NO. 23-_____

In the Supreme Court of the United States

JIM BOYDSTON, ET AL.,

Petitioners,

v.

SHIRLEY N. WEBER, AS CALIFORNIA SECRETARY OF STATE,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where, under State law, the selection of a political party's presidential nominee is governed by internal party rules and procedures and ***not*** by the results of the State-administered presidential-primary election, may the State—consistent with the First and Fourteenth Amendments—lawfully require registered voters wanting to participate in the State-administered presidential-primary election to, as a condition of participating, formally associate with the political party of the nominee for whom the voters desire to cast a vote?

2. Did the California Court of Appeal err in concluding that primary votes cast by non-partisan ("no party preference" or "NPP") voters in California's presidential primary are not subject to constitutional protection under this Court's *Anderson/Burdick* framework merely because one or more political parties may choose not to consider those votes during their candidate-nomination process?

PARTIES TO THE PROCEEDINGS

Petitioners

- Jim Boydston, California registered voter
- Steven Fraker, California registered voter
- Daniel Howle, California registered voter
- Josephine Piarulli, California registered voter
- Jeff Marston, California registered voter
- Independent Voter Project ("IVP"), non-profit, non-partisan 501(c)(4) corporation dedicated to informing voters about important public-policy issues and encouraging non-partisan voters to participate in the State's electoral process.

Respondent

- Shirley N. Weber,
  California Secretary of State

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner INDEPENDENT VOTER PROJECT states that it is a not-for-profit entity that has not issued shares to the public and has no affiliates, parent companies, or subsidiaries that have issued shares to the public, and no publicly traded company owns a stake in it.

LIST OF PROCEEDINGS

California Supreme Court

No. S279767

Jim Boydston, Et Al., *Plaintiffs and Appellants,* v. Shirley N. Weber, as Secretary of State, etc., Et Al., *Defendants and Respondents.*

Denial of Petition for Review: July 19, 2023

California Court of Appeal, Fourth Appellate District

No. D080921

Jim Boydston, Et Al., *Plaintiffs and Appellants,* v. Shirley N. Weber, as Secretary of State, etc., Et Al., *Defendants and Respondents.*

Final Opinion: April 14, 2023

California Superior Court, San Bernadino County

Case No. CIVDS1921480

Jim Boydston; Steven Fraker; Daniel Howle; Josephine Piarulli; Jeff Marston; Lindsay Vurek; Linda Carpenter Sexauer, and Independent Voter Project, a Non-Profit Corporation, *Plaintiffs and Petitioners,* v. Alex Padilla, in His Official Capacity as California Secretary of State; State of California, and Does 1 through 1,000, *Defendants and Respondents.*

Final Judgment: April 28, 2021

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OPINIONS BELOW

Petitioners seek review of the modified Opinion of the California Court of Appeals, Fourth Appellate District, dated April 14, 2023, which is included in the Appendix ("App.") at App.2a. The original opinion was issued on March 21, 2023, but was subsequently modified in two orders included at App.30a, 34a. This opinion is published as *Boydston v. Weber*, 90 Cal. App. 5th 606 (Fourth App. Dist., Mar. 21, 2023, *as modified on denial of rehearing* Apr. 11, 2023, *as modified on* Apr. 14, 2023)

That opinion affirmed the ruling and judgment of the San Bernardino County Superior Court on the Demurrer to the Second Amended Complaint. *Boydston v. Padilla*, No. CIVDS1921480 (Cal. Super. Ct., County of San Bernardino, Jan. 29, 2021), which is included at App.38a, 41a.

The California Supreme Court entered an order denying a petition for review on July 19, 2023 which is included at App.1a. *Boydston v. Weber*, Docket No. S279767 (Cal. Sup. Ct., July 19, 2023) (*en banc*).

JURISDICTIONAL STATEMENT

The California Supreme Court summarily denied Petitioners' timely petition for review on July 19, 2023. (App.1a). This petition for writ of certiorari is timely filed and this Court has jurisdiction under 28 U.S.C. § 1257(a). *See also* 28 U.S.C. §§ 2101(c), 2104; U.S. Sup. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Elections Code Section 13102(b)

> At partisan primary elections, each voter not registered disclosing a preference for any one of the political parties participating in the election shall be furnished only a nonpartisan ballot, unless the voter requests a ballot of a political party and that political party, by party rule duly noticed to the Secretary of State, authorizes a person who has declined to disclose a party preference to vote

> the ballot of that political party. The nonpartisan ballot shall contain only the names of all candidates for nonpartisan offices, voter-nominated offices, and measures to be voted for at the primary election. Each voter registered as preferring a political party participating in the election shall be furnished only a ballot for which the voter disclosed a party preference in accordance with Section 2151 or 2152 and the nonpartisan ballot, both of which shall be printed together as one ballot in the form prescribed by Section 13207.

STATEMENT OF THE CASE

A. Introduction

California has millions of "no party preference" or "NPP" voters. With an increasing number of voters opting to register as NPP,[1] a substantial segment of California's electorate is effectively disenfranchised from the first integral stage of the presidential-election process: the presidential primary.

Under California's current so-called "semi-closed" presidential-primary system, NPP voters can only participate in the State-administered presidential-primary election if: (1) they formally associate with one of the qualified political parties or (2) their preferred candidate happens to be associated with one

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[1] Voters opt to register as NPP for a variety of reasons including (but not limited to) political ideology, dissatisfaction with the political parties, concerns for privacy, confusion, or some combination thereof.

of the three (of six) qualified political parties[2] that, under internal party rules, allow NPP voters to submit a so-called "crossover" ballot. If any NPP voters do not want to formally associate with a political party and their preferred candidate is not associated with one of the political parties that allows crossover voting, then those voters are out of luck.

What's more: The political parties can change their internal rules regarding crossover voting at virtually any time.[3] The political parties that allow crossover voting today may amend their internal rules to disallow crossover voting tomorrow (and vice-versa), leaving NPP voters who desire to exercise their constitutional rights to vote but do not want to associate with a political party in the lurch at this integral stage. This disenfranchisement of NPP voters has far-reaching negative consequences on political discourse, on voter turnout, and perhaps most importantly on faith in the electoral process.

In response to this Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) ("*Jones*"), California modified its presidential-primary system from one that violated the constitutional rights of the plaintiffs in that case—private political parties (the "blanket" primary)—to a system that

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[2] California recognizes six "qualified political parties": American Independent Party, Democratic Party, Green Party, Libertarian Party, Peace and Freedom Party, and Republican Party. *See Qualified Political Parties*, California Secretary of State, https://www.sos.ca.gov/elections/political-parties/qualified-political-parties (last visited Oct. 5, 2023).

[3] But they must follow the applicable procedures. *See* Cal. Elec. Code § 13102(c).

violates the constitutional rights of the plaintiffs in this case—private individuals consisting of NPP voters (the "semi-closed" primary). The "constitutionally crucial" detail in *Jones* was that the State's blanket presidential primary selected the political parties' nominees. That is no longer the case; under the current system, the political parties' nominees are not selected by primary voters but through the parties' respective internal rules and procedures. The question is then: *Why does the State continue to enforce a formal party-association requirement against NPP voters as a condition of participating in the State-administered presidential-primary election process?*

Petitioners' position in this case stems from a truly simple premise: If the State's presidential-primary system cannot force political parties to associate with certain voters in the context of a primary election, then it surely cannot force certain voters to associate with political parties in that same context. If the political parties have the constitutional right not to associate with certain voters, then so too must voters have the right not to associate with political parties, and the State must justify any burden on that right with a narrowly tailored law that serves a compelling state interest. The California Court of Appeal concluded that Petitioners and other NPP voters have no fundamental right to vote at an integral stage of the State's election process. The conclusion was erroneous, and this Court should grant certiorari.

B. Statement of the Case

Petitioners commenced this action against the then-Secretary of State Alex Padilla[4] and the State of California (the "State"[5]) alleging that the semi-closed presidential-primary election system it administered unconstitutionally burdened the voting and associational rights of "no party preference" or "NPP" voters by requiring them to associate with a political party in order to participate in the State-administered presidential-primary election. *See* App.43a.

The Superior Court of San Bernardino County sustained the State's general demurrer to the second amended complaint without leave to amend on the grounds that the operative pleading did not allege facts sufficient to state a cognizable constitutional claim. *See* App.55a, 57a, 58a-59a. Petitioners timely appealed the trial court's ruling and judgment to the California Court of Appeal, Fourth Appellate District.[6] *See* App.12a

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[4] *But see* App.31a (Court of Appeal ordering caption to be updated to reflect that Shirley N. Weber is the current Secretary of State for California).

[5] Based on the Court of Appeal's ruling, Petitioner acknowledges that the Secretary of State is the only proper defendant/respondent in this matter. *See* App.5a n.1. Petitioner nonetheless refers to the Secretary of State as the "State" because it is the State's regulatory scheme that is being challenged here.

[6] Petitioners' appeal was originally filed in Division Two of California's Fourth Appellate District pursuant to California Rule of Court 8.100(a)(2) ("appeal . . . taken to the Court of Appeal for the district in which the superior court is located"). After the appeal was briefed, it was transferred to Division One of the Fourth Appellate District for consideration and oral argument. *See* App.2a.

(deeming Petitioners' notice of appeal as being timely taken from the subsequently filed judgment).

In affirming the trial court's judgment, the Court of Appeal held:

> In this case, we reject the [Petitioners'] 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.

App.3a.

In particular, the Court of Appeal held that requiring NPP voters to register with a political party or request a crossover ballot was only a "slight burden" on their constitutionally protected associational rights (App.21a); that the additional "hoops" that NPP voters must jump through in order to participate in a presidential-primary election did not support a finding that the burdens on associational, substantive due process, and equal-protection rights were severe (App.24a); that the State had important regulatory interests that justified the "minimal burdens" placed on NPP voters' constitutional rights (App.26a); and that the State's primary election system did not exclusively benefit the political parties in violation of the State's constitutional prohibition on the use of public funds for a predominantly private purpose (App.27a-29a).

Petitioners timely sought rehearing in the Court of Appeal. (App.34a). The Court of Appeal denied rehearing but modified its opinion with no change in the judgment. (App.34a). The following day, at the

request of the State, the Court of Appeal certified its modified opinion for publication. (App.32a). The Court of Appeal modified its opinion a second time to replace "ALEX PADILLA" with "SHIRLEY N. WEBER" in the caption. (App.30a-31a). For ease of reference, Petitioners cite the published modified opinion, reprinted at (App.2a).

Petitioners timely sought review in the California Supreme Court on both procedural and constitutional grounds. (App.1a). On July 19, 2023, the California Supreme Court summarily denied Petitioner's petition for review without discussion. (App.1a). This petition for writ of certiorari follows.[7]

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[7] It is important to emphasize the procedural posture of this case: This case was decided on demurrer (*i.e.*, a motion to dismiss akin to a Rule 12(b)(6) motion under the Federal Rules of Civil Procedure) and was not permitted to advance beyond the pleading stage. No discovery has been conducted by either party. No evidence has been offered by either party. The "facts" of this case are those that have been alleged by Petitioners in their second amended complaint, which all courts were required to accept as true and liberally construe. *See Rubin v. Padilla*, 233 Cal. App. 4th 1128, 1144 (2015); *Arce v. Cty. Of Los Angeles*, 211 Cal. App. 4th 1455, 1471 (2012); *see also Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). Petitioners have maintained that, given the opportunity, they could offer admissible evidence showing the unconstitutional burden that California's semi-closed presidential-primary system places on NPP voters (including Petitioners) and the lack of a compelling state interest for maintaining that system.

REASONS FOR GRANTING THE PETITION

A. The Court of Appeal Erred in Concluding that the State May Lawfully Require NPP Voters to Associate with the Political Party of the Voters' Preferred Candidate as a Condition of Participating in the State-Administered Presidential-Primary Election.

1. *Anderson/Burdick* Balancing Test

The analytical framework used to decide constitutional challenges to state election laws is well-established.

> A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against "the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213-214 (1986)). This analytical framework is known as the *Anderson/Burdick* test.

Importantly, "'[t]his 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); citing *Burdick*). Even if the constitutional 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.'" *Id.*, at 905 (declining to rule in the State's favor at the pleading stage).

Therefore, contrary to the Court of Appeal's assertion (App.24a), a finding that the alleged constitutional burdens are not "severe" does not mean that those burdens are automatically "minimal and reasonable" and/or not subject to judicial scrutiny.

B. The Court of Appeal Erred in Concluding that the Constitutional Burdens Imposed on NPP Voters Are Minimal and Reasonable.

1. The U.S. Constitution protects the right to vote.

Each "citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), even though "the right to vote in state elections is nowhere expressly mentioned" in the Constitution. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966).

> In this country the right to vote is recognized as one of the highest privileges of the citizen. It is so recognized, not only by the citizen, but by the law; and any infringement by legislative power upon that right as granted by the constitution is idle legislation. If the legislature by this act has deprived citizens

> of the right to participate in the elections therein provided, who are qualified to participate under the constitution,—aye, even if the legislature has deprived one citizen so qualified of such right,—the act is void, as an attempted exercise of power it does not possess.

Spier v. Baker, 120 Cal. 370, 375 (1898).

In California, this privilege includes the right to vote in primary elections:

> [T]he right of suffrage, everywhere recognized as one of the fundamental attributes of our form of government is guaranteed and secured by the Constitution of this state to all citizens who are within the requirements therein provided. [Citations.] This constitutional right of the individual citizen includes the right to vote 'at all elections which are now or may hereafter be authorized by law (Const. of Calif., art. II, § 1), <u>including the right to vote at primary elections</u>. [¶] . . . <u>the legislature has no power to deprive any citizen of the state, who fills all the requirements demanded by [the state constitution], from voting [in a primary election]</u>.

Communist Party of U.S. of Am. v. Peek, 20 Cal. 2d 536, 542-543 (1942) (emphasis added) ("*Communist Party*").

Moreover, this Court has recognized "the 'fundamental right' to cast a meaningful vote" for the candidate of one's choice. *See Jones*, 530 U.S. at 573 n.5.

Here, the Court of Appeal agreed: "There is no dispute that the right to vote is fundamental." (App. 16a) (citing *Burdick*, 504 U.S. at 433).

2. The U.S. Constitution protects the right to associate (or not associate).

The U.S. Constitution protects the right of citizens to freely associate. *See* U.S. Const., amends. I, XIV; *Jones*, 530 U.S. at 574; *accord* Cal. Const., art. I, §§ 2 & 7. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Tashjian*, 479 U.S. at 214 (citations omitted). "'The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.'" *Id.* (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)). This right is understood to include the right not to associate. *See Jones*, 530 U.S. at 574 ("That is to say, a corollary of the right to associate is the right not to associate."); *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018) ("The right to eschew association for expressive purposes is likewise protected"); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 9 (1986) ("forced associations that burden protected speech are impermissible").

In the context of voting regulations, this Court has held that

> [T]he Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives," [U.S. Const.] Art. I,

> § 4, cl. 1, which power is matched by state control over the election process for state offices. But this authority does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens. The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, . . . , or, as here, the freedom of political association.

Tashjian, 479 U.S. at 217 (internal citations omitted; emphasis added).

3. The State's semi-closed presidential-primary system imposes an unconstitutional burden on NPP voters' right to participate in a presidential-primary election.

State law requires an otherwise duly qualified and registered voter[8] to associate with one of the qualified political parties[9] in order to receive a primary ballot with any presidential candidates listed on it. *See* Cal. Elec. Code § 2151(b)(1) ("a person shall not be entitled to vote the ballot of a political party at a primary

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[8] 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. *See* Cal. Const., art. II, §§ 2, 4; Cal. Elec. Code §§ 2000, 2101(a). 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*.

[9] *See* note 2, *supra*.

election for President of the United States or for a party committee unless he or she has disclosed the name of the party that he or she prefers"). A political party may, by internal party rule, permit unaffiliated (*i.e.*, NPP) voters to cast a vote for a candidate listed on its presidential-primary ballot, known as "crossover" voting. *See id.* (a person who has "declined to disclose a party preference" may cast a primary vote for a presidential candidate if "the political party [of that candidate], by party rule duly noticed to the Secretary of State, authorizes a person who has declined to disclose a party preference to vote the ballot of that political party").

If a registered voter does not associate with one of the qualified political parties and his or her preferred candidate is not associated with one of the political parties that allows crossover voting, that voter will not receive a primary ballot containing any presidential candidates and, therefore, cannot participate in the State-administered presidential-primary election. *See* Cal. Elec. Code § 13102(b) ("At partisan primary elections, each voter not registered disclosing a preference for any one of the political parties participating in the election shall be furnished only a nonpartisan ballot, unless the voter requests a ballot of a political party and that political party, by party rule duly noticed to the Secretary of State, authorizes a person who has declined to disclose a party preference to vote the ballot of that political party. The nonpartisan ballot shall contain only the names of all candidates for nonpartisan offices, voter-nominated offices, and measures to be voted for at the primary election.").

There are two separate processes in play when it comes to primary elections. There is the process by

which the political parties' respective members cast a vote (albeit a non-binding advisory vote) for one of the parties' primary candidates. *See generally* Cal. Elec. Code § 6000 *et seq*. And then there is the larger public-election process administered by the State. *See* Cal. Const., art. II, §§ 1, 2; *see also* Cal. Elec. Code § 2300 (Voter Bill of Rights). The State's obligations to individual voters are the same regardless of whether the voter is party-affiliated or unaffiliated (NPP): the State must provide free and fair elections that are accessible by all qualified voters, and they must accept, tally, and report the results of each validly cast vote. *See id.*; *see also* Cal. Const., art. II, § 2.5 ("A voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted."), § 3 ("The Legislature shall . . . provide for registration and free elections."). What the political parties do with primary votes cast in favor of their candidates as tallied by the State is left entirely to these parties' respective rules; the results of the primary election do not determine the political parties' presidential nominees. *See generally* Cal. Elec. Code § 6000 *et seq*.

If the right to vote is constitutionally protected and the right to freely associate (or not) is also constitutionally protected, then the State's semi-closed presidential-primary system—which requires (at least some) NPP voters to formally associate with one of the qualified political parties as a condition of participating the State-administered presidential-primary election—imposes an unconstitutional burden on those NPP voters' constitutional rights. *Accord Tashjian*, 479 U.S. at 213-217 & nn. 5, 7 (holding that burdens on the right to vote in a primary election and the freedom to associate were significant enough to require the state

to articulate a compelling state interest to justify the burdens).

In *Tashjian*, this Court invalidated Connecticut's "closed" primary statute on the grounds that it unconstitutionally burdened the associational rights of both political parties and individual voters. *Tashjian*, 479 U.S. at 215-217. There, the Court rejected the state's contention that requiring voters to formally affiliate with a political party as a condition of participating in a primary election was only a *de minimis* infringement on the voters' associational rights. *See id.*, at 216 n.7; *see also id.*, at 215 n.5 (recognizing that "acts of public affiliation may subject the members of political organizations to public hostility or discrimination."). The Court distinguished between voters merely notifying the state authorities of their intention to vote in a particular party's primary (such as by requesting a crossover ballot) and formally affiliating with the political party: "'[t]he problem is that the State is insisting on a public act of affiliation . . . joining the [political party] as a condition of this association.'" *Id.*, at 216 n.7 (citation omitted).

Of course, not all NPP voters who do not want to associate with one of the qualified political parties are similarly burdened. However, this Court has held: "We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." *Jones*, 530 U.S. at 581 (citations omitted).

The Court of Appeal incorrectly asserted that an NPP voter could merely request a crossover ballot from one of the qualified political parties, thereby reducing or eliminating the burden of the State's associational requirement. *See* App.21a ("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."), App.29a ("To the extent that NPP voters feel disenfranchised by the primary system, they may simply join the party or request a crossover ballot."); *see also id*., at App.7a (noting the trial court stating the same). However, this overlooks that (1) not all qualified political parties permit crossover voting—as of 2020 only half of the qualified political parties allowed crossover voting—and (2) the political parties can change their internal rules regarding crossover voting at virtual any time. *See* Cal. Elec. Code § 13102(c).

NPP voters who wish to cast a primary vote for a candidate associated with the American Independent, Libertarian, or Democratic parties have the ability to request a crossover ballot from the State. *See* App.53a. However, NPP voters who which to cast a primary vote for a candidate associated with the Green, Peace & Freedom, or Republican party do not have the ability to request a crossover ballot from the State; they are simply barred from participating unless they formally associate with the political party of their preferred candidate. *See id.* For those NPP voters, including Petitioners, who want to participate in the State-administered presidential-primary election by casting a vote for a candidate belonging to one of the three qualified political parties that do not allow crossover voting, there is no alternative or recourse other than to formally associate with that political party. This is an unconstitutional burden on their constitutionally protected right to vote and to not associate. *See Tashjian*, 479 U.S. at 216 n.7 & 217.

Whether this burden is sufficiently severe to warrant strict scrutiny is, perhaps, beside the point; what is clear is that the burden is more than minimal or *de minimis*. And given that the *Anderson/Burdick* test is a "sliding scale," the State was required to offer more than ideas and platitudes about its interests as its rational basis to justify this burden on NPP voters (including Petitioners). Once the burden on NPP voters is seen as constitutionally significant, the State's "compelling interests" crumble under even a minimal amount of scrutiny. *See id.*, at 217-225 (dismissing State's asserted interests).

4. Governing Law Protecting First Amendment Rights of Political Parties Does Not Hold that the Burdens on NPP Voters' Associational Rights Are Minimal.

The Court of Appeal incorrectly held that *Jones* and *Clingman v. Beaver*, 544 U.S. 581 (2005), are dispositive on the character and magnitude of burdens on Petitioners and other NPP voters and thus foreclosed Petitioners' claims. There is a crucial difference between those cases and the situation in California today, which the Court of Appeal failed to appreciate. Unlike the situation in those cases, voters in California's presidential primary no longer choose the political parties' nominees; those decisions are ultimately made based on the parties' respective internal rules. This "constitutionally crucial" difference therefore compels a different result.

In *Jones*, this Court invalidated California's Proposition 198, a citizens' initiative providing for a "blanket" primary to determine the party's nominees for the general election, on the grounds that it unconstitutionally burdened the associational rights of the

political parties. *Jones*, 530 U.S. at 581-582. Indeed, this Court found the burden to be severe.

> Proposition 198 forces [the political parties] to adulterate their candidate-selection process —the "basic function of a political party,' [citation]—by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome—indeed, in this case the *intended* outcome—of changing the parties" message. We can think of no heavier burden on a political party's associational freedom.

Id., at 581-582. "[B]eing saddled with an unwanted, and possibly antithetical, nominee would not destroy the party but severely transform it." *Id.*, at 579. In this context, the Court held: "The voter who feels himself disenfranchised should simply join the party. That may put him to a hard choice, but it is not a state-imposed restriction upon *his* freedom of association, whereas compelling party members to accept his selection of their nominee *is* a state-imposed restriction upon theirs." *Id.*, at 584 (italics in original).

Importantly, at the time *Jones* was decided, Section 15451 of the California Elections Code stated:

> The person who receives the highest number of votes at a primary election as the candidate of a political party for the nomination to an office is the nominee of that party at the ensuing general election.

Cal. Elec. Code § 15451 (1994) (prior to 2009 amendment); *see Jones*, 530 U.S. at 569. In 2011, the amended Section 15451 took effect and now currently reads:

> The nominees for a voter-nominated office shall be determined in accordance with Section 8141.5 and subdivision (b) of Section 8142.

Cal. Elec. Code § 15451 (2023)[10]; *accord Rubin*, 233 Cal. App. 4th at 1138 ("The primary election does not,

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[10] Cal. Elec. Code § 8141.5 reads in full:

> Except as provided in subdivision (b) of Section 8142, only the candidates for a voter-nominated office who receive the highest or second highest number of votes cast at the primary election shall appear on the ballot as candidates for that office at the ensuing general election. More than one candidate with the same party preference designation may participate in the general election pursuant to this subdivision. Notwithstanding the designation made by the candidate pursuant to Section 8002.5, no candidate for a voter-nominated office shall be deemed to be the official nominee for that office of any political party, and no party is entitled to have a candidate with its party preference designation participate in the general election unless that candidate is one of the candidates receiving the highest or second highest number of votes cast at the primary election.

Cal. Elec. Code § 8142 reads in full:

> (a) In the case of a tie vote, nonpartisan candidates receiving the same number of votes shall be candidates at the ensuing general election if they qualify pursuant to Section 8141 whether or not there are more candidates at the general election than prescribed by this article. In no case shall the tie be determined by lot.
>
> (b) In the case of a tie vote among candidates at a primary election for a voter-nominated office, the following applies:
>
> (1) All candidates receiving the highest number of votes cast for any candidate shall be candidates at the ensuing general election whether or not there are more candidates at the general election than prescribed by this article.

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; Cal. Elec. Code § 332.5.[11]

Similarly, in *Clingman*, this Court upheld Oklahoma's "semi-closed" primary on the grounds that "requiring voters to register with a party prior to participating in the party's primary minimally burdens voters' associational rights." *Clingman*, 544 U.S. at 592. Importantly, the "voters" at issue in *Clingman* were voters already registered/associated with other

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(2) Notwithstanding Section 8141.5, if a tie vote among candidates results in more than one primary candidate qualifying for the general election pursuant to subdivision (a), candidates receiving fewer votes shall not be candidates at the general election, even if they receive the second highest number of votes cast.

(3) If only one candidate receives the highest number of votes cast but there is a tie vote among two or more candidates receiving the second highest number of votes cast, each of those second-place candidates shall be a candidate at the ensuing general election along with the candidate receiving the highest number of votes cast, regardless of whether there are more candidates at the general election than prescribed by this article.

(4) In no case shall the tie be determined by lot.

11 Cal. Elec. Code § 332.5 states in full:

"Nominate" means the selection, at a state-conducted primary election, of candidates who are entitled by law to participate in the general election for that office, but does not mean any other lawful mechanism that a political party may adopt for the purposes of choosing the candidate who is preferred by the party for a nonpartisan or voter-nominated office.

political parties: "At issue here are voters who have *already* affiliated publicly with one of Oklahoma's political parties." *Id.* (italics in original). This Court held that requiring those voters already willing to be publicly affiliated with a non-Libertarian party to change their party affiliation in order to participate in the Libertarian Party's primary was only a minimal burden on those voters' associational rights. *Id.*

Notably, in *Clingman* the Court distinguished *Tashjian* (discussed above) on the ground that the law challenged in *Tashjian* operated as a barrier to participating in the primary election:

> Oklahoma's semiclosed primary imposes an even less substantial burden than did the Connecticut closed primary at issue in *Tashjian*. In *Tashjian,* this Court identified two ways in which Connecticut's closed primary limited citizens' freedom of political association. The first and most important was that it required Independent voters to affiliate publicly with a party to vote in its primary.

Id. (emphasis added).

In California, 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*, *e.g.*, Cal. Elec. Code §§ 6002 (Democratic Party primary selects "delegates"); 6300 (Republican Party primary selects delegates; Republican Party rules apply to any qualified parties for which no other provisions apply (*i.e.*, Libertarian)), 6480(b) (Republican presidential-primary ballot to state "presidential preference"); 6520(a)

(American Independent Party uses "presidential preference ballot"); 6720 & 6820 (Peace & Freedom Party uses "presidential preference ballot"); 6850, 6850.5, 6861.5(b) (Green Party uses "presidential preference primary ballot"); *see also* Cal. Elec. Code § 13103(b)(1) & (2).[12] The State-administered presidential primary only selects (unnamed) delegates that go on to select/pledge support for the respective parties' presidential nominees at party conventions. *See id.*

Importantly, this Court has held that a state cannot require the delegates to the national party convention to vote in accordance with the presidential-primary results if doing so would violate the party's rules; how the delegates are selected and for whom those delegates are to pledge their support are entirely governed by the political parties' internal rules and procedures. *See Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 126 (1981) ("*La Follette*"); *accord*, *e.g.*, Cal. Elec. Code § 6461(c) (releasing Republican delegate from obligation to pledge support to a particular candidate under various circumstances).

As such, all votes cast in a presidential-primary election in California are advisory and non-binding on the political parties in their selection of their respective presidential nominees for the general election. *See La Follette*, 450 U.S. at 126.

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[12] Cal. Elec. Code § 13103 reads in relevant part:

> Every ballot shall contain all of the following:
>
> (a) The title of each office, arranged to conform as nearly as practicable to the plan set forth in this chapter.
>
> (b) The names of all qualified candidates, except that:

In comparison, candidates for congressional and state elective offices in California are nominated directly by the voters. *See* Cal. Const., art. II, § 5(a).

> A political party or party central committee shall not nominate a candidate for any congressional or state elective office at the voter-nominated primary. [. . .] A political party or party central committee shall not have the right to have its preferred candidate participate in the general election for a voter-nominated office other than a candidate who is one of the two highest vote-getters at the primary election, as provided in subdivision (a).

Cal. Const., art. II, § 5(b).

Thus, the "constitutionally crucial" characteristic in *Jones* and *Clingman*—that the unaffiliated primary voters were choosing the political parties' nominees—is not present here. *See Jones*, 530 U.S. at 573 n.5 ("the associational 'interest' in selecting the candidate of a group to which one does not belong [] falls far short of a constitutional right" (emphasis added)) & 585-586; *Clingman*, 544 U.S. at 590. Absent that "constitutionally crucial" distinction, *Jones* and *Clingman* are not dispositive and do not foreclose Petitioners' claim that the State's semi-closed presidential-primary system impermissibly burdens the constitutional rights of Petitioners and other NPP voters in California.

C. The Court of Appeal Erred in Concluding that Presidential-Primary Votes Cast by NPP Voters Do Not Receive Constitutional Protection unless the Political Parties Consider Those Votes in Their Candidate-Nominee Process.

The Court of Appeal agreed that "[t]here is no dispute that the right to vote is fundamental." MOD OPN 619; *accord Communist Party*, 20 Cal. 2d at 542-543 (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 Petitioners seek to enforce is not constitutionally protected because that vote would not be counted by the political parties in their respective nominee-selection processes, characterizing the vote as having only "expressive" or "symbolic" value. *See* App.3a ("[W]e reject the [Petitioners'] 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."); App.23a ("Not only is [Petitioners'] desire to express themselves via the polls without having their votes count in determining the result not a constitutional right. . . ."); App.23a n.6 ("[Petitioners'] 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."); App.27a ("The State's strong interest . . . outweighs any interest of NPP voters to cast purely symbolic votes . . . ."). 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 discussed above and codified in the California Elections Code, the State-administered presidential-primary election does not select the political parties' presidential nominees. *See*, *e.g.*, Cal. Elec. Code §§ 6002, 6300, 6480(b), 6520(a), 6720, 6820, 6850, 6850.5, 6861.5(b); *see also* Cal. Elec. Code § 13103(b)(1) & (2); *accord La Follette*, 450 U.S. at 126.[13] The State nonetheless sends out presidential-primary ballots and then collects, tallies, and reports the votes cast therein every four years, but only for voters who—willingly or begrudgingly—associate with a political party (or happen to want to cast a primary vote for a candidate whose political party allows crossover voting).

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." Thus, there is no difference for California, as a state government, between the "value" of a presidential-primary vote cast by a party-affiliated voter or one that would be cast by an NPP voter. Both are "expressive" or "symbolic" votes that the State is required to collect,

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[13] 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*, 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; Cal. Elec. Code §§ 332.5, 8141.5.

tally, and report the results of and that the political parties are free to consider or not in their candidate-nominating process. There is no legally justified basis for the State to recognize the constitutional right of a party-affiliated voter to cast a vote in the State-administered presidential-primary election but not recognize that same right with respect to an NPP voter.

D. The Court of Appeal Erred in Concluding that the Interests Proffered by the State Justify the Burdens on NPP Voters.

Because the Court of Appeal concluded that the rights Petitioners seek to enforce are not constitutionally protected and/or that the burden on those rights was only "minimal," it then concluded that the State's regulatory interests provided a sufficient rational basis to justify the burdens. (App.24a). In particular, the Court of Appeal held that the State's interests in curtailing "party raiding" and in "'the integrity of the primary system' and 'avoid[ing] primary election outcomes which would tend to confuse or mislead the general voting population'" would be undermined by a system that simultaneously recognizes the rights of individual voters and the political parties. *See* App.25a-27a.

As discussed above, the unconstitutional burdens here are more than minimal. *Accord Tashjian*, 479 U.S. at 217-225. In *Tashjian*, the Court did not characterize the burden as "severe" but nonetheless went on to find that the proffered state interests—some of the same interests invoked here—were not sufficient to justify the burden. *See id.*; *accord Mecinas*, 30 F.4th at 904 (*Anderson/Burdick* test is a "flexible standard" on a "sliding scale"; citing *Burdick* and *Timmons*).

For example, in *Clingman*, this Court held that the state interest in preventing party raiding was sufficient to justify the burdens on individual voters—because the results of the primary vote dictated the political party's presidential nominee. *See Clingman*, 544 U.S. at 593-597. In *Tashjian*, however, the Court found that the same state interest was not sufficient to justify requiring formal association with a political party as a condition of participating in the primary election. *See Tashjian*, 479 U.S. at 219 & n.9. Although not exact, the instant case is more analogous to *Tashjian* than it is to *Jones* and *Clingman* with regard to the rights it seeks to protect (*see* discussion of *Tashjian*, *supra*).

Ironically, several remedies for the burden on the individual's right to vote—like giving NPP voters their own NPP primary ballot—not only would respect non-partisan individuals' constitutional rights against forced political associations, but also would significantly reduce the number of NPP voters forced to "roam" into a political party's private candidate-nomination process as their only means of participating in a presidential-primary election just to drop out afterward.

Similarly, *Tashjian* rejected that state's "voter confusion" argument, finding that it was not sufficient to justify formal association with a political party in order to vote in the primary election:

> [The state's] concern that candidates selected under the Party rule will be the nominees of an "amorphous" group using the Party's name is inconsistent with the facts. The Party is not proposing that independents be allowed to choose the Party's nominee without Party

> participation; on the contrary, to be listed on the Party's primary ballot continues to require, under a statute not challenged here, that the primary candidate have obtained at least 20% of the vote at a Party convention, which only Party members may attend. [Citation]. [Under that state's law] [i]f no such candidate seeks to challenge the convention's nominee in a primary, then no primary is held, and the convention nominee becomes the Party's nominee in the general election without any intervention by independent voters.

Tashjian, 479 U.S. at 220-221; *Anderson*, 460 U.S. at 796-797 ("There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election. *** [¶] [But] [o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues."); *see also* Cal. Elec. Code § 332.5.

In California, the political parties' nominees are selected at the national party conventions, not the State-administered presidential-primary election. Yet the State continues to send out primary ballots listing presidential-primary candidates (not delegates), giving the impression that a vote for a presidential-primary candidate decides who the political parties' nominee will be in the general election. *See* Cal. Elec. Code § 13103(b). If Petitioners were to succeed in their legal challenge, California's presidential primary would be no more confusing than the State has already made it.

Moreover, the State is capable of counting and classifying votes cast by its electorate; in fact, it

already does. Technology exists to create and track different ballots and to quickly count and classify votes not only by party affiliation (or non-affiliation), county, and other demographic categories (*e.g.*, by city, by district), but also by whether the ballot was cast in-person or by mail and whether the ballot is provisional or not. Indeed, there is already a separate primary ballot that is sent and/or provided to NPP voters (albeit without an option to vote for all presidential candidates). *See* Cal. Elec. Code § 13102(b). Therefore, the State is capable of giving NPP voters a unique, trackable ballot; of collecting, counting, and reporting the votes cast on NPP ballots; and of publicly reporting the vote totals under the various classifications. And, as always, the political parties are free to do what they will with that information.

Therefore, given the character and magnitude of the burden imposed on NPP voters as a condition of participating in the State-administered presidential-primary election, the mere assertion of the State's interest, without any specific evidentiary support, cannot and does not justify those burdens and the Court of Appeal erred in concluding otherwise.

E. The Court of Appeal Erred in Concluding that the Application of the *Anderson/Burdick* Test Did Not Require a Factual Record

Separately, the Court of Appeal held that a factual or evidentiary record was not required in this case to assess the constitutional burdens or the proffered state interests under the *Anderson/Burdick* test. However, this Court has repeatedly held that "[c]onstitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions."

Tashjian, 479 U.S. at 213 (quoting *Anderson*, 460 U.S. at 789). Instead, the *Anderson/Burdick* test requires the court to "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. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.*, at 214 (quoting *Anderson*, 460 U.S. at 789).

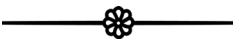
This necessarily requires an evaluation of a factual record. Whether or not the rights and/or burdens that Petitioners describe are ultimately "outweighed by the State's countervailing interest" involves factual determinations and a review of the evidence that goes beyond the face of the pleadings. Indeed, the leading case law was all decided after some form of evidentiary hearing and not through a pleading challenge. *See*, *e.g.*, *Tashjian*, 479 U.S. at 211 (decided on motion for summary judgment); *Burdick*, 504 U.S. at 432 (decided on motion for summary judgment); *Jones*, 530 U.S. at 599 (decided after bench trial); *Clingman*, 544 U.S. at 584 (decided after bench trial).

Furthermore, as the case law demonstrates, the State's asserted interests may be sufficient to justify certain burdens but not others depending on the facts of the case. For example (as discussed above), *Clingman* held that preventing so-called "party raiding" was a legitimate state interest that was served by the challenged statute, but that same interest was dismissed in *Tashjian* as "provid[ing] no justification for the statute challenged here." *Compare Clingman*, 544 U.S. at 593-597, *with Tashjian*, 479 U.S. at 219 & n.9.

The Court of Appeal dismissed the fundamental constitutional rights Petitioners seek to vindicate as

"novel" and their theories as "inventive." (App.3a, 4a). While the Court of Appeal may have used those terms pejoratively, it is a tacit acknowledgement that no prior case law is on point and a review of the factual record in this case may yield a different conclusion.[14] Petitioners should have been provided that opportunity.

[14] The Court of Appeal overstated Petitioners' concerns regarding the premature disposition of their claims; Petitioners have never asserted that election-law challenges "can *never* be decided on the pleadings."(App.18a) (emphasis in original). Petitioners have only ever asserted that it would be inappropriate to decide this case on the pleadings because the precise legal issue raised here has not been raised before.



CONCLUSION

For these reasons, Petitioners respectfully ask this Court to grant their petition for writ of certiorari.

Respectfully submitted,

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October 17, 2023

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ORDER DENYING PETITION FOR REVIEW, SUPREME COURT OF CALIFORNIA (JULY 19, 2023)

IN THE SUPREME COURT OF CALIFORNIA

JIM BOYDSTON ET AL.,

Plaintiffs and Appellants,

v.

SHIRLEY N. WEBER, as Secretary of State, etc. ET AL.,

Defendants and Respondents.

S279767

Court of Appeal, Fourth Appellate District, Division One - No. D080921

Before: GUERRERO, Chief Justice.

The petition for review is denied.

GUERRERO
Chief Justice

OPINION,
COURT OF APPEAL FOR THE
FOURTH APPELLATE DISTRICT OF
THE STATE OF CALIFORNIA
(APRIL 14, 2023)

[NOTE: as modified by the
Order at App.30a and App.34a]

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE, STATE OF CALIFORNIA

JIM BOYDSTON, ET AL.,

Plaintiffs and Appellants,

v.

SHIRLEY N. WEBER, as Secretary of State, etc., ET AL.,

Defendants and Respondents.

D080921

Appeal from a Judgment of the Superior Court of San Bernardino County, Wilfred J. Schneider, Jr., Judge. Affirmed. (Super. Ct. No. CIVDS1921480)

Before: BUCHANAN, J., DO, J.,
IRION, Acting P. J.

BUCHANAN, J.

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.

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, 120 S.Ct. 2402, 147 L.Ed.2d 502 (*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, 120 S.Ct. 2402.) In *Clingman v. Beaver* (2005) 544 U.S. 581, 125 S.Ct. 2029, 161 L.Ed.2d 920 (*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, 125 S.Ct. 2029.)

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, 112 S.Ct. 2059, 119 L.Ed.2d 245 (*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 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

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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.

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, 226 Cal.Rptr.3d 336, 407 P.3d 18.) 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, 216 Cal.Rptr. 718, 703 P.2d 58.) 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, 183 Cal.Rptr.3d 373.) 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, 150 Cal.Rptr.3d 735.) 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 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, 120 S.Ct. 2402.) 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.

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

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, 120 S.Ct. 2402.) 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, 120 S.Ct. 2402.) 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, 120 S.Ct. 2402.) 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, 120 S.Ct. 2402.) 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, 120 S.Ct. 2402.) 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, 120 S.Ct. 2402.)

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, 112

S.Ct. 2059.) "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, 94 S.Ct. 1274, 39 L.Ed.2d 714 (*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, 112 S.Ct. 2059.)

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, 103 S.Ct. 1564, 75 L.Ed.2d 547 (*Anderson*) and developed more fully in *Burdick*. (*Kunde v. Seiler* (2011) 197 Cal.App.4th 518, 538-539, 128 Cal.Rptr.3d 869; *see also Norman v. Reed* (1992) 502 U.S. 279, 288, fn. 8, 112 S.Ct. 698, 116 L.Ed.2d 711 ["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, 112 S.Ct. 2059.) Where the law imposes severe restrictions on voters' First and Fourteenth Amendment

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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, 241 Cal.Rptr.3d 324.)

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, 103 S.Ct. 1564.)

Before turning to the application of this framework, we first address plaintiffs' threshold argument that conducting the *Anderson*/*Burdick* analysis 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, 126 Cal.Rptr.2d 727, 56 P.3d 1029 (*Edelstein*) [concluding that the trial court had properly granted defendant's motion for judgment on the pleadings]; *Rubin v. City of Santa*

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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, 229 Cal.Rptr.3d 219.)

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, 183 Cal. Rptr.3d 373 [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 constitutional rights and weigh that burden against the state's asserted interests." (*Id.* at p. 1154, 183 Cal.Rptr.3d 373.) 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, 112 S.Ct. 2059.) 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, 125 S.Ct. 2029.)

In *Clingman*, the Court considered a constitutional challenge to Oklahoma's semi-closed primary system. (*Clingman, supra*, 544 U.S. at p. 584, 125 S.Ct. 2029.) 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, 125 S.Ct. 2029, 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, 120 S.Ct. 2402; *see also Tashjian v. Republican Party* (1986) 479 U.S. 208, 215, fn. 6, 107 S.Ct. 544, 93 L.Ed.2d 514 ["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, 120 S.Ct. 2402.) 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, 112 S.Ct. 2059, quoting *Storer, supra*, 415 U.S. at pp. 730, 735, 94 S.Ct. 1274.) 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, 117 S.Ct. 1364, 137 L.Ed.2d 589 (*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, 126 Cal.Rptr.2d 727, 56 P.3d 1029, citing *Burdick*, at p. 438, 112 S.Ct. 2059.) 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.[6]

Plaintiffs next argue that California's semi-closed primary system is unconstitutional because it requires NPP voters to jump through hoops to participate in

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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, 58 P.2d 1278.)

[6] 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, 125 S.Ct. 2029.) 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.

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, 125 S.Ct. 2029; *see also Rosario v. Rockefeller* (1973) 410 U.S. 752, 760-762, 93 S.Ct. 1245, 36 L.Ed.2d 1 [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, 125 S.Ct. 2029.) 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 appropriate time,'" and tasks like requesting a ballot or filing a form constitute "minimal effort." (*Clingman*, at pp. 590-592, 125 S.Ct. 2029.) Such "minor barriers between voter and party do not compel strict scrutiny." (*Id.* at p. 593, 125 S.Ct. 2029.)

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, 125 S.Ct. 2029, quoting *Timmons, supra*, 520 U.S. at p. 358, 117 S.Ct. 1364.) 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, 125 S.Ct. 2029, 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, 125 S.Ct. 2029.)

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, 125 S.Ct. 2029, 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, 125 S.Ct. 2029.) 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, 112 S.Ct. 2059, quoting *Storer, supra*, 415 U.S. at p. 735, 94 S.Ct. 1274.) Primaries "avoid burdening the general election ballot with frivolous candidacies" (*Jones, supra*, 530 U.S. at p. 572, 120 S.Ct. 2402) and "avoid the possibility of unrestrained factionalism at the general election" (*Munro v. Socialist Workers Party* (1986) 479 U.S. 189, 196, 107 S.Ct. 533, 93 L.Ed.2d 499), 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, 92 S.Ct. 849, 31 L.Ed.2d 92.) 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, 120 S.Ct. 2402; *Clingman, supra*, 544 U.S. at p. 590, 125 S.Ct. 2029.)

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.[7] 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.

WE CONCUR:

IRION, Acting P. J.

DO, J.

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[7] 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, 183 Cal.Rptr.3d 373), so we do not address that issue.

ORDER MODIFYING OPINION — NO CHANGE IN JUDGMENT, COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT OF THE STATE OF CALIFORNIA (APRIL 14, 2023)

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)

Before: IRION, Acting P. J.

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.

BRANDON L. HENSON
CLERK

By /s/
Deputy Clerk

04/14/2023

ORDER CERTIFYING OPINION FOR PUBLICATION, COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT OF THE STATE OF CALIFORNIA (APRIL 12, 2023)

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)

Before: IRION, Acting P. J.

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.

BRANDON L. HENSON
CLERK

By /s/
Deputy Clerk

04/12/2023

ORDER MODIFYING OPINION AND DENYING REHEARING — NO CHANGE IN JUDGMENT, COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT OF THE STATE OF CALIFORNIA (APRIL 12, 2023)

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)

Before: IRION, Acting P. J.

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

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.

BRANDON L. HENSON
CLERK

By /s/
Deputy Clerk

04/11/2023

JUDGMENT ENTERED IN FAVOR OF DEFENDANTS, SUPERIOR COURT OF THE STATE OF CALIFORNIA (APRIL 28, 2021)

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF SAN BERNARDINO

JIM BOYDSTON; STEVEN FRAKER; DANIEL HOWLE; JOSEPHINE PIARULLI; JEFF MARSTON; LINDSAY VUREK; LINDA CARPENTER SEXAUER, and INDEPENDENT VOTER PROJECT, a non-profit corporation,

Plaintiffs and Petitioners,

v.

ALEX PADILLA, in his official capacity as California Secretary of State; STATE OF CALIFORNIA, and DOES 1 through 1,000,

Defendants and Respondents.

Case No. CIVDS1921480
S-32

Before: Honorable Wilfred J. SCHNEIDER, J.

[~~PROPOSED~~] JUDGMENT ON ORDER SUSTAINING DEFENDANTS' DEMURRER TO SECOND AMENDED COMPLAINT WITHOUT LEAVE TO AMEND

Defendants' Demurrer to the Second Amended Complaint came on for hearing on January 29, 2021 in Department S32 of the above-titled court, the Honorable Wilfred J. Schneider, Jr. presiding. Cory J. Briggs appeared for Plaintiffs and Petitioners Jim Boydston, Steven Fraker, Daniel Howle, Josephine Piarulli, Jeff Marston, Lindsay Vurek, Linda Carpenter Sexauer, and the Independent Voter Project. Deputy Attorney General Natasha Saggar Sheth appeared for Defendants and Respondents, California Secretary of State and the State of California.

The Court having reviewed the arguments and papers submitted by the parties, and considered the argument of counsel,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that:

1. This Court hereby SUSTAINS Defendants' Demurrer to the Second Amended Complaint, WITHOUT LEAVE TO AMEND, in accordance with the reasoning set forth in the Court's ruling issued on January 29, 2021, a copy of which is attached herewith as Exhibit A.

2. Defendants' demurrer having been sustained without leave to amend, judgment be and hereby is entered in favor of Defendants and Respondents California Secretary of State and State of California and against Plaintiffs and Petitioners Jim Boydston, Steven Fraker, Daniel Howle, Josephine Piarulli, Jeff Marston, Lindsay Vurek, Linda Carpenter Sexauer,

and the Independent Voter Project, and the case is dismissed with prejudice.

/s/ The Honorable Wilfred J. Schneider, Jr.

Dated: 4/28/2021

Approved as to form:

/s/ Cory J. Briggs
Attorney for All Plaintiffs and Petitioners except Lindsay Vurek and Linda Carpenter Sexauer

Approved as to form:

/s/ William M. Simpich
Attorney for Plaintiff and Petitioner Lindsay Vurek and Linda Carpenter Sexuaer

RULING ON DEMURRER TO THE SECOND AMENDED COMPLAINT, SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO (JANUARY 29, 2021)

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF SAN BERNARDINO

JIM BOYDSTON, ET AL.,

Plaintiffs,

v.

ALEX PADILLA, ET AL.,

Defendants.

Case No. CIVDS1921480
Dept: S-32

Date: January 29, 2021.
Time: 9:00 AM
Dept: S32

Before: Honorable Wilfred J. SCHNEIDER, J.

RULING ON DEMURRER TO THE SECOND AMENDED COMPLAINT

After full consideration of the written and oral submissions by the parties, the Court rules as follows:

PROCEDURAL/FACTUAL BACKGROUND

This litigation concerns the rights of non-party preference voters in voting in the presidential primary election.

Plaintiffs Jim Boydston, Steven Fraker, Daniel Howle, Josephine Piarulli, Jeff Marston, Lindsay Vurek, Linda Carpenter Sexauer, and Independent Voter Project ("IVP") (collectively, Plaintiffs") filed this action against Defendants Alex Padilla in his capacity as the Secretary of State and the State of California.[1]

On November 19, 2019, the Court denied Plaintiffs' application for preliminary injunction requiring Defendants to implement an open presidential primary whereby any registered voter could vote for any political party without having to join, associate, or otherwise pledge allegiance to that political party as a condition of casting their vote. The Court found Plaintiffs failed to establish a likelihood of success and failed to establish irreparable harm.

On December 6, 2019, Plaintiffs filed their First Amended Complaint ("FAC"), which included six causes of action: (1) violation of Cal. Constitution, Art. II, § 5, subd. (c); (2) violation of Cal. Constitution, Art. I, § 7 (due process); (3) violation of Cal. Constitution, Art. I, § 7 (equal protection); (4) violation of violation of Cal. Constitution, Art. XVI, § 3 (unconstitutional misappropriation of public funds); (5) violation of 42

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[1] Plaintiff Linda Carpenter Sexauer was not named as a plaintiff/petitioner in Plaintiffs' original complaint. She was added by stipulation and order as a party to Plaintiffs' First Amended Complaint.

U.S.C. § 1983 (due process); and (6) violation of 42 U.S.C. § 1983 (non-association).

On October 2, 2020, the Court granted a motion filed by Defendants for judgment on the pleadings of Plaintiffs' FAC, with leave to amend.

On October 22, 2020, Plaintiffs filed their operative Second Amended Complaint ("SAC") against Defendants, which includes the same six causes of action previously pleaded in the FAC.

The relevant allegations are largely unchanged. Plaintiffs allege the California Constitution requires open presidential primary elections. But the State has adopted a closed, or modified-closed, presidential primary.

Voters registered with an approved political party can vote for their party's presidential candidates in the primary.

However, no preference party ("NPP") voters can only vote for the political parties which have agreed /authorized NPPs to vote in their parties' presidential primaries; but only if the NPP requested, either in writing associated with voting by mail or in person at the polling place, a cross-over ballot. This requirement violates NPP voters' rights of association, due process, and equal protection. (SAC, ¶¶ 1, 3, 39, 40, 43-48, 64-65, 72, and 77-78.)

Now at issue is Defendants' general demurrer to Plaintiffs' SAC. Plaintiffs filed a timely opposition. Defendants filed a timely reply.

DISCUSSION

New Allegations in Plaintiffs' SAC

The most apparent amendment to the FAC is the addition of paragraphs 53 through 61. Essentially, Plaintiffs allege Defendants are imposing additional burdens on NPP voters. Specifically, Plaintiffs allege the additional burdens include requiring NPP voters who vote by mail to "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 their polling place; or (c) re-register with a party at their polling place and receive the party's primary ballot." (SAC ¶ 54.) Defendants also allege the deadline for requesting crossover ballots is arbitrary and the wording on the postcards relating to the deadlines "leads reasonable NPP voters to believe that if they don't respond by such a deadline they will have lost their right to vote for a presidential candidate in the primary. . . . " (SAC ¶ 55.)

Plaintiffs' allegations suggest Defendants should be providing NPP voters with non-partisan ballots in the presidential primary election. The NNP voters could then vote for a presidential candidate and the private political parties would be free to ignore the votes for a presidential candidate. (*See* SAC ¶¶ 57-61.)

These allegations do not materially change the flawed nature of Plaintiffs' legal theory.

Under their second cause of action, Plaintiffs added an allegation that "at least one of IVP's members have been . . . forced to associate with a private political party in order to participate in a presidential primary election *on the same burden-free basis* that

party-affiliated voters enjoy." (SAC ¶ 74 (emphasis added).) But that is not forced speech or forced association.

As previously discussed in connection to Defendants' motion for judgment on the pleadings, and is further discussed below, the law is clear that the semi-closed primary system in California is constitutional and elections law will invariably impose some burden on individual voters. Plaintiffs have still failed to allege *facts* to demonstrate arbitrary acts on the part of the State or showing the State unreasonably deprived them of life, liberty or property without due process.

Plaintiffs' First, Second, Third, Fifth, and Sixth Causes of Action

Plaintiffs' first, second, third, fifth, and sixth causes of action involve claims Defendants violated Plaintiffs' due process and associational rights under the California and United States Constitutions.

Under their first cause of action, Plaintiffs allege Elections Code section 13102, which provides for "closed and/or modified-closed presidential primaries" violates the requirement under Article II, section 5(c) of the California Constitution that the Legislature shall provide for an "open presidential primary." (SAC ¶¶ 63-65.) Plaintiffs allege they were unable to vote for the candidate of their choice in the 2016 and 2020 presidential primary elections "unencumbered by a condition of party preference . . . ." (*Id.* ¶ 67.)

Under their second cause of action, Plaintiffs allege California's use of a "closed presidential-primary election" violates their substantive due process rights

guaranteed under Article I, section 7, of the California Constitution. (SAC ¶¶ 70-75.)

Under their third cause of action, Plaintiffs allege Elections Code section 13102 denies Plaintiffs their equal protection rights guaranteed under the California Constitution "by giving partisan voters an opportunity to cast a vote for a [presidential candidate] without affording NPP voters the right to do the same." (SAC ¶ 77.)

Under their fifth cause of action, Plaintiffs allege a substantive due process claim under the First and Fourteenth Amendments. (SAC ¶¶ 86-95.)

Under their sixth cause of action, Plaintiffs allege Elections Code section 13102 violates their First Amendment right of non-association. (SAC ¶¶ 96-100.)

Essentially, Plaintiffs still allege California's semi-closed presidential primaries violate the California and United States Constitutions.[2]

Defendants correctly point out the Supreme Court struck down state statutes that required blanket primaries (*see Cal. Democratic Party v. Jones* (2000) 530 U.S. 567, 574) and closed primaries (*see Tashjian v. Republican Party of Conn.* (1986) 479 U.S. 208, 217), but has upheld a statute that mandated semi-closed primaries (*see Clingman v. Beaver* (2005) 544 U.S. 581).

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[2] A "semi-closed" primary is one in which a party may invite independent voters as well as its own registered members to vote in its primary. (*Clingman v. Beaver* (2005) 44 U.S. 581, 584.)

A state may not keep a party from welcoming unaffiliated voters to participate in its primary. (*Tashjian, supra,* 479 U.S. 208 at pp. 213-29.) However, contrary to Plaintiffs' contentions, it may prohibit party members from participating in another party's primary. (*Clingman v. Beaver* (2005) 544 U.S. 581, 586-97.)

Plaintiffs cite no authority supporting their argument that Elections Code section 13102 violates the California Constitution.

Article II, section 5, of our State's Constitution provides:

> The Legislature shall provide for partisan elections for presidential candidates, and political party and party central committees, *including an open presidential primary whereby the candidates on the ballot are those found by the Secretary of State to be recognized candidates throughout the nation or throughout California for the office of President of the United States*, and those whose names are placed on the ballot by petition, but excluding any candidate who has withdrawn by filing an affidavit of noncandidacy. (Emphasis added.)

This Constitutional provision addresses which candidates must be placed on the ballot, not the procedures for voting for the candidates. As argued by Defendants, the Supreme Court decided in *Jones* that the 1996 adoption of Proposition 198, which provided for an "open primary," was unconstitutional because, in part, a "'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.'" (*Cal. Democratic Party v. Jones, supra,* 530 U.S. at p. 583, quoting *Tashjian, supra,* 479 U.S. at pp. 215-216.)

Defendants' RJN Exhibit 5 is a copy of the Voter Information Guide from the June 8, 2010 election, which includes Proposition 14—the most recent amendment to Article II, section 5 of the California Constitution ("Top Two Candidates Open Primary Act").[3] It includes the following declaration:

> (f) Presidential Primaries. This act makes no change in current law as it relates to presidential primaries. This act conforms to the ruling of the United States Supreme Court in *Washington State Grange v. Washington State Republican Party* (2008) 128 S.Ct. 1184. Each political party retains the right either to close its presidential primaries to those voters who disclose their party preference for that party at the time of registration or to open its presidential primary to include those voters who register without disclosing a political party preference. (Def's RJN Ex. 5 at p. 65.)

This is consistent with the relevant language of Elections Code section 13102:

> (b) At partisan primary elections, each voter not registered disclosing a preference for any one of the political parties participating in

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[3] Defendants' demurrer references the exhibits of which the Court previously took judicial notice in ruling on Defendants' motion for judgment on the pleadings.

> the election shall be furnished only a nonpartisan ballot, unless the voter requests a ballot of a political party and that political party, by party rule duly noticed to the Secretary of State, authorizes a person who has declined to disclose a party preference to vote the ballot of that political party. The nonpartisan ballot shall contain only the names of all candidates for nonpartisan offices, voter-nominated offices, and measures to be voted for at the primary election. Each voter registered as preferring a political party participating in the election shall be furnished only a ballot for which the voter disclosed a party preference in accordance with Section 2151 or 2152 and the nonpartisan ballot, both of which shall be printed together as one ballot in the form prescribed by Section 13207.
>
> (c) A political party may adopt a party rule in accordance with subdivision (b) that authorizes a person who has declined to disclose a party preference to vote the ballot of that political party at the next ensuing partisan primary election. The political party shall notify the party chair immediately upon adoption of that party rule. The party chair shall provide written notice of the adoption of that rule to the Secretary of State not later than the 135th day before the partisan primary election at which the vote is authorized. (Elections Code, § 13102, subds. (b), (c).)

Plaintiffs argues *Jones* and *Clingman* are distinguishable because they focus on the rights of the

political parties, rather than the rights of the individual voters. The Court previously explained that appears to be a distinction without a difference. Plaintiffs take issue with that characterization. They argue it is permissible for political parties to make distinctions, but not the state. But Plaintiffs still fail to allege state action which deprives them of a cognizable right.

Plaintiffs, as non-party affiliated voters, do not have a *constitutional right* to vote in a presidential primary for a political party's candidate.

The Civil Rights Act, 42 U.S.C. section 1983 ("Section 1983") does not create any substantive rights but is a vehicle used to vindicate rights secured by the federal constitution and federal law. (*Chapman v. Houston Welfare Rights Org.* (1979) 441 U.S. 600, 616, 617-18.) For a Section 1983 violation, the following must be established: (1) the conduct was committed by a person acting under the color of state law, and (2) it deprived the person of rights, privileges, or immunities secured by the Constitution or other laws of the United States. (*Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1402.)

The First Amendment of the U.S. Constitution guarantees citizens the right to associate, including the right to associate with the political party of one's choice. (*Tashjian v. Republican Party* (1986) 479 U.S. 208, 214.) Also, the freedom of association presupposes the freedom not to associate. (*Roberts v. United States Jaycees* (1984) 468 U.S. 609, 623.)

On one hand, the right to vote freely for one's candidate choice is the essence of the democratic society and restrictions on that right strike at the heart of the representative government. (*Moore v.*

Ogilvie (1969) 394 U.S. 814, 814.) On the other hand, it is recognized a political party has the constitutional right to preclude non-party members from interfering with the rights of its members, *i.e.*, preclude non-party members from voting in its primary election. (*Cal. Democratic Party v. Jones* (2000) 530 U.S. 567, 583; *Tashjian v. Republican Party* (1986) 479 U.S. 208, 216, fn. 6.)

The apparent contradiction of these holdings is rectified by every citizen has the right to freely vote in general type elections but as to presidential primary elections, which the vote is not the means by which the presidential nominees are chosen, as they are chosen by delegates of the political parties (Elections Code, §§ 6020, sub. (b), 6480, subd. (b), 6620, subd. (a) and (d), 6821, subd. (a), and 6851), the political parties' right to determine its own membership trumps. As recognized in the law, the right to vote in any manner and the right to associate for political purposes through the ballot are not absolute. (*Burdick v. Takushi* (1992) 504 U.S. 428, 433.)

Elections law will invariably impose some burden on individual voters. (*Id.*) The fact the State's system may create barriers tending to limit the field of candidates from which voters might choose does not compel close scrutiny. (*Id.*) Rather,

> a more flexible standard applies. A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the *First* and *Fourteenth Amendments* that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its

> rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." [Citation.]
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens *First* and *Fourteenth Amendment* rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the *First* and *Fourteenth Amendment* rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. [Citations.]

(*Burdick, supra*, 504 U.S. at p. 434 (citations omitted); *see also Rawls v. Zamora* (2003) 107 Cal.App.4th 1110, 1116 ("Courts will uphold as "not severe" restrictions that are generally applicable, even-handed, politically neutral, and which protect the reliability and integrity of the election process. This is true even when the regulations "have the effect of channeling expressive activities at the polls."' 'Courts will strike down state election laws as severe speech restrictions only when they significantly impair access to the ballot, stifle core political speech, or dictate electoral outcomes."' (citations omitted)]).

Here, California's presidential primary process, unlike any other type of election for a public office (federal or state), provides generally for only party

members to vote on their party's presidential candidates.

Nevertheless, qualified political parties may adopt a rule to allow no party preference ("NPP") voters to vote in its primary election. The political party is to notify the Secretary of State by the 135th day before the primary election if they will allow NPPs to vote in their primary. For the 2016 primary election, the Democratic, Libertarian, and American Independent Parties authorized NPP voters to participate. (SAC ¶¶ 44-47.)

The ballot a NPP receives associated with the presidential primary will contain information on the option to vote for all matters except the candidates for President. To vote for a presidential candidate, the NPP voter must request a cross-over ballot for one of the parties allowing NPP voters by either an application associated with voting by mail or at the polling place. (SAC ¶¶ 44, 48.)

Plaintiffs have still not pointed to any provision in the presidential primary statutory scheme which mandates they associate with any political party. In order to participate in the presidential primary election, one must either be a member of the political party or the political party is allowing NPPs to vote in its primary.

However, neither method mandates the NPP associate with one party or another.

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 problem is the U.S. Supreme Court has found the political parties' freedom to associate

means they get to dictate who is permitted to participate in the primaries that will assist in deciding the political parties' candidate for the general election.

The U.S. Supreme Court noted: "[Elven if it were accurate to describe the plight of the non-party-member in a safe district as 'disenfranchisement,' Proposition 198 is not needed to solve the problem. 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." (*Cal. Democratic Party, supra*, 530 U.S. at p. 584.)

The same is true here.

Neither Secretary Padilla nor the State is imposing a restriction on the NPPs' associational freedoms in order to vote in the presidential primary; the restriction is coming from the political parties themselves to which they are authorized to do so under the law above.

Additionally, a NPP has available the ability to vote (in part) in the presidential primary election by three of the six qualified political parties allowing them to vote in their primaries. To vote in those parties' primaries is no requirement that the NPP associate with that party, *i.e.*, NPPs are not required to register as a Democrat, Libertarian, or American Independent to obtain the cross-over ballot for that party.

An equal protection claim has two essential elements. Plaintiffs must plead and prove the State adopted a classification that affects two or more

similarly situated groups in an unequal manner (for purposes of the law challenged) and an insufficient reason for distinguishing between the two groups. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) Substantive due process applies to governmental action which arbitrarily or unreasonably deprives a person of life, liberty, or property. (*See*, *e.g.*, *Terminal Plaza Corp, v City County of San Francisco* (1986) 177 Cal.App.3d 892, 908.)

Plaintiffs want to vote for their presidential candidate of choice in the presidential election without the burden of having to associate with a political party or requesting a crossover ballot.

Plaintiffs allegations demonstrate they are treated differently than members of political party members.

However, *Jones* and *Clingman* establish a sufficient reason for the different treatment.

They also demonstrate Plaintiffs failed to allege facts demonstrating arbitrary acts on the part of the State or that the State unreasonably deprived them of life, liberty or property.

In short, Plaintiffs cite no authority, and none is apparent, holding that the semi-closed primary system in California, as set forth in Section 13102 of the Elections Code is unconstitutional.

Likewise, Plaintiffs failed to allege facts demonstrating voter disenfranchisement or any other cognizable constitutional claim.

Therefore, the Court will sustain the Defendants' demurrer to the Plaintiffs' first, second, third, fifth, and sixth causes of action.

Plaintiffs' Fourth Cause of Action

Section 3 of Article XVI of the California Constitution provides that "[n]o money shall ever be appropriated or drawn from the State Treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a state institution, nor shall any grant or donation of property ever be made thereto by the State," with certain enumerated exceptions.

Plaintiffs allege California's semi-closed presidential primary serves a predominately private purpose—to benefit private political parties—and thus Elections Code section 13102 violates the California's Constitution's prohibition against appropriating public funds for a private purpose. (SAC ¶¶ 80-85.)

Notably, Plaintiffs' allegations, which were previously determined to have been deficient, appear to be unchanged.

Just as before, Defendants argue Plaintiffs' fourth causes of action fails as a matter of law because using public funds to conduct primary elections does not violate the Constitution.

Plaintiffs quote Section 3 of Article II of the California Constitution which states "[t]he Legislature shall define residence and provide for registration and *free elections*." (Emphasis added.)

Plaintiffs argue a "primary election serves a substantially different purpose than a general election, particularly for the position of the President of the United States, in that it is merely advisory and intended to serve only the interests of the parties." (Opp. 21:7-9.)

However, Plaintiffs cite no authority to support that argument.

In paragraph 50 of their SAC, Plaintiffs allege "the California presidential primary is, in effect, a state-sponsored straw poll for the exclusive and private benefit of the political parties."

That is a colorful conclusion, not a fact.

Plaintiffs' fourth cause of action is novel.

But Plaintiffs cite no authority showing it is colorable under the law.

Therefore, the Court will sustain the Defendants' demurrer to the Plaintiffs' fourth cause of action.

The State as an Improper Defendant

Defendants argue the State is not a proper defendant in this action.

There is a "general and long-established rule that in actions for declaratory and injunctive relief challenging the constitutionality of state statutes, state officers with statewide administrative functions under the challenged statute are the proper parties defendant." (*Serrano v. Priest* (1976) 18 Cal.3d 728, 752; *see also Templo v. State of California* (2018) 24 Cal.App.5th 730, 737 ["in the instant case, it is the Judicial Council, and not the State as a whole, that has the 'direct institutional interest' necessary to defend the action."].)

Just as before, Plaintiffs' opposition does not address Defendants' argument.

Defendants appear to be correct that Defendant Alex Padilla, in his capacity as the Secretary of State,

not the State as a whole, has the direct institutional interest necessary to defend the action.

Therefore, the Court will sustain the Defendants' demurrer as to claims against the State.

Leave to Amend

Courts are very liberal in permitting amendments, not only where a complaint is defective in form, but also where substantive defects are apparent: "Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217.)

It is an abuse of discretion for the court to deny leave to amend where there is any *reasonable possibility that* plaintiff can state a good cause of action. (*Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 484 [court should grant leave to amend if in all probability plaintiff will cure defect].)

However, no abuse of discretion will be found unless a potentially effective amendment is "both apparent and consistent with plaintiff's theory of the case." (*Camsi IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1542.)

"Leave to amend *should be denied* where the facts are not in dispute and the nature of the claim is clear, but no liability exists under substantive law." (*Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436 (emphasis added); *Schonfeldt v. State of Calif.* (1998) 61 Cal.App.4th 1462, 1465 [if no liability as a matter of law, leave to amend should not be granted].)

Plaintiffs have been given an opportunity to amend and failed to effectively do so. Therefore, the Court will sustain this demurrer without leave to amend.

RULING

The Court SUSTAINS the Defendants' demurrer to the Plaintiffs' Second Amended Complaint, without leave to amend.

/s/ Wilfred J. Schneider, Jr.
Judge

Dated: January 29, 2021