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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.,** Intervener-Defendants	Case No. RG11605301 **DEFENDANT DEBRA BOWEN'S REPLY BRIEF IN SUPPORT OF DEMURRER TO FIRST AMENDED COMPLAINT** Date: September 25, 2012 Res. No. R-129165 Time: 9:00 a.m. Dept.: 16 Judge: Hon. Lawrence John Appel Trial Date: None Action Filed: November 21, 2011

INTRODUCTION

Plaintiffs assert that they have alleged a valid "as-applied" challenge to Proposition 14, in contrast to their facial challenge previously rejected by this Court, but they fail to identify any colorable basis to proceed with such a claim and instead have just lightly repackaged their purported facial claims. Plaintiffs have not shown that Proposition 14 unconstitutionally denies minor parties and their members access to the general election ballot. Nor have they alleged that Proposition 14 and its implementing legislation, both clearly designed to comply with applicable United States Supreme Court precedent, infringe on the speech or associational rights of minor parties by leading voters to believe that a candidate's self-designated party preference is tantamount to an endorsement by that party.

For the same reasons, no claim under the Elections Clause has been stated. Separately plaintiffs have not alleged any basis to find that Proposition 14 violates equal protection by targeting minor political parties for disparate treatment.

For the reasons discussed below and in the moving papers, the Secretary of State's demurrers to the first amended complaint should be sustained without leave to amend.

ARGUMENT

I. PLAINTIFFS FAIL TO DEMONSTRATE THAT PROPOSITION 14 UNCONSTITUTIONALLY DENIES MINOR POLITICAL PARTIES AND THEIR SUPPORTERS ACCESS TO THE GENERAL ELECTION BALLOT.

In their first cause of action for alleged denial of general election ballot access, plaintiffs claim that Proposition 14 unconstitutionally excludes minor political parties, their candidates and supporters from full participation in the general election process. But none of the revised allegations of the Firs Amended Complaint ("FAC"), even if true, would present any basis to find that plaintiffs' ballot access rights under the First and Fourteenth Amendments are in fact violated by Proposition 14.

Plaintiffs begin by trying to distinguish the Ninth Circuit's decision in *Washington II*, which upheld the Washington top two election system, on the ground that Washington holds its

primary election in August, two months closer to the general election than does California.[1] But nothing in *Washington II* suggests that the constitutionality of a top-two elections system turns on this distinction or that the decision is limited to the Washington election system.

In *Washington II*, the Ninth Circuit addressed the plaintiffs' reliance on *Anderson v. Celebrezze* (1983) 460 U.S. 780, a decision in which the United States Supreme Court "struck down a[n] [Ohio] statute requiring an independent candidate for president to file a statement of candidacy and nominating petition in March in order to appear on the November general election ballot." (*Washington II*, 676 F.3d at p. 794.) This 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." (*Ibid.*) Although the Ninth Circuit noted that the Washington law posed similar concerns by giving minor party candidates access to the primary ballot but not the general election ballot, it easily distinguished Washington's system (known as I–872) from the ballot access rules invalidated by the Supreme Court 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*, 676 F.3d at p. 795.)

Thus, *Washington II* recognizes that a top two system, while it may potentially implicate issues similar to those that concerned the Court in *Anderson*, presents a fundamentally different set of circumstances. The Court's reference to the fact that the Washington's primary was closer

[1] *Washington State Republican Party v. Washington State Grange* (9th Cir. 2012) 676 F.3d 784, petition for cert. filed, 80 USLW 3615 (April 18, 2012) (No. 11-1263, 11-1266). The petition for cert. is scheduled for conference by the United States Supreme Court on September 24, 2012. (See http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-1263.htm.)

to the election than the filing deadline for independent candidates invalidated in *Anderson* must be read in conjunction with the other characteristics typical of a top two system, including California's system: participation by minor parties at the same time and on the same terms as major parties and with the same opportunity to advance to the general election. Under these circumstances, a top two system does not impose a severe burden on minor party rights. (*Washington II*, 676 F.3d at p. 795.)

Even if there may in theory be some absolute date by which an early top two primary would raise insurmountable constitutional concerns similar to those presented in *Anderson*, nothing in *Washington II*, or for that matter, its progenitor *Washington I*,[2] suggests that California's traditional June primary date crosses this line. Nor do plaintiffs offer any argument to suggest why this should be the case. To the contrary, the June primary serves the same function under the top two system as under the former partisan election system: narrowing the list of candidates who will appear on the general election ballot. Under the partisan system, the general election candidates were the party nominees and occasionally an independent candidate. Under the top two system, the candidates are the voter nominees. In each case, the primary candidates compete on the same terms. Under *Washington II*, this is sufficient to survive a ballot access challenge in the face of California's articulated justifications for adopting the top two system. (See Secretary of State Demurrer, pp. 11-12.)

For the same reason, plaintiffs' assertion that fewer persons vote in the primary than in the general election does not support a viable ballot access claim. Basing a ballot access claim on this assertion is tantamount to claiming that plaintiffs have a guaranteed right to participate in the general election, a claim rejected by the United States Supreme Court and the Ninth Circuit. (*California Democratic Party v. Jones* (2000) 530 U.S. 567, 585-586 [recognizing constitutionality of top two voting system]; *Washington II*, 676 F.3d at pp. 793-795 [upholding top two voting system against ballot access claim].) The fact that the top two candidates will appear on the general election ballot when there will likely be more voters is merely "an inherent

[2] *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442.

feature of any top two primary system," not a disqualifying constitutional infirmity. (See *Washington II*, 676 F.3d at p. 795 [possibility that it may be more difficult for a minor party candidate to qualify for the general election ballot "is an inherent feature of any top two primary system, and the Supreme Court has expressly approved of top two primary systems"].)

Finally, plaintiffs suggest that recent amendments to Elections Code section 9106, effectively restricting placement of most initiatives and referenda to the November general election ballot, demonstrates that California cannot justify the potential exclusion of minor party candidates from that same ballot as a result of the implementation of Proposition 14. But the fact that the Legislature has determined that initiatives should be considered at an election with a higher likely turnout does not mean that minor party rights are severely burdened by a top-two, voter nomination system.

Just like the top two system upheld in *Washington II*, the California system imposes at most minimal burdens on the interests of minor parties, burdens that do not outweigh the significant interests that have been advanced in favor of a top two system. Therefore, the demurrer to the first cause of action for denial of ballot access should be sustained.

II. PLAINTIFFS HAVE NOT ALLEGED FACTS SUPPORTING THEIR CLAIM THAT PROPOSITION 14 VIOLATES RIGHTS TO FREEDOM OF SPEECH OR ASSOCIATION.

In support of their second cause of action for violation of speech and association rights based on alleged ballot confusion, plaintiffs do not contend that the form of the general election ballot itself demonstrates voter confusion. Instead, they claim that their projections of supporting academic studies and voter surveys are sufficient to allege a triable claim under the standards of *Washington II*. But plaintiffs' allegations are insufficient to show that Proposition 14, as applied, violates First Amendment rights of the minor parties and their supporters.

In order to support this cause of action, plaintiffs "must show 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 II*, 676 F.3d at p. 792, quoting *Washington I*, 552 U.S. at p. 454.) For the reasons discussed in the opening brief, the California system complies with the guidelines

described by the United States Supreme Court and the Ninth Circuit in *Washington I* and *Washington II*. (See Secretary of State Demurrer, pp. 12-14.) Plaintiffs do not argue otherwise.

Pointing to *Washington II*, plaintiffs claim that "a properly conducted study of voter confusion" and "surveys of actual voters" showing that voters "mistakenly believed" a candidate to be an official party nominee can create a triable issue of fact. (Opp., p. 8.) *Washington II*, however, did not suggest that such allegations would be sufficient when a state uses a facially valid form of the ballot, rejecting similar arguments advanced on a motion for summary judgment. (*Washington II*, 676 F.3d at pp. 792-793.) The *Washington II* plaintiffs advanced these arguments in an effort to overcome the absence of any showing that the Washington state ballot failed to satisfy Supreme Court standards. But the academic study offered by the *Washington II* plaintiffs was flawed because it did not address how a "well-informed electorate" would interpret a ballot actually used by the voters. (*Id.* at p. 792.) By definition, a well-informed electorate would understand that under a voting system complying with *Washington I* standards a candidate's designated party preference would not equate to a political party endorsement. As for voter surveys, the Ninth Circuit referenced this possible evidence in the context of rejecting the plaintiffs' assertion that the failure of a political party's favored nominee to advance to the general election served as evidence of voter confusion. (*Ibid.*) It did not suggest that a general survey of voters would be sufficient if a voting system was already in compliance with *Washington I* guidelines. (*Ibid.*)

The standard for measuring voter confusion remains that of the "well-informed voter," presumably one who has read the information included with the ballot materials explaining the top two system. (See Secretary of State Demurrer, pp. 13-14 [describing California statutes designed to minimize possibility of voter confusion].) The provisions adopted by California in implementing Proposition 14 satisfy this standard (*ibid.*), and plaintiffs do not argue otherwise. Because plaintiffs have not alleged any facts that would suggest that the well-informed voter would be confused by a candidate's self-designation of political party preference, the second cause of action fails to state a claim on which relief can be granted.

III. PLAINTIFFS' THIRD CAUSE OF ACTION FAILS TO STATE A CLAIM UNDER THE ELECTIONS CLAUSE OF THE UNITED STATES CONSTITUTION.

In support of their third cause of action for alleged violation of the Elections Clause, plaintiffs limit their response to one paragraph and merely repeat their assertion that Proposition 14 dictates electoral outcomes by favoring wealthier parties and candidates. But no new facts are alleged that would support a finding that Proposition 14 has this effect. As discussed in the demurrer, the Court has previously rejected the sufficiency of these allegations. (See Secretary of State Demurrer, pp. 15-16, citing Order, filed April 25, 2012.)

The Elections Clause grants the States "broad power" to prescribe procedural mechanisms for holding congressional elections. (*Cook v. Gralike* (2001) 531 U.S. 510, 523.) Plaintiffs have alleged no facts to suggest that Proposition 14 does more than govern the "manner" of such elections. (*Id.* at pp. 523-524.) In the absence of allegations demonstrating that Proposition 14 dictates electoral outcomes, plaintiffs cannot state a claim under the Elections Clause.

IV. PLAINTIFFS' EQUAL PROTECTION CAUSE OF ACTION DOES NOT STATE A CLAIM UNDER *PERRY V. BROWN.*

Relying solely on the Ninth Circuit's decision in *Perry v. Brown* (2012) 671 F.3d 1052 (petition for cert. filed 81 USLW 3075 (July 30, 2012) (No. 12-144)), plaintiffs assert that their new fourth cause of action alleges a claim for violation of the Equal Protection Clause of the United States Constitution and its counterpart in the California Constitution. But *Perry* addressed a far different situation and does not support the finding of an equal protection violation by Proposition 14.

In *Perry*, the Ninth Circuit overturned Proposition 8, which had eliminated the right to same-sex marriage, because "the Equal Protection Clause requires the state to have a legitimate reason for withdrawing a right or benefit *from one group but not others*, whether or not it was required to confer that right or benefit in the first place." (*Perry v. Brown, supra*, 671 F.3d at pp. 1083-1084, original emphasis.) *Perry* was concerned with whether an initiative measure involved "the targeted exclusion of a group of citizens from a right or benefit that they had

enjoyed on equal terms with all other citizens" as opposed to serving as "a law of general applicability" applying equally to all persons. (*Id.* at pp. 1084-1085.)

Plaintiffs assert that they meet the *Perry* test because they allege that Proposition 14 withdrew the right of general election ballot access from minor parties and favors major political parties. But nothing in Proposition 14 targets minor political parties in the way that Proposition 8 targeted the marriage rights of same-sex couples. Candidates belonging to minor political parties stand on equal footing with major party candidates in primary elections with equal access to the general election ballot.

Nor does plaintiffs' flat assertion that Proposition 14 intentionally disadvantages minor political parties present a question of fact that prevents sustaining the Secretary of State's demurrer. As discussed in the demurrer, plaintiffs have alleged no facts suggesting that Proposition 14 was motivated by this type of discriminatory purpose. (See Secretary of State's Demurrer, pp. 17-18.)

Therefore, plaintiffs have not alleged a claim that minor political parties have been intentionally disadvantaged in violation of the Equal Protection Clause. The demurrer to the fourth cause of action should be sustained.

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CONCLUSION

For all the foregoing reasons, and for the reasons stated in the Secretary of State's opening brief, the demurrers to the first amended complaint should be sustained without leave to amend.

Dated: September 18, 2012

Respectfully Submitted,

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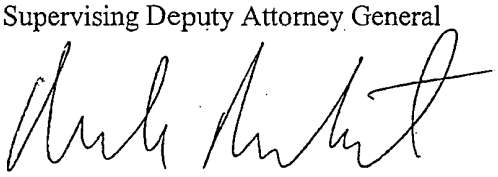

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