KAMALA D. HARRIS
Attorney General of California
CONSTANCE L. LELOUIS
Supervising Deputy Attorney General
MARK R. BECKINGTON
Deputy Attorney General
State Bar No. 126009
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-1096
Fax: (213) 897-1071
E-mail: Mark.Beckington@doj.ca.gov
Attorneys for Defendant Debra Bowen, as California Secretary of State

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 By FAX

NOTICE OF HEARING ON DEMURRER AND DEMURRER TO SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: June 4, 2013
Res. No: R-1377383
Time: 9:00 a.m.
Dept: 16
Judge: Hon. Lawrence John Appel
Trial Date: February 18, 2014
Action Filed: November 21, 2011

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NOTICE OF HEARING

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 4, 2013, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department 16 of the above-entitled court, located at 1221 Oak Street, Oakland, California, Defendant Debra Bowen, in her official capacity as California Secretary of State, shall demur, and hereby does demur, to plaintiffs' second amended complaint, and each and every cause of action therein, as set forth herein.

The demurrer shall be based on this notice of demurrer and the demurrer to complaint, the accompanying memorandum of points and authorities, the pleadings and papers on file in this action, and upon such further argument as may be offered at the time of the hearing.

Dated: March 11, 2013

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
CONSTANCE L. LELOUIS
Supervising Deputy Attorney General

MARK R. BECKINGTON
Deputy Attorney General
Attorneys for Debra Bowen, as California Secretary of State

DEMURRER TO COMPLAINT

Defendant Debra Bowen, as California Secretary of State, demurs to plaintiffs' second amended complaint, and each and every cause of action therein, on each of the following grounds:

(1) To the first cause of action, designated in the second amended complaint as the First Claim for Relief: Ballot Access, on the ground that the cause of action does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

(2) To the second cause of action, designated in the second amended complaint as the Second Claim for Relief: Equal Protection Clause, on the ground that the cause of action does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

WHEREFORE, defendant prays as follows:

1. That the demurrers, and each of them, be sustained without leave to amend;
2. That plaintiffs take nothing by their complaint;
3. That judgment be entered in favor of the defendant;
4. That the defendant be awarded her costs of suit.

Dated: March 11, 2013

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
CONSTANCE L. LELOUIS
Supervising Deputy Attorney General

MARK R. BECKINGTON
Deputy Attorney General
Attorneys for Debra Bowen, as California Secretary of State

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

When California voters approved Proposition 14 in June 2010, they fundamentally changed how state and congressional candidates are chosen for the general election ballot. Formerly, under the partisan primary system, voters affiliated with qualified political parties selected the parties' nominees, who would then run in the general election. Now, under Proposition 14's voter nomination system, all voters, regardless of party affiliation, select the candidates who will compete in the general election. The top two primary vote getters, not the nominees of political parties, appear on the general election ballot.

The United States Supreme Court, other federal courts, and a California appellate court have all expressly or impliedly recognized that this system is a constitutional means for choosing general election candidates and channeling final voter choice between the top two primary vote getters. As such, all of plaintiffs' challenges to the constitutionality of Proposition 14 lack merit as a matter of law.

Plaintiffs' first cause of action for denial of ballot access turns entirely on the fact that some minor party candidates in the 2012 election received a significant percentage of the primary vote but were denied a place on the general election ballot because they did not finish among the top two vote getters. But the fact that some candidates will not reach the general election despite receiving more than a modicum of votes is merely "an inherent feature of any top two primary system," not a basis to declare that system unconstitutional. (*Washington State Republican Party v. Washington State Grange* (2012) 676 F.3d 784, 795, cert. denied, 133 S.Ct. 110 (2012).) This Court has previously determined that plaintiffs cannot state a *facial* ballot access claim, and their alleged facts cannot support an *as applied* claim. The first cause of action therefore fails to allege a valid claim as a matter of law.

Plaintiffs' second cause of action for alleged violation of the Equal Protection Clause is flawed as either a facial or an as applied claim. Proposition 14 is facially neutral. It neither favors major political parties nor disables minor political parties on its face. And although plaintiffs allege that the "drafters" of Proposition 14 intended the measure to exclude minor party

candidates from participating in general elections, they do not allege that the voters themselves intended to promote invidious discrimination. The only realistic guides to the voters' intent, the ballot measure and the voter pamphlet, do not support an inference of discriminatory intent. As such, the second cause of action also fails as a matter of law.

After three attempts, plaintiffs have had ample opportunity to allege claims challenging the constitutionality of Proposition 14. It is now clear that they have no legal theory or factual basis to overturn this voter-approved ballot initiative. The Secretary of State therefore requests that the demurrers to the second amended complaint be sustained without leave to amend.

LEGAL BACKGROUND

In February 2009, the Legislature placed Senate Constitutional Amendment 4, officially known as the "Top Two Candidates Open Primary Act," on the June 2010 election ballot. (Sen. Const. Amend. No. 4 [SCA 4], Stats. 2009, 4th Ex. Sess., res. ch. 2.) Designated as Proposition 14 by the Secretary of State, the measure was approved by the voters by a margin of 53.8 to 46.2 percent. (See http://www.sos.ca.gov/elections/sov/2010-primary.)

Proposition 14 replaced the former partisan primary process for state and congressional offices with "[a] voter-nomination primary election . . . to select the candidates for congressional and state elective offices in California." (Cal. Const., art. II, § 5, subd (a); see *Field v. Bowen* (2011) 199 Cal.App.4th 346, 351 ["Proposition 14 replaced party (partisan) primaries with one open primary" for state and congressional offices].) Under this system, "[a]ll voters may vote at a voter-nominated primary election for any candidate for congressional and state elective office without regard to the political party preference disclosed by the candidate or the voter, provided that the voter is otherwise qualified to vote for candidates for the office in question." (Cal. Const., art. II, § 5, subd (a).)

This process leads to a general election between the two candidates receiving the most votes in the primary election: "The candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office shall, regardless of party preference, compete in the ensuing general election." (Cal. Const., art. II, § 5, subd (a).) A political party or party central committee may endorse, support or oppose a candidate, but it

"shall not nominate a candidate for any congressional or state elective office at the voter nominated primary." (Cal. Const., art. II, § 5, new subd (b).)

In contrast to prior law, Proposition 14 provides that "[a] political party or party central committee shall not have the right to have its preferred candidate participate in the general election for a voter-nominated office other than a candidate who is one of the two highest vote-getters at the primary election . . . ." (Cal. Const., art. II, § 5, new subd (b).) The measure, however, leaves in place partisan elections for presidential candidates, political party committees and party central committees and preserves the right of political parties to participate in the general election for the office of president. (Cal. Const., art. II, § 5, new and amended subds. (c), (d).) Proposition 14 became operative January 1, 2011. (SCA 4, Fifth Clause.)

STATEMENT OF THE CASE

Plaintiffs are minor political parties and organizations[1] and also candidates and voters who are affiliated with those parties or support their candidates.[2] On November 21, 2011, plaintiffs filed their original complaint for declaratory, injunctive and other relief, challenging the constitutionality of Proposition 14 based upon its alleged effect on minor parties and their supporters.

After a series of demurrers to the original and amended complaints, the Court dismissed with prejudice plaintiffs' causes of action for violation of freedom of speech and association and violation of the Elections Clause. (Order on Demurrers to First Amended Complaint, filed January 25, 2013.) Additionally, the Court sustained with leave to amend the demurrers to plaintiffs' causes of action for alleged denial of ballot access and violation of equal protection. (*Ibid.*) On the ballot access cause of action, the Court limited amendment to an "as-applied"

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[1] The political party plaintiffs are the Peace and Freedom Party of California and the Libertarian Party of California, both qualified political parties, and the Green Party of Alameda County, which is described as a geographic division of the Green Party of California. (SAC, p. 5, ¶¶ 14-16.)

[2] The individual plaintiffs include four persons who ran as candidates preferring minor parties in 2012: Steve Collett, Marsha Feinland, Charles L. Hooper, and C.T. Weber. (SAC, p. 4-5, ¶¶ 8-10, 12.) The other individual plaintiffs are Michael Rubin, Katherine Tanaka, and Cat Woods. (*Id.*, pp. 4-5, ¶¶ 7, 11, 13.)

theory, holding that plaintiffs' could not allege a claim for facial unconstitutionality. (*Id.*, pp. 8:15-9:2.) On the equal protection cause of action, the Court granted leave to file either a facial or an as applied challenge. (*Id.*, pp. 13:23-14:2.)

In response to this ruling, plaintiffs have filed a second amended complaint alleging: (1) denial of ballot access, and (2) violation of equal protection. (SAC, pp. 11-12, ¶¶ 39-43.) Each cause of action is based on alleged violations of provisions in the California Constitution and United States Constitution. (*Ibid.*)

In the first cause of action, plaintiffs allege that Proposition 14 "has unconstitutionally burdened the rights of minor party voters, minor party candidates, and the minor parties themselves from effective participation in California's general elections, even when those parties and candidates demonstrated substantial support in the primary election." (SAC, p. 11, ¶ 40.) Therefore, they ask that Proposition 14 be declared unconstitutional under the First and Fourteenth Amendments of the United States Constitution and article I, sections 2 and 3 of the California Constitution. (*Id.*, p. 12, ¶ 40.)

In the second cause of action plaintiffs allege that Proposition 14 violates the Equal Protection Clause of the Fourteenth Amendment and the equal protection guarantees of the California Constitution. (SAC, p. 12, ¶ 42.) They allege that Proposition 14 withdrew an established right to participate in statewide general elections and was motivated by an invidious purpose to discriminate against minor parties, their candidates and supporters. (*Id.*, p. 12, ¶ 43.)

STANDARD OF REVIEW

Courts have long recognized that states may regulate the elections process: "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" (*Burdick v. Takushi* (1992) 504 U.S. 428, 433, quoting *Storer v. Brown* (1974) 415 U.S. 724, 730; accord, *Timmons v. Twin Cities Area New Party* (1997) 520 U.S. 351, 358 ["States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder"].)

As such, review of voting regulations under the United States Constitution does not automatically require strict scrutiny, but instead follows a flexible balancing standard:

> A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'

(*Burdick v. Takushi, supra*, 504 U.S. at p. 434, quoting *Anderson v. Celebreeze* (1983) 460 U.S. 780, 788.)

Under this standard, "when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" (*Burdick v. Takushi, supra*, 504 U.S. at p. 434, quoting *Norman v. Reed* (1992) 502 U.S. 279, 289.) "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." (*Ibid.*, quoting *Anderson v. Celebreeze, supra*, 460 U.S. at p. 788.)

The same balancing test advanced by the United States Supreme Court in elections cases has been followed by the California Supreme Court in cases arising under the California Constitution: "'[I]n analyzing constitutional challenges to election laws, [the California Supreme Court] has followed closely the analysis of the United States Supreme Court.'" (*Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 179, quoting *Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 710.) Thus, like the federal courts, the California courts assess an election regulation by determining whether it imposes a "severe restriction" on voting rights or only a "limited burden" on those rights, and then weighing the interests advanced by the regulation. (See *Edelstein v. City and County of San Francisco, supra*, 29 Cal. 4th at pp. 182-183 [applying balancing test to voting regulation challenged under California's free speech clause].)

ARGUMENT

I. PLAINTIFFS' FIRST CAUSE OF ACTION DOES NOT ALLEGE A VALID CLAIM FOR DENIAL OF ACCESS TO THE GENERAL ELECTION BALLOT IN VIOLATION OF THE STATE OR FEDERAL CONSTITUTION.

A. Federal and State Authority Has Recognized the Top Two Primary as a Constitutional Method of Choosing General Election Candidates.

Plaintiffs stake their ballot access claim on a flawed premise: that a candidate who has not finished among the top vote getters in a top two primary has been unconstitutionally denied the right to participate in the general election if he or she has received more than a modicum of the votes. The possibility that a candidate may receive a large percentage of the primary vote—possibly as much as a third of the vote—and not reach the general election ballot is merely one consequence of a top two primary system. As state and federal courts have recognized, it is not a basis on which to declare a top two system inherently unconstitutional.

For example, the Ninth Circuit has rejected the notion that a top two primary is flawed solely because that system "makes it more difficult for minor-party candidates to qualify for the general election ballot than regulations permitting a minor-party candidate to qualify for a general election ballot by filing a required number of petition signatures." (*Washington State Republican Party v. Washington State Grange*, *supra*, 676 F.3d at p. 795.) "This additional burden . . . is an inherent feature of any top two primary system, and the Supreme Court has expressly approved of top two primary systems." (*Id.*, citing *California Democratic Party v. Jones* (2000) 530 U.S. 567, 585-586.)

Construing a Washington top two system that is similar to the California system, the Ninth Circuit found that the ballot access rights of minor political parties were not severely burdened. (*Washington State Republican Party v. Washington State Grange*, *supra*, 676 F.3d at p. 794.) Given the features of a top two system, including access to the primary ballot by minor party candidates, the minor parties had not shown that the system "impermissibly 'limit[s] the field of candidates from which voters might choose.'" (*Ibid*, quoting *Anderson v. Celebrezze* (1983) 460 U.S. 780, 786.) And "because [the top two primary] 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.'" (*Ibid.* at p. 795, quoting *Williams v. Rhodes* (1968) 393 U.S. 23, 31.) The Ninth Circuit therefore affirmed dismissal of a ballot access claim nearly identical to the one presented by plaintiffs in this action. (*Id.* at pp. 794-795.)

Other federal and state decisions have acknowledged the validity of a top two system in the face of other constitutional challenges. In *California Democratic Party v. Jones*, relied upon by the Ninth Circuit in *Washington State Republican Party*, the United States Supreme Court recognized that a top two primary, which it referred to as a nonpartisan blanket primary, avoids the constitutional dilemma posed by allowing all voters to cast ballots nominating a particular party's candidates. (*California Democratic Party v. Jones*, *supra*, 530 U.S. at 585-586.) The nonpartisan blanket primary, allowing each voter to vote for any candidate and the top two vote getters to advance to the general election, differs from the partisan blanket primary in a way that is "the constitutionally crucial one: primary voters are not choosing a party's nominee." Thus, "[u]nder a nonpartisan blanket primary, a State may 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." (*California Democratic Party v. Jones* (2000) 530 U.S. 567, 586.) Although *Jones* did not directly address ballot access for minor political parties, its reasoning is consistent with the conclusion that a top two or blanket primary system is not inherently unconstitutional.

In another case construing Washington's top two system, the United States Supreme Court noted that "we assumed that the nonpartisan primary we described in *Jones* would be constitutional." (*Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, 452.) The Court characterized as "unexceptional" the fact that political parties may no longer indicate their nominees on the ballot, observing that "[t]he First Amendment does not give political parties a right to have their nominees designated as such on the ballot." (*Id* at p. 453, fn. 7.) The exact question facing the Court—whether associational rights of political parties were violated if candidates were allowed to express their party preference on the ballot—differs from the precise question presented here and in *Jones*, and the Court noted that it was not

deciding the parties' ballot access claim. (*Id.* at p. 458, fn. 11.) But the Court concluded that a nonpartisan blanket primary ballot could be designed that would eliminate any threat to associational rights and rejected a challenge to the Washington top two primary on that basis. (*Id.* at pp. 456-457.) Thus, *Washington State Grange*, like *Jones* before it, recognizes that a top two primary system is not an inherently unconstitutional method for nominating general election candidates.

Additionally, in a case implicating the larger question of Proposition 14's validity, the First District Court of Appeal upheld the constitutionality of the measure's implementing legislation relating to party preference ballot designations and write-in voting. (*Field v. Bowen, supra*, 199 Cal.App.4th 346.) The First District found no basis in the implementing statutes to enjoin enforcement of Proposition 14. (*Id.* at pp. 350, 372.) Although the appellate court did not expressly pass on the constitutionality of Proposition 14 itself, the Court's recognition that these provisions were constitutional is consistent with the recognition that a top two primary system may be validly implemented by the voters. (*Ibid.*)

B. Plaintiffs Fail to Allege Any Facts that Would Support a Finding that Proposition 14 is Unconstitutional as Applied.

In their complaint, plaintiffs allege that in the June 2012 primary nine minor party candidates received at least five percent of the vote but did not advance to the general election. (SAC, p. 2, ¶ 2; p. 8, ¶ 27.) Plaintiffs allege that only three minor party candidates reached the general election, leaving minor party candidates off the general election ballot in 98 percent of state and congressional elections in November 2012. (*Id.*, p. 8, ¶ 26.) Plaintiffs identify candidates receiving between 2.1 percent and 18.6 percent of the vote in races for the Legislature, House of Representatives, and United States Senate. (*Id.*, pp. 8-9, ¶¶ 28-31.)

Even accepting these statistics as true, they say nothing about the constitutionality of Proposition 14. In a top two primary system, it is virtually inevitable, not merely probable, that in some races some candidates will receive double-digit percentages of the primary vote and not reach the general election. This is not a disability facing only minor party candidates; it is as likely to occur to candidates preferring major parties to those preferring minor parties. Indeed, it

was recognized before passage of Proposition 14 that a general election might pit candidates preferring the same political party, or pit candidates preferring no political party, excluding party-affiliated candidates altogether. (See RJN, Exh. 1, June 8, 2010 Voter Guide, Legislative Analyst's Analysis of Proposition 14.)

Put another way, if more than two candidates each representing different political parties seek the same office in a voter-nominated primary, then one or more of the political parties will have no affiliated candidate running in the general election. Plaintiffs would have the Court find that this result renders a voter-nominated, nonpartisan blanket primary unconstitutional and that California voters must reinstate a partisan primary for most state and congressional offices. Under the authority cited above, however, a primary that narrows the general election candidates to the top two vote getters, regardless of party affiliation, is constitutionally permitted.

The California top two primary fits squarely within the framework approved by state and federal courts. The voter nomination primary is open to candidates regardless of their preference for a qualified political party or their lack of party preference. (See Elec. Code, § 13105 [political party preference designation].) And "the candidates for a voter-nominated office who receive the highest or second highest number of votes cast at the primary election shall appear on the ballot as candidates for the office at the ensuing general election." (Elec. Code, § 8141.5.)

Plaintiffs may not advance their claim on the theory that the major parties are able to get their candidates on the general election ballot to the exclusion of minor parties. Under Proposition 14, general election candidates are not party nominees. (Elec. Code, § 8141.5 ["no candidate for a voter-nominated office shall be deemed to be the official nominee for that office of any political party"].) A candidate's designation of party preference "shall not be construed as an endorsement of that candidate by the party designated." (Elec. Code, § 8002.5, subd. (d). The candidate's party preference designation "is shown for the information of the voters only." (*Ibid.*) Although political parties may endorse candidates in the primary or general election (Cal. Const., art. II, § 5, subd (b)), no party, major or minor, has a guarantee that its preferred nominee will reach the general election.

Nor are other facts alleged by plaintiffs in connection with their ballot access claim sufficient to undercut existing authority approving of top two election systems. Although plaintiffs point to a disparity in the number of voters in primary elections and general elections (SAC, p. 10, ¶¶ 33-34), this is no different than the voting patterns in partisan primary elections in which a smaller number of party voters select the nominees who will be presented to the larger general electorate. Plaintiffs also object that the June primary is five months before the general election. (*Id.*, p. 9, ¶ 32.) But the timing of the primary election is not directly at issue. Plaintiffs are challenging the constitutionality of the voter-nominated primary system, not the date of a particular primary election.

C. The State's Legitimate Regulatory Interests Support Upholding the Constitutionality of Proposition 14.

Proposition 14 has been justified on at least two grounds: increasing voter participation in the selection of candidates, particularly through increased participation by independent voters who previously had limited rights to vote in the primary, and reducing government gridlock by promoting less partisan candidates. For example, in the Official Voter Information Guide, the measure's title and summary, approved by the Legislature, stated that Proposition 14 would "encourage[] increased participation in elections for congressional, legislative, and statewide offices by changing the procedure by which candidates are selected in primary elections." (RJN, Exh. 1, June 8, 2010 Voter Guide, p. 14.) The title and summary further stated that the measure would "give[] voters increased options in the primary by allowing all voters to choose any candidate regardless of the candidate's or voter's political party preference." (*Ibid.*)

In their arguments in favor of the measure, the proponents echoed these points, asserting that Proposition 14 "will open up primary elections" and allow Californians "to vote for any candidate [they] wish for state and congressional offices, regardless of political party preference." (Request for Judicial Notice, Exh. 1, June 8, 2010 Voter Guide, Argument in Favor of Prop. 14, p. 18.) The proponents argued that this would "reduce gridlock by electing the best candidates." (*Ibid.*) Proposition 14 was also seen as "giv[ing] independent voters an equal voice in primary elections." (*Ibid.*) As a further benefit, the proponents claimed that Proposition 14 would "help

elect more practical office-holders who are more open to compromise." (*Ibid.*) The proponents expressed the concern that "partisanship is running our state into the ground" and argued that Proposition 14 would "push our elected officials to begin working together for the common good." (*Ibid*, emphasis omitted.)

These interests are sufficient for Proposition 14 to pass muster as a "reasonable, nondiscriminatory" election regulation justified by the State's important regulatory interests. And even if Proposition 14 were viewed as a "severe restriction," the measure has been narrowly drawn to achieve the interests promoted by a top two primary. (See *California Democratic Party v. Jones*, *supra*, 530 U.S. at 585-586 [all goals promoted by partisan primary with open voting can be protected by a nonpartisan blanket primary].)

Because the facts alleged in the ballot access cause of action either merely recite the inherent consequences of a top two system, or do not concern the constitutionality of Proposition 14, plaintiffs have not alleged an as applied claim for violation of either the California or United States Constitutions. Therefore, the demurrer to the first cause of action should be sustained.

II. PLAINTIFFS' SECOND CAUSE OF ACTION DOES NOT ALLEGE EITHER A FACIAL OR AN AS APPLIED CLAIM FOR VIOLATION OF THE EQUAL PROTECTION CLAUSE.

In its order sustaining the Secretary of State's demurrer to the First Amended Complaint, the Court permitted plaintiff to file an amended pleading alleging either a facial or an as-applied claim for violation of equal protection. (Orders on Demurrers, January 25, 2013, pp. 13-16.) Plaintiffs' second cause of action fails to sufficiently allege either ground as a basis to challenge Proposition 14.

Under the Fourteenth Amendment of the United States Constitution, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., amend., XVI, § 1.) Its counterpart in the California Constitution provides that "[a] person may not be . . . denied equal protection of the laws." (Cal. Const., art. I, § 7(a).)

As a neutral measure, Proposition 14 does not violate either the State or Federal Equal Protection Clauses on its face for the same reasons discussed above with respect to the ballot access claim. Since the courts have already upheld top two primary systems as constitutional, and

since major parties and minor parties are treated identically under the terms of Proposition 14, no equal protection violation appears on the face of the measure. For the same reasons, plaintiffs have not alleged an as applied claim. Plaintiffs rely on the same factual allegations they make in support of their ballot access cause of action, and these allegations fail for the same reasons.

Plaintiffs allege that "implementation of Prop. 14 withdrew an established right from . . . minor parties, their voters, and their candidates to participate in statewide general elections." (SAC, p. 12, ¶ 43.) However, the right of minor parties to participate in general elections through nomination of preferred candidates bearing the party label was a function of the partisan primary system. When California switched to the top two system, not just minor parties, but major parties as well, lost the guarantee that their chosen candidates would reach the general election. This allegation supports neither a facial nor an as-applied equal protection violation when minor parties are compared to major parties, other voters or other candidates.

Plaintiffs no doubt seek to fit within the doctrine recognized by the Ninth Circuit in *Perry v. Brown*, a decision overturning Proposition 8, which had eliminated the right to same-sex marriage. (*Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052, cert granted, 133 S.Ct. 786 (2012).) In *Perry*, which is now before the United States Supreme Court, the Ninth Circuit held that "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.) In that context, 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." (*Id.* at p. 1084, emphasis added.) Proposition 8 was not "a law of general applicability" but a measure that ""carve[d] out' rights from gays and lesbians alone." (*Id.* at p. 1085, original brackets.)

Even if *Perry* remains citable while on appeal, it would have no application here because Proposition 14 does not target minor parties for disparate treatment. This is not a case where major parties are allowed to nominate and place their preferred candidates on the general election ballot while minor parties are left off the ballot. As a matter of law, and in actual practice, all candidates, regardless of party preference, compete equally in the primary for the right to

compete in the general. Thus, the *Perry* doctrine would not support a finding that Proposition 14 violates equal protection by selectively withdrawing rights from the minor parties.

Alternatively, plaintiffs reassert their contention that the drafters of Proposition 14 "intended . . . [to] exclude[] the standard bearers from minor political parties from participating in general elections." (SAC, p. 12, ¶ 43.) Plaintiffs allege that the drafters "were motivated by an invidious purpose when they enacted electoral reform." (*Ibid.*) But this allegation, which focuses on the alleged motivations of the legislative drafters, is insufficient to allege a claim for violation of the Equal Protection Clause by a voter-approved measure.

"[N]either explicit discrimination nor discrimination by 'disparate impact' is unconstitutional unless motivated at least in part by purpose or intent to harm a protected group." (*Kim v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 1357, 1361.) For example, in the context of racial discrimination, "[a] court addressing this issue must keep in mind the fundamental principle that 'official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." (*People v. Superior Court (Williams)* (1992) 8 Cal.App.4th 688, 711, quoting *Hernandez v. New York* (1991) 500 U.S. 352, 358.)

In construing an initiative measure, what matters is the intent of the voters: "The opinion of drafters or of legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent." (*Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n* (1990) 51 Cal.4th 744, 764 fn. 10.) In construing a voter-approved initiative, "the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1990) 22 Cal.3d 208, 245-246.) Legislative opinions, on the other hand, "do not provide aid in determining the intent of the electorate" where "none of the opinions was distributed to the voters by way of the voter's

pamphlet, and [where a court] can only speculate on the extent to which the voters were cognizant of them." (*People v. Castro* (1985) 38 Cal.3d 301, 312.)

Here, plaintiffs allege no facts that would support an inference that California *voters* were motivated by animus against minor political parties when they approved Proposition 14. For reasons briefed earlier, Proposition 14 is easily explainable for reasons other than invidious discriminatory purpose. Moreover, the voter pamphlet and the measure itself do not disclose any intent to harm the unique interests of minor parties. (See RJN, Exh. 1.) Instead, the voters' ire appears to have been directed at the major parties, not the minor parties. (*Ibid.*) As a practical matter, these are the only materials available to discern the voters' intent. Plaintiffs do not allege that there are any other indicia of voter intent that would support a claim of invidious discrimination.

Plaintiffs suggest that the goal of electing more pragmatic or practical politicians must necessarily imply the additional goal of excluding minor political parties. (SAC, p. 12, ¶ 43.) But there is no reason to conclude that a third party would necessarily represent a more extreme viewpoint than those of the more established parties. A third party could compete for voters by presenting a more centrist position in contrast to the positions of other political parties. No inference of invidious discriminatory intent can be drawn from this allegation.

In the absence of supporting allegations, plaintiffs have failed to set forth any basis to find an equal protection violation under either the United States or California Constitutions. Therefore, the demurrer to this cause of action should be sustained.

III. THE DEMURRERS SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND.

A demurrer may be sustained without leave to amend "'where the facts are not in dispute, and the nature of the plaintiff's claim is clear, but, under the substantive law, no liability exists'" and "'[o]bviously no amendment would change the result.'" (*Frost v. Geernaert* (1988) 200 Cal.App.3d 1104, 1107, quoting 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 945, p. 379.)

Here, plaintiffs have shown that they cannot allege an as-applied ballot access claim or either a facial or as-applied equal protection claim. No purpose would be served by allowing

plaintiffs to further amend the complaint. Defendant therefore requests that the demurrers be sustained without leave to amend.

CONCLUSION

For the foregoing reasons, the Court is requested to sustain the demurrers to the second amended complaint without leave to amend.

Dated: March 11, 2013

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
CONSTANCE L. LELOUIS
Supervising Deputy Attorney General

MARK R. BECKINGTON
Deputy Attorney General
Attorneys for Debra Bowen, as California Secretary of State

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DECLARATION OF SERVICE BY E-MAIL and U.S. MAIL

Case Name: **Rubin, Michael, et al. v. Debra Bowen**
Case 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 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 11, 2013, I served the attached **NOTICE OF HEARING ON DEMURRER AND DEMURRER TO SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Michael Siegel
Siegel & Yee
499 14th Street, Suite 300
Oakland, CA 94612
E-mail Address: michaeljwsiegel@gmail.com
Attorneys for Plaintiffs

Marguerite Mary Leoni
Christopher E. Skinnell
Nielsen, Merksamer, Parrinello, Gross & Leoni LLP
2350 Kerner Boulevard, Suite 250
San Rafael, CA 94901
E-mail Address: mleoni@nmgovlaw.com; cskinnell@nmgovlaw.com
Attorneys for Intervener-Defendants
Independent Voter Project

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 March 11, 2013, at Los Angeles, California.

Angela Artiga
Declarant

Signature

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