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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

**MICHAEL RUBIN, MANJA ARGUE, STEVE COLLETT, MARSHA FEINLAND, CHARLES L. HOOPER, KATHERINE TANAKA, C. T. WEBER, CAT WOODS, GREEN PARTY OF ALAMEDA COUNTY, LIBERTARIAN PARTY OF CALIFORNIA, AND PEACE AND FREEDOM PARTY OF CALIFORNIA,**

Plaintiffs,

v.

**DEBRA BOWEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF CALIFORNIA,**

Defendant.

Case No. RG11605301

**NOTICE OF DEMURRER AND DEMURRER OF DEFENDANT DEBRA BOWEN, AS SECRETARY OF STATE, TO VERIFIED COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES**

Date: March 20, 2012
Reservation No: 1247750
Time: 9:00 a.m.
Dept: 16
Judge: Hon Lawrence John Appel
Trial Date: None Set
Action Filed: November 21, 2011

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

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PLEASE TAKE NOTICE that on March 20, 2012, at 9:00 a. m., or as soon thereafter as the matter may be heard, in Department 16 of the above-entitled court, located at 1221 Oak Street, Oakland, California, Defendant Debra Bowen, in her official capacity as California Secretary of State, shall demur, and hereby does demurrer to the plaintiffs' verified complaint, and each and every cause of action therein, as set forth herein.

The demurrers, and each of them, and the grounds on which they are based, are as follows:

(1) To the first cause of action, designated in the verified complaint as the First Claim for Relief: Ballot Access, on the ground that the cause of action does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

(2) To the second cause of action, designated in the verified complaint as the Second Claim for Relief: Violation of Rights to Freedom of Speech and Association, on the ground that the cause of action does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

(3) To the third cause of action, designated in the verified complaint as the Third Claim for Relief: Elections Clause, on the ground that the cause of action does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

The demurrers, and each of them, shall be based on this notice of demurrer and the demurrers stated herein, on the accompanying memorandum of points and authorities, on the pleadings and papers on file in this action, and upon such further evidence and argument as may be offered at the time of the hearing.

Dated: December 21, 2011

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
PETER A. KRAUSE
Supervising Deputy Attorney General

MARK R. BECKINGTON
Deputy Attorney General
*Attorneys for Defendant Secretary of State Debra Bowen*

## MEMORANDUM OF POINTS AND AUTHORITIES

### INTRODUCTION

In their complaint, plaintiffs make a broad attack on the new open primary system adopted by California voters through the passage of Proposition 14 in the June 2010 primary election. Focusing on the measure's alleged effect on small political parties and their members, plaintiffs allege that Proposition 14 violates various provisions of the United States and California Constitutions. They seek injunctive and declaratory relief that would prevent implementation of Proposition 14 in all future elections, permanently ending California's experiment with voter-nominated primaries in place of partisan political primaries for state and congressional offices.

Plaintiffs, however, have failed to allege any valid ground on which this drastic relief may be granted. For example, in their first cause of action, plaintiffs allege that Proposition 14 will effectively deny small political parties access to general election ballots. But none of the purported grounds for this assertion are sufficient to overcome California's stated interests in adopting an open primary that limits the general election ballot to the top two primary votegetters, who may belong to any political party or have no political party preference. Further, plaintiffs' second cause of action, which challenges the method of designating a candidate's political party preference on primary and general election ballots, fails to state a valid claim for violation of the parties' speech and associational rights. Under applicable authority from the United States Supreme Court and from California courts, California may allow candidates to declare their political party preference on the ballot without violating these fundamental rights. For the same reasons, plaintiffs' third cause of action for alleged violation of the Elections Clause is also without merit.

Plaintiffs' allegations do not always disclose whether plaintiffs are pursuing a facial challenge to Proposition 14, an as-applied challenge, or both. But it is clear that their allegations cannot support injunctive and declaratory relief under any of the causes of action or theories advanced in the complaint. The Secretary of State respectfully requests that the demurrers to the complaint be sustained for the reasons discussed herein.

## STATEMENT OF THE CASE

Plaintiffs filed their verified complaint for declaratory, injunctive and other relief on November 21, 2011. Plaintiffs include eight persons[1] who identify themselves as regular voters, most of whom support candidates of one of California's small qualified political parties or plan to run for office as a candidate for such a party. (Complaint, ¶¶ 9-16, pp. 5-7.) The remaining plaintiffs are two of the state's qualified political parties and a local division of a third qualified political party.[2] (*Id.*, ¶¶ 17-19, p. 7.)

Plaintiffs challenge the constitutionality of Proposition 14, alleging that it "effectively denies voters their fundamental right of choice by precluding small party candidates from the general election ballot . . . ." (Complaint, ¶ 1, p. 2.) Plaintiffs rest their challenge on three fundamental contentions, all relating to the purported impact of Proposition 14 on small political parties and their supporters. (*Id.*, ¶¶ 3-5, pp. 3-4.)

First, they contend that Proposition 14, by allegedly limiting access to the general election ballot, "effectively bars small political parties, their candidates and their members from effective political association" and "severely burdens voter, candidate, and party associational rights." (*Id.*, ¶ 3, p. 3.) Second, they allege that Proposition 14, by allowing candidates to self-designate their preferred political party without the party's consent, violates the political parties' rights of expression and association as guaranteed by the United States and California Constitutions. (*Id.*, ¶ 4, pp. 3-4.) Finally, plaintiffs assert that Proposition 14 disadvantages smaller political parties and benefits the two major political parties and therefore violates the Elections Clause of the U.S. Constitution in elections for U.S. Senators and Representatives. (*Id.*, ¶ 5, p. 4.)

In the first cause of action, which concerns ballot access, plaintiffs allege that Proposition 14 precludes small party voters and candidates and small parties themselves from participating in

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[1] The individual plaintiffs are Michael Rubin, Manja Argue, Steve Collett, Marsha Feinland, Charles L. Hooper, Katherine Tanaka, C. T. Weber and Cat Woods.

[2] The party and party-affiliated plaintiffs are the Libertarian Party of California, the Peace and Freedom Party of California and the Green Party of Alameda County, identified as a "geographical division" of the Green Party of California. California has seven qualified political parties: American Independent, Americans Elect, Democratic, Green, Libertarian, Peace and Freedom, and Republican. (See http://www.sos.ca.gov/elections/ elections_f.htm [list of qualified political parties for the June 12, 2012 primary election].)

California general elections. (Complaint, ¶ 44, p. 13.) On this basis, they ask that the measure be declared unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution and pursuant to Article I, sections 2 and 3, of the California Constitution.[3] (*Id.*, ¶ 45, p. 13.)

In the second cause of action, which concerns alleged violations of speech and associational rights, plaintiffs focus on a Proposition 14 provision that allows candidates to self-designate their political party preference on the election ballot. (Complaint, ¶ 47, p. 14.) Plaintiffs allege that this provision allows candidates to appropriate the parties' trademarks and will have a "chilling effect" on the parties' rights of expression and association guaranteed by the First Amendment of the U.S. Constitution and Article I, sections 2 and 3 of the California Constitution. (*Ibid.*)

Finally, in the third cause of action, which concerns the Elections Clause of the U.S. Constitution, plaintiffs assert that Proposition 14 disadvantages small party candidates and grants advantage to wealthier parties and candidates. (Complaint, ¶ 50, pp. 14-15.) Plaintiffs claim that Proposition 14 violates the Elections Clause by precluding small party candidates for federal office from participating in general elections. (*Ibid.*)

## BACKGROUND OF PROPOSITION 14

### A. Before Proposition 14: Party Primaries for Partisan Offices and General Elections for Party Nominees, Independents, and Write-in Candidates.

Before passage of Proposition 14, the California Constitution provided for "primary elections for partisan offices . . . ." (Cal. Const., art. II, § 5, former subd. (a), repealed by leg. const. amend. (June 8, 2010), commonly known as Prop. 14.) The candidates chosen by a party at the primary election "[became] its official nominees at the general election . . . and [were] identified by their party affiliation on the general election ballot." (*Libertarian Party v. Eu* (1980) 28 Cal.3d 535, 541.) Under this system, a political party that had participated in a primary election for a partisan office, "ha[d] the right to participate in the general election for that office"

[3] Article I, section 2, subdivision (a) of the California Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Article I, section 3, subdivision (a) provides: "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good."

and could 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." (Cal. Const., art. II, § 5, former subd. (b), repealed by leg. const. amend. (June 8, 2010), commonly known as Prop. 14.)

In addition to the party nomination process, a candidate could appear on the general election ballot through the process of independent nomination by petition. (Elec. Code, § 8300, et seq.; see *Libertarian Party v. Eu*, *supra*, 28 Cal.3d at p. 541.) If a candidate qualified for the general election ballot by means of an independent nomination, the word "Independent" would be printed on the ballot after the candidate's name instead of a party designation. (Elec. Code, § 13105, subd. (a); see *Libertarian Party v. Eu, supra*, 28 Cal.3d at p. 542.)

A person could also run as a write-in candidate in either the primary or general election. (Elec. Code, § 8600, et. seq.; *Libertarian Party v. Eu*, *supra*, 28 Cal.3d at p. 542, n. 7.) As under current law, a write-in candidate was required to file a statement of write-in candidacy and nomination papers with the requisite number of signatures. (Elec. Code, § 8600.)

**B. After Proposition 14: Open Primaries for State and Congressional Offices and General Elections Between the Top Two Primary Vote-Getters.**

In February 2009, the Legislature placed Senate Constitutional Amendment 4, officially known as the "Top Two Candidates Open Primary Act," on the June 2010 election ballot. (Sen. Const. Amend. No. 4 ("SCA 4"), stats. 2009 (2009-2010 4th Ex. Sess.) res. ch. 2.) Designated as Proposition 14 by the Secretary of State, the measure was approved by the voters by a margin of 53.8 to 46.2 percent. (See http://www.sos.ca.gov/elections/sov/2010-primary.)

Proposition 14 changed the California Constitution to replace the partisan primary process for state and congressional offices with "[a] voter-nomination primary election . . . to select the candidates for congressional and state elective offices in California." (Cal. Const., art. II, § 5, new subd (a).) Under this system, "[a]ll voters may vote at a voter-nominated primary election for any candidate for congressional and state elective office without regard to the political party preference disclosed by the candidate or the voter, provided that the voter is otherwise qualified to vote for candidates for the office in question." (*Ibid.*) This leads to a general election between

the two candidates receiving the most votes in the primary election: "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." (*Ibid.*)

Proposition 14 allows a congressional or state candidate for a partisan office to 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." (Cal. Const., art. II, § 5, new subd. (b).) Under legislation adopted to implement Proposition 14, the political party preference of a candidate for a voter-nominated office shall be identified on the ballot in substantially the following form: "My party preference is the _____ Party." (Elec. Code, § 13105, subd. (a) [as amended, eff. Jan. 1, 2011].) If the candidate designates no political party, the phrase "No Party Preference" shall be printed instead of the party preference identification. (*Ibid.*) If the candidate chooses not to have his or her party preference listed on the ballot, the space that would be filled with a party preference designation is left blank. (*Ibid.*) In this context, the term "party" refers to an organization that is a qualified political party under California law. (*Field v. Bowen* (2011) 199 Cal.App.4th 346, 354.) "Therefore, a candidate's party preference will not be shown on the ballot unless the candidate prefers a qualified party." (*Ibid.*)

A political party or party central committee may endorse, support or oppose a candidate, but it "shall not nominate a candidate for any congressional or state elective office at the voter nominated primary." (*Ibid.*) In contrast to prior law, Proposition 14 provides that "[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 . . . ." (*Ibid.*) The measure leaves in place partisan elections for presidential candidates, political party committees and party central committees and preserves the right of political parties to participate in the general election for the office of president.[4] (Cal. Const., art. II, § 5, new and amended subds. (c), (d).) Proposition 14 became operative January 1, 2011. (SCA 4, Fifth Clause.)

[4] The measure adds the Superintendent of Public Instruction to the list of nonpartisan offices designated in article II, section 6. (Cal. Const., art. II, § 6, amended subd. (a).) Further, it (continued...)

## LEGAL BACKGROUND

The courts have long recognized that states may regulate the elections process: "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" (*Burdick v. Takushi* (1992) 504 U.S. 428, 433, quoting *Storer v. Brown* (1974) 415 U.S. 724, 730; accord, *Timmons v. Twin Cities Area New Party* (1997) 520 U.S. 351, 358 ["States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."]

As such, review of voting regulations under the United States Constitution does not automatically require strict scrutiny, but instead follows a flexible balancing standard:

> A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'

(*Burdick v. Takushi*, *supra*, 504 U.S. at p. 434, quoting *Anderson v. Celebreeze* (1983) 460 U.S. 780, 788.)

Under this standard, "when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" (*Burdick v. Takushi*, *supra*, 504 U.S. at p. 434, quoting *Norman v. Reed* (1992) 502 U.S. 279, 289.) "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." (*Ibid.*, quoting *Anderson v. Celebreeze*, *supra*, 460 U.S. at p. 788.)

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(...continued)
precludes a political party or party central committee from nominating a candidate for nonpartisan office and provides that a nonpartisan candidate's party preference shall not be included on the ballot. (Cal. Const., art. II, § 6, amended subd. (b).)

"No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." (*Timmons v. Twin Cities Area New Party*, *supra*, 520 U.S. at p. 359.) But "[b]ecause 'the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions,' . . . a party challenging such a regulation bears a 'heavy constitutional burden.'" (*Rubin v. City of Santa Monica* (9th Cir. 2002) 308 F.3d 1008, 1017.)

The same balancing test advanced by the United States Supreme Court in elections cases has been followed by the California Supreme Court in cases arising under the California Constitution: "'[I]n analyzing constitutional challenges to election laws, [the California Supreme Court] has followed closely the analysis of the United States Supreme Court.'" (*Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 179, quoting *Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 710.) Thus, like the federal courts, the California courts assess an election regulation by determining whether it imposes a "severe restriction" on voting rights or only a "limited burden" on those rights, and then weighing the interests advanced by the regulation. (See *Edelstein v. City and County of San Francisco*, *supra*, 29 Cal. 4th at pp. 182-183 [applying balancing test to voting regulation challenged under California's free speech clause].)

## ARGUMENT

### I. THE FIRST CAUSE OF ACTION FAILS TO STATE A CLAIM BECAUSE PROPOSITION 14 DOES NOT DENY SMALL PARTIES AND THEIR MEMBERS ACCESS TO THE GENERAL ELECTION BALLOT.

Although Proposition 14 has changed the way state and congressional candidates are nominated for general elections, switching from a partisan primary system in which parties nominate the candidates to an open primary system in which voters make the nominations, it does not discriminate against small qualified political parties in defining participation in that system. Like members of the two major political parties, members of small political parties may qualify for the primary election ballot and have their party preference listed on that ballot. And if they finish among the top two votegetters in the primary election, small party candidates will automatically proceed to the general election.

In its findings and declarations, Proposition 14 stated that this new system would "protect and preserve the right of every Californian to vote for the candidate of his or her choice." (Request for Judicial Notice, Exh. 1, SCA 4, Second Clause, Findings and Declarations, ¶ 1.) In the Official Voter Information Guide, the measure's title and summary, approved by the Legislature, stated that Proposition 14 would "encourage[] increased participation in elections for congressional, legislative, and statewide offices by changing the procedure by which candidates are selected in primary elections." (Request for Judicial Notice, Exh. 2, June 8, 2010 Voter Guide, p. 14.) The title and summary further stated that the measure would "give[] voters increased options in the primary by allowing all voters to choose any candidate regardless of the candidate's or voter's political party preference." (*Ibid.*)

In their arguments in favor of the measure, the proponents echoed these points, asserting that Proposition 14 "will open up primary elections" and allow Californians "to vote for any candidate [they] wish for state and congressional offices, regardless of political party preference." (Request for Judicial Notice, Exh. 2, June 8, 2010 Voter Guide, Argument in Favor of Prop. 14, p. 18.) The proponents argued that this would "reduce gridlock by electing the best candidates." (*Ibid.*) Proposition 14 was also seen as "giv[ing] independent voters an equal voice in primary elections." (*Ibid.*) As a further benefit, the proponents claimed that Proposition 14 would "help elect more practical office-holders who are more open to compromise." (*Ibid.*) The proponents expressed the concern that "partisanship is running our state into the ground" and argued that Proposition 14 would "push our elected officials to begin working together for the common good." (*Ibid*, emphasis omitted.)

Under the balancing test for reasonable, non-discriminatory election regulations, the stated interests of reducing partisanship and increasing voter participation are sufficient to support the open primary system against constitutional attack. The new system does not facially discriminate between major and minor parties or their supporters; members and supporters of small political parties have equal access to the primary ballot along with members of major political parties. Further, candidates may identify their affiliation with a particular political party by stating their party preference on the ballot. The parties themselves are free to endorse and support any

candidate in the primary and general elections. (Request for Judicial Notice, Exh. 1, SCA 4, Clause 2, [Findings and Declarations], ¶ (e).)

The courts have never recognized an unfettered right by political parties to access the general election ballot. Although a party has the right to select its own candidate, "[i]t does not follow . . . that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate." (*Timmons v. Twin Cities Area New Party*, *supra*, 520 U.S. at p. 359.) "States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office. (*Munro v. Socialist Workers Party* (1986) 479 U.S. 189, 193.) "States are not burdened with a constitutional imperative to reduce voter apathy or to 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot." (*Id*, at p. 198.)

In *Munro*, the United States Supreme Court upheld a Washington law that required minor party candidates to receive a minimum of one percent of the primary vote before advancing to the general election. (*Munro v. Socialist Workers Party*, *supra*, 479 U.S. at pp. 196-197.) The Court viewed the primary election as "an integral part of the entire election process ... [that] functions to winnow out and finally reject all but the chosen candidates." (*Id.*, at 196, quoting *Storer v. Brown*, *supra*, 415 U.S. at p. 735.) "[T]he State can properly reserve the general election ballot "for major struggles," . . . by conditioning access to that ballot on a showing of a modicum of voter support." (*Ibid.*) "Thus, the State of Washington was clearly entitled to raise the ante for ballot access, to simplify the general election ballot, and to avoid the possibility of unrestrained factionalism at the general election." (*Munro v. Socialist Workers Party*, *supra*, 479 U.S. at p. 196.)

Here, Proposition 14 performs a similar function. It enables voters to choose among all candidates for a state or congressional office, regardless of party, in the primary election. This election then narrows the choice in the general election to one between the top two primary votegetters. In effect, the measure sets up a run-off in the general election between the top two primary candidates. Nothing in the State or Federal Constitution precludes a state from adopting this type of electoral system.

Although plaintiffs assert that small parties will be effectively deprived of ballot access in the general election, which they characterize as "the moment of peak participation" by voters, media and candidates (complaint, ¶¶ 36-37, p. 11), California provides sufficient access to the general election ballot by allowing all qualified candidates to compete in the primary election. (See *Munro v. Socialist Workers Party*, *supra*, 479 U.S. at p. 198 [rejecting argument that rule requiring one percent of primary election vote to reach general election ballot reduced pool of voters available to minor party].) (*Ibid.*)

Similarly, small parties are not unduly burdened merely because one method of maintaining qualified political party status under California derives from receiving at least two percent of the votes cast for a statewide office in a general election. (Complaint, ¶ 37, p. 11.) Small political parties continue to have this method of maintaining qualified status. (Elec. Code, § 5100.) And they retain the other authorized methods to retain that status: sufficient registered voters affiliating with a party or petitioning for qualification.[5] (*Ibid.*)

By allowing all candidates, regardless of political party preference, to participate in the primary election and equally contest for the right to compete in the general election, California complies with constitutional requirements for ballot access. Therefore, plaintiffs' first cause of action, relating to ballot access requirements, fails to state a claim on which relief may be granted.

## II. THE SECOND CAUSE OF ACTION FAILS TO STATE A CLAIM BECAUSE THE PROVISION FOR PARTY PREFERENCE BALLOT DESIGNATION DOES NOT INFRINGE ON SPEECH OR ASSOCIATIONAL RIGHTS OF SMALL PARTIES.

In their second cause of action, plaintiffs focus on the effect of the party preference designation provision on the speech and associational rights of small political parties and their members. But this provision of Proposition 14 is substantively similar to one that has been upheld by the United States Supreme Court as facially valid against claims based on First Amendment rights of speech and association. Moreover, a recent decision by the First Appellate District upheld the constitutionality of the underlying legislation implementing this portion of

[5] Plaintiffs incorrectly assert that voters may no longer declare their party membership upon registration. (Complaint, p. 9, ¶ 26.) At the time of registering, each elector may disclose his or her political party preference. (Elec. Code, § 2151, subd. (a).)

Proposition 14. Pursuant to this authority, the party preference ballot designation provision of Proposition 14 does not present a facial violation of the United States or California Constitutions.

In *Washington State Grange v Washington State Republican Party* (2008) 552 U.S. 442, the United States Supreme Court upheld against a facial challenge a Washington state electoral system in which the top two candidates from the primary election would proceed to the general election regardless of their party preferences. As with Proposition 14, the Washington law, known as I-872, "provides that candidates for office shall be identified on the ballot by their self-designated 'party preference'; that voters may vote for any candidate; and that the top two votegetters for each office, regardless of party preference, advance to the general election." (*Id.*, p. 444.) The Court held that the law did not on its face impose a severe burden on political parties' associational rights and that respondents' arguments to the contrary rested on factual assumptions about voter confusion that could be evaluated only in the context of an as-applied challenge. (*Ibid.*)

*Washington State Grange* found that I-872 did not facially infringe on the parties' associational rights because the Washington state primary did not choose the parties' nominees. (*Washington State Grange, supra*, 552 U.S. at p. 453.) Washington state political parties were free to nominate their own candidates outside of the primary process. (*Ibid.*) The fact that the parties were no longer able to indicate their nominees on the ballot did not present an issue of constitutional concern. (*Id.*, at p. 453, n. 7.) "The First Amendment does not give political parties a right to have their nominees designated as such on the ballot." (*Ibid.*)

The same holds true under Proposition 14. The measure recognizes that political parties may endorse or support candidates and "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." (Request for Judicial Notice, Exh. 1, SCA 4, Second Clause, ¶ (e).) And under the implementing legislation for Proposition 14, the parties may have a list of their officially endorsed candidates printed in the sample ballot. (Elec. Code, § 9083.5, subd. (b).) Because the political parties are not forced to associate with nominees selected by persons who are not party members, Proposition 14 does not facially violate the

associational rights of the political parties or their registered members. (Compare: *California Democratic Party v. Jones* (2000) 530 U.S. 567 [California blanket primary that forced political parties to allow nonmembers to participate in selecting the parties' nominees severely burdened the parties' freedom of association.])

This conclusion is supported by the First Appellate District's recent decision upholding the constitutionality of Elections Code section 13105, subdivision (a), which implements the party preference designation provision of Proposition 14. (*Field v. Bowen*, *supra*, 199 Cal.App.4th at pp. 350, 372.) Although *Field* addressed a challenge by persons who were not qualified party candidates, rather than by qualified parties or their members, the Court upheld the provision based on a challenge to the forms of party preference designations mandated by the statute. (*Id.*, at pp. 353-366.) Of particular significance, *Field* held that section 13105, subdivision (a), did not differ materially from an earlier statute (former Elections Code section 10210), upheld by the California Supreme, requiring persons who achieved ballot status through the independent nomination process to use the "Independent" label rather than their party label. (*Id.*, at p. 359, citing *Libertarian Party v. Eu*, *supra*, 28 Cal.3d 545.)

The method of identifying independently nominated candidates under the earlier statute "impose[d] an insubstantial burden on the rights to associate and to vote and . . . the statute serve[d] a compelling state interest to protect the integrity and stability of the electoral process in California." (*Field v. Bowen*, *supra*, 199 Cal.App.4th 357, quoting *Libertarian Party v. Eu.*, *supra*, 28 Cal.3d at p. 543.) "In concluding that former section 10210 did not substantially burden constitutional rights, the court observed that the statute 'denies access to the ballot to no one. It merely provides for a ballot designation, *party* affiliation.'" (*Ibid.*, emphasis in original.) Or, as *Libertarian Party* saw it, "[t]he designation informs the voter of the manner in which ballot access was accomplished, i. e., by primary in the case of nominees of qualified political parties or, in the case of all others, by the independent nomination process." (*Libertarian Party v. Eu*, *supra*, 28 Cal.3d at p. 543.)

Once again, the same holds true here. Proposition 14 merely provides for each candidate to state his or her party preference designation or to leave that preference blank. This designation

informs the voter of the candidate's party preference or lack of party preference. It does not deprive political parties or their members of associational rights or compel them to adopt the speech of candidates who express a preference for a particular party.

Although plaintiffs allege that California voters are likely to be confused in primary elections when they attempt to determine whether a particular candidate is endorsed by a particular political party (Complaint, ¶ 41, p. 12), this allegation fails to allege a claim establishing that Proposition 14 facially violates associational rights of political parties. (See *Washington State Grange, supra*, 552 U.S. at pp. 445-456 [declining to strike down statute on its face based on the mere possibility of voter confusion].) "There are a variety of ways in which the State could implement [an open primary] that would eliminate any real threat of voter confusion." (*Id.*, at p. 456 [suggesting use of prominent disclaimers, candidate statements, or public education campaigns].) "And without the specter of widespread voter confusion," arguments like those by plaintiffs "about forced association and compelled speech fall flat." (*Id.*, at pp. 456-457.)

Plaintiffs do not couch their second cause of action as an as-applied challenge to the form of a particular ballot listing the candidates' party preferences. Instead, they seek to have Proposition 14 declared unconstitutional on the theory that it cannot be implemented in any manner without violation of associational and speech claims. This is the essence of a facial challenge. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 [To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.] And as a facial claim, the second cause of action fails to state a claim on which relief may be granted.

Plaintiffs' suggestion that the use of party preference labels on the ballot violates a party's trademarks does not save the cause of action from demurrer. Plaintiffs present the cause of action as an alleged violation of association and speech rights, not of trademark. (See Complaint, p. 14, ¶ 47 [Second Claim].)

## III. THE THIRD CAUSE OF ACTION FAILS TO STATE A CLAIM UNDER THE ELECTIONS CLAUSE BECAUSE PROPOSITION 14 ESTABLISHES PROCEDURAL REGULATIONS BUT DOES NOT DETERMINE ELECTORAL OUTCOMES.

Under the Elections Clause of the United States Constitution, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ." (U.S. Const., art. I, § 4, cl. 1.) The Elections Clause grants to the States "broad power" to prescribe the procedural mechanisms for holding congressional elections. (*Cook v. Gralike* (2001) 531 U.S. 510, 523.)

The Elections Clause does not permit states "to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *U.S. Term Limits, Inc. v. Thornton* (1995) 514 U.S. 779, 833.) But it "gives States authority 'to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'" (*Id.* at p. 834, quoting *Smiley v. Holm* (1932) 285 U.S. 355, 366.) "States are thus entitled to adopt 'generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.'" (*U.S. Term Limits, Inc. v. Thornton*, *supra*, 514 U.S. at p. 834, quoting *Anderson v. Celebrezze*, *supra*, 460 U.S. at p. 788, n. 9.)

Here, Proposition 14 establishes the procedures for primary and general elections in state and congressional offices in California. It governs the "manner" of such elections, falling within the commonsense understanding of procedural regulations authorized by the Elections Clause, "like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'" (*Cook v. Gralike*, *supra*, 531 U.S. at pp. 523-524, quoting *Smiley v. Holm*, *supra*, 285 U.S. at p. 366.)

Plaintiffs allege that Proposition 14 favors wealthy parties and candidates by precluding small parties from participating in general elections. (Complaint, ¶ 50, p. 15.) But candidates who are members of small parties would not participate in the general election only if they fail to receive sufficient votes to become one of the top two vote-getters in the primary election. Proposition 14 itself does not determine this electoral outcome. All candidates, regardless of

political affiliation, have equal access to the primary election ballot. Nothing requires California to alter its election system to promote the interests of small parties. (*Timmons v. Twin Cities Area New Party*, *supra*, 520 U.S. at p. 362 [upholding law against fashion candidates; supposed benefits to minor parties did require state to permit this type of candidacy].)

Moreover, even if Proposition 14 were to result in general elections exclusively between candidates belonging to the two major parties, this would not indicate a violation of the Elections Clause. The States' interest in the stability of their political systems "permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system . . . and that temper the destabilizing effects of party-splintering and excessive factionalism." (*Timmons v. Twin Cities Area New Party*, *supra*, 520 U.S. at p. 367.)

California's interests in setting up an open primary system that are discussed above—prevention of gridlock and partisanship and increasing voter participation in the selection of candidates—applies with equal force to plaintiffs' Election Clause claim. Because it merely regulates the election process without determining electoral outcomes, outcomes that begin with primary elections in which members of small political parties may fully participate, Proposition 14 does not violate the Elections Clause.

## CONCLUSION

For the foregoing reasons, the Secretary of State respectfully requests the Court to sustain the demurrers to the complaint and each cause of action alleged therein.

Dated: December 21, 2011

Respectfully Submitted,

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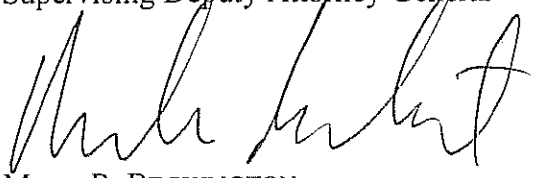

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## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Rubin, Michael, et al. v. Debra Bowen**

Case No.: **RG11605301**

I declare:

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

On December 21, 2011, I served the attached **NOTICE OF DEMURRER AND DEMURRER OF DEFENDANT DEBRA BOWEN, AS SECRETARY OF STATE, TO VERIFIED COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Michael Siegel
Siegel & Yee
499 14th Street, Suite 220
Oakland, CA 94612
*Attorney for Plaintiffs*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 21, 2011, at Los Angeles, California.

Angela Artiga
Declarant

Signature

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