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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

MICHAEL RUBIN, et al., Plaintiffs, v. **DEBRA BOWEN, in her official capacity as Secretary of State of California,** Defendant, **INDEPENDENT VOTER PROJECT, et al.,** Interveners	Case No. RG11605301 **DEFENDANT SECRETARY OF STATE'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT** Date: February 7, 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

BY FAX

INTRODUCTION

In their opposition to the Secretary of State's demurrer, plaintiffs argue that their complaint presents factual issues that cannot be resolved on the pleadings. But plaintiffs' argument cannot succeed in light of federal decisions upholding the constitutionality of Washington's top two election system, including a recent decision by the Ninth Circuit Court of Appeals. (*Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442 (hereinafter "*Washington I*"); *Washington State Republican Party v. Washington State Grange* (9th Cir. 2012) ___ F.3d ___, 2012 WL 149475 (hereinafter "*Washington II*").) These decisions, along with the other authority cited in the moving papers, demonstrate that top two primary systems, like California's system, are constitutional as a matter of law.

First, there is no factual issue to be decided concerning plaintiffs' first cause of action for ballot access. Proposition 14 provides equal ballot access to all candidates in the primary election, and the voters nominate the candidates for the top two general election ballot. Even if all facts alleged in the complaint are true, plaintiffs' first cause of action for ballot access does not, as a legal matter, allege a violation of plaintiffs' constitutional rights.

Nor have plaintiffs alleged an as-applied claim based on alleged voter confusion that would support their second cause of action for alleged violation of speech and association rights. California law governing top two election ballots complies with the standards articulated by the federal courts in *Washington I* and *Washington II*. Plaintiffs have alleged no additional facts that would take California outside the procedures that were approved in these decisions. For the same reasons, plaintiffs' third cause of action for violation of the Elections Clause also does not present an issue of fact that can survive a demurrer. Proposition 14 does not unlawfully infringe on ballot access or associational rights, and therefore does not violate the Elections Clause by determining the outcome of elections.

In short, plaintiffs' complaint has not alleged a factual issue that requires resolution by this Court. Defendant Secretary of State therefore respectfully requests that the Court sustain her demurrer to all causes of action without leave to amend.

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ARGUMENT

I. THE FIRST CAUSE OF ACTION DOES NOT RAISE A FACTUAL QUESTION AS TO THE LEVEL OF BURDEN IMPOSED ON BALLOT ACCESS BY PROPOSITION 14.

In *Washington I*, the United States Supreme Court upheld Washington's top two election system as facially constitutional against a challenge that the law severely burdened the associational rights of political parties. (*Washington I, supra*, 552 U.S. at p. 459.) Like the new California law, the Washington law, known as I-872, provided "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.* at p. 444.)

Washington I did not address whether I-872 was unconstitutional based on its effect on ballot access for political parties. (*Washington I, supra*, 552 U.S. at p. 458, fn. 11 ["We do not consider the ballot access and trademark arguments as they were not addressed below . . . ."]) But on remand, the Ninth Circuit in *Washington II*, rejected ballot access claims virtually identical to those made by plaintiffs' here.[1] (*Washington II, supra*, 2012 WL 149475 at pp. 7-8.)

Like plaintiffs here, the Washington Libertarian Party argued that "its rights are violated because I–872 makes it difficult for a minor-party candidate to progress to the *general* election ballot." (*Washington II, supra*, 2012 WL 149475 at p. 7, original emphasis.) The Libertarian Party, again like plaintiffs here, relied on the fact that "[a] candidate, whether from a major or minor party, can attain a place in the general election only by finishing in the top two in the primary." (*Ibid.*)

But the Ninth Circuit held that "I–872 does not impose a severe burden on the Libertarian Party's rights." (*Washington II, supra*, 2012 WL 149475, p. 7.) I–872 did not "impermissibly 'limit the field of candidates from which voters might choose[,]' and "by giving major- and minor-party candidates equal access to the primary and general election ballots, it does not give

[1] The opinion in *Washington II* was handed down on January 19, 2011, after the filing of the Secretary of State's demurrer. Copies of *Washington I* and *Washington II* have been lodged with the Court in conjunction with the Secretary of State's opposition to the motion for preliminary injunction.

the 'established parties a decided advantage over any new parties struggling for existence.'" (*Id.* at p. 8, citations and internal bracket omitted.) The possibility that it might be more difficult for a minor-party candidate to qualify for general election ballot was merely "an inherent feature of any top two primary system," a system that the Supreme Court "has expressly approved." (*Ibid*, citing *California Democratic Party v. Jones* (2001) 530 U.S. 567.)

Plaintiffs attempt to distinguish *Washington II* by pointing to the fact that it considered a ruling on a summary judgment, and imply that they should be allowed as a matter of law to have the case heard at least through that stage of litigation. But *Washington II* provides no basis for postponing a decision in this case. The significance of the facts in *Washington II* was to distinguish the case from earlier cases invalidating early filing deadlines. (*Washington II, supra*, 2012 WL 149475, p. 7.) Distinguishing the circumstances found in *Anderson v. Celebrezze* (1983) 460 U.S. 780, an early filing case, the Court noted:

> By giving minor-party candidates access to the August primary ballot rather than the November general election ballot, I–872 poses, albeit to a lesser extent, some of these same concerns. I–872, however, is distinguishable from the ballot access rules invalidated in *Anderson*. First, the I–872 primary is in August, not March. Second, unlike the system challenged in *Anderson*, in which independent candidates were required to file petitions before the major parties selected their nominees, the Libertarian Party participates in a primary at the same time, and on the same terms, as major party candidates. Libertarian Party candidates thus have an opportunity to appeal to voters at a time when election interest is near its peak, and to respond to events in the election cycle just as major party candidates do. In addition, whereas conventional systems guarantee major-party candidates a place on the general election ballot, I–872 gives minor-party candidates the same opportunity as major-party candidates to advance to the general election.

(*Washington II, supra*, 2012 WL 149475, p. 7.)

The factors discussed in *Washington I* and *Washington II* equally apply here. Small political parties in California also participate in the primary at the same time as the other parties and thus may appeal to the voters near the peak of voter interest and participation. And minor parties have the same opportunity to advance to the general election. True, the California primary is not as late as the Washington primary, but nothing in *Washington II* suggests that a decision

would turn on this fact alone.[2] Plaintiffs do not allege any unique facts that would require additional factual proceedings relating to the California top two primary system.

Together, *Washington I* and *Washington II* are fatal to plaintiffs' ballot access claims. Like the other authorities cited in the opening brief in support of the demurrer, they demonstrate that the top two primary system does not impose a severe burden on plaintiffs merely because it may have the effect of limiting their access to the general election ballot. Because this issue can be decided as a matter of law, the Court should sustain the demurrer to the first cause of action.

II. THE SECOND CAUSE OF ACTION DOES NOT RAISE FACTUAL ISSUES CONCERNING VOTER CONFUSION CAUSED BY CANDIDATE PARTY PREFERENCE DESIGNATIONS

In *Washington I* the United States Supreme Court rejected the presumption that "that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." (*Washington I, supra*, 552 U.S. at p. 456.) The Court concluded that it was not difficult to conceive of a ballot that would eliminate the possibility of widespread voter confusion:

> For example, petitioners propose that the actual I-872 ballot could include prominent disclaimers explaining that party preference reflects only the self-designation of the candidate and not an official endorsement by the party. They also suggest that the ballot could include prominent disclaimers explaining that party preference reflects only the self-designation of the candidate and not an official endorsement by the party. They also suggest that 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.' 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. We are satisfied that there are a variety of ways in which the State could implement I-872 that would eliminate any real threat of voter confusion. And without the specter of widespread voter confusion, respondents' arguments about forced association and compelled speech fall flat.

(*Washington I, supra*, 552 U.S. at pp. 456-457.)

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[2] *Anderson* concerned an early filing deadline that required independent presidential candidates to file nominating papers by March for a November election. (See *Washington II*, 2012 WL 149475, p. 7.) In contrast, under Proposition 14, all candidates participate in a June primary that decides the candidates for the November election.

In *Washington II*, the Ninth Circuit concluded that the form of the Washington ballot indicated an absence of widespread voter confusion because it adopted each of the Supreme Court's suggestions offered in *Washington I*. (*Washington II*, 2012 WL 149475, p. 5.) True, the Ninth Circuit also addressed the evidence of actual confusion offered by the Washington plaintiffs. (*Ibid.*) But it found that this evidence was "insufficient to create a triable issue of widespread voter confusion." (*Ibid.*) In their complaint, plaintiffs do not allege any facts beyond those found insufficient in *Washington II*.

The factors considered in the federal cases apply fully to California's elections system. Like Washington candidates, California candidates for voter-nominated offices identify their party preference on the ballot, thereby signaling that this is a personal determination rather than a party nomination.[3] And, as discussed in the opposition to the motion for preliminary injunction, California has adopted a variety of statutory measures that mitigate possible voter confusion consistent with those measures approved by the Supreme Court and the Ninth Circuit.

For example, in the state ballot pamphlet for a voter-nominated office (i.e., a state or congressional office subject to the top two primary system), the Secretary of State must include a written explanation of the electoral procedure for such offices. (Elec. Code, § 9083.5, subd. (b) [specifying language that must appear in ballot pamphlet]; see also Elec. Code, § 9084 [ballot pamphlet shall contain a written explanation of the appropriate election procedures for party-nominated, voter-nominated, and nonpartisan offices as required by section 9083.5]; Gov. Code, § 88001, subd. (l) [same].) Posters and other printed material containing this explanation must be supplied to voting precincts and conspicuously posted both inside and outside every polling place. (Elec. Code, § 9083.5, subd (d); Elec. Code, § 14105.1.)

Moreover, on the nonpartisan part of the direct primary election ballot, there must appear a heading for "Voter-Nominated and Nonpartisan Offices" and below that a statement that explains

[3] The California Legislature has approved and sent to the Governor for signature a clean-up bill amending provisions of Proposition 14's implementing legislation, including the form of a candidate's party preference designation. (AB 1413 (2011-2012 Reg. Sess.).) The legislation, however, continues to provide for a candidate's self-designation of "party preference." (*Ibid.*, amending Elec. Code, § 8002.5.)

the process for voter-nominated offices. (Elec. Code, § 13206, subd. (b); cf. Elec. Code, § 13230 [allowing heading and statement to be omitted when ballot is larger than may be conveniently handled].) This statement tells voters that they may vote for any voter-nominated candidate, that the candidate's party preference is selected by the candidate and shown for information purposes only, that the party preference designation does not constitute or imply an endorsement by the party indicated, and that no candidate nominated by the voters shall be deemed the officially nominated candidate of any political party. (Elec. Code, § 13206, subd. (b).)

A similar notification is provided when a person registers to vote. (Elec. Code, § 2151, subd. (b)(1).) The voter registration card explains that any voter may vote for any candidate at a primary election for state elective or congressional office, regardless of the disclosed party preference of the voter or the candidate. (*Ibid.*)

Moreover, nothing in Proposition 14 or its implementing legislation prevents a political party or party central committee from endorsing, supporting or opposing a candidate for a voter-nominated office. (Elec. Code, § 359.5, subd. (b).) A qualified political party may have their endorsements of candidates for voter-nominated offices printed in the sample ballot mailed to voters. (Elec. Code, § 13302, subd. (b).) In addition to these notifications, the Secretary of State has been directed to "conduct public voter education campaigns, using existing resources, for the purpose of publicly disseminating information regarding the roles of the parties in primary elections for party-nominated offices, voter-nominated offices, and nonpartisan offices." (Elec. Code, § 8005.)

In opposing the demurrer, plaintiffs rely on broad assertions that they have alleged triable issues of fact relating to voter confusion. But these are merely conclusory assertions of the type rejected by *Washington I* and *Washington II*. These allegations are insufficient to support the claims when California, consistent with applicable authority, has enacted statutes designed to eliminate the possibility of widespread confusion among well-informed voters.

III. THE THIRD CAUSE OF ACTION FOR ALLEGED VIOLATION OF THE ELECTIONS CLAUSE DOES NOT ALLEGE A CLAIM ON WHICH RELIEF MAY BE GRANTED.

The authority discussed above and in the opening brief is also fatal to plaintiffs' third cause of action under the Elections Clause. Because it does not infringe on ballot access or associational rights, Proposition 14 cannot be said to violate the Elections Clause by determining the outcome of elections.

Plaintiffs assert that there is a triable issue of fact over whether Proposition 14 blocks access to general election ballots and therefore dictates the outcome of elections. But this is merely another form of their ballot access argument. It fails equally here.

CONCLUSION

For all the foregoing reasons, the Secretary of State respectfully requests that her demurrer to plaintiffs' complaint be sustained without leave to amend.

Dated: January 31, 2012

Respectfully Submitted,

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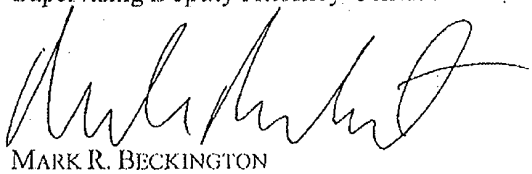

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DECLARATION OF SERVICE BY ELECTRONIC AND U.S. MAIL

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

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; my business address is 300 S. Spring Street, Suite 1702, Los Angeles, CA 90013.

On January 31, 2012, I served the attached **DEFENDANT SECRETARY OF STATE'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT** by transmitting a true copy via electronic mail and by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Los Angeles, California 90013, addressed as follows:

[SEE ATTACHED SERVICE LIST]

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 January 31, 2012, at Los Angeles, CA 90013.

Rosa Macias
Declarant

Rosa Macias
Signature

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Reply.pdf	518903	1/31/2012 12:30 PM
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Options

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Concealed Subject: No
Expiration Date: None
Notify Recipients: Yes
Priority: Standard
Reply requested by None
Security: Standard
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