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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Rubin	Plaintiff/Petitioner(s)	No. <u>RG11605301</u>
VS.		Order
Bowen	Defendant/Respondent(s) (Abbreviated Title)	Motion for Preliminary Injunction Denied

The Motion for Preliminary Injunction filed for Peace and Freedom Party of California and Libertarian Party of California and Green Party of Alameda County and Cat Woods and C.T. Weber and Katherine Tanaka and Charles L Hooper and Marsha Feinland and Manja Argue and Michael Rubin was set for hearing on 04/10/2012 at 09:00 AM in Department 16 before the Honorable Lawrence John Appel. The Tentative Ruling was published and was contested.

Moving Party Michael Rubin appeared by counsel Dan Siegel and Michael Siegel.
Moving Party Manja Argue appeared by counsel Dan Siegel and Michael Siegel.
Moving Party Marsha Feinland appeared by counsel Dan Siegel and Michael Siegel.
Moving Party Charles L Hooper appeared by counsel Dan Siegel and Michael Siegel.
Moving Party Katherine Tanaka appeared by counsel Dan Siegel and Michael Siegel.
Moving Party C.T. Weber appeared by counsel Dan Siegel and Michael Siegel.
Moving Party Cat Woods appeared by counsel Dan Siegel and Michael Siegel.
Moving Party Green Party of Alameda County appeared by counsel Dan Siegel and Michael Siegel.
Moving Party Libertarian Party of California appeared by counsel Dan Siegel and Michael Siegel.
Moving Party Peace and Freedom Party of California appeared by counsel Dan Siegel and Michael Siegel.
Opposing Party Debra Bowen appeared by counsel Mark Beckington.
Intervenor Californias to Defend the Open Primary represented by Christopher Skinnell.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

Plaintiffs' Motion for Preliminary Injunction, filed on January 13, 2012, is DENIED.

In deciding whether to issue a preliminary injunction, a court must weigh two interrelated factors: (1) the likelihood that the moving party will ultimately prevail on the merits; and (2) the relative interim harm to the parties from issuance or non-issuance of the injunction. The court's determination is guided by a mix of the potential merit and interim harm factors. (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-678.) "A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim." (*Id.*, at p. 678.)

Based on a consideration of these factors and all the material before it on the present motion, the court finds that Plaintiffs Michael Rubin et al. ("Plaintiffs") have not made a sufficient showing of likelihood

of success on the merits and balance of interim harms to warrant preliminary injunctive relief against enforcement of the Proposition 14 ("Prop. 14") laws approved by the California voters in June 2010.

As to likelihood of success on the merits, Plaintiffs' claims suffer from the numerous deficiencies and invalidities identified in the opposition papers filed by the Secretary of State and the Intervener-Defendants and in the court's accompanying order ruling on those defendants' demurrers to the Verified Complaint. Among other things, the claims are virtually indistinguishable from those rejected in *Washington State Republican Party v. Washington State Grange* (2008) 552 U.S. 442 ("Washington I") and *Washington State Republican Party v. Washington State Grange* (9th Cir. 2012) __ F.3d __, 2012 WL 149475 ("Washington II").

Plaintiffs' First Cause of Action, for example, is extremely similar to the "ballot access" cause of action rejected as a matter of law in *Washington II*, supra. (The decision in *Washington I* did not address such cause of action, as reflected in footnote 11 at page 458 of that decision.) This cause of action is premised on the assertion that small party voters, small party candidates or the small parties themselves have constitutional rights to have small party candidates on the general election ballot, regardless of whether such candidates were included on a primary ballot and did not muster support. Plaintiffs' cited authority does not support this assertion, as the Court held in *Washington II*, supra, at pp. *7-8. Instead, such authority invalidates legislation that imposes unfair or discriminatory burdens for members of small or independent parties to be eligible for an election in the first instance. (See, e.g., *Lee v. Keith* (7th Cir. 2006) 463 F.3d 763, 768-772 [state restrictions that required independent candidates to submit nominating petitions 323 days before their initial election and to collect signatures from 10% of the voters in the last general election unduly infringed independent candidate's and independent voters' rights of expression and association].) Prop. 14 does not include any such discriminatory provisions that preclude candidates affiliated with minor (or no) political parties to be considered by voters in the first instance. Instead, it allows voters to vote for candidates of any (or no) party affiliation or preference in the primary process, without placing significant restrictions on their access to the primary ballot. The fact that only the top two vote-getters advance to the general election is not a discriminatory restriction but instead a result of the voting process. (See, e.g., *Washington II*, at p. *8, citing *Cal. Democratic Party v. Jones* (2000) 530 U.S. 567, 585-586.) Although the California primary is in June as distinguished from the August primary analyzed in *Washington II*, Plaintiffs have not demonstrated a likelihood that this difference amounts to a "severe" burden on constitutional voting rights that is any different from that found not to be severe in *Washington II*. Further, the allegations, matters of judicial notice and evidence in the record reflect that Prop. 14 advances state interests similar or identical to those found to suffice as "important regulatory interests" in *Washington II*.

As to the Second Cause of Action, a similar cause of action was squarely rejected in *Washington I*, supra, 552 U.S. at pp. 452-455. Plaintiffs' proffered evidence regarding potential voter confusion is similar to that rejected by the Supreme Court as being insufficient to support a "facial" challenge to the similar *Washington* "top two" voting law on the basis of interference with rights of speech and association. (Id.; see, e.g., id., at p. 454 ["There is simply no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate," and any such possible voter confusion was not compelled by the statute.]) It is also similar to that considered by the Court of Appeals in *Washington II* and found insufficient to create even a "triable issue that the state's implementation of [the "top two" law] imposes a severe burden" on the plaintiff political party's freedom of association. (*Washington II*, at pp. *5-6.)

Plaintiffs' assertion that Prop. 14 will have the result of eliminating the "easiest and most effective route for minor parties to remain ballot qualified," even if it should turn out to be the case, does not support their assertion the entire framework approved by the voters in June 2010 and enacted into the California constitution should be invalidated. As Plaintiffs acknowledge, Prop. 14 does not affect the two other ways for minor parties to remain ballot qualified under California statutory law. (See Elections Code § 5100.) Further, Plaintiffs have not tied this argument to a constitutional deprivation, particularly as Prop. 14 allows candidates to be on the primary ballot regardless of their party preference or lack thereof. (Cf. *Peace and Freedom Party v. Shelley* (2004) 114 Cal.App.4th 1237, 1246.)

As to the Third Cause of Action, Plaintiffs have not set forth factual allegations (or evidence) regarding any manner in which the Prop. 14 laws, either on their face or as specifically applied, dictate electoral outcomes as opposed to prescribing the "Times, Places and Manner of holding Elections for Senators and Representatives...."

Although Plaintiffs base their First and Second Causes of Action on the California Constitution in addition to the U.S. Constitution, they have not cited California decisions providing a basis to determine that the "top two" system severely infringes on California rights of speech or association in a manner different than that discussed in the federal authority, as reflected in the court's ruling on the demurrer.

As to the balance of interim harm, Plaintiffs have not established that an injunction against implementation of Prop. 14 during the pendency of this suit would involve less of an intrusion and interference on the rights of voters and candidates than would denial of such preliminary relief. To the contrary, the evidence reflects that if Prop. 14 were to be suspended at this point in time, shortly before a primary election, there would be a severe and potentially irreparable interference and disruption with the voting process.

Plaintiffs' Request for Judicial Notice, filed on January 13, 2012, and Interveners' Request for Judicial Notice, filed on January 25, 2012, are GRANTED. Nevertheless, the court takes judicial notice of the contents of the exhibits and not the truth of factual matters asserted therein.

Intervener-Defendants' Objections to Winger Declaration and Intervener-Defendants' Objections to Manweller Declaration, filed on January 25, 2012, are OVERRULED on the grounds asserted. While some of the statements which are the subject of the objections are of questionable if any relevance or weight to the issues raised in this motion, the court exercises its discretion to consider them for whatever evidentiary value they may have.

Dated: 04/24/2012

A handwritten signature in black ink, appearing to read "L. Appel", with the word "facsimile" written in a smaller font to the right of the signature.

Judge Lawrence John Appel

SHORT TITLE: Rubin VS Bowen	CASE NUMBER: RG11605301
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ADDITIONAL ADDRESSEES

-- Third Party --
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Superior Court of California, County of Alameda
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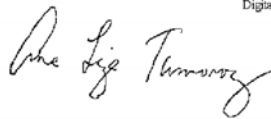
Case Number: RG11605301
Order After Hearing Re: of 04/24/2012

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 was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 04/25/2012.

Executive Officer / Clerk of the Superior Court

By  Digital

Deputy Clerk