Docket No. E076797

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

JIM BOYDSTON, STEVEN FRAKER, DANIEL HOWLE, JOSEPHINE PIARULLI, JEFF MARSTON, and INDEPENDENT VOTER PROJECT,
Plaintiffs and Appellants,

v.

ALEX PADILLA, as SECRETARY OF STATE; and STATE OF CALIFORNIA,
Defendants and Respondents.

San Bernardino County Superior Court
Case No. CIVDS1921480
(Judge Wilfred J. Schneider, Jr. – Department S-32)
From Judgment after Court Trial

PETITION FOR REHEARING

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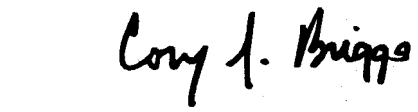
CERTIFICATION OF WORD COUNT
(Cal. R. of Court 8.204(c)(1).)

I, **Cory J. Briggs**, hereby certify, pursuant to California Rule of Court 8.204(c)(1), that this **Petition for Rehearing** is set in 13-point Century Schoolbook font and contains under 2,800 words, as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: April 5, 2023.



Cory J. Briggs

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I. INTRODUCTION

Plaintiffs respectfully request that this Court grant rehearing of this appeal. As explained below, the Court fundamentally mischaracterizes Plaintiffs' argument, ignores Plaintiffs' allegations, and relies on inapposite case law in order to insulate California's discriminatory presidential primary process from a full evidentiary hearing.

II. DISCUSSION

"A rehearing may be granted on the ground that the court's opinion misstated or omitted a *material fact* in the case, or misstated or failed to address any *material issue*." Eisenberg et al., Cal. Prac. Guide Civ. App. & Writs, Ch. 12-B, ¶ 12:16 (The Rutter Group) (citing *In re Jessup's Estate*, 81 Cal. 408, 471 (1889)) (italics in original); *accord People v. Castello*, 65 Cal. App. 4th 1242, 1248 (1998) (citing *In re Jessup's Estate* with approval).

A. Rehearing Is Warranted because the Court Mischaracterized or Ignored Material Factual Allegations

The Court's review of a trial court's ruling on demurrer – whether under state law or federal law – ***must assume the truth*** of the plaintiff's factual allegations and construe those allegations, and all reasonable inferences drawn therefrom, in Plaintiffs' favor. *Arce v. Cty. of Los Angeles*, 211 Cal. App. 4th 1455, 1471 (2012). Furthermore, a demurrer must be overruled if the complaint "states facts sufficient to state a cause of action under ***any***

possible legal theory" and is not limited to plaintiffs' stated theories of recovery. *City of Dinuba v. Cty. of Tulare*, 41 Cal. 4th 859, 870 (2007) (emphasis added). This Court failed to do either of those things here.

The Court begins its opinion by framing Plaintiffs' claims in a way that is materially different from the way Plaintiffs framed the claims: "[W]e reject the plaintiffs' assertion of a novel and peculiar constitutional right to vote ***in the presidential primary of a political party*** they have chosen not to join – without having their votes count for anything other than their expressive value." Slip Op., 1 (emphasis added). This is not Plaintiffs' argument.

First, the Court misstates the factual allegations and rests its opinion on a question that the Plaintiff never asked below. Plaintiffs did ***not*** ask whether they could "vote in the presidential primary of a political party." Rather, Plaintiffs asked whether – ***outside of*** any political party's presidential primary – they could participate in California's publicly funded presidential-primary process at all.

According to the allegations in the Second Amended Complaint ("SAC"), which the Court must accept as true:

- "[T]he results of California's presential primary have no legally binding authority over the ultimate determination of a political party's presidential nominee. … [T]he ultimate selection of the candidates, is governed by the private rulemaking processes of nationally controlled political parties." II AA 807-808 (¶ 15).

- "The ultimate selection of each party's nominee is conducted according to private party rules, not the presidential primary. [Citation]. Accordingly, the California presidential primary is, in effect, a state-sponsored straw poll for the exclusive and private benefit of the political parties." II AA 813-814 (¶ 50).
- "What the political parties do with primary votes cast in favor of their candidates is left entirely to these parties' respective rules." II AA 815 (¶ 58).
- "Defendants could easily provide NPP voters with their own non-partisan ballot in the presidential primary election." II AA 815 (¶ 60).
- "The private political parties are free to ignore the votes cast by NPP voters, just as they are free to ignore votes cast by their own party members, in selecting the party's preferred candidate for the general election." II AA 815 (¶ 61).

These allegations are based not only on facts but on various provisions of the Election Code establishing that the private political parties' rules and internal processes govern the selection of the parties' presidential nominee; the parties' respective selections are ***not the result of the State-administered presidential primary***. *See*, *e.g.*, Elec. Code §§ 6002(b) ("Except as otherwise specified in this chapter, the elements and practices to select delegates and alternates shall be the same as set forth in the standing rules and bylaws of the Democratic National Committee and the Democratic Party of California. . . ."), 6300(b) (providing

that legislation governs selection of Republican presidential nominee "to the extent that the constitution, bylaws, and rules of the Republican Party do not provide otherwise"); *see also Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 126 (1981) (holding that state could not bind its Democratic delegation to results of open primary).[1] The State nonetheless sends out presidential primary ballots and then collects, tallies, and reports the votes cast every four years, but only for voters who – willingly or grudgingly – associate with a political party.

Second, and against the backdrop of Plaintiffs' allegations and the case law confirming their accuracy, the Court ignores a crucial truth: as far as California law – as opposed to internal party rules and procedures -- is concerned, ***all presidential primary votes are "expressive" or "purely symbolic votes."*** *See* Slip Op. 1, 22.

Accepting plaintiffs' allegations as true (as the Court must), there is no difference ***for California as a state government*** between the "value" of a presidential primary vote that would be cast by an NPP voter and one that is cast by a party-affiliated

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[1] Indeed, not even California's "top-two" primary system – which applies to all statewide executive offices and state and federal legislative offices – chooses a party's "nominees," even though it does decide which candidates will appear on the general election ballot. *Rubin v. Padilla*, 233 Cal. App. 4th 1128, 1138 (2015) ("The primary election does not, however, result in the selection of party 'nominees,' which are defined by statute as party-affiliated candidates 'who are entitled by law to participate in the general election for that office.'); Cal. Const., art. II, § 5; Elec. Code §§ 332.5, 8141.5.

voter. Both are "expressive" or "symbolic" votes that the State is required to collect, tally, and report the results of and that – here being a key factor discounted by the Court – the political parties are free to consider ***or not*** in their nominating process for presidential candidates.

The California Supreme Court has declared that the right to vote in a primary election is fundamental; it did ***not*** declare that the right to vote in a primary election is fundamental ***only if*** the voter first affiliates with a political party. *See Communist Party of U.S. of Am. v. Peek*, 20 Cal. 2d 536, 542-543 (1942). If the right is fundamental for one voter, then it is fundamental for all voters.

To hold – at least under state law if not under federal law – that an NPP voter does not have a constitutionally protected right to cast an "expressive" vote in the presidential primary election, but a party-affiliated voter does is irreconcilable with the concept of equal protection under the law. *See* Cal. Const., art. I, § 7; *In re Mary G.*, 151 Cal. App. 4th 184, 198 (2007) ("The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment."); *Jauregui v. City of Palmdale*, 226 Cal. App. 4th 781, 800 (2014) ("state equal protection clause quite naturally applies to voting related issues"); *cf. Huntington Beach City Council v. Superior Ct.*, 94 Cal. App. 4th 1417, 1433 (2002) ("Ballots . . . are hemmed in by the constitutional guarantees of equal protection and freedom of speech. [Citation.] These guarantees mean, in practical effect, that the wording on a

ballot or the structure of the ballot cannot favor a particular partisan position.").

Thus, the Court erred in disregarding, ignoring, or otherwise not adequately accounting for these must-be-taken-as-true factual allegations and the corresponding case law in its analysis. If, as the allegations and case law show, if there is no functional difference ***from the State's perspective*** between an NPP vote and a party-affiliated primary vote in the presidential primary, then there is no constitutionally defensible reason to treat these two groups of voters differently or to uphold the rights of party-affiliated voters but not those of NPP voters.

B. Rehearing Is Warranted because the Court Relied on Factually Distinguishable Case Law to Dispose of Plaintiffs' Claims as a Matter of Law

Rehearing is warranted because the case law relied on by the Court is ***factually distinguishable***, and Plaintiffs should have been given an opportunity to develop a factual record in support of their claims.

First, the Court concluded that Plaintiffs' claims could be decided on demurrer without a factual or evidentiary record. Slip Op., 15.[2] The Court points to three election-law cases that were

[2] The Court incorrectly interpreted Plaintiffs' arguments here as implying that similar election law cases could "*never*" be decided on the pleadings. Slip Op., 15 (italics in original). Plaintiffs argue only that it would not be appropriate to decide ***this case*** on the pleadings because the precise issues raised here have not previously been raised. *See id*.

decided at the pleading stage, but those cases considered claims not presented here.

In *Edelstein v. City and County of San Francisco*, 29 Cal. 4th 164, 167 (2002), a would-be candidate challenged a prohibition against write-in voting during a runoff election. In *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1013-1014 (9th Cir. 2002), a would-be candidate challenged the ballot-designation regulations. In *Rubin v. Padilla*, 233 Cal. App. 4th 1128, 1137-1138 (2015), minor political party-affiliated plaintiffs challenged California's top-two primary system, which made all statewide executive offices and state and federal legislative offices "voter-nominated" offices, *i.e.*, the top-two system applied to candidates for all statewide political offices ***except*** for the office of the President. *See* Cal. Const., tit. II, § 5(a), (c). While plaintiffs there did include individual voters, arguments on their behalf were not advanced (and therefore not considered by the court). *See Ruben v. Padilla*, 233 Cal. App. 4th at 1144 n.9. True, the court noted that it could not, in the abstract, see what separate arguments the individual voter-plaintiffs could articulate, but that does not mean that such arguments were not made or could not be made. *See id*.

At their core, however, none of those cases dealt with the rights of NPP voters. "'It is axiomatic that cases are not authority for propositions not considered.'" *In re Marriage of Cornejo*, 13 Cal. 4th 381, 388 (1996) (citation & footnote omitted).

Next, this Court concluded that Plaintiffs' claim that the State's semi-closed presidential primary system imposes unconstitutional burdens on NPP voters' right to vote in a

presidential primary election is foreclosed by *Clingman v. Beaver*, 544 U.S. 581 (2005), and *California Democratic Party v. Jones*, 530 U.S. 567, 569 (2000) ("*Jones*"). Slip Op., 16. Yet both of these cases are factually distinguishable and therefore do not foreclose Plaintiffs' claims, particularly in the absence of a developed evidentiary record.

Clingman is distinguishable because the question before the High Court was "whether the [U.S.] Constitution requires that ***voters who are registered in other parties*** be allowed to vote in the LPO's [Libertarian Party of Oklahoma] primary" ***to select the LPOs candidates*** for the general election. *Clingman*, 544 U.S. at 588. As noted above, California's presidential primary election does not in any way select the political parties' candidates for the general election and Plaintiffs are ***not*** asking to participate in any party's candidate-selection process or to have their votes forced upon any political party. Rather, Plaintiffs are asking to participate in the ***State's*** presidential primary regardless of whether or not the political parties choose to consider the votes of non-members.

Jones is not only distinguishable, but it actually advances Plaintiff's argument. The question there was "whether the State of California may . . . use a so-called 'blanket' primary ***to determine a political party's nominee*** for the general election." *Jones*, 530 U.S. at 569 (emphasis added). Indeed, the High Court noted that the "***constitutionally crucial***" characteristic of California's "blanket primary" was that the primary voters were ***choosing the party's nominee***. *Id.*, at 585-586 (emphasis added). That is a

crucial difference because, as Plaintiffs' allegations state and as case law confirms, none of California's presidential primary voters select any party's presidential nominee; indeed, when it comes to respecting everyone's associational rights – whether those of political parties or individuals – Plaintiffs fully agree with *Jones*. Just as the State cannot establish an election process that infringes on the associational rights of political parties, the State cannot establish an election process that infringes on the associational rights of individual voters.

Next, the Court cites to *Burdick v. Takushi*, 504 U.S. 428, 438 (1992), and *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), for the proposition that voting does not have a "generalized expressive function," however, the context in which those Courts made those pronouncements distinguishes from the instant case.

Burdick, like *Edelstein* (discussed *supra*), involved a challenge to a state-law ban on write-in voting. *See Burdick*, 504 U.S. at 430. There, the plaintiff "wished to vote in the primary and general elections ***for a person who had not filed nominating papers***." *Id*. (emphasis added). Here, Plaintiffs' do not wish to cast a protest vote for "Daffy Duck" but to cast a vote in support of an actual candidate running for the office of the President without the burden of associating with a political party. *Id*., at 438.

Timmons involved a challenge to a state's "antifusion" laws which prohibited a candidate from appearing on two different parties' primary ballots ***as the parties' nominee***. *See Timmons*, 520 U.S. at 354. There, two different political parties (DFL and

New Party) chose the same candidate as their nominee (with the candidate being formally associated with DFL and not New Party). *Id*. Here, there is no political party that seeks to nominate the candidate of another political party. Therefore, the holding has little, if any, relevance to this Case.

C. Rehearing Is Warranted because California's Interests as Articulated in *Clingman* Are Distinguishable and Cannot Outweigh the Burdens on NPP Voters as a Matter of Law

Lastly, the Court found that the State's interests justify the burdens imposed by the current, semi-closed primary system. Slip Op., 20-21. However, the Court arrived at that conclusion based on factual records developed in other (distinguishable) cases and under other state election laws and another state's constitution.

Given California's current presidential primary system – wherein the State administers a presidential primary election even though the parties independently choose their presidential nominees according to their private party rules and not according to the result of the presidential primary election – ***the State's interests*** in protecting the integrity of the primary system, preserving the political parties' ability to select their own standard-bearers and preventing confusion (as articulated in *Clingman*) collapse. Again, unlike in *Clingman*, the result of California's presidential primary election cannot and does not decide the presidential nominees for the political parties. Furthermore, the State can easily provide separate vote counts for

votes cast by voters who are not members of a political party, ***just as the State already provides separate vote counts for votes cast by particular party members***. Such a minor burden on the State would have absolutely no impact on the political parties' ability to select their standard-bearers.

In short, the difference between Oklahoma's semi-closed primary system challenged in *Clingman* and California's semi-closed primary system challenged here is ***material*** (*i.e.*, "constitutionally crucial") and warrants a different result. *See Jones*, 530 U.S. at 585-586. Accordingly, Plaintiffs should be afforded an opportunity to develop their factual record to support their claims.[3]

III. CONCLUSION

Election-law challenges require the Court to weigh and balance the burdens of the challenged law against the State's compelling state interests. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Burdick*, 504 U.S. at 434. Neither the facts (as alleged in the SAC) nor the case law cited by the Court supports the disposal of Plaintiffs' claims as a matter of law on the pleadings

[3] To the extent the Court is unwilling to construe the SAC's allegations as at least implying that California's current process for counting, tallying, and reporting the votes of party-affiliated voters could easily accommodate the counting, tallying, and reporting of NPP voters' votes, Plaintiffs should be granted leave to amend their operative pleading. *See McDonald v. Superior Ct.*, 180 Cal. App. 3d 297, 303-304 (1986).

(*i.e.*, without an evidentiary record) based on the weighing and balancing of facts in other cases and contexts.

For all these reasons, Plaintiffs respectfully ask the Court grant this Petition for Rehearing.

PROOF OF SERVICE

1. My name is **Ruth Flores**. I am over the age of eighteen. I am employed in the State of California, County of **San Bernardino**.

2. My ✔ business ____ residence address is **Briggs Law Corporation, 99 East "C" Street, Suite 203, Upland, CA 91786**.

3. On **April 5, 2023**, I served ____ an original copy ✔ a true and correct copy of the following documents: **Petition for Rehearing**

4. I served the documents on the person(s) identified on the attached mailing/service list as follows:

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I declare under penalty of perjury under the laws ____ of the United States ✔ of the State of California that the foregoing is true and correct.

Date: **April 5, 2023** Signature: Ruth Flores

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Fourth District Court of Appeal Div. 1 Case No. D080921
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