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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 **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRERS OF DEFENDANT AND INTERVENER-DEFENDANTS** Hearing: September 25, 2012 Time: 9:00 a.m. Department: 16 Assigned for all Purposes to Hon. Lawrence John Appel Suit filed: November 21, 2011 Trial date: TBD

I. SUMMARY

Plaintiffs Michael Rubin, *et al.* ("Rubin") seek an injunction prohibiting further implementation of Proposition 14, the California "Top Two" primary act, based upon ongoing violations of state and federal rights of association, expression, and equal protection. In response to the Court's Order sustaining demurrer of April 25, 2012, Rubin filed a First Amended Complaint ("FAC") that framed the suit as an "as-applied" challenge, added an equal protection claim, and pled additional facts that would distinguish his challenge to the California "Top Two" system from federal precedent regarding the Washington State "Top Two" approach.

Defendant Bowen and intervener-defendants Independent Voter Project, *et al.* both argue that Proposition 14 is legally permissible because it gives all political parties the same right to participate in a primary election. As discussed below, however, Rubin's claims are based on the fact that California primary elections and general elections are subject to substantial differences, as recently noted by the Legislature and Governor. Because half as many California voters participate in the statewide primary elections as compared to statewide general elections, and because voters must wait a full five months after the primary before the general election, thus dissipating media attention and voter interest, the right to participate in primary elections is not an adequate substitute for the minor parties' previously held right to participate in the general elections, and denial of the right to participate in general elections thus constitutes a severe burden on plaintiffs' rights. Based on these arguments, and as argued more fully below, Rubin has pled sufficient facts to state legally cognizable claims against defendant Bowen and Proposition 14, and the demurrers should be overruled.

II. LEGAL ARGUMENT

A. A General Demurrer Cannot Challenge the Clarity of a Pleading, and Should Be Overruled if Any Valid Cause of Action Exists

A demurrer under Code of Civil Procedure §430.10(e) should be overruled 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"). A plaintiff need only plead such facts as are necessary "to acquaint a defendant with the nature, source and extent of his claims." *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 560. "Moreover, plaintiff may allege on information and belief any matters that are not within his personal knowledge, if he has information leading him to believe the allegations are true." *Id.* The code specifically authorizes the court to consider, as ground for demurrer, any matter which the court must or may judicially notice under Evidence Code sections 451 or 452, including official acts of any state legislative department. Evid. C. §452(c).

Clarity of pleading is not essential to overcome a general demurrer: "(O)bjections that a complaint is ambiguous or uncertain, or that essential facts appear only inferentially, or as conclusions of law, or by way of recitals, must be raised by *special demurrer*, and cannot be reached on general demurrer." *Johnson v. Mead* (App. 1 Dist. 1987) 191 Cal.App. 3d 156, 160 (emphasis in original; internal quotes omitted)]

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 Ballot Access Claim Gives Adequate Notice and is Factually Distinguishable from Washington State Precedent

California may not implement a ballot access restriction that imposes severe restrictions on ballot access without fulfilling a compelling government interest. *California Democratic Party v. Jones* (2000) 530 U.S. 567, 581. This Court, in its Order on Demurrer, wrote that:

> 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 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 . . . 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. Order: Demurrer to Complaint Sustained (April 24, 2012) at 2 (factual citations omitted).

Plaintiffs urge the Court to reconsider this position, and overrule the parallel arguments of defendant (Bowen MPA 11:3-18) and defendant-interveners (Intervener MPA at 3, 6), on the following grounds.

Washington II is distinguishable because the holding addresses the Washington State election system, which couples an August primary with a November general election, whereas California holds its primary election a full two months earlier. Thus, the reasoning of *Washington II*—that minor 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," *Wash. State Republican Party v. Wash State Grange* (9th Cir. 2012) 676 F.3d 784, 794—is inapplicable to the California context, where voters must wait a full five months between primary and

general elections, and where five million less voters participate in the primary as compared to the general election.[1]

In fact, the California Legislature, in its 2011 amendments to California Election Code section 9016, affirmed that the general election is a superior venue for the democratic process, as part of a reform requiring that statewide initiatives and referenda be placed on the November ballot, only. Cal. Elec. §9016 (amended by statute 2011, Senate Bill 202). In a signing statement, Governor Brown wrote as follows:

> The backers of this measure point out that there are dramatically more voters at a general rather than a primary election. In 2010, for example, only 5.7 million people voted in the primary compared to 10.3 million in the general election – a pattern that has held true over time. The idea of direct democracy is to involve as many voters as possible. This bill accomplishes that objective. Cal. Elec. §9016 ("Historical and Statutory Notes: 2011 Legislation") (West's Annotated California Codes 2012).

Because California's Legislature and Governor have recognized the dramatic difference in public participation between California primary and general elections, and because *Washington II* and related cases did not consider whether a primary election is a legally adequate substitute for a general election even if twice as many voters can be accessed in the general election, Rubin's claims should not be barred by past precedent. To the contrary, the revision of Election Code section 9016 and the Governor's signing statement should be admitted as evidence that California's regulatory interests favor increased access to the general election, minor political parties included.

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[1] Defendant-interveners argue that the June 2010 primary was a closed primary, and not indicative of voter participation under Proposition 14. (Interveners MPA at 8, fn. 4.) In June 2012, however, only 5.3 million voters participated in the statewide primary election, 400,000 less than the primary election held in 2010, and a full five million less than the 2010 statewide general election. (Request for Judicial Notice in Opposition to Demurrers, Ex. 1.)

California's recent legislative and executive action regarding general elections should also serve to distinguish the dicta of *California Democratic Party v. Jones* that is discussed by both the Court and the demurring parties. As all acknowledge, the Supreme Court in *Jones* spoke approvingly of "top-two" systems, with the essential caveat: that the subject nonpartisan primary be otherwise constitutional. *Jones* (2000) 530 U.S. 567, 585; *Wash. State Republican Party v. Wash. State Grange* (2008) 552 U.S. 442, 452 ("*Washington I*"). As the Rubin plaintiffs allege, Proposition 14 is not unconstitutional simply because it involves a nonpartisan primary, but rather, because it withdraws from the minor parties right to participate in the general election and substitutes the inferior option of participation in a primary election that is five months earlier and is attended by millions less voters. When the Ninth Circuit held that Washington's I-872 did not impose a severe burden on minor party rights, it relied upon the factual finding that Washington's two elections were "near" enough in public participation that participation in the primary was an inadequate substitute for the general election. *Washington II, supra,* 676 F.3d at 794. Because that finding is not applicable to California, and because California's "top two" approach would impose substantially greater burdens on minor parties, the *Jones* dicta does not preclude Rubin's claims.

Here, Rubin pled a prima facie case as to plaintiffs' first cause of action. He pled that Proposition 14 effectively withdrew access to the general election ballot for minor political parties and their candidates, thus denying voters the ability to support such candidates. (First Amended Complaint ("FAC") ¶¶ 21-23, 26, 34-42, 45-46.) Although defendants and defendant-interveners argue that plaintiffs still have access to the primary election ballot, Rubin 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 ¶¶ 37-38, 45.) In sum, Rubin alleged that the Proposition 14 restrictions constitute a "severe burden" on constitutional rights because plaintiffs have been effectively barred from the general election.

The demurrers to Rubin's first cause of action should be overruled, because Rubin has alleged facts sufficient to state a claim for unlawful denial of ballot access, and because existing precedent does not preclude suit based upon the particular injuries that Proposition 14 has inflicted on California voters, given that the primary is a full five months before the general election, given that millions more voters participate in a general election, and given that the California Governor and Legislature have declared that the primary election is an inadequate substitute for democratic involvement in statewide general elections.

C. Rubin's Ballot Confusion Claim Gives Adequate Notice and Requires a Factual Determination Before Resolution

Rubin's 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,* 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,* 676 F.3d at 791-793. Both of these inquiries were conducted after the parties presented evidence on cross-motions for summary judgment. *Id.* at 791.

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 793 (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. (FAC ¶¶ 27-33, 48.) 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 Elections Clause Claim is Adequately Pled

Rubin's Election Clause claim should survive demurrer if it pleads that Proposition 14 "dictate[s] electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *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. (FAC ¶51.) "Objections that a complaint is ambiguous or uncertain, or that essential facts appear only inferentially, or as conclusions of law, or by way of recitals, must be raised by *special demurrer*, and cannot be reached on general demurrer." *Johnson v. Mead* (App. 1 Dist. 1987) 191 Cal.App. 3d 156, 160 (emphasis in original). To the extent that Bowen denies that Proposition 14 blocks less wealthy minor parties from the general election ballot, this is an issue of fact and should not be decided on demurrer.

E. Rubin's Equal Protection Claim is Adequately Pled

As defendant describes, the Ninth Circuit in *Perry v. Brown* held that the Equal Protection clause forbids "the targeted exclusion of a group of citizens from a right or benefit that they had enjoyed on equal terms with all other citizens." *Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052, 1084. As the Supreme Court has explained:

> The equal protection component of the Fourteenth Amendment requires actions taken by the sovereign to be supported by some legitimate interest, and further establishes that a bare desire to harm a politically disfavored group is not a legitimate interest. Similarly, the freedom of political belief and association guaranteed by the First Amendment prevents the State, absent a compelling interest, from penalizing citizens because of their participation in the electoral process, their association with a political party, or their expression of political views. These protections embodied in the First and Fourteenth Amendments reflect the fundamental duty of the sovereign to govern impartially. *League of United Latin American Citizens v. Perry* (2006) 548 U.S. 399, 461-462.

Here, Rubin pled that Proposition 14 withdrew from minor political parties the right of access to the general election ballot, and instead substituted a system that knowingly favors the two major political parties and their access to general election voters. (FAC ¶¶ 25-26, 52-55.) To the extent that Proposition 14 effectuates the alleged exclusion is a question of fact. Similarly, to the extent that Proposition 14 intentionally disadvantages minor political parties is a question of fact. Because *Perry v. Brown*

provides Rubin with a cause of action based upon withdrawal of an established right, and because Rubin has adequately pled facts supporting his claim that California has intentionally disadvantaged minor political parties, the demurrer should be overruled.

F. 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 rights of association, expression, and equal protection as guaranteed by state and federal constitutions, by withdrawing from minor political parties a right of access to the general election ballot and by causing widespread voter confusion. Rubin's 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, the demurrers should be overruled.

Dated: September 12, 2012

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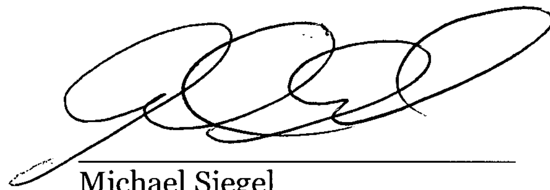

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