SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

Michael Rubin, et al.,
plaintiffs,

vs.

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

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

Case No. RG11605301

ORDER
[Amended-Corrected]

I. Introduction.

This case challenges the constitutionality of Article 2, section 5(a) of the California Constitution ("Top Two Candidates Open Primary Act" or "Prop. 14") and is presently before the court on demurrers to the second amended complaint (the "SAC").

Plaintiffs jointly 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 Article IV, section 16 of the California Constitution by barring minor political parties and voters registered with such parties from effective participation in general elections;" and declaring that "Prop. 14 violates the rights of plaintiffs under the Equal Protection Clause of the Fourteenth Amendment and the equal protection rights of the California Constitution, by withdrawing established rights and privileges from minor political parties, their candidates, and their supporters. Prop 14 converted plaintiff minor parties into 'second class' parties which, unlike the major political parties are denied the ability to access voters at the moment of peak political participation, the statewide general election." (SAC, Prayer for Relief, ¶¶ 1(a) and 1(b).)

II. Pertinent Law-Selected.

As background, the court sets forth the various constitutional provisions cited in the SAC. Article 2, section 5(a) provides: "A voter-nomination primary election shall be conducted to select the candidates for congressional and state offices in California. All 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. 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."

The First Amendment to the Constitution of the United States of America states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourteenth Amendment provides in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, section 2 of the Constitution of the State of California provides in part: "(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

Article 1, section 3 of the Constitution of the State of California provides: "The people have the right to instruct their representatives, petition for the redress of grievances, and assemble freely to consult for the common good."

Article 1, section 7 of the Constitution of the State of California provides in part: "(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws... (b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked."

Article IV, section 16 of the Constitution of the State of California provides: "(a) All laws of a general nature have uniform operation. (b) A local or special statute is invalid in any case if a general statute can be made applicable."

III. Procedural Background.

On November 21, 2011, plaintiffs filed a verified complaint for declaratory, injunctive, and other relief and named Debra Bowen in her official capacity as Secretary of State of California (the "Secretary") as defendant. The complaint asserts that Article 2, section 5 of the California Constitution (referred to as the "Top Two Candidates Open Primary Act" and "Prop. 14") is unconstitutional, and purports to plead three causes of action: a "First Claim For Relief: Ballot Access," a "Second Claim For Relief: Violation Of Rights To Freedom Of Speech And Association," and a "Third Claim For Relief: Elections Clause."

While the initial complaint employs the phrase "by implementing an electoral process," and makes passing reference to Elections Code sections 2150, 1930 and 5100 et seq., the complaint centers on the alleged unconstitutionality of Article 2, section 5(a) without reference to any statute or other law. The complaint does not allege the creation or imposition of any burden or restriction on candidate access to the ballot for primary elections or on the ability of voters to cast their vote for the candidates of their choice at primary elections. Rather, the complaint focuses on the general ballot and alleges: "[I]n June 2010, California voters approved Proposition 14, an electoral scheme which prevents general election voters from selecting their candidate of choice. Under Proposition 14, voters in a general election may select from only two candidates for most political offices." (Complaint, ¶ 1; see also id., ¶¶ 21-22, 25.)

On January 11, 2012, the Independent Voter Project, David Takashima, Abel Maldonado & Californians to Defend the Open Primary ("Interveners") filed a complaint in intervention, stating that they intervene "as defendants, and do hereby seek an order of this Court denying any relief to Plaintiffs." (Signed Complaint In Intervention, ¶ 1.) The complaint in intervention makes specific reference to the complaint filed on November 11, 2011, and alleges: "Plaintiffs seek[] an order enjoining Defendant Secretary of State from implementing and enforcing Proposition 14, California's new Top Two Candidate Open Primary law, and S.B. 6, a statutory scheme enacted by the California Legislature on February 19, 2009 to implement Proposition 14." (*Id.*, ¶¶ 2, 6, 8 and 10.) It is not at all clear to the court that the original complaint filed by plaintiffs challenged "S.B. 6," and the SAC does not do so. On February 10, 2012, plaintiffs filed an answer and thereby generally denied each and every allegation of the complaint in intervention.

On April 24, 2012, the court issued and served orders granting interveners' application for joinder in the Secretary's demurrer and sustaining demurrers to the initial complaint. Based on the record before it, leave to amend was granted. For example, with regard to the first cause of action (ballot access) the court granted leave to amend "to plead facts sufficient to state a cognizable cause of action challenging the Proposition 14 ("Prop 14") laws based on the United States Constitution, Amendments 1 and 14, and/or the California Constitution, Article 1, sections 2 and 3, based on a restriction to access to the ballot or otherwise." (*See* Order Demurrer to Complaint Sustained, April 24, 2013.) By separate order issued the same date, the court denied plaintiffs' motion for preliminary injunction.

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

On January 25, 2013, the court issued and filed an order sustaining demurrers to the first cause of action (ballot access) and the fourth cause of action (equal protection clause) of the first amended complaint with leave to amend, and sustaining demurrers to the second cause of action (freedom of speech and association) and the third cause of action (elections clause) of the first amended complaint without leave to amend. With regard to the first cause of action, the court granted leave to amend to seek to state an "as applied" challenge to Proposition 14. (Order, 8:19-10:2.)

IV. The Second Amended Complaint.

On February 14, 2013, plaintiffs filed the second amended complaint (sometimes referred to as the "SAC"). The SAC is filed on behalf of ten named plaintiffs and purports to plead two causes of action, a "First Claim For Relief: Ballot Access" and a "Second Claim For Relief: Equal Protection Clause."

Two of the plaintiffs named in the SAC identify themselves as being "a statewide political party that qualified for the ballot in 2012," the phrase "the ballot" apparently being a reference to the general ballot for an elective office in California. One plaintiff alleges it is a geographic division of a qualified political party. (*Id.*, ¶¶ 14-15.)

Seven of the plaintiffs identify themselves as individuals who are members of one of the plaintiff political parties and allege they regularly support and vote for candidates of one such political party. (*Id.*, ¶¶ 7-13.) Of the seven individual plaintiffs, two (Charles L. Hooper and C.T. Weber) allege that in 2012 they ran a campaign as a candidate for state elective office in California, and two (Steve Collett and Marsha Feinland) allege that in 2012 they ran a campaign as a candidate for congressional elective office. (*Id.*, ¶¶ 8-10 and 12.)

The second amended complaint alleges "Plaintiffs bring this action based upon defendant Bowen's implementation of Proposition 14," and asserts that, as implemented, Article 2, section 5 of the California Constitution violates various provisions of the California and United States constitutions. In a nutshell, plaintiffs complain that defendant Bowen's implementation of Prop. 14 prevented minor political parties, minor party voters, and minor party candidates from participating in the November 6, 2012 statewide *general* election, despite the fact that many minor party candidates received substantial voter support in the June 5, 2012 *primary* election." (*Id.*, ¶¶ 1-3.)

As was the case with the original complaint and the first amended complaint, the second amended complaint does not allege creation or imposition of a burden or restriction on opportunity to participate in a primary election. Rather, the allegation is that Prop. 14 has imposed an unconstitutional burden in connection with plaintiffs' participation in the statewide general election. (*See id.*, ¶¶ 2-3, 19-37, 40, 42-44.)

In support of their allegation that many minor party candidates received substantial voter support in the 2012 primary election, plaintiffs allege: "During last year's [2012] statewide election, nine minor party candidates – including

plaintiff Charles L. Hooper, candidate for state assembly – received 5% or more of the vote [in the primary election] but were not permitted to advance to the general election." (*Id.*, ¶ 2.) The SAC alleges: "Dozens of minor party candidates, receiving as much as 18% of the vote, were limited to participation in the June primary." (*Id.*, ¶ 3.) The SAC alleges that in the 2012 statewide primary Green Party candidate Anthony W. Vieyra received 18.6% of the vote, alleges that Libertarian Party candidate John H. Webster received 15.4% of the vote, and alleges that plaintiff Charles L. Hooper received 5.4% of the vote. (*Id.*, ¶¶ 29-31.)

V. Demurrers –Second Amended Complaint.

On March 11, 2013, the Secretary filed a demurrer to second amended complaint and memorandum of points and authorities. On the same date, the Secretary filed a request for judicial notice. Also on March 11, 2013, the Interveners filed a demurrer and memorandum of points and authorities and a request for judicial notice. On May 21, 2013, plaintiffs filed a memorandum of points and authorities in opposition to the demurrers and a request for judicial notice. On May 28, 2013, the Secretary filed a reply and a further request for judicial notice and Interveners filed a reply and supplemental request for judicial notice.

The aforementioned requests for judicial notice, all of which are unopposed, are GRANTED. (*See* Evid. Code § 452, subds. (c), (d) and (h), and Evid. Code § 453.) Nevertheless, the court does not take judicial notice of the truth of factual matters asserted in the attached exhibits. For example, as to Interveners' supplemental request filed on May 28, 2013, the court takes judicial notice of the reporting of certain statements purportedly made and published in connection with the debate on Prop. 14 but does not take judicial notice of the truth of such

statements. Also, the court notes some matters subject to the requests are of marginal relevance to the issues presently before the court

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

On June 19, 2013, the clerk of the court filed a nine-page letter dated June 18, 2013 addressed directly to the undersigned judge by a person identifying himself as an attorney for the Libertarian Party of Washington State. Interveners filed an objection to that letter communication on July 25, 2013, which objection is SUSTAINED. The court did not grant leave for the submission of such additional communication by a purported "amicus."

On June 21, 2013, the court issued an order taking both demurrers under submission. On September 5, 2013, the court issued an order which order is amended by the instant order.

VI. Discussion and Disposition.

1. Standards on Demurrer.

The demurrers filed on March 11, 2013 assert that neither of the claims contained in the second amended complaint states facts sufficient to constitute a cause of action. (*See* C.C.P. § 430.10(e); *see also* C.C.P. §§ 430.30-430.60.)

Interveners cite authority to the effect that the court "should apply federal law to determine whether a complaint pleads a cause of action under section 1983 sufficient to survive a general demurrer." (*See* Memo., p. 2, citing *Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 891,

quoting *Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 563). Plaintiffs do not dispute the applicability of such authority. (Opp., p. 5.)

Accordingly, the court has considered the demurrers in light of federal pleading standards, which are not fundamentally different from state pleading standards, including that "the allegations of the complaint are generally taken as true," and that a demurrer may be sustained "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." (*Catsouras, supra*, 181 Cal.App.4th at p. 891.) "Furthermore, a pleading is insufficient to state a claim ... if the allegations are mere conclusions," and "[s]ome particularized facts demonstrating a constitutional deprivation are needed to sustain a cause of action...." (*Id.*) Nevertheless, as discussed below, the court's determination would be the same regardless of whether state pleading standards are applied.

2. Voting Rights and Standard Governing Election Law Challenges.

"Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections...The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." (*Reynolds v. Sims*, 377 U.S. 533, 554-555 (1964).) And see: (*William v. Rhodes*, 393 U.S. 23, 29-31, 38-39 (1968); (Sto*rer v. Brown*, 415 U.S. 724 (1974)

"The right of suffrage, everywhere recognized as one of the fundamental attributes of our form of government, is guaranteed and secured by the Constitution of this state to all citizens who are within the requirements therein provided.... This constitutional right of the individual citizen includes the right to

vote ... at primary elections." (*Communist Party v. Peek* (1942) 20 Cal.2d 536, 542; *see also* Cal. Const. Art. 2, §§ 2 and 5; Elections Code § 2000.)

In *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), the Court stated: "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.'" (*Id.* [citations omitted.]) "The rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First Amendment and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulations must be 'narrowly drawn to advance a state interest of compelling importance.' [Citation.] 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." (*Id.* [citation omitted]; *see, e.g., Williams v. Rhodes*, *supra*, 393 U.S. at pp. 30-31; *Storer v. Brown*, 415 U.S. 724 (1974); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-196 (1986); *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 174.)

3. Ballot Access.

Plaintiffs do not allege that, on its face or as applied, Prop.14 imposes any restriction or burden on the opportunity of any candidate or voter to participate in a *primary* election. Plaintiffs do not (and cannot) dispute that Article 2, section 5(a) provides all candidates with easy and equal access to the primary election

ballot, and provides all voters with the same opportunity to vote for the primary election candidate(s) of their choice. Rather, plaintiffs allege that, while they "still have the opportunity to participate in a primary election," Prop. 14 as applied "unconstitutionally burdened the rights of minor party voters, minor party candidates, 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, ¶ 40 [italics supplied.]) Plaintiffs' allegations that certain minor-party candidates received more than 5% and as much as 18.6% of the primary election votes cast for particular offices and yet did not qualify for the general election ballot are insufficient to set forth a constitutionally cognizable burden on ballot access.

It is well settled that States have the right to require candidates to make "a preliminary showing of substantial support" in order to qualify for a place on the general election ballot. (*Munro, supra,* 479 U.S. at p. 194, and cases cited; *see also California Democratic Party v. Jones,* 530 U.S. 567, 572 (2000) ["in order to avoid burdening the general election ballot with frivolous candidacies, a State may require parties to demonstrate 'a significant modicum of support' before allowing their candidates a place on that ballot"].)

Under California law, the purpose of a primary election is to provide the machinery for the selection of candidates to be voted for in the ensuing general election. (*Cummings v. Stanley* (2009) 177 Cal. App. 4th 493, 510.) As observed by the Supreme Court: "[I]t is now clear that States may condition access to the general election ballot by a minor party candidate or independent candidate upon a showing of a modicum of support among the potential voters for the office." (*Munro, supra,* 479 U.S. at pp. 193-194.) But it does not follow that any and every

candidate who receives some percentage of the votes cast in a given primary election thereby obtains a constitutional right to compete in the ensuing general election. Plaintiffs cite no law expressing or supporting such a right. In any event, Article 2, section 5(a) does not restrict access to the general election ballot based on a specified percentage of votes cast in the primary election but instead allows the top two primary election vote-getters, with any percentage of votes, to advance to the general election.

In *Munro, supra,* 479 U.S. 189, the Supreme Court addressed a state statute which required that a minor-party candidate for partisan office receive 1% of all votes cast for that office in the primary election before the candidate's name would be placed on the general election ballot. The Court stated: "The question for decision is whether this statutory requirement, as applied to candidates for statewide offices, violates the First and Fourteenth Amendments to the United States Constitution." (*Id.,* at pp. 190-191.) The Court observed that, as with Prop. 14, "Washington conducts a 'blanket primary' at which registered voters may vote for any candidate of their choice, irrespective of the candidates' political party affiliation." (*Id.*, p. 192.) The Court further observed: "The primary election in Washington, like its counterpart in California, is 'an integral part of the entire electoral process ... [that] functions to winnow out and finally reject all but the chosen candidates.'" (*Id.,* p. 196.) After review of pertinent authority, the Court held that the challenged "winnowing" structure was constitutionally permissible. (*Id.*, pp. 194-195, citing, *inter alia, Storer v. Brown, supra*, 415 U.S. at p. 736.) In doing so, the Court pointed out: "States are not burdened with a constitutional imperative to reduce voter apathy or to 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general ballot."

(*Id.*, at p. 198.) Similarly, "[i]t can hardly be said that ... voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election...." (*Id.*, p. 199.)

Plaintiffs are correct that the Supreme Court has not yet squarely addressed whether a "top two" primary system such as established by Article 2 section 5(a) affects or could affect ballot access rights in a manner that would be constitutionally impermissible. (*See, e.g., Washington State Grange v. Washington State Republican Party*, 552 U.S. 452, 452 (2008) ["Petitioners are correct that we assumed that the non-partisan primary we described in *Jones* would be constitutional"]; *id.*, p. 458, n. 11.)

Nevertheless, in a recent decision the United States Court of Appeals for the Ninth Circuit that held that a similar system enacted in the State of Washington did not impose a "severe burden" on the rights of minor parties (or their voters or candidates) regarding access to the general election ballot. (*See Washington State Republican Party v. Washington State Grange* (9th Cir. 2012) 676 F.3d 784, 794-795.) Relying on *Munro* and other Supreme Court cases, the court held, among other things, that "because [the law] 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.'" (*Id.*, at p. 795, quoting *Williams v. Rhodes* (1968) 393 U.S. 23, 31; *see also id.*, quoting *Munro, supra*, 479 U.S. at p. 199.) Because the law did not impose a "severe" burden on constitutional rights, the court held that it survived review because it furthered Washington's "important regulatory interests." (*Id.*, at pp. 794-795.)

In *Washington State Republican Party v. Washington State Grange, supra*, the court cited *California Democratic Party v. Jones, supra*, in which the Supreme

Court held that California's then existing blanket primary (Proposition 198) violated a political party's First Amendment right of association because it involved a partisan primary in which a party was required to permit non-party members to participate in selecting the party's candidate for the general election, which involved "forced association." (530 U.S. at pp. 578-582.)[1] In evaluating the State's interests, the Supreme Court noted that the First Amendment infringement could be avoided by "resorting to a *nonpartisan* blanket primary," under which each voter, "regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election." (*Id.*, p. 585.) The Supreme Court stated that under such a system, "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." (*Id.*, p. 586.)

Plaintiffs are correct that the above statements made by the Court in *Jones* are *dicta* as to whether a "top two" non-partisan voter-nomination primary would or could constitute an unconstitutional infringement on ballot access. Nonetheless, such statements provide some indication that the Supreme Court would not consider such a hypothesized system to impose a severe burden on voting and associational rights. *Washington State Republican Party, supra,* 676 F.3d at p. 795 ["the Supreme Court has expressly approved of top two primary systems"]; *see also Coeur D'Alene Tribe of Idaho v. Hammond* (9th Cir. 2004) 384 F.3d 674, 683 ["our precedent requires that we give great weight to dicta of the Supreme

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[1] With regard to non-partisan elections, *see Communist Party v. Peek*, *supra*, 20 Cal.2d at p. 544 ["in a non-partisan election the party system is not an integral part of the elective machinery and the individual's right of suffrage is in no way impaired by the fact that he cannot exercise his right through a party organization."])

Court"]; *California Amplifier, Inc. v. RLI Ins. Co.* (2001) 94 Cal.App.4th 102, 114 ["legal pronouncements by the Supreme Court are highly probative and, generally speaking, should be followed even if dictum"]; *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 287.)

Plaintiffs are correct that, notwithstanding the apparently plenary power of the States recognized by Article I, section 4 of the Constitution, the Supreme Court of the United States has invalidated certain state-imposed restrictions on ballot access. However, the Court has not done so in the context of a *non-partisan* election such as is required by Article 2 section 5(a.)

For example, while Article 2 section 5(a) is limited to selection of candidates for congressional and state elective offices in California, in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court held that an Ohio "early filing deadline" statute which required that an *independent* candidate for President file a statement of candidacy and nominating petition in March in order to appear on the general election ballot in November imposed an unconstitutional burden on voting and associational rights: "A [statutory] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." Id., 793-794. Likewise, in *Williams v. Rhodes, supra*, 393 U.S. at pp. 24-25, the Court invalidated a statute requiring a new party to obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last preceding gubernatorial election in order to have any access to the election. That statute imposed a requirement applicable only to new parties and prevented any access to the ballot unless it was met. In contrast, Prop. 14 provides easy (and unchallenged) access to the primary ballot and allows voters to vote for candidates

of any (or no) party affiliation or preference in the primary process at the same time and on the same terms as major party candidates. (And see: *Washington State Republican Party, supra,* 676 F.3d at p. 794.)

Plaintiffs do not dispute that Article 2, section 5 gives all candidates equal access to the primary election ballot. Article 2, section 5 does not, on its face or as applied, give any "established" candidate or party an advantage over plaintiffs, or over any other political party, candidate, or voter. The circumstance that a candidate does not receive enough votes in a primary election to be one of the top two vote-getters cannot be equated or conflated with an absence of access to a ballot.

The court concludes that the primary election required by Article 2 section 5 must be considered as an integral part of the entire election process. (*See, e.g., Donnellan v. Hite* (1956) 139 Cal.App.2d 43, 47 ["The primary election is an integral part of the election process"]; *Munro, supra,* 479 U.S. at p. 196; *Cummings, supra,* 177 Cal.App.4th 493, 509-510.) The court further concludes that because California affords all candidates easy access to the primary election ballot and the opportunity for the candidates to wage a ballot-connected campaign, the effect of Prop. 14 (Article 2, section 5(a)) on plaintiffs' constitutional rights is slight, and any resulting burden or restriction does not violate any constitutionally guaranteed right. (*See Munro, supra,* 479 U.S. at p. 196 ["We think that the State can properly reserve the general election ballot 'for major struggles'"; "The State of Washington was clearly entitled to raise the ante for ballot access, to simplify the general election ballot, and to avoid the possibility of unrestrained factionalism at the general election"]); *Burdick v. Takushi, supra,* 504 U.S. at p. 434 ["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."])

Without limiting the generality of the foregoing, with regard to the allegation that as part of the implementation of Article 2, section 5 the Secretary *decided to hold the primary in June*, the court notes the June date was set by the Legislature in 2007, *well prior* to and independent of Prop. 14. Indeed, the second amended complaint alleges as much. (SAC, ¶ 18.) In any event, plaintiffs have failed to cite (and the court has been unable to find) any law tending to support a conclusion that plaintiffs (or candidates, voters, and/or political parties in general) have a constitutionally guaranteed right to require the State to set primary election or general election dates at times and places thought by certain candidates, voters, and/or political parties as conducive to their success at the ballot.

The court determines that, whether the second amended complaint is considered under the rules governing pleading in federal courts or the rules of pleading in California courts, the demurrers to the "First Claim for Relief: Ballot Access" must be sustained without leave to amend. The court's decision is made on the ground that the "First Claim For Relief: Ballot Access" does not state facts sufficient to constitute a cause of action. (*See* C.C.P. § 430.10(e).)

Although plaintiffs' opposition includes a request that leave to amend be permitted if the demurrer is sustained, they have not met their burden of demonstrating how they could amend the cause of action to overcome the deficiencies. (*See Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The court has sustained two previous demurrers with leave to amend and plaintiffs have not stated a sufficient constitutional claim. Under the circumstances, permitting a

further opportunity to amend would be futile. (*Cf. Hills Transp. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 713-714.)

4. Equal Protection.

The court further determines that the demurrers to the "Second Claim For Relief: Equal Protection Clause" must be sustained without leave to amend.

In this claim, plaintiffs allege in relevant part that Prop. 14 "withdrew an established right from plaintiffs, namely, the right of minor political parties, their voters, and their candidates to participate in statewide general elections" and that "[b]ecause Prop. 14 drafters were motivated by an invidious purpose when they enacted electoral reform, and because Secretary Bowen's implementation of Prop. 14 in 2012 denied numerous well-supported minor party candidates from participating in the general election, plaintiffs' equal protection rights have been violated...." (SAC, ¶ 43.) In its order of January 25, 2013, the court sustained a demurrer to a similar claim based on similar allegations in the first amended complaint with leave to amend to plead facts sufficient to state a constitutional equal protection challenge. Plaintiffs have not remedied the deficiencies.

The court's decision is made on the ground that the cause of action as amended does not state facts sufficient to constitute a cause of action (C.C.P. § 430.10(e)), and is based on the points recited in the papers filed by defendants in support of their demurrers. In so ruling, the court concludes that plaintiffs have failed to identify "an established right" which was withdrawn from plaintiffs (or any of them) by the implementation of Prop. 14, have failed to sufficiently allege any instance of invidious intent or conduct, and have failed to meet their burden to show how they could amend this cause of action to overcome the deficiencies pointed to by defendants. (*Goodman, supra,* 18 Cal.3d at p. 349.)

Among other things, and as the court stated in its prior order, Prop. 14 on its face does not appear to be directed to any classification or group. (*See, e.g.*, Cal. Const. Art II, § 5; Nowak & Rotunda, Constitutional Law [5th ed.], § 14.4 [and cases cited therein.]) Nor is there anything in Prop. 14 that "withdraws" an "established right" from a particular group of people. It appears the claim is based largely on principles set forth in *Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052, 1083-1084, vacated and remanded in *Hollingsworth v. Perry* (2013) 133 S.Ct. 2652. Plaintiffs' theory is not supported by *Perry*, in which the court 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." (671 F.3d at pp. 1083-1084.)

Here, in contrast to *Perry*, the challenged law does not on its face or in its application "target" one group or another for disparate treatment. Instead, it allows broad access to candidates identifying with any party (or no party) to participate in the primary election and then permits the top two vote-getters of whatever (or no) party affiliation to advance to the general election. In contrast to circumstances such as those in *Valle Del Sol Inc. v. Whiting* (9th Cir. 2013) 708 F.3d 808, 819, or *Moss v. U.S. Secret Service* (9th Cir. 2012) 675 F.3d 1213, 1224-1225, there are no allegations that the Secretary applied the law in a discriminatory way to deny rights to any particular group or persons with a particular viewpoint as compared to others.

Further, there are insufficient allegations to support a violation of the Equal Protection Clause based on discriminatory intent. "[O]fficial action will not be held unconstitutional solely because it results in a ... disproportionate impact....

Proof of ... discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." (*Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 264-265.)

First, Plaintiffs' allegations regarding the intent of the "drafters" of Prop. 14 are irrelevant because "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 Pol. Practices Comm'n* (1990) 51 Cal.3d 744, 765 n.10.) This applies equally to the materials included in Plaintiffs' Request for Judicial Notice, upon which they base an argument that the manner in which the legislature decided to place Prop. 14 on the ballot reflects an invidious purpose. Regardless of how the legislature decided to place it on the ballot, however, such circumstances do not show that the voters lacked ample time to consider and vote on the measure or that they had any discriminatory intent in doing so.

Second, Plaintiffs' selected quotation of an argument against Prop. 14 in the voter guide materials is an insufficient basis on which to support a finding of voter discriminatory intent. (*See, e.g., Legislature v. Eu* (1991) 54 Cal.3d 492, 505; *NLRB v. Fruit & Vegetable Packers & Warehousemen* (1964) 377 U.S. 58, 66; *Ross v. RagingWire Telecommuns., Inc.* (2008) 42 Cal.4th 920, 929 [rejecting opponents' ballot arguments as a guide to voter intent].) As a whole, the statements in the voter guide do not reflect that the proposition was aimed at depriving a particular group of established rights. (*See* Interveners' Request for Judicial Notice, Exh. F.)

To the extent the cause of action is based on a violation of the California Constitution as opposed to the United States Constitution, it is deficient for the

same reasons. "In analyzing constitutional challenges to election laws, [the California Supreme Court] has followed closely the analysis of the United States Supreme Court." (*Edelstein, supra,* 29 Cal.4th at p. 179.) Also, Prop. 14 is itself part of the California Constitution and is accorded equal dignity with other provisions. (*Strauss v. Horton* (2009) 46 Cal.4th 364, 465-469.)

VII. Conclusion.

The second amended complaint is dismissed. The September 20, 3013 dismissal of the entire action is vacated. The parties shall appear for case management conference on October 4, 2013 at 9 o'clock a.m. and will address the status of the case, including the complaint in intervention and entry of judgment.

The foregoing order augments, amends, and corrects the orders issued and filed herein on September 5, 2013 and September 20, 2013.

IT IS SO ORDERED.

Date: September 23, 2013

Lawrence John Appel

Lawrence John Appel
Superior Court Judge

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number : RG11605301
Case name: Rubin vs. Bowen

ORDER [AMENDED-CORRECTED]
FILED ON SEPTEMBER 23, 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 [AMENDED-CORRECTED] FILED ON SEPTEMBER 23, 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 23, 2013.

A. Tumonong

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

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