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ENDORSED
FILED
ALAMEDA COUNTY
MAY 2 1 2013
CLERK OF THE SUPERIOR COURT
By Angela Yamsuan

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: June 4, 2013
Time: 9:00 a.m.
Department: 16

Assigned for all Purposes to
Hon. Lawrence John Appel

Suit filed: November 21, 2011
Trial date: February 18, 2014

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I. SUMMARY

In their Second Amended Complaint, plaintiffs Michael Rubin, *et al.* ("Rubin"), have alleged that defendant Secretary of State Debra Bowen ("Bowen") violated their rights of political association, expression, and equal protection when, in 2012, she implemented California's Proposition 14 and prevented well-established candidates from minor political parties from accessing the statewide general election ballot. Bowen and intervener-defendants Abel Maldonado, *et al.* ("Maldonado"), have now filed their third demurrer in this action. Because Rubin has pled facts establishing his right to seek a preliminary injunction against Proposition 14, the demurrers should be overruled.

Rubin's first cause of action is for denial of ballot access in violation of the First Amendment. During the 2012 primary election, numerous candidates from minor political parties garnered the constitutionally-defined "modicum of support," but were nonetheless denied access to the general election ballot. Bowen and Maldonado argue that the decisions in *Washington* and *Washington II* should bar a ballot access claim. Their arguments are misplaced, however, because the 2012 California "top two" elections are factually distinguishable from the elections litigated in the Washington State cases, and as Rubin has pled, access to California's June 2012 primary election was not an adequate substitute for access to the November 2012 general election. Because Rubin has pled facts that would establish that Bowen's 2012 implementation of Proposition 14 placed a substantial burden on ballot access for minor party candidates and voters, the demurrers should be overruled.

Rubin's second cause of action is for violation of equal protection. This claim is based upon the impact of Proposition 14: namely, the withdrawal of long-established minor political party access to the California general election ballot. Bowen and

Maldonado argue that Rubin cannot state an equal protection challenge, because Rubin cannot show that the voters acted with invidious purpose. Their arguments should fail, however, because there is evidence that both the author of Proposition 14 and the voters themselves were aware that Proposition 14 would result in minor party candidates and supporters losing their access to the general election ballot; yet the voters ratified this discriminatory measure anyway. Furthermore, because Bowen's 2012 implementation of Proposition 14 resulted in the almost complete elimination of ballot access for minor political party candidates and their supporters, it is reasonable to infer that voters and drafters achieved their desired result.

Thus, the demurrers should be overruled and Rubin's claims put to trial.

II. STATEMENT OF FACTS

A. The California Legislature, Led by Senator Maldonado, Placed Prop. 14 Before Voters Without Any Public Debate

California Senator Abel Maldonado initiated the implementation of Proposition 14 when, on February 18, 2009, his "Senate Bill 6" was withdrawn from the Senate Committee on Environmental Quality. ("SB 6 Senate Bill – History," Plaintiffs' Request for Judicial Notice, Ex. A.) At the time, Senate Bill 6 ("SB6") was "an act to repeal and add Section 25214.8 of the Health and Safety Code, relating to hazardous waste." ("Senate Bill No. 6," *Id.* at Ex. B. (introduced on December 1, 2008).

The next day, February 19, 2009, the Senate waived the requirements of Article IV, Section 8(b) of the California Constitution, which sets a procedure for the reading of a proposed bill over several days of public session. SB6—still a "hazardous waste" bill—was then read twice. (*Id.* at Ex. A.)

After the third reading of Sen. Maldonado's hazardous waste law, SB6 was amended. (*Id.*) This amendment was a complete transformation: the bill became a comprehensive reform of the California Election Code that would be put before the voters in June 2010 as Proposition 14. ("Senate Bill No. 6, Amended in Senate February 19, 2009," *Id.* at Ex. C.)

After the amendment, the Senate suspended Rule 29.3, which requires amendments to be heard over multiple days. The amended SB6 was read once and then passed by the Senate. (*Id.* at Ex. A.)

Later that same day, the Assembly also waived the requirements of Article IV, Section 8 of the California Constitution, and passed the bill. (*Id.*)

The Governor approved the bill the next day, February 20, 2009. (*Id.*)

B. The Ballot Pamphlet Warned that Proposition 14 Would Exclude Minor Political Parties from the General Election, But Voters Still Approved the Change

When Proposition 14 was presented to the voters in June 2010, the official ballot pamphlet warned voters that the law would burden minor political parties. Voters were told that, "Voter choice will be reduced because the top two vote getters advance to the general election regardless of political party." ("Voter Information Guide," Interveners' Request for Judicial Notice, Ex. F, at 19.) And more directly, voters were warned, "Independent and smaller political parties like Greens and Libertarians will be forced off the ballot, further reducing choice." (*Id.*)

C. In 2012, Prop. 14 Disproportionately Harmed Minor Political Parties, While Leaving the Major Parties Unscathed

In June 2012, out of over 150 races that were governed by the Proposition 14, "top two" electoral reform, only three minor party candidates advanced to the general

election. ("June 5, 2012 Presidential Primary Election – Statement of Vote," Plaintiff's Request for Judicial Notice, Ex. D; "November 6, 2012 General Election – Statement of Vote," Plaintiff's Request for Judicial Notice, Ex. E.) Thus, in 98% of the elections, candidates from major parties filled both places on the general election ticket; and in the other 2%, the major parties claimed one out of two places.

Numerous minor party candidates garnered substantial support in races for major state and federal political offices. Nine candidates from the Green, Peace and Freedom, and Libertarian parties received more than 5% of the vote. But none of those nine were permitted to advance to the general election ballot. (SAC ¶27.)

Among the minor party candidates for United States Senator, Gail K. Lightfoot of the Libertarian Party garnered 2.1% of the vote, and was the leading vote-getter from her party. Plaintiff Marsha Feinland of the Peace and Freedom Party garnered 1.2% of the vote, and was the leading vote-getter from her party. Neither candidate was permitted to advance to the general election ballot. (SAC ¶28.)

Among the minor party candidates for various open seats for United States Representative, several garnered substantial support. In District 33, plaintiff Steve Collett (Libertarian) earned 4.3% of the vote. Anthony W. Vieyra (Green) was the leading minor party vote-getter in 2012, earning 18.6% of the vote in District 35. Yet neither Vieyra nor any of the other minor party candidates for U.S. Representative were permitted to advance to the general election. (SAC ¶29.)

Among the minor party candidates for State Senator, John H. Webster (Libertarian) earned 15.4% of the vote in District 13, but was denied access to the general election ballot. (SAC ¶30.) Several minor party candidates for State Assembly also garnered substantial support, but were denied access to the general election ballot.

These include plaintiff Charley Hooper (Libertarian), who earned 5.4% of the vote in District 1, and plaintiff C. T. Weber (Peace and Freedom), who earned 3.0% of the vote in District 9. (SAC ¶31.)

III. STANDARD OF REVIEW

For the purposes of a demurrer to a section 1983 complaint, the allegations of the complaint are generally taken as true. *Catsouras v. Dept. of Cal. Hwy Patrol* (App. 4 Dist. 2010) 181 Cal.App.4th 856, 891. An action may be dismissed for failure to state a claim "only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* Although conclusory pleadings do not meet plaintiff's burden, a demurrer should be overruled if plaintiff states "some particularized facts" demonstrating a constitutional deprivation." *Id.*

IV. ARGUMENT

A. The California "Top Two" Places a Substantial Burden on Ballot Access and Does Not Fulfill a Compelling Government Interest

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. Here, defendants and intervener-defendants rely upon the Ninth Circuit's decision in *Washington II* (*Washington State Republican Party v. Washington State Grange* (9th Cir. 2012) 676 F.3d 784), for the proposition that California's "top two" does not impose a substantial burden on plaintiffs. (*See, e.g.* Defendant's Demurrer at 9-11 (*Washington II* "constru[ed] a Washington top two system that is similar to the California system"); Intervener-Defendant's Demurrer at 3-7 "In *Washington II*, the Ninth Circuit squarely rejected an identical claim"). Despite their reliance on this precedent, however,

Washington II is distinguishable, and the precedent decision of *Anderson* (*Anderson v. Celebrezze* (1983) 460 U.S. 780), in fact, should govern. For these reasons, as described below, the demurrers should be overruled.

Washington II has limited reach to California's "top two" system because of the facts of that case. *Washington II* was primarily a "voter confusion" case: the plaintiffs argued that the Washington State "top two" system, as implemented in 2008, confused voters who would think that a candidate-designated "party preference" represented the actual endorsement of a political party. *Washington II, supra*, 676 F.3d at 787-793. The *Washington II* plaintiffs did make a claim for denial of ballot access, as Rubin does here, but the issue of voter participation was not developed on appeal. For example, the Ninth Circuit made no reference to actual voter participation; the Court did not mention any difference in voter turnout between the primary and general elections. *Id.* at 793-795.

The Libertarian Party challenging the 2008 Washington State "top two" system relied upon *Anderson*, in the Supreme Court overturned a March filing deadline for independent presidential candidates:

> The Court held that the 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. *Washington II, supra,* 676 F.3d at 794 (citing *Anderson, supra,* 460 U.S. at 786, 790-92).

The Ninth Circuit in *Washington II* acknowledged that *Anderson* was good law and that the Washington "top two" posed "some of these same concerns." *Washington II*, 676 F.3d at 794. The Court then proceeded to distinguish the Washington State "top two" from the *Anderson* early filing deadline, relying upon only two factual distinctions. First, the Court stated, the Washington "top two" primary "is in August, not March," as in

Anderson. *Id.* Second, unlike the system challenged in *Anderson*, the Court stated that in Washington State "the Libertarian Party participates in the primary at the same time, and on the same terms, as major party candidates." *Id.* "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 parties do." *Id.*

Thus, the Ninth Circuit in *Washington* only used two factual distinctions to distinguish the case from the *Anderson* precedent – and both of those distinctions relied upon the fact that only three months separate the Washington primary and general elections.

Here, the California primary is in June, a full five months before the general election. Even though minor parties and major parties alike have access to the primary election, it is not fair to say that, in the context of this "as applied" challenge, California minor party candidates in 2012 had " an opportunity to appeal to voters at a time when election interest is near its peak." *Washington II*, 676 F.3d at 794. As the California Secretary of State described in her 2012 Statements of the Vote, less than half as many voters participated in the June primary election, as compared to the November general election. (Plaintiffs' Request for Judicial Notice, Ex. D, at 3 (5,328,296 total voters in June) and Ex. E, at 3 (13,202,158 voters in November). Because the facts the Ninth Circuit used to distinguish the Washington State electoral system from *Anderson* are not applicable here in California, *Washington II* does not create binding precedent, and the rule of *Anderson* should apply.

In *Anderson*, the Supreme Court emphasized that laws that impact political candidates also impact the voters:

> Our primary concern is with the tendency of ballot access restrictions to limit the field of candidates from which voters might choose. Therefore, in approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters. *Anderson, supra*, 460 U.S. 780, 786.

The Court also noted that, "The right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are clamoring for a place on the ballot." *Anderson, supra*, 460 U.S. at 787.

The *Anderson* Court in turn cited the watershed opinion in *Williams v. Rhodes* (1968) 393 U.S. 23, 31. In *Williams*, the Court criticized the hegemony of the two major parties in Ohio State:

> [T]he Ohio system does not merely favor a 'two-party system'; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. *Williams, supra*, 393 U.S. at 32.

The *Williams* Court then proceeded to strike down a system of laws that prevented minor political parties from appearing on the general election ballot. *Id.* at 34-35.

After the *Anderson* Court established (via *Williams* and other precedent) its primary interest in promoting voter access to diverse political views, it then proceeded to outline the process by which a trial court should separate valid from invalid ballot access restrictions:

> [A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all

> these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. *Anderson, supra,* 460 U.S. at 789 (citing *Williams, supra,* 393 U.S. at 30-31).

Here, the trial court has begun the analytical process that *Anderson* suggested, as evidenced by the January 25, 2013, Order on Demurrers to First Amended Complaint, which preceded the now-challenged Second Amended Complaint ("SAC") filed by plaintiffs on February 14, 2013. In particular, the trial court referred to *Munro* and *Jenness* for the proposition that a measure may violate the Constitution if it denies access to minor party candidates that receive a "modicum of support." (*See* Order at 5.) In *Jenness*, the Supreme Court permitted a 5% threshold for access to the general election ballot in Georgia; in *Munro*, the Court permitted a 1% threshold in Washington State. *Jenness v. Fortson* (1971) 403 U.S. 431, 442; *Munro v. Socialist Workers Party* (1986) 479 U.S. 189, 191-192.

In response to the trial court's order, Rubin alleges in the SAC that in 2012 at least seventeen minor party candidates received at least 2.0% of the popular vote during the primary elections, but none of these candidates were permitted to advance to the general election ballot. (SAC ¶¶ 26-31.) Additionally, nine candidates from minor political parties received more than 5.0% of the vote, but none of these nine were permitted to advance to the general election ballot. (SAC ¶27.)

Furthermore, to distinguish the 2012 California "top two" election from the Washington State election at issue in *Washington II*, Rubin alleges that because the primary election was held five months before the primary, participation in the primary was an inadequate substitute for participation in the general election, as further evidenced by the fact that 248% more voters participated in the 2012 California general election as compared to the primary. (SAC ¶¶ 32-33.)

Rubin has thus described how Proposition 14 imposed a substantial burden on plaintiffs' protected interests, and this Court should proceed to evaluate the asserted government interests, and the extent to which those interests "make it necessary to burden" plaintiffs' rights. *See Anderson, supra*, 460 U.S. at 789. Neither Bowen nor Maldonado argues that the State of California has a compelling interest in preventing minor party candidates from accessing the general election ballot, however. Because no such reason exists, and because plaintiffs have suffered serious injury to constitutionally-protected rights based upon Bowen's implementation of Proposition 14, Rubin has stated a claim and must be allowed a hearing on the merits. The pending demurrers should be overruled.

B. Proposition 14 Targets Minor Political Parties in Order to Fulfill an Invidious Purpose: the Narrowing of Political Debate

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. Even if a law challenged under the Equal Protection Clause is facially neutral, a trial court should nonetheless subject the law to higher scrutiny if "invidious discriminatory purpose was a motivating factor" in the decision. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.* (1977) 429 U.S 252, 265-66. A court may infer the existence of discriminatory intent if a law imposes disproportionate sanctions on a particular protected class. *Valle Del Sol Inc. v. Whiting* (9th Cir. 2013) 708 F.3d 808, 819.

In *Valle Del Sol*, the Ninth Circuit permitted an inference of discriminatory intent against the drafters of Senate Bill 1070, an Arizona law that, among other provisions, targeted day laborers for particular traffic violations. *Valle Del Sol, supra*, 708 F.3d at

819. The Court held that, "The imposition of a much harsher penalty for those who block traffic while engaging in labor solicitation speech"—as compared to those who dangerously or recklessly block traffic and are subject to a lesser penalty—"evidences the desire to suppress such speech." *Id.*

The *Valle Del Sol* ruling rested on a previous Ninth Circuit decision in *Moss v. U.S. Secret Service* (9th Cir. 2012) 675 F.3d 1213, 1224-25, in which the Court held that differential treatment supports an inference of viewpoint discrimination.[1] In *Moss*, plaintiffs were protesters against President George W. Bush, who alleged that the U.S. Secret Service subjected them to disparate treatment by moving them further from the President's location, as compared to pro-Bush demonstrators. The Court upheld the disparate treatment claim against a motion to dismiss, finding that the anti-Bush protesters had pled "nonconclusory factual allegations that they were treated differently than the pro-Bush demonstrators," and that the allegations, taken together, were sufficient to permit an inference that the Secret Service had acted with discriminatory intent. *Moss, supra*, 675 F.3d at 1227.

Here, Rubin pleads that prior to California's implementation of Proposition 14, candidates could participate in party-specific primary elections and that the top vote-getter from each political party was permitted to participate in a November general election. (SAC ¶6.) After the adoption of Proposition 14, in 98% of the affected elections,

[1] *Valle Del Sol* and *Moss* were both cases brought under the First Amendment, as opposed to the Equal Protection Clause, but their analysis regarding the factual basis for making an inference of viewpoint discrimination should still hold. The Equal Protection Clause also protects against viewpoint discrimination. *See Police Dept. of the City of Chicago v. Mosley* (1972) 408 U.S. 92, 96 (the Equal Protection Clause is violated when the government grants the use of a forum to speakers whose views it finds acceptable, but denies access to those wishing to express disfavored or more controversial views).

only candidates from the two major parties were able to participate in the general election. (SAC ¶26.) And even in the remaining 2% of the elections, the minor party candidate gained access to the general election only after one of the major parties declined to put forward a candidate. (SAC ¶26, fn. 1.)

Thus, by these pleadings, Rubin has established that candidates and supporters of minor political parties have been singled out for extraordinary sanction, as compared to the major political parties, and that a reasonable court could draw the inference that they have been subject to invidious discrimination.

Bowen and Maldonado make an issue regarding the Second Amended Complaint, based on the fact that the California voters approved Proposition 14 and thus, they claim, the intent of the drafter(s) is less relevant. This argument does not defeat Rubin's equal protection claim.

As described above, the official ballot pamphlet advised voters that the law would burden minor political parties. Voters were told that, "Voter choice will be reduced because the top two vote getters advance to the general election regardless of political party." ("Voter Information Guide," Interveners' Request for Judicial Notice, Ex. F, at 19.) And more directly, voters were warned, "Independent and smaller political parties like Greens and Libertarians will be forced off the ballot, further reducing choice." (*Id.*) Because voters had notice of the likely impact of Proposition 14, and because a majority of them supported Proposition 14 despite this likely impact, it is reasonable to make an inference of the voters' viewpoint discrimination against minor parties, their candidates, and supporters.

Furthermore, it should be noted that intervener-defendant Maldonado utilized an extraordinary legislative process to avoid public scrutiny of Proposition 14. Then-

Senator Maldonado protected Proposition 14 supporters from the rigorous process of a petition drive and instead convinced the California Legislature (as part of a massive budget compromise) to place the measure directly on the ballot. Maldonado accomplished all of this with the least possible "sunshine" of the law itself: he salvaged a "hazardous waste" act on February 18, 2009, turned it into a Proposition 14 bill, and mediated a suspension of all public debate before the bill was signed into law by the Governor less than two days later. Although no rule of law permits an inference of discrimination based upon the lack of legislative history, surely Senator Maldonado has "unclean hands," as he now relies upon a deficiency of public comment that he himself contrived to seek dismissal of an equal protection challenge.

C. 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").

V. CONCLUSION

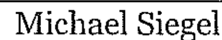
As described above, Rubin has stated a ballot access claim by pleading that in 2012 Bowen denied access to the general election ballot to well-supported minor party candidates and thus unconstitutionally burdened protected First Amendment rights. *Washington II* does not bar Rubin's ballot access claim because the Washington State "top two" is factually distinguishable from the California system.

Additionally, Rubin stated an equal protection claim by pleading that Proposition 14 has singularly burdened minor party candidates by withdrawing their established right to participate in the general election. Despite Bowen and Maldonado's arguments that "all parties were treated equally," only minor political party candidates and supporters have suffered the grievous injury of lost access to the general election. Additionally, California voters were advised in the official ballot pamphlet that Proposition 14 would likely result in the denial of minor party ballot access, but they nevertheless approved the measure.

For these reasons, Rubin has stated claims under the First and Fourteenth Amendments of the United States Constitution, and the demurrers should be overruled.

Dated: May 21, 2013

SIEGEL & YEE



Michael Siegel

Attorneys for Plaintiffs
MICHAEL RUBIN, *et al.*

PROOF OF SERVICE

I, MICHAEL SIEGEL, 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.

On May 21, 2013, I served copies of the following documents:

1. **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRERS OF DEFENDANT AND INTERVENER-DEFENDANTS**

2. **PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO DEMURRERS OF DEFENDANT AND INTERVENER-DEFENDANTS**

on the parties to this action by mailing the documents by U.S. Mail to the offices of the attorneys for defendant and the defendant-interveners, respectively:

Kari Krogseng
Deputy Attorney General
1300 I Street
Sacramento, CA 95814

Christopher Skinnell
Nielsen Merksamer Parrinello Gross & Leoni
2350 Kerner Boulevard, Suite 250
San Rafael, CA 94901

I declare under penalty of perjury that the foregoing is true and correct. Executed May 21, 2013, at Oakland, California.

Michael Siegel