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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Rubin Plaintiff/Petitioner(s) VS. Bowen Defendant/Respondent(s) (Abbreviated Title)	No. RG11605301 Order Demurrer to Complaint Sustained

The Demurrer to Complaint filed for Debra Bowen was set for hearing on 04/10/2012 at 09:00 AM in Department 16 before the Honorable Lawrence John Appel. The Tentative Ruling was published and was contested.

Moving Party Debra Bowen appeared by counsel Mark Bekington.
Opposing Party Michael Rubin appeared by counsel Dan Siegel and Michael Siegel.
Opposing Party Manja Argue appeared by counsel Dan Siegel and Michael Siegel.
Opposing Party Marsha Feinland appeared by counsel Dan Siegel and Michael Siegel.
Opposing Party Charles L Hooper appeared by counsel Dan Siegel and Michael Siegel.
Opposing Party Katherine Tanaka appeared by counsel Dan Siegel and Michael Siegel.
Opposing Party C.T. Weber appeared by counsel Dan Siegel and Michael Siegel.
Opposing Party Cat Woods appeared by counsel Dan Siegel and Michael Siegel.
Opposing Party Green Party of Alameda County appeared by counsel Dan Siegel and Michael Siegel.
Opposing Party Libertarian Party of California appeared by counsel Dan Siegel and Michael Siegel.
Opposing Party Peace and Freedom Party of California appeared by counsel Dan Siegel and Michael Siegel.
Intervenor Californias to Defend the Open Primary represented by Christopher Skinnell.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

On the Demurrer to Verified Complaint for Declaratory, Injunctive, and Other Relief, filed by Defendant Debra Bowen, as Secretary of State on December 23, 2011, the court ORDERS as follows:

(1) The demurrer to the First Cause of Action (ballot access) is SUSTAINED, pursuant to C.C.P. § 430.10(e), WITH LEAVE TO AMEND to plead facts sufficient to state a cognizable cause of action challenging the Proposition 14 ("Prop. 14") laws based on the United States Constitution, Amendments 1 and 14, and/or the California Constitution, Article 1, sections 2 and 3, based on a restriction to access to the ballot or otherwise. As pled, it appears that this cause of action is a "facial challenge" to the Prop. 14 laws rather than an "as applied" challenge, as it appears to challenge the general framework of Prop. 14 - i.e. an open primary election coupled with a general election with the top two vote-getters from the primary - rather than a challenge to some manner in which the Prop. 14 framework is being implemented or applied in practice in a discriminatory or unreasonable way. Plaintiffs confirmed this at the hearing on the demurrer.

As pled, the cause of action does not withstand demurrer for the reasons set forth in Washington State Republican Party v. Washington State Grange (9th Cir. 2012) __ F.3d __, 2012 WL 149475, pp. *7-8 ("Washington II"). That decision considered and rejected the same broad challenge made by Plaintiffs herein - i.e. that an open primary system resulting in the top two vote-getters' advancing to the general election imposed a "severe burden" on the rights of minor parties (or their voters or candidates) to have access to the ballot. (Id., at pp. *7-8, citing, inter alia, Cal. Democratic Party v. Jones (2000) 530 U.S. 567, 585-586 ["Jones"]; Munro v. Socialist Workers Party (1986) 479 U.S. 189, 199; and Williams v. Rhodes (1968) 393 U.S. 23, 31.) Among other things, the Court held that "because [the law] gives major- and minor-party candidates equal access to the primary and general election ballots, it does not give the 'established parties a decided advantage over any new parties struggling for existence.'" (Id., at p. *8, quoting Williams v. Rhodes, supra, 393 U.S. at p. 31; see also id., quoting Munro, supra, 479 U.S. at p. 199 ["It can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election."]) Given that the law did not impose a "severe" burden on constitutional rights, it survived review because it furthered Washington's "important regulatory interests." (Id., at p. *7.)

The court disagrees with Plaintiffs' argument that this determination was based on evidence submitted on a motion for summary judgment. Instead, the Washington II Court upheld the district court's dismissal of such a cause of action on a motion to dismiss. (Id., at p. *7.) Plaintiffs' allegations to the effect that participation in the general election is not equivalent to participation in the primary election, that access to the general election ballot is essential for minor political parties seeking to qualify for subsequent ballots, and that California does not have sufficient regulatory interests to justify the restrictions on ballot access (see Verified Complaint, ¶¶ 25, 32-36, 38, 40, 44-45, cited in Opp. at p. 4) are legal assertions that are inconsistent with Washington II and other applicable authority as opposed to factual matters that distinguish this case from Washington II. As pled, Plaintiffs have not alleged sufficient facts to provide a constitutional basis to distinguish their challenge to Prop. 14 to the challenge to the Washington state laws challenged in Washington II.

The court is not persuaded by Plaintiffs' argument at the hearing on the demurrer that the Washington II decision is distinguishable or inapplicable because it "went too far" by stating that "the Supreme Court has expressly approved of top two primary systems." (Washington II, supra, at p. *8, citing Jones, supra, 530 U.S. at pp. 585-586.) Although Plaintiffs are correct that the Supreme Court's comments in Jones about a "top two" primary system are in the nature of dicta, they nevertheless provide a good indication that the Supreme Court would not consider a "top two" primary system as imposing a severe burden on voting and associational rights of supporters of independent or minor-party candidates. (See Jones, 530 U.S. at pp. 585-586 [contrasting the prior California law at issue therein to a "nonpartisan blanket primary," in which "[e]ach voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters ... then move on to the general election," which would ensure "more choice, greater participation, increased 'privacy,' and a sense of 'fairness' - all without severely burdening a political party's First Amendment right of association."]; see also Coeur D'Alene Tribe of Idaho v. Hammond (9th Cir. 2004) 384 F.3d 674, 683 ("our precedent requires that we give great weight to dicta of the Supreme Court"]; California Amplifier, Inc. v. RLI Ins. Co. (2001) 94 Cal.App.4th 102, 114 ["legal pronouncements by the Supreme Court are highly probative and, generally speaking, should be followed even if dictum"].)

Plaintiffs' reliance on Jenness v. Fortson (1971) 403 U.S. 431, and Williams v. Rhodes, supra, 393 U.S. 23, to withstand demurrer is unavailing. In Jenness, 403 U.S. at p. 442, the Court unanimously rejected a challenge to Georgia's election statutes that required independent candidates and minor-party candidates, in order to be listed on the general election ballot, to submit petitions signed by at least 5% of the voters eligible to vote in the last election for the office in question. The Court observed that "[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot - the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." (Id.) Based on the allegations and matters of which judicial notice is taken, these same interests support the "top two" primary system challenged in this case. Further, as noted in Washington II, the "top two" system is not equivalent to a petition-signing requirement to obtain access to a ballot, as any candidate of any party may participate in the primary election "at the same time, and on the same terms, as major party candidates." (Washington II, at p. *7.)

The decision in Williams is similarly distinguishable, as it involved a statute requiring a new party to obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last

preceding gubernatorial election, in order to have any access to the election. (393 U.S. at pp. 24-25.) Prop. 14, in contrast, allows voters to vote for candidates of any (or no) party affiliation or preference in the primary process at the same time and on the same terms as major party candidates. (Cf. Washington II, supra, at p. *7.) The fact that only the top two vote-getters advance to the general election is not a discriminatory restriction but instead a result of the voting process. (See id., at p. *8.)

(2) The demurrer to the Second Cause of Action (violation of rights to freedom of speech and association) is SUSTAINED, pursuant to C.C.P. § 430.10(e), WITH LEAVE TO AMEND to plead facts sufficient to state a cognizable cause of action challenging the Prop. 14 laws on the basis that they violate the rights to freedom of speech and association under the United States or California constitutions.

As pled, this cause of action is a "facial challenge" to the Prop. 14 laws based on the assertion that permitting candidates to self-designate a "preferred" political party on the electoral ballot, without the party's approval, interferes with constitutional rights of speech or free association. As such, the cause of action does not withstand demurrer for the reasons discussed in the recent Supreme Court decision in Washington State Republican Party v. Washington State Grange (2008) 552 U.S. 442, 453-455 ("Washington I"). As reflected therein, a statute (like Prop. 14) that allows for an open primary in which candidates identify themselves on the ballot by a self-designated party preference does not unconstitutionally interfere with a political party's rights of association or speech. (Id.) Unlike the prior California law struck down in Jones, supra, 530 U.S. 567, such a statutory framework does not interfere with a party's right to choose "its nominees" because the primary process does not choose the parties' nominees at all. (Washington I, 552 U.S. at p. 453 ["The law never refers to the candidates as nominees of any party, nor does it treat them as such," and "[w]hether parties nominate their own candidates outside the state-run primary is simply irrelevant."])

The challenged provisions of the Prop. 14 laws are indistinguishable from the Washington statute upheld in Washington I, and Plaintiffs have not alleged sufficient facts to the effect that Prop. 14 is being applied in a particular manner that compels individuals or political parties to be associated with particular candidates. As in Washington I, the mere possibility that "voters will misinterpret the candidates' party-preference designations as reflecting endorsement by the parties" is not sufficient to support a facial challenge to the statute. (Washington I, 552 U.S. at p. 455.)

(3) Although Plaintiffs base their First and Second Causes of Action on the California Constitution in addition to the U.S. Constitution, neither their complaint nor their memorandum in opposition to the demurrer cites any California decisions, much less decisions that provide a basis to determine that the "top two" system severely infringes on California rights of speech or association in a manner different than that discussed in the federal authority. Even though the free speech clause of article 1 of the California constitution has been construed as more broad than the First Amendment in some respects (see, e.g., Gerawan Farming, Inc. v. Lyons (2000) 24 Cal.4th 468, 491, and cases cited therein), this does not mean that "it is broader ... in all its applications." (Edelstein v. City & County of San Francisco (2002) 29 Cal.4th 164, 179.) Indeed, the Court in Edelstein expressly reaffirmed that "[i]n analyzing constitutional challenges to election laws, this court has followed closely the analysis of the United States Supreme Court." (Id.)

(4) The demurrer to the Third Cause of Action is SUSTAINED, pursuant to C.C.P. § 430.10(e), WITH LEAVE TO AMEND to plead facts sufficient to state a cognizable cause of action challenging the Prop. 14 laws on the basis of the Elections Clause of the United States Constitution. As pled, this cause of action is conclusory and does not set forth factual allegations regarding any manner in which the Prop. 14 laws, either on their face or as specifically applied, dictate electoral outcomes as opposed to prescribing the "Times, Places and Manner of holding Elections for Senators and Representatives...."

(5) The unopposed Request for Judicial Notice, filed on December 23, 2011, is GRANTED. Nevertheless, the court takes judicial notice only of the contents of the attached documents and not the truth of factual matters asserted therein.

(6) Plaintiffs shall have 15 days after the date reflected in the clerk's certificate of mailing of this order in which to file and serve a First Amended Complaint. Defendants shall have 15 days after service thereof in which to respond. C.C.P. § 1013 applies to the calculation of these dates.

Dated: 04/24/2012

facsimile

Judge Lawrence John Appel

SHORT TITLE:	CASE NUMBER:
Rubin VS Bowen	RG11605301

ADDITIONAL ADDRESSEES

-- Third Party --
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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Case Number: RG11605301
Order After Hearing Re: of 04/24/2012

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 04/25/2012.

Executive Officer / Clerk of the Superior Court

By Digital _____

Deputy Clerk