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SUPERIOR COURT FOR 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

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRER OF DEFENDANT DEBRA BOWEN**

Hearing: February 7, 2012
Time: 9:00 a.m.
Department: 16

Assigned for all Purposes:
Judge: Hon. Lawrence John Appel

Suit filed: November 21, 2011
Trial date: TBD

## I. SUMMARY

Plaintiffs Michael Rubin, *et al.* ("Rubin") have alleged that Proposition 14 violates their fundamental rights of political association by (1) denying access to the general election ballot to candidates from minor political parties, thereby depriving minor party voters meaningful participation in the political process; (2) preventing minor political parties from qualifying for subsequent elections; and (3) causing voter confusion by permitting candidates to self-select a political party "preference." If Rubin can prove that any one of these three ballot access restrictions constitutes a "severe burden" on First Amendment rights of political association, he will be entitled to injunctive relief. *See California Democratic Party v. Jones* (2000) 530 U.S. 567, 581.

To the extent that defendant Debra Bowen, Secretary of State of California ("Bowen") denies plaintiffs' allegations, it will be up to the fact-finder to determine whether plaintiffs have been effectively denied access to the general election ballot, whether minor political parties have been prevented from qualifying for subsequent elections, whether voters are in fact confused by candidates who self-select a party "preference," and whether any of these issues constitutes a "severe burden" on First Amendment rights. Because multiple issues of fact must be determined before Rubin's claims can be decided, Bowen's demurrer should be overruled.

## II. LEGAL ARGUMENT

### A. A Demurrer May Not Challenge Issues of Fact

A general demurrer under California Code of Civil Procedure §430.10(e) may be defeated if the plaintiff alleged the essential facts of any valid cause of action. *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998 (general demurrer may be

upheld "only if the complaint fails to state a cause of action under any possible legal theory"). In considering a demurrer, the Court must assume that all facts alleged in the complaint are true. *Id.* A demurrer may not be used to challenge issues of fact. Cal. Civ. Proc. §§ 422.10, 589.

### B. Rubin's First Cause of Action Raises Issues of Fact as to Whether Proposition 14 Imposes a "Severe Burden" on Associational Rights by Blocking Minor Party Access to the General Election Ballot

This Court may enjoin any ballot access restriction that imposes severe restrictions on ballot access without fulfilling a compelling government interest. *See California Democratic Party v. Jones* (2000) 530 U.S. 567, 581 (holding that California's "blanket primary" system severely burdened the associational rights of political parties by denying them the right to exclude nonmembers from their candidate selection process). In its demurrer, defendant Debra Bowen assumes that Proposition 14 should be reviewed under the balancing test for "reasonable, non-discriminatory election regulations." (*See* Demurrer to Verified Complaint at 10:22-24.) Yet defendant's position ignores the process established by the United States Supreme Court and followed by the Ninth Circuit, by which the Courts have undertaken a factual inquiry to determine whether or not a ballot access restriction imposes a "severe burden" on associational rights. *See Washington State Republican Party v. Washington State Grange* (9th Cir. Jan. 19, 2012) ___ F.3d ___, 2012 WL149475 at *7.

As the Ninth Circuit recently explained:

> When evaluating the constitutionality of ballot access regulations, we weigh the degree to which the regulations burden the exercise of constitutional rights against the state interests the regulations promote. *Washington State Republican Party, supra,* at *7.

In order to "weigh the degree to which the regulations burden the exercise of constitutional rights," the Courts must undertake a factual inquiry. In *Washington State Republican Party*, the Court examined whether the Washington "top two" electoral system imposed a severe burden on associational rights. The Court emphasized at least two factual inquiries. First, the Court found that the defendant, Washington State Grange, had proven that a party's participation in a Washington primary was not substantially different than participation in the general election:

> Libertarian Party candidates . . . have an opportunity to appeal to voters at a time when election interest is near its peak, and to respond to events in the election cycle just as major party candidates do. *Id.*

Second, the Court found that the plaintiff Libertarian Party had not shown that the "top two" law "impermissibly limits the field of candidates from which voters might choose." *Id.* at *8. The Court made both of these determinations after the parties presented evidence to the trial court on cross-motions for summary judgment. *Id.* at *4.

Here, plaintiffs have pled a prima facie case as to their first cause of action. Plaintiffs pled that Proposition 14 denied access to the general election ballot to minor political parties and their candidates, thus denying voters the ability to support such candidates. (Verified Complaint ¶¶ 25, 33-34, 40, 44.) Plaintiffs have pled that the general election is a unique moment of public participation in the electoral process, one that is not equivalent to a primary election. (*Id.* at ¶ 36, 45.) Plaintiffs have alleged that access to the general election ballot is essential for minor political parties seeking to qualify for subsequent ballots. (*Id.* at ¶¶ 32, 34,) And plaintiffs have alleged that defendant does not have sufficient regulatory interests to justify the restrictions on ballot access. (*Id.* at ¶38, 45.)

Before the Court can determine whether the ballot access restrictions imposed by Proposition 14 comprise a "severe burden" to associational rights, the parties will need to present evidence and permit the fact-finder to resolve issues of fact. The Court will need to resolve whether minor parties' access to state primary elections is equivalent to the parties' longstanding access to the general elections. The Court will need to resolve whether voter rights are severely burdened by Proposition 14's limitation of general election candidates. And the Court will need to resolve whether minor political parties suffer a severe burden because Proposition 14 takes away their most effective method of qualifying for subsequent ballots. Because plaintiffs have adequately pled a cause of action for denial of ballot access in violation of state and federal rights of political association, the demurrer should be overruled.

### C. Rubin's Second Cause of Action Raises Issues of Fact as to Whether Proposition Imposes a Severe Burden on Party Associational Rights By Permitting Candidates to Self-Designate a Party "Preference"

Plaintiffs' second cause of action was pled in accord with the Supreme Court's instructions in *Washington State Grange v. Washington State Republican Party* (2008) 522 U.S. 422, in which the Court declared that a "top two" electoral system could impose a "severe burden" on associational rights, pending the results of a factual inquiry as to whether or not voters are confused when candidates are permitted to self-designate a party "preference" on state-produced ballots. *Washington State Grange, supra,* 522 U.S. at 1195 (inviting evidence in support of an as-applied challenge).

In *Washington State Republican Party, supra,* 2012 WL149475 at *5, the Ninth Circuit considered whether the Washington "top two" system, as applied, violated political parties' rights of association. The Court conducted two factual inquiries: first,

examining the form of the ballot, and second, reviewing evidence of actual voter confusion. *Washington State Republican Party, supra,* at *5. Both of these inquiries were conducted after the parties presented evidence on cross-motions for summary judgment. *Id.* at *4.

When the Ninth Circuit reviewed evidence of actual voter confusion, it identified two pathways for an effective challenge to a "top two" electoral system. When reviewing plaintiff's expert testimony, the Court noted that a properly conducted study of voter confusion could be sufficient to create a triable issue of fact. *Id.* at*6 (suggesting that the study needed to use actual ballot inserts and voter pamphlets provided to the electorate, and that the study ballots should conform to ballots used in actual elections). The Court also noted that plaintiffs could create a triable issue of fact by producing "surveys of actual voters showing that they voted for a candidate they mistakenly believed to be an official party nominee or representative." *Id.*

Here, Rubin alleged that California ballots under Proposition 14 cause voter confusion by permitting candidates to self-designate a party preference. (Verified Complaint ¶¶ 4, 27-31, 50.) To the extent that Bowen denies the fact of voter confusion, the parties will need to present competing evidence and the fact-finder will decide. Because Rubin has stated a cause of action for voter confusion as recognized by the highest courts, Bowen's demurrer should be overruled.

### D. Rubin's Third Cause of Action Raises Issues of Fact as to Whether Proposition 14 Impermissibly "Dictates Electoral Outcomes" in Violation of the Elections Clause

Bowen acknowledges that an Elections Clause challenge will upheld when a state electoral regulation "dictate[s] electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." (Demurrer to Verified

Complaint at 16 (*citing U.S. Term Limits v. Thornton* (1995) 514 U.S. 779, 833).) Here, Rubin alleges that Proposition 14 unlawfully favors wealthier political parties and their candidates by blocking minor party access to the general elections. (Verified Complaint ¶50.) To the extent that Bowen denies that Proposition 14 blocks minor parties from the general election ballot, this is an issue of fact and should not be decided on demurrer.

### E. If this Court Finds the Complaint to be Defective, Rubin Should Be Granted Leave to Amend

Even if this Court finds that Rubin's complaint is susceptible to demurrer, leave to amend should be granted. *Roman v. County of Los Angeles* (App. 2 Dist. 2000) 85 Cal.App.4th 316, 322 ("unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion").

## III. CONCLUSION

Rubin has alleged that Proposition 14 violates the First Amendment and the Elections Clause by preventing minor party access to the general election ballot, by preventing minor parties from qualifying for subsequent elections, and by causing widespread voter confusion. Any of these allegations, if proven, would justify issuance of an injunction preventing further implementation of Proposition 14. To the extent that Bowen denies Rubin's allegations, the controversy should be decided by the fact-finder after a presentation of evidence. Because Rubin has pled the essential elements of his statutory challenge, Bowen's demurrer should be overruled.

Dated: January 25, 2012

SIEGEL & YEE

Michael Siegel

Attorneys for Plaintiffs
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Defendant.

Case No. RG11605301

**PROOF OF SERVICE**

Hearing: February 7, 2012
Time: 9:00 a.m.
Department: 16

Assigned for all Purposes:
Judge: Hon. Lawrence John Appel

Suit filed: November 21, 2011
Trial date: TBD

PROOF OF SERVICE

I, MICHAEL SIEGEL, declare as follows:

I am over eighteen years of age and a citizen of the State of California. I am not a party to the within action. My business address is 499 14th Street, Suite 220, Oakland, CA 94612.

On January 25, 2012, I served copies of the following documents:

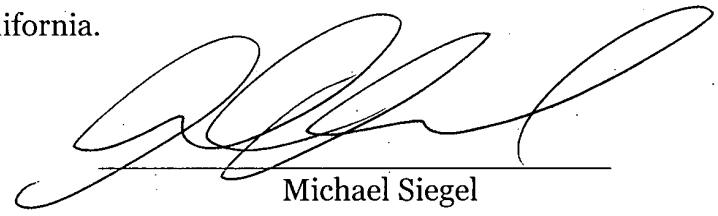
1. **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRER OF DEFENDANT DEBRA BOWEN**

on the parties to this action by mailing the documents by U.S. Mail to the offices of the attorneys for defendant and the defendant-interveners:

Mark R. Beckington
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Christopher Skinnell
Nielsen Merksamer Parrinello Gross & Leoni
2350 Kerner Boulevard, Suite 250
San Rafael, CA 94901

I declare under penalty of perjury that the foregoing is true and correct. Executed January 25, 2012, at Oakland, California.



Michael Siegel