KEVIN J. MINNICK (STATE BAR NO. 269620)
Kevin.Minnick@probonolaw.com
ZACHARY M. FAIGEN (STATE BAR NO. 294716)
Zack.Faigen@probonolaw.com
MAXIMILLIAN W. HIRSCH (STATE BAR NO. 301872)
Maximillian.Hirsch@probonolaw.com
300 South Grand Avenue, Suite 3400
Los Angeles, California 90071-3144
Telephone: (213) 687-5000
Facsimile: (213) 687-5600

BRENDAN HAMME (STATE BAR NO. 285293)
BHamme@aclusocal.org
ACLU OF SOUTHERN CALIFORNIA
1851 East 1st Street, Suite 450
Santa Ana, California 92705
Telephone: (714) 450-3963

Attorneys for Plaintiffs
EMIDIO "MIMI" SOLTYSIK
JENNIFER MCCLELLAN

(additional counsel on following page)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EMIDIO "MIMI" SOLTYSIK; JENNIFER MCCLELLAN, Plaintiffs, v. ALEX PADILLA, in only his official capacity as Secretary of State; DEAN LOGAN, in only his official capacity as Registrar-Recorder / County Clerk of the County of Los Angeles, Defendants, CALIFORNIANS TO DEFEND THE OPEN PRIMARY, Intervenor-Defendant.	CASE NO.: 2:15-cv-07916-AB-GJSx PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANT ALEX PADILLA AND INTERVENOR-DEFENDANT CALIFORNIANS TO DEFEND THE OPEN PRIMARY'S MOTIONS TO DISMISS. Judge: André Birotte, Jr. Courtroom: 4 Hearing Date: Mar. 14, 2016 Hearing Time: 10:00 a.m.

ADDITIONAL COUNSEL

PETER ELIASBERG (STATE BAR NO. 189110)
peliasberg@aclu.sc.org
ACLU OF SOUTHERN CALIFORNIA
1313 W. 8th St.
Los Angeles, California 90017
Telephone: (213) 977-5297

Attorneys for Plaintiffs
EMIDIO "MIMI" SOLTYSIK
JENNIFER MCCLELLAN

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. PRELIMINARY STATEMENT 1

II. FACTUAL BACKGROUND 4

A. California Passes Proposition 14, Replacing California's Traditional Party Primary System With A "Nonpartisan Blanket Primary" 4

B. The California Legislature Enacts AB 1413, Which Amended Sections 8002.5(a) And 13105(a) In Constitutionally Problematic Ways 7

C. The Statutes Infringe On Plaintiffs' First Amendment Rights 7

III. LEGAL STANDARD UNDER FRCP 12(b)(6) 8

IV. ELECTION LAW CHALLENGES ARE SUBJECT TO THE FACT-SPECIFIC AND FACT-DEPENDENT *ANDERSON* BALANCING TEST 9

V. PLAINTIFFS ADEQUATELY ALLEGE THAT THE STATUTES AT ISSUE SEVERELY BURDEN THEIR ASSOCIATIONAL RIGHTS, AND THAT NO STATE INTEREST JUSTIFIES THOSE BURDENS 10

A. Plaintiffs Allege That The Statutes Impose A Severe Burden On The Right To Cast Votes Effectively, And Defendants' Cases Support That Burden Is A Fact Question Not To Be Decided On A Motion To Dismiss 12

B. The Proffered State Interests That Sections 13105(a) And 8002.5(a) Supposedly Advance Are Legally And Factually Suspect 18

1. Maintaining The Integrity Of The Distinction Between Qualified And Non-Qualified Parties 20

2. Maintaining Minimum Qualifications For A Party To Appear On The Ballot 21

3. Preventing Political Advertising On The Ballot; Preventing Misrepresentation; Avoiding Confusion And Deception; And Preventing Profanity, Racism And Sexism On The Ballot 22

4. Protecting The Integrity, Fairness And Efficiency Of The Ballots; Maintaining An Orderly Ballot; And Preserving The Simplicity On The Ballot 25

VI. PLAINTIFFS ADEQUATELY ALLEGE THAT THE STATUTES AT ISSUE DISCRIMINATE AGAINST THEM BASED ON THEIR VIEWPOINT 25

A. The State Has Created A Limited Public Forum On Its Ballots 26

B. The Statutes Discriminate On The Basis Of Viewpoint 27

C. Dismissal Of The Viewpoint Discrimination Claim Is Inappropriate On A Motion To Dismiss 32

VII. PLAINTIFFS ADEQUATELY ALLEGE THAT THE STATUTES COMPEL THEIR SPEECH IN VIOLATION OF THE FIRST AMENDMENT 33

A. The Ballot Statement "Party Preference: None" Constitutes Compelled Speech That Is Attributed To Plaintiffs 34

B. The Compelled Statement "Party Preference: None" Is False and Misleading 36

VIII. CONCLUSION 38

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Anderson v. Celebrezze,
460 U.S. 780 (1983).....*passim*

Arutunoff v. Oklahoma State Election Board,
687 F.2d 1375 (10th Cir. 1982).....1, 9, 14

Board of Regents of University of Wisconsin v. Southworth,
529 U.S. 217 (2000).....27, 28, 30

Broam v. Bogan,
320 F.3d 1023 (9th Cir. 2003).....9

Burdick v. Takushi,
504 U.S. 428 (1992).....10, 18

Carey v. Brown,
447 U.S. 455 (1980).....24

Caruso v. Yamhill County
422 F.3d 848 (9th Cir. 2005).....36

Chamness v. Brown,
722 F.3d 1110 (9th Cir. 2013).....*passim*

Citizens for Clean Government v. City of San Diego,
474 F.3d 647 (9th Cir. 2007).....19

Clements v. Fashing,
457 U.S. 957 (1982).....9

Cornelius v. NAACP Legal Defense & Education Fund, Inc.,
473 U.S. 788 (1985).....29, 32, 33

Cosio v. Simental,
No. CV 08-6853 PSG (PLAx),
2009 WL 201827 (C.D. Cal. Jan. 27, 2009).....9

Cressman v. Thompson,
798 F.3d 938 (10th Cir. 2015).....37

Dart v. Brown,
717 F.2d 1491 (5th Cir. 1983).....2, 16

Erickson v. Pardus,
551 U.S. 89 (2007).....9, 14

Eu v. San Francisco County Democratic Central Committee,
489 U.S. 214 (1989).....19

Field v. Bowen,
199 Cal. App. 4th 346 (2011).....2, 11, 15

Flint v. Dennison,
488 F.3d 816 (9th Cir. 2007) 26

Good News Club v. Milford Central School,
533 U.S. 98 (2001) 29

Hopper v. City of Pasco,
241 F.3d 1067 (9th Cir. 2001) 26

Jenness v. Fortson,
403 U.S. 431 (1971) 22

Johanns v. Livestock Marketing Ass'n,
544 U.S. 550 (2005) 4, 35

Kaplan v. County of Los Angeles,
894 F.2d 1076 (9th Cir. 1990) 26

Lamb's Chapel v. Center. Moriches Union Free School District,
508 U.S. 384 (1993) 27, 28

Libertarian Party v. Eu,
28 Cal. 3d 535 (1980) 37

Lightfoot v. Eu,
964 F.2d 865 (9th Cir. 1992) 18

McLain v. Meier,
637 F.2d 1159 (8th Cir. 1980) 10

McLaughlin v. North Carolina Board of Elections,
65 F.3d 1215 (4th Cir. 1995) ..... *passim*

Mendiondo v. Centinela Hospital Medical Center,
521 F.3d 1097 (9th Cir. 2008) 9

NAACP Legal Defense & Educational Fund, Inc. v. Horner,
636 F. Supp. 762 (D.D.C. 1986), *vacated as moot by NAACP Legal Defense & Educational Fund v. Horner*, 795 F.2d 215 (D.C. Cir. 1986)) 33

Niemotko v. Maryland,
340 U.S. 268 (1951) 30

Police Department of Chicago v. Mosley,
408 U.S. 92 (1972) 30

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 27

Rainbow Coalition of Oklahoma v. Oklahoma State Election Board,
844 F.2d 740 (10th Cir. 1988) 18

Reed v. Town of Gilbert,
135 S. Ct. 2218 (2015) 27, 28, 31

Riley v. National Federation of the Blind, Inc.,
487 U.S. 781 (1988) 37

Rosen v. Brown,
970 F.2d 169 (6th Cir. 1992) 2, 11, 12, 13

Rosenberger v. Rector and Visitors of University of Virginia,
515 U.S. 819 (1995) 26, 27, 28, 31

Rubin v. City of Santa Monica,
308 F.3d 1008 (9th Cir. 2002) 11, 17, 32

Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,
547 U.S. 47 (2006) 37

San Francisco County Democratic Central Committee v. Eu,
826 F.2d 814 (9th Cir. 1987) 19

Schrader v. Blackwell,
241 F.3d 783 (6th Cir. 2001) 18

Socialist Workers Party v. Eu,
591 F.2d 1252 (9th Cir. 1978) 10, 18

Storer v. Brown,
415 U.S. 724 (1974) 10

Tashjian v. Republican Party,
479 U.S. 208 (1986) 11, 12

Texas v. Johnson,
491 U.S. 397 (1989) 23, 24

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) 18, 27

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943) 34, 35

Wooley v. Maynard,
430 U.S. 705 (1977) 3, 34, 35, 37, 38

STATUTES

Cal. Elec. Code § 359.5 ..... 5, 6

Cal. Elec. Code § 5100 ..... 4, 37

Cal. Elec. Code § 8002.5 ..... *passim*

Cal. Elec. Code § 13105 ..... 4, 7, 25

Cal. Gov't Code § 85601(a) 18

OTHER AUTHORITIES

S.B. 6, 2009-2010 Reg. Sess (Cal. 2009). 4, 5, 6, 7

Elections in California, California Secretary of State, http://voterguide.sos.ca.gov/en/voter-info/elections-in-california.htm 6

Proposition 14, subsection (d) 26

I. PRELIMINARY STATEMENT

Plaintiffs, members of the Socialist Party USA, challenge two provisions of the California Elections Code as unconstitutional. First, Plaintiffs challenge the provision that allows candidates who prefer "qualified" parties to state their party preference on the ballot, but forbids candidates who prefer "non-qualified" parties from doing the same. Second, Plaintiffs challenge the provision that compels candidates who prefer non-qualified parties to declare on the ballot that they have ***no*** party preference, even though that declaration is untrue.

"Constitutional 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." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).[1] "[E]ach case must be resolved on its own facts after due consideration is given to the practical effect of the election laws of a given state, viewed in their totality." *Arutunoff v. Okla. State Election Bd.*, 687 F.2d 1375, 1379 (10th Cir. 1982). The "results of this evaluation will not be automatic" and "there is no substitute for the hard judgments that must be made." *Anderson*, 460 U.S. at 789-90.

The process is fact-intensive. A court must "first consider the character and magnitude of the asserted injury." *Id.* at 789. Then, it "must identify and evaluate the precise interests put forward by the State as justifications for the burden" and "determine the legitimacy and strength of each of those interests," while "consider[ing] the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* "Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Id.*

Defendants Alex Padilla and Californians to Defend the Open Primary ("CADOP" and, together with Padilla, "Defendants") ask the Court to short-circuit this fact-dependent inquiry and deny Plaintiffs the opportunity to prove their allegations and claims through

[1] Internal citations and quotations omitted and all emphasis added unless specified.

evidence. Moreover, as Plaintiffs allege, the statutes severely burden constitutional rights including by discriminating on the basis of viewpoint such that they must satisfy strict scrutiny—scrutiny that cannot possibly be satisfied at the Motion to Dismiss stage. Defendants' request should be denied.

In their first cause of action, Plaintiffs allege that the challenged Code provisions severely burden their rights of association and equal protection by preventing them from stating their party preference on the ballot, while permitting candidates who prefer qualified political parties to do so. Plaintiffs allege that voters are unable to cast their votes effectively when this party preference information is withheld because it denies voters a critical "voting cue." Instead, Plaintiffs are forced to state, "Party Preference: None" on the ballot, which causes voters to draw negative inferences about them. The Sixth Circuit struck down a state election law where *the evidence showed* that the challenged statute inflicted these exact burdens. *Rosen v. Brown*, 970 F.2d 169, 175 (6th Cir. 1992).

Defendants counter that the Code provisions impose only a "slight" burden. This, however, is a *factual* assertion that contradicts Plaintiffs' well-pleaded allegations. Such an argument is improper at the pleading stage. Moreover, the cases on which Defendants rely—almost all of them summary judgment and trial cases—specifically cite the lack of evidence in the record as a reason for upholding the challenged laws:

- *Chamness v. Brown*, 722 F.3d 1110, 1117-18 (9th Cir. 2013): Plaintiff "*failed to provide any evidence* that the two phrases are actually likely to be understood by voters to convey these different meanings, and, if they do, that the distinction would tend to affect the way voters cast their votes. Considered in context, *we cannot assume these facts in the absence of evidence*."
- *Field v. Bowen*, 199 Cal. App. 4th 346, 364 (2011): "Unlike the candidate in *Rosen*, *plaintiffs have not presented, and state no intention to present, evidence to support their theory* that 'No Party Preference' is a more disadvantageous ballot designation than 'Independent.'"
- *Dart v. Brown*, 717 F.2d 1491, 1505 (5th Cir. 1983): "[T]he truth of such a proposition is by no means self-evident, and *there is no evidence in this*

> *record, and appellants point to no recognized literature or facts of common knowledge*, so demonstrating."

If Plaintiffs can prove their allegations with evidence, they will be entitled to the relief they seek. Plaintiffs are entitled to that opportunity, and not a single case cited by Defendants suggests otherwise.

With regard to Plaintiffs' second cause of action, Plaintiffs allege that the challenged Code provisions discriminate on the basis of viewpoint in a limited public forum. The state has created a limited public forum on its ballot for candidates to inform voters of their political party preference. However, whereas candidates who wish to express the view that they prefer a qualified political party are permitted to do so, candidates who wish to express the view that they prefer a non-qualified political party are not permitted to participate in the limited public forum. This discrimination excludes minority political views, severely burdens Plaintiffs' rights and, thus, warrants strict scrutiny. Whether the state can demonstrate through evidence that the Code provisions are narrowly tailored to advance a compelling state interest is a question of fact for a much later date—after discovery.

Plaintiffs' third claim is that the Elections Code compels Plaintiffs to state on the ballot that they have "Party Preference: None," even though they do not want to make that statement. The "right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). To avoid this obvious constitutional violation, Defendants claim that Plaintiffs' stated party preference is actually government speech, not Plaintiffs' speech. This position cannot withstand scrutiny. The statute that governs party preference designations repeatedly refers to the preference as a "selection made *by a candidate*," and a "party preference *designated by the candidate*." Cal. Elec. Code § 8002.5(b), (c). Defendants' argument is contrary to the plain text of the statute. Moreover, even if the party preference on the ballot were arguably a form of government speech, the content of that speech could logically only be attributable to the candidate

stating the preference. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 564 n.7 (2005) (First Amendment compelled speech analysis turns on whether "a viewer would identify the speech as [plaintiffs']"). To conclude otherwise would entail the incorrect notion that the *state* is selecting candidates' party preferences *for them*.

For the foregoing reasons and those explained below, Plaintiffs ask the Court to deny Defendants' motions to dismiss and allow Plaintiffs the opportunity to prove with evidence the constitutional claims they have adequately pleaded.

II. FACTUAL BACKGROUND

A. California Passes Proposition 14, Replacing California's Traditional Party Primary System With A "Nonpartisan Blanket Primary"

Throughout the vast majority of California's political history, political parties played a key role in the elections process. (Compl. ¶ 17.) Foremost, political parties nominated their candidates for the general election in primary elections, which were conducted through the State's ballots. (*Id.*) In these primaries, only party members or independents (depending on each party's rules), could vote on the party's nominee. (*Id.*)

Under that system, the State had an interest in ensuring political parties had a modicum of support before setting into motion the machinery of the State to operate a party's primary. (*Id.* ¶ 18.) As such, only "qualified" parties under California Elections Code § 5100 were permitted to use the State ballot to conduct their primaries. (*Id.*)[2]

---

[2] By its terms, § 5100 provides three ways for a party to become qualified. However, the first option is impossible in the context of voter-nominated offices under the new top-two primary system. Under § 5100(a), a party is considered qualified if, "[a]t the last preceding gubernatorial primary election, the sum of the votes cast for all of the candidates for an office voted on throughout the state who disclosed a preference for that party on the ballot was at least 2 percent of the entire vote of the state for that office." Cal. Elec. Code § 5100(a). However, as Plaintiffs complain, a candidate is not permitted to disclose a preference for a non-qualified party under §§ 8002.5 and 13105. Thus, by definition, no candidate who disclosed such a preference could ever receive two percent of the vote. In this way, § 5100(a) represents a Catch-22 for non-qualified parties.

Section 5100 is also outdated and inapplicable in a second way, because it governs when a party is "qualified to participate in a primary election." Cal. Elec. Code § 5100. However, parties do not participate in primaries in the top-two primary system. These inconsistencies within the statute itself only undercut the state's continued reliance on the *(cont'd)*

In February 2009, the California Legislature passed SB 6, a bill that would fundamentally change the way primaries for certain offices are conducted in California. In relevant part, SB 6 provided for:

> a "voter-nominated primary election" for each state elective office and congressional office in California, in which a voter may vote at the primary election for any candidate for congressional or state elective office without regard to the political party preference disclosed by either the candidate or the voter. The 2 candidates receiving the 2 highest vote totals for each office at a primary election, regardless of party preference, would then compete for the office at the ensuing general election.

(S.B. 6, 2009-2010 Reg. Sess. (Cal. 2009), *codified at* Cal. Stats. 2009, ch. 1 ("SB 6").) This primary system, often called a "nonpartisan blanket primary" or "top two" primary system, applies only to primaries for "voter-nominated offices." A "voter-nominated office" means "a congressional or state elective office for which a candidate may choose to have his or her party preference or lack of party preference indicated upon the ballot." *Id.*; Cal. Elec. Code § 359.5(a).[3]

Under SB 6, candidates had three options for how to list their party preference on the ballot. First, a candidate could state, "[m]y party preference is the _____ Party," and fill in the blank with the party that the candidate designated on the candidate's most recent statement of registration. SB 6 § 46; former Cal. Elec. Code § 8002.5(a). Second, "[i]f the candidate designates no political party [on its statement of registration], the phrase 'No Party Preference' shall be printed instead of the party preference identification." SB 6 § 46. Third, "[i]f the candidate chooses not to have his or her party preference listed on the ballot, the space that would be filled with a party preference designation shall be left blank." *Id.*

(cont'd from previous page)
statute as a reason to differentiate—in the context of voter-nominated offices—among candidates based on which party they prefer.

[3] SB 6 does not apply to the way primaries are conducted for presidential, party central committee, or nonpartisan elections, which are governed by separate sections of the Elections Code.

By its terms, SB 6 would become operative only if voters approved Senate Constitutional Amendment 4, which became Proposition 14. SB 6.

Sixteen months later, in June 2010, California voters approved Proposition 14, and SB 6 went into effect on January 1, 2011. As a result of SB 6 and Proposition 14, "[t]he primary conducted for a voter-nominated office does not serve to determine the nominees of a political party but serves to winnow the candidates for the general election to the candidates receiving the highest or second highest number of votes cast at the primary election." Cal. Elec. Code § 359.5(a). Under the new system, "[p]olitical parties are not entitled to formally nominate candidates for voter-nominated offices at the primary election. A candidate nominated for a voter-nominated office at the primary election is the nominee of the people and not the official nominee of any party at the general election." Elections in California, California Secretary of State, http://voterguide.sos.ca.gov/en/voter-info/elections-in-california.htm; *see also* Cal. Elec. Code § 8002.5(d) ("A candidate's designation of party preference shall not be construed as an endorsement of that candidate by the party designated.").

Because political parties are no longer entitled to nominate candidates and a candidate's designation of a party preference does not indicate an endorsement by that party, "[t]he party preference designated by the candidate is shown for the information of the voters only," an important and constitutionally significant departure from the traditional primary system. Cal. Elec. Code § 8002.5(d).

In further contrast to the traditional primary system, belonging to a qualified party is not a prerequisite for participation in a primary under the "top two" system. Under the "top two" system, candidates for voter-nominated offices need only pay a filing fee and submit their declaration of candidacy and the signatures of, at most, 100 nominators before being placed on the ballot. (Compl. ¶ 26.)

B. The California Legislature Enacts AB 1413, Which Amended Sections 8002.5(a) And 13105(a) In Constitutionally Problematic Ways

In February 2012, the California Legislature passed AB 1413.[4] AB 1413 amended California Elections Code §§ 8002.5(a) and 13105(a) (the "Statutes"), which were enacted pursuant to SB 6, in two ways that are relevant here.

First, AB 1413 amended § 8002.5 to explicitly state that only candidates who prefer qualified parties can state their party preference on the ballot. Thus, AB 1413 amended section 8002.5(a) to read:

> (a) A candidate for a voter-nominated office shall indicate one of the following upon his or her declaration of candidacy, which shall be consistent with what appears on the candidate's most recent affidavit of registration:
>
> (1) "Party Preference: _____ (insert the name of the *qualified* political party as disclosed upon your affidavit of registration)."
>
> (2) "Party Preference: None (if you have declined to disclose a preference for a *qualified* political party upon your affidavit of registration)."[5]

Second, AB 1413 removed the third option that was formerly available to candidates under SB 6: "If the candidate chooses not to have his or her party preference listed on the ballot, the space that would be filled with a party preference designation shall be left blank." *Compare* Cal. Elec. Code § 8002.5(a), *with* SB 6 § 46. Thus, AB 1413 forced candidates who prefer non-qualified political parties to affirmatively state, "Party Preference: None."

C. The Statutes Infringe On Plaintiffs' First Amendment Rights

In 2014, Plaintiff Soltysik ran for State Assembly in California's 62nd District. (Compl. ¶ 13.) However, unlike candidates affiliated with qualified political parties, who

---

[4] AB 1413 was previously filed with the Court as Exhibit 8 to the Declaration of Kevin J. Minnick in Support of Plaintiffs' Opposition to Non-Party Californians to Defend the Open Primary's Motion to Intervene. (ECF No. 19-1.)

[5] Section 13105, which governs how candidates appear on the ballot, incorporates by reference the candidates' political party designations from section 8002.5(a).

are free to communicate their preferred political party on the ballot, Plaintiff Soltysik was not permitted to state on the ballot that he prefers the Socialist Party USA—the political party he chairs and with which he associates. (*Id.*) Instead, he was compelled to falsely identify as having no party preference. (*Id.*) This false designation caused confusion among the limited number of voters to whom he was able to speak and, in Plaintiff Soltysik's estimation, countless more. (*Id.*) It also raised concerns among voters about Plaintiff Soltysik's credibility, and caused voters to view him with skepticism. (*Id.* ¶ 45.) Indeed, this false designation conveyed *mis*information to voters about Plaintiff Soltysik and caused voters to draw negative inferences about him. (*Id.* ¶¶ 40, 44.)

By denying Plaintiff Soltysik the ability to identify his party preference on the ballot, the Statutes denied Plaintiff Soltysik and voters a critical "voting cue." A "candidate's party preference is the single largest predictor of voter choice and the primary factor informing how the vast majority of voters vote." (*Id.* ¶ 32.) This is particularly true "in low information elections, such as some elections for state offices and elections in off presidential years." (*Id.* ¶ 33.) "[S]uch labels convey a vast amount of information about a candidate to voters," and this "is especially true of candidates from minor parties." (*Id.* ¶¶ 36, 37.) Citizens are unable to cast their votes effectively when this information is withheld. (*See id.* ¶ 39.)

Plaintiff McClellan is a member of the Socialist Party USA's National Committee and a former Vice Chair of the Ventura Local chapter. (*Id.* ¶ 14.) She plans to run for State Assembly, at which time she will suffer the same violations of her rights that Plaintiff Soltysik suffered in 2014. (*Id.*)

On October 8, 2015, Plaintiffs brought the instant action, asserting three claims for violations of their First and Fourteenth Amendment rights. (ECF No. 1.) On January 11, 2016, Defendants moved to dismiss the claims in their entirety. (ECF Nos. 39, 41.)

III. LEGAL STANDARD UNDER FRCP 12(b)(6)

"Dismissal under [Federal Rule of Civil Procedure] 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a

cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In evaluating a motion to dismiss under Rule 12(b)(6), a court "must accept as true all of the factual allegations contained in the complaint," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), "and must construe all reasonable inferences in the light most favorable to the plaintiff." *Cosio v. Simental*, 2009 WL 201827, at *2 (C.D. Cal. Jan. 27, 2009) (citing *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003)).

IV. ELECTION LAW CHALLENGES ARE SUBJECT TO THE FACT-SPECIFIC AND FACT-DEPENDENT *ANDERSON* BALANCING TEST

The Supreme Court has long held that "Constitutional 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." *Anderson*, 460 U.S. at 789. "Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened." *Clements v. Fashing*, 457 U.S. 957, 963 (1982). "[E]ach case must be resolved on its own facts after due consideration is given to the practical effect of the election laws of a given state, viewed in their totality." *Arutunoff*, 687 F.2d at 1379. Accordingly, the "results of this evaluation will not be automatic" and "there is no substitute for the hard judgments that must be made." *Anderson*, 460 U.S. at 789-90.

In evaluating an election law challenge, a court must "first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Id.* at 789. Then, a court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* During this portion of the inquiry, "the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* Finally, and "[o]nly after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Id.*

Under this standard, the "rigorousness of [the] inquiry . . . depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). In other words, the extent of the burden will determine what level of scrutiny a court applies. If "protected rights are severely burdened . . . strict scrutiny applies." *McLaughlin v. N. Carolina Bd. of Elections*, 65 F.3d 1215, 1221 (4th Cir. 1995). If the burdens are not severe, a court must still "balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests in ensuring that 'order, rather than chaos, is to accompany the democratic processes.'" *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

In the election law context, "a regulation which imposes only moderate burdens could well fail the *Anderson* balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational." *Id.* at 1221 n.6; *see also McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980) (applying the rational basis test, but finding as a factual matter that the "statute does not withstand even this minimal standard of review, because the justification offered for North Dakota's ballot arrangement is unsound").

V. PLAINTIFFS ADEQUATELY ALLEGE THAT THE STATUTES AT ISSUE SEVERELY BURDEN THEIR ASSOCIATIONAL RIGHTS, AND THAT NO STATE INTEREST JUSTIFIES THOSE BURDENS

In their first cause of action, Plaintiffs allege that the Statutes violate their associational and equal protection rights under the First and Fourteenth Amendments by preventing them—and all other candidates who prefer non-qualified political parties—from stating their party preference on the ballot, while at the same time permitting candidates who prefer qualified political parties to state that preference. (*See* Compl. ¶¶ 8-10, 32-45, 67-70.)

"The freedom to associate, guaranteed by the First Amendment, has been held to be 'fundamental' in several [U.S. Supreme] Court opinions, as has the right of citizens to participate equally in the electoral process." *Socialist Workers Party v. Eu*, 591 F.2d 1252, 1260 (9th Cir. 1978). Because of this fundamental right to participate equally in

the electoral process, "the right of qualified voters, regardless of their political persuasion, to cast their votes *effectively* . . . rank[s] among our most precious freedoms." *Anderson*, 460 U.S. at 787.

"A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." *Id.* at 793-94. Indeed, one of the "primary concern[s] in any ballot access case" is the interests of "the voters who support the candidate and the views espoused by the candidate." *Rosen*, 970 F.2d at 175. Thus, "any restriction on ballot access by candidates necessarily burdens the rights of their supporters to some extent." *Id.* at 175-76.

In the specific context of Plaintiffs' claims, "[r]estricting the party label a candidate can use on an election ballot implicates the candidate's constitutional rights to freedom of speech, freedom of association, and equal protection." *Field*, 199 Cal. App. 4th at 355; *accord Tashjian v. Republican Party*, 479 U.S. 208, 215-16, 220 (1986). As the Supreme Court explained, "[t]o the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian*, 479 U.S. at 220. For that reason, the Ninth Circuit has determined that regulations governing party labels on a ballot "affect[] core political speech." *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002); *cf. id.* ("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.").

Election law challenges concerning the use of party labels on a ballot are subject to the *Anderson* balancing test described above, *supra* Part IV. *Rosen*, 970 F.2d at 175.

A. Plaintiffs Allege That The Statutes Impose A Severe Burden On The Right To Cast Votes Effectively, And Defendants' Cases Support That Burden Is A Fact Question Not To Be Decided On A Motion To Dismiss

Plaintiffs adequately allege that "the restrictions on only some candidates' ability to communicate their party preference constitutes a severe burden on Plaintiffs' rights." (Compl. ¶ 8.)

Specifically, Plaintiffs aver that a "candidate's party preference is the single largest predictor of voter choice and the primary factor informing how the vast majority of voters vote." (*Id.* ¶ 32.) Plaintiffs allege that this is particularly true "in low information elections, such as some elections for state offices and elections in off presidential years." (*Id.* ¶ 33.) Plaintiffs allege—and the U.S. Supreme Court agrees—that "such labels convey a vast amount of information about a candidate to voters, including a sense of the candidate's ideology and policy platform." (*Id.* ¶ 36 (citing *Tashjian*, 479 U.S. at 22).) Plaintiffs assert that this "is especially true of candidates from minor parties." (*Id.* ¶ 37.) Plaintiffs allege that citizens are unable to cast their votes effectively when this information is withheld from voters. (*Id.* ¶ 39.)

Plaintiffs further allege that the information they are *required* to convey—"Party Preference: None"—actually "conveys *mis*information to voters about candidates forced to identify in this way." (*Id.* ¶ 40.) Plaintiffs also specifically allege that the moniker "Party Preference: None" causes voters to draw "negative inferences" about them because, among other things, "the designation of no party preference may mislead voters into believing that Plaintiffs lack an organized political philosophy or simply stand for nothing." (*Id.* ¶ 44.) By providing a "voting cue" to candidates who prefer qualified political parties and denying the same "voting cue" to Plaintiffs, the Statutes impair the ability to cast a meaningful vote.

If Plaintiffs are able to prove the facts they have alleged, they will be entitled to the relief they seek. For example, in *Rosen v. Brown*, the plaintiff (Rosen) alleged that a provision of the Ohio Code violated his freedoms of association and equal protection by prohibiting him from having the designation "Independent" or "Independent candidate"

placed next to his name on the ballot. 970 F.2d at 171, 173-74. In support of his motion for summary judgment, Rosen presented testimony from three experts. *Id.* at 172. The first expert concluded that, "[w]ithout a designation next to an Independent's name on the ballot, the voter has no clue as to what the candidate stands for. Thus, the state affords a crucial advantage to party candidates by allowing them to use a designation, while denying the Independent the crucial opportunity to communicate a designation of their candidacy." *Id.* The second expert stated that providing a "'voting cue' on the ballot in the form of a party label . . . is the most significant determinant of voting behavior." *Id.* In fact, the expert concluded, "*this effect is so substantial that Ohio dooms Independent candidates to failure by its means of structuring the ballot.*" *Id.* The third expert stated that, "the absence of a label for a candidate gives rise to mistrust and negative inferences." *Id.* at 173. It also prevents voters from "mak[ing] a connection between the candidate and his platform" and "creat[ing] an identification in the voter's mind." *Id.*

The Sixth Circuit affirmed summary judgment for Rosen and struck down the ballot restriction as unconstitutional. *Id.* at 178. In so concluding, the court found that "plaintiffs have established that Ohio Rev. Code § 3505.03 burdens the First and Fourteenth Amendment rights of the supporters of Independent candidates," and that "such *evidence* does appear in the record." *Id.* at 176. Specifically, the Sixth Circuit concluded that the expert "affidavits show that the State infringes upon the right of supporters of Independent candidates to meaningfully vote and meaningfully associate by providing a 'voting cue' to Democratic and Republican candidates." *Id.*

Like the plaintiff in *Rosen*, Plaintiffs here intend to establish through evidence—including expert testimony from political scientists similar to that introduced in *Rosen*—that the Statutes infringe on the ability of candidates from non-qualified parties to inform voters of their political philosophy and the right of voters to receive valuable cues about the views and positions of those candidates.

Defendants, meanwhile, argue that the Statutes impose only a "slight" or "insubstantial" burden on Plaintiffs. (CADOP Mot. at 13; Padilla Mot. at 9.) This,

however, is a factual argument that contradicts Plaintiffs' well-pleaded allegations, and is therefore improperly before the Court on a motion to dismiss. *See Erickson*, 551 U.S. at 94 (a court "must accept as true all of the factual allegations contained in the complaint"); *cf. Arutunoff*, 687 F.2d at 1379 ("[E]ach case must be resolved on its own facts after due consideration is given to the practical effect of the election laws of a given state, viewed in their totality.").

Moreover, the cases on which Defendants rely—almost all cases decided at summary judgment—specifically cite the lack of evidence in the record as a reason for upholding the statutes at issue.

Both Defendants cite to *Chamness v. Bowen*, 722 F.3d 1110 (9th Cir. 2013), a case affirming the grant of summary judgment, for the proposition that the statutes at issue impose only a "slight" or "insubstantial burden" on Plaintiffs. (*See* CADOP Mot. at 13-15; Padilla Mot. at 11.)[6] In *Chamness*, the Ninth Circuit explained that, "[t]he law prohibits Chamness from designating himself as 'Independent,' and requires him to state he has 'No Party Preference.' Yet, Chamness has failed to demonstrate any real difference between the two locutions." 722 F.3d at 1117. Indeed, the court noted, Chamness "failed to provide any evidence that the two phrases are actually likely to be understood by voters to convey these different meanings, and, if they do, that the distinction would tend to affect the way voters cast their votes. Considered in context, *we cannot assume these facts in the absence of evidence*." *Id.* at 1117-18. The Ninth Circuit then analyzed *Rosen*, discussed *supra*, and concluded that "*Rosen* is not in conflict with our holding in this case." *Id.* at 1120. In addition:

---

[6] CADOP implies that the claims Plaintiffs assert here were already adjudicated in *Chamness*. (CADOP Mot. at 6-8.) That is not correct. The *Chamness* Court, while expressing grave doubts about the continued validity of distinguishing between qualified and non-qualified parties in voter-nominated elections, clearly stated that, "[w]e therefore express no views as to the validity of California's restriction against stating preferences for non-qualified parties," 722 F.3d at 1118 n.5, and "we express no view as to whether the removal of the blank space option compels speech by requiring candidates who prefer a non-qualified party to falsely state that they have no party preference," *id.* at 1116 n.4.

> [*Rosen*] involved the distinction, supported by expert testimony establishing its prejudicial impact, between "Independent" and no designation at all, when pitted against "Republican" or "Democrat." By contrast, this case involves an asserted, but unsupported, distinction in likely impact between "Independent" on the one hand, and "No Party Preference," when pitted against other "preference" designations for California's six qualified parties.

Id. The Ninth Circuit's holding is a direct result of a failure of proof; Defendants would deprive Plaintiffs of even the opportunity to attempt to develop that necessary proof.[7]

Similarly, the California Court of Appeals in *Field v. Bowen*—cited by both Defendants (CADOP Mot. at 6, 14; Padilla Mot. at 12)—distinguished *Rosen* based on lack of evidence:

> Unlike the candidate in *Rosen*, *plaintiffs have not presented, and state no intention to present, evidence to support their theory that "No Party Preference" is a more disadvantageous ballot designation than "Independent."* On their face the labels are equivalent: someone who is independent of any political party has no party preference. "Independent" may be the more familiar shorthand term for no party affiliation, but it is not apparent that voters would take "No Party Preference" to mean anything other than "Independent," particularly under the new ballot scheme where, in lieu of the traditional party labels, candidates of qualified parties will be shown as having a "preference" for that party (e.g., "My party preference is the Democratic Party," rather than simply "Democrat"). (§ 13105, subd. (a).) In any event, whether the new label will make any practical difference in voters' minds is entirely speculative.

199 Cal. App. 4th at 364; *see also id.* at 366 ("No evidence, stipulation, or concession in this case establishes that 'Independent' would have a more positive connotation than 'No Party Preference" on ballots for a voter-nominated office; much less that the advantage of using one term over the other would be sufficient to raise a constitutional issue."). Here, in contrast, Plaintiffs specifically allege that the moniker "Party Preference: None" causes

[7] Furthermore, *Chamness* is distinguishable because, unlike the obvious similarity between "Independent" and "No Party Preference," voters would not understand "Party Preference: None" and "Socialist Party USA" to be interchangeable.

voters to draw "negative inferences" about them because, among other things, "the designation of no party preference may mislead voters into believing that Plaintiffs lack an organized political philosophy or simply stand for nothing." (Compl. ¶ 44.) That allegation is accepted as true for purposes of a motion to dismiss and puts this case in line with *Rosen*—not *Field*.

CADOP cites *Dart v. Brown*, 717 F.2d 1491 (5th Cir. 1983), characterizing it as a case that upheld "a party labeling scheme just like California's *in the specific context of an open primary system*." (CADOP Mot. at 2 (emphasis in original).) Once again, however, *Dart* counsels that election law challenges such as these should be decided based on facts in the record. In the first place, *Dart* was appealed following a bench trial, not a motion to dismiss. 717 F.2d at 1492. In affirming the trial court's judgment for the state, the Fifth Circuit noted that, "Perhaps the inability of a candidate affiliated with a 'minor' party to have the ballot designate his party affiliation, while the respective party affiliations of candidates affiliated with 'major' parties do appear on the ballot, diminishes the former's chances of success in any given election." 717 F.2d at 1504-05. "If this were true to any really significant extent, the lack of party designation *might* arguably be said to impair the ability to cast a *meaningful* vote, or to *meaningfully* associate for the enhancement of political beliefs." *Id.* at 1505 (emphasis in original). Critically, however:

> [T]he truth of such a proposition is by no means self-evident, and there is no evidence in this record, and appellants point to no recognized literature or facts of common knowledge, so demonstrating.

Id. at 1505.[8] Thus, as in *Chamness* and *Field*, the result in *Dart* was based on the plaintiff's failure to develop evidence during discovery to support his claims. Plaintiffs

[8] Padilla asserts in his Motion that even if Plaintiffs are deprived of a voting "cue," "it does not add to their constitutional burden as a matter of law." (Padilla Mot. at 11.) That assertion, however, conflicts with the Sixth Circuit's holding in *Rosen*, and the statements by the Ninth Circuit, Fifth Circuit, and California Court of Appeals (in *Chamness*, *Dart*, and *Field*, respectively) that such a finding *would* impact the constitutional analysis.

here do not intend to repeat that mistake. *See also McLaughlin*, 65 F.3d at 1227 n.12 ("We reiterate that the Libertarians did not proffer any evidence that the challenged aspects of the mandated petition language actually hampered their petition drive in even the slightest degree.").

Both Defendants also cite extensively to *Rubin v. City of Santa Monica*, 308 F.3d 1008 (9th Cir. 2002). (*See, e.g.*, CADOP Mot. at 12, 16; Padilla Mot. at 13.) In contrast to most of the cases Plaintiffs cite, *Rubin* actually was decided on a motion to dismiss. However, the court in *Rubin* specifically discussed and distinguished *Rosen*, and in so doing demonstrated exactly why Plaintiffs' claims here are not subject to dismissal at the pleading stage.

Rubin concerned a statute that allowed candidates, at their option, to state on the ballot their "principal professions, vocations, or occupations." 308 F.3d at 1011. The statute, however, specifically prohibited candidates from stating their "status" in place of their occupation. *Id.* at 1012. The plaintiff challenged the statute because the "status" prohibition precluded him from designating himself as a "peace activist." *Id.*

In affirming the dismissal of the plaintiff's claims, the Ninth Circuit first distinguished *Rosen*. *Id.* at 1015. The court noted that *Rosen* involved regulations concerning "political party designations." *Id.* Because "party labels provide a shorthand designation of the views of party candidates on matters of public concern," such a "regulation therefore affects core political speech." *Id.* In contrast, the Ninth Circuit explained, a regulation that "merely limits how [Rubin] may describe his occupation on the ballot" "does not infringe on core political speech." *Id.* Thus, *Rubin* provides no support for Defendants' argument that Plaintiffs' claims here—which the Ninth Circuit in *Rubin* characterized as affecting "core political speech"—should be dismissed at the pleading stage.[9]

[9] The other cases on which Defendants principally rely were also decided at the summary judgment stage, and therefore do not support Defendants' request to dismiss Plaintiffs' claims before Plaintiffs have an opportunity to prove their allegations with evidence. *See (cont'd)*

As each of these cases makes clear, whether and to what extent the Statutes burden Plaintiffs' First Amendment rights are questions of fact. That factual inquiry will, in turn, determine what level of scrutiny the Court applies in evaluating these statutes. As the Supreme Court said, the "results of this evaluation will not be automatic" and "there is no substitute for the hard judgments that must be made." *Anderson*, 460 U.S. at 789-90. Defendants' efforts to short-circuit that process should be denied.[10]

B. The Proffered State Interests That Sections 13105(a) And 8002.5(a) Supposedly Advance Are Legally And Factually Suspect

The Court's future factual findings will determine the level of scrutiny the Court applies in evaluating the constitutionality of the statutes and, thus, how narrowly tailored the statutes must be to advance the state's interests. *See Burdick*, 504 U.S. at 434 ("[T]he rigorousness of our inquiry . . . depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."). If "protected rights are severely burdened . . . strict scrutiny applies." *McLaughlin*, 65 F.3d at 1221. Even if strict scrutiny does not apply, the Court must still "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed," "determine the legitimacy and strength of each of those interests," and "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789.

As the Ninth Circuit has held, "[w]e cannot hold that hypotheticals, accompanied

---

(cont'd from previous page)
Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Lightfoot v. Eu*, 964 F.2d 865 (9th Cir. 1992) ; *Socialist Workers Party*, 591 F.2d 1252; *Schrader v. Blackwell*, 241 F.3d 783 (6th Cir. 2001); *McLaughlin*, 65 F.3d 1215; *Rainbow Coalition of Okla. v. Okla. State Elections Bd.*, 844 F.2d 740 (10th Cir. 1988).

[10] Defendants also claim that alternative methods of speech lessen the burden on Plaintiffs here, citing *Rubin*. In *Rubin*, however, the City of Santa Monica bore the expense for distributing a candidate statement, 308 F.3d at 1011, whereas here candidates must pay. *See* Cal. Gov't Code § 85203(a). In addition, alternative methods of speech are no answer to Plaintiffs' allegation that party preference information is a voting cue provided at the crucial "moment the voter casts their ballot." (Compl. ¶ 38.)

by vague allusions to practical experience, demonstrate a sufficiently important state interest." *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 653, 654 (9th Cir. 2007) (applying a sliding scale approach to a campaign contribution limitation and stating "[b]ecause the government has the burden of demonstrating its state interest, any empirical evidence it offers must overcome any evidence to the contrary presented by the plaintiff."). Thus, both the Supreme Court and the Ninth Circuit have struck down statutes as unconstitutional where the state fails to provide sufficient evidence that a regulation actually advances the proffered state interest. *See Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 228 n.18 (1989) ("The State makes no showing, moreover, that voters are unduly influenced by party endorsements. There is no evidence that an endorsement issued by an official party organization carries more weight than one issued by a newspaper or a labor union."); *Citizens for Clean Gov't*, 474 F.3d at 653 ("In this circuit, we have upheld the district court's decision to overturn limits on corporate spending because the government failed to counter the plaintiff's evidence . . . and, following both Supreme Court and Ninth Circuit precedent, *we again emphasize the importance of factual development*."); *S.F. Cty. Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 833 (9th Cir. 1987) ("We agree with Judge Patel that the State failed to submit 'a shred of evidence' in support of its claim that unregulated parties would be more vulnerable to 'the predations of faction.'").

In this regard, even a compelling interest is not sufficient to justify a regulation if the connection between the regulation and the interest is too attenuated. *See Eu v. S.F. Cty.*, 489 U.S. at 226 ("Maintaining a stable political system is, unquestionably, a compelling state interest. California, however, never adequately explains how banning parties from endorsing or opposing primary candidates advances that interest."). As a result, courts "cannot dispose of [an] issue . . . simply by noting that schemes with similar tiers have been uniformly upheld. The Supreme Court has emphasized that ballot access restrictions must be assessed as a complex whole." *McLaughlin*, 65 F.3d at 1223.

Here, to justify the burdens imposed by the Statutes, Defendants assert no fewer

than nine supposed state interests: (i) maintaining the integrity of the distinction between qualified and non-qualified parties; (ii) maintaining minimum qualifications for a party to appear on the ballot; (iii) preventing the ballot from being used for political advertising; (iv) preventing misrepresentation; (v) avoiding confusion and deception; (vi) preventing profanity, racism and sexism on the ballot; (vii) protecting the integrity, fairness and efficiency of the ballots; (viii) maintaining an orderly ballot; and (ix) preserving simplicity on the ballot.

As an initial matter, because discovery has not concluded (indeed it is only just under way), and because the Court, therefore, cannot yet determine the extent of the burdens imposed on Plaintiffs, the Court is not yet in a position to decide how narrowly tailored the statutes must be in advancing these supposed state interests. Nor is there evidence that the statutes actually *do* advance these interests. Thus, even if the Court determines that some or all of these interests are legitimate, adjudication of the constitutional question is premature at the pleading stage.

Even though it is premature to evaluate "the legitimacy and strength" of Defendants' proffered interests, or "consider the extent to which those interests make it necessary to burden the plaintiff's rights," *Anderson*, 460 U.S. at 789-90, there are several legal and factual shortcomings associated with Defendants' stated interests.[11]

1. Maintaining The Integrity Of The Distinction Between Qualified And Non-Qualified Parties

Both Defendants claim that the state has an interest in maintaining the integrity of the distinction between qualified and non-qualified political parties in voter-nominated elections. (Padilla Mot. at 22-23; CADOP Mot. at 16-19) The Ninth Circuit disagrees. In *Chamness*, the defendants asserted this very same interest. 722 F.3d at 1118 n.5. The court noted that the California Supreme Court had previously held—in 1980, under the

[11] While Plaintiffs address the shortcomings of the state's proffered interests here, in the context of the first cause of action, this analysis applies perforce to the Court's inquiry with regard to all three claims.

prior closed primary system—that maintaining this distinction served a compelling state interest. *Id.* The Ninth Circuit observed, however, that the holding in *Libertarian Party v. Eu*, 28 Cal. 3d 535 (1980), was "largely in reliance on conditions that no longer obtain—namely, the use of party primaries conducted by the state, in which only one endorsed candidate per party could appear on the final ballot." *Id.* The opinion elaborated: "Under the current system, in contrast, political parties do not choose candidates; the state does not run separate primaries for various parties; and multiple candidates can state that they prefer the same party." *Id.* Therefore, the court concluded, "the analysis in that case of the governmental interests supporting the 'qualified parties' distinction is not fully transferable to the present context." *Id.*

CADOP attempts to avoid the Ninth Circuit's reasoning in two ways. First, it appears to argue that, because the California Court of Appeals in *Field* adopted the reasoning of *Libertarian Party* in 2011, this Court should for some reason ignore the Ninth Circuit's 2013 *Chamness* analysis, which undercuts any continued reliance on *Libertarian Party* on this point. (*See* CADOP Mot. 18.) This Court must follow the well-reasoned explanation in *Chamness*, not a state court decision. Second, CADOP argues that because the state still maintains *some* distinctions between qualified and non-qualified parties in *other* contexts, the state necessarily continues to have a compelling interest in maintaining that distinction in *this* context. That logic does not follow, however. As the *Chamness* court noted, the state has affirmatively done away with many, if not all, of the distinctions between qualified and non-qualified political parties as it regards primary elections in "voter-nominated" contests. California may have an arguable interest in maintaining such a distinction in other primaries, but any such purported interest cannot justify burdening the constitutional rights of candidates in voter-nominated elections.

2. Maintaining Minimum Qualifications For A Party To Appear On The Ballot

Defendants assert a compelling state interest in establishing minimum

qualifications *for parties to participate* in elections and appear on the ballot. (Padilla Mot. at 21; CADOP Mot. at 16-17). The cases on which Plaintiffs rely, however, all arose in the context of a closed primary system, where states ran the party primaries, and the winner of a party's primary was placed on the ballot as the official nominee of that party. *See, e.g., Jenness v. Fortson*, 403 U.S. 431 (1971).

Proposition 14 overhauled California's primary procedures in voter-nominated elections, rendering the analysis—and the asserted state interests—in Plaintiffs' cases inapplicable here. Political parties no longer participate in voter-nominated primaries. They cannot, and do not, nominate candidates for such offices through the primary. They also have no say in which candidate or candidates claim to associate with the party or its beliefs. *See* Cal. Elec. Code § 8002.5(d) ("A candidate designating a party preference pursuant to subdivision (a) shall not be deemed to be the official nominee of the party designated as preferred by the candidate. A candidate's designation of party preference shall not be construed as an endorsement of that candidate by the party designated."). Political parties simply serve no formal or official role in primary elections for voter-nominated offices.

Thus, it is not clear how the state could have an interest in "establishing minimum qualifications for political parties to participate in elections," because political parties do *not* participate in the voter-nominated primary elections at issue here. Similarly, parties do not appear on these primary ballots as a qualified party, or as the party of any official nominee. They only appear on the primary ballot where candidates say they "prefer" that party. There is no apparent justification for requiring a party to "establish minimum qualifications" before a candidate can "prefer" it.

3. Preventing Political Advertising On The Ballot; Preventing Misrepresentation; Avoiding Confusion And Deception; And Preventing Profanity, Racism And Sexism On The Ballot

Defendants articulate four interests—preventing political advertising on the ballot (Padilla Mot. at 12; CADOP Mot. at 12, 24); preventing misrepresentation (Padilla Mot. at 20); avoiding confusion and deception (Padilla Mot. at 20, 21, 23); and preventing

profanity and sexist remarks on the ballot (Padilla Mot. at 22)—that all speak to the same concern: Political candidates could misuse the party preference designation for an improper purpose.

These supposed state interests suffer from both legal and factual infirmities. As a factual matter, these concerns are entirely speculative. Defendants conjure up a parade of horribles that would supposedly befall the state if Plaintiffs are allowed to tell voters that they prefer the Socialist Party USA. As support, CADOP cites to language in *Dart* where the Fifth Circuit suggested that allowing minor party names to appear on the ballot would engender confusion. (CADOP Mot. at 20-22.) However, there is no evidence whatsoever that voters would be confused, deceived, or offended.[12] To the contrary, the facts the Court can consider at this point suggest the opposite. As Plaintiffs allege in their Complaint, Washington, like California, operates a nonpartisan blanket primary, allowing candidates to list any political party preference they choose so long as it meets the State's character limit. (Compl. ¶ 57.) Defendants have identified no reports or incidents of Washington voters feeling confused or deceived. (*See id.*)

At bottom, Defendants' concerns appear to be that it would confuse voters if a candidate said he or she preferred an unknown party, or instead included a political message, such as "No New Taxes Party." (Padilla Mot. at 21; CADOP Mot. at 20.) However, the Supreme Court has repeatedly cautioned that a "State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Anderson*, 460 U.S. at 798. That legal principle is not just well-settled, it is logical, too. If a voter saw a candidate preferred the "No New Taxes Party," that conveys information to the voter. It likely conveys at least one policy position of the candidate. The voter probably has never heard

[12] Nor does the state have an interest, in the first instance, in preventing people from being offended. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

of that party, and may view it as either an illegitimate party or a fringe party. That, too, is information. If, under Defendants' parade of horribles, the candidate writes something silly, that too tells the voter something (most obviously that this is not a serious candidate).[13]

Both Defendants cite case law for the proposition that courts must "assume the ballot was presented to a well-informed electorate, familiar with the qualified political parties it has seen on past ballots." (CADOP Mot. at 11; Padilla Mot. at 19 (both quoting *Chamness*, 722 F.3d at 1118).) Defendants should not also be heard to argue that the very same well-informed electorate will be confused and deceived by what a candidate writes for his party preference. Moreover, when candidates (or voters) fill out their voter registration application, they declare under penalty of perjury that they understand it is a crime to intentionally provide incorrect information on the registration form. *See* http://registertovote.ca.gov/. This penalty-of-perjury requirement provides an effective safeguard against would-be candidates conveying misleading information in place of their true party preference.[14]

---

[13] To the extent Defendants argue that a statement of a candidate's party preference itself constitutes political advertising, and that the State has an interest in preventing political advertising on the ballot, the Statutes are facially under-inclusive in that they permit such "political advertising" for some candidates, *i.e.*, those who prefer qualified parties. *See Carey v. Brown*, 447 U.S. 455, 465 (1980) ("The apparent overinclusiveness and underinclusiveness of the statute's restriction would seem largely to undermine appellant's claim that the prohibition of all nonlabor picketing can be justified by reference to the State's interest in maintaining domestic tranquility.").

[14] If Defendants find the penalty-of-perjury safeguard insufficient, then the current system does little to prevent deception and confusion either. Under the current system, if a candidate was going to disregard the penalty-of-perjury warning, the candidate could prefer a particular qualified political party on the ballot even if he or she holds views entirely antithetical to that party. For instance, a very conservative candidate could state that she prefers the Democratic Party as part of a ploy to diffuse and splinter the left-leaning vote, thereby creating a better chance that a Republican candidate would emerge as one of the top two vote-getters in the primary. The current primary system permits such maneuvering, but only if candidates disregard that they are signing their registration applications under penalty of perjury. Thus, if the state believes that the penalty-of-perjury safeguard is insufficient, then California has done nothing to address this potential source of confusion and deception, which undermines Defendants' assertion that the state has a compelling interest in preventing ballot deception.

Finally, as noted *supra*, the state does not have a blanket interest in preventing the public from being exposed to offensive language or ideas. *See Texas v. Johnson*, 491 U.S. at 414 ("the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). However, even assuming *arguendo* that the state has such an interest in preventing hypothetical profane, racist, and sexist remarks on the ballot, it can institute neutral, constitutionally sound regulations that are more narrowly and appropriately tailored to advancing that interest.

4. Protecting The Integrity, Fairness And Efficiency Of The Ballots; Maintaining An Orderly Ballot; And Preserving The Simplicity On The Ballot

Defendants also claim three state interests that appear to focus on administrative concerns with the ballot. (Padilla Mot. at 9; 20-22).

The asserted interest of "electoral 'integrity' does not operate as an all-purpose justification flexible enough to embrace any burden, malleable enough to fit any challenge and strong enough to support any restriction." *McLaughlin*, 65 F.3d at 1228. Here, that warning is particularly apt. It is not at all clear—and Defendants fail to explain—how allowing Plaintiffs to state that they prefer the Socialist Party USA would render the ballot disorderly, undermine the ballot's simplicity, or compromise its fairness. And, common sense suggests otherwise. Mr. Soltysik has already satisfied the state law requirements to appear on the ballot. It would be more confusing for a voter to figure out whether Mr. Soltysik actually has "no party preference," or is being forced by state law to assert he has "no party preference" when he actually does, than it would be for the voter to learn that Mr. Soltysik prefers the Socialist Party USA.

VI. PLAINTIFFS ADEQUATELY ALLEGE THAT THE STATUTES AT ISSUE DISCRIMINATE AGAINST THEM BASED ON THEIR VIEWPOINT

California Elections Code §§ 8002.5(a) and 13105(a) discriminate on the basis of viewpoint in a limited public forum and, as such, severely burden Plaintiffs' rights. Only those candidates whose viewpoints align with those of qualified political parties may indicate their party preference on the ballot; those candidates whose viewpoints align

with non-qualified political parties, such as Plaintiffs, are instead forced to state "Party Preference: None." This severe burden triggers strict scrutiny. *McLaughlin*, 65 F.3d at 1221. Because the Statutes discriminate on the basis of viewpoint and the state's interest in doing so is insufficient to justify the resulting severe burden, they violate Plaintiffs' First Amendment rights.

A. The State Has Created A Limited Public Forum On Its Ballots

Limited public fora are "a sub-category of a designated public forum that refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics." *Flint v. Dennison*, 488 F.3d 816, 831 (9th Cir. 2007) (alteration in original) (quoting *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001)). While the state may preserve the space "for certain groups or for the discussion of certain topics," *id*. at 831, the state must abide by the limitations it has created for itself and may not discriminate on the basis of viewpoint as the statutes at issue here do. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995).

Courts have found limited public fora in analogous contexts. In *Kaplan v. City. of Los Angeles*, the court held that California had created a limited public forum in its voter information pamphlets, observing that "California created the pamphlets for the specific purpose of allowing a limited class of speakers, the candidates, to address a particular class of topics, statements concerning the personal background and qualifications of the candidate." 894 F.2d 1076, 1080 (9th Cir. 1990). Similarly, in *Flint*, the court found that the University of Montana's student election was itself a limited public forum because it had "reserve[d] access to it for only certain groups or categories of speech." 488 F.3d at 832-33 ("This forum exists solely to allow campaigns for ASUM student office and the election of student representatives. . . .").

As in these cases, California has created a limited public forum in its ballot by permitting access to all candidates who meet the state's requirements. The plain text of Proposition 14 states that, "[a]t the time they file to run for public office, *all candidates* shall have the choice to declare a party preference." Proposition 14, subsection (d)

(Open Candidate Disclosure). California Elections Code § 8002.5 also makes clear that the candidates themselves indicate their party preference "for the information of the voters only." Cal. Elec. Code § 8002.5(d).

Defendants rely on dicta in some court opinions that state that, "[b]allots serve primarily to elect candidates, not as forums for political expression," *Timmons*, 520 U.S. at 363. Plaintiffs do not disagree that the principal function of the ballot is to elect candidates, but when the government opens a non-public forum to speech activity, creating a limited public forum, the First Amendment requires that "the State must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829.

B. The Statutes Discriminate On The Basis Of Viewpoint

The "First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).[15] The Supreme Court's viewpoint discrimination doctrine rests upon the sound Constitutional principle that minority views must not be stifled by the majority. Indeed, "[t]he whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent." *Bd. of Regents of Univ. of Wisc. v. Southworth*, 529 U.S. 217, 235 (2000).

In assessing whether a statute is discriminatory, courts must follow a two-step process. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015). First, a court must determine whether the law discriminates on its face, based on the plain language of the statute. *Id*. If the statute is facially discriminatory, a court must apply strict scrutiny; if the statute is facially neutral, however, the court must then inquire into the purpose and justification for the statute and apply strict scrutiny if the purpose and justification are

[15] The prohibition against such discrimination is, in fact, so strong that the government is prohibited from discriminating on that basis even where the speech is otherwise not constitutionally protected. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

discriminatory. *Id.* "[V]iewpoint discrimination . . . is *presumed impermissible* when directed against speech otherwise within the forum's limitations." *Rosenberger*, 515 U.S. at 830.

Here, the Statutes discriminate because they exclude minority views. Although the Statutes do not expressly target a particular party or parties for exclusion, an individual's preference for a political party is self-evidently a proxy for that person's viewpoint, encompassing their political ideology and policy preferences on a range of issues. The Statutes restrict access to the ballot forum by reference to whether the candidate's party preference—his or her political viewpoint—aligns with one of only six qualified parties who enjoy a certain level of popular support. Indeed, party qualification is withheld by the state except upon a showing of support from a percentage of the electorate. Cal. Elec. Code § 5100. Thus, under the Statutes, minority ideas are not treated with the same respect as majority ideas; preventing such exclusion is "[t]he whole theory of viewpoint neutrality." *Southworth*, 529 U.S. at 235.

In addition to their stifling effect on minority viewpoints, the Statutes are also analogous to state restrictions on certain kinds of religious speech in schools. In that context, the Supreme Court has held that facial viewpoint discrimination exists where "otherwise includable" speech is excluded from a limited forum. *See, e.g.*, *Lamb's Chapel*, 508 U.S. at 394. In a succession of cases, the Supreme Court struck down various restrictions on religious speech in schools after finding viewpoint discrimination in each. Critical in each decision was the determination that the school had excluded speech on topics from a religious viewpoint that were otherwise permissible under the schools' policies. *Id.* (finding viewpoint discrimination when an elementary school excluded films on the teaching of "family values" from a Christian perspective because the films "no doubt dealt with a subject otherwise permissible" under the rule, which allowed use of the forum for "social, civic or recreational use"); *Rosenberger*, 515 U.S. at 823, 831 (holding that a school's refusal to provide funding to a student publication was viewpoint discriminatory when the University "d[id] not exclude religion as a subject

matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints"); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-111 (2001) (invalidating an elementary school's prohibition on a Christian organization that sought to teach morality through "live storytelling and prayer," where the school had opened its forum for "events 'pertaining to the welfare of the community,'" including the teaching of "morals and character development.").

Although Padilla emphasizes the word "solely" in *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.* (Padilla Mot. at 15), presumably to imply that they lack a discriminatory animus, *Cornelius* is not to the contrary and, indeed, supports the above analysis. 473 U.S. 788 (1985). Read in full, *Cornelius* actually instructs that it is impermissible for the government to exclude those whose speech falls within the forum's purpose or to deny access to those for whom the forum was created as discussed above. *Id.* at 806.[16]

The Court should apply the Supreme Court's traditional viewpoint discrimination analysis here. In this case, the state has excluded a subset of candidates from expressing their party preference even though the expression of party preference clearly falls within the scope of speech permitted in the forum and the forum was created for candidates. Although the limited forum was established for candidates for voter-nominated office to express their political party preference for the benefit of voters, candidates for such office who do not prefer state-recognized parties are forced to say "Party Preference: None" on the ballot rather than the party they actually prefer. Democrats and Republicans, for example, are free to state that they prefer the Democratic and Republican parties respectively, but Plaintiffs are prohibited from stating a preference for the Socialist Party USA.

[16] "Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Id.* at 806.

Defendants' contention that the statutes are viewpoint neutral because candidate access is "based solely on whether the political body they prefer has qualified to participate in elections by having demonstrated a sufficient level of support based on the objective criteria" is unavailing. (Padilla Mot. at 15-16; CADOP Mot. at 3, 22-23.) First, even articulated in this way, the state still provides differing levels of access to the ballot based on whether the candidate's viewpoint aligns with a qualified party or a non-qualified party. The state already restricts which *candidates* have demonstrated sufficient support to appear on the ballot by requiring a certain number of signatures from electors. The use of other "objective criteria" relating to party qualification status cannot justify differential treatment of views expressed by people who otherwise fit within the criteria defining the forum.

Second, the use of objective criteria relating to "level of support" as a basis for discriminating among speakers is not proper. Permitting speech in favor of abortion restrictions, while forbidding speech in favor of a woman's right to choose is a distinction based on "objective criteria," but it is nonetheless blatantly illegal. In this case, use of the "objective criteria" laid out in Section 5100 impermissibly restricts speech on the basis of its "level of support" among the public. But, "[t]he whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent." *Southworth*, 529 U.S. at 235; *see also Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (government "may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"); *Niemotko v. Maryland*, 340 U.S. 268, 284 (1951) (Frankfurter, J., concurring) ("To allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment.").[17]

[17] Although it may have served a compelling interest in protecting ballot integrity to require a showing of popular support before operating a *party's* primary, that interest no *(cont'd)*

In these ways, Defendants mistakenly equate their purportedly viewpoint neutral justification with whether the law itself is viewpoint discriminatory. As the Supreme Court recently remarked in analyzing a content-based statute, "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Town of Gilbert*, 135 S. Ct. at 2228 (emphasis added). For example, in *Rosenberger*, the court had no difficulty concluding that the regulations, which denied funding to editorials expressing a religious viewpoint, were viewpoint discriminatory, despite the University's viewpoint neutral justification of avoiding a violation of the Establishment Clause. 515 U.S. at 836-38.

That the Statutes discriminate against all candidates who prefer non-qualified political parties in the same way does not help, as CADOP argues. (CADOP Mot. at 23.) As the *Rosenberger* Court stated, "The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar . . . . The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong. . . ." 515 U.S. at 831-32.

Contrary to CADOP's assertion, the *Chamness* court did not broadly hold that the Statutes are viewpoint-neutral for all purposes. (CADOP Mot. at 22.) Instead, the *Chamness* court held that the specific term "No Party Preference" as applied to candidates who did not prefer any political party was viewpoint neutral because "[t]he restriction does not allow any candidates to term themselves 'Independents.'" 722 F.3d at 1118. By contrast, Plaintiffs here challenge the statutes on the basis that some candidates are allowed to list a party preference, while they are denied the same right

(cont'd from previous page)
longer obtains in the current voter-nominated system where candidates have already garnered sufficient support to appear on the ballot in the first instance. *See Chamness*, 722 F.3d at 1118 n.5. Once the state has chosen to allow certain candidates to appear on the ballot, it may not then permit some of them to express their viewpoint by stating their party affiliation while forbidding others from doing so.

because of their views.

Importantly, CADOP's reliance on *Rubin v. City of Santa Monica* (CADOP Mot. at 23), is misplaced, as the *Rubin* court actually stated that restrictions such as these are viewpoint discriminatory. In *Rubin*, the court considered a regulation that prohibited candidates from using "status designations," such as "activist," to describe themselves on the ballot. 308 F.3d at 1015. The court held the restriction to be "viewpoint neutral" because the prohibition applied to "peace activists" and "defense activists," as well as "right to life" and "pro-choice activists," alike. *Id*. In doing so, however, the court differentiated the case from *Rosen v. Brown*, "in which the Sixth Circuit held that prohibiting the designation 'Independent' was unconstitutional *where the regulations allowed for other political party designations*," as the statutes do here. *Id*. at 1015.

Finally, although CADOP argues that *Anderson-Burdick* balancing and not forum analysis applies, regardless of whether this Court applies forum analysis or the *Anderson-Burdick* test, the fact that the state has created a limited forum and excluded candidates whose speech otherwise fit the purpose of the forum are facts that the Court must consider in assessing the burdens placed on Plaintiffs. Viewpoint discrimination, no matter which analysis a court employs, severely burdens First Amendment interests, including in the elections context, and is, therefore, subject to strict scrutiny. *See, e.g.*, *Rubin*, 308 F.3d at 1015 (applying *Anderson* balancing and first analyzing whether the restrictions were viewpoint discriminatory in assessing the burden on plaintiff's speech, holding that regulation was viewpoint-neutral and not a severe burden).

C. Dismissal Of The Viewpoint Discrimination Claim Is Inappropriate On A Motion To Dismiss

Even if this Court believes at this stage of the proceedings that the statutes are viewpoint neutral on their face, dismissal of the cause of action is inappropriate as information gathered in discovery may provide evidence that the statutes were merely "a facade for viewpoint-based discrimination." *Cornelius*, 473 U.S. at 811-14. Restrictions on speech present a significant danger that hostility to viewpoint is the underlying motive

for enacting them; the State may, for example, seek to suppress the views of candidates that prefer non-qualified parties because, on the whole, they are more radical or, equally odious, simply because they are unpopular, as discussed above.

Although the Supreme Court in *Cornelius* held that the challenged regulations were reasonable and facially neutral, it remanded the case to the lower court for a determination of whether viewpoint discrimination was actually afoot. *Id*. (stating that "[t]he existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination"). On remand to the district court, plaintiffs propounded discovery aimed at ascertaining the "underlying motive" for the restrictions, just as Plaintiffs have done here, and the court denied defendant's motion to dismiss and granted a preliminary injunction. *NAACP Legal Def. & Educ. Fund, Inc. v. Horner*, 636 F. Supp. 762 (D.D.C. 1986) *vacated as moot by NAACP Legal Def. & Educ. Fund v. Horner*, 795 F.2d 215 (D.C. Cir. 1986).

If the Court finds these statutes to be facially viewpoint-neutral, Plaintiffs should be allowed the benefit of conducting discovery to ascertain whether Defendants were motivated by animus or some other improper government motive.

VII. PLAINTIFFS ADEQUATELY ALLEGE THAT THE STATUTES COMPEL THEIR SPEECH IN VIOLATION OF THE FIRST AMENDMENT

Plaintiffs allege that the Statutes violate the First Amendment by "compel[ling them] to state either that they prefer a 'qualified' political party, or that they have no party preference, *even if both of those statements are false*." (Compl. ¶ 51 (emphasis in original).)

CADOP previously agreed with Plaintiffs on this point. When the California Legislature was debating AB 1413 (the bill that took away a candidate's right to decline to state a party preference and forced candidates who prefer non-qualified parties to falsely state "Party Preference: None"), CADOP wrote letters to Governor Brown and others "object[ing] to AB 1413's deletion of existing provisions of law that allows candidates unassociated with major parties to be silent (or unidentified) on ballots with regard to party

preference."[18] As CADOP forcefully stated: "We believe that candidates unassociated with qualified parties have the right to leave the ballot space reserved for party preference blank."

CADOP has apparently changed its view of the First Amendment and the rights of candidates unassociated with qualified parties. Now, both Padilla and CADOP ask the Court to dismiss this claim for two reasons. Defendants first claim that the statement "Party Preference: None" is accurate because a section of the California Elections Code equates the term "party" with a qualified political party. As explained *infra* Part VII.B, this argument elevates form over substance. In any event, that dispute is largely irrelevant: compelled speech need not be false to violate the First Amendment. Recognizing that principle, Defendants also argue that the statement "Party Preference: None" is actually government speech, not the candidate's. This position does not withstand legal or factual scrutiny.

A. The Ballot Statement "Party Preference: None" Constitutes Compelled Speech That Is Attributed To Plaintiffs

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). This axiom means that the "right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). That is because the "right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." *Id.*

Based on those principles, the Supreme Court in *Barnette* enjoined a state

[18] These letters were previously filed with the Court as Exhibits 1 and 2 to the Declaration of Kevin J. Minnick in Support of Plaintiffs' Opposition to Non-Party Californians to Defend the Open Primary's Motion to Intervene. (ECF No. 19-1.)

regulation that required all students to participate in a "salute honoring the Nation represented by the Flag." 319 U.S. at 626. Failure to participate in the salute was considered "insubordination dealt with by expulsion." *Id.* at 629. Thus, the regulation amounted to "[t]he State assert[ing] power to condition access to public education on making a prescribed sign and profession." *Id.* at 630. The Court refused to allow the state to compel student speech as a condition of education. *Id.* at 642.

In *Wooley v. Maynard*, the plaintiff challenged a New Hampshire law that required him to put a license plate on his vehicle containing the motto, "Live Free or Die," a maxim with which he disagreed. 430 U.S. at 707-09. The Supreme Court held that the "First Amendment protects the right of individuals to . . . refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." *Id.* at 715. Though the dissent argued that the statute did not implicate any First Amendment concerns because the plaintiff was not required to affirm his belief in the motto, *id.* at 720, the Court reasoned that an automobile and the messages it carries are "readily associated with its operator." *Id.* at 717 n.15; *see also Johanns*, 544 U.S. at 564 n.7 (First Amendment analysis turns on whether "a viewer would identify the speech as [plaintiffs']").

Here, as in *Barnette*, the state is conditioning Plaintiffs' access to the ballot on their stating that they have no political party preference. This requirement is improper. Further, as in *Wooley v. Maynard*, each candidate's political party preference is "readily associated" with that candidate. Section 8002.5, the statute that governs party preference designations, variously refers to the preference as "[t]he selection made *by a candidate*," § 8002.5(b), "the party preference, or lack of party preference, *designated by the candidate*," § 8002.5(b), "[a] *candidate designating a party preference*," § 8002.5(d), "[a] *candidate's designation of party preference*," *id.*, and "*The party preference designated by the candidate*." *Id.* Thus, voters would be correct to "readily associate" the party preference designation as the preference of the candidate—that is exactly what it is according to the Elections Code. To conclude otherwise would lead to the illogical idea that the state is selecting candidates' party preferences for them.

Defendants point to *Caruso v. Yamhill County*, where the Ninth Circuit rejected a petition circulator's challenge to a statute that required ballot initiatives proposing local option taxes to state that the measure could increase property taxes more than three percent. 422 F.3d 848, 851 (9th Cir. 2005). *Caruso*, however, does not help Defendants. In that case, the Ninth Circuit stated that the statute "provides for the State's message to be transmitted through ballots, documents prepared, printed, and distributed by—and therefore attributed to—State and local governments." *Id.* at 858. Critically, all parties agreed that the statement was government speech, and that voters understood it was government speech. Indeed, the plaintiff himself "opined that voters view the three-percent warning as an official statement of government." *Id.* The *Caruso* court acknowledged that "the First Amendment may limit government speech . . . that attributes a government message to a private speaker," *id.* at 855, but all parties agreed that was not the case. Here, in contrast, the controlling statute explicitly states that party preferences are those of the candidates. Thus, *Caruso* does not apply.[19]

To the extent there is any uncertainty about who is responsible for designating a candidate's party preference—and Plaintiffs contend that the designations clearly are made by the candidates themselves—that is a question of fact not subject to adjudication on a motion to dismiss.

B. <u>The Compelled Statement "Party Preference: None" Is False and Misleading</u>

Defendants argue that the state is not forcing Plaintiffs to falsely state "Party Preference: None" because the California Elections Code equates the term "party" with a qualified political party. Notably, however, Defendants do not argue or cite any case law that the truth or falsity of a statement impacts the compelled speech analysis under the

[19] Padilla appears to argue that speech is only compelled "when states have required owners to use their private property to transmit the state's message." (Padilla Mot. at 17.) To the extent that is the state's argument, it cannot be reconciled with *Barnette*, which involved no private property whatsoever—only whether a student could be required to the state the pledge of allegiance in a public school.

First Amendment. Nor can they—as noted above, the freedom of speech "includes both the right to speak freely and the right *to refrain from speaking at all*." *Wooley*, 430 U.S. at 714. "Thus, the Supreme Court, starting with *Barnette*, has consistently 'prohibit[ed] the government from telling people what they must say.'" *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). This constraint on state compulsion is not limited to ideological messages; compelled statements of fact are equally proscribed by the First Amendment." *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (citing *Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 797-98 (1988)). However, even if Defendants are correct that compelled speech applies only to purely "ideological messages," statement of one's party preference is more than a dry statement of fact; as discussed above, it has a significant ideological component in that it aligns a candidate with a particular set of political beliefs and values.

Even if the truth or falsity of a compelled statement were relevant to the constitutional analysis, Defendants do not cite any compelled speech case holding that the technical definition of a term trumps its common, ordinary usage. Nor do Defendants point to any evidence or literature that Californians interpret the term "party" to mean "qualified party." In fact, even the courts that have adjudicated lawsuits about the distinction between qualified and non-qualified parties refer to the non-qualified parties as "parties." *See, e.g.*, *Libertarian Party*, 28 Cal. 3d at 545 (discussing non-qualified "parties"); *Chamness*, 722 F.3d at 1116 n.4 ("[W]e express no view as to whether the removal of the blank space option compels speech by requiring candidates who prefer a non-qualified *party* to falsely state that they have no party preference."). Moreover, the Elections Code itself uses the term "party" to refer to non-qualified parties. *See, e.g.*, Cal. Elec. Code § 5100.5(a) ("A party that does not meet the standards for qualification set forth in Section 5100 . . . ."); 5100.5(b) ("A party seeking qualification under provisions of this section and subdivision (b) or (c) of Section 5100 shall file formal notice with the Secretary of State . . . ."). In fact, CADOP even used the terms "unqualified political party" and "unqualified party candidate" in its Motion. (*See, e.g.*, CADOP Mot. at 5, 7.)

That is not to criticize CADOP; it is simply a reflection of how people—even lawyers and judges—refer to organizations of citizens that associate together in order to, among other things, advance their political ideas and elect candidates who support those positions.

As such, forcing Plaintiffs to state "Party Preference: None" on the ballot, when they actually prefer the Socialist Party USA, requires Plaintiffs to make a false, or, at the very least, misleading statement and, regardless of its falsity, the designation is one that Plaintiffs find "objectionable." *Wooley*, 430 U.S. at 715.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motions to dismiss.

DATED: February 15, 2016

By: */s/ Kevin J. Minnick*
KEVIN J. MINNICK
Attorney for Plaintiffs
EMIDIO "MIMI" SOLTYSIK
JENNIFER MCCLELLAN