No. A140387

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

MICHAEL RUBIN, MARSHA FEINLAND, CHARLES L. HOOPER, C.T. WEBER, CAT WOODS, GREEN PARTY OF ALAMEDA COUNTY, LIBERTARIAN PARTY OF CALIFORNIA, and PEACE AND FREEDOM PARTY OF CALIFORNIA,

Plaintiffs and Appellants,

vs.

DEBRA BOWEN, Secretary of State of California, Defendant and Respondent, and INDEPENDENT VOTER PROJECT, *et al.*, Interveners and Respondents.

On Appeal from an Order of the Superior Court of Alameda, Case No. RG11605301

Honorable Lawrence John Appel

APPELLANTS' OPPOSITION TO INTERVENER/RESPONDENTS' MOTION TO STRIKE

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I. INTRODUCTION

Although Interveners go to considerable lengths to argue otherwise, appellants Michael Rubin, *et al.*, have not made any new arguments in their Reply. Rather, Rubin has simply argued that his equal protection claim should proceed because a reasonable inference of discriminatory intent can be made through an examination of both the face of Proposition 14 and extrinsic materials, including the historical record and the published voter information pamphlet. Because no "new argument" has been made in Rubin's reply brief, there is no need for a surreply by respondents.

Alternatively, if such a surreply is permitted, Rubin should be granted his right as appellant to the final word, and thus permitted an additional brief as well.

II. ARGUMENT

A. Rubin's Argument is that the Invidious Purpose of Proposition 14 Can Be Inferred by an Examination of the Law, the Historical Record, the Law's Predictable Impact, the Law's Actual Impact, and the Ballot Information Materials

Interveners have used their motion to strike as an additional opportunity to challenge Rubin's equal protection claim, which they argue "confuses" the difference between a

challenge to a facially-discriminatory measure and a challenge to a facially-neutral measure.[1] Rubin acknowledges that he does not maintain a typical facial equal protection challenge to Proposition 14, however. Rather, as his Second Amended Complaint states, the invidious intent behind Proposition 14 can be discerned only by examining the law in conjunction with extrinsic evidence, including historical evidence of minor party ballot access and the ballot information materials.[2] Through such an examination, a law that is arguably "facially-neutral" may be shown to be discriminatory in fact.

In Rubin's Reply, he cited Jim Crow-era precedent that establishes that ostensibly "facially neutral" laws can be deemed discriminatory in fact.[3] Thus, in the same way that a "grandfather clause" would be discriminatory when read in conjunction with the history of African/African-American slaves denied the voter franchise, Proposition 14's "top two" is discriminatory when read in conjunction with California history, in which qualified minor parties were granted access to the general election ballot. Rubin's argument is thus that Proposition 14's impact is discriminatory,

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[1] Intervener/Respondents' Motion to Strike at 3, fn. 4.
[2] *See* Appellants' Appendix at 12 (Second Amended Complaint, ¶¶ 41-43).
[3] Appellants' Reply at 22-23.

and that discriminatory intent can be inferred based upon an examination of the law, its application, and reasonable inferences regarding its intent. This argument is consistent with Rubin's claim in his Second Amended Complaint, and with his argument on appeal in his Opening Brief.

Interveners make a secondary argument, that because Rubin's equal protection argument was raised "in cursory fashion" it may be deemed waved.[4] This argument should also be rejected, however, given that Rubin's Opening Brief gave ample notice of his claim that Proposition 14's discriminatory intent may be discerned through an examination of the law in conjunction with extrinsic evidence, including historical evidence of minor party ballot access and the results of the 2012 statewide elections.[5] Rubin specifically challenged the trial court's ruling that Proposition 14 "does not on its face or in its application 'target' one group or another for disparate treatment."[6] He cited precedent establishing that, even though Proposition 14 can be read as "facially neutral," it should be deemed discriminatory, because as *Jenness* established, "Sometimes the grossest

[4] Intervener/Respondents' Motion to Strike at 4.
[5] Appellants' Opening Brief at 31-33.
[6] *Id*. at 32.

discrimination can lie in treating things that are different as though they were exactly alike."[7]

Interveners' rights will not be prejudiced by denial of their application to file an additional brief. Through Rubin's Opening Brief and Appendix, they received ample notice of the basis for Rubin's equal protection claim.

B. If Respondents' Are Permitted to File an Additional Brief, Rubin Should Be Granted the Same Privilege

Rubin, as appellant, has the right to submit the "last word" in regards to his appeal, prior to oral argument. To the extent that the Court finds that respondents may file an additional brief, he requests the same courtesy.

III. CONCLUSION

Rubin's equal protection claim is based upon the argument that the language of Proposition 14, although "facially neutral" in some respects, is in fact discriminatory when read in conjunction with extrinsic evidence, including the historical right of general election ballot access of California's qualified minor political parties as well as the actual results of 2012 statewide elections. Although Interveners argue that Rubin raised new arguments in

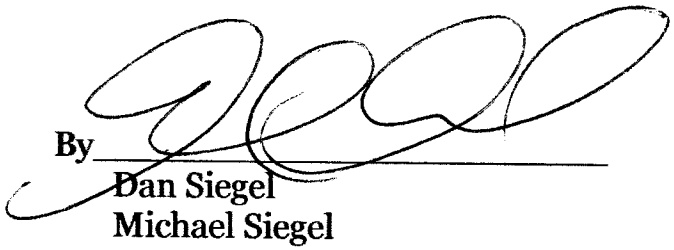
[7] *Id*.

his Reply, this argument is without basis, and no surreply is warranted.

Alternatively, if the Court grants respondents' the right to file additional briefs, Rubin requests the same courtesy.

Respectfully submitted,

SIEGEL & YEE



By_____
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PROOF OF SERVICE

I, MICAH CLATTERBAUGH, declare as follows:

I am over eighteen years of age and a citizen of the State of California. I am not a party to the within action. My business address is 499 14th Street, Suite 300, Oakland, CA, 94612, and my electronic service address is micah@siegelyee.com.

On August 18, 2014. at 5:30 pm, I electronically served copies of:

1. **APPELLANTS' OPPOSITION TO INTERVENER/ RESPONDENTS' MOTION TO STRIKE**

on the parties in this action by filing the documents with the First District Court of Appeal's electronic filing system pursuant to Rule 8.71(f) and First District Court of Appeal Local Rule 16(j). The electronic service addresses for the parties are:

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And an electronic copy sent via the First District Court of Appeal's electronic filing system, pursuant to Rule 8.212(c)(2), to:

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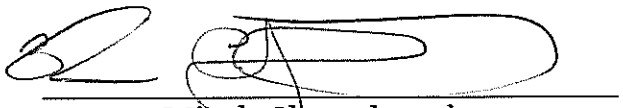
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 18, 2014, at Oakland, California.



Micah Clatterbaugh