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IN THE SUPREME COURT OF CALIFORNIA

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

v.

SHIRLEY N. WEBER, as SECRETARY OF STATE; and STATE OF CALIFORNIA,
Defendants and Respondents.

Review of a Decision by the Court of Appeal
Fourth Appellate District, Div. One, Docket no. D080921
San Bernardino County Superior Court Case No. CIVDS1921480
(Judge Wilfred J. Schneider, Jr. – Department S-32)

PETITION FOR REVIEW

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COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION ONE	COURT OF APPEAL CASE NUMBER: D080921
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 176284 NAME: Cory J. Briggs (State Bar no. 176284)//Janna M. Ferraro (State Bar no. 328921) FIRM NAME: Briggs Law Corporation STREET ADDRESS: 99 East "C" Street, Suite 203 CITY: Upland STATE: CA ZIP CODE: 91786 TELEPHONE NO.: 909-949-7115 FAX NO.: E-MAIL ADDRESS: cory@briggslawcorp.com ATTORNEY FOR (*name*): Plaintiffs and Petitioners Jim Boydston, et al	SUPERIOR COURT CASE NUMBER: CIVDS1921480
APPELLANT/ PETITIONER: JIM BOYDSTON; STEVEN FRAKER, et al. RESPONDENT/ REAL PARTY IN INTEREST: SHIRLEY N. WEBER, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party *(name*): Jim Boydston

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest *(Explain):*
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(2)		
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[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: May 1, 2023

Cory J. Briggs
(TYPE OR PRINT NAME)

Cory J. Briggs
(SIGNATURE OF APPELLANT OR ATTORNEY)

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Judicial Council of California
APP-008 [Rev. January 1, 2017]

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

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1. This form is being submitted on behalf of the following party *(name*): Steven Fraker

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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1. This form is being submitted on behalf of the following party *(name*): Daniel Howle

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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1. This form is being submitted on behalf of the following party *(name*): Independent Voter Project

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1. This form is being submitted on behalf of the following party *(name*): Jeff Marston

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1. This form is being submitted on behalf of the following party *(name*): Josephine Piarulli

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TABLE OF AUTHORITIES

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ISSUES PRESENTED

1. Under the *Anderson/Burdick* test, election-law claims require a fact-specific evaluation and balancing of the burdens imposed by the law against the asserted interests of the State.

   a. Did the lower courts err in concluding, at the pleading stage and without an evidentiary hearing, that the burdens imposed on no-party-preference ("NPP") voters by California's semi-closed presidential primary system are "minimal and reasonable" and that the State's interests are sufficiently compelling to justify those burdens?

   b. Did the lower courts err in dismissing Plaintiffs' constitutional claims regarding the rights of NPP voters to access ***the State's*** presidential primary process, at the pleading stage and without an evidentiary hearing, by applying *Jones* and *Clingman* which concerned the rights of individual voters to access the ***political parties'*** presidential primary process?

2. The selection of a political party's presidential nominee is governed by its internal party rules and procedures and ***not*** by the results of the State's presidential primary election. Did the lower courts err in concluding that presidential primary votes cast by NPP voters are not subject to constitutional protection merely because those votes would not be counted by the political parties in their candidate-nomination process?

INTRODUCTION

Plaintiffs respectfully request that this Court grant review of the now-published opinion of the Fourth District Court of Appeal, Division One, affirming the lower court's sustaining of Respondents' demurrer without leave to amend. Despite Plaintiffs' best efforts here, to date no court has heard evidence on the burdens and barriers to voting in California's presidential primary, particularly for NPP voters, since the State's voters passed a constitutional amendment eliminating partisan primaries for all primaries other than presidential elections. California has taken many steps to ease the burden of voting generally but the burdens for NPP voters remain substantial, particularly in the presidential-primary context. For instance, no court has yet heard evidence (despite its existence) that third-party ballot gatherers working for parties lawfully collect ballots and submit them to registrars of voters, but there is no such service for NPP voters. Likewise, no court has heard evidence (despite its existence) that NPP voters must go to polling stations in order to request a crossover ballot or have to take burdensome steps to obtain a crossover ballot through the mail compared to party-affiliated voters (whose original mailed ballots are preprinted with the names of presidential candidates). Only an evidentiary hearing can provide a forum by which Plaintiffs can demonstrate that the very cases cited by Respondents, all decided prior to these changes in California's unique set of laws, point to legal shortcomings in the State's current presidential primary process.

BACKGROUND

A. Parties

Plaintiff Jim Boydston is a resident, citizen, registered voter, and taxpayer in California. II AA 810 (¶ 27).[1] Boydston is registered as NPP and has been qualified to vote in California at all relevant times. *See* II AA 811 (¶ 30). Boydston would like to vote for a presidential candidate without being forced to associate with a political party. II AA 811 (¶ 32).

Plaintiff Steven Fraker is a resident, citizen, registered voter, and taxpayer in California. II AA 810 (¶ 27). Fraker is registered as NPP and has been qualified to vote in California at all relevant times. *See* II AA 811 (¶ 30). Fraker would like to vote for a presidential candidate, including NPP candidates, without being forced to associate with a political party. II AA 811 (¶ 33).

Plaintiff Daniel Howle is a resident, citizen, registered voter, and taxpayer in California. II AA 810 (¶ 27). Howle is registered as NPP and has been qualified to vote in California at all relevant times. *See* II AA 811 (¶ 30). Howle would like to vote for a presidential candidate, including NPP candidates, without being forced to associate with a political party. II AA 811 (¶ 31).

Plaintiff Josephine Piarulli is a resident, citizen, registered voter, and taxpayer in California. II AA 810(¶ 27). Piarulli has been qualified to vote in California at all relevant times. II AA 811 (¶ 35). Piarulli is registered with the Democratic Party but

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[1] Citations to the Appellants' Appendix ("AA") are preceded by the volume and followed by the consecutive page number.

would prefer to register as NPP. *Id*. Piarulli has remained registered with the Democratic party to ensure she has the full opportunity to vote in the State's presidential primary election. *Id*.

Plaintiff Jeff Marston is a resident, citizen, registered voter, and taxpayer in California. II AA 810 (¶ 27). Marston is registered with the Republican Party and has been qualified to vote in California at all relevant times. *See* II AA 811 (¶ 34). Marston would like to vote for a presidential candidate, including NPP candidates, without being forced to change his party preference. *Id*.

In 2016 and 2020, each individual Plaintiff was unable to vote for the candidate of their choice in the State's presidential primary election unencumbered by the condition to declare a party preference or otherwise associate with a political party. *See* II AA 811-812 (¶ 37).[2]

Plaintiff Independent Voter Project ("IVP") is a non-profit, non-partisan 501(c)(4) corporation dedicated to informing voters about important public-policy issues and encouraging non-partisan (*i.e.*, NPP) voters to participate in the State's electoral process. II AA 810 (¶ 28). At least one of IVP's members pays taxes to the State. *Id*.[3]

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[2] In the trial court, Plaintiffs included Lindsay Vurek and Linda Carpenter Sexauer. *See* II AA 810 (¶ 27), 811 (¶¶ 35, 36). The appeal as to these plaintiffs was not perfected. As such, they are not included here.

[3] For simplicity, Plaintiffs are referred to collectively herein as "Plaintiffs" with the express understanding that Plaintiffs Vurek

Defendants and Respondents Shirley N. Weber, as Secretary of State,[4] and the State of California (hereinafter collectively, "Respondents" or the "State") administer the State's presidential-primary election. *See* II AA 814 (¶¶ 51, 53). The Secretary of State is the chief elections officer tasked with "adopting regulations to assure the uniform application and administration of state election laws." *Id.* (¶ 53). Presidential-primary elections are publicly funded from county treasuries. *Id.* (¶ 51).

B. <u>Factual Allegations</u>[5]

The State's only criteria to be a "qualified registered voter" – and, thus, participate in the public-election process – are that the individual must be: (1) a U.S. citizen living in California, (2) registered where he or she currently lives, (3) at least 18 years old, and (4) not in prison or on parole for a felony. II AA 812 (¶ 38). There is ***no requirement*** that a registered voter identify a political party preference – that is, to associate with a political party – in order to exercise the right to vote. *Id.* A voter who

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and Sexauer are not parties to this appeal (*see* note 3, *supra*) and Plaintiff IVP is not itself an individual voter (but does advocate for the voting rights of NPP voters); nothing in this petition is intended to imply otherwise.

[4] This lawsuit was originally filed against the then-Secretary of State Alex Padilla. The current Secretary of State is Shirley N. Weber. *See* Att. 4 (Order Mod. Op. No. 2).

[5] For purposes of demurrer, Plaintiffs' factual allegations must be accepted as true and given a liberal construction. *Gerwan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 515-516 (2000); Civ. Proc. Code § 452.

declines to associate with a political party is registered as "no party preference" (*i.e.*, NPP). *Id.*

In 2016, approximately 4.7 million voters – nearly 25 percent of the electorate – were registered as NPP. *See* II AA 807 (¶ 14), 814 (¶ 52). Whether or not those voters could cast a vote for a presidential-primary candidate was completely controlled by the private political parties. *Id.*; II AA 807-808 (¶¶ 15-16), 809 (¶ 23); *see also* II AA 812 (¶¶ 41-43).

NPP voters are not given the same access to the State's presidential-primary process. By default, NPP voters receive a "non-partisan" primary ballot ***from the State***, but the ballot ***omits*** all candidates for President of the United States. II AA 812 (¶ 44). NPP voters can gain access to the presidential-primary process in only two ways: (1) they can waive or relinquish their NPP/unaffiliated status and register with the political party of their preferred candidate; or (2) they can request a "crossover" ballot from a political party, but only if that party, by its own internal rules, allows NPP voters to participate.[6] *See* II AA 812-813 (¶¶ 44-49). Said another way, NPP voters can participate in the presidential primary election ***only if authorized by the private political party***. II AA 813 (¶ 46); *see also* II AA 805 (¶ 4).

[6] NPP voters that want to cast a vote for a presidential candidate associated with one of the political parties that does not permit crossover voting have no other options but to formally associate with the party. *See* II AA 813 (¶ 49).

In 2016 and 2020, only three of the six qualified political parties[7] (American Independent, Libertarian, and Democratic) allowed NPP voters to even request a crossover ballot from the State; the other three political parties (Green, Peace & Freedom, and Republican) did not. *Id*. (¶¶ 47-49). Therefore, NPP voters who wanted to cast a vote for a presidential candidate in the State's primary election could only cast a vote for those candidates appearing on the American Independent, Libertarian, and Democratic primary ballots (if they went through the process for requesting a crossover ballot) but were precluded from casting a vote for those candidates appearing on the Green, Peace & Freedom, and Republican primary ballots (unless they formally associated (*i.e.*, registered) with the respective political party). *Id*.

Unless they affirmatively request a crossover ballot, the non-partisan ballot NPP voters automatically receive from the State that does not include any presidential-primary candidates. The process by which an NPP voter can request a crossover ballot ***from the State*** has its own constitutionally concerning burdens. NPP voters must individually request a crossover ballot, either from a poll worker or, if voting by mail, by requesting one by a certain deadline in advance of the primary election. *See id*. (¶ 48); *see also* II AA 814-815 (¶¶ 54, 55).[8] However, if NPP voters do not

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[7] Political parties are "qualified" by the Secretary of State. *See* II AA 812 (¶ 41).

[8] When an NPP voter requests a crossover ballot, their names and contact information are provided to that political party for future marketing. *See* II AA 50:14-16.

request the ballot using the correct terminology (*i.e.*, requesting a "crossover" ballot), they will not receive it and poll workers are barred from making any suggestions or providing additional information to these voters about their options. II AA 815 (¶ 56). In contrast, party-affiliated voters are automatically provided a ballot ***by the State*** that includes at least some of the presidential-primary candidates. *See id*. (¶ 57); *but see* II AA 813 (¶ 45) (party-affiliated voters can only vote for candidates in the primary of the political party for which they are registered).

Even where a crossover ballot is available to an NPP voter, the burdens imposed ***by the State*** on voters obtaining that crossover ballot creates confusion and imposes additional, onerous steps on NPP voters desiring to cast a vote in a primary election. *See* II AA 814-815 (¶¶ 54-59). For example, NPP voters who vote by mail (also known as "absentee voters") must either (a) respond to an innocuous postcard to request a crossover ballot; (b) bring their NPP ballot to their polling place, surrender it, and request a crossover ballot at the polling place; or (c) register with one of the qualified private political parties. II AA 814 (¶ 54). Respondents are aware that many counties, when they send out the aforementioned postcards (which often resemble junk mail) to NPP voters, set arbitrary deadlines for NPP voters to respond with what type of crossover ballot they want in order for them to receive that ballot. II AA 814-815 (¶ 55). Reasonable NPP voters are led to believe that if they miss the deadline, they have lost their right to vote in the presidential-primary election, which is not the case. *Id*. Furthermore, Respondents fail to adequately

inform NPP voters of their options and poll workers are barred from making any suggestions or providing additional information to these voters about their options. II AA 815 (¶ 56).

The result of these burdens is confusion and the disenfranchisement of NPP voters. *See* II AA 805 (¶ 4), 807 (¶ 13). Respondents have an obligation to provide a free and fair election equally to every qualified registered voter, regardless of party affiliation (or lack thereof) and regardless of what the political parties do with the results. *See* II AA 815 (¶ 59).

The ultimate selection of each political party's presidential nominee is conducted according to private party rules, not the presidential primary election conducted by the State. *See* II AA 807-808 (¶ 15), 813-814 (¶ 50), 815 (¶¶ 58, 61).

Regardless of how the private political parties ultimately select their nominees, Respondents have the same obligations to NPP and party-affiliated voters alike: provide free and fair elections that are accessible by all qualified voters; and accept, tally, and report the result of each validly cast vote. II AA 815 (¶ 59).

Respondents' perverse efforts to protect the associational rights of ***political parties*** has resulted in a presidential-primary system that violates the state and federal constitutional rights of ***individual voters***, including Plaintiffs. *See* II AA 805 (¶ 4), 808-809 (¶¶ 16-18). With NPP voters now approximately 25 percent of the electorate in 2020 (and growing), the level of *de facto* voter suppression due to the party-controlled primary-election process

is constitutionally (and morally) untenable. II AA 805-806 (¶¶ 5, 7), 807 (¶¶ 13-14), 814 (¶ 52).

California's primary elections are paid from county treasuries. II AA 814 (¶ 51; citing Elec. Code § 13001). As a result of this transferring of control of the primary-election process to the political parties and prioritizing the rights of political parties over the rights of individual voters, California's current presidential-primary system serves a predominantly private purpose – *i.e.*, to wholly benefit the private political parties – and unconstitutionally appropriates public funds for a private purpose. *See* II AA 817-818 (¶¶ 81-85); Cal. Const., art. XVI, § 3.

C. Relevant Procedural History

Plaintiffs filed their complaint for declaratory and injunctive relief in July 2019 in the San Bernardino County Superior Court. I AA 13. Respondents answered, generally denying Plaintiffs' allegations, and asserting seven affirmative defenses. I AA 34-36.

In November 2019, the trial court heard and denied Plaintiffs' pre-trail motion for preliminary injunction. *See* I AA 390-398 (ruling on motion dated Nov. 19, 2019). During the pendency of that motion, the parties stipulated to allow Plaintiffs to file a first amended complaint to add an additional plaintiff. I AA 331-334, 339. Because the amendment only added an additional plaintiff and made no other changes, Respondents' original answer was deemed their answer to the first amended complaint. I AA 332.

In August 2020, Respondents filed a motion for judgment on the pleadings ("MJOP") as to the first amended complaint. I AA 425. The trial court granted the MJOP with leave to amend. *See* II AA 793-803 (ruling on motion dated Oct. 2, 2020).

On October 22, 2020, Plaintiffs filed and served their second amended complaint ("SAC"). II AA 804.

Respondents demurred to Plaintiffs' SAC on the ground that each and every cause of action failed to state facts sufficient to constitute a cause of action against Respondents. *See* II AA 824-825. The trial court sustained the demurrer without leave to amend. *See* II AA 895-910 (minute order and ruling on demurrer dated Jan. 29, 2021).

The trial court directed counsel for Respondents to prepare the order or judgment of dismissal after hearing. *See* II AA 895. Entry of judgment was never perfected, and, on March 29, 2021, Plaintiffs[9] filed their notice of appeal in Division Two of the Fourth Appellate District ("Division Two") despite no judgment being entered in order to preserve their appeal rights. *See* II AA 911. On April 26, 2021, Division Two ordered Plaintiffs to file and serve a file-stamped copy of the judgment. Plaintiffs complied and prepared a proposed judgment that was subsequently signed and entered by the trial court on April 28, 2021, and lodged with Division Two thereafter. II AA 936-937.

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[9] Plaintiffs who are a party to this appeal are Boydston, Fraker, Howle, Piarulli, Marston, and IVP. As noted above, the appeal as to Plaintiffs Vurek and Sexauer was not perfected, and they are not included here. *See* notes 2 & 3, *supra*.

After the parties had fully briefed this matter in Division Two, the appeal was transferred to Division One of the Fourth Appellate District (hereinafter, "Court of Appeal") where oral argument was heard.

On March 21, 2023, the Court of Appeal filed and served its unpublished opinion affirming the judgment of the trial court. *See generally* Att. 1 (Unpub. Op.).

Plaintiffs timely sought rehearing of the Court of Appeal's opinion, and, on April 11, 2023, the Court of Appeal denied Plaintiffs' rehearing petition but made modifications to its opinion, with no change in judgment. *See* Att. 2 (Order Mod. Op. No. 1).

On April 12, 2023, the Court of Appeal granted the Attorney General's request to publish the opinion. *See* Att. 3 (Order Cert. Op. Pub.).

On April 14, 2023, the Court of Appeal again modified its opinion to update the named Secretary of State to the current officer holder, Shirley N. Weber, with no change in judgment. *See* Att. 4 (Order Mod. Op. No. 2).

D. <u>Court of Appeal Opinion, As Modified</u>

The Court of Appeal affirmed the trial court's judgment after sustaining Respondent's demurrer without leave to amend. *See* Att. 1, p. 1.

From a procedural standpoint, the Court of Appeal concluded that it could properly dismiss Plaintiffs' claims at the pleading stage and without an evidentiary hearing. Att. 1, p. 14-16. The Court of Appeal also concluded in a footnote that

Plaintiffs had forfeited their declaratory relief argument by raising it for the first time in the appellants' reply brief. *Id.*, p. 15 n.4.

On the merits of Plaintiffs' claims, the Court of Appeal determined that the *Anderson/Burdick* balancing test or framework applied to Plaintiffs' election-law claims; that, under step one, any constitutional burdens imposed by the State's semi-closed presidential primary system on an NPP voters right to vote in the State's presidential primary election is minimal and reasonable as a matter of law; and that, under step two, the State's purported interest in its semi-closed presidential primary system were sufficient to justify the burdens imposed on NPP voters as a matter of law. *Id.*, pp. 16-22.

Additionally, the Court of Appeal concluded that because it had rejected Plaintiffs' election law claims, that Plaintiffs claim for waste of public funds must also be rejected. *Id.*, pp. 22-23.

LEGAL DISCUSSION

A. Evaluation and Balancing of Constitutional Burdens and State Interests Under the *Anderson/Burdick* Test at the Pleading Stage Requires the Court to Accept Plaintiffs' Allegations as True and to Give the Operative Complaint a Liberal Construction

This case requires the evaluation of Plaintiffs claims under two separate standards. On the one hand there is the *Anderson/Burdick* test which is the test under which the merits

of Plaintiffs' election-law claims are evaluated. On the other hand, there are the rules and presumptions on demurrer. As discussed below, at the pleading stage and in the absence of an evidentiary record, the courts were required, but failed, to accept Plaintiffs' allegations as true and purported to decide Plaintiffs' claims based on the bare assertions of the State based on factually distinguishable case law. This was in error and this petition should be granted to correct that error.

1. Anderson/Burdick Test

The analytical framework used to decide constitutional challenges to state election laws is well-established: the court "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. [The court] then must identify and evaluate the precise interests put forward by the State as justification for the burden imposed by its rule." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213-214 (1986); *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). This framework is known as the *Anderson/Burdick* test. "'This is a sliding scale test, where the more severe the burden, the more compelling the state's interest must be.'" *Mecinas v. Hobbs*, 30 F.4th 890, 904 (9th Cir. 2022) (quoting *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018)).

While Plaintiffs do not dispute the applicability of the *Anderson/Burdick* test to its election-law claims, it needs to be

applied in light of the procedural posture of the case; this is something that the lower courts did not do.

2. Standard of Review on Demurrer

A demurrer is limited to defects appearing ***on the face*** of the complaint. Civ. Proc. Code § 430.30; *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985). Whether assessed under state or federal law, the court "must ***assume the truth of the complaint's properly pleaded or implied factual allegations***" and the court must "construe[] those allegations, and any reasonable inferences that may be drawn from them, in the ***light most favorable to the plaintiff***." *Arce v. Cty. of Los Angeles*, 211 Cal. App. 4th 1455, 1471 (2012) (emphasis added; internal citations and quotation marks omitted).

Therefore, in applying the *Anderson/Burdick* test to Plaintiffs' claims, the court's evaluation of the facts is limited to the allegations in the SAC (which must be accepted as true) and, as discussed below, those allegations are sufficient to survive demurrer.

3. Plaintiffs Sufficiently Alleged a Constitutional Burden in the SAC

The face of the SAC demonstrates that the State's semi-closed presidential primary system imposes burdens on NPP voters: the burden of associating with a political party in order to cast a vote in the State's presidential primary process (*see* II AA 808-809 (¶¶ 16-18, 21), 811-812 (¶¶ 30-38)), the burden of jumping through various hoops in order to cast a vote in the

State's presidential primary process while maintaining NPP status, even when authorized by a major political party to participate in its presidential primary (*see* II AA 812-813 (¶¶ 44-49), 814-815 (¶¶ 54-61)). These associational burdens have been recognized by the U.S. Supreme Court as being significant, if not severe. *See California Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (finding forced political associations "severe and unnecessary") ("*Jones*"); *Anderson*, 460 U.S. at 793-794 ("A 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. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties.").

It is true that in the context of participating in a ***political party's*** presidential nominee process, the U.S. Supreme Court found that the burden on a voter to associate with the political party was minimal. *See Clingman v. Beaver*, 544 U.S. 581, 582 (2005) ("Requiring voters to register with a party before participating in its primary minimally burdens voters' associational rights."). However, the Plaintiffs here ask a fundamentally different question related to their right to vote in ***the State's*** presidential primary process.

First, under California law, it is not the State's primary election that determines the political parties' presidential candidates/nominees. II AA 813-814 (¶ 50), 815 (¶ 58). Where ***the State's*** presidential primary process is not the process that

determines the political parties' presidential nominees, it cannot be said ***as a matter of law*** that Plaintiffs' have not alleged a sufficient burden to survive demurrer.

Second, under California law, certain political parties have authorized NPP voters to participate in their presidential primary process. Even in those circumstances, however, NPP voters must jump through additional hoops in order to vote for those parties' candidates. Where ***the State's*** presidential primary process creates unnecessary barriers and burdens for a class of voters who have been authorized to participate, it cannot be said, ***as a matter of law,*** that Plaintiffs have not alleged enough of a burden to survive demurrer.

In sum, Plaintiffs have alleged a cognizable injury resulting from ***the State's*** requirement to associate with a political party in order to participate in ***the State's*** presidential primary process. *See* II AA 815 (¶¶ 59, 61). Plaintiffs have also alleged a cognizable injury resulting from the additional and often confusing requirements that NPP voters must satisfy in order to cast a vote in the State's presidential primary process while maintaining their NPP status, even when authorized by the political party's rules. *See* II AA 813 (¶¶ 46, 48-49), 814 (¶¶ 54-56). Plaintiffs further allege that these burdens are so substantial and pervasive that they disenfranchise NPP voters *en masse*. *See* II AA 805 (¶¶ 4-5); *see also id.*, 804 (¶ 14). At this stage of the proceedings (*i.e.*, the pleading stage), Plaintiffs allegations need to be accepted as true and given a liberal and favorable

construction and under that standard, Plaintiffs have sufficiently alleged a constitutional burden. *Accord Soltysik*, 910 F.3d at 444.

Even if the Court is persuaded that the burdens described in the SAC (and again above) are not "severe" such that strict scrutiny is required, that does not mean that the burdens are necessarily "minimal and reasonable." Even if the burden imposed by an election law or regulation is "'not severe enough to warrant strict scrutiny' [it] may well be 'serious enough to require an assessment of whether alternative methods would advance the proffered government interests.'" *Mecinas*, 30 F.4th at 905 (quoting *Soltysik*, 910 F.3d at 445) (declining to rule in the State's favor at the pleading stage). Such cannot be determined on the pleadings and without an evidentiary record.

4. Whether the State's Asserted Regulatory Interests Outweigh the Constitutional Burdens Cannot be Determined as a Matter of Law on the Pleadings

Without the benefit of a factual record, the Court of Appeal concluded that the State's asserted regulatory interests in the State's semi-closed presidential primary system were the same as those asserted in *Clingman* and therefore, ***as a matter of law***, those interests were sufficient to justify the burdens of the State's semi-closed presidential primary system on NPP voters. Att. 1, p. 20-22.

The state interests described in *Clingman* – "preserving political parties as interest groups," "enhancing parties' electioneering and party-building efforts," and "guarding against

party raiding" – were articulated in the context of protecting the constitutional rights of ***political parties*** with respect to ***their*** respective candidate-nomination processes. II AA 843 (lns. 2-4); RB 22-25. As noted in the SAC, ***the State's*** presidential primary election ***is not the process that selects the political parties' nominees***. *See* II AA 807-808 (¶ 15), 813-814 (¶ 50), 815 (¶ 61). It is not clear whether or how these interests are implicated here, particularly when the NPP Plaintiffs here (1) have no party allegiances; and (2) face State-imposed barriers to and burdens on voting that no party-affiliated voter faces, even when NPP voters desire to vote for a candidate whose party allows NPP voters to participate. For example, how would simply printing the names of presidential candidates whose parties have authorized NPP voters to participate on the NPP ballot sent by the State degrade the parties as interest groups or diminish their electioneering? Wouldn't knowing NPP voters' choices for president at the primary stage facilitate party electioneering and help their candidate win the general election? As for party raiding, wouldn't allowing NPP voters to vote in ***the State's*** presidential primary process protect parties from unfaithful voters by obviating the need for those voters to become members solely for the purpose of interfering with a party's nominee process?

The Court of Appeal opined that giving NPP voters equal access to the State's presidential primary process would somehow harm the integrity of the primary system and/or confuse or

mislead the general voting population: "It would also create massive confusion to allow some voters to participate in a presidential primary without having their votes used to determine the result." Att. 1, p. 21. However, as previously noted, ***none*** of the votes cast in the State's presidential primary election – whether by party-affiliated voters or crossover voters (if permitted) – legally dictates the result (*i.e.*, the political parties' nominees). *See* II AA 807-808 (¶ 15), 813-814 (¶ 50). In fact, the political parties are already free to completely ignore the votes cast in the State's presidential primary election in selecting their respective nominees. *See id.*, at 815 (¶ 61).

Furthermore, Plaintiffs have alleged that the current semi-closed presidential primary system already causes massive confusion among the general voting population which harms the integrity of the primary system. *See* II AA 814-815 (¶¶ 54-56). At this stage of the proceedings, these allegations must be accepted as true. The State has put forth no evidence to the contrary on this point, only bare assertions; this has been found to be insufficient to warrant dismissal at the pleading stage:

> We also disagree with the notion that a state is categorically "not required to make an evidentiary showing of its interests." [Citation.] We acknowledge, as we must, that a state need not offer "elaborate, empirical verification" that voter confusion in fact occurs, [citation], particularly where the burden a challenged regulation imposes on a plaintiff's associational rights is slight or minimal. But we cannot agree that "[e]ven a speculative concern of voter confusion is

> sufficient" as a matter of law to justify any regulation that burdens a plaintiff's rights, [citations], especially where that burden is more than de minimus.

Soltysik, 910 F.3d at 448. The *Anderson/Burdick* test is a sliding scale, not the "ordinary rational-basis review" and "the state must sometimes be required to offer evidence that its regulation of the political process is a reasonable means of achieving the state's desired ends." *See id.*, at 448-449 (citations omitted). This is one of those times.

Therefore, while "avoiding voter confusion" has been held to be "an important government interest," it is not clear how the current semi-closed primary system advances that goal (indeed, Plaintiffs argue it does not). *See id.*, at 446-447. Nor is it clear how an alternative system that is less burdensome on NPP voters would not advance that goal ***as a matter of law***. *Cf. id.*, at 447 ("But without any factual record at this stage, we cannot say that the [State's] justifications outweigh the constitutional burdens on [plaintiff] as a matter of law."). In the absence of a factual record, the Court of Appeal erred in finding the state's asserted interests outweighed the burdens on NPP voters in this case.

5. ***The Rights of Individual Voters Cannot be Determined as a Matter of Law Based on U.S. Supreme Court Case Law Protecting the Rights of Political Parties***

The Court of Appeal concluded that Plaintiffs' claim that the State's semi-closed presidential primary system imposes

unconstitutional burdens on NPP voters' right to cast a vote in the State's presidential primary election is foreclosed by *Clingman* and *Jones*. Att. 1, p. 16. Yet, both of these cases are procedurally and factually distinguishable and therefore cannot foreclose Plaintiffs' claims, particularly at the pleadings stage and in the absence of a developed evidentiary record.

First, *Clingman* and *Jones* were both decided after ***bench trials***, not on the pleadings. *See Jones*, 530 U.S. at 599; *Clingman*, 544 U.S. at 584.

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 (emphasis added). As noted above, California's presidential primary election does not in any way select the political parties' candidates for the general election. Plaintiffs are merely asking to participate in ***the State's*** presidential primary process regardless of whether the political parties choose to consider the votes of non-members in their nominee selection process (again, the political parties already have the discretion to consider the votes of its own members or not).

Jones is not only distinguishable, but it actually advances Plaintiffs' 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, ***this***

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 (party-affiliated or not) select any political 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*. *See* II AA 808 (¶ 18), 819 (¶ 97). 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.

The Court of Appeal cited three election law cases that were decided at the pleadings stage, however, those cases considered claims that are 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. These cases involved the rights of candidates in relation to appearing on a ballot and are thus factually distinguishable and/or inapposite here.

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 the above cases dealt with the rights of NPP voters and the fundamental right of all voters to participate in ***the State's*** presidential primary process. "'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).

6. ***The Court of Appeal Erred in Concluding Plaintiffs Forfeited Their Declaratory Relief Argument***

Separate but related, the Court of Appeal concluded in a footnote that Plaintiffs had forfeited their declaratory relief argument by only raising it in its reply brief. Att. 1, p. 15 n.4. This is not the standard, and the demurrer should have been overruled.

As noted above, a demurrer is limited to defects appearing ***on the face*** of the complaint. Civ. Proc. Code § 430.30; *Blank*, 39 Cal. 3d at 318. The appellate court must examine the operative complaint to determine whether it "states facts sufficient to state a cause of action under ***any possible legal theory***" and is "***not limited to plaintiffs' theory*** of recovery or 'form of action' pled in testing the sufficiency of the complaint." *City of Dinuba v. Cty. of Tulare*, 41 Cal. 4th 859, 870 (2007) (emphasis added).

"[T]he 'any possible legal theory' standard encompasses a legal theory presented for the first time in an opening appellant's brief. The standard also includes legal theories first raised by the reviewing court. In short, an appellate court 'may consider new theories on appeal from the sustaining of a demurrer.'" *Gutierrez v. Carmax Auto Superstores California*, 19 Cal. App. 5th 1234, 1244-1245 (2018) (internal citations omitted). Additionally, "a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts. A demurrer is directed to the face of a complaint and it raises only questions of law. Thus an appellant challenging the sustaining of a general demurrer may change his or her theory on appeal, and an appellate court can affirm or reverse the ruling on new grounds." *Bocanegra v. Jakubowski*, 241 Cal. App. 4th 848, 857 (2015) (internal citations and quotation marks omitted).

Here, the Court of Appeal concluded that Plaintiffs forfeited declaratory relief argument, however, as the above authorities make clear, Plaintiffs were not precluded from (and should not have been penalized for) raising the declaratory relief

argument for the first time in its appellate briefing.[10] Whether or not Plaintiffs' SAC sufficiently states a claim for declaratory relief such that the demurrer should be overruled is a pure question of law. *Accord Lord v. Garland*, 27 Cal. 2d 840, 852 (1946) (an "action for declaratory relief may be invoked to test the constitutionality of a statute … [and] declaratory relief is an available remedy against the state."); *Qualified Patients Assn. v. City of Anaheim*, 187 Cal. App. 4th 734, 751 (2010) ("a general demurrer is usually not an appropriate method for testing the merits of a declaratory relief action").

Furthermore, Plaintiffs' declaratory relief claim appears ***on the face*** of the SAC (and indeed, on each of the complaint's

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[10] Notably, the authority cited by the Court of Appeal did not involve a ***de novo*** review of a demurrer ruling but a review of a denial of a motion for judgment notwithstanding the verdict for ***substantial evidence***. *See* Att. 1, p. 15 n.4 (citing *Hurley v. Dep't of Parks & Recreation*, 20 Cal. App. 5th 634, 648 n.10 (2018)). Issues brought under these differing standards of review receive different treatment on appeal. *Compare* Eisenberg, *et al*., Cal Prac. Guide Civ. App. & Writs, Ch. 8-C (The Rutter Group), ¶¶ 8:33 ("The 'substantial evidence' standard, which applies where the appealed ruling turns on the trial court's determination of disputed fact issues.") *with* 8:35 ("The 'independent' (or 'de novo') review standard, which applies to pure questions of law not involving the resolution of disputed fact issues."). "However convoluted the facts, or complex the issues, the standard of review is the compass that guides the appellate court to its decision. It defines and limits the course the court follows in arriving at its destination." *People v. Jackson*, 128 Cal. App. 4th 1009, 1018 (2005). "'It is axiomatic that cases are not authority for propositions not considered.'" *In re Marriage of Cornejo*, 13 Cal. 4th at 388 (citation & footnote omitted).

iterations). *See* II AA 810 (¶ 25; citing Civ. Proc. Code § 1060 *et seq*.), 820 (¶ A; prayer for relief seeking declaration of rights). Therefore, even if not explicitly advanced in Plaintiffs' prior briefing below, it was an error for the Court of Appeal to disregard Plaintiffs' declaratory relief arguments in its review of the SAC for legal sufficiency.

Because Plaintiffs' SAC sufficiently stated a claim for declaratory relief on its face and Plaintiffs were legally permitted to raise that issue for the first time on appeal, it was an error for the Court of Appeal to conclude otherwise.

B. Whether a Voter Has a Constitutional Right to Cast a Vote in the State's Presidential Primary Election Cannot Depend on Whether that Vote is Counted by the Political Parties in Their Nominee Process

The Court of Appeal agreed that "[t]here is no dispute that the right to vote is fundamental." Att. 1, p. 13; *accord Communist Party of U.S. of Am. v. Peek*, 20 Cal. 2d 536, 542-543 (1942) (every citizen has the constitutional right to vote at primary elections). But then the Court of Appeal went on to conclude that the right to vote that Plaintiffs seek to enforce is not constitutionally protected because that vote wouldn't be counted by the political parties in their respective nominee selection processes, characterizing the vote as having only "expressive" or "symbolic" value. *See* Att. 2, pp. 1 ("we reject the plaintiffs' assertion of a … constitutional right to vote in California's presidential primary … without having their votes count for anything other than their expressive value"), 2 ("plaintiffs' desire to express themselves via

the presidential primary process without actually assisting in the selection of a party's nominee does not implicate any constitutional right"), 19 ("Plaintiffs' desire to express themselves via the polls without having their votes count in determining the result not a constitutional right:), 22 ("The State's strong interest … outweighs any interest of NPP voters to cast purely symbolic votes"); Att. 2, p. 2 ("plaintiffs' desire to express themselves via the presidential primary process without actually assisting in the selection of a party's nominee does not implicate any constitutional right"). According to the Court of Appeal, having the vote be counted by the political parties in their candidate or nominee selection process was a defining feature of a constitutionally protected primary vote.

As previously noted, and as alleged in the SAC, the State's presidential primary election does not select the political parties' presidential nominees. *See* II AA 807-808 (¶ 15), 813-814 (¶ 50), 815 (¶¶ 58, 60, 61). Those 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).[11] 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.

Against the backdrop of Plaintiffs' allegations and the case law confirming their accuracy, the Court of Appeal ignored 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 "symbolic."*** *See* Att. 1, p. 22; Att. 2, p. 1. 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 voter. Both are "expressive" or "symbolic" votes

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[11] Indeed, not even California's "top-two" primary system – which applies to all statewide executive offices and state and federal legislative offices – chooses a political party's "nominees," even though it does decide which candidates will appear on the general election ballot. *Rubin v. Padilla*, 233 Cal. App. 4th at 1138 ("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.

that the State is required to collect, tally, and report the results of and that – here being a key factor discounted by the Court of Appeal – the political parties are free to consider ***or not*** in their candidate nominating process.

What the aforementioned makes clear is that there is no legal basis for the State to recognize the constitutional right of a party-affiliated voter to cast a vote in the State's presidential primary election but to not recognize that same right with respect to an NPP voter. Even if the political parties' consideration and treatment of votes cast in the State's presidential primary election could be a valid basis for the State to extend or deny constitutional rights to individual voters, as discussed above, no political party is required to consider or count even their own members votes in its candidate nomination process.

CONCLUSION

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.*, 20 Cal. 2d at 542-543. 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 a vote in the State's 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.").

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.

For all these reasons, Plaintiffs respectfully ask the Court to grant this petition for review.

Dated: May 1, 2023.

Respectfully submitted,
Briggs Law Corporation

By: Cory J. Briggs
Cory J. Briggs
Attorneys for Plaintiffs and Appellants ***Jim Boydston, Steven Fraker, Daniel Howle, Josephine Piarulli, Jeff Marston, and Independent Voter Project***

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

I, **Cory J. Briggs**, hereby certify that this **Petition for Review** is set in 13-point Century Schoolbook font and contains under 7,600 words, as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: May 1, 2023.

Cory J. Briggs

ATTACHMENT:
COURT OF APPEAL OPINION
DATED MARCH 21, 2023

Filed 3/21/23

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JIM BOYDSTON et al., Plaintiffs and Appellants, v. ALEX PADILLA, as Secretary of State, etc., et al., Defendants and Respondents.	D080921 (Super. Ct. No. CIVDS1921480)

APPEAL from a judgment of the Superior Court of San Bernadino County, Wilfred J. Schneider, Jr., Judge. Affirmed.

Briggs Law Corporation, Cory J. Briggs, Janna M. Ferraro; Peace & Shea and S. Chad Peace for Plaintiffs and Appellants.

Rob Bonta, Attorney General, Thomas S. Patterson, Assistant Attorney General, Anya M. Binsacca, Nelson R. Richards and Megan Anne Richards, Deputy Attorneys General, for Defendants and Respondents.

In this case, we 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.

The question presented here is whether California may lawfully require anyone who seeks to vote in a presidential primary for a candidate of a particular political party to associate with that party as a condition of receiving a ballot with that candidate's name on it. Plaintiffs contend that the answer is no. They argue that Elections Code section 13102, the statute that establishes California's semi-closed presidential primary system, is therefore unconstitutional.

Defendants California Secretary of State and the State of California dispute this conclusion, asserting that the United States Supreme Court has answered this question in the affirmative on multiple occasions. In *California Democratic Party v. Jones* (2000) 530 U.S. 567 (*Jones*), the Court held that states may not force political parties to allow non-members to participate in their candidate-selection process and found 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." (*Id.*, at pp. 573, fn. 5, 586.) In *Clingman v. Beaver* (2005) 544 U.S. 581 (*Clingman*), the Court held that requiring voters to register with a political party before participating in its primary only minimally burdens voters' associational rights; any such restriction is constitutional so long as it is reasonable and nondiscriminatory. (*Id.* at pp. 592–593.)

Attempting to avoid the conclusion compelled by these holdings, plaintiffs assert that although they must be permitted to vote in the presidential primary election without affiliating themselves with any political party, they do not seek to require the political parties to *count* their votes in determining the winner. Rather, plaintiffs merely desire to express their political preferences, and they believe they are constitutionally entitled to do

so by casting votes for a party's presidential candidate without registering with that party, and having "their preferences tallied and reported by the State" but not used to determine the outcome. In other words, they want their votes to be counted, but they do not want their votes to count.

As defendants point out, however, when plaintiffs discuss a "right" to cast an expressive ballot simply for the sake of doing so, rather than to affect the outcome of an election, they have ceased talking about voting. Indeed, the Supreme Court has rejected the notion that elections have some "generalized expressive function." (*Burdick v. Takushi* (1992) 504 U.S. 428, 438 (*Burdick*).) Plaintiffs' inventive theories therefore do not supply a constitutional basis for evading binding legal precedent that forecloses their arguments. Accordingly, we affirm the trial court's ruling sustaining the defendants' demurrer without leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Original Complaint and Motion for Preliminary Injunction*

Plaintiffs are registered voters and California taxpayers who filed their initial complaint in July 2019 against then-Secretary of State Alex Padilla, named in his official capacity, and the State of California.[1] They alleged that, in 2016, California's Secretary of State administered a semi-closed presidential primary that resulted in widespread voter confusion and the disenfranchisement of millions of voters. This included voters who had not registered as preferring a qualified political party, referred to as "no party

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1 The Secretary points out that, despite two rulings by the trial court that the State of California is not a proper party to this lawsuit, plaintiffs continue to improperly refer to the State as a defendant. Defendants contend that plaintiffs have waived any argument that the trial court erred in ruling that the State is not a proper party. We agree, and we will refer to the defendants together as "the Secretary" throughout this opinion.

preference" (NPP) voters, and therefore were only allowed to vote for the candidate of a party that had chosen to allow NPP voters to participate in their primary election. According to plaintiffs, California's presidential primary system is unconstitutional on its face and as applied under both the state and federal constitutions.

The complaint further alleged that three of the plaintiffs were registered as NPP voters but wanted to vote for presidential primary candidates of their choice in 2020 without registering with a political party. Two plaintiffs were registered with a political party but wanted to vote for presidential primary candidates from other parties in 2020. One plaintiff preferred to register as NPP but had remained registered as a Democrat to vote for her preferred candidate in 2020. The individual plaintiffs alleged that none of them were able to vote for the candidate of their choice in the 2016 presidential primary election "unencumbered by a condition of party preference."

The complaint asserted six causes of action: (1) California's semi-closed presidential primary election system does not comply with the California Constitution's section requiring an open presidential primary (Cal. Const., art. II, § 5, subd. (c)); (2) the semi-closed primary violates plaintiffs' substantive due process rights afforded to them by the California Constitution (Cal. Const., art. I, § 7); (3) the semi-closed primary denies plaintiffs equal protection of the law in violation of the California Constitution (Cal. Const., art. I, § 7); (4) the semi-closed primary appropriates public funds for a private purpose in violation of the California Constitution (Cal. Const., art. XVI, § 3); (5) the semi-closed primary violates plaintiffs' substantive due process rights under the United States Constitution (42 U.S.C. § 1983); and (6) the semi-closed primary violates

plaintiffs' right of non-association under the United States Constitution (42 U.S.C. § 1983). The complaint requested a declaration that California's presidential primary system is "illegal in some manner." 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."

Shortly after filing the complaint, plaintiffs filed a motion for a preliminary injunction requiring the Secretary to allow all registered voters to cast a ballot for their candidate of choice in the 2020 presidential primary election without having to associate with a political party. The Secretary opposed, arguing that plaintiffs were unlikely to succeed on the merits because the United States Supreme Court had upheld a presidential primary system nearly identical to California's system and plaintiffs' claims therefore failed as a matter of law.

The trial court held a hearing and thereafter denied the motion, concluding that plaintiffs had failed to establish a likelihood of prevailing. The court first found that, "to the extent the heart of the Plaintiffs' complaint is that they are being denied the right to vote in the presidential primary election unless they associate with a party, the U.S. Supreme Court has found that the political parties' freedom to associate means they get to dictate who is permitted to participate in the primaries that will assist in determining" their presidential nominee. Additionally, the court explained, NPP voters can vote in presidential primary elections when permitted by a political party merely by requesting a crossover ballot—they are not required to register with the party.

B. *First Amended Complaint and Motion for Judgment on the Pleadings*

The parties stipulated to a first amended complaint to add another plaintiff, which plaintiffs filed in December 2019. Plaintiffs did not otherwise modify or add to their allegations. By stipulation, the Secretary's answer to the original complaint was deemed the answer to the first amended complaint.

The Secretary then moved for judgment on the pleadings, making many of the same arguments it had asserted in opposition to the preliminary injunction, including that plaintiffs' claims had already been rejected by the United States Supreme Court in cases addressing similar constitutional challenges. After briefing and a hearing, the trial court granted the motion but gave plaintiffs leave to amend their complaint.

C. *Second Amended Complaint and Demurrer*

In response to the court's ruling, plaintiffs filed their second amended complaint in October 2020. The second amended complaint repeated most of the allegations of the first two complaints but slightly revised the allegations regarding the individual plaintiffs. It alleged that plaintiffs Daniel Howle and Steven Fraker each seek to vote for a presidential candidate of his choice without being required to associate with a political party. Plaintiff Jim Boydston seeks to vote for a presidential candidate running for the Democratic Party nomination in the next presidential primary election without being required to associate with the Democratic Party. Plaintiff Jeff Marston, a registered Republican, seeks to vote in the primary election for a presidential candidate other than a Republican without being required to change his party preference. Plaintiff Josephine Piarulli, a registered Democrat, would prefer to be registered as a NPP voter but remains affiliated with the Democratic Party to ensure she can vote for a presidential candidate in the next presidential primary election.

The second amended complaint also added several paragraphs alleging that the Secretary imposes additional burdens on NPP voters who want to vote in the presidential primary. NPP voters seeking to vote in the presidential primary election are required to "respond to an innocuous postcard to request a crossover ballot," bring their NPP ballot to their polling place to surrender it and request a crossover ballot there, or re-register with a party at their polling place and vote using that party's primary ballot. Plaintiffs allege that this process is onerous and the Secretary fails to inform NPP of their options. Plaintiffs also allege that many counties set arbitrary deadlines for NPP voters to request a crossover ballot, which leads some NPP voters to mistakenly believe that if they do not request a crossover ballot by mail, they have lost their ability to vote in the presidential primary.

The Secretary demurred to the second amended complaint on the grounds that it failed to state facts sufficient to constitute a cause of action, arguing that the new allegations in the second amended complaint did not salvage plaintiffs' claims. The demurrer was similar to defendants' prior attacks on the complaint and made three main arguments. First, plaintiffs misconstrued the meaning of the term "open primary" in the California Constitution (Cal. Const., art. II, § 5, subd. (c)), which requires only that the State open the ballot to nationally recognized presidential candidates without requiring them to submit a certain number of qualified signatures, not that all voters be allowed to vote for any candidate regardless of stated party preference. Second, plaintiffs could not get around the United States Supreme Court opinions in *Clingman*, which upheld a substantially similar statutory scheme against a similar constitutional challenge, and *Jones*, where the Court found unconstitutional the same open primary system plaintiffs here argue is required under the California Constitution. Third,

the California Constitution requires that the Legislature provide for "free elections" (Cal. Const., art. II, § 3), and courts have consistently upheld laws that provide for primary elections at the public expense while rejecting efforts to redistribute those costs to candidates or parties.

Plaintiffs opposed the demurrer, arguing in response to the Secretary's first argument that the logical extension of the California Constitution's requirement that nationally recognized presidential candidates be included on the primary ballot is that all voters, including NPP voters, should have the right to vote for any candidate meeting the requirements. Plaintiffs next argued that California's presidential primary system violates their right to freedom of association, equal protection, and substantive due process. They asserted that their case is distinguishable from *Clingman* and *Jones*, both because those cases involved the rights of political parties, rather than voters, and because plaintiffs here are not seeking to require political parties to count their presidential primary votes, only to require the Secretary to allow them to participate in the presidential primary voting process. Finally, plaintiffs asserted that they had sufficiently pleaded unconstitutional misappropriation of public funds because the California presidential primary election serves a substantially different purpose than a general election in that it is merely advisory and exclusively serves the interests of political parties; it therefore cannot serve a legitimate public purpose.

D. *Ruling on Demurrer to Second Amended Complaint*

After a hearing in January 2021, the trial court issued a ruling sustaining the Secretary's demurrer without leave to amend. The court concluded that plaintiffs' new allegations did not materially change the nature of their legal theory, which the court had previously rejected, and found that the law is clear that California's semi-closed primary system is

constitutional. Specifically, the court determined that plaintiffs still failed to allege state action that deprived them of a cognizable right, because NPP voters "do not have a *constitutional right* to vote in a presidential primary for a political party's candidate."

The trial court also found that plaintiffs' right to freedom of association is not violated by the system because the system does not mandate that they associate with any political party. The court noted that the United States Supreme Court has already held that political parties are permitted to restrict who can participate in their primaries. Moreover, the court found, *Jones* and *Clingman* establish that the Secretary's differing treatment of NPP voters and political party members is justified, and plaintiffs failed to allege facts demonstrating any arbitrary state action such that plaintiffs' constitutional rights were violated.

Regarding plaintiffs' misappropriation claim, the court concluded that the claim failed as a matter of law because using public funds to conduct primary elections does not violate the California Constitution, and plaintiffs cited no authority to support their argument to the contrary.

The court declined to grant leave to amend based on its conclusion that the facts were not in dispute, no liability exists as a matter of law, and plaintiffs had failed to effectively amend their complaint after they had already been given the opportunity to do so. The court directed counsel for defendants to prepare and submit the order of judgment. They did so, but the trial court did not execute the judgment at that time.

When plaintiffs filed their notice of appeal on March 29, 2021, they submitted only a copy of the January 29, 2021 order sustaining the demurrer. This court notified plaintiffs that an order sustaining a demurrer without leave to amend is not appealable and directed them to file a judgment with

this court or have their appeal dismissed. Plaintiffs then obtained and filed with this court a judgment from the trial court dated April 28, 2021. We construe the notice of appeal as being taken from the judgment.

DISCUSSION

I

We review a judgment of dismissal based on a sustained demurrer de novo to determine whether the complaint alleges facts sufficient to state a cause of action. (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162.) The California standard of review for an order sustaining a demurrer requires us to accept as true all properly pleaded material factual allegations of the complaint, together with facts that may be properly judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Where the trial court sustains a demurrer without leave to amend, we consider whether there is a reasonable possibility plaintiffs could cure the defect by an amendment and must reverse for abuse of discretion if that possibility exists. (*Ibid.*) Plaintiffs bear the burden of proving that an amendment would cure the defect. (*Ibid.*)

Because certain of plaintiffs' claims are pleaded under section 1983 of title 42 of the United States Code, however, we apply the federal standard for review of the grant of a motion to dismiss to those claims. (*Rubin v. Padilla* (2015) 233 Cal.App.4th 1128, 1144.) Under that standard, dismissal is proper only where it appears certain that plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. (*Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1471.) In line with both California and federal practice, we accept the allegations in the complaint as true and construe them in the light most favorable to plaintiffs. (*Ibid.*)

II

Plaintiffs' first argument on appeal is that California's semi-closed presidential primary system is unconstitutional because it violates (1) their First Amendment right to freedom of association under the United States Constitution, (2) the equal protection clause of the California Constitution and United States Constitution, and (3) their substantive due process rights under the United States Constitution. We conclude that these constitutional challenges are without merit.

A. *Legal Background*

California currently uses a semi-closed primary for presidential elections. (Elec. Code, § 13102.)[2] Voting in primary elections is limited to voters who have registered disclosing a preference for one of the political parties participating in the election unless the political party has authorized a voter who has not registered a party preference to vote the ballot of that party. Under this system, NPP voters may vote in presidential primaries of qualified political parties in one of two ways: (1) they may register for the party in whose presidential primary election they wish to vote; or (2) they may request the partisan ballot of a political party that has authorized NPP voters to participate in the party's primary election. (§ 13102, subds. (a), (b).) All voters may change their voter registration to reflect a different party preference at any point up to two weeks prior to the election. (§ 2119, subd. (a).) Voters who miss that deadline may conditionally register up to and on election day and cast a provisional ballot, which will be processed and

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2 All subsequent statutory references are to the Elections Code unless otherwise noted.

counted once the county elections office verifies the information supplied by the voter. (§ 2170.)

Before adopting a semi-closed presidential primary election, California used a "closed" primary to determine the nominees of qualified political parties for many years. (*Jones*, *supra*, 530 U.S. at p. 570.) Under the closed system, voters who did not identify a political party affiliation when registering to vote were not allowed to vote for candidates running for a partisan office in primary elections. Each voter thus received a ballot limited to candidates of their own party. (*Ibid.*)

In 1996, California voters adopted by initiative Proposition 198, which changed California's partisan primary from a closed primary to an "open" or "blanket" primary. (*Jones*, *supra*, 530 U.S. at p. 570.) Proposition 198 allowed all voters, including those not affiliated with any political party, to vote for any candidate regardless of the candidate's political affiliation. (*Ibid.*, citing former § 2001.) After the new law's enactment, each voter's primary ballot listed "every candidate regardless of party affiliation and allow[ed] the voter to choose freely among them." (*Ibid.*)

In 2000, the United States Supreme Court invalidated California's partisan blanket primary. The Court found that it violated political parties' First Amendment right to freedom of association because it required political parties to affiliate with voters who had chosen not to become party members by forcing the parties to allow non-members to participate in their candidate-selection process. (*Jones*, *supra*, 530 U.S. 567.) While the Court recognized "that States have a major role to play in structuring and monitoring the election process, including primaries," it emphasized that the processes by which political parties select their nominees are not "wholly public affairs that States may regulate freely." (*Id.* at pp. 572–573.) The Court concluded

that California's blanket primary forced political parties to associate with "those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." (*Id*. at p. 577.) Such forced affiliation, the Court found, had the likely effect of negatively impacting the political parties' candidate-selection process and overall message—a severe burden on the parties' right of association. (*Id*. at pp. 581–582.) The Court determined that the proffered state interests were not compelling, nor was Proposition 198 narrowly tailored such that it could withstand strict scrutiny, and it therefore held the law unconstitutional. (*Id*. at pp. 582–586.)

After *Jones*, the California legislature reinstated the previous closed primary system, but it modified the law. (Stats. 2000, ch. 898, § 8.) Voters registered as preferring a qualified political party receive a ballot containing that party's partisan candidates as well as all candidates for nonpartisan offices, voter-nominated offices, and measures. (§ 13102, subds. (a), (b).) By default, NPP voters receive only a nonpartisan ballot containing all candidates for nonpartisan offices, voter-nominated offices, and measures. (*Id*., subd. (b).) An NPP voter may, however, request the partisan ballot of a political party if that party has authorized NPP voters to participate in the party's primary election. (*Ibid*.) A party that wants to allow NPP voters to vote in its primary must notify the Secretary of State no later than the 135th day before the partisan primary election. (*Id*., subd. (c).) This semi-closed system for partisan primary elections remains in place today. (§ 13102.)

B. *Analysis*

1. *Applicable Legal Standard*

There is no dispute that the right to vote is fundamental. (See *Burdick*, *supra*, 504 U.S. at p. 433.) "It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the

ballot are absolute." (*Ibid.*) As a practical matter and under constitutional law, government must play an active role in, and substantially regulate, elections to ensure they are fair. (*Ibid.*; *Storer v. Brown* (1974) 415 U.S. 724, 730 (*Storer*).) And though electoral regulations "will invariably impose some burden upon individual voters," not all burdens are unconstitutional, nor do all regulations compel strict scrutiny. (*Burdick*, at p. 433.)

A court considering a constitutional challenge to an election law under the First and Fourteenth Amendments must apply the analysis and balancing test set forth by the United States Supreme Court in *Anderson v. Celebrezze* (1983) 460 U.S. 780 (*Anderson*) and developed more fully in *Burdick*. (*Kunde v. Seiler* (2011) 197 Cal.App.4th 518, 538–539; see also *Norman v. Reed* (1992) 502 U.S. 279, 288, fn. 8 ["As in *Anderson* . . . 'we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis.' "].)[3] Under the *Anderson*/*Burdick* test, the standard applied to the challenged election law depends upon the burden it places upon voters. (*Burdick*, *supra*, 504 U.S. at p. 434.) Where the law imposes severe restrictions on voters' First and Fourteenth Amendment rights, it must be narrowly tailored and advance a compelling state interest. (*Ibid.*) If the law imposes only "reasonable, nondiscriminatory restrictions," on the other hand, "the state's important regulatory interests are generally sufficient to justify" the restrictions. (*Anderson*, at p. 788.)

Before turning to the application of this framework, we first address plaintiffs' threshold argument that conducting the *Anderson*/*Burdick* analysis

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3 The equal protection clauses of the California Constitution and United States Constitution "are substantially equivalent" and courts "analyze them in a similar fashion." (*People v. K.P.* (2018) 30 Cal.App.5th 331, 341.)

is beyond the scope of a demurrer, and the trial court therefore erred in applying the test.[4] Plaintiffs assert that because various United States Supreme Court election law challenges were decided after some form of evidentiary hearing where the lower court had weighed voter burdens and countervailing state interests, implicit in those holdings is the conclusion that such cases can *never* be decided on the pleadings. Plaintiffs cite no authority in support of this proposition. In fact, they concede on reply that the California Supreme Court and the Ninth Circuit have both resolved election law challenges at the pleading stage. (See, e.g., *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164 (*Edelstein*) [concluding that the trial court had properly granted defendant's motion for judgment on the pleadings]; *Rubin v. City of Santa Monica* (9th Cir. 2002) 308 F.3d 1008 [affirming grant of defendant's motion to dismiss for failure to state a claim].)

At least one appellate court has also affirmed dismissal of a constitutional challenge to a state election law at the pleading stage. (See *Rubin v. Padilla*, *supra*, 233 Cal.App.4th at pp. 1135, 1137 [affirming judgment after trial court sustained demurrer without leave to amend].) The plaintiffs in *Rubin v. Padilla* argued that the trial court improperly resolved their claims on demurrer because it was "required to permit them 'to investigate the historical record, analyze statistical data, and develop expert testimony' before it could evaluate the nature of the burden imposed on their

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[4] Plaintiffs also contend it was error for the trial court to sustain the demurrer because the second amended complaint seeks declaratory relief, and plaintiffs are entitled to a declaration of rights even if it is against their interests. Because plaintiffs raise this argument for the first time in their reply brief without a showing of good cause, it has been forfeited. (*Hurley v. Dept. of Parks & Recreation* (2018) 20 Cal.App.5th 634, 648, fn. 10.)

constitutional rights and weigh that burden against the state's asserted interests." (*Id*. at p. 1154.) The court rejected the argument, as do we.

We therefore turn to application of the *Anderson*/*Burdick* framework to plaintiffs' claims.

2. *Any Constitutional Burden Is Minimal and Reasonable*

Step one of the *Anderson*/*Burdick* balancing test is to determine " 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.' " (*Burdick*, *supra*, 504 U.S. at p. 434.) In other words, we must first decide whether the challenged law severely burdens the right to vote. Plaintiffs contend that section 13102 places a steep burden on NPP voters because it forces them to affiliate with a political party as a prerequisite to primary voting and requires NPP voters who have not affiliated with a party but wish to vote in a primary election to request a crossover ballot, which is a confusing and onerous process. According to Plaintiffs, the imposition of these burdens leads to the disenfranchisement of NPP voters. The Secretary argues that California NPP voters experience materially similar burdens as those already recognized as minimal in *Clingman*, and plaintiffs' arguments are foreclosed by the United States Supreme Court decisions in *Clingman* and *Jones*. We agree with the Secretary.

Plaintiffs first contend that California's presidential primary system imposes an impermissible burden on their First Amendment freedom to associate because it requires them to associate with a political party to vote in the primary. They assert that "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[ ]." As the

Secretary points out, however, characterizing party affiliation as a minimal burden does not merely reflect California's "understanding" of the prerequisite to partisan voting—it reflects a binding statement of law made by the United States Supreme Court. (*Clingman*, *supra*, 544 U.S. at p. 592.)

In *Clingman*, the Court considered a constitutional challenge to Oklahoma's semi-closed primary system. (*Clingman*, *supra*, 544 U.S. at p. 584.) Like California's current system, Oklahoma's law allowed political parties to choose whether to allow independent voters to participate in their partisan primary elections, but the law did not allow parties to open their primary elections to other parties' members. (*Ibid.*) The Libertarian Party of Oklahoma and voters registered as Republicans and Democrats argued that Oklahoma's semi-closed primary system violated their First Amendment right to freedom of political association. (*Ibid.*) The Court disagreed, finding that "requiring voters to register with a party prior to participating in the party's primary *minimally* burdens voters' associational rights." (*Id.* at p. 592, italics added.)

Even before *Clingman*, the Court had determined 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 p. 573, fn. 5; see also *Tashjian v. Republican Party* (1986) 479 U.S. 208, 215, fn. 6 ["the nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications"].) Dismissing the argument plaintiffs advance here, the Court explained: "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." (*Jones*, at p. 584.) Requiring voters to associate with a party—whether by registering or requesting a crossover ballot—to participate in a partisan primary is thus, at most, a slight burden.

Plaintiffs seek to avoid this conclusion by claiming they are not seeking to *participate* or interfere in the political parties' process but rather to *express themselves* through the presidential primary process. Specifically, they desire to "express their political views and preferences at the polls, unencumbered by the condition of registering or otherwise associating with a political party."

But again, United States Supreme Court precedent forecloses this argument. The Court has explained that "the function of the election process is 'to winnow out and finally reject all but the chosen candidates,' . . . not to provide a means of giving vent to 'short-range political goals, pique, or personal quarrel[s].' Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." (*Burdick*, *supra*, 504 U.S. at p. 438, quoting *Storer*, *supra*, 415 U.S. at pp. 730, 735.) It has also expressly stated that "[b]allots serve primarily to elect candidates, not as fora for political expression." (*Timmons v. Twin Cities Area New Party* (1997) 520 U.S. 351, 363 (*Timmons*).) The California Supreme Court has also recognized that the purpose of the election process is "not simply to provide an outlet for political expression." (*Edelstein*, *supra*, 29 Cal.4th at p. 182, citing *Burdick*, at p. 438.) Moreover, the Legislature has defined the word "vote" as used in the California Constitution as "all action necessary *to make a vote effective* in any primary, special, or general election, including, but not limited to, voter registration, any other act prerequisite to voting, *casting a ballot, and having the ballot counted properly and included in the appropriate totals of votes cast* with

respect to candidates for public office and ballot measures." (§ 15702, italics added.)[5] Not only is Plaintiffs' desire to express themselves via the polls without having their votes count in determining the result not a constitutional right, therefore, but it also runs contrary to the California Constitution.

Plaintiffs next argue that California's semi-closed primary system is unconstitutional because it requires NPP voters to jump through hoops to participate in the presidential primary election as crossover voters, a process which is itself unconstitutional because it is unduly burdensome and leaves some NPP voters confused. We do not agree.

Most electoral regulations—including voter and party registration—"require that voters take some action to participate in the primary process." (*Clingman*, *supra*, 544 U.S. at p. 593; see also *Rosario v. Rockefeller* (1973) 410 U.S. 752, 760–762 [upholding requirement that voters change party registration 11 months before primary election].) Here, voters may change their party registration up until 15 days before an election. (§ 2119.) Even if voters miss that deadline, they may still cast a ballot in a party primary using the conditional voter registration process before or on the day of the election. (§ 2170.) They can also take other "action to participate in the primary process" by requesting a crossover ballot via mail or at their polling place. (*Clingman*, at p. 593.) That California NPP voters wishing to vote in a primary election must read their mail or otherwise seek out information to request a crossover ballot cannot reasonably be classified as a severe burden. It is "not difficult" to " 'ask[ ] for the appropriate ballot at the

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5 Courts ordinarily follow the Legislature's definition of a word used in the Constitution if it is a reasonable construction. (*Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 540.)

appropriate time,' " and tasks like requesting a ballot or filing a form constitute "minimal effort." (*Clingman*, at pp. 590–592.) Such "minor barriers between voter and party do not compel strict scrutiny." (*Id.* at p. 593.)

We therefore conclude that, even accepting all plaintiffs' allegations as true, the burdens plaintiffs identify are minimal.

C. *Sufficient State Interests Justify the Minimal Burdens*

The second step of the *Anderson*/*Burdick* balancing test requires us to consider California's interests in imposing the voter restrictions and weigh those interests against the burdens. Where, as here, the challenged election law is reasonable, nondiscriminatory, and does not place a heavy burden on voters' rights, " 'a State's important regulatory interests will usually be enough to justify' " the law. (*Clingman*, *supra*, 544 U.S. at p. 593, quoting *Timmons*, *supra*, 520 U.S. at p. 358.) Plaintiffs contend that the state lacks a legitimate reason to treat NPP voters and party-affiliated voters differently—in other words, that the state's interests are insufficient to justify the restrictions of section 13102—and that the Secretary has failed to identify any state interests, as opposed to political party interests, that support section 13102. We reject these contentions.

Plaintiffs' argument that the state's interests are insufficient to justify treating NPP voters differently from party-affiliated voters is again foreclosed by United States Supreme Court precedent. First, the Court has already found that "[i]n facilitating the effective operation of [a] democratic government, a state might reasonably classify voters or candidates according to political affiliations." (*Clingman*, *supra*, 544 U.S. at p. 594, internal quotation marks omitted.) States are therefore "allowed to limit voters' ability to roam among parties' primaries" by, for example, requiring them to

register with a party before voting in a primary and prohibiting voters in one party from voting in another's primary. (*Id.* at pp. 594–595.)

Second, the state interests asserted here are the same as those the Court held in *Clingman* to be sufficient to justify minimal burden on voters. As in *Clingman*, California's semi-closed primary "advances a number of regulatory interests that [the Supreme] Court recognizes as important: It 'preserv[es] [political] parties as viable and identifiable interest groups'; enhances parties' electioneering and party-building efforts; and guards against party raiding and 'sore loser' candidacies by spurned primary contenders." (*Clingman*, *supra*, 544 U.S. at pp. 593–594, internal citations omitted.) These important state interests easily justify the minimal burdens California's presidential primary system imposes on voters.

The State also has a compelling interest in "the integrity of the primary system" and " 'avoid[ing] primary election outcomes which would tend to confuse or mislead the general voting population . . . .' " (*Clingman*, *supra*, 544 U.S. at p. 594.) This interest would be undermined by plaintiffs' proposed system. According to their theory, NPP voters have a right to have their presidential primary votes "tallied and reported by the State," but not actually used in determining the party nominee. As a result, the reported "winner" of a party's presidential primary (including NPP voters) could differ from the actual winner (excluding NPP voters). This could undermine public confidence in the election and create the false perception of a rigged primary. It would also create massive confusion to allow some voters to participate in a presidential primary without having their votes used to determine the result. NPP voters would be casting genuine votes for nonpartisan offices, voter-nominated offices, and measures on the ballot, but only token votes for a presidential primary candidate on the same ballot. Many NPP voters would

likely be misled into believing that their presidential primary votes would count towards the outcome. In such a bewildering election system, the public would have reason to question whether all genuine votes were being properly counted and all token votes properly excluded. The State's strong interest in maintaining public confidence in the integrity of the election system outweighs any interest of NPP voters to cast purely symbolic votes for the candidate of a political party they have chosen not to join.

We therefore conclude that the trial court properly sustained the demurrer as to plaintiffs' claims based on their freedom of association, equal protection, and due process rights.

III

Plaintiffs also contend that the presidential primary election system violates the California Constitution's prohibition on private use of public funds found in section 3 of article XVI, which provides that, subject to certain exceptions, "[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, nor shall any grant or donation of property ever be made thereto by the State." (Cal. Const., art. XVI, § 3.) Plaintiffs argue that the primary system violates the constitution because it (1) serves a predominantly private purpose despite being financed by public funds and (2) disenfranchises NPP voters. They cite no authority in support of this claim but explain that "it is the constitutionally infirm presidential-primary system . . . that causes the appropriation of public funds in support of that system to be, likewise, constitutionally infirm." Because we have already rejected plaintiffs' claim that California's presidential primary

system is unconstitutional, it follows that their claim regarding the use of public funds in support of that system must likewise be rejected.

Even considering this argument separately from the others, we conclude that it is without merit. California's primary election plainly serves a public purpose, as primaries are " 'an integral part of the entire election process.' " (*Burdick*, *supra*, 504 U.S. at p. 439, quoting *Storer*, *supra*, 415 U.S. at p. 735.) Primaries "avoid burdening the general election ballot with frivolous candidacies" (*Jones*, *supra*, 530 U.S. at p. 572) and "avoid the possibility of unrestrained factionalism at the general election" (*Munro v. Socialist Workers Party* (1986) 479 U.S. 189, 196), both important goals that benefit the public. And the costs associated with holding these primary elections do not arise "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.) California "has presumably chosen this course more to benefit the voters than the candidates" or parties. (*Ibid.*) We therefore disagree with plaintiffs' conclusory statement that the presidential primary is for the exclusive benefit of political parties. To the extent that NPP voters feel disenfranchised by the primary system, they may simply join the party or request a crossover ballot. (See *Jones*, at p. 572; *Clingman*, *supra*, 544 U.S. at p. 590.)

In sum, we agree with the trial court that, despite multiple opportunities to amend their complaint, plaintiffs have failed to plead facts

that could entitle them to relief.[6] We therefore conclude that the demurrer was properly sustained in its entirety.

DISPOSITION

The judgment of the trial court is affirmed. Respondents are entitled to recover their costs on appeal.

BUCHANAN, J.

WE CONCUR:

IRION, Acting P. J.

DO, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

03/21/2023

KEVIN J. LANE, CLERK

By Deputy Clerk

6 Plaintiffs do not argue that they are entitled to leave to amend their complaint again, nor do they suggest a different set of facts they would have pleaded if granted leave (see *Rubin v. Padilla*, *supra*, 233 Cal.App.4th at p. 1154), so we do not address that issue.

ATTACHMENT:

ORDER MODIFYING OPINION (NO. 1) AND DENYING REHEARING; NO CHANGE IN JUDGMENT

DATED APRIL 11, 2023

Filed 4/11/23

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JIM BOYDSTON et al., Plaintiffs and Appellants, v. ALEX PADILLA, as Secretary of State, et al., Defendants and Respondents.	D080921 (Super. Ct. No. CIVDS1921480) ORDER MODIFYING OPINION AND DENYING REHEARING NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on March 21, 2023, be modified as follows:

The first sentence of the opinion (beginning with "In this case . . .") is deleted and replaced with the following:

> In this case, we reject the plaintiffs' assertion of a novel and peculiar constitutional right to vote in California's presidential primary for the candidate of a political party they have chosen not to join—without having their votes count for anything other than their expressive value.

Immediately after the first full sentence on page 19 (beginning with "Not only is Plaintiffs' desire . . ."), the following footnote is inserted, which will necessitate the renumbering of subsequent footnotes:

> Plaintiffs also contend that their claims are not foreclosed by Supreme Court precedent because, unlike in *Jones*, (1) plaintiffs' complaint focuses on the rights of individual voters rather than political parties, and (2) plaintiffs allege that California's primary system is a "state-sponsored straw poll," as the political parties are not bound by the results in nominating a candidate. We reject this argument for the same reasons we have just explained. First, even if we were to accept that *Jones* is distinguishable, plaintiffs fail to sufficiently distinguish their case from *Clingman*. *Clingman* also involved the rights of individual voters and a semi-closed primary system that, like California's, leaves each political party "free to . . . nominate the candidate of its choice." (*Clingman*, *supra*, 544 U.S. at p. 587.) Plaintiffs repeatedly emphasize language from the *Clingman* opinion referencing the Libertarian Party of Oklahoma's primary—presumably to contrast with what they refer to as California's "state-funded presidential-primary process"—but fail to explain how California's presidential primary process is materially different from the system in Oklahoma upheld as constitutional by the Supreme Court. Second, as we have explained, plaintiffs' desire to express themselves via the presidential primary process without actually assisting in the selection of a party's nominee does not implicate any constitutional right.

There is no change in judgment.

The petition for rehearing is denied.

IRION, Acting P. J.

Copies to: All parties

ATTACHMENT: ORDER CERTIFYING OPINION FOR PUBLICATION

DATED APRIL 12, 2023

Filed 4/12/23

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JIM BOYDSTON et al., Plaintiffs and Appellants, v. ALEX PADILLA, as Secretary of State, etc., et al., Defendants and Respondents.	D080921 (Super. Ct. No. CIVDS1921480) ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The opinion in this case filed March 21, 2023 and modified on April 11, 2023 was not certified for publication. It appearing the opinion meets the standards for publication specified in California Rules of Court, rule 8.1105(c), the request pursuant to rule 8.1120(a) for publication is GRANTED.

IT IS HEREBY CERTIFIED that the opinion meets the standards for publication specified in California Rules of Court, rule 8.1105(c); and

ORDERED that the words "Not to Be Published in the Official Reports" appearing on page one of said opinion be deleted and the opinion herein be published in the Official Reports.

IRION, Acting P. J.

Copies to: All parties

BRANDON L. HENSON, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

04/12/2023

BRANDON L. HENSON, CLERK

By Deputy Clerk

ATTACHMENT: ORDER MODIFYING OPINION (NO. 2);
NO CHANGE IN JUDGMENT
DATED APRIL 14, 2023

Filed 4/14/23

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JIM BOYDSTON et al., Plaintiffs and Appellants, v. ALEX PADILLA, as Secretary of State, etc., et al., Defendants and Respondents.	D080921 (Super. Ct. No. CIVDS1921480) ORDER MODIFYING OPINION NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on March 21, 2023, modified on April 11, 2023, and certified for publication on April 12, 2023, be modified as follows:

On page one of the opinion, in the caption, the name "ALEX PADILLA" is deleted and replaced with "SHIRLEY N. WEBER."

There is no change in judgment.

IRION, Acting P. J.

Copies to: All parties

BRANDON L. HENSON, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

04/14/2023

BRANDON L. HENSON, CLERK

By /Deputy Clerk