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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

INDEPENDENT PARTY and WILLIAM LUSSENHEIDE, Plaintiffs, **v.** **ALEJANDRO "ALEX" PADILLA, in his official capacity as Secretary of State of California,** Defendant.	2:16-cv-00316-WBS-CKD **DEFENDANT SECRETARY OF STATE'S NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES** Date: May 2, 2016 Time: 1:30 p.m. Courtroom: 5 Judge: Hon. William B. Shubb Trial Date: None Action Filed: Feb. 16, 2016

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 2, 2016, at 1:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 5 of the above-titled court, located at 501 I Street, Sacramento, CA 95814, defendant Alex Padilla, in his capacity as the California Secretary of State, shall move, and hereby does move this Court for an order under Federal Rule of Civil Procedure 12(c) granting judgment on the pleadings and dismissing the Complaint of Plaintiffs Independent Party and William Lussenheide.

Defendant Secretary of State moves to dismiss the first and second causes of action for violation of First and Fourteenth Amendments rights of free speech, association, and ballot access on the ground that they fail to state a claim upon which relief may be granted. Plaintiffs sustain at most a slight burden on the asserted rights and any minimal burden is justified and outweighed by compelling state interests.

Defendant Secretary of State moves to dismiss the third cause of action for violation of the Equal Protection Clause on the ground that it fails to state a claim upon which relief may be granted. Plaintiffs sustain at most a slight burden on their Equal Protection rights, and any burden is justified and outweighed by compelling state interests. Furthermore, Plaintiffs do not allege any invidious discrimination, and none exists.

This motion is based upon this notice of motion and motion, the accompanying memorandum of points and authorities, the pleadings and papers on file, and upon such further evidence, both oral and documentary, as may be offered at the time of the hearing.

Dated: April 4, 2016

Respectfully submitted,

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INTRODUCTION

This case is about whether a nonqualified "political body" may use the name "Independent Party" in its attempt to qualify as a "political party" to participate in the State's elections process. This case is brought by a political body that seeks to do so and one of its supporters. By their own admission, the political body was formed, and this name was chosen, so that any candidate who wishes to have the word "Independent" appear next to his or her name on the ballot may do so. This was, again by Plaintiffs' admission, to circumvent California law, which does not permit (with one narrow exception) candidates to identify themselves as "Independent" or preferring "Independent" on the ballot.

Defendant Secretary of State (Secretary) denied Plaintiffs' proposed name, and Plaintiffs claim that the denial violated their rights of speech, association, ballot access, and equal protection. Each of Plaintiffs' claims must fail. Any burden on Plaintiffs' rights based on the Secretary's denial of their use of the name "Independent Party" is slight and is outweighed by the State's compelling and overriding interests in avoiding electoral confusion and deception, preventing misrepresentation, and ensuring the efficiency, integrity, and fairness of the ballots. Plaintiffs intend to use the name "Independent Party" in a way that would confuse, mislead, and deceive voters. First, if Plaintiffs are permitted to use the proposed name, both its presidential nominee and a candidate who qualifies for the presidential ballot by way of an independent nomination would confusingly appear on the ballot as "Independent." Second, the proposed name is so similar to the name of an existing qualified political party, the American Independent Party, that it is likely to mislead voters and cause conflict with the existing qualified political party. And third, if Plaintiffs are permitted to use the proposed name, voters could be misled or deceived into believing that a candidate with the word "Independent" next to his or her name affirmatively rejects all political parties, when instead the candidate is affiliated with the "Independent Party."

The court should grant this motion and dismiss the Complaint in its entirety.

STATEMENT OF FACTS

I. CALIFORNIA'S ELECTION SYSTEM

A. Proposition 14 and the Party Qualification Requirement

In 2010, California voters enacted Proposition 14, which amended the California Constitution to replace a closed partisan primary with an open nonpartisan primary leading to a "top two" runoff general election. Cal. Const., art. II, § 5; *see generally, Rubin v. Padilla* 233 Cal.App.4th 1128, 1137-38 (Cal. App. 2015). Under Proposition 14's "top two" primary system, candidates for voter-nominated offices may list their qualified party preferences on the ballot and "[a]ll voters may vote at a voter-nominated primary election for any candidate for congressional and state elective office without regard to the political party preference disclosed by the candidate or the voter."[1] Cal. Const., art. II, § 5(a) & (b); Cal. Elec. Code § 13105(a) (West 2015)[2]. "The candidates who are the top two vote-getters at a voter-nominated primary election . . . shall, regardless of party preference, compete in the ensuing general election." *Id.* A political party may endorse, support or oppose a candidate, but "shall not nominate a candidate for any congressional or state elective office at the voter nominated primary," and "shall not have the right to have its preferred candidate participate in the general election for a voter-nominated office other than a candidate who is one of the two highest vote-getters at the primary election." Cal. Const., art. II, § 5(b).

Proposition 14 leaves in place partisan primary elections for presidential candidates, political party committees and party central committees, and preserves the right of political parties to participate in the general election for the office of President. *Id.* at § 5(c), (d).

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[1] "Voter-nominated offices" include: (1) Governor; (2) Lieutenant Governor; (3) Secretary of State; (4) State Treasurer; (5) Controller; (6) State Insurance Commissioner; (7) Member of the Board of Equalization; (8) Attorney General; (9) State Senator; (10) Member of the Assembly; (11) United States Senator; (12) Member of the U.S. House of Representatives. Cal. Elec. Code § 359.5.

[2] Unless otherwise noted, all statutory references herein are to the California Elections Code.

Under both the prior closed partisan primary system and the current top two primary system, political bodies may participate in elections only if they qualify to do so by demonstrating a minimal level of voter support. The Elections Code expressly defines "party" to mean "a political party or organization that has qualified for participation in any primary or presidential general election." § 338. Thus, any political body that has not qualified to participate in elections is not a "party" within the meaning of the Elections Code.

For a political body to participate either in the primary election or the general election as a qualified political party, the Elections Code's requirements are clear and straightforward: The organization must hold a caucus or convention to elect temporary officers and designate a party name, and the designated name "shall not be so similar to the name of an existing party so as to mislead the voters, and shall not conflict with that of any existing party" or political body that has previously filed notice. § 5001(a). The political body must then file a formal notice with the Secretary of State to qualify a political party for the primary election or the general election. § 5001(b). After the Secretary of State receives the notice, he would notify county election officials of the political body's intent to qualify for the next primary or presidential general election, and the county election officials would tabulate the political affiliation of registered voters who are members of the political body. § 5002.

There are two ways a political body that desires to qualify for the presidential general election but which did not participate in the primary election can qualify to participate in the election:[3] (1) 123 days before the presidential general election, 0.33 percent of registered voters declared a preference for the party; and (2) 135 days before the presidential general election, a petition is filed with the Secretary of State bearing signatures equal to at least 10 percent of the vote of the state at the last preceding gubernatorial election, declaring that they represent a proposed party. § 5151(c), (d).

[3] The Elections Code provides two other ways for a political body to qualify to participate in the presidential general election, but they do not apply to Plaintiff Independent Party. *See* § 5151(a) (for parties that were qualified to participate in the presidential primary election preceding the presidential general election); § 5151(b) (for parties that participated in the last preceding gubernatorial primary election).

There are six political parties currently qualified to participate in California elections: the American Independent Party, the Democratic Party, the Green Party, the Libertarian Party, the Peace and Freedom Party, and the Republican Party.[4] Additionally, there are four political bodies currently attempting to qualify as political parties for the November 8, 2016, general election: California National Party, Constitution Party of California, Independent California Party, and Reform Party of California.[5]

B. A Candidate's Party Preference is Identified on the Ballot, But Only a Presidential Candidate May be Identified as "Independent" on the Ballot

A candidate may have the name of the political party he or she prefers placed next to the candidate's name on the ballot, but only if the political party is qualified to participate in the election. For a candidate running for a voter-nominated office in a primary election, a general election, or a special election, if the candidate designates a preference for a qualified political party in the candidate's affidavit of registration, the designation "Party Preference: [qualified party name]" would be placed next to the candidate's name on the ballot. § 13105(a)(1). If the candidate does not state a preference for a qualified political party, the designation "Party Preference: None" would be placed next to the candidate's name. § 13105(a)(2). California law does not permit a candidate to designate the word "Independent," or any other word, in lieu of the party preference designation.

In a presidential general election, which is not governed by the top-two primary system, the party name of the presidential or vice presidential candidate would be placed next to the candidate's name. § 13105(b). In addition to the party nomination process for a presidential or vice presidential candidate, a presidential or vice presidential candidate may also be placed on the ballot by way of independent nomination. § 8300, et seq. If the presidential or vice presidential candidate qualified for the ballot through the independent nomination process, the word

[4] California Secretary of State, http://www.sos.ca.gov/elections/political-parties/qualified-political-parties/ (last visited Apr. 4, 2016).

[5] California Secretary of State, http://www.sos.ca.gov/elections/political-parties/political-bodies-attempting-qualify/ (last visited Apr. 4, 2016).

"Independent" would be printed next to the name of the candidate instead of the name of a political party. § 13105(c).

II. PLAINTIFFS' ALLEGATIONS

Mr. Charles Deemer, Chairman of the non-qualified Independent Party, submitted to the Secretary a notice of intent to qualify the "Independent Party"[6] as a political party in California under Section 5001. Complaint, p. 2. The reason Mr. Deemer, and presumably others, organized as a political body was not based on any particular shared political ideology, but to "make it possible for candidates who wish to be identified as 'independent candidates' to be able to run for office with the label, 'Independent.'" *Id.* Plaintiffs allege that California law no longer permits independent candidates to use the term "independent" as their party label, but requires them to use the label "Party Preference: None" on the primary and general election ballots. *Id.* Therefore, Plaintiffs believe that if they could qualify the "Independent Party" as a political party, then any candidate who prefers to run as an "independent" could declare his or her preference for the "Independent Party" and use that party label on the ballot. *Id.*

In February 2015, Plaintiff Independent Party submitted the paperwork to the Secretary indicating its intent to qualify as a political party to place their candidate on the ballot. Complaint, ¶ 6. The Secretary denied Plaintiff's paperwork, stating that the name "Independent Party" is too similar to the name of the existing American Independent Party. *Id.*, ¶¶ 7 & 9.

Plaintiffs allege that the "Independent Party" is seeking to participate in the upcoming 2016 presidential election. Complaint, ¶ 1.

LEGAL STANDARD

This motion is brought under Federal Rule of Civil Procedure 12(c). Rule 12(c) is "functionally identical" to Rule 12(b)(6), and the same legal standard applies to motions brought under either rule. *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). In reviewing the dismissal of a complaint, the court must inquire "whether the complaint's factual

[6] References to Plaintiff Independent Party is solely to their proposed name. Plaintiff Independent Party is not a qualified political party and is a political body only. *See* § 338 (a "party" means "a political party or organization that has qualified for participation in any primary or presidential general election").

allegations, together with all reasonable inferences, state a plausible claim for relief." *Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011), citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court accepts as true all material allegations in the complaint and construes those allegations in the light most favorable to the plaintiff. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). However, the court need not accept as true legal conclusions, conclusory allegations, unwarranted deductions of fact, or unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988, *amended by* 275 F.3d 1187 (9th Cir. 2001).

ARGUMENT

I. A FLEXIBLE BALANCING STANDARD APPLIES TO THIS CHALLENGE

In examining challenges to state election laws based on First and Fourteenth Amendment rights, the Supreme Court has developed a flexible balancing standard: A court must weigh "the character and magnitude" of the asserted injury against the "interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration the extent to which the State interests make the burden necessary. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Under this standard, when state election laws impose only "'reasonable, non-discriminatory restrictions . . . the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Accordingly, the Supreme Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." *Burdick*, 504 U.S. at 438 (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986)). But when those rights are subject to "severe restrictions," the law must be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. The Ninth Circuit Court of Appeals has "noted that 'voting regulations are rarely subject to strict scrutiny.'" *Chamness v. Bowen*, 722 F.3d 1110, 1116 (9th Cir. 2013) (citing *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011)).

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick,* 504 U.S at 433. The Constitution

itself "provides that States may prescribe 'the Times, Places and Manner of holding Elections for Senators and Representatives.'" *Burdick,* 504 U.S. at 433 (quoting U.S. Const. art. I, § 4, cl. 1 (brackets omitted)).

II. PLAINTIFFS SUFFER AT MOST A SLIGHT BURDEN TO THEIR FIRST AMENDMENT RIGHTS OF SPEECH, ASSOCIATION, AND BALLOT ACCESS FROM THE SECRETARY'S DENIAL OF THEIR ATTEMPT TO IMPROPERLY USE THE "INDEPENDENT" DESIGNATION

Plaintiffs do not allege any specific injury other than the inability to use the party name "Independent Party." This alleged injury causes an insignificant burden to Plaintiffs' rights of free speech, association, and ballot access. The "character and magnitude" of the alleged injury is particularly frivolous in the context of this case. Under the Elections Code, the designation "Independent" is reserved for a presidential or vice presidential candidate who qualifies for the general election through the independent nomination process, and no other candidate in either the primary or general election may use the designation "Independent." Here, Plaintiffs' admitted purpose for seeking to use the designation "Independent Party" is to circumvent the restriction and allow any candidate who wishes to be identified on the ballot as "Independent" to do so. This objective is inherently deceptive, and therefore, under state law, Plaintiffs should not be permitted to do so.

A. Plaintiffs' Inability to Use the Designation "Independent Party" Does Not Impose a Severe Burden on Their First Amendment Rights

Plaintiffs claim that the Secretary's denial of Plaintiffs' proposed political body designation of "Independent Party" violates their rights of free speech, association, and ballot access. Complaint, ¶¶ 13, 15, & 18. Any burden on those rights, however, is insubstantial and not severe. "Courts will uphold as 'not severe' restrictions that are generally applicable, even-handed, politically neutral, and which protect the reliability and integrity of the election process." *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002). The Secretary's denial of Plaintiffs' use of the name "Independent Party" does not impose a severe burden on Plaintiffs because it is an even-handed, politically neutral application of Section 5001 intended to protect the integrity of the election process and the State's compelling interests in avoiding electoral confusion and

deception, preventing misrepresentation, and ensuring the efficiency, integrity, and fairness of the ballot.

1. Plaintiffs' Right of Free Speech Are Not Severely Burdened

The Secretary's denial of Plaintiffs' use of the name "Independent Party" does not impose a severe burden on Plaintiffs' speech rights. Plaintiffs do not allege that the Secretary applied Section 5001 in an uneven or discriminatory fashion. There is also no allegation that the Secretary's application of Section 5001 was based on the Plaintiffs' political ideology or viewpoint, or based on the content of Plaintiffs' speech. Indeed, by its own admission, Plaintiff Independent Party has no particular political ideology but seeks only to provide a mechanism for candidates who wish to have the "Independent" designation on the ballot, regardless of the candidate's political beliefs. Complaint, Intro. ¶ 1. Those candidates who do not indicate a preference for a qualified political party would otherwise be designated with the label "Party Preference: None." § 13105(a)(2).

Plaintiffs' alleged burden is similarly to one that the Ninth Circuit previously held to be "slight." In *Chamness v. Bowen*, the Ninth Circuit held that a state prohibition against a primary election candidate from designating himself as "Independent" and requiring him to state that he has "No Party Preference" did not violate his First Amendment speech rights. *Chamness*, 722 F.3d at 1119. The Ninth Circuit found the statute to impose only a "slight speech burden" because there is no "real difference" between "Independent" and "No Party Preference." *Id.* at 1117-18. The court further found the fact that the prohibition is viewpoint neutral supports the conclusion that it imposed only a slight burden on speech. *Id*. at 1118. Similarly here, Plaintiffs are free to choose any name that meet the requirements of Section 5001. And the prohibition against using the name "Independent Party" is viewpoint neutral.

Furthermore, Plaintiffs are free to express their political views in every forum available except on the ballot. Plaintiffs may support, endorse, vote for, or campaign on behalf of any candidate, including candidates who wish to run for office without declaring a preference for an existing qualified political party. To the extent Plaintiffs' claim is based on an assertion that they have the right to use the ballot for their expressive activity, through the use of their proposed

name, "Independent Party," it must fail. The ballot is not a forum for speech. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362-63 (1997) ("Ballots serve primarily to elect candidates, not as forums for political expression"). As the Supreme Court held in *Timmons*, a political party does not have the right to use the ballot to send a message to the voters about the nature of its support for a candidate. *See id.*, at 363. And as the Ninth Circuit has recognized, "[a] ballot is a ballot, not a bumper sticker. Cities and states have a legitimate interest in assuring that the purpose of a ballot is not 'transform[ed] . . . from a means of choosing candidates to a billboard for political advertising." *Rubin*, 308 F.3d at 1016 (citing *Timmons*, 520 U.S. at 365).

2. Plaintiffs' Right of Association and Voting Rights Are Not Severely Burdened

The Secretary's denial of Plaintiffs' use of the name "Independent Party" does not impose a severe burden on Plaintiffs' associational and voting rights. The First Amendment protects the right of citizens to associate and to form political parties. *Timmons*, 520 U.S. at 537. Here, Plaintiffs are free to associate and organize and form a political body under any name designation that complies with Section 5001 and other applicable California laws. They simply may not use the name "Independent Party" in their attempt to qualify as a political party. Plaintiffs may even use a name that includes the word "independent" without running afoul of Section 5001. Indeed, the Secretary has approved the name "Independent California Party" for a political body that is currently attempting to qualify for the 2016 general election.[7] Thus, Plaintiffs' associational and voting rights are not severely burdened because Plaintiff Independent Party is free to associate with any candidate it supports, and the voters are free to vote for any candidate who indicates a preference for Plaintiff.

Timmons is instructive. In *Timmons*, the New Party challenged Minnesota's law prohibiting candidates from listing more than one party affiliation on the ballot. *Timmons*, 520 U.S. at 362. The New Party argued that the ban violated its right of association. The Supreme Court, however, found the burden imposed by the state law to be not severe. *Id.* at 363. As the

[7] California Secretary of State, http://www.sos.ca.gov/elections/political-parties/political-bodies-attempting-qualify/ (last visited Apr. 4, 2016).

Court reasoned, Minnesota has not directly precluded the parties from developing and organizing, and the New Party "remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen." *Id.* at 361. Members of the New Party are likewise free to endorse, support, or vote for anyone they like. *See id.* at 363. Similarly here, the Secretary's denial of Plaintiffs' use of the name "Independent Party" does not impose a severe burden on Plaintiffs' associational and voting rights because Plaintiff Independent Party remains free to associate with whom it likes and supporters of Independent Party are free to endorse, support, or vote for anyone they like.

3. Plaintiffs' Right of Ballot Access is Not Severely Burdened

The Secretary's denial of Plaintiffs' use of the name "Independent Party" does not impose a severe burden on their ballot access rights. In examining challenges to ballot access, the Supreme Court focuses on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. *Clements v. Fashing* 457 U.S. 957, 964 (1982). "The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" *Id.* (quoting *Lubin v. Panish*, 415 U.S. 709, 716 (1974). Here, the Secretary has not directly limited Plaintiff Independent Party or their candidates' access to the ballot. Candidates who prefer the political body Plaintiffs are attempting to qualify have the same access to the ballot as any other candidate.[8] Instead, the Secretary has only denied the use of the name "Independent Party" in Plaintiff's attempt to qualify as a political party. The resulting burden on Plaintiffs' ballot access right is not severe.

[8] Any candidate for statewide, legislative, or congressional offices may be placed on the primary election ballot merely by filing a declaration of candidacy and nomination papers with up to 100 voter signatures, and paying a filing fee of 1 percent (2 percent for United States Senator and statewide candidates) of the office's salary. § 8062, § 8103. In lieu of a filing fee, any candidate may submit a petition with 1,500 to 10,000 signatures, depending on the office sought. § 8106. A candidate for the presidential general election who wishes to have the ballot label "Independent" may qualify for the ballot under the independent nomination process. § 13105(c); *see* § 8300, et seq.

B. Plaintiffs' Inability to Use the Designation "Independent Party" Does Not Impose a Severe Burden on Their Equal Protection Right

In election cases, courts have analyzed free speech and equal protection in tandem. *See Rubin*, 308 F.3d at 1019. An election regulation is subject to heightened scrutiny on Equal Protection grounds only if it burdens a suspect class or fundamental right. *Id.* Being a political body that is seeking to qualify as a political party is not a suspect class. Therefore, rational basis review is appropriate unless Plaintiffs' right to speech is burdened, which, as established above, it is not. Therefore, the state's important interests justify any burden on Plaintiffs' Equal Protection right.

In addition, Plaintiffs' claim under the Equal Protection Clause must be dismissed on the separate basis that Plaintiffs do not allege any invidious discrimination against them. The administration by a state officer of a state law fair on its face that results in unequal classifications offends the Equal Protection Clause only if those classifications are "invidious, arbitrary, or irrational." *Clements*, 457 U.S. at 967; *see Snowden v. Hughes*, 321 U.S. 1, 8 (1944). Plaintiffs do not allege that the Secretary's denial of their use of the name "Independent Party" is "invidious, arbitrary, or irrational," and their claim under the Equal Protection Clause must be dismissed.

III. COMPELLING STATE INTERESTS JUSTIFY ANY BURDEN ON PLAINTIFFS' INABILITY TO USE THE "INDEPENDENT" DESIGNATION

Any burden imposed on Plaintiffs' rights as alleged by the Complaint is justified by at least three important—indeed, compelling—state interests. The State's interest in denying Plaintiffs' the use of the "Independent Party" designation include avoiding electoral confusion and deception, preventing misrepresentation, and ensuring the efficiency, integrity, and fairness of the ballots. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (The State has important interests in "avoiding confusion, deception, and even frustration of the democratic process at the general election"). Each of these state interests has been found by courts to sufficiently justify burdens imposed by ballot restrictions.

First, the State has compelling interests in avoiding voter confusion and misrepresentation that could result if a presidential candidate of the "Independent Party" and a presidential candidate who qualified for the general election by way of independent nomination are both designated "Independent" on the ballot. For a presidential or vice presidential candidate at the general election, the name of the candidate's party would appear next to the candidate's name. § 13105(b). If Plaintiff Independent Party qualifies as a political party for the general election and nominates a presidential candidate, assuming the candidate meets other conditions under the Elections Code, its candidate's name would appear on the ballot with the word "Independent." If, however, a presidential candidate qualifies for the presidential general election not as a party nominee but through the independent nomination process, the candidate's name would also appear on the ballot with the word "Independent" next to his or her name. § 13105(c). This is likely to lead to voter confusion since voters may not know whether a candidate qualified for the presidential election ballot through the independent nomination process or is a nominee of the "Independent Party." The designation could also mislead voters into believing that a nominee of the "Independent Party" actually qualified not by party nomination but through the independent nomination process.

Second, the State has compelling interests in avoiding voter confusion and deception that could result if candidates for voter-nominated offices indicate a preference for the "Independent Party" because that proposed party name is too similar to the name of the "American Independent Party," which is an existing, qualified political party. The Ninth Circuit has previously observed the similarity between the names and has anticipated that electoral confusion could result if a candidate for a voter-nominated office has the word "Independent" next to his or her name.

In *Chamness v. Bowen*, a candidate who sought to run for office in the primary election wanted to have the ballot state "Independent" in the party preference space. *Chamness*, 722 F.3d at 1114. He argued that the State's prohibition against the use of the ballot label "Independent" violated his First Amendment rights. *Id.* at 1116. The Ninth Circuit held that the statute that prohibited the candidate from designating him as "Independent" and requiring him to state that he has "No Party Preference" did not violate his First Amendment rights. *Id.* at 1119. In reaching

that holding, the court found that the State has an interest in preventing the confusion that could result if the candidate is permitted to use the ballot label "Independent." As the Ninth Circuit observed, "[t]he term 'Independent,' if listed next to a candidate's name on the ballot, might be confused with the name of a political party, such as the 'American Independent' Party—one of California's 'qualified' political parties." *Id.* at 1118.

The Secretary reached the same conclusion. Under Section 5001, a proposed party name "must not be so similar to the name of an existing party so as to mislead the voters, and shall not conflict with that of any existing party." The Secretary has determined that the proposed name "Independent Party" is too similar to that of the existing "American Independent Party." Complaint, ¶¶ 7 & 9. Permitting Plaintiffs to use the name "Independent Party" as the party name is likely to cause voter confusion and mislead the voters.

Third, the State has a compelling interest in preventing voter deception. Plaintiffs seek to use the party name "Independent Party" for the express purpose of enabling candidates to place the ballot label "Independent" next to their names. Complaint at Intro., ¶ 1. In *Chamness*, it was suggested to the court that having the word "Independent" next to a candidate's name "may evoke a positive view—that the candidate affirmatively rejects the politics of the other parties." *Chamness*, 722 F.3d at 1117. Plaintiffs presumably intend for their candidates to be able to latch onto this "positive view" perceived to be evoked by the word "Independent." If Plaintiffs prevail, however, a candidate having the word "Independent" next to his or her name on the ballot would actually be indicating a preference for the "Independent Party" and not rejecting all political parties. Thus, the Secretary's denial of Plaintiffs' use of the designation, "Independent Party," also protects voters. A voter seeing the word "Independent" next to a candidate's name, could be deceived and misled into believing that the candidate affirmatively rejects all political parties. *See id.*

These compelling state interests in avoiding electoral confusion and deception, preventing misrepresentation, and ensuring the efficiency, integrity, and fairness of the ballots justify and outweigh any burden on Plaintiffs caused by their inability to use the proposed name "Independent Party."

IV. ALTERNATIVELY, THE COURT SHOULD ABSTAIN

If the Court nonetheless finds that any of the counts has been adequately pled, the Court should in any event abstain from hearing the dispute under the *Pullman* abstention doctrine. The *Pullman* abstention doctrine allows district courts to postpone the exercise of jurisdiction in exceptional cases. *Pearl Inv. Co. v. City & Cnty. of San Francisco*, 774 F.2d 1460, 1462 (9th Cir. 1985). Abstention is appropriate "in cases presenting a federal constitutional issue "if constitutional adjudication could be avoided or if the constitutional issue could be narrowed by a ruling on an uncertain question of state law." *Id.* (citation omitted). "[A]bstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Id.* (quoting *Harman v. Forssenius,* 380 U.S. 528, 534 (1965)).

In *Pearl*, a building owner challenged on constitutional grounds a city planning commission's decision to condition the issuance of a building permit on the provision of relocation services and replacement housing. *Pearl*, 774 F.2d at 1462. The decision was made under an ordinance that gave the commission discretionary review powers, which the plaintiff alleged had been exercised in an arbitrary manner. *Id*. at 1464. The Ninth Circuit upheld the district court's decision to abstain, agreeing that federal constitutional issues could be avoided if a state court were to rule the commission had abused its discretion by acting arbitrarily, and order the building permit application approved as filed. *Id*.

The complaint in this case follows a similar pattern. Plaintiffs are challenging the Secretary's determination that their proposed party name, "Independent Party," is so similar to the name of the "American Independent Party" that it would mislead voters and cause conflict with the "American Independent Party." While Plaintiffs allege that their constitutional rights have been violated, they could bring an application for a writ of mandate in the state court to challenge the Secretary's determination under the Elections Code as an abuse of discretion, without implicating the constitutional issues. If the Court should find that any of the counts has been adequately pled, the court should nonetheless decline to proceed on Plaintiffs' claims. As in *Pearl*, abstention is appropriate here to avoid an unnecessary constitutional adjudication.

CONCLUSION

For all the reasons provided above, each of Plaintiffs' causes of action should be dismissed because their inability to use the name "Independent Party" does not impose a severe burden on their First and Fourteenth Amendment rights, and any burden is justified by the State's compelling interests. The Secretary respectfully requests that the Court grant his motion to dismiss Plaintiffs' Complaint in its entirety.

Dated: April 4, 2016

Respectfully Submitted,

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