No. E076797

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

JIM BOYDSTON ET AL.,
Plaintiffs and Appellants,
v.
ALEX PADILLA ET AL.,
Defendants and Respondents.

San Bernardino County Superior Court, Case No. CIVDS1921480
The Honorable Wilfred J. Schneider, Jr., Judge

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June 9, 2022

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Case Name: *JIM BOYDSTON, et al. v. ALEX PADILLA, et al.* Court of Appeal No.: E076797

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INTRODUCTION

Political parties in California select their presidential nominees in a semi-closed primary election administered by the Secretary of State. Voters who register with a political party receive that party's ballot and may vote to select the party's nominee for the general election. Voters who have declined to register with a political party, known as No Party Preference ("NPP") voters, receive a nonpartisan ballot by default. That ballot does not allow them to vote for the presidential nominee of a political party. NPP voters, however, may request a "cross-over ballot" from political parties who choose to open their primaries to unaffiliated voters. Jim Boydston and his fellow appellants (together "Boydston") believe that this system violates their constitutional rights by preventing NPP voters from voting for their preferred presidential candidate in primary elections. They sued the Secretary and the State of California (together "the Secretary") to invalidate the statute that establishes the semi-closed primary system, Election Code section 13102. As the trial court recognized when it sustained the Secretary's demurrer to the second amended complaint, all of Boydston's claims fail as a matter of law.

The second amended complaint alleges that allowing political parties to decide whether to welcome NPP voters into their primary elections violates free-association and equal-protection principles protected by the California and United States Constitutions. But these legal theories are foreclosed in two ways. First, in *Clingman v. Beaver* (2005) 544 U.S. 581, the

United States Supreme Court rejected virtually the same constitutional challenges to Oklahoma's semi-closed primary law. The Court recognized that states have sound reasons for choosing to use semi-closed primary elections: preserving political parties, enhancing electioneering and party-building efforts, and guarding against "party raiding" and "sore loser" candidacies. Those reasons, the Court held, outweigh the minimal burdens that the system may impose on voters. Second, the open-type primary that Boydston envisions in his pleadings, where the State forces political parties to accept ballots from voters who have not registered for the party, was held unconstitutional in *California Democratic Party v. Jones* (2000) 530 U.S. 567.

On appeal, Boydston says that the relief he wants is not NPP-voter participation in the presidential primary elections of parties who have not invited them. He says, rather, that he wants something more nuanced: allowing NPP voters to cast a vote for a presidential primary candidate of their choosing as a purely expressive matter—votes, he assures this Court, that political parties will not have to count and that will have no effect on the outcome of presidential primary elections. Although voting is unquestionably one of the most important rights protected by the state and federal Constitutions, it is not so expansive. Boydston cites no authority that supports his argument that NPP voters have an interest in voting as a purely expressive act, and, even he had, he would have simply identified one of many policies that California may adopt consistent with the state and federal Constitutions. Identifying a constitutionally viable alternative to

California's semi-closed primary system neither compels adoption of the new system, nor establishes the unconstitutionality of the current system.

At bottom, Boydston's legal theories depend on evading the dual effect of *Clingman* and *Jones*. The relief he seeks cannot be squared with the holdings in those cases, no matter how mightily he may try. This Court should therefore affirm the trial court's judgment sustaining the Secretary's demurrer without leave to amend.

STATEMENT OF THE CASE

The terminology of primary elections can be somewhat confusing. Terms sometimes have different meanings depending on whether the focus is on who may be a candidate or who may be a voter. Some terms "have no precise legal definition," as the Attorney General recognized decades ago when considering the question: "What is meant by 'open' and closed' primaries?" (62 Ops.Cal.Atty.Gen. 386 (1979).) And some concepts are called different things by different people, as when the United Supreme Court called the system enacted by California's Open Primary Act a "blanket primary." (See *Jones*, *supra*, 530 U.S. at pp. 570, 576 fn. 6.) Although resolution of this appeal does not turn on fine distinctions in terminology, knowing that the terms used to describe various approaches to primary elections vary is helpful to understanding the background of this case.

A. A BRIEF HISTORY OF WHO MAY VOTE IN CALIFORNIA'S PRESIDENTIAL PRIMARIES

California currently uses a "semi-closed" primary for presidential elections. (Elec. Code, § 13102; all further undesignated statutory references are to the Elections Code.) A semi-closed primary system limits voting in primary elections to members of qualified political parties, and, upon invitation of those parties, to voters unaffiliated with a party. Under this system, NPP voters may vote in presidential primaries of qualified political parties in one of two ways. As noted above, they may request the partisan ballot of a political party that has authorized NPP voters to participate in the party's primary election. (§ 13102, subd. (b).) Or, they may register for the party in whose presidential primary election they wish to vote. (See § 13102, subd. (a).) All voters may change their voter registration to reflect a different party preference at "all times except during the 14 days immediately preceding an election." (§ 2119, subd. (a).) Even voters who miss that deadline may conditionally register up to and on election day and cast a provisional ballot, which will be processed and counted once the county elections office verifies the information supplied by the voter. (§ 2170.)

California adopted semi-closed presidential primary elections in the wake of a brief and failed experiment with "open" (or "blanket") primaries. In 1996, voters enacted Proposition 198, also known as the Open Primary Act. (AA 551-554, 580.) At the time, California used a "closed" primary. (AA 553; *Jones*, *supra*, 530 U.S. at p. 570.) Under that old framework, voters who did not identify a political party affiliation were not allowed to vote for

candidates running for any partisan office in primary elections. (AA 552.) As explained by the Legislative Analyst in the ballot materials accompanying Proposition 198, the closed primary meant that a voter had to "identif[y] a political party affiliation when registering to vote" and could then vote only for candidates of that party. (AA 552.) The Open Primary Act allowed "all persons entitled to vote, including those not affiliated with any political party, to vote for any candidate regardless of the candidate's political party affiliation." (AA 552, 580; former § 2001.) The United States Supreme Court considered a First Amendment challenge to the law in *California Democratic Party v. Jones*. The Court held the law unconstitutional because it forced political parties to affiliate with people who had chosen not to become members. (*Jones*, *supra*, 530 U.S. 567.)

In response to *Jones*, the Legislature repealed the unlawful provisions of Proposition 198 and reinstated the closed primary system, but modified it to allow NPP voters to vote in the primary of a party if the party allowed it. (Stats. 2000, ch. 898; see also Sen. Com. on Elections and Reapportionment, Rep. on Sen. Bill No. 28 (1999-2000 Reg. Sess.) Aug. 30, 2000, pp. 1-2.) With some slight modifications, that system remains in place today for presidential primaries. (Compare Stats. 2000, ch. 898, § 8, with current § 13102; see also, e.g., Stats. 2002, ch. 585, § 2, adding new subd. (d) to § 13102.) Voters registered as preferring a qualified political party receive a ballot that contains that party's partisan candidates as well as the names of all candidates for nonpartisan offices and voter-nominated offices. (§ 13102, subds.

(a), (b).) Generally, NPP voters receive the nonpartisan ballot that contains the names of all candidates for nonpartisan offices and voter-nominated offices. (*Id*., subd. (b).) However, an NPP voter may request the partisan ballot of a political party that has authorized NPP voters to participate in the party's presidential primary election. (*Ibid.*) To allow NPP voters to vote in its primary, a party must notify the Secretary no later than the 135th day prior to the presidential primary election. (*Id.*, subd. (c).)

Over the years, the qualified political parties in California that allow NPP voters to participate in their presidential primary elections have fluctuated. (AA 312-313.) For the last two presidential elections, however, it has remained consistent. In 2016, there were six qualified parties: American Independent, Democratic, Green, Libertarian, Peace & Freedom, and Republican. (AA 599.) Three of those parties, Democratic, American Independent, and Libertarian, allowed NPP voters to vote in their presidential primary; the other three did not. (AA 599.) In 2020, the same six parties qualified, and the same three allowed NPP voters to vote in their primaries. (AA 634.)

Perhaps the most noteworthy change to the greater system of primary elections in recent years had no effect on presidential primaries (and hence this case). In 2010, the voters enacted Proposition 14, also known as the Top Two Candidates Open Primary Act. The Act provides that the top two vote-getters in primary elections for congressional, legislative, and statewide offices proceed to the general election, regardless of political

party. (AA 742, amending Cal. Const., art. II, § 5; see also § 8141.5.) But, by its terms, the law does not apply to the State's presidential primary system. (AA 742.)

B. A Brief History of Who May Run in California's Presidential Primaries

The term "open presidential primary" has a different meaning in California law from "open primary." The concept of an "open presidential primary" derives from the history of regulating who could appear as a candidate on party ballots, rather than which voters may vote in a primary election. That history dates back to the June 1972 primary election, when the voters enacted Proposition 4. (AA 472, 480-482, 503.) Before that, California used an "opt-in" primary system in which potential candidates had to petition the Secretary for permission to appear on the ballot. (*Patterson v. Padilla* (2019) 8 Cal.5th 220, 237, citing former Elec. Code, § 6055.) At the same time, California had a "favorite son" rule, which allowed the State's governor or United States senators to appear on the primary ballot. (*Ibid.*) The upshot of these rules was that national candidates often did not appear on the primary ballot. For example, the winner of the 1960 election, John F. Kennedy, did not appear on the California primary ballot. (*Ibid.*) Nor did the winner of the 1968 election, Richard Nixon, or his opponent in the national election, Hubert Humphrey. (*Ibid.*)

Proposition 4 created an "open presidential primary" in response to that peculiar state of affairs. (AA 481.) Proponents of the initiative argued that it was "designed to give voters a meaningful voice in choosing their party's presidential nominee."

(AA 481.) The initiative amended article II of the California Constitution by adding section 8. (AA 503.) This new section provided that the "Legislature shall provide for an open presidential primary whereby the candidates on the ballot are those found by the Secretary of State to be recognized candidates throughout the nation or throughout California[.]" (AA 503.) As explained by the Legislative Counsel's detailed analysis, which was included in the ballot materials, the amendment "require[d] the Secretary of State to place upon the presidential primary ballot . . . the names of those persons who he determined to be either (a) recognized as candidates throughout the nation or (b) recognized as candidates throughout California." (AA 481.) Subject to minor changes and renumbering, the law remains essentially the same today, and is codified in article II, section 5.

C. PROCEDURAL HISTORY

Boydston and five other plaintiffs filed the initial complaint in this case in July 2019 naming the Secretary and the State of California. (AA 13-28.) He alleged that he and two of the other plaintiffs were registered as NPP voters but wanted to vote for presidential primary candidates of their choice without registering with a party. (AA 20.) Two plaintiffs were registered with parties but wanted to vote for presidential primary candidates from other parties. (AA 20.) And one plaintiff preferred to register as NPP but had registered as a Democrat to vote for her preferred candidate. (AA 20.) They alleged that none of them were able to vote for the candidate of his or her choice in

the 2016 presidential primary "unencumbered by a condition of party preference." (AA 20-21.)

The complaint alleged six causes of action:

- ***First***, that California's presidential primary system does not comply with article II, section 5, subdivision (c) of the California Constitution (section 5(c)) (AA 23-24);
- ***Second***, that the system violates plaintiffs' substantive due process rights (AA 24);
- ***Third***, that the system denies equal protection of the law to plaintiffs in violation of article I, section 7, of the California Constitution (AA 24-25);
- ***Fourth***, that the system appropriates public funds for a private purpose in violation of article XVI, section 3, of the California Constitution (AA 25-26);
- ***Fifth***, that the system violates plaintiffs' substantive due process rights under the First and Fourteenth Amendments of the United States Constitution (AA 26); and,
- ***Sixth***, that the system violates the right of non-association under the First Amendment of the United States Constitution (AA 27).

The complaint requested a declaration that California's presidential primary system is "illegal in some manner." (AA 27.) It also sought an injunction prohibiting the Secretary from "administering a presidential-primary election that does not comply with all applicable laws" and a writ directing the Secretary to "bring the[] administration of the presidential-

primary election into compliance with all applicable laws." (AA 28.)

Shortly after filing the complaint, Boydston filed a motion for preliminary injunction, and the Secretary opposed. (AA 38-40, 285-305.) The trial court held a hearing and, afterwards, denied the motion. (AA 390-398.) While the motion was pending, the parties stipulated to Boydston filing a first amended complaint, which added another plaintiff, but otherwise did not change the allegations. (AA 331-332.) With the preliminary injunction motion resolved, the first amended complaint became the operative pleading. (AA 399-414.) By stipulation, the Secretary's answer to the original complaint was the answer to the first amended complaint. (AA 332.)

The Secretary then moved for judgment on the pleadings and asked the court to take judicial notice of voter information guides from five elections from 1972 to 2010. (AA 425-452, 466-757.) After briefing and a hearing, the court took judicial notice of the guides and granted the motion with leave to amend. (AA 793-803.) In response to the ruling, Boydston filed a second amended complaint. (AA 804-818.) That new pleading repeated the allegations of the first two complaints and added three paragraphs alleging "additional burdens" experienced by NPP voters who want to vote in the presidential primary. (See AA 837.) Boydston alleged the process is confusing for NPP voters who choose to vote by mail. (AA 814.) Those voters must either request a cross-over ballot, which they may do by mail or at their polling place, or they may register for a party and vote in that

party's primary. (AA 814.) Boydston alleged that the notice that some counties provide to voters sets arbitrary deadlines to request a cross-over ballot by mail that may lead some NPP voters to mistakenly believe that if they do not request a cross-over ballot by mail, they have lost their ability to do so. (AA 814.)

The Secretary demurred to the second amended complaint, arguing that the causes of action alleged suffered from the same irremediable flaws as the first amended complaint. (AA 824-848.) The Secretary also argued that the allegations added to the second amended complaint did not salvage Boydston's claims. (AA 840.) After what amounted to a third round of briefing and a third hearing on the viability of Boydston's claims, the trial court again held they failed as a matter of law. (AA 897-910.)

The court issued its decision on January 29, 2021. (AA 910.) It directed the Secretary to prepare a judgment. (AA 895.) In his Opening Brief, Boydston asserts, mistakenly, that the Secretary "did not comply" with that directive. (Appellants' Opening Brief (AOB) 24.) The Secretary prepared a proposed judgment (which counsel for Boydston signed), served the proposed judgment on the plaintiffs, and submitted it to the court. (Respondents' Appendix (RA) 3-22.) The trial court received the document. (RA 3.) But, for reasons unknown to the Secretary, the court did not enter the document on the register of actions or otherwise act on it. (See AA 926.) It may have been because Boydston filed his notice of appeal before the court could process the proposed judgment. (AA 911.) In any case, when Boydston appealed, this Court directed him to file a judgment. Apparently using the

Secretary's proposed judgment, Boydston obtained a judgment from the trial court dated April 28, 2021. (Compare RA 5, with AA 937 [the documents are identical except judge's signature].) Other than Boydston's mischaracterization of the Secretary's compliance with the trial court's directive, the Secretary does not dispute the statement of appealability in Boydston's opening brief. (AOB 25.)

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews an order sustaining a demurrer de novo. (*Curcio v. Fontana Teachers Association CTA/NEA* (2021) 68 Cal.App.5th 924, 930.) It considers whether the operative complaint alleges "facts sufficient to state a claim for relief." (*Rubin v. Padilla* (2015) 233 Cal.App.4th 1128, 1144, quotation marks omitted.) When the Court reviews claims asserted under 42 U.S.C. section 1983, it applies "the federal standard of review of the grant of a motion to dismiss." (*Ibid.*) To state a claim under that standard, a complaint must allege "well-pleaded facts, not legal conclusions, that plausibly give rise to an entitlement to relief." (*Whitaker v. Tesla Motors, Inc.* (9th Cir. 2021) 985 F.3d 1173, 1176, internal citation and quotation marks omitted.)

II. CALIFORNIA'S SEMI-CLOSED PRIMARY IS CONSTITUTIONAL

Voting is unquestionably a fundamental right. (*Weber v. Shelley* (9th Cir. 2003) 347 F.3d 1101, 1105.) And "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections."

(*Burdick v. Takushi* (1992) 504 U.S. 428, 433.) If elections "are to be fair and honest," states must have a "substantial" role in regulating them. (*Anderson v. Celebrezze* (1983) 460 U.S. 780, 788 quotation marks omitted.) At the same time, regulating elections "inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." (*Ibid.*) In recognition of this reality, courts reviewing the constitutionality of voting legislation "weigh the magnitude of the burden imposed against the interest which the state argues justify the burden and consider whether these concerns justify the burden." (*Howard Jarvis Taxpayers Association v. Weber* (2021) 67 Cal.App.5th 488, 497.) "Regulations imposing severe burdens must be narrowly tailored to advance a compelling state interest." (*Ibid.*) "Lesser burdens require a less stringent review, and the state's regulatory interests will usually justify reasonable restrictions." (*Ibid.*; see also, e.g., *Field v. Bowen* (2011) 199 Cal.App.4th 346, 356.)

Here, Boydston's challenges to California's semi-closed primary system are subject to less stringent review because he and the other plaintiffs are free to vote in whatever presidential primary they wish, so long as they either register for a party or request a cross-over ballot from a party that allows NPP voters to participate in their primaries. (§ 13102.) Considering a challenge to Oklahoma's semi-closed primary, the Supreme Court held in *Clingman* that "minor barriers" of this sort "between voter and party do not compel strict scrutiny." (*Clingman*, *supra*, 544 U.S. at p. 593; see also *Dudum v. Arntz* (2011) 640 F.3d 1098, 1106

["voting regulations are rarely subjected to strict scrutiny"].) Under this more relaxed standard, Boydston's challenge to California's semi-closed primary system fails as a matter for law for three interrelated reasons. First, the United States Supreme Court has upheld the constitutionality of semi-closed primary elections in *Clingman*. Second, in *Jones*, the United States Supreme Court held unconstitutional the sort of open-primary policy advocated by the second amended complaint. Third, Boydston's attempts to distinguish and argue around those two holdings are unavailing. The trial court thus correctly sustained the Secretary's demurrer to Boydston's theories challenging section 13102.

A. The United States Supreme Court Has Upheld the Constitutionality of Semi-Closed Primary Systems Like California's

In *Clingman*, the Libertarian Party of Oklahoma and voters registered with the Republican and Democratic Parties challenged Oklahoma's semi-closed primary. (*Clingman*, *supra*, 544 U.S. at p. 584.) Like California's semi-closed primary law, Oklahoma's law allowed parties to choose whether to open voting to independent voters (the equivalent of NPP voters), but not to voters registered with other political parties. (*Id.* at p. 584; § 13102.) The Court identified three important regulatory interests justifying the semi-closed primary system: preserving political parties as "viable identifiable interest groups"; enhancing electioneering and party-building efforts; and guarding against "party raiding" and "sore loser" candidacies. (*Id.* at p. 594.) The Court explored each of those important interests.

1. Preserving Political Parties. The Libertarian Party of Oklahoma wanted to open its presidential primary to voters from any party, including members of the Republican and Democratic Parties. (*Clingman*, *supra*, 544 U.S. at p. 594.) The Court recognized that as a threat to the integrity of the primary system, which facilitates voter understanding by having candidates affiliate with a party. (*Ibid.*) The Libertarian Party's proposed approach could result in a candidate who "may be unconcerned with, if not hostile to, the political preferences of the majority of the [party's] members." (*Ibid.*, ellipsis and quotation marks omitted.) Even if the Libertarian Party were willing to accept that risk, Oklahoma nonetheless had an interest in avoiding confusion among the greater voting public, which tends to rely on "party labels as representative of certain ideologies." (*Ibid.*) States can reasonably conclude that classifying voters by party facilitates "the effective operation of a democratic government." (*Ibid.*, brackets and quotation marks omitted.) They can also conclude that opening party primary elections to "all voters regardless of party affiliation would undermine the crucial role of political parties in the primary process." (*Id.* at p. 595.)

2. Enhancing Electioneering and Party-Building Efforts. Parties depend on accurate voter rolls in their voter-turnout efforts. (*Ibid.*) If any voter can vote in any party primary, then the voter rolls become less useful to the parties. (*Ibid.*) As the Court recognized, "without registration rolls that accurately reflect likely or potential primary voters, parties risk expending precious resources to turn out party members who may have

decided to cast their vote elsewhere." (*Ibid.*) Because encouraging citizens to vote is an important state interest, a state "is entitled to protect parties' ability to plan their primaries for a stable group of voters." (*Id.* at p. 596)

3. Guarding Against Party Raiding and Sore-Loser Candidacies. The Court recognized that states have an important interest in "tempering the effects . . . of party splintering and excessive factionalism." (*Ibid.*, brackets and quotation marks omitted.) A semi-closed primary poses obstacles to party raiding, where voters of one party attempt to manipulate the primary outcomes of another party. (*Ibid.*) And it prevents sore-loser candidacies, where candidates who anticipate defeat in their party's primary defect to another party, inducing registered voters to follow them. (*Ibid.*)

In rejecting the challenge to Oklahoma's semi-closed primary law brought by the Libertarian Party and registered members of the Republican and Democratic parties, the Court held that those three important considerations outweighed the "minimal[]" burden of "[r]equiring voters to register with a party prior to participating in the party's primary." (*Id.* at p. 592; see also *Burdick*, *supra*, 504 U.S. at p. 437 fn. 7 ["[It] is generally true of primaries [that] voters are required to select a ticket, rather than choose from the universe of candidates running on all party slates"].) Almost half the states, including California, use semi-closed primaries. (*Clingman*, *supra*, 544 U.S. at p. 588 & n.1.)

Section 13102 advances the same interests as Oklahoma's semi-closed primary law. Like the Oklahoma voters in *Clingman*, California voters experience only a minimal burden as a result of the semi-closed primary system. Voters may easily change their party preference up until 15 days before an election by submitting an affidavit of registration. (§ 2119.) Even if a voter misses that deadline to change their registration, they may still do so and cast a ballot in a party primary using the conditional voter registration process, up to, and including, Election Day. (§ 2107.)

B. Forcing Political Parties to Accept Nonmember Participation in Primary Elections Is Unconstitutional

The freedom of association protected by the First and Fourteenth Amendments extends to both political parties and individual voters. (*Tashjian v. Republican Party of Connecticut* (1986) 479 U.S. 208, 214.) It "also encompasses a political party's decisions about the identity of, and the process for electing, its leaders." (*Eu v. San Francisco County Democratic Cent. Comm.* (1989) 489 U.S. 214, 229.) Under California's semi-closed primary law, parties are allowed to determine who participates in their primaries. (§ 13102.) The second amended complaint, however, asks that a court order the Secretary to allow NPP voters to cast a vote in any party's presidential primary election. (See AA 811.) That sort of system, which requires qualified parties to allow unaffiliated voters to participate in their presidential primary elections, is exactly what the Supreme Court in *Jones* held to be unconstitutional. (*Jones*, *supra*, 530 U.S. 567.)

As discussed above in Section A of the Statement of the Case, *Jones* involved a challenge to the 1996 Open Primary Act, which voters enacted when they passed Proposition 198. (*Id.* at p. 569.) Much like the relief sought in the second amended complaint, the Open Primary Act allowed NPP voters to vote for any presidential primary candidate regardless of party. (AA 552, 580.) The Court recognized that in "no area is the political association's right to exclude more important than in the process of selecting its nominee." (*Jones*, *supra*, 530 U.S. at p. 575.) It held that the Open Primary Act violated the constitution by forcing "political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." (*Id.* at p. 577.) Opening the primaries to all comers forced political parties "to adulterate their candidate-selection process . . . by opening it up to persons wholly unaffiliated with the party." (*Id.* at p. 581.) The Court called that burden "both severe and unnecessary." (*Id.* at p. 586.)

The second amended complaint argues that *Jones* actually supports the claims for relief. (AA 808.) It suggests that an NPP voters' right of non-association—his or her interest in not "affiliating himself or herself with ideologically driven private organizations with whom he or she may have profound disagreement, distaste, and/or distrust" (AA 808)—outweighs political parties' right to non-association. That woefully misreads *Jones*, which anticipates and rejects Boydston's very point. The Court explained that any "associational 'interest' in selecting the

candidate of a group to which one does not belong . . . falls far short of a constitutional right, if indeed it can even fairly be characterized as an interest." (*Jones*, *supra*, 530 U.S. at pp. 573-74 n.5.) "The voter who feels himself disenfranchised should simply join the party. That may put him to a hard choice, but it is not a state-imposed restriction upon *his* freedom of association, whereas compelling party members to accept his selection of their nominee *is* a state-imposed restriction upon theirs." (*Id.* at p. 583, quotation marks omitted.)

C. Boydston's Arguments for Reversal Are Unavailing

The Opening Brief unsuccessfully attempts to argue around *Clingman* and *Jones*. As a starting point, the Opening Brief makes separate equal-protection, free-association, and substantive due process arguments when the single standard discussed above governs his claims. (AOB 29-39.) More importantly, the substance of the arguments fails to establish that the trial court erred when it sustained the Secretary's demurrer.

1. The Opening Brief Uses the Wrong Analytical Framework

Four of the claims in the second amended complaint—the second, third, fifth, and sixth—allege that California's semi-closed primary system violates individual rights protected by the California and Untied States Constitutions. (AA 816-820.) The third and sixth causes of action allege, respectively, that the system violates equal protection under the California Constitution and the right of non-association guaranteed by the

First Amendment. (AA 817-819.) The second and fifth causes of action assert substantive due process theories. (AA 816-819.) The Opening Brief addresses each of these theories separately, with stand-alone equal protection, First Amendment, and substantive due process arguments. (AOB 29-42.) But courts apply a single analytical framework (set forth above) when evaluating challenges to election laws under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. (*Kunde v. Seiler* (2011) 197 Cal.App.4th 518, 538-539; see also *People v. K.P.* (2018) 30 Cal.App.5th 331, 341 [explaining that the equal protection clause of the California Constitution and that of the Fourteenth Amendment to the United State Constitution "are substantially equivalent" and courts "analyze them in a similar fashion"].) And the Opening Brief makes clear that Boydston's substantive due process theories are derivative of his First Amendment and equal-protection theories. It contends that the "fundamental liberty interests at stake" in this case are the "rights not to associate with a political party if they so prefer and to vote for the candidate of their choice in . . . the presidential-primary election." (AOB 41.) Because the equal protection clause of the California Constitution and the First Amendment provide "explicit textual source[s] of constitutional protection against" impinging on the rights of free association and equal protection, the framework for analyzing challenges under those provisions, and "not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." (*Graham v. Connor* (1989) 490 U.S. 386, 395.) Thus, for purposes of this case,

the second, third, fifth, and sixth causes of action are one and the same.

2. The Opening Brief Cannot Distinguish *Clingman* and *Jones*

Boydston argues that *Clingman* and *Jones* do not apply to his claims because he and the other plaintiffs "are not looking to participate in the affairs of the private political parties but rather to express themselves in the State-funded presidential-primary process." (AOB 50.) He repeats this assurance throughout the brief, though it is not apparent in the second amended complaint. (See AOB 22, 47 fn. 10.) In Boydston's proposed world, political parties would be "free to ignore the votes cast by NPP voters," and "NPP voters will have had their preferences tallied and reported by the state." (AOB 51.) The likely reality of Boydston's proposal runs headlong into *Jones*. Parties can already choose to allow NPP voters to participate in their presidential primary elections. (§ 13102.) So the almost certain effect of Boydston's proposal would be to work some unwelcome influence on the presidential primaries of parties who have decided they do not want NPP voters to participate.

Even taken at face value, however, Boydston's claim fails. When he proposes a "right" to cast an expressive ballot that, by design, will not be counted and will have no effect on the outcome of the election, he has ceased talking about voting. Correctly conceived, voting is a process that "winnow[s] out and finally reject[s] all but the chosen candidates." (*Burdick*, *supra*, 504 U.S. at p. 438, quotation marks and brackets omitted.) Voting is not, as Boydston supposes, a means for voters to "express

themselves," untethered to the central purpose of a voting system: selecting a candidate. (AOB 50.) Indeed, the Supreme Court has directly rejected the notion that voting has some "generalized expressive function." (*Burdick*, *supra*, 504 U.S. at p. 438.)

And even if Boydston were talking about real voting and his proposed presidential primary system were constitutional under *Jones*, that would not make California's semi-closed primary unconstitutional. It would simply present one additional way that California could structure its presidential primary system, a choice "the Constitution leaves . . . to the democratic process, not to the courts." (*Clingman*, *supra*, 544 U.S. at p. 598.) Lawmakers will always have to balance the associational interests of parties and voters because "[n]o perfect election system has been devised." (*Dudum*, *supra*, 640 F.3d at p. 1100.) In the best case scenario for his claim, Boydston is asking the courts to conduct the balancing of constitutionally available election-law policies—here, presidential primary systems—that is the province of the Legislature and voters.

Boydston also reads *Clingman* too narrowly when he argues that the "decision had nothing to do with burdens imposed on non-partisan voters." (AOB 49.) The Court ruled that "[r]equiring voters to register with a party prior to participating in the party's primary minimally burdens voters' associational rights." (*Clingman*, *supra*, 544 U.S. at p. 592.) That conclusion necessarily contemplates non-partisan voters and is not unique to *Clingman*. The Court has long approved of state laws requiring

voters who want to participate in a primary to register for a party. (See, e.g., *Jones*, *supra*, 530 U.S. at p. 583 [noting that joining a party was the simple solution to an NPP voter feeling disenfranchised in the primary election process]; *Rosario v. Rockefeller* (1973) 410 U.S. 752, 758-759 [holding that voters who were ineligible to vote in primary because they had not registered with a party in time had not been disenfranchised].)

Disregarding this precedent, Boydston argues "California's understanding of party affiliation as a minimal burden . . . cannot be squared with the ever-increasing number of voters who do not want to associate with any of the political parties or participate in their private nomination process." (AOB 36.) But that is not just California's understanding, it is what the Supreme Court has held. (See, e.g., *Clingman*, *supra*, 544 U.S. at pp. 594-595 [recognizing state's interests in having voters participate in political parties].) Boydston's indirect and legally unsupported attack on the political parties in general cannot cure the legal defects in the second amended complaint. NPP voters can easily join a party. (§ 2119.) Or, if they are dissatisfied with the six currently qualified political parties, they can group together and form their own. (See § 5000 et seq.) To the extent those are burdens, they are commonplace and commonly accepted.

Nor is California's presidential primary what Boydston calls "scarcely more than a State-sponsored straw poll." (AOB 36.) He seems to believe that because party delegates may, hypothetically, cast a vote for a candidate other than the prevailing candidate that California's laws regulating primary elections do not

advance an important governmental interest. (AOB 36.) He cites no legal authority to support his position, and he does not explain how, even if he is correct, that makes California's semi-closed primary different from the semi-closed primary upheld in *Clingman*—or any presidential primary system used by other states. His citation to a paragraph in the second amended complaint that itself cites the *national* bylaws of the Democratic Party suggests his argument does not uniquely attack California's presidential primary. (AOB 36, citing AA 813.)

Finally, the second amended complaint alleges that NPP voters experience burdens not experienced by voters who register with a party. (AA 814-815.) For instance, it alleges that some NPP voters—none of whom happen to be plaintiffs—are confused by the notice that some unnamed counties send out informing them of their options to vote in presidential primaries. (AA 814.) These sort of vague allegations are insufficient to support Boydston's facial challenge to section 13102. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 ["To support a determination of facial unconstitutionality . . . petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions," quotation marks omitted].) The burdens imposed on NPP voters by section 13102 are not materially different from the burdens that Oklahoma's semi-closed primary imposed on registered voters and that the Supreme Court recognized were minimal. (*Clingman*, *supra*, 544 U.S. at p. 592.)

As the party seeking to invalidate section 13102, Boydston "bears a heavy constitutional burden." (*Rubin v. City of Santa Monica* (9th Cir. 2002) 308 F.3d 1008, 1017, quotation marks omitted.) The second amended complaint alleges legal theories that are foreclosed by United States Supreme Court precedent and at odds with basic tenets of election law. No amount of evolving argument on appeal can evade the fundamental flaw in those theories. The trial court therefore correctly sustained the demurrer to the second, third, fifth, and sixth causes of action.

III. THE CALIFORNIA CONSTITUTION DOES NOT PROHIBIT THE FUNDING OF PRESIDENTIAL PRIMARIES

The second amended complaint's fourth cause of action alleges that section 13102 violates article XVI, section 3 of the California Constitution. (AA 817-818.) That section provides that "[n]o money shall ever be appropriated or drawn from the State Treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a state institution." (Cal. Const., art. XVI, § 3.) In the trial court, the Secretary explained why the fourth cause of action failed as a matter of law, including citation to legal authority. (AA 846-847.) Boydston's opposition did not address these authorities, or cite any of his own. (AA 879-880.) Observing that "Plaintiffs' fourth cause of action is novel," but that "Plaintiffs cite no authority showing it is colorable under law," the trial court agreed with the Secretary. (AA 908.)

Other than a passing and inapposite reference to *Jones*, the Opening Brief continues to cite no legal authority to support this

novel legal theory. (AOB 42-44.) It appears to be largely cut-and-pasted from Boydston's opposition to the Secretary's demurrer. (Compare AOB 42-44, with AA 879-880.) As the appellant, Boydston has "a duty to make a cognizable argument on appeal as to why the trial court" erred. (*Hernandez v. First Student, Inc.* (2019) 37 Cal.App.5th 270, 277, quotation marks omitted.) His Opening Brief cannot simply repeat arguments presented to the trial court or rely on "bare assertion of error." (*Ibid.*) It remains unclear to the Secretary what, exactly, Boydston contends is incorrect about the legal arguments and authority that the Secretary presented below. (See AA 846-847.)

Those authorities show that, as the trial court concluded, Boydston has not alleged a colorable legal claim under article XVI, section 3. That provision prevents "the appropriation of funds from the state fisc for a purpose foreign to the interests of the state and outside of its control." (*Cal. Family Bioethics Council v. Cal. Inst. for Regenerative Med.* (2007) 147 Cal.App.4th 1319, 1353.) It was "not intended to unduly restrict the state in the expenditure of public funds for legitimate state purposes." (*People v. Honig* (1996) 48 Cal.App.4th 289, 352.) "The determination whether an expenditure serves a public purpose is for the Legislature to make through duly enacted legislation." (*Ibid.*)

Although political parties are private organizations, primary elections benefit the public. As a starting point, "States have a major role to play in structuring and monitoring the election process, including primaries." (*Jones*, *supra*, 530 U.S. at p. 572.)

Primary elections serve to "avoid the possibility of unrestrained factionalism at the general election," and they allow states "to reserve the general election ballot . . . for major struggles," preventing them from becoming "a forum for continuing intraparty feuds." (*Burdick*, *supra*, 504 U.S. at p. 439, quotation marks omitted].) For that reason, the costs of a primary election "do not arise because candidates decide to enter a primary or because the parties decide to conduct one, but because the State has, as a matter of legislative choice, directed that party primaries be held." (*Bullock v. Carter* (1972) 405 U.S. 134, 148-49.)

In California, the "direct party primary . . . is not merely an exercise or warm-up for the general election but an integral part of the entire election process." (*Storer v. Brown* (1974) 415 U.S. 724, 735.) California lawmakers have long determined that primary elections are worth the public expenditures required to conduct them. (See, e.g., *Patterson*, *supra*, 8 Cal.5th at pp. 236-237 [discussing history of presidential primary laws].) The current system reflects that determination as well. (See § 6000 et seq.; §13102.) In fact, article II, section 3 of the California Constitution requires that "[t]he Legislature . . . provide for registration and free elections." That clause requires elections to be administered at the expense of the public and limits what fees may be charged to candidates appearing on the ballot. (*East Bay Municipal Utility Dist. v. Appellate Dept.* (1979) 23 Cal.3d 839, 845 [finding that "the cost of the personal qualifications statement" was not "part of the public expense of a 'free election'

provided for in the constitution"].) There is no reason to exclude primary elections from this provision, which applies not only to statewide elections but also to local elections. (*Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 126-28 [holding that the use of public funds for informational, rather than campaign, activities in a local election did not violate taxpayer plaintiffs' right to free elections under article II, section 3].) Because Boydston has offered no support—legal, logical, historical, or otherwise—that undermines the longstanding practice of public funding of primary elections, this Court should affirm the trial court's order sustaining the demurrer to the fourth cause of action.

IV. THE TRIAL COURT CORRECTLY RESOLVED BOYDSTON'S CLAIMS ON THE PLEADINGS

Boydston argues that the trial court erred because his claims should be "decided on the merits." (AOB 51, capitalization omitted.) But, like the judgment on the pleadings that the trial court granted as to the first amended complaint, a demurrer is a decision on the merits. (See, e.g., *Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 291 ["A ruling on a general demurrer is . . . a method of deciding the merits of the cause of action" quotation marks omitted].) What Boydston appears to mean is that the only method of weighing his claims is by an "evidentiary hearing." (AOB 52.) He argues that because many of the cases in this area have been decided after discovery, this case should be too. (AOB 52.) But an evidentiary hearing would serve no purpose. His claims fail as a matter of law, even

with the well-pleaded factual allegations accepted as true (though not Boydston's characterization of them).

Boydston appears to believe that all constitutional challenges to election laws must be decided, at the earliest, on summary judgment, and likely at trial. (See AOB 52-53.) He argues that because he "believe[s] the acts of Respondents are arbitrary and unreasonable," he has stated a claim. (AOB 53.) But both state and federal courts can and do address constitutional challenges to election laws on the pleadings. For example, in *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, the California Supreme Court resolved, on the pleadings, a constitutional challenge to local charter provisions prohibiting write-in voting in runoff elections. And in *Rubin v. City of Santa Monica*, the Ninth Circuit affirmed the district court's dismissal of a complaint against the Secretary challenging a regulation that prevented a candidate from listing his occupation as "peace activist." (*Rubin*, *supra*, 308 F.3d at pp. 1012-1013.) A legally deficient complaint, such as Boydston's, is just that: legally deficient. Allowing his case to proceed when he cannot, after multiple attempts, allege facts that establish a claim would waste resources of the courts and the parties.

V. BOYDSTON HAS ABANDONED TWO THEORIES ON APPEAL

A. Boydston Does Not Dispute That the First Cause of Action Fails to State a Claim for Relief

The first cause of action in the second amended complaint alleges that the language in article II, section 5(c), stating "'The

Legislature shall provide for . . . an open presidential primary'" means that "any registered voter—regardless of party preference—has the right to vote for a presidential candidate." (AA 815-816, quoting Cal. Const., art. II, § (5), subd. (c).) In the trial court, the Secretary argued that the phrase "open presidential primary" does not mean what the second amended complaint contends it means. (AA 838-839.) Section 5(c) addresses who may run, not who may vote, in a presidential primary. It provides for a primary "whereby the candidates on the ballot are those found by the Secretary of State to be recognized candidates throughout the nation or throughout California for the office of President of the United States, and those whose names are placed on the ballot by petition." (Cal. Const. art. II, § 5, subd. (c).) If Boydston's argument were correct and "an open presidential primary" did mean a primary where parties must accept and count votes from unaffiliated voters, then voters would not have enacted the Open Primary Act in 1996 when they approved Proposition 198—not to mention the obvious incompatibility with the holding in *Jones*. The trial court agreed that the first cause of action failed to state a claim. (AA 907.) Although the Opening Brief does not say it, Boydston now appears to agree, albeit obliquely, that his claim based on the "open presidential primary" language in article II, section 5(c), is not viable. He contends that his "claims have evolved since the commencement of this lawsuit" and that he is not "seeking to participate in the affairs of political parties." (AOB 47 fn. 10.) While all his claims seek to do just that, he has at least

chosen not to challenge the trial court's ruling as to the first cause of action.

B. The Opening Brief Continues to Inexplicably and Incorrectly Refer to the State of California as a Party

Each of Boydston's three complaints named the State of California as a defendant. (AA 13; AA 336; AA 804.) In the motion for judgment on the pleadings, the Secretary argued that the State was not a proper party. (AA 449.) Plaintiffs did not respond to the argument. (AA 767-777; AA 788.) And the trial court agreed with the Secretary that the State was not a proper party (AA 802). Inexplicably, the second amended complaint again named the State. (AA 804.) The Secretary again challenged the pleading for naming the State. (AA 847-848.) Boydston again did not respond. (AA 869-880.) And the trial court again agreed that the State was not a proper party. (AA 908.) Despite twice refusing to justify naming the State as a Defendant in the trial court, the Opening Brief continues to refer to "Defendants and Respondents . . . Secretary of State[] and the State of California." (AOB 17.) Yet it does not contend that the trial court erred in ruling that the State is not a proper party. Boydston has thus triply waived the argument, twice in the trial court and now on appeal. Lest there be any doubt, the State is not a proper party in a case challenging the constitutionality of a state statute. (*Templo v. State of California* (2018) 24 Cal.App.5th 730, 736 ["There is a 'general and long-established rule . . . that in actions for declaratory and injunctive relief challenging the constitutionality of state statutes, state officers with statewide

administrative functions under the challenged statute are the proper parties defendant,'" quoting *Serrano v. Priest* (1976) 18 Cal.3d 728, 752]; see also *State of California v. Superior Court (Veta Company)* (1974) 12 Cal.3d 237, 255.)

CONCLUSION

This Court should affirm the trial court's judgment.

Respectfully submitted,

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June 9, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached Respondents' Brief uses a 13 point Century Schoolbook and contains 7,869 words.

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June 9, 2022

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **Boydston, Jim, et al. v. Alex Padilla, et al.**
No.: **E076797**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On June 9, 2022, I electronically served the attached **RESPONDENTS' BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on June 9, 2022, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on June 9, 2022, at Sacramento, California.

Eileen A. Ennis
Declarant

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