Case No. S257302

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JESSICA MILLAN PATTERSON
And
CALIFORNIA REPUBLICAN PARTY

Petitioners,

v.

ALEX PADILLA,
California Secretary of State, In His Official Capacity

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S RESPONSE TO ORDER TO SHOW CAUSE

IMMEDIATE STAY REQUESTED
IMMEDIATE RELIEF REQUESTED – NO LATER THAN NOVEMBER 4, 2019

---

*Charles H. Bell, Jr. (SBN 060553)
Thomas W. Hiltachk (SBN 131215)
Terry J. Martin (SBN 307802)
BELL, McANDREWS & HILTACHK, LLP
455 Capitol Mall, Suite 600
Sacramento, CA 95814
Telephone: (916) 442-7757
Attorneys for Petitioners JESSICA MILLAN PATTERSON
And CALIFORNIA REPUBLICAN PARTY

TABLE OF CONTENTS **Page(s)**

TABLE OF AUTHORITIES **Page(s)**

Cases

Constitutional Provisions

Elections Code

Other Authorities

I. INTRODUCTION

On August 21, 2019, this Court ordered Respondent Secretary of State Padilla to Show Cause why Petitioners' request for relief should not be granted. In doing so, the Court directed both parties to address (1) the legislative history of Proposition 4, as well as related contemporaneous or prior legislation; and (2) any guidelines used by Secretaries of State to determine who is a "recognized" candidate for purposes of California Constitution, article II, section 5.

Respondent has provided the Court with 19 documents retrieved primarily from records of the Secretary of State himself, or from San Jose State University's special collection and archive of former State Senator Alfred Alquist's personal legislative papers.

Petitioners undertook similar research pursuant to this Court's order, searching for legislative and Secretary of State documents maintained at the State Library and Archives in Sacramento. Many of the items provided by Respondent were also found during Petitioners' search. However, Petitioners' research uncovered several items that were not found by Respondent, including:

(1) More complete legislative records concerning Senator Alquist's proposed legislation in 1967, 1968, 1969, 1970, and 1971, including SB 3 in 1971 which was passed and presented to the Governor in the same legislative year that SCA 3 was passed by the Legislature and placed on the ballot as Proposition 4 in June of 1972; and

(2) The press releases of every Secretary of State announcing the list of recognized candidates for President from 1972 – present.

Faced with a constitutional provision that is clear and direct, namely that the Constitution provides for an open Presidential Primary "whereby the candidates on the ballot are those found by the Secretary of State to be recognized candidates throughout the nation or throughout California for the

office of President of the United States…," Respondent now argues that legislative history of the effort to enact an open Presidential Primary "signaled [the Legislature's] intention to retain its ability to define further who can be a 'recognized candidate' that the Secretary may place on a primary ballot." (Respondent's Response to OSC at p. 10.) The lynchpin of Respondent's argument is the absence of the term "sole discretion" in the Constitution, a term that was used in the prior legislative attempts to enact an open Presidential Primary by statute.

As indicated more fully below, Respondent has found no signal. In fact, the complete legislative history paints a clear picture of the purpose and intent of Proposition 4, an intent that is consistent with the language of the Constitution and its interpretation and application by *every* Secretary of State from 1976 until now, including Respondent himself in connection with the 2016 Presidential Primary. Indeed, the legislative history will show that all of the bills proposing an open Presidential Primary by statute were generally described by the Author, Legislative Counsel, and the Governor using the ***exact same words*** which are now part of the Constitution.

Moreover, the change from a Presidential primary system in which the candidates themselves could choose to run and/or campaign in California or not was replaced by an "open" primary system where <u>all</u> the candidates running for the highest office in the land would be listed on the ballot for consideration by California voters. If a candidate did not want to be listed on the California ballot, he or she had to file an affidavit declaring noncandidacy. SB 27 upends that reform, allowing a candidate to remove his or her name *without declaring noncandidacy*. Rather, he or she can simply refuse to release 5 years of personal tax returns to Respondent and he or she will not be on the ballot, even though that person is in fact a "recognized candidate."

More importantly, Respondent offers no explanation why he has chosen to disavow his only constitutionally-delegated authority in favor of legislation that "prohibits" him from carrying out that simple duty. Even if this Court were willing to accept that the Legislature has the power to enact law establishing guidelines for the Secretary to use to determine if a candidate is "recognized" throughout the nation or the state, SB 27 is not such a law.[1] Indeed, SB 27 does not even reference the Constitutional requirement to identify a "recognized candidate" or even the Legislature's recent attempt to define that term in SB 505, enacted the same day. Rather, SB 27 boldly declares:

> ***Notwithstanding any other law***, the Secretary of State shall not print the name of a candidate for President of the United States on a primary election ballot, unless the candidate, at least 98 days before the presidential primary election, files with the Secretary of State copies of every income tax return the candidate filed with the Internal Revenue Service in the five most recent taxable years, in accordance with the procedure set forth in Section 6884.
>
> (Emphasis added.)

In short, the Legislature has no power to "notwithstand" the Constitution. If Respondent does his duty under the Constitution, he will identify a number of recognized candidates for President running in several political party primaries. In 2016, he identified 43 such candidates and placed each of their names on their respective party primary ballots.

[1] Respondent's continual citation to SB 505, enacted on the same day as SB 27, as proof that the Legislature has power to assist the Secretary of State by defining the term "recognized candidate" proves nothing. The constitutionality of SB 505 is not at issue in this case and need not be addressed to resolve the legality of SB 27, as it relates to the "recognized candidates" for President. Petitioners have no particular quarrel with the definition of a "recognized candidate" provided by the Legislature since most of the indicia of "recognition" in the bill have been used by each Secretary of State since Proposition 4 was enacted. Whether the Legislature has authority to direct the Secretary of State at all in this regard or direct the Secretary to obtain "proof" of recognition is better left for another day.

(Petitioners' Exh. DD, p. 458.) Any attempt to "prohibit" Respondent from fulfilling that duty because the Legislature and Governor would like to force the President and all of the other candidates for President to release their personal and private tax returns is unconstitutional.

Petitioners incorporate their prior arguments and reply arguments in support of their Emergency Petition for Writ of Mandate and further respond to Respondent's response to the Court's Order to Show Cause as follows.

II. ARGUMENT

A. HISTORICAL BACKGROUND

1. Partisan Primary Elections Prior To Proposition 14 In 2010.

As Respondent notes, our Constitution has provided for the direct nomination of candidates for "public office" in partisan primary elections since 1908. Not surprisingly, the Legislature was empowered to enact laws providing for such elections, and for more than 100 years, it has done so in a variety of ways. At one point, during the Progressive Movement, state law allowed for "cross-filing" whereby a candidate could seek the nomination of more than one party. (Grodin et al., The California State Constitution (2d ed. 2016) pp. 112-13.) This system lasted for nearly 50 years and was replaced by a "closed-primary" system by statutory initiative enacted in 1959. (*Id.*) That system existed until the voters enacted Proposition 14 in 2010, which replaced partisan primaries with a "voter nominated system" which disregards party affiliation. (*Id*.)

Obviously, state voters have no power to "nominate" any candidate running for President. In fact, even today, voters merely assign "delegates" to the respective national political party convention, who are pledged to support the candidate "elected" by the voters pursuant to the different rules of each political party (See, Elec. Code, §§ 6000, 6300, 6500, 6700, 6850.)

In fact, prior to Proposition 4 in 1972, the Legislature had provided different methods for the selection of delegates to party conventions.

The system for assigning delegates pledged to Presidential candidates immediately prior to enactment of Proposition 4 was provided for in Chapter 1 (commencing with Section 6000) of Division 5 of the Elections Code. That system required a candidate seeking an allocation of pledged delegates to his or her party convention to submit both a list of such delegates to the Secretary of State and to have his or her supporters circulate delegate nomination petitions signed by a requisite number of voters registered with the same political party. (See, Petitioners' Exh. Q, p. 410 and Exh. R, p. 414.)

Thus, a candidate running for President nationally could choose either to participate in the California Presidential Primary by placing a slate of delegates on the ballot expressing preference for that candidate or not to participate by simply declining to submit delegate nominating petitions. Conversely, a person who was not really a candidate running for President nationally could submit a minimal number of delegate nomination petitions and thereafter seek to control delegates pledged to that "candidate" (i.e., a "favorite son" candidate) at his or her national party convention. As indicated previously, in the decades preceding Proposition 4, many nationally recognized candidates chose not to participate in the California Presidential Primary, some unwilling to run against a "favorite son" candidate (e.g., sitting Governors Pat Brown and Ronald Reagan) and others unwilling to spend the time and resources needed to compete in a state as large and populous as California. Senator Alquist believed that California voters deserved to have a voice in the Presidential Primary process.

2. Senator Alquist's Legislative Attempts To Provide For An "Open Presidential Primary."

Petitioners generally agree with the historical record presented by Respondent of the numerous legislative attempts of Senator Alquist to

provide for an "open Presidential Primary," culminating in the enactment of SCA 3 in 1971.[2] Petitioners disagree with the conclusion reached by Respondent about what that history means.

Senator Alquist started his legislative attempt to provide for an "open Presidential Primary" in 1967 with the introduction of SB 586. That bill, which was not approved by the Legislature, would have done two things as stated in the Legislative Counsel's Digest: (1) it proposed to repeal the existing statutory system "dealing with delegates and candidates in the presidential primary" and; (2) it would have provided for an open Presidential Primary whereby "voters of qualified political parties may express preference among candidates ***found by [the] Secretary of State to be nationally recognized candidates*** for offices of President and Vice President…" (Petitioners' Exh. G, p. 2, emphasis added.) If that highlighted language looks familiar it is because it is the exact language found in the Constitution today.

This Legislative Counsel's general description of the Secretary of State's duty under the proposed statutory attempt to enact an open Presidential Primary occurred every year Senator Alquist introduced such a bill, including SB 145 in 1968 (Petitioners' Exh. I, p. 38), SB 3 in 1969 (Petitioners' Exh. J, p. 93), SB 3 in 1970 (Petitioners' Exh. K, p. 179), and SB 3 (Petitioners' Exh. M, p. 215), SB 278 (Petitioners' Exh. N, p. 293) and

[2] In response to this Court's direction, Petitioners obtained the legislative bill file for each of the bills proposing an open Presidential Primary from the State Library and State Archives in Sacramento. In some cases, the bill file merely includes a copy of the introduced bill and history indicating that it was not approved by the Legislature. In other cases, the bill file includes committee analyses, letters from the author, and veto letters from the Governor, as well as materials connected to the bill (e.g. newspaper clippings/editorials, support or opposition letters). Pursuant to this Court's order, Petitioners have attached to this reply every document obtained for each of the referenced bills as Exhibits G through P.

SB 279 in 1971 (Petitioners' Exh. O, p. 352). The specific operative language in each of these bills was the same – namely that the Secretary of State would identify recognized candidates in his or her "sole discretion."

In 1968, Senator Alquist succeeded in getting SB 145 passed by the Legislature, and as Respondent correctly points out, Governor Reagan vetoed SB 145. Governor Reagan vetoed the bill for a variety of reasons, including the provision that placed the selection process "on the shoulders of one man." What Respondent does not point out is that Governor Reagan's veto statement also described the Secretary of State's duty, as proposed by SB 145, using the ***exact*** same language that would be later used in SCA 3 in 1971, and found in the Constitution today. The Governor stated that "[t]his bill provides that candidates on the presidential primary ballot will be those found by the Secretary of State to be nationally recognized candidates for the office of President…" (Petitioners' Exh. I, p. 80.)

In 1969, Senator Alquist proposed and the Legislature passed SB 3. It was virtually identical to its two predecessors and, not surprisingly, it met a similar fate – veto by Governor Reagan. Indeed, the Legislative Counsel's and Governor's summary description of the Secretary of State's duty in his veto message were identical to SB 586 in 1967 and SB 145 in 1968. (Petitioners' Exh. J, pp. 94, 157.)

In 1970, Senator Alquist re-introduced SB 3, a bill identical to the two prior bills vetoed by Governor Reagan. This time, he was not able to get SB 3 through the Legislature. (Petitioners' Exh. K, p. 179.) However, in that same year, Senator Alquist devised another plan that would avoid the Governor's veto, a constitutional amendment that would be proposed by the Legislature and approved directly by the voters, so he also introduced SCA 3 in 1970. (Petitioners' Exh. L, p. 210.) While SCA 3 was not approved by the Legislature in 1970, the language of SCA 3 that year incorporated the exact language used to describe the duty of the Secretary of State that was

affixed by Legislative Counsel to all of his prior bills. (Petitioners' Exh. L, p. 211.)

Finally, in 1971, Senator Alquist introduced four bills: SB 3, SB 278, SB 279, and SCA 3. The statutory bills (SB 3, 278, and 279) were identical and only SB 3 was advanced and passed by the Legislature. (Petitioners' Exh. M, p. 215, Exh. N, p. 293, and Exh. O, p. 352.) But this time, the Legislature also passed SCA 3. (Petitioners' Exh. P, p. 391.)

Respondent places great significance in the adoption of SCA 3 in two respects. First, he points to the committee analysis of SCA 3 which noted that "no companion" legislation was proposed with the SCA, meaning that subsequent legislation would be required if the voters approved the Constitutional amendment in 1972. Second, he notes that the language used in SCA 3 is not identical to the language used in any of the prior statutory bills considered by the Legislature and rejected by the Governor – namely exclusion of the term "sole discretion" in SCA 3. (Respondent's Response to OSC at pp. 16-18.)

Neither point is significant and is easily explained by reference to the legislative history. There is no significance to the non-existence of "companion legislation" to SCA 3 for one simple reason: SB 3 was also approved by the Legislature at the same time as an "alternative" to SCA 3. In short, the Governor could finally approve the bill providing for an open Presidential Primary ***by statute,*** or the voters would be asked to provide for an open Presidential Primary by ***Constitutional Amendment.*** If the latter course were chosen, then the statutory processes needed to implement such a system would be enacted after voter approval. The Governor had made his position well-known twice before. If he was going to reject the statutory bill again, he certainly would have rejected "companion legislation" that implemented SCA 3.

The difference in language used between the proposed statutes and the enacted Constitution is equally unpersuasive. First, drawing any inference or insight from proposed legislation that is not enacted is generally of little probative value (*Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 923, citing *Dyna–Med, Inc. v. Fair Employment & Housing Com*. (1987) 43 Cal.3d 1379, 1396, internal quotations omitted ["It is precisely because there is no way of knowing which if any inference is correct that [u]npassed bills, as evidences of legislative intent, have little value"].)

Moreover, the difference in language used between the prior statutory descriptions of the Secretary of State's duty, including the language used in SB 3, and the language used to describe the same duty in SCA 3 is easily explained by the legislative history. First, as noted *supra*, even the lay description of the prior statutory bills used the phrases "determined in his sole discretion" and "as found by the Secretary of State" synonymously to describe the open Presidential Primary proposal (See, Legislative Counsel Digest of SB 586, Petitioners' Exh. G, p. 2; SB 145, Petitioners' Exh. I, p. 39; SB 3 - 1969, Petitioners' Exh. J, p. 94; SB 3 – 1971, Petitioners' Exh. M, p. 216; SB 278, Petitioners' Exh. N, p. 294; and SB 279, Petitioners' Exh. O, p. 353.) Indeed, Governor Reagan's veto statement of SB 3 dated December 30, 1971 described SB 3 using the language of SCA 3, as follows:

> SB 3 provides that candidates on the ballot will be those found by the Secretary of State to be recognized candidates throughout the nation or California for the office of President of the United States…

(Petitioners' Exh. M, p. 292.)

The legislative record further indicates that the Legislature understood that the result of SCA 3, if enacted, would be that the "Secretary of State would be required to place all publicly recognized candidates for president on the primary ballot." (Petitioners' Exh. P, p. 397.) In other words,

everyone understood that SB 3 and SCA 3 accomplished the same objective in the same way – candidates would no longer choose whether to appear on the California ballot; instead, the Secretary of State would identify the candidates and place their names on the ballot unless the candidate declared, by affidavit, that he or she was not a candidate for President.

Moreover, the difference in language between SB 3 and SCA 3 is primarily explained by the fact that Senator Alquist was reluctant to clutter the Constitution with matters that did not require placement in the Constitution. SB 3 included numerous statutory provisions providing the mechanics for an open Presidential Primary in addition to the imposition of a statutory duty on the Secretary of State. (Petitioners' Exh. M, p. 216.) There was no need to place those mechanics in the Constitution. Indeed, the Legislature had created a Constitution Revision Commission which was simultaneously and systematically proposing the elimination of unnecessary text from the Constitution. We know Senator's Alquist view on this subject, because he informed Governor Reagan in his letter asking him to sign SB 3:

> As you are undoubtedly aware, SCA 3 also passed during this past legislative session and will be on the June, 1972, ballot. Should you approve SB 3 and, therefore, place this change in our election law on the statute books where it more appropriately belongs, it would be my intention to utilize the appropriate legislative provisions for the removal of SCA 3 from the June, 1972, ballot and spare our lengthy State Constitution any additional language.

(Petitioners' Exh. M, p. 290.)

Senator Alquist's persistent history trying to enact an "open Presidential Primary" is of no help to Respondent and actually provides additional support for Petitioners' reading of the Constitutional provision at issue.

3. Interpretation and Application of Proposition 4 By Secretaries Of State From 1976 To Present.

Respondent summarizes some of the former Secretaries of States' press releases concerning the Presidential candidate selection process. The initial press release by former Secretary of State March Fong Eu provides a useful contemporaneous view of the Legislature's and Secretary of State's role following enactment of Proposition 4. Ms. Eu's press release to announce her actions in response to the "new" open Presidential Primary enacted by Proposition 4 in 1972, stated in part:

> '***When the discretion was given to the Secretary of State to place names of prospective candidates on the primary ballots*** of the four lawfully-acknowledged political parties in California, my suspicion is that many people warmed their hands to the prospect of a beauty contest,' Ms. Eu told the group of reporters. …
>
> 'Today I am announcing my first definite list of active candidates for California. In arriving at this list, I have taken into consideration a number of factors, including the fact that the persons are announced candidates, appear to be actively campaigning, have qualified for matching federal funds under the 1974 amendments to the Federal Elections Campaign Act, and are slated to appear on other states' primary ballots,' Ms. Eu said.
>
> 'Additionally I have closely monitored the media coverage of potential candidates, I appointed staff members to compile their own independent lists, I wrote the state central committee chairpersons of the Democratic, Republican, American Independent and Peace and Freedom parties requesting their written suggestions of nominees, and I polled the California news media….'
>
> A constitutional amendment passed by the votes in November of 1972 called for the legislature to adopt laws to create an open presidential primary. In accordance with this mandate, the legislature enacted laws last year providing new rules to govern the presidential primary elections of each of California's four

> parties. Each of the laws provides that the 'Secretary of State shall place the name of a candidate upon the primary ballot when the Secretary of State has determined that such a candidate is generally advocated for or recognized throughout the United States or California as actively seeking the nomination' of their party for President of the United States.
>
> (Petitioners' Exh. S, p. 417, emphasis added.)

Thus, from the very beginning, the Secretary of State understood her role (to identify the recognized candidates running for President) and the Legislature's role (to enact laws providing for a partisan Presidential Primary). Notably, Secretary Eu stated that the Legislature did its job in the years following enactment of Proposition 4. Respondent argues that the enactment of statutes providing for each political party's delegate selection process, including a general restatement of the Constitutional provision delegating authority to the Secretary to identify the candidates running for President, was the legal authority for the Secretary to act. On the contrary, the legal authority referenced in the first line of her press release was derived from the Constitution and was understood by Secretary Eu then and by every Secretary of State that followed her, until now. Each of the prior Secretaries of State issued press releases announcing their identification of "recognized candidates." Those that chose to describe the criteria used to select candidates described a process nearly identical to the original process used by Secretary Eu.[3] They all acted without guidance or interference from the Legislature. Notably, Respondent himself was able to fulfill his constitutional duty in 2016, identifying 43 "recognized candidates" without

[3] Pursuant to this Court's direction, Petitioners obtained the press releases of the Secretary of State relating to the Presidential Primary elections for 1972, 1976, 1980, 1988, 1992, 1996, 2000, 2004, 2008, 2012, and 2016. Only 1984 was missing from State Archives. These press releases are attached as Petitioners' Exhibits Q through DD.

any assistance or direction from the Legislature. (Petitioners' Exh. DD, p. 458.)

B. ARTICLE II, SECTION 5(c) SIMPLY REQUIRES THE LEGISLATURE TO PROVIDE FOR AN OPEN AND PARTISAN PRESIDENTIAL PRIMARY ELECTION AND DELEGATES TO THE SECRETARY OF STATE THE DUTY TO IDENTIFY ALL THE CANDIDATES RUNNING FOR THE OFFICE OF PRESIDENT AND TO PLACE THEIR NAMES ON THE PRIMARY BALLOT, WITHOUT RESTRICTION OR LIMITATION BY THE LEGISLATURE.

1. Section 5(c)'s Delegation of Power to the Secretary of State Is Limited.

Respondent argues that Petitioners' interpretation of the Legislature's power to "provide for partisan elections for presidential candidates" would render that provision "prefatory and effectively meaningless" (Respondent's Response to OSC at p. 24.) Petitioners have never made that argument and in fact, have stated that the Constitutional provision clearly empowers the Legislature to establish by statute the time, place, and manner in which such elections are conducted. Indeed, the Legislature has enacted numerous such statutes, for example, the Constitution provides a process whereby a candidate who is not "found" by the Secretary of State to be a "recognized candidate" for President can, nonetheless, place his or her name on the ballot by petition. The Legislature has provided the "manner" in which such petitions may be circulated (See, Elec. Code, §§ 6061, 6343, 6523, 6723, and 6853.5.) In fact, the only limitation on legislative power with respect to the open Presidential Primary election under the California Constitution[4] is that the power to identify the candidates running for President and to place their names on the ballot is exclusively delegated to the Secretary of State.

[4] The Legislature's power is also limited by the United States Constitution, including the Qualifications Clause.

Respondent's assertion that the Legislature's authority to define the terms upon which a political party is "qualified" to participate in partisan primary elections is an act to define who is a recognized candidate of that party is not persuasive. Establishing rules for qualifying as a political party is simply consistent with the Legislature's authority to provide for the orderly conduct of an election. (*Storer v. Brown* (1973) 415 U.S. 724, 730.) More importantly, SB 27's "prohibition" on the Secretary of State's duty to place the name of all recognized candidates for President on the ballot is not an act to "define" who is, in fact, a recognized candidate.

2. Proposition 4's Delegation of Power is Unambiguous.

Proposition 4's delegation of power to the Secretary of State is unambiguous. There is no need for this Court to "imply" such delegation from the text. Though resort to legislative history is unnecessary, as the constitutional provision is clear, even the legislative history shows that the Constitution delegated to the Secretary of State the duty to identify the recognized candidates running for President and to place their names on the appropriate primary ballot.

First, Proposition 4 was placed on the ballot by the Legislature's enactment of SCA 3 in 1971. The committee analysis of SCA 3 stated that the "Secretary of State would be *required* to place all publicly recognized candidates for President on the primary ballot." (Petitioners' Exh. P, p. 393, emphasis added.)

Second, the ballot materials presented to the voters when asked to approve or reject Proposition 4 were equally clear about the exclusive delegation to the Secretary of State. Legislative Counsel advised the electorate that Proposition 4 would:

> [R]equire the Secretary of State to place upon the presidential primary ballot of the appropriate political party as its candidates for the office of President of the United States, the names of those persons ***who he determined*** to be either (a)

> recognized as candidates throughout the nation or (b) recognized as candidates throughout California.

(Petitioners' Opening Brief, Exh. D, emphasis added.)

Respondent asserts that the statements made by opponents of Proposition 4 and the open Presidential Primary that the measure would give "just one man, the California Secretary of State, the right to determine which names will be placed on the ballot for President" were wrong and should not be used as an aid to interpreting the intent of Proposition 4. Then-Senator Deukmejian and Senator Whitmore were not wrong. They simply restated the same point made to the voters by Legislative Counsel. The Legislative Counsel's summary of Proposition 4 presented to the voters is a valuable aid to determining the voters' intent. (See *People v. Superior Court (Henkel)* (2002) 98 Cal.App.4th 78, 82 ["both the Legislative Analyst's impartial evaluation of the measure as well as the arguments in favor of the initiative assist us in construing the statute"].)

Respondent also ignored the ballot arguments made in favor of Proposition 4 by its author; for example, Senator Alquist stated in his rebuttal to the argument against Proposition 4:

> By placing the names of all recognized candidates on the ballot the Secretary of State can help ensure that Californians have a chance to choose which candidate they wish to represent their party.

(Petitioners' Opening Brief, Exh. D.)

Two subsequent amendments to the section added to article II by Proposition 4 were later amended in November, 1992 and then again in June, 2010, but neither affected the twin requirements of Proposition 4: (1) the Legislature shall provide for a partisan Presidential Primary election and (2) the Secretary of State is required to identify the recognized candidates running for President and to place their names on the appropriate primary

ballot. Indeed, the voters were specifically told that neither Proposition 7, in 1992, nor Proposition 14, in 2010, changed the Presidential primary system.

With respect to Proposition 7, the Legislative Counsel advised the voters that "[p]rovisions for an open presidential primary would be unchanged." (Respondent's Exh. M, p. 18.) With respect to Proposition 14, the Attorney General advised the voters that it "[d]oes not change the primary elections for President…" (Petitioners' Opening Brief, Exh. F.)

C. ARTICLE II, SECTION 5(c) IS SELF-EXECUTING

Respondent argues that he only has such powers as conferred to him by either statute or the Constitution, but then argues that Article II, Section (5)(c) confers no duty that can be compelled by law. As indicated more fully above, there is no question that the Constitution confers power to the Secretary of State and that such power is supported by the legislative history of its enactment. Moreover, Respondent's continued insistence that this Court has no authority to compel his compliance with the Constitution, even in the face of an unconstitutional statute, is baffling. This Court need not decide if the Secretary's execution of his duty to identify candidates and place their names on the ballot is ministerial or discretionary. What this Court must decide is whether the Secretary's compliance with the mandate of SB 27 is constitutional or not. If it is not, this Court has power to compel an election official "to conduct an election according to law." (*Knoll v. Davidson* (1974) 12 Cal.3d 335, 341.)

Respondent also argues that Article II, Section 5(c) is not "self-executing" and anticipates necessary legislation. While the constitutional provision providing for partisan primary elections clearly requires implementing legislation (which has long since been enacted), the requirement that applies to the Secretary of State does not. (See *Bautista v. State of California* (2011) 201 Cal.App.4th 716, 724 ["a constitutional provision will be presumed to be self-executing and will be given effect

without legislation unless a contrary intention is *clearly* expressed"], emphasis added.) No such clear intention is manifest in Article II, Section 5(c) because that provision only entrusts the Legislature with procedural authority over primary elections. The substance of "who is a candidate" rests with the Secretary, and Respondent has failed to carry his burden to the contrary. Indeed, for over 40 years, every Secretary of State, including Respondent himself, has been quite able to undertake their duty without any direction or guidance from the Legislature.

But more importantly, Respondent again tries to conflate guidance from the Legislature with SB 27. SB 27 does not "guide" or "implement" the Constitution, it directly conflicts with and impairs the Constitution, and for that reason alone, Petitioners are entitled to the immediate relief they seek.

III. CONCLUSION

For the reasons stated *supra*, a writ of mandate must issue under either Code of Civil Procedure sections 1085 and 1086, or Elections Code section 13314, directed to the Secretary of State to disregard recently enacted Elections Code sections 6883 and 6884 (SB 27) and to perform his constitutional duty to place candidates "recognized" throughout the State, and nation, on the March 2020 Presidential primary ballot.

Respectfully Submitted,

Dated: September 11, 2019

BELL, McANDREWS & HILTACHK, LLP

By: 

CHARLES H. BELL, JR.
THOMAS W. HILTACHK
TERRY J. MARTIN
Attorneys for Petitioners, JESSICA MILLAN PATTERSON and CALIFORNIA REPUBLICAN PARTY

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) and 8.360(b)(1) of the California Rules of the Court, the enclosed brief of JESSICA MILLAN PATTERSON and CALIFORNIA REPUBLICAN PARTY is produced using 13-point Times New Roman type including footnotes and contain approximately 5,217 words, which is less than the total words permitted by the rules of the court. Counsel relies on the word count of the computer program, Microsoft Word 2010, used to prepare this brief.

Dated: September 11, 2019.

BELL, McANDREWS & HILTACHK, LLP

By: 

CHARLES H. BELL, JR.
THOMAS W. HILTACHK
TERRY J. MARTIN
Attorneys for Petitioners, JESSICA MILLAN PATTERSON and CALIFORNIA REPUBLICAN PARTY

PROOF OF SERVICE

Case S257302 Patterson, et al. v Padilla

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My electronic address is kmerina@bmhlaw.com

On September 11, 2019, I served the following:

PETITIONERS' REPLY TO RESPONDENT'S RESPONSE TO ORDER TO SHOW CAUSE

on the following party(ies) in said action:

Jay C. Russell
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
415-510-3617
Jay.Russell@doj.ca.gov

Chad Stegeman
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
415-510-3617
Chad.Stegeman@doj.ca.gov

Paul Stein
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
415-510-3617
Paul.Stein@doj.ca.gov

Anthony Hakl
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
415-510-3617
Anthony.Hakl@doj.ca.gov

X **BY ELECTRONIC MAIL:** By causing true copy(ies) of PDF versions of said document(s) to be sent to the e-mail address of each party listed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 11, 2019, at Sacramento, California.

KIERSTEN MERINA