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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.

INDEPENDENT VOTER PROJECT, DAVID TAKASHIMA, ABEL MALDONADO, and CALIFORNIANS TO DEFEND THE OPEN PRIMARY,

Intervener-Defendants.

Case No. RG11605301

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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

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

Reservation Number R-1246546

Suit filed: November 21, 2011
Trial date: TBD

I. SUMMARY

Defendant Debra Bowen's implementation of Proposition 14 severely burdens plaintiffs' fundamental rights of political association by denying them the opportunity to effectively participate in general elections for statewide office. Proposition 14 also imposes severe burdens on plaintiffs' rights by denying political parties the ability to disassociate from candidates who self-identify a party "preference" and by precluding minor political parties from qualifying for future electoral ballots.

Although the Ninth Circuit recently rejected a challenge to the Washington "top two" primary system, its decision in *Washington State Republican Party v. Washington State Grange* ("*Washington II*") (9th Cir. Jan. 19, 2012) ____ F.3d. ____, 2012 WL 149475, is distinguishable on critical legal and factual grounds. Most importantly, the California Constitution provides greater protection of associational rights than the United States Constitution, thus requiring the defendant and intervener-defendants (collectively, "defendants") to demonstrate a compelling government interest in implementing Proposition 14. See *Hart v. Cult Awareness Network* (App. 2 Dist. 1993) 13 Cal.App.4th 777, 790-791. In addition, defendants have conceded critical facts, including (1) that the general election is the moment of peak public participation in the political process, (2) the Placer County Special Election conducted on May 3, 2011 under Proposition 14 failed to include any explanations on the ballot distinguishing party "preference" from party endorsement, and (3) the asserted government interests supporting Proposition 14 pale in comparison to the irreparable injury caused to plaintiffs' fundamental rights. Because plaintiffs' have demonstrated the likelihood of irreparable injury to their rights as voters, candidates, and political parties, this Court should grant plaintiffs' motion and enjoin further implementation of Proposition 14.

II. ARGUMENT

A. The U.S. Supreme Court Has Never Sanctioned the Exclusion of Minor Political Parties from the General Election Ballot

Both defendant and intervener-defendants rely heavily upon the Supreme Court decision in *Munro v. Socialist Workers Party* (1986) 479 U.S. 189, for the proposition that a state "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." (Defendant's Opposition at 6 (citing *Munro*, 479 U.S. at 193); Intervener-Defendants' Opposition at 9.) Of course, the "modicum of support" required by the *Munro* defendant was a suitable modest bar: in Washington, a minor party candidate needed to "receive at least 1% of all votes cast for that particular office at the primary election." *Munro*, 479 U.S. at 191-192. Here, as defendant Debra Bowen admits, a minor party candidate could receive as much as 33% of the votes cast in a primary election and still be denied access to the general election. (Defendant's Opposition at 7 (claiming that the denial of access is due to "insufficient support among the voters, not because of unduly onerous qualification requirements").) Clearly, the "modicum of support" rule from *Munro* does not justify the regulation at hand.

Defendants do not deny that the general election ballot is the moment of peak political participation. This issue is of particular importance when examining the recent Ninth Circuit decision in *Washington II*. In that case, the Court addressed whether or not the Washington "top two" system would violate the Supreme Court precedent of *Anderson v. Celebrezze* (1983) 460 U.S. 780, which struck down an early filing deadline for independent candidates.

> The Court held that the early filing deadline placed an unconstitutional burden on voting and associational rights because it prevented independents from taking

> advantage of unanticipated political opportunities that might arise later in the election cycle and required independent candidates to gather petition signatures at a time when voters were not attuned to the upcoming campaign. *Washington II, supra*, 2012 WL 149475 at *7 (citing *Anderson, supra*, 460 U.S. at 790-792).

In *Washington II*, the Ninth Circuit held that because the Washington "top two" primary is in August, not March, minor party candidates have an opportunity to appeal to voters at a time "when election interest is near its peak." *Washington II* at *7.

Here, the primary election will take place in June 2012, a full five months before the general election. Minor party candidates will not have an opportunity "to respond to events in the election cycle just as major party candidates do." See *Washington II* at *7. Instead, after the primary election, plaintiffs will be denied access to the political process throughout the summer and fall, excluded from the crescendo of activity that culminates in the general election.

B. Plaintiffs Allege that California's "Top Two" Primary Violates Their Rights of Association Under the California Constitution, a Claim Never Addressed By the U.S. Supreme Court

Plaintiffs' freedom of association claims are made under both the California Constitution and the United States Constitution. (Verified Complaint ¶¶ 43-47.) The California Constitution promises that, "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." Cal. Const. Art. I, § 3(a). This constitutional provision, which largely mirrors the federal constitution, "affords greater privacy, expressive, and associational rights in some cases than its federal counterpart." *Hart v. Cult Awareness Network* (App. 2 Dist. 1993) 13 Cal.App.4th 777, 790. Regulations that impinge on the California constitutional right to free association can only be justified by regulations adopted to serve compelling state interests. *Id.* at 791.

Thus, it will be the province of this Court to determine whether the California Constitution permits defendants to preclude minor party voters, minor party candidates, and the minor parties themselves from effective participation in statewide primary elections. Even the Ninth Circuit, in *Washington II*, has acknowledged that a challenge to the "top two" electoral regime may present "novel and complex issues of state constitutional law best decided by the state courts." *Washington II, supra*, 2012 WL 149475 at *10.

C. Plaintiffs' Have Established a Likelihood of Interim Harm Which Far Outweighs the Inconsistent Government Interests Asserted by Defendants

> Trial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued. *Hart, supra*, 13 Cal.App.4th at 785.

Here, as established in plaintiffs' opening brief, defendant Debra Bowen has implemented an electoral system that effectively denies plaintiffs an opportunity to participate in statewide general elections. As the Declaration of Richard Winger suggests, minor party candidates will never place among the top two vote recipients in a "top two" system." (Winger Dec. ¶¶ 18, 31.) Defendant Bowen attempts to justify this result by arguing that, "Small party candidates may access the ballot just like major party candidates." (Defendant Opposition at 2.) Fortunately for plaintiffs, however, the U.S. Supreme Court places a higher burden on states like California when it comes to excluding minor political parties from elections. The state may not require minor parties to demonstrate more than a "modicum of support" in order to access the general election ballot. See *Munro, supra*, 479 U.S. at 191-192. Here, as defendants do not

contest, plaintiffs may garner as much as 33% of the primary election vote and still be blocked from participation in the general election.

In addition to denying plaintiffs access to the general election, Proposition 14 is also likely to lead to voter confusion. Plaintiffs submitted into evidence an actual ballot issued by the Placer County Registrar of Voters in preparation for a 2011 special election that took place pursuant to Proposition 14 regulations. (Request for Judicial Notice in Support of Injunctive Relief, ¶1 and Ex. A.) Neither defendant nor intervener-defendants contest the authenticity of this ballot. From a plain reading of the text of the ballot, it is clear that the 2011 Placer County special election was conducted without the presence of any disclaimers on the ballot regarding the candidate's self-selection of a party "preference." Because this ballot has failed to provide the type of disclaimers and explanations identified by the U.S. Supreme Court in analyzing a claim of "voter confusion" in connection with the Washington "top two" initiative, plaintiffs have met their burden of showing imminent harm as a result of voter confusion. See *Washington State Grange v. Washington State Republican Party* ("*Washington I*") (2008) 552 U.S. 442, 552 (encouraging the use of prominent ballot disclaimers).

Defendant has attempted to justify the Proposition 14 infringement of plaintiffs' freedom of association by highlighting two asserted public policy interests: (1) "encourag[ing] increased participation in elections" and (2) "giv[ing] voters increased options by enabling them to choose any candidate regardless of party preference." (Defendant's Opposition at 5-6.) Both of these asserted interests stand in stark contrast to the effect of Proposition 14 on minor political parties. Instead of "encouraging increased participation" in elections, Proposition 14 precludes minor party supporters from participating in the most important elections of all, the general elections. And

instead of "enabling [voters] to choose any candidate regardless of party preference," Proposition 14 permits general election voters to select from only two options, neither of which will likely ever be a minor party candidate.

III. CONCLUSION

Plaintiffs have established the likelihood that Proposition 14 severely burdens their rights of freedom association. Meanwhile, defendants are unable to assert a government interest that would justify the wholesale exclusion of minor political parties, their candidates, and their supporters from statewide general elections. In order to protect plaintiffs' fundamental rights of political association as guaranteed by constitutions of California and United States, this Court should grant plaintiffs' motion for a preliminary injunction.

Dated: January 31, 2012

SIEGEL & YEE

By _____
Michael Siegel
Attorneys for Plaintiffs

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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 31, 2012, I served copies of the following documents:

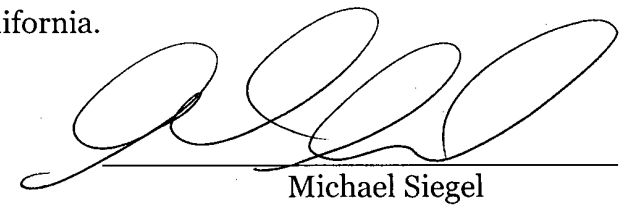
1. **REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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 31, 2012, at Oakland, California.



Michael Siegel