



FILED
ALAMEDA COUNTY
SEP - 5 2013
CLERK OF THE SUPERIOR COURT
By _____ Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Michael Rubin, et al.,
plaintiffs,

Case No. RG11605301

vs.

Order

Debra Bowen, in her official capacity
as Secretary of State of California,
defendant.

Independent Voter Project, et al.,
Intervener-Defendants.

I. Introduction.

The case is presently before the court on demurrer to the second amended complaint. Plaintiffs request that the court enter a judgment declaring that "Prop. 14 violates the rights of minor political parties and registered members of minor political parties under the First and Fourteenth Amendments of the United States Constitution, 42 U.S.C. section 1983, and Article 1, sections 2, 3, and 7 and

1 Article IV, section 16 of the California Constitution by barring minor political
2 parties and voters registered with such parties from effective participation in
3 general elections;” and declaring that “Prop. 14 violates the rights of plaintiffs
4 under the Equal Protection Clause of the Fourteenth Amendment and the equal
5 protection rights of the California Constitution, by withdrawing established rights
6 and privileges from minor political parties, their candidates, and their supporters.
7 Prop 14 converted plaintiff minor parties into ‘second class’ parties which, unlike
8 the major political parties are denied the ability to access voters at the moment of
9 peak political participation, the statewide general election.”

10 Plaintiffs do not allege that Prop. 14, on its face or as applied creates or
11 imposes any restriction or burden on the opportunity of any candidate to
12 participate in a primary election. Rather, plaintiffs complain of restrictions
13 imposed on the general election and allege that while they “still have the
14 opportunity to participate in a primary election,” Prop. 14 as applied
15 “unconstitutionally burdened the rights of minor party voters, minor party
16 candidates, the minor parties themselves from effective participation in
17 California’s general elections, even when those parties and candidates
18 demonstrated substantial support in the primary election.

19 The First Amendment states: “Congress shall make no law respecting an
20 establishment of religion, or prohibiting the free exercise thereof; or abridging the
21 freedom of speech, or of the press; or the right of the people peaceably to
22 assemble, and to petition the government for a redress of grievances.”

23 The Fourteenth Amendment provides in part: “No state shall make or
24 enforce any law which shall abridge the privileges or immunities of citizens of the
25 United States, nor shall any state deprive any person of life, liberty, or property,

1 without due process of law; nor deny to any person within its jurisdiction the equal
2 protection of the laws.

3 The right to vote derives from the right of association that is at the core of
4 the First Amendment. Voting is of the most fundamental significance under our
5 constitutional structure and is a fundamental political right because it is
6 conservative of all other rights. The First Amendment, including the right to
7 associate and the right to vote, is made applicable to the States by reason of the
8 Fourteenth Amendment.

9 States have the right to require candidates to make “a preliminary showing
10 of substantial support” in order to qualify for a place on the general election ballot.
11 *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (and cases cited).
12 (requirement that minor-party candidate receive at least 1% of all votes cast for
13 office in state’s primary election before candidate’s name would be placed on
14 general election ballot not unconstitutional under First Amendment). And see:
15 *California Democratic Party v. Jones, supra*, at 572 (A State may require a
16 candidate to demonstrate “a significant modicum of support” before allowing that
17 candidate a place on the general election ballot.)

18 Article 2 section 5(a) of the California Constitution provides: “A voter-
19 nomination primary election shall be conducted to select the candidates for
20 congressional and state offices in California. All voters may vote at a voter-
21 nominated primary election for any candidate for congressional and state elective
22 office without regard to the political party preference disclosed by the candidate or
23 the voter, provided that the voter is otherwise qualified to vote for candidates for
24 the office in question. The candidates who are the top two vote-getters at a voter-

1 nominated primary election for a congressional or state elective office shall,
2 regardless of party preference, compete in the ensuing general election.”

3 On its face, Article 2 section 5(a) does not appear to limit the number of
4 candidates who may compete in an ensuing general election to “only two.”
5 However, the parties read Article 2 section 5(a) to restrict competition in the
6 ensuing general election to *only* the top two vote-getters.

7 In *Burdick v. Takushi (supra)* 504 U.S. 428, 434 the Court stated: “A court
8 considering a challenge to a state election law must weigh ‘the character and
9 magnitude of the asserted injury to the rights protected by the First and Fourteenth
10 Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put
11 forward by the State as justifications for the burden imposed by its rule,’ taking
12 into consideration ‘the extent to which those interests make it necessary to burden
13 the plaintiff’s rights.’” (citations omitted.) The rigorousness of our inquiry into the
14 propriety of a state election law depends upon the extent to which a challenged
15 regulation burdens First Amendment and Fourteenth Amendment rights. Thus, as
16 we have recognized when those rights are subjected to ‘severe’ restrictions, the
17 regulations must be ‘narrowly drawn to advance a state interest of compelling
18 importance.’ (citation omitted.) But when a state election law provision imposes
19 only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth
20 Amendment rights of voters, ‘the State’s important regulatory interests are
21 generally sufficient to justify’ the restrictions. (citation omitted.)”

22 **II. Procedural Background.**

23 On November 21, 2011, plaintiffs filed a verified complaint for declaratory,
24 injunctive, and other relief and named Debra Bowen in her official capacity as a
25 Secretary of State of California as defendant. The complaint asserts that Article 2,

1 section 5 of the California Constitution (referred to as the “Top Two Candidates
2 Open Primary Act” and “Prop. 14”) is unconstitutional, and purports to plead three
3 causes of action, a “First Claim For Relief: Ballot Access,” a “Second Claim For
4 Relief: Violation Of Rights To Freedom Of Speech And Association,” and a
5 “Third Claim For Relief: Elections Clause.”

6 On December 23, 2011, Secretary Bowen filed a notice of demurrer and
7 demurrer. On January 11, 2012, the Independent Voter Project, David Takashima,
8 Abel Maldonado & Californians to Defend the Open Primary (Interveners) filed a
9 complaint in intervention as intervener-defendants. See: Application and
10 Stipulation for Order Granting Intervention By Independent Voter Project, et al.,
11 as defendants; Order Granting Intervention, filed January 9, 2012; *Perry v. Brown*
12 (2011) 52 Cal. 4th 1116.

13 On January 13, 2012, plaintiffs filed a notice of motion and motion for
14 preliminary injunction. The motion was accompanied by several declarations, a
15 request for judicial notice, and a memorandum.

16 On January 25, 2012, plaintiffs filed a memorandum in opposition to the
17 demurrer of defendant Bowen and in connection with the “Ballot Access” cause of
18 action, contended: “Before the court can determine whether the ballot access
19 restrictions imposed by Proposition 14 comprise a ‘severe burden’ to associational
20 rights, the parties will need to present evidence and permit the fact-finder to
21 resolve issues of fact.”

22 Also on January 25, 2012, defendant Bowen filed a memorandum in
23 opposition to the motion for preliminary injunction together with several
24 declarations and a request for judicial notice. On the same date, interveners filed a
25 number of declarations and a request for judicial notice in opposition to plaintiffs’

1 motion for preliminary injunction; filed a notice of joinder in defendant Bowen's
2 demurrer, and a reply in support of defendant Bowens' demurrer.

3 On January 31, 2012, plaintiffs filed a reply in support of plaintiff's motion
4 for preliminary injunction and Bowen filed a reply in support of demurrer. On
5 February 4, 2012, interveners filed a request to file surreply...or to strike belated
6 reply argument.

7 On February 10, 2012, plaintiffs filed an answer to the complaint in
8 intervention.

9 On April 9, 2012, the court published a tentative ruling. On April 10, 2012,
10 the case was called for hearing and the court entertained extensive oral argument
11 after which all matters were taken under submission.

12 On April 24, 2012, the court issued orders granting interveners' application
13 for joinder in defendant Bowen demurrer and sustaining demurrers to the
14 complaint with leave to amend. By separate order issued the same date, the court
15 denied plaintiffs' motion for preliminary injunction.

16 On May 10, 2012, plaintiffs filed a first amended complaint. The first
17 amended complaint purported to plead the same three causes of action ("claims")
18 as are contained in the original complaint, but adds a "Fourth Claim For Relief:
19 Equal Protection Clause." Like the original complaint, the first amended
20 complaint is light on fact and laden with conclusion, assertion, and legal
21 argument, including citation and quotation of case authorities. See: Order on
22 Demurrers to First Amended Complaint filed January 25, 2013, 16:9-15.

23 Skipping ahead, on January 25, 2013, the court issued an order sustaining
24 demurrers to the first and fourth causes of action of the first amended complaint
25

1 with leave to amend, and sustaining demurrers to the second and third causes of
2 action of the first amended complaint without leave to amend.

3 **III. The Second Amended Complaint.**

4 On February 14, 2013, plaintiffs filed the second amended complaint
5 (hereinafter "the complaint"). The complaint purports to plead two causes of
6 action, a "First Claim For Relief: Ballot Access" and a "Second Claim For Relief:
7 Equal Protection Clause" and was filed on behalf of ten named plaintiffs.

8 Two of the plaintiffs named in the complaint identify themselves as being
9 "a statewide political party that qualified for the ballot in 2012," the phrase "the
10 ballot" apparently being a reference to the general ballot for an elective office in
11 California. One plaintiff alleges it is a geographic division of a qualified political
12 party.

13 Seven of the plaintiffs identify themselves as individuals who are members
14 of one of the plaintiff political parties and allege they regularly support and vote
15 for candidates of one such political party. Of the seven individual plaintiffs, two
16 (Charles L Hooper and C.T. Weber) allege that in 2012 they ran a campaign as a
17 candidate for state elective office in California, and two (Steve Collet and Marsha
18 Feinland) allege that in 2012 they ran a campaign as a candidate for congressional
19 elective office.

20 The complaint alleges "Plaintiffs bring this action based upon defendant
21 Bowen's implementation of Proposition 14," and asserts that, as implemented,
22 Article 2, section 5 of the California Constitution violates various provisions of
23 the California and United States constitutions.

24 As was the case with the original complaint and the first amended
25 complaint, the complaint presently before the court does not allege creation or

1 imposition of a burden or restriction on opportunity to participate in a primary
2 election. Rather, the allegation is that Prop. 14 has imposed an unconstitutional
3 burden in connection with plaintiffs participation in the statewide general election.
4 See: complaint, paragraphs 2-3, 19-37, 40, 42-44. For example, the complaint
5 alleges: “During last year’s [2012] statewide election, nine minor party
6 candidates—including plaintiff Charles L. Hooper, candidate for state assembly—
7 received 5% or more of the vote [in the primary election] but were not permitted
8 to advance to the general election.” Without naming any individual plaintiff, the
9 complaint alleges: “Dozens of minor party candidates, receiving as much as 18%
10 of the vote, were limited to participation in the June primary.” The complaint
11 alleges that in the 2012 statewide primary Green Party candidate Anthony W.
12 Vieyra received 18.6 % of the vote, alleges that Libertarian Party candidate John
13 H. Webster received 15.4 % of the vote, and alleges that plaintiff Charles L.
14 Hooper received 5.4% of the vote. The complaint alleges such candidates were
15 excluded from participation in the general election by application of Article 2,
16 section 5(a).

17 **IV. Demurrers –Second Amended Complaint.**

18 On March 11, 2013, defendant Bowen filed a notice of hearing on demurrer
19 to second amended complaint; memorandum of points and authorities. On the
20 same date, Bowen filed a request for judicial notice. Also on March 11, 2013, the
21 intervener-defendants filed a notice of demurrer and memo of points and a request
22 for judicial notice and memo of points and authorities. On May 21, 2013,
23 plaintiffs filed a memorandum of points and authorities in opposition to the
24 demurrers and a request for judicial notice. On May 28, 2013, defendant Bowen
25

1 filed a reply and a further request for judicial notice and the intervener defendants
2 filed a reply.

3 On June 7, 2013, the court published a tentative ruling. On June 10, 2013,
4 the parties appeared for hearing on the demurrers and the court entertained oral
5 argument. On June 18, 2013, the parties separately filed further papers as
6 requested by the court.

7 On June 19, 2013, the clerk of the court filed a nine page letter dated June
8 18, 2013 addressed directly to the undersigned judge by a person identifying
9 himself as an attorney for the Libertarian Party of Washington State. An objection
10 to such letter communication was filed by intervener-defendants on July 25, 2013.
11 In the meantime, on June 21, 2013, the court issued its order taking both
12 demurrers under submission.

13 **V. Discussion and Disposition.**

14 The issue before the court is one of state power. The wisdom of Article 2
15 section 5(a) is not for the court to decide. For example, the wisdom of permitting
16 access to the general election ballot to a candidate who received 0.2 % of the votes
17 cast in the primary election while excluding a candidate who received 18.6% of
18 the votes cast in a primary election is not a question for the court.

19 The demurrers filed on March 11, 2013 assert that neither of the claims
20 contained in the second amended complaint state facts sufficient to constitute a
21 cause of action. See: C.C.P. section 430.10(e). And see: Id sections 430.30-
22 430.60.

23 In addition to filing demurrers, Secretary Bowen and intervener-defendants
24 filed requests for judicial notice. However, neither demurrer states it is based upon
25 a matter of which the court may take judicial notice. Nor is any such matter

1 specified in the demurrers or in the supporting points and authorities. C.C.P.
2 section 430.70.

3 The memorandum filed by Secretary Bowen fails to cite or discuss any
4 case construing or applying C.C.P. section 430.10(e). See: CRC 3.1113(a)-(b.) On
5 the other hand, the memorandum filed by the intervener-defendants asserts the
6 demurrers must be judged under “federal pleading rules.” See: memorandum filed
7 March 11, 2013, 2:12-3:3. And see: *Bach v. County of Butte* (1983) 147 Cal. App.
8 3d 554, 560-564; *Catsouras v. Department of California Highway Patrol* (2010)
9 181 Cal. App. 4th 856, 890-891. Also see: 5 Witkin California Procedure (5th ed.
10 2008), Pleading, sections 946-948, 952-961, 980.

11 In *California Democratic Party v. Jones*, 530 U.S. 567 (2000) the Court
12 held that California’s blanket primary (Proposition 198) violated a political party’s
13 First Amendment right of association. The statement made in *Jones* “...and the
14 top two vote getters (or however many the State prescribes) then move on to the
15 general election.” appears to be dicta and is not binding on this court. More to the
16 point, the *Jones* Court did not state or suggest it was approving *all* “top two”
17 systems or *any* “only two” system.

18 In *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) the Court
19 addressed a statutory requirement that a minor-party candidate for partisan office
20 receive 1% of all votes cast for that office in the primary election before the
21 candidate’s name would be placed on the general election ballot. “The question
22 for decision is whether this [1%] statutory requirement, as applied to candidates
23 for statewide offices, violates the First and Fourteenth Amendments to the United
24 States Constitution.” *Id.* 190-191. The Court held it did not. As pertinent here, the
25 Court stated: “It can hardly be said that Washington’s voters are denied freedom

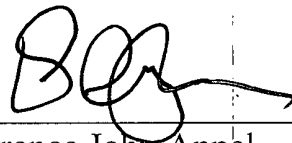
1 of association because they must channel their expressive activity into a campaign
2 at the primary as opposed to the general election.” Id. 199.

3 The court has determined that, whether the second amended complaint is
4 considered under the rules governing pleading in federal courts or the rules of
5 pleading in California courts, the demurrers to the “First Claim for Relief: Ballot
6 Access” and to the “Second Claim For Relief: Equal Protection Clause” must be
7 sustained without leave to amend. The court’s decision is made on the ground that
8 neither “First Claim for Relief: Ballot Access” nor the “Second Claim for Relief:
9 Equal Protection Clause” state facts sufficient to constitute a case of action, and is
10 based on the points recited in the papers filed by defendants in support of their
11 demurrers.

12 Among other things, the court concludes that no party—major or minor—
13 has a constitutionally guaranteed absolute right of access to an election ballot. The
14 court is further persuaded and concludes that because California affords all
15 candidates easy access to the primary election ballot and the opportunity for the
16 candidate to wage a ballot-connected campaign, the effect of Prop. 14 [Article 2
17 section 5(a)] on constitutional rights is slight and that any resulting burden or
18 restriction does not violate any constitutionally guaranteed right. Accordingly, the
19 complaint is dismissed.

20
21 **IT IS SO ORDERED.**

22 Date: September 5, 2013



24 Lawrence John Appel
25 Superior Court Judge

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA


Case Number : RG11605301
Case name: Rubin vs. Bowen

ORDER FILED ON SEPTEMBER 5, 2013

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, **ORDER FILED ON SEPTEMBER 5, 2013** was mailed first class, postage prepaid, in a sealed envelope, addressed as shown at the bottom of this document, and that the mailing of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland, California.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 5, 2013.


Executive Officer/Clerk of the Superior Court
By Ana Liza Tumonlong, Deputy Clerk

Michael Siegel, Esq.
Siegel & Yee
499 14th Street, #220
Oakland, CA 94612

Mark Beckington, Esq.
Office of the Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244

Christopher Skinnell, Esq.
Parrinello Gross & Leoni LLP
2350 Kerner Blvd., Suite 250
San Rafael, CA 94901