The Washington State Republican Party argued that the replacement primary system continued to violate its associational rights by usurping its right to nominate its own candidates and forcing it to associate with candidates it did not endorse.[162]

The Court characterized the early facial challenge as "sheer speculation," stating that "[i]t depends upon the belief that voters can be 'misled' by party labels." However, the Court further held that "[o]f course, it is *possible* that voters will misinterpret the candidates' party-preference designations as reflecting endorsement by the parties…" but "because I–872 has never been implemented, we do not even have ballots indicating how party preference will be displayed."[163] The Court held that "[i]t stands to reason that whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot," and that the inquiry must turn on "whether the ballot could conceivably be printed in such a way as to

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[158] Elections Code section 9051 (Stats. 1994, ch. 920 (SB 1547)).

[159] *Lungren v. Superior Court* (1996) 48 Cal.App.4th 435, at p. 440 [citing *Tinsley v. Superior Court* (1980) 150 Cal.App.3d 90.

[160] *Lungren*, *supra*, 48 Cal.App.4th at p. 440 [citing *Amador Valley Joint Union High School District v. State Board of Equalization*, (1978) 22 Cal.3d 208].

[161] See *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, at pp. 445-446; *Democratic Party of Washington State v. Reed* (2003) 343 F.3d 1198; *California Democratic Party v. Jones* (2000) 530 U.S. 567

[162] *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, at p. 448.

[163] *Id*, at p. 455.

eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment."[164] Specifically, the Court suggested:

> [T]he ballots might note preference in the form of a candidate statement that emphasizes the candidate's personal determination rather than the party's acceptance of the candidate, such as "my party preference is the Republican Party." Additionally, the State could decide to educate the public about the new primary ballots through advertising or explanatory materials mailed to voters along with their ballots.[165]

The Court concluded that "there are a variety of ways in which the State could implement [its top-two primary] that would eliminate any real threat of voter confusion," and thus upheld the law against the facial challenge alleging impairment of the parties' associational rights.[166]

The provisions of Proposition 14 are intended to avoid the potential constitutional pitfalls identified in *Washington State Grange*. Section (b) of the findings and declarations in Proposition 14 states in part that "[a]ll registered voters otherwise qualified to vote shall be guaranteed the unrestricted right to vote for the candidate of their choice in all state and congressional elections." Section (b) of the findings and declarations also states that "[a]ll candidates for a given state or congressional office shall be listed on a *single primary ballot*." And, section (c) of the findings and declarations states that "[a]t the time they register, all voters shall have the freedom to choose whether or not to disclose their party preference," and "[a]t the time they file to run for public office, all candidates shall have the choice to declare a party preference." Section (d) of the findings and declarations adopted by the voters explains, in accordance with *Washington State Grange*, that each candidate's party preference "shall accompany the candidate's name on both the primary and general election ballots," and "shall not constitute or imply endorsement of the candidate by the party designated, and no candidate for that office shall be deemed the official candidate of any party by virtue of his or her selection in the primary." Finally, section (f) of the findings and declarations adopted for Proposition 14 states that "[t]his act conforms to the ruling of the United States Supreme Court in *Washington State Grange v. Washington State Republican Party* (2008) 128 S.Ct. 1184."[167]

Accordingly, Proposition 14 eliminated partisan primary elections for all congressional and state offices (preserving partisan primaries for presidential candidates and party committee offices), and provided that any voter, regardless of party preference, could vote for any candidate for congressional or state office. The adoption of Proposition 14 by the voters amended article II, section 5 of the California Constitution, which provides, in pertinent part:

> (a) A voter-nomination primary election shall be conducted to select the candidates for congressional and state elective offices in California. All voters may vote at a voter-nominated primary election for any candidate for congressional and state elective office *without regard to the political party*

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[164] *Id*, at p. 456.

[165] *Ibid*.

[166] *Ibid*.

[167] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

preference disclosed by the candidate or the voter, provided that the voter is otherwise qualified to vote for candidates for the office in question. The candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office shall, regardless of party preference, compete in the ensuing general election.

(b) Except as otherwise provided by Section 6, a candidate for a congressional or state elective office may have his or her *political party preference*, or lack of political party preference, indicated upon the ballot for the office in the manner provided by statute. A political party or party central committee *shall not nominate* a candidate for any congressional or state elective office at the voter-nominated primary. This subdivision shall not be interpreted to prohibit a political party or party central committee from endorsing, supporting, or opposing any candidate for a congressional or state elective office. A political party or party central committee *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, as provided in subdivision (a).

(c) The Legislature shall provide for partisan elections for presidential candidates, and political party and party central committees…[168]

Proposition 14 also amended article II, section 6 to provide that for nonpartisan candidates, including the Superintendent of Public Instruction, no party may nominate a candidate, and the candidate's party preference shall not be included on the ballot for nonpartisan office.[169]

Therefore, based on the plain language of the constitutional provisions amended by Proposition 14, as well as the findings and declarations approved by the voters in Proposition 14, a voter-nominated top two primary election system requires that

- All candidates for a particular office be listed on a unified *primary* election or *special primary* election ballot;[170]
- Voters of any party preference be permitted to vote for any candidate and have that vote counted; that candidates be permitted to select their party preference at the time they file their candidacy;
- Each candidate's designated party preference be included in the ballot for both primary and general election ballots;
- Parties be permitted to informally nominate candidates for voter-nominated office, but no longer have an automatic right to have their chosen candidate appear on the ballot for the general election; and

[168] California Constitution, article II, section 5 (as amended by Proposition 14, adopted June 8, 2010) [emphasis added].

[169] California Constitution, article II, section 6 (as amended by Proposition 14, adopted June 8, 2010).

[170] All candidates are already required be listed on a *general* election ballot under prior law.

- Only the top two "vote-getters" for any voter-nominated office advance to the general election, irrespective of those two candidates' stated party preferences.

Finally, Proposition 14 makes no changes to presidential primary elections, and retains party committee offices as partisan-nominated, and thus requires the Legislature to continue to provide for separate ballots for those offices.

b) Activities Pertaining to the Reorganization of Ballots: Elections Code sections 13102 and 13110, as amended by Statutes 2009, chapter 1 (SB 6) are necessary to implement a Proposition 14.

The activities required by sections 13102 and 13110, as amended, pertain to the consolidation and reorganization of primary election ballots in order to implement a top two candidates open primary consistently with Proposition14.

Before the adoption of Proposition 14, existing law required the county elections official or county clerk to "provide ballots for any elections within his or her jurisdiction, and…cause to be printed on them the name of every candidate whose name has been certified to or filed with the proper officer pursuant to law, and who, therefore, is entitled to a place on the appropriate ballot."[171] Prior section 13110 required that the group of names appearing on the ballot shall be the same for all voters entitled to vote for candidates for that office.[172] Prior section 13102 required separate ballots for *partisan* primary elections for each qualified political party, to be printed together with the nonpartisan ballot, if possible,[173] and provided that voters would receive a partisan ballot only if registered with the particular political party whose ballot they requested, or if the party whose ballot was requested adopted a rule permitting nonparty voters to vote that ballot.[174] The names of candidates appearing on each of the separate partisan primary ballots were those that were duly nominated by registered party voters.[175]

Prior to Proposition 14, all congressional and state offices were elected by this partisan nominating process.[176] However, Proposition 14 removed all congressional and state offices from the *partisan* nominating process, and reclassified those offices as "voter-nominated." Proposition 14 provided that all voters would have the opportunity to vote for any candidate, and that candidates would have the opportunity to self-select their party preferences. Proposition 14 also provided that the "Legislature shall provide for partisan elections" for presidential and party committee candidates. As noted above, the Proposition 14 findings and declarations section (b) states expressly that "[a]ll candidates for a given state or congressional office shall be listed on a single primary ballot." Accordingly, separate partisan ballots are still provided for in the Elections Code and the Constitution, but only for presidential and party committee offices; and voter-nominated offices are included in the nonpartisan primary ballot, along with the

[171] Elections Code section 13000 (Stats. 1994, ch. 920 (SB 1547)).

[172] Elections Code section 13110 (Stats. 1994, ch. 920 (SB 1547)).

[173] Elections Code section 13230 (Stats. 2000, ch. 898 (SB 28)).

[174] Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)).

[175] Elections Code sections 8062; 13000 (Stats. 1994, ch. 920 (SB 1547)).

[176] California Constitution, article II, section 5 (as amended by Stats. 2004, Res. C. 103 (SCA 18) (Proposition 60, approved November 2, 2004)).

candidate's self-ascribed party preference designation, which previously would only have been printed in the general election ballot.

In conjunction with placing Proposition 14 before the voters, the Legislature enacted Statutes 2009, chapter 1, which expressly stated that it would become operative only if Proposition 14 were adopted by the voters.[177] Statutes 2009, chapter 1 amended Elections Code section 13102 to change all "party affiliation" language to "party preference,"[178] and sections 13102 and13110 to provide for a unified nonpartisan primary ballot, containing the names of all candidates for voter-nominated offices and nonpartisan offices.[179] These amendments do not of themselves impose any new activities on counties; the requirement to print ballots is found in section 13000, which is not new.[180] Moreover, the scope and extent of the counties' duties under sections 13102 and 13110 are not clearly expanded by the test claim statutes; counties were always required to include in the ballot the names of all candidates duly nominated, and both sections 13102 and 13110 were amended only to ensure that voter-nominated offices would be included in the nonpartisan ballot, and party committee offices would remain partisan, consistent with the requirements of Proposition 14.

Claimant alleges increased costs, asserting that "[e]ach ballot and sample ballot will [now] list all candidates for each voter-nominated contest, regardless of party preference or lack of party preference," resulting in "[i]ncreased length of ballot and sample ballot to accommodate lengthy voter-nominated contests."[181]

However, claimant's allegations do not describe a new activity or task imposed on counties, and no new activity is found in the plain language of sections 13102 and 13110, as amended; the same offices and candidates previously included in primary election ballots are now required to be included in the nonpartisan ballot provided to all voters. Even if the reorganization of ballots imposes additional costs on counties, increased costs alone do not amount to a new program or higher level of service.[182]

Moreover, any costs resulting from the "increased length of ballot [*sic*]" are imposed by the voter-enacted ballot measure, Proposition 14, and are not mandated by the state. As noted above, the Proposition 14 findings and declarations expressly call for a "single primary ballot,"[183] and the plain language of article II, section 5, as amended, provides that "[a]ll voters may vote at a voter-nominated primary election for any candidate for congressional and state

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[177] Statutes 2009, chapter 1 (SB 6) section 67.

[178] Elections Code sections 13102; 13105 (as amended by Stats. 2009, ch. 1 (SB 6)).

[179] Elections Code sections 13102; 13110 (as amended by Stats. 2009, ch. 1 (SB 6)).

[180] See Elections Code section 13000 (Stats. 1994, ch. 920 (SB 1547)).

[181] Exhibit A, Test Claim, at pp. 6-7.

[182] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830.

[183] Exhibit F, Text of Ballot Measure, Proposition 14.

elective office without regard to the political party preference disclosed by the candidate or the voter."[184]

Therefore, the tests described above to determine when duties imposed by a test claim statute are "necessary to implement" a ballot measure both apply to this situation. Because the California Constitution, as amended by Proposition 14, calls for all voters to be permitted to vote for any candidate (except presidential or party committee candidates), counties would be required, "even in the absence of"[185] the test claim statutes, to provide the list of candidates for voter-nominated office to *all voters* (i.e., to include voter-nominated offices in the nonpartisan ballot). In addition, the amendments made to sections 13102 and 13110 were a matter of "no true choice"[186] for the Legislature; the Proposition 14 findings and declarations call for a "single primary ballot," as noted above, but also state that "[t]his act makes no change in current law as it relates to presidential primaries…" and "[p]olitical parties may also adopt such rules as they see fit for the selection of party officials…"[187] Therefore, the amendments to sections 13102 (adding "voter-nominated" offices to the nonpartisan ballot provided to all voters) and 13110 (providing for political party committee and presidential candidates to remain on a separate partisan ballot) implemented Proposition 14 as a matter of "no true choice."

In comments submitted in response to the draft proposed decision, claimant disputes this conclusion. Claimant argues that the language of Proposition 14 "is plain and clear in its directive that presidential primary elections be open." Claimant reasons that an open presidential primary means "there is no need to prepare a partisan ballot in any primary election." Therefore, claimant concludes that "[t]he partisan ballot rules found in the codes changed by SB 6 set out specific rules for political party ballots in primary elections, rules that were not contemplated in the SCA 4/Proposition 14." Therefore, "[t]his is not needed to implement, nor incidental to SCA 4/Proposition 14."[188]

Claimant's comments do not address the analysis above, in that the changes to the ballot effected by SB 6 were made to implement a voter-nominated primary for all offices *except* presidential and political party candidates. No change was intended to the party-centered nominating process for presidential candidates,[189] and yet the provision for partisan primary ballots for presidential elections is the apparent focus of claimant's comments. In addition, it is unclear on what basis claimant believes that an "open presidential primary" would not require partisan ballots. In *Washington State Grange, supra*, the Court described an open primary as follows:

> The term "blanket primary" refers to a system in which "any person, regardless of party affiliation, may vote for a party's nominee." A blanket primary is distinct from an "open primary," in which a person may vote for any party's nominees,

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[184] California Constitution, article II, section 5 (as amended by Proposition 14, June 8, 2010).

[185] *County of Los Angeles II*, *supra*, (1995) 32 Cal.App.4th 805.

[186] *Hayes*, *supra*, 11 Cal.App.4th, at pp. 1592-1594.

[187] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[188] Exhibit E, Claimant Comments on Draft Proposed Decision, at p. 5.

[189] See Exhibit F, Text of Ballot Measure, Findings and Declarations, section (f) ["This act makes no change in current law as it relates to presidential primaries."].

> but must choose among that party's nominees for all offices, and the more traditional "closed primary," in which "only persons who are members of the political party ... can vote on its nominee."[190]

Therefore, an "open presidential primary," as required by Proposition 14, is one in which voters may request the ballot of any party, "but must choose among that party's nominees for all offices…" Claimant's suggestion that partisan ballots are not necessary at all under Proposition 14 is more akin to a "blanket primary," which the Court in *California Democratic Party v. Jones* held an unconstitutional violation of the First Amendment rights of political parties.[191] The Commission finds that claimant's comments do not alter the above analysis.

Based on the foregoing, the requirements of sections 13102 and 13110 to include all candidates for voter-nominated offices in the nonpartisan ballot provided to all voters, and to include political party candidates only in the partisan ballots provided to voters registered as disclosing a preference for that party, are necessary to implement the plain language requirements of Proposition 14, and therefore do not impose costs mandated by the state.

c) *Activities Pertaining to the Form and Content of Candidates' Ballot Entries: Elections Code section 13105, as amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3; and portions of Secretary of State's Memoranda CC/ROV #11005, CC/ROV #11125, and CC/ROV #12059 are either necessary to implement Proposition 14 or are incidental to the implementation of Proposition 14 and produce at most de minimis costs in the context of the Top Two Primary.*

The activities required by section 13105, as amended, and by portions of the Secretary of State's Memoranda CC/ROV #11005, CC/ROV #11125, and CC/ROV #12059, pertain to the form and content of each candidate's entry on the primary, general, and special election ballots.

Before the adoption of Proposition 14, existing law required the county elections official or county clerk to "provide ballots for any elections within his or her jurisdiction, and…cause to be printed on them the name of every candidate whose name has been certified to or filed with the proper officer pursuant to law, and who, therefore, is entitled to a place on the appropriate ballot."[192] Existing law requires separate ballots for *partisan* primary elections for each qualified political party, to be printed together with the nonpartisan ballot, if possible,[193] and voters receive a partisan ballot only if registered with the particular political party, or if the party whose ballot was requested has adopted a rule permitting nonparty voters to vote that ballot.[194] The names of candidates appearing on each of the separate partisan primary ballots are those that are duly nominated by registered party voters.[195] In a *general* election for partisan office, the nominee of each qualified political party that participated in the partisan primary election is

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[190] *Washington State Grange, supra* 552 U.S. 442, at p. 445, Fn. 1 [citing *California Democratic Party v. Jones* (2000) 530 U.S. 567, at pp. 570; 576, n. 6].

[191] 530 U.S. 567, at p. 577.

[192] Elections Code section 13000 (Stats. 1994, ch. 920 (SB 1547)).

[193] Elections Code section 13230 (Stats. 2000, ch. 898 (SB 28)).

[194] Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)).

[195] Elections Code sections 8062; 13000 (Stats. 1994, ch. 920 (SB 1547)).

printed on the ballot, along with the nominee's political party affiliation,[196] or the word "independent."[197] Seven qualified political parties participated in the 2012 presidential election, requiring seven separate partisan ballots, and requiring county elections officials to print the names of as many as seven party nominees for the general election.[198]

Absent Proposition 14, all congressional and state offices would have been elected by this partisan nominating process.[199] What has changed is the definition and scope of "partisan" offices, and the addition of a new category, called "voter-nominated" offices: Proposition 14 removed all congressional and state offices from the partisan nominating process, and reclassified those offices as "voter-nominated." Proposition 14 also provided that all voters would have the opportunity to vote for any candidate, and that candidates would have the opportunity to self-select their party preferences. In so doing, Proposition 14 significantly limited the importance of party affiliation in primary elections, and provided that only the top two candidates for any office would advance to the general election, regardless of their stated party preferences. Accordingly, separate partisan ballots are still provided for in the Elections Code and the Constitution, but only for presidential and party committee offices; and *all candidates* for voter-nominated offices are included in the nonpartisan primary ballot, along with each candidate's self-ascribed party preference designation, which previously would only have been printed in the general election ballot.

In conjunction with placing Proposition 14 before the voters, the Legislature enacted Statutes 2009, chapter 1, which expressly stated that it would become operative only if Proposition 14 were adopted by the voters.[200] Statutes 2009, chapter 1 amended Elections Code section 13105 to provide that in *both the primary and general election ballots,* each candidate for voter-nominated office would have his or her party *preference* indicated in the ballot, with the words "My party preference is the _____ Party," or the words "No Party Preference." If a candidate chose not to have his or her party preference listed in the ballot, the space for party preference would be left blank.[201] Secretary of State's Memorandum CC/ROV #11005, issued January 26, 2011, restated and clarified the requirements of amended sections 13105 and 13107[202] as applied to *special elections,* and required that counties print the name, party preference, and ballot designation of each candidate on three lines in the ballot.[203] CC/ROV #11125, issued November

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[196] Elections Code section 13105 (Stats. 1994, ch. 920 (SB 1547)).

[197] See Elections Code section 8300 et seq. (Stats. 1994, ch. 920 (SB 1547)).

[198] Exhibit A, Test Claim, at p. 72.

[199] California Constitution, article II, section 5 (as amended by Stats. 2004, Res. C. 103 (SCA 18) (Proposition 60, approved November 2, 2004)).

[200] Statutes 2009, chapter 1 (SB 6) section 67.

[201] Elections Code section 13105 (as amended by Stats. 2009, ch. 1 (SB 6)).

[202] Section 13107 was not pled in the test claim filing, and the Commission therefore does not have jurisdiction to analyze this section. However, the plain language of section 13107 addresses the form and content of the candidate's ballot designation, usually a few words describing the candidate's current occupation, vocation, or office.

[203] Exhibit A, Test Claim, at pp. 52-55.

23, 2011, provided for shortening the party preference designation phrases required to be printed in the ballot, from a full sentence ("My party preference is the…") to "Party Preference: _____." CC/ROV #11125 also provided for party name abbreviations to be used to aid in solving "ballot printing and cost challenges."[204] On February 10, 2012, the Legislature enacted Statutes 2012, chapter 3 as an urgency measure, which amended section 13105 to adopt the shortened party preference designation phrases called for by CC/ROV #11125, and to eliminate the option for a candidate for voter-nominated office to withhold a registered party preference (section 8002.5, discussed above, was similarly amended).[205] CC/ROV #12059, issued on the same day that Statutes 2012, chapter 3 took effect, restated the shortened party preference designation phrases, this time omitting the option "Party Preference: Not Given," in accordance with the amendment to section 13105, and restated the requirements of the earlier orders to print the required candidate information on three consecutive lines and to utilize the party name abbreviations.[206]

Claimant alleges that the amendments to section 13105, as well as the requirements imposed by the alleged executive orders, impose state-mandated increased costs for the preparation and printing of ballots by requiring a certain font size and lengthy wording, and using a three line format on the ballots to reflect the candidates' party preference.

Claimant's allegations are not persuasive. The courts have made clear that increased costs alone do not constitute a state mandated new program or higher level of service.[207] Although counties may experience additional costs to comply with the statutes and executive orders that implement Proposition 14, those costs are not mandated by the state, but result from the voters adoption of Proposition 14. Counties were always required to print ballots, and to provide the names of all candidates eligible for nomination or election.[208] Under prior law, counties would provide separate partisan ballots for each qualified political party for a primary election, and then print each party's nominee in a single ballot for a general election. Now, pursuant to Proposition 14 and the test claim statutes, ballots have been reorganized, and the group of candidates appearing on the single unified primary ballot has increased, and thus the length of the nonpartisan ballot will be increased, in the usual case; but the added length itself does not constitute a new activity.

Nevertheless, the addition of a party preference designation to primary election ballots is a new activity, and the use of specific wording, which claimant describes as "lengthy," also constitutes an additional or new activity.

Thus, the plain language of the above-described statutes and executive orders requires counties to perform the following new activities:

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[204] Exhibit A, Test Claim, at p. 57.

[205] Elections Code section 13105 (Stats. 2012, ch. 3 (AB 1413)).

[206] Exhibit A, Test Claim, at pp. 70-71.

[207] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830.

[208] See Elections Code section 13000 (Stats. 1994, ch. 920 (SB 1547)).

- Identify in the ballot, for voter-nominated offices in a *primary election*, including a *special primary election*, the political party designated by the candidate pursuant to section 8002.5;[209]
- Identify each candidate's name, party preference, and ballot designation on three consecutive lines in the ballot.[210]
- Beginning November 23, 2011, utilize approved party name abbreviations, as necessary.[211]
- With regard to a candidate's party preference designation:
    - For the period between July 1, 2011 and November 23, 2011,[212] identify each candidate's party preference in *both the primary and general election ballots, including special elections*, with the words "My party preference is the _____ Party," "No Party Preference," or "My party preference is the _____ Party," with the space left blank;"[213]
    - For the period between November 23, 2011 and February 10, 2012,[214] identify each candidate's party preference in *both the primary and general election ballots* with the words "Party Preference:_____," "Party Preference: None," or "Party Preference: Not Given;"[215] And,
    - Beginning February 10, 2012, identify each candidate's party preference in *both the primary and general election ballots* with the words "Party Preference:_____," or "Party Preference: None;"[216]

However, while the plain language imposes the above new activities, the Commission finds that these activities are necessary to implement Proposition 14 or are incidental to the ballot measure

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[209] Elections Code section 13105 (Stats. 2009, ch. 1 (SB 6)).

[210] Secretary of State's Memorandum CC/ROV #11005, issued January 26, 2011.

[211] Secretary of State's Memorandum CC/ROV #11125, issued November 23, 2011.

[212] The potential period of reimbursement begins July 1, 2011, based on the filing date of the test claim. As of November 23, 2011, CC/ROV #11125 required counties to use the shortened "Party Preference: _____." The Commission takes official notice that at least one special election was held within between July 1, 2011 and November 23, 2011 in which candidates for a voter-nominated office appeared on the ballot. (See Exhibit F, Special Election, Congressional District 36, July 12, 2011.).

[213] Elections Code section 13105 (Stats. 2009, ch. 1 (SB 6)); CC/ROV #11005, issued January 26, 2011.

[214] The Commission is unaware of any special elections between November 23, 2011 and February 10, 2012 in which a voter-nominated candidate appeared on the ballot.

[215] Secretary of State's Memorandum CC/ROV #11125, issued November 23, 2011.

[216] Elections Code section 13105 (as amended by Stats. 2012, ch. 3 (AB 1413) effective February 10, 2012).

mandate and produce at most de minimis added costs, and are, therefore, not reimbursable pursuant to Government Code section 17556(f).

i) The requirement to identify each candidate's party preference designation in primary and special primary ballots is necessary to implement Proposition 14.

The requirements of section 13105 to add each candidate's party preference designation to the *primary election* ballot,[217] and of CC/ROV #11005 to include each candidate's party preference in a *special primary election* ballot,[218] are necessary to implement the plain language requirements of Proposition 14. Prior to Proposition 14, as noted above, counties were required to prepare separate primary ballots for each qualified political party for any election containing "partisan offices."[219] This could include any or every primary or special primary election: all congressional and state offices were then party-nominated.[220] As discussed above, pursuant to Proposition 14, all candidates for congressional and state offices are now included in the nonpartisan ballot given to all voters, irrespective of their party preference or affiliation. Therefore some indication on the ballot of party preference attributed to each candidate is required, both to inform the voters, and to avoid impairment of the parties' First Amendment associational rights, as discussed above.[221] Moreover, article II, section 5 expressly provides, as amended, that "a candidate for a congressional or state elective office *may have his or her political party preference, or lack of political party preference, indicated upon the ballot* for the office in the manner provided by statute."[222] Accordingly, section 13105 (requiring party preference to be included in both primary and general election ballots) gives effect to the express requirements of the California Constitution, as amended by Proposition 14, and the express language of the Proposition 14 findings and declarations adopted by the voters. And likewise that portion of CC/ROV #11005 that requires each candidate's party preference to be indicated in a special primary ballot also gives effect to the express requirements of Proposition 14 and the express language of the findings and declarations.

As discussed above, the court found in *Hayes v. Commission on State Mandates* that a test claim statute could not impose a state-mandated cost if the state had no "true choice" in the manner of implementation of the federal mandate.[223] And, in *County of Los Angeles II*, the court held that an activity or requirement of a test claim statute was not "state-mandated" if the local government would be required by federal law [or in this case, a ballot measure] to perform the activity or incur the cost "even in the absence of" the test claim statute.[224] Here, the

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[217] Elections Code section 13105 (Stats. 2009, ch. 1 (SB 6)).

[218] CC/ROV #11005, found at Exhibit A, Test Claim, at p. 54.

[219] Former Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)).

[220] California Constitution, article II, section 5 (as amended by Stats. 2004, ch. 103 (Proposition 60, November 2, 2004)).

[221] See *Washington State Grange, supra*, (2008) 552 U.S. 442, at pp. 445-446.

[222] California Constitution, article II, section 5 (as amended by Stats. 2009, ch. 2 (Proposition 14)).

[223] 11 Cal.App.4th, at pp. 1592-1594.

[224] 32 Cal.App.4th at p. 815.

requirements to include each candidate's party preference designation in primary and special primary ballots is both a matter of "no true choice," and would be required "even in the absence of" the test claim statute (section 13105) and executive order (CC/ROV#11005).

Based on the foregoing, the portion of section 13105, as amended by Statutes 2009, chapter 1, and Statutes 2012, chapter 3,and that portion of CC/ROV #11005, which require party preferences to be indicated in a *primary* or *special primary* election ballot, do not impose costs mandated by the state pursuant to Government Code section 17556(f).

ii) The requirement to identify each candidate's party preference in primary and general election ballots with specified party preference language is incidental to the implementation of Proposition 14 and produces at most de minimis added costs in the context of the Top Two Primary.

The remaining requirements of section 13105, as amended by Statutes 2009, chapter 1; interpreted by CC/ROV #11005 and CC/ROV #11125; and as subsequently amended by Statutes 2012, chapter 3 and restated by CC/ROV #12059; to identify each candidate's party preference in *both the primary and general election ballots* with *specified party preference language* (the language varies with subsequent amendments and based on interpretation in the Secretary of State's Memoranda, as noted above) are incidental to the ballot measure mandate and produce at most de minimis added costs, pursuant to *San Diego Unified*, *supra*, and *CSBA I*, *supra*.[225] In addition, the requirement of the alleged executive orders to print each candidate's name, party preference designation, and ballot designation in a "three-line format" is incidental to the ballot measure mandate and produces at most de minimis added costs.

Under prior law, candidates' party *affiliations* were only included in the *general* election ballot, at which time each candidate appearing on the ballot would be the official nominee of a qualified political party,[226] and therefore only the *name* of the candidate's affiliated party was needed to identify that nomination.[227] Similarly, with respect to primary election ballots under prior law, each candidate appearing on the *separate partisan* ballot of his or her political party would be a duly-nominated candidate affiliated with that party, and therefore no indication of party affiliation was needed.[228] And, under prior law, a candidate's party affiliation could be placed to the right of the name, or below the name if necessary,[229] and a ballot designation (usually the candidate's current or previous occupation or office), was required to be placed beneath the candidate's name.[230] However, pursuant to Proposition 14, the concept of "party *affiliation*," with respect to voter-nominated offices has been replaced by the concept of a candidate's "party *preference*," which the Proposition 14 findings and declarations make clear is chosen *by the*

[225] *San Diego Unified*, 33 Cal.4th at p. 873, fn. 11; *CSBA I*, 171 Cal.App.4th 1183, at p. 1214.

[226] See former California Constitution, article II, section 5 (as amended by Stats. 2004, ch. 103 (Proposition 60, November 2, 2004)).

[227] Elections Code section 13105 (Stats. 1994, ch. 920 (SB 1547)).

[228] Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)).

[229] Elections Code section 13105 (Stats. 1994, ch. 920 (SB 1547)).

[230] Elections Code section 13107 (Stats. 1994, ch. 920 (SB 1547)).

candidate and does not reflect the endorsement or support of the party named.[231] A candidate appearing in either a primary or general election ballot need not be *affiliated* with any particular party, or any party, and may declare a party preference at the time he or she files a declaration of candidacy.[232] Furthermore, the *general* election ballot no longer consists of the official party *nominees* for each office: article II, section 5 states that "[a] political party *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."[233] Thus, not only is it inaccurate to suggest that the party named in conjunction with each candidate is that candidate's party affiliation, it also is inaccurate and misleading to fail to indicate in the text of the ballot itself that the party preference of the candidate is chosen by the candidate, and not necessarily reflective of the party's endorsement or approval of the candidate. Accordingly, the *party preference designation* required by section 13105 (which replaced party *affiliation* previously required only for general election ballots) was expanded to provide some context, and resulted in more often being placed on the line below the candidate's name.[234]

In *Washington State Grange*, *supra*, the United States Supreme Court recognized that a top-two primary system imposed by direct voter enactment may lead to voter confusion, and may give rise to a constitutional challenge on the basis of an impairment of the political parties' associational rights under the First Amendment.[235] Helpfully, the Court suggested remedial measures that might be implemented to avoid such challenge: "the ballots might note preference in the form of a candidate statement that emphasizes the candidate's personal determination rather than the party's acceptance of the candidate, such as 'my party preference is the Republican Party.'"[236] Accordingly, the state has implemented the Court's suggestions in Elections Code section 13105, as amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3, and as interpreted by the Secretary of State in CC/ROV #11005, CC/ROV #11125, and CC/ROV #12059. Section 13105, as noted above, requires counties to include in both the primary and general election ballots a party preference designation "in substantially the following form: 'My party preference is the _____ Party.'"[237] Later interpretations of that section, pursuant to CC/ROV #11125,[238] followed by a statutory amendment effected by Statutes 2012, chapter 3, shortened the party preference designation, as described above, to simply "Party

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[231] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[232] However, note that sections 8002.5 and 8040, discussed above, require a candidate to certify 10 years of party affiliation/party preference history at the time he or she files a declaration of candidacy.

[233] California Constitution, article II, section 5 (as amended by Proposition 14, June 8, 2010).

[234] See Exhibit A, Test Claim, at p. 54 [CC/ROV #11005, stating that the need to place party preference below candidate's name "will be more likely to occur now, given the new political party identification sentences required by the Top Two Candidates Open Primary Act"].

[235] *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442.

[236] *Id*, at p. 456.

[237] Elections Code section 13105 (as amended, Stats. 2009, ch. 1 (SB 6)).

[238] See Exhibit A, Test Claim, at p. 57.

Preference: _____."[239] But the requirement to print in the ballot something more than merely the name of a party preferred by the candidate remains. As noted above, section (a) of the Proposition 14 findings and declarations expressly invokes Statutes 2009, chapter 1,[240] and findings and declarations section (f) expressly states that the "act conforms to the ruling in *Washington State Grange*. . ."[241] The amendments to section 13105, and the later interpretations of that section, along with the statutory "clean-up" of Statutes 2012, chapter 3,[242] are therefore intended to implement Proposition14 in a manner that does not lead to a confusing or misleading ballot, which could give rise to a constitutional challenge, as was the case in the State of Washington.

Moreover, as discussed above, the Court in *San Diego Unified* found that where a test claim statute provides "specific statutory procedures," designed to "set forth…details that were not expressly articulated" in prior law or in the ballot measure, and which do not "significantly increase the cost of compliance," those activities should be viewed as "part and parcel" of the underlying [ballot measure] mandate, and thus non-reimbursable.[243] The activities that the Court in *San Diego Unified* found were "incidental and de minimis" included a number of notice and recordkeeping requirements related to providing due process to students under threat of expulsion from public school, but which the Court presumed to be "excessive due process" aspects of the statute:

> …(i) adoption of rules and regulations pertaining to pupil expulsions; (ii) inclusion in the notice of hearing of (a) a copy of the disciplinary rules of the District, (b) a notice of the parents' obligation to notify a new school district, upon enrollment, of the pupil's expulsion, and (c) a notice of the opportunity to inspect and obtain copies of all documents to be used at the hearing; (iii) allowing, upon request, the pupil or parent to inspect and obtain copies of the documents to be used at the hearing; (iv) sending of written notice concerning (a) any decision to expel or suspend the enforcement of an expulsion order during a period of probation, (b) the right to appeal the expulsion to the county board of education, and (c) the obligation of the parent to notify a new school district, upon enrollment, of the pupil's expulsion; (v) maintenance of a record of each expulsion, including the cause thereof; and (vi) the recording of expulsion orders and the causes thereof in the pupil's mandatory interim record (and, upon request, the forwarding of this record to any school in which the pupil subsequently enrolls).[244]

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[239] Elections Code section 13105 (as amended, Stats. 2012, ch. 3 (AB 1413)).

[240] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[241] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[242] See Statutes 2012, chapter 3 (AB 1413) ["This bill would make technical revisions to provisions of the Elections Code to reflect the 'voter-nominated primary election process.'"].

[243] 33 Cal.4th at p. 889.

[244] *Id,* at p. 873, fn. 11 [citing Education Code section 48918]; 890.

The Court found these "excessive" activities to be part and parcel of the existing federal mandate, and denied reimbursement under article XIII B, section 6 of the California Constitution.[245]

Here, the requirements of section 13105 to include a short party preference designation sentence[246] (later reduced to only a few words[247]) in the primary and general election ballots, and to print each candidate's entry, including name, party preference, and ballot designation, on three consecutive lines, when viewed in context of the existing and other new requirements, impose at most de minimis added costs. As shown above, existing law required that counties produce ballots for every election; and the plain language of Proposition 14 and Elections Code sections 13102 and 13110 require including all voter-nominated offices in a single nonpartisan primary ballot. The plain language of amended section 13105, requiring including each candidate's party preference in the primary ballot (in addition to the general election ballot, which was already required), is also shown above to be required by the plain language of Proposition 14 (i.e., required even in the absence of the test claim statutes, and the state had "no true choice"). Moreover, because a general election now includes only two candidates for each office, rather than a candidate from each participating qualified political party, there may often be a cost savings inherent in the Top Two Candidates Open Primary Act, related to the form and content of general election ballots. In that context, the asserted new requirement to print a short phrase or sentence identifying each candidate's party preference, and to do so on three lines, is significantly less costly and burdensome than the notice and recordkeeping activities denied by the California Supreme Court in *San Diego Unified*, and therefore the activities are incidental to the ballot measure mandate and produce at most de minimis added costs.

In comments submitted on the draft proposed decision, claimant states specifically that "[t]he wording 'party preference' is not required ballot wording in SCA 4/Proposition 14 and is not necessary to implement the plain language requirements of SCA 4/Proposition 14." In addition, claimant argues that "[f]or counties that are required to provide materials in alternate languages, this 'party preference' wording after each voter-nominated candidate makes the official ballot longer by one line for each candidate on the ballot, in some cases several inches longer." Finally, claimant alleges that all of this results in increased costs, as follows:

> The ballot is the most costly part of any election and the legislation and CCROVs could have directed the counties to provide a definition of the party preference in the sample ballot pamphlet at a much reduced, and even de minimus, cost. They did not. Adding the words 'party preference' after each voter-nominated candidate on the ballot results in longer ballots cards and even additional ballot cards. The resulting costs are not de minimus. [*Sic*].[248]

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[245] 33 Cal.4th at p. 873, fn. 11; 889-890.

[246] Elections Code section 13105 (as amended, Stats. 2009, ch. 1 (SB 6)).

[247] See Exhibit A Test Claim, at p. 57 [CC/ROV #11125].

[248] Exhibit E, Claimant Comments on Draft Proposed Decision, at pp. 5-6.

As explained above, increased costs alone do not constitute a state mandate,[249] and counties were already required under prior law to print ballots.[250] Moreover, as the analysis above demonstrates, some additional identifying information for each candidate *is* required, in order to satisfy state law requirements that ballots may not be misleading[251] and the United States Supreme Court's ruling with respect to the First Amendment associational rights of political parties.[252] And, Proposition 14 itself expressly states that candidates must be allowed to indicate their party preference on the ballot for voter-nominated offices.[253] Finally, as shown above, Proposition 14 itself provides that: "a candidate for a congressional or state elective office may have his or her political party preference, or lack of political party preference, indicated upon the ballot…" And finally, given that some additional information and context (beyond merely a party name) is required, the additional requirement to identify the party with a short phrase, and to utilize three lines for each candidate's entry, are incidental to the ballot measure mandate and produce at most de minimis added costs, in context. Claimant's comments do not alter the above analysis.

Based on the foregoing, the Commission finds that the requirements of section 13105, as amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3, as well as those portions of CC/ROV #11005, CC/ROV #11125, and CC/ROV #12059 which pertain to the party preference designation phrases required for each candidate's entry on the ballot do not impose costs mandated by the state pursuant to Government Code section 17556(f).

d) Activities Pertaining to the Receipt and Printing of Party Endorsements in the Sample Ballot: Elections Code section 13302, as amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3; and portions of Secretary of State's Memoranda CC/ROV #11005, CC/ROV #12059 are intended to implement and are incidental to Proposition 14 and produce at most de minimis additional costs in the context of the Top Two Primary.

Elections Code section 13302, as amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3, as well as portions of CC/ROV #11005 and CC/ROV #12059, require counties to receive and print in the voter information portion of the sample ballot, for any election, including a special election, a list of party endorsements timely submitted by a qualified political party. In addition, CC/ROV #11005 interprets section 13302 to require counties to treat as timely, for purposes of special elections, a list of endorsements received from a qualified political party not

[249] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830.

[250] Former Elections Code section 13102 (Stats. 2007, ch. 515 (AB 1734)).

[251] *Lungren, supra*, 48 Cal.App.4th at p. 440 [citing *Amador Valley Joint Union High School District v. State Board of Equalization*, (1978) 22 Cal.3d 208].

[252] *Washington State Grange, supra*, (2008) 552 U.S. 442, at pp. 445-446.

[253] California Constitution, article II, section 5 (as amended by Stats. 2009, ch. 2 (Proposition 14)).

later than *43 days* prior to a *special primary* election, and to "work with any interested qualified political parties who wish to submit lists" of endorsements for a *special general* election.[254]

Under existing law, each county elections official is required to "provide ballots for any election within his or her jurisdiction."[255] Separate ballots are required for *partisan* primary elections[256] for each qualified political party, and for partisan offices each party participating in the primary election has the right to participate in the general election.[257]

Pursuant to and after Proposition 14, all candidates for voter-nominated office are included on a single primary ballot, and the general election ballot contains the names only of the two candidates for each office who received the highest vote totals in the primary election, regardless of those candidates' party preference. Partisan elections are still provided for presidential and party committee candidates, but political parties no longer have the right to nominate a candidate for voter-nominated office, and the candidates appearing on the ballot for voter-nominated office need not be nominated only by members of the party for which the candidate states a preference.[258] However, the findings and declarations section (e) in Proposition 14 states, in pertinent part, as follows:

> Nothing in this measure shall restrict the parties' right to contribute to, endorse, or otherwise support a candidate for state elective or congressional office. Political parties may establish such procedures as they see fit to endorse or support candidates or otherwise participate in all elections, and they may informally "nominate" candidates for election to voter-nominated offices at a party convention or by whatever lawful mechanism they so choose, other than at state-conducted primary elections.[259]

Accordingly, in conjunction with the adoption of Proposition 14, the Legislature amended Elections Code section 13302 to require counties to receive and print in the sample ballot a list of party endorsements timely submitted by a qualified political party.[260] CC/ROV #11005 interpreted section 13302 to apply also to a special election, and directed counties to treat as

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[254] Exhibit A, Test Claim, at pp. 52-5 [emphasis added].

[255] Elections Code section 13000 (Stats. 1994, ch. 920 (SB 1547)).

[256] Note, however, that the category of partisan offices has been significantly narrowed by Proposition 14.

[257] See Elections Code section 13102 (Stats. 2007 ch. 515 (AB 1734); Stats. 2009, ch. 1) [new category of "voter-nominated" offices added to the nonpartisan ballot, but separate ballot still required for partisan offices]. See also, California Constitution, article II, section 5 (as amended, Stats. 2004, ch. 103 (Proposition 60, November 2, 2004); Stats. 2009, ch. 2 (SCA 4) (Proposition 14, June 8, 2010)) [political party participating in partisan primary election has the right to participate in general election for partisan office, but all congressional and state offices now designated voter-nominated].

[258] California Constitution, article II, section 5 (as amended by Proposition 14, June 8, 2010).

[259] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[260] Elections Code section 13302(b) (as amended, Stats. 2009, ch. 1 (SB 6)).

timely a list of endorsements received not later than 43 days prior to the election,[261] and Statutes 2012, chapter 3 made minor technical changes to section 13302, which clarified that counties were only required to print the list of endorsements if timely submitted.[262]

Claimant argues that printing a list of party endorsements is not necessary to implement Proposition 14, and "makes printing sample ballot booklets much more expensive by increasing the number of pages that must be included." Claimant also alleges that printing party endorsements "increases staff costs because counties must verify the information submitted to ensure it complies with all requirements."[263]

Claimant's focus on costs is not persuasive, and the existing requirement to print the ballot was not added or amended by the test claim statutes.[264] However, to the extent claimant alleges increased staff time and additional information being included in the ballots and sample ballots pursuant to amended section 13302, the following new activities are identified for analysis:

- In connection with any election at which a candidate for voter-nominated office will appear on the ballot, receive from a qualified political party a list of endorsements for candidates for voter nominated office, and print the list, if provided not later than 43 days prior to a *special primary* election, or 83 days prior to a primary or general election, in the voter information section of the sample ballot.[265]

The Commission finds that these activities, as explained herein, are incidental to the ballot measure mandate and produce at most de minimis added costs, and therefore do not impose costs mandated by the state pursuant to Government Code section 17556(f).

As discussed above, the United States Supreme Court in *Washington State Grange* recognized that a top two candidates primary election system could give rise to a constitutional challenge based on a perceived threat to the associational rights of the political parties, (i.e., a threat to their right to exclude unwanted candidates, or disassociate themselves from such persons). The Court held that in order to mitigate that threat and defuse potential legal challenges, "the State could decide to educate the public about the new primary ballots through advertising or explanatory materials mailed to voters along with their ballots."[266]

Here, the requirements of section 13302, to receive from a qualified political party and print in the ballot, if timely received, a list of party endorsements for congressional and state elective offices, constitute a form of "explanatory materials" in the ballot, which are intended to vindicate the parties' rights to "informally 'nominate' candidates," (or to abstain from endorsing or

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[261] See Exhibit A, Test Claim, at p. 55.

[262] Elections Code section 13302(b) (as amended, Stats. 2012, ch. 3 (AB 1413)).

[263] Exhibit C, Claimant Rebuttal Comments, at p. 4.

[264] Elections Code section 13000 (Stats. 1994, ch. 920 (SB 1547)).

[265] Elections Code section 13302 (Stats. 2009, ch. 1; Stats. 2012, ch. 3) Secretary of State's Memorandum CC/ROV #11005 [See Exhibit A, Test Claim, at p. 55.].

[266] *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, at p. 456.

nominating such candidates) and to avoid a constitutional challenge to the Top Two Candidates Open Primary Act on the basis of the parties' First Amendment associational rights. As discussed above, the legal standard for "necessary to implement" under section 17556(f) is whether the duties imposed would be required "even in the absence of" the test claim statute or executive order,[267] or the Legislature had no "true choice" but to enact the statute or order implementing the ballot measure, and choice may include the compulsion of likely litigation.[268] Here, *some* mechanism or procedure to allow political parties to express their "informal" endorsements (both at primary and general elections) is required to effectuate the provisions of Proposition 14 even in the absence of the test claim statute.[269] And, because the top two primary system imposed by Proposition 14 results in a potential threat to the parties' First Amendment associational rights, a "barrage of litigation"[270] on constitutional grounds is sufficiently likely, and the Legislature is compelled to act to provide the parties with some means to distinguish their favored candidates from those less favored.

However, while some new requirements are implicated by the plain language requirements of Proposition 14, and by the compulsion to avoid a First Amendment challenge to the law,[271] the state may have exercised some discretion as to the manner of implementation of the ballot measure in this case. Nevertheless, any excess requirements of section 13302 and CC/ROV #11005 to receive and print a list of party endorsements, if timely, are not reimbursable. In *San Diego Unified School Dist*., the California Supreme court considered whether statutory procedures designed to make the underlying federal due process rights enforceable and to set forth procedural details not expressly articulated in the case law establishing the due process rights could constitute a reimbursable state mandate. Some of the alleged due process protections and procedures were considered adopted to implement federal due process law, while the excess activities were determined to be *incidental to the federal mandate* and did not significantly increase the cost of compliance with the underlying federal mandate. The Court identified the following "excess" due process requirements, but concluded that they were incidental to federal due process requirements and impose de minimis added costs, in context:

> …(i) adoption of rules and regulations pertaining to pupil expulsions; (ii) inclusion in the notice of hearing of (a) a copy of the disciplinary rules of the District, (b) a notice of the parents' obligation to notify a new school district, upon enrollment, of the pupil's expulsion, and (c) a notice of the opportunity to inspect and obtain copies of all documents to be used at the hearing; (iii) allowing, upon request, the pupil or parent to inspect and obtain copies of the documents to be used at the hearing; (iv) sending of written notice concerning (a) any decision to expel or suspend the enforcement of an expulsion order during a period of probation, (b) the right to appeal the expulsion to the county board of education, and (c) the obligation of the parent to notify a new school district, upon

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[267] *County of Los Angeles II* (1995) 32 Cal.App.4th 805.

[268] *Hayes, supra*, (1992) 11 Cal.App.4th 1564, at pp. 1592-1594.

[269] *County of Los Angeles II, supra*.

[270] *Hayes, supra*, at p. 1592.

[271] *Washington State Grange, supra*, 552 U.S. 442.

> enrollment, of the pupil's expulsion; (v) maintenance of a record of each expulsion, including the cause thereof; and (vi) the recording of expulsion orders and the causes thereof in the pupil's mandatory interim record (and, upon request, the forwarding of this record to any school in which the pupil subsequently enrolls).[272]

Thus, for purposes of article XIII B, section 6, the excess activities were considered not reimbursable under Government Code section 17556(c).[273] The court of appeal in *CSBA* later applied that same analysis to Government Code section 17556(f) and statutes that implement underlying ballot measure mandates.[274]

Applying that analysis here, section 13302, as amended, and that portion of CC/ROV #11005 pertaining to printing a list of endorsements in the ballot for special elections,[275] constitute "specific statutory procedures" which are "designed to…set forth procedural details that were not expressly articulated"[276] in the ballot measure, in order to provide for political parties to continue to express their endorsements and to "informally nominate" candidates.

And, as compared with the prior law requirements to print separate ballots for each qualified political party (as many as seven separate ballots required for the 2012 presidential election [See Exhibit A, Test Claim, at p. 72.]), and to include the names of each party's winning candidates (i.e., each party's nominees) in the general election ballot,[277] preparing a *single* primary ballot for all voter-nominated offices, and printing *only the names of the top two* "vote getters" in the general election ballot likely presents a cost savings to the counties. In that context, the additional requirement to receive and print a list of endorsements from qualified political parties, instead of printing separate primary ballots and including the names of all nominees in the general election ballot, is incidental to Proposition 14 and produces at most de minimis added costs. Moreover, the requirement imposed by CC/ROV #11005, to treat a list of endorsements as timely received if provided by a qualified political party not later than 43 days prior to a *special* election, is also incidental to Proposition 14 and produces at most de minimis added costs, in context of the larger program.

In comments submitted on the draft proposed decision, claimant argues that Proposition 14 "does not provide for, nor in any manner of interpretation, require counties to provide, at the counties' costs, sample ballot pamphlet endorsement pages for the California's qualified political parties [*sic*]." Claimant argues that Proposition 14 "clearly states that 'Political Parties may establish such procedures as they see fit to endorse or support candidates or otherwise participate in all

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[272] *San Diego Unified*, *supra*, 33 Cal.4th at p. 873, fn. 11 [citing Education Code section 48918]; 890.

[273] *San Diego Unified*, *supra*, 33 Cal.4th at p. 889.

[274] *CSBA*, *supra*, 171 Cal.App.4th at p. 1216.

[275] Exhibit A, Test Claim, at p. 55.

[276] *San Diego Unified*, *supra*, 33 Cal.4th, at p. 889.

[277] See former California Constitution, article II, section 5 (as amended by Stats. 2004, Res. C. 103 (SCA 18) (Proposition 60, approved November 2, 2004)) [providing that a qualified political party participating in the primary election has the right to participate in the general election].

elections…'" But, claimant asserts, "[n]othing in this wording requires the county to receive and print a list of party endorsements at the County's cost in order to implement SCA 4/Proposition 14." Finally, the claimant concludes that "[c]osts to comply with the mandate language in both SB6 [Stats. 2009, ch. 1] and AB 1413 [Stats. 2012, ch. 3] exceed $1,000 which meets the threshold for mandate claiming and therefore are not de minimus [*sic*]."[278]

However, as the analysis above shows, Statutes 2009, chapter 1 and Statutes 2012, chapter 3 both expressly state that they are intended to implement Proposition 14,[279] and the requirements of section 13302 give effect to the provisions of Proposition 14 that state that parties shall continue to have the right to informally nominate candidates, and to express their preferences. The provision for parties to endorse candidates for voter-nominated offices is merely a mechanism to allow parties to express their "informal" nominations, as provided for in the findings and declarations section of Proposition 14. Specifically, subdivision (e) of the Proposition 14 Findings and Declarations states that "[p]olitical parties may establish such procedures as they see fit to endorse or support candidates or otherwise participate in all elections, and they may informally 'nominate' candidates for election to voter-nominated offices at a party convention or by whatever lawful mechanism they so choose, other than at state-conducted primary elections."[280]

Moreover, prior to Proposition 14, party nominations would indeed control the appearance or absence of a candidate on the ballot (with the exception of write-in candidates), and the party chair would provide the list of nominations to the county officials, who would reproduce that list in the form of a partisan ballot.[281] Now, pursuant to the voter-nominated primary, the party no longer nominates a candidate,[282] and the list of endorsements authorized by section 13302 allows the parties to continue to express their preferences. Finally, the finding that this activity is

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[278] Exhibit E, Claimant Comments on Draft Proposed Decision, at p. 6.

[279] The Proposition 14 findings and declarations approved by the voters expressly state that "[t]his act, along with legislation already enacted by the Legislature to implement this act, are intended to implement an open primary system in California as set forth below." Accordingly, Statutes 2009, chapter 1states that "[t]his measure shall become operative only if SCA 4 [Proposition 14] is approved by the voters." In addition, the Legislative Counsel's Digest preceding Statutes 2012, chapter 3 (AB 1413) states that "[t]his bill would make technical revisions to provisions of the Elections Code to reflect the 'voter-nominated primary election' process."

[280] Exhibit F, Text of Ballot Measure, Proposition 14, Findings and Declarations (e).

[281] See Former Elections Code section 13000 (Stats. 1994, ch. 920) ["The person in charge of elections for any county, city and county, city, or district shall provide ballots for any elections within his or her jurisdiction, and shall cause to be printed on them the name of every candidate whose name has been certified to or filed with the proper officer pursuant to law and who, therefore, is entitled to a place on the appropriate ballot."]. See also Former Elections Code section 8300 et seq., pertaining to write-in nominations (Stats. 1994, ch. 920).

[282] California Constitution, article II, section 5 (as amended by Proposition 14, June 8, 2010) ["A political party or party central committee shall not nominate a candidate for any congressional or state elective office at the voter-nominated primary."].

incidental to the ballot measure mandate and results in de minimis added costs follows the analysis of the California Supreme Court in *San Diego Unified*. The Court held that the activities that "exceeded" the federal mandate, which were listed in a footnote and included a number of notice and recordkeeping requirements triggered by a process to expel a student from public school, "fall within the category of matters that are merely incidental to the underlying federal mandate, and that produce at most a de minimis cost."[283] Here, a comparison must be drawn between the alleged state required activities to implement the ballot measure mandate of Proposition 14 and the entire Top Two Primary Act. Actual yearly costs of the excess activities were not considered by the Supreme Court in *San Diego Unified* and are not relevant to those questions, except in context of the entire program. Nor, as the County suggests, is the Commission's threshold $1,000 for reimbursement pursuant to section 17564 a viable test for whether an activity is de minimis.

Therefore, based on the foregoing, the requirements of section 13302, as amended, and of CC/ROV #11005, to receive and print in the ballot, if timely, a list of endorsements from a qualified political party, do not impose costs mandated by the state pursuant to Government Code section 17556(f).

e) Activities to Educate Voters About Proposition 14 with Instructions and Voter Information Provided in the Ballot and Posted at Polling Places: Elections Code sections 9083.5, 14105.1, 13206, and 13206.5, as added or amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3; and portions of Secretary of State's Memoranda CC/ROV #11005, CC/ROV #11126, CC/ROV #12059 are intended to implement and are incidental to Proposition 14 and produce at most de minimis costs.

Elections Code sections 9083.5, 14105.1, 13206, and 13206.5, as added or amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3, as well as portions of CC/ROV #11005, CC/ROV #11126, and CC/ROV #12059, require counties to include certain instructions and explanatory text in the ballots and sample ballots for primary elections, general elections and special primary and general elections, respectively, and to furnish to precincts and post at polling places a poster informing voters of the changes to the election laws.

Under pre-existing law, each county elections official is required to "provide ballots for any election within his or her jurisdiction."[284] Those ballots are required to contain instructions to voters, with respect to how to mark their ballots for particular candidates, how to vote for a qualified write-in candidate, how to vote for a ballot measure, and what to do if the voter makes a mistake or wrongly tears or defaces their ballot. These instructions also include the procedures for confirmation of justices of the Supreme Court or the Court of Appeal.[285] In addition, county elections officials are required to include in the ballot, as appropriate to the election cycle, instructions for voting for delegates to a national convention, and for voting for the electors for a

[283] 33 Cal.4th 890.

[284] Elections Code section 13000 (Stats. 1994, ch. 920 (SB 1547)).

[285] Elections Code sections 13204; 9083 (Stats. 1994, ch. 920 (SB 1547)).

presidential candidate.[286] And finally, under pre-existing law, county elections officials are required to provide to each precinct a list of "precinct supplies," as specified by statute.[287]

Proposition 14 eliminated partisan primary elections for all congressional and state offices, and created a new category of elective office, called "voter-nominated." Proposition 14 required that all voters would be permitted to vote for any candidate for voter-nominated office, regardless of the party preference of the voter or the candidate, and accordingly called for a unified ballot for all voter-nominated and nonpartisan offices. In addition, Proposition 14 provided that a candidate for voter-nominated office could have his or her party preference indicated in the ballot, but a candidate for nonpartisan office would not be permitted to do so. Proposition 14 also provided that only the top two "vote getters" in any voter-nominated primary contest would advance to the general election for that office, regardless of party preference, but that no party shall have the right to have its preferred candidate appear on the ballot unless that candidate is one of the two highest "vote getters" in the primary election.[288] And finally, Proposition 14 findings and declarations section (d), approved by the voters, also cautioned that a candidate's self-selected party preference "shall not constitute or imply endorsement of the candidate by the party designated, and no candidate for that office shall be deemed the official candidate of any party by virtue of his or her selection in the primary."[289]

In conjunction with placing Proposition 14 before the voters, the Legislature enacted Statutes 2009, chapter 1, which expressly stated that it would become operative only if Proposition 14 were adopted by the voters.[290] Statutes 2009, chapter 1 provided for posters available at polling places[291] and additional instructions to be added to the ballot[292] containing information for voters regarding the changes to the primary election system, including the ability of voters to vote for any candidate regardless of party preference. Secretary of State's Memorandum CC/ROV #11005, issued January 26, 2011, restates and clarifies the requirements of the amended and added sections of the Elections Code as applied to *special elections*. CC/ROV #11005 notes specifically that while section 9083.5 *requires the Secretary of State* to include in the statewide Voter Information Guide (VIG) certain information pertaining to the new voter-nominated primary system and top two candidates open primaries, "there is no VIG for special elections to fill vacancies," and therefore "county elections officials should provide…the language (taken from Elections Code section 9083.5), *on the sample ballot* in order to educate voters about the changes in the law."[293] CC/ROV #11126, issued November 23, 2011, directs counties to *omit from the primary ballots* some of the language provided by section 13206, because the June 5,

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[286] Elections Code section 13205 (Stats. 1994, ch. 920 (SB 1547)).

[287] Elections Code section 14105 (Stats. 1994, ch. 920 (SB 1547); Stats. 2003, ch. 425 (AB 177); Stats. 2003, ch. 810 (AB 1679)).

[288] California Constitution, article II, sections 5, 6 (as amended by Proposition 14, June 8, 2010).

[289] Exhibit F, Text of Ballot Measure, Proposition 14, June 8, 2010.

[290] Statutes 2009, chapter 1 (SB 6) section 67.

[291] Elections Code sections 9083.5; 14105.1 (added, Stats. 2009, ch. 1 (SB 6)).

[292] Elections Code section 13206 (as amended, Stats. 2009, ch. 1 (SB 6)).

[293] See Exhibit A, Test Claim, at pp. 52-53 [CC/ROV #11005].

2012 Presidential Primary election did not contain any nonpartisan offices, and thus explanation of the procedures and significance of nonpartisan offices was not necessary.[294] On February 10, 2012, the Legislature enacted Statutes 2012, chapter 3 as an urgency measure, amending section 13206 to make the explanatory text in the ballot describing voter-nominated and nonpartisan offices slightly shorter than that provided in Statutes 2009, chapter 1,[295] and also adding section 13206.5, which provides for similar explanatory text to appear in the statewide *general* election ballot.[296] CC/ROV #12059, issued on the same day that Statutes 2012, chapter 3 took effect, restated the language of amended section 13206, including the language pertaining to nonpartisan offices that counties had been directed to exclude pursuant to CC/ROV #11126. The order also restated the language added by section 13206.5.[297] Because CC/ROV #12059 superseded CC/ROV #11126 before the June 5, 2012 primary election occurred, the omission required pursuant to CC/ROV #11126 is no longer required.

Claimant alleges that sections 13206 and 13206.5 require each ballot and sample ballot to "include new specified information regarding partisan offices, and voter-nominated and nonpartisan offices," and "contain specified language, per election type."[298] In rebuttal, claimant explains that "[n]othing in Proposition 14 requires voter education," and that "[u]sing space on official ballots for voter education is particularly expensive due to the extraordinarily strict requirements related to official ballot paper quality, type, thickness, and ink quality..."[299] In addition, claimant alleges that "AB 1413 added Elections Code Section 13206.5, which requires certain information to be printed at the top of the ballot used in a statewide general election in years evenly divisible by four" and that "[t]hese requirements are entirely new and involve considerable ballot space to print."[300] And, claimant alleges that sections 9083.5 and 14105.1 require counties to "[r]eproduce and provide to each polling place the Secretary of State created explanation of electoral procedures," to "[p]ost at each polling place, in specified locations and quantities, the Secretary of State created explanation of electoral procedures," and to post at each polling place and mail to vote-by-mail voters "[s]pecified party abbreviations."[301] Claimant alleges that "[t]his requirement results in increased costs to change poll worker training materials and training procedures," and that "[v]oter education is not required by Proposition 14."

Claimant's allegations are not persuasive. To begin, claimant's assertion that "nothing in Proposition 14 requires voter education" is not accurate, because, as discussed below, the findings and declarations approved by the voters in Proposition 14 expressly state that the Top Two Candidates Open Primary Act "conforms to the ruling in *Washington State Grange v. Washington State Republican Party*," which centers on the potential for voter confusion giving

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[294] Exhibit A, Test Claim, at p. 62 [CC/ROV #11126].

[295] Elections Code section 13206 (as amended, Stats. 2012, ch. 3 (AB 1413)).

[296] Elections Code section 13206.5 (added, Stats. 2012, ch. 3 (AB 1413)).

[297] Exhibit A, Test Claim, at p. 70.

[298] Exhibit A, Test Claim, at p. 6.

[299] Exhibit C, Claimant Rebuttal Comments, at p. 3.

[300] Exhibit C, Claimant Rebuttal Comments, at p. 3.

[301] Exhibit A, Test Claim, at pp. 6-7.

rise to a constitutional challenge to a top two primary system. The Court in *Washington State Grange* held that a constitutional challenge to Washington's top two primary system could be avoided by the institution of certain voter information and education procedures, as discussed below. By expressly invoking that case, the Proposition 14 findings and declarations demonstrate the voters' intent that Proposition 14 must be implemented in a manner that would avoid a similar constitutional challenge. Secondly, the plain language of sections 9083.5 and 14105.1 does not require counties to "reproduce" the notices specified in section 9083.5;[302] section 14105.1 expressly states that the notices will be "supplied by the Secretary of State," and therefore only the activity of "furnishing" the notices is required.[303] Moreover, claimant's comments and allegations focus heavily on the increased *costs* of preparing ballots resulting from Proposition 14 and the implementing test claim statutes, but increased costs alone do not result in a reimbursable state-mandated program.[304]

Therefore, based on the foregoing, the following new activities pertaining to voter information and instructions provided in the ballot and posted at polling places are required:

- Furnish to precinct officers printed copies of the notices specified in section 9083.5, as supplied by the Secretary of State.[305]
- Conspicuously post the notices inside and outside every polling place.[306]
- Add to a *partisan primary ballot*, below the box labeled "Party-Nominated Offices," the following:

  > "Only voters who disclosed a preference upon registering to vote for the same party as the candidate seeking the nomination of any party for the Presidency or election to a party committee may vote for that candidate at the primary election, unless the party has adopted a rule to permit non-party voters to vote in its primary elections."[307]

- Add to a *special primary election ballot* a box and label for "Voter-Nominated Offices," and below that box the following:

  > "All voters, regardless of the party preference they disclosed upon registration, or refusal to disclose a party preference, may vote for any candidate for a voter-nominated or nonpartisan office.

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[302] Exhibit A, Test Claim, at p. 6.

[303] Elections Code section 14105.1 (added, Stats. 2009, ch. 1 (SB 6)).

[304] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830.

[305] Elections Code section 14105.1 (as added, Stats. 2009, ch. 1 (SB 6)).

[306] *Ibid.*

[307] Elections Code section 13206(a) (as amended, Stats. 2009, ch. 1 (SB 6); Stats. 2012, ch. 3 (AB 1413)).

Voter-Nominated Offices. The party preference, if any, designated by a candidate for a voter-nominated office is selected by the candidate and is shown for the information of the voters only.

It does not constitute or imply an endorsement of the candidate by the party indicated, and no candidate nominated by the qualified voters for any voter-nominated office shall be deemed to be the officially nominated candidate of any political party.[308]

- From July 1, 2011 to February 10, 2012,[309] add to the nonpartisan part of the *primary election ballot*, below the box labeled "Voter-Nominated and Nonpartisan Offices," the following:

  "All voters, regardless of the party preference they disclosed upon registration, or refusal to disclose a party preference, may vote for any candidate for a voter-nominated or nonpartisan office.

  Voter-Nominated Offices. The party preference, if any, designated by a candidate for a voter-nominated office is selected by the candidate and is shown for the information of the voters only.

  It does not constitute or imply an endorsement of the candidate by the party indicated, and no candidate nominated by the qualified voters for any voter-nominated office shall be deemed to be the officially nominated candidate of any political party.

  "Nonpartisan Offices. A candidate for a nonpartisan office may not designate a party reference on the ballot."[310]

- Beginning February 10, 2012, add to the nonpartisan part of the *primary election ballot*, below the box labeled "Voter-Nominated and Nonpartisan Offices," the following:

  "All voters, regardless of the party preference they disclosed upon registration, or refusal to disclose a party preference, may vote for any candidate for a voter-nominated or nonpartisan office. The party preference, if any, designated by a candidate for a voter-nominated office is selected by the candidate and is shown for the information of the voters only. It does not imply that the candidate

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[308] Secretary of State's Memorandum CC/ROV #11005 [See Exhibit A, Test Claim, at pp. 53-54.].

[309] The potential period of reimbursement begins July 1, 2011, based on the filing date of the test claim. As of February 10, 2012, Elections Code section 13206 was amended to shorten the required text for inclusion in the ballot. The Commission takes official notice that at least one special election was held within between July 1, 2011 and November 23, 2011 in which candidates for a voter-nominated office appeared on the ballot. (See Exhibit F, Special Election, Congressional District 36, July 12, 2011.).

[310] Elections Code section 13206(b) (as amended, Stats. 2009, ch. 1 (SB 6)).

is nominated or endorsed by the party or that the party approves of the candidate. The party preference, if any, of a candidate for a nonpartisan office does not appear on the ballot."[311]

- Add to the *general election ballot, in an election year evenly divisible by the number four*, below the box and label for "Party Nominated Offices," the following:

  "The party label accompanying the name of a candidate for party-nominated office on the general election ballot means that the candidate is the official nominee of the party shown."[312]

- Add to the *general election ballot*, in *all election years*, below the box and label for "Voter-Nominated and Nonpartisan Offices," the following:

  "All voters, regardless of the party preference they disclosed upon registration, or refusal to disclose a party preference, may vote for any candidate for a voter-nominated or nonpartisan office. The party preference, if any, designated by a candidate for a voter-nominated office is selected by the candidate and is shown for the information of the voters only. It does not imply that the candidate is nominated or endorsed by the party or that the party approves of the candidate. The party preference, if any, of a candidate for a nonpartisan office does not appear on the ballot."[313]

- Add to a *special election ballot*, the following:

  "VOTER-NOMINATED OFFICES

  Under the California Constitution, political parties are not entitled to formally nominate candidates for voter-nominated offices at the primary election, and a candidate nominated for a voter-nominated office at the primary election is not the official nominee of any party for the office in question at the ensuing general election. A candidate for nomination or election to a voter-nominated office may, however, designate his or her party preference, or lack of party preference, and have that designation reflected on the primary and general election ballot, but the party designation so indicated is selected solely by the candidate and is shown for the information of the voters only. It does not constitute or imply an endorsement of the candidate by the party designated, and no candidate nominated by the qualified voters for any voter-nominated office shall be deemed to be the officially nominated candidate of any political party. The parties may have a list of

[311] Elections Code section 13206(b) (as amended, Stats. 2012, ch. 3 (AB 1413)).

[312] Elections Code section 13206.5(a)(1) (Stats. 2012, ch. 3).

[313] Elections Code section 13206.5(a)(2) (Stats. 2012, ch. 3).

> candidates for voter-nominated offices, who have received the official endorsement of the party, printed in the sample ballot.
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> All voters, regardless of the party for which they have expressed a preference upon registering, or of their refusal to disclose a party preference, may vote for any candidate for a voter-nominated office, provided they meet the other qualifications required to vote for that office. The top two vote-getters at the primary election advance to the general election for the voter-nominated office, and both candidates may have specified the same party preference designation. No party is entitled to have a candidate with its party preference designation participate in the general election unless such candidate is one of the two highest vote-getters at the primary election."[314]

The Commission finds that these activities are incidental to the ballot measure mandate and produce at most de minimis added costs, and therefore do not impose costs mandated by the state pursuant to Government Code section 17556(f).

In *Hayes, supra*, court held that "[r]eimbursement is required when the state 'freely chooses to impose on local agencies any peculiarly "governmental" cost which they were not previously required to absorb,'"[315] but "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention."[316] Ultimately the threat of "a barrage of litigation" was seen as sufficient compulsion against the state to act to implement an applicable federal mandate.[317] Accordingly, here, a significant potential for constitutional challenge (and the significant potential that such challenge could succeed) is sufficiently compelling as against the state to require certain voter education measures, as discussed herein.

In *Washington State Grange, supra,* the Court recognized that a top two candidates open primary could give rise to widespread voter confusion, especially with respect to the diminished role of the political parties, and thus lead to a successful constitutional challenge to the law, asserting impairment of the political parties' associational rights under the First Amendment. The Court held that "[i]t stands to reason that whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot,"[318] but because the State of Washington had yet to implement its voter-enacted top two primary system, a facial constitutional challenge based on possible voter confusion was premature. Specifically, the Court suggested:

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[314] Secretary of State's Memorandum CC/ROV #11005 [See Exhibit A, Test Claim, at pp. 52-53.].

[315] (1992) 11 Cal.App.4th 1564, at p. 1578 [quoting *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, at p. 70].

[316] *Id,* at p. 1593.

[317] *Hayes, supra,* 11 Cal.App.4th at p. 1592.

[318] *Id,* at p. 456.

> [T]he ballots might note preference in the form of a candidate statement that emphasizes the candidate's personal determination rather than the party's acceptance of the candidate, such as "my party preference is the Republican Party." Additionally, the State could decide to educate the public about the new primary ballots through advertising or explanatory materials mailed to voters along with their ballots.[319]

Here, the Top Two Candidates Open Primary Act has been implemented in a manner that includes both of the innovations that the Court suggested would help weather any challenge asserting impairment of the parties' First Amendment associational rights. Specifically, the requirements of sections 9083.5 and 14105.1 to furnish the notices and post the notices inside and outside each polling place, and of sections 13206 and 13206.5 and CC/ROV #11005 to include additional explanation in primary, general, and special election ballots, involve notice and information to the voters which operate to "educate the public about the new primary ballots."[320] The explanatory text specified in amended section 13206 and added section 13206.5, and in CC/ROV #11005 (all of which are substantially similar), whether posted at polling places or printed in the ballot, draws heavily from the text of Proposition 14 itself,[321] and the information is provided to voters in order to avoid misleading or confusing the voters. Based on the state law requirement to "avoid misleading the public with inaccurate information,"[322] and the statement in the text of Proposition 14 that the act conforms to the ruling of *Washington State Grange*, additional instructions and voter information as required by sections 9083.5, 14105.1, 13206, and 13206.5 provide helpful information to voters regarding the changes to the primary system.

However, the Court in *Washington State Grange* suggested some options for the State of Washington to implement its top-two primary in a manner that avoided further litigation; the Court did not demand all of the stated measures. Moreover, the Court was not specific as to exactly what extent and scope of "advertising or explanatory materials" would be necessary to vindicate the First Amendment rights of the political parties.

Therefore, the activities required by added sections 9083.5 and 14105.1, to furnish to precinct officers the notices specified in section 9083.5, and to conspicuously post the notices at each polling place; as well as those required by added and amended sections 13206.5 and 13206, and by CC/ROV #11005, to include additional instructions and explanatory text in primary, general, and special election ballots, are adopted to implement Proposition 14. Even if they are not "necessary" to implement a top two candidates open primary consistently with Proposition 14, Government Code section 17556(f) still applies; these requirements are incidental to the ballot measure mandate and produce at most de minimis added costs. As discussed above, the California Supreme Court in *San Diego Unified*, found that statutory notice and recordkeeping requirements associated with public school expulsion proceedings were not reimbursable under

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[319] Ibid.

[320] *Washington State Grange*, *supra*, (2008) 552 U.S. 442, at p. 456.

[321] See Exhibit F, Text of Ballot Measure, Proposition 14.

[322] *Lungren*, *supra*, 48 Cal.App.4th at p. 440 [citing *Amador Valley Joint Union High School District v. State Board of Equalization*, (1978) 22 Cal.3d 208].

Government Code section 17556(c) because they represented "specific statutory procedures to comply with the general federal mandate," which are "designed to…set forth procedural details that were not expressly articulated in the case law establishing the respective rights [of the parties]." The Court held that if the excess procedural activities, "viewed singly or cumulatively, [do] not significantly increase the cost of compliance," then they "should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable" under Government Code section 17556(c).[323] The activities which the Court in *San Diego Unified* held were "incidental to" the federal due process requirements are as follows:

> …(i) adoption of rules and regulations pertaining to pupil expulsions; (ii) inclusion in the notice of hearing of (a) a copy of the disciplinary rules of the District, (b) a notice of the parents' obligation to notify a new school district, upon enrollment, of the pupil's expulsion, and (c) a notice of the opportunity to inspect and obtain copies of all documents to be used at the hearing; (iii) allowing, upon request, the pupil or parent to inspect and obtain copies of the documents to be used at the hearing; (iv) sending of written notice concerning (a) any decision to expel or suspend the enforcement of an expulsion order during a period of probation, (b) the right to appeal the expulsion to the county board of education, and (c) the obligation of the parent to notify a new school district, upon enrollment, of the pupil's expulsion; (v) maintenance of a record of each expulsion, including the cause thereof; and (vi) the recording of expulsion orders and the causes thereof in the pupil's mandatory interim record (and, upon request, the forwarding of this record to any school in which the pupil subsequently enrolls).[324]

The court of appeal in *CSBA* applied the same reasoning to a voter-enacted ballot measure under section 17556(f), and concluded that "statutes imposing duties on local governments do not give rise to reimbursable costs if the duties are incidental to the ballot measure mandate and produce at most de minimis costs." The court directed the Commission, on remand, to consider its interpretation of section 17556(f) when determining whether "the State is obligated to provide reimbursement with respect to the *Mandate Reimbursment Process II* test claim."[325]

Here, the requirements of sections 9083.5 and 14105.1 to furnish the notice specified in section 9083.5 to precinct officers along with the precinct supplies identified in section 14105,[326] and to conspicuously post the notice inside and outside each polling place; and the requirements of sections 13206 and 13206.5,[327] and a portion of CC/ROV #11005,[328] to include similar explanatory information in the ballots for primary, general, and special elections, constitute

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[323] *San Diego Unified, supra*, 33 Cal.4th at p. 889.

[324] *Id*, at p. 873, fn. 11 [citing Education Code section 48918]; 890.

[325] *CSBA, supra* (2009) 171 Cal.App.4th 1183, at p. 1216-1217.

[326] Elections Code section 14105.1 (added, Stats. 2009, ch. 1 (SB 6)).

[327] Elections Code section 13206 (amended, Stats. 2009, ch. 1 (SB 6); Stats. 2012, ch. 3 (AB 1413)); Elections Code section 13206.5 (added, Stats. 2012, ch. 3 (AB 1413)).

[328] Exhibit A, Test Claim, at pp. 52-53.

"specific statutory procedures" which are "designed to…set forth…details that were not expressly articulated"[329] in Proposition 14, or in *Washington State Grange*, *supra*. And when "viewed singly or cumulatively, [those activities] did not significantly increase the cost of compliance…"[330] This conclusion is reached by examining the extent of voter instructions printed in the ballot under prior and existing law, and the preexisting duties of county elections officials with respect to precinct supplies.

Under prior law, section 14105, as amended by Statutes 2003, chapter 810, provides for a long list of precinct supplies that a county elections official must already furnish, as follows:

> (a) Printed copies of the indexes.
>
> (b) Necessary printed blanks for the roster, tally sheets, lists of voters, declarations, and returns.
>
> (c) Envelopes in which to enclose returns.
>
> (d) Not less than six nor more than 12 instruction cards to each precinct for the guidance of voters in obtaining and marking their ballots. On each card shall be printed necessary instructions and the provisions of Sections 14225, 14279, 14280,14287, 14291, 14295, 15271, 15272, 15273, 15276, 15277, 15278, 18370, 18380,18403, 18563, and 18569.
>
> (e) A digest of the election laws with any further instructions the county elections official may desire to make.
>
> (f) An American flag of sufficient size to adequately assist the voter in identifying the polling place. The flag is to be erected at or near the polling place on election day.
>
> (g) A ballot container, properly marked on the outside indicating its contents.
>
> (h) When it is necessary to supply additional ballot containers, these additional containers shall also be marked on the outside, indicating their contents.
>
> (i) Sufficient ink pads and stamps for each booth. The stamps shall be one solid piece and shall be made so that a cross (+) may be made with either end. If ballots are to be counted by vote tabulating equipment, an adequate supply of other approved voting devices shall be furnished. All voting stamps or voting devices shall be maintained in good usable condition.
>
> (j) When a candidate or candidates have qualified to have his or her or their names counted pursuant to Article 3 (commencing with Section 15340) of Chapter 4 of Division 15, a sufficient number of ink pens or pencils in the voting booths for the purpose of writing in on the ballot the name of the candidate or candidates.
>
> (k) A sufficient number of cards to each polling place containing the telephone number of the office to which a voter may call to obtain information about his or

[329] *San Diego Unified*, *supra*, 33 Cal.4th at p. 889.

[330] *Ibid.*

her precinct location. The card shall state that the voter may call collect during polling hours.

(l) An identifying badge or insignia for each member of the precinct board. The member shall print his or her name and the precinct number thereon and shall wear the badge or insignia at all times in the performance of duties, so as to be readily identified as a member of the precinct board by all persons entering the polling place.

(m) Facsimile copies of the ballot containing ballot measures and ballot instructions printed in Spanish or other languages as provided in Section 14201.

(n) Sufficient copies of the notices to be *posted* on the indexes used at the polls. The notice shall read as follows: "This index shall not be marked in any manner except by a member of the precinct board acting pursuant to Section 14297 of the Elections Code. Any person who removes, tears, marks, or otherwise defaces this index with the intent to falsify or prevent others from readily ascertaining the name, address, or political affiliation of any voter, or the fact that a voter has or has not voted, is guilty of a misdemeanor."

(o) A roster of voters for each precinct in the form prescribed in Section 14107.

(p) In addition, the elections official may, with the approval of the board of supervisors, furnish the original books of affidavits of registration or other material necessary to verify signatures to the precinct officers.

(q) Printed copies of the Voter Bill of Rights, as supplied by the Secretary of State. The Voter Bill of Rights shall be conspicuously *posted* both inside and outside every polling place.[331]

The new requirements to *furnish* to precinct officers printed copies of the notices specified in section 9083.5, as supplied by the Secretary of State, and to ensure that those notices are *conspicuously posted* inside and outside each polling place, do not significantly increase the cost of compliance with Proposition 14 and the costs of conducting elections pursuant to the Elections Code. In other words, these activities are "incidental" to Proposition 14 and "produce at most de minimis added costs."[332] As noted above, these are the only requirements of the plain language of sections 908.5 and 14105.1.

Similarly, prior to enactment of the test claim statutes, section 13204 provided for the following instructions in the ballots of all voters:

> "To vote for a candidate for Chief Justice of California; Associate Justice of the Supreme Court; Presiding Justice, Court of Appeal; or Associate Justice, Court of Appeal, stamp a cross (+) in the voting square after the word "Yes," to the right of the name of the candidate. To vote against that candidate, stamp a cross (+) in the voting square after the word "No," to the right of the name of that candidate."

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[331] Elections Code section 14105 (Stats. 1994, ch. 920 (SB 1547); Stats. 2003, ch. 425 (AB 177); Stats. 2003, ch. 810 (AB 1679)) [emphasis added].

[332] *CSBA*, *supra*, 171 Cal.App.4th 1183, at p. 1216.

"To vote for any other candidate of your selection, stamp a cross (+) in the voting square to the right of the candidate's name. [When justices of the Supreme Court or Court of Appeal do not appear on the ballot, the instructions referring to voting after the word "Yes" or the word "No" will be deleted and the above sentence shall read: "To vote for a candidate whose name appears on the ballot, stamp a cross (+) in the voting square to the right of the candidate's name."] Where two or more candidates for the same office are to be elected, stamp a cross (+) after the names of all candidates for the office for whom you desire to vote, not to exceed, however, the number of candidates to be elected."

"To vote for a qualified write-in candidate, write the person's name in the blank space provided for that purpose after the names of the other candidates for the same office."

"To vote on any measure, stamp a cross (+) in the voting square after the word "Yes" or after the word "No."

"All distinguishing marks or erasures are forbidden and make the ballot void."

"If you wrongly stamp, tear, or deface this ballot, return it to the precinct board member and obtain another."

"On vote by mail ballots mark a cross (+) with pen or pencil."[333]

The pre-existing requirements of section 13205 also provide for four paragraphs of *additional* instructions to be included in the ballot during presidential election cycles.[334]

Section 13206, as amended by Statutes 2009, chapter 1, requires counties to add the following, to primary election ballots, below the box and label for "Voter-Nominated and Nonpartisan Offices":

"All voters, regardless of the party preference they disclosed upon registration, or refusal to disclose a party preference, may vote for any candidate for a voter-nominated or nonpartisan office.

Voter-Nominated Offices. The party preference, if any, designated by a candidate for a voter-nominated office is selected by the candidate and is shown for the information of the voters only.

It does not constitute or imply an endorsement of the candidate by the party indicated, and no candidate nominated by the qualified voters for any voter-nominated office shall be deemed to be the officially nominated candidate of any political party.

"Nonpartisan Offices. A candidate for a nonpartisan office may not designate a party reference on the ballot."[335]

The required language was shortened by Statutes 2012, chapter 3, as follows:

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[333] Elections Code section 13204 (Stats. 2007, ch. 508 (AB 1243)).

[334] Elections Code section 13205 (Stats. 1994, ch. 920 (SB 1547)).

[335] Elections Code section 13206(b) (as amended, Stats. 2009, ch. 1 (SB 6)).

> "All voters, regardless of the party preference they disclosed upon registration, or refusal to disclose a party preference, may vote for any candidate for a voter-nominated or nonpartisan office. The party preference, if any, designated by a candidate for a voter-nominated office is selected by the candidate and is shown for the information of the voters only. It does not imply that the candidate is nominated or endorsed by the party or that the party approves of the candidate. The party preference, if any, of a candidate for a nonpartisan office does not appear on the ballot."[336]

In addition, CC/ROV #11005 directed counties to omit the last sentence of section 13206(b), as amended by Statutes 2009, chapter 1, pertaining to nonpartisan offices for special election ballots, and to add two paragraphs explaining the procedure and significance of voter-nominated offices, derived from section 9083.5, to a special election ballot, to take the place of the statewide Voter Information Guide.[337] Then, section 13206.5, added by Statutes 2012, chapter 3 required two additional sentences to be included in the general election ballot during presidential election cycles, and one additional sentence to be included the general election ballot during all other election cycles. In context of the instructions already required pursuant to sections 13204 and 13205, the additional text required pursuant to sections 13206 and 13206.5, and CC/ROV #11005 (for special elections) produces at most de minimis added costs, and these sections do not impose costs mandated by the state within the meaning of article XIII B, section 6.

In comments submitted on the draft proposed decision, claimant argues that "Proposition 14 does not provide for any type of additional instructions or ballot text in the absence of voter information guides." In addition, claimant argues that "additional instructions or ballot text is not required to implement nor incidental to SCA 4/Proposition 14." Claimant asserts that "Government Code section 17556(f) does not apply here as these activities are not expressly included in the ballot measure and are not necessary to implement SCA 4/Proposition 14." Claimant further asserts that "[e]ven should the Commission find they are necessary, these methods are not the least burdensome method for providing the information to the voters." And finally, claimant argues that "[t]he costs related to these activities are not de minimus for the Claimant, exceeding the $1000 threshold required for mandate claiming [*sic*]."[338]

Although Proposition 14 does not expressly state that additional instructions and ballot text must be provided, the instructions and text are derived from the ballot measure mandate and the findings and declarations approved by the voters, and are intended to implement a Top Two Primary system in accordance with the California Constitution, and in a manner that does not violate the First Amendment associational rights of the political parties, in accordance with *Washington State Grange*, *supra*.[339] Moreover, the changes made by Statutes 2009, chapter 1 and Statutes 2012, chapter 3 are expressly intended to implement the Top Two Candidates Open

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[336] Elections Code section 13206(b) (as amended, Stats. 2012, ch. 3 (AB 1413)).

[337] Secretary of State's Memorandum CC/ROV #11005 [See Exhibit A, Test Claim, at pp. 52-54.].

[338] Exhibit E, Claimant Comments, at pp. 6-7.

[339] 552 U.S. 442.

Primary Act.[340] For these reasons, the requirements of sections 9083.5, 14105.1, 13206, and 13206.5 are incidental to Proposition 14, and produce at most de minimis added costs. And finally, the "$1000 threshold required for mandate claiming" is not dispositive of the issue whether costs claimed are de minimis; the analysis turns on a comparison of the claimed costs and activities to the scope of the entire program, as discussed in *San Diego Unified, supra*.[341]

Based on the foregoing, the requirements of Elections Code sections 9083.5, 14105.1, 13206, and 13206.5, as added or amended by Statutes 2009, chapter 1 and Statutes 2012, chapter 3, and portions of Secretary of State's Memoranda CC/ROV #11005, CC/ROV #11126, CC/ROV #12059 related to the instructions and explanatory information for the voters do not impose costs mandated by the state pursuant to Government Code section 17556(f).

V. Conclusion

Based on the foregoing, the Commission finds that the test claim statutes and executive orders alleged either do not require any new activities of local government, or impose duties that are necessary to implement the ballot measure, and are incidental to the ballot measure and produce at most de minimis added costs within the meaning of Government Code section 17556(f). Therefore all alleged statutes and executive orders are denied.

[340] Statutes 2009, chapter 1 (SB 6) expressly states that it "would become operative only if SCA 4 [Proposition 14] is approved by the voters. Proposition 14, in turn, refers to "legislation already enacted by the Legislature to implement this act…" And, Statutes 2012, chapter 3 (AB 1413) states that "[t]his bill would make technical revisions to provisions of the Elections Code to reflect the 'voter-nominated primary election' process."

[341] 33 Cal.4th 859.

STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

RE: **Adopted Decision**

Top Two Candidates Open Primary Act, 12-TC-02
Statutes 2009, Chapter 2 (SCA 4); Elections Code Sections 13, 300.5, 325, 332.5, 334, 337, 359.5, 9083.5, 13102, 13105, 13110, 13206, 13230, 13302, 14105.1, as added or amended by Statutes 2009, Chapter 1 (SB 6); Elections Code Sections 8002.5, 8040, 8062, 9083.5, 13105, 13206, 13206.5, 13302, as added or amended by Statutes 2012, Chapter 3 (AB 1413)
Secretary of State's CC/ROV Memorandums #11005, #11125, #11126, and #12059
County of Sacramento, Claimant

On September 26, 2014, the foregoing decision of the Commission on State Mandates was adopted in the above-entitled matter.

Heather Halsey, Executive Director

Dated: October 1, 2014