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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

CIVIL DIVISION

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

Plaintiffs and Petitioners,

v.

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

Defendants-Respondents.

Case No. CIVDS1921480

DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Date: November 19, 2019
Time: 8:30 a.m.
Dept: S32
Judge: The Honorable Wilfred J. Schneider, Jr.
Trial Date: Not Set
Action Filed: July 23, 2019

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INTRODUCTION

Plaintiffs assert that California's current modified-closed presidential primary system violates the rights of voters registered as having no party preference (known as NPP voters) under the First and Fourteenth Amendments. But the United States Supreme Court upheld Oklahoma's nearly identical presidential primary system against a similar constitutional challenge in *Clingman v. Beaver* (2005) 544 U.S. 581 (*Clingman*). The Supreme Court held that the primary system at issue only minimally burdened the rights of voters, and that the State's interests were sufficient to justify those minimal burdens. (*Id.* at pp. 593-98.) These interests include "preserving the political parties as viable and identifiable interest groups;" "insuring that the results of a primary election . . . accurately reflect the voting of the party members;" "aid[ing] in parties' electioneering and party-building effort;" and "guard[ing] against party raiding." (*Id.* at pp. 594-96) Plaintiffs offer no reason why this Court should depart from the precedent set in *Clingman*. As a matter of law, they cannot succeed on the merits of their claims.

Plaintiffs also have not shown that they will suffer irreparable harm in the absence of their requested injunction. They rely on the violation of their constitutional rights as the purported injury, but because they are not likely to succeed on the merits of their constitutional claims, those purported constitutional injuries cannot satisfy the harm element for purposes of a preliminary injunction. On the other hand, the public interest in minimizing voter confusion and running a smooth primary election weighs against granting the requested relief. Plaintiffs seek a preliminary injunction requiring the Secretary of State to impose a new system in which NPP voters would receive a separate ballot listing all presidential candidates qualified to appear on any party's primary ballot. They propose that the votes then be tallied and the results published, at which point "[t]he political parties will be free to count or ignore the NPP votes." (Op. Brief at p. 2.) Such a ballot would confuse NPP voters, leading them to cast votes the political parties are under no obligation to count. As one California Court of Appeal has explained, "[i]t would make no sense to authorize the voters to cast votes that cannot be counted." (*Field v. Bowen* (2011) 199 Cal.App.4th 346, 367 (*Field*).) Yet this is precisely the remedy Plaintiffs seek to address their alleged violations of their right to freedom of association and their right to vote.

In addition to misleading voters at the ballot box, Plaintiffs' proposed remedy would create chaos in the electoral process by requiring massive changes to county voting systems and outreach and educational efforts across the state only a few months before the election. It would also directly violate the guarantee of the California Constitution that a "voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted." (Cal. Const., art. II, § 2.5.)

Plaintiffs can show neither a likelihood of success on the merits nor the presence of irreparable harm, and their proposed injunction would jeopardize the public interest. Their motion for preliminary injunction should be denied.

BACKGROUND

I. CALIFORNIA'S CURRENT PRESIDENTIAL PRIMARY SYSTEM

California has a "modified" closed primary system for presidential elections, which went into effect on January 2, 2001. (Sen. Bill No. 585 (2001-2002 Reg. Sess.) § 2.) Under the current primary system, voters registered as preferring a qualified political party receive one ballot that contains that party's partisan candidates as well as the names of candidates for nonpartisan offices, voter-nominated offices, and measures to be voted for at the primary election. (Elec. Code, § 13102, subds. (a), (b).)[1] The process is different for NPP voters, who receive only the nonpartisan ballot. (*Id* at subd. (b).) However, an NPP voter may request the partisan ballot of a political party that has authorized NPP voters to participate in the party's primary election. (*Ibid.*) In order to allow NPP voters to participate in its primary, a party must notify the Secretary in writing that it has adopted a party rule to that effect no later than the 135th day prior to the partisan primary election. (*Id.* at subd. (c).) In the 2016 presidential primary, the American Independent, Libertarian, and Democratic Parties allowed NPP voters to participate in their primary elections, while the Green, Peace & Freedom, and Republican Parties did not. (Compl. at ¶ 13; Declaration of Jana Lean (Lean Decl.), Ex. 1.) The same three parties have authorized NPP voters to participate in their primary elections on March 3, 2020. (*Id.*, Ex. 2.)

[1] All statutory references herein are to the Elections Code unless otherwise stated.

II. BACKGROUND OF THE CURRENT CASE

The plaintiffs and petitioners in this case are registered voters in the State of California, one of whom is registered in San Bernardino County and the rest of whom are registered elsewhere in California, along with the Independent Voter Project, a non-profit organization (collectively "Plaintiffs"). Plaintiffs filed their unverified complaint and petition for writ of mandate on July 23, 2019, and filed a purported verification to that complaint on October 8, 2019, the same day they filed their motion for preliminary injunction. They then filed an amended complaint on October 21, 2019, which added a plaintiff but did not change any of the allegations. The complaint alleges that "[e]ach of the individual Plaintiffs/Petitioners was unable to vote for the candidate of his or her choice in the 2016 presidential-primary election unencumbered by a condition of party preference." (Am. Compl. at ¶ 36.) Some Plaintiffs are NPP voters who wish to vote in one of the political parties' primaries "without being forced to associate with a political party or disclosing his ballet choice to anyone." (*Id.* at ¶¶ 30, 31, 32.) Other Plaintiffs registered as preferring one political party but wish to vote in a different political party's primary without changing their party preference. (*Id.* at ¶¶ 33, 35.) And one plaintiff would prefer to register as an NPP voter but has registered as preferring the Democratic Party in order to vote in the Democratic presidential primary in 2020. (*Id.* at ¶ 34.)

The complaint and petition assert six causes of action: failure to conduct an open presidential primary in violation of the California Constitution (*Id.* at ¶¶ 53-60); denial of the substantive right of due process in violation of the California Constitution (*Id.* at ¶¶ 61-64); denial of right to equal protection in violation of the California Constitution (*Id.* at ¶¶ 65-68); unconstitutionally appropriating public funds for private purposes in violation of the California Constitution (*Id.* at ¶¶ 69-74); denial of substantive due process under the First and Fourteenth Amendments of the United States Constitution (*Id.* at ¶¶ 75-82); and denial of the right of non-association under the First Amendment of the United States Constitution (*Id.* at ¶¶ 83-87). Plaintiffs challenge California's current presidential primary system as unconstitutional on its face and as applied to Plaintiffs themselves. (*Id.* at ¶ 23.) Plaintiffs' motion for preliminary injunction focuses on purported violations of the right of political association guaranteed by the

First Amendment to the United States Constitution and protected by the California Constitution's right to privacy, as well as the fundamental right to vote, protected by the federal and state constitutions. (Op. Brief at p. 1.)

Plaintiffs ask for a preliminary injunction requiring the Secretary to "give NPP voters a ballot that includes the names of all presidential candidates who have qualified for the primary." (Op. Brief at p. 1.) Plaintiffs are not "asking the Court to require political parties themselves to count the NPP voters' votes." (*Ibid.*) Instead, their proposal is that the Secretary "can tally the votes, break them down by party . . . and publish the results," at which point the "political parties will be free to count or ignore the NPP votes." (Op. Brief at p. 2.)

LEGAL STANDARD

A party seeking injunctive relief has the burden "to show all elements necessary to support issuance of a preliminary injunction." (*O'Connell v. Sup. Ct.* (2006) 141 Cal.App.4th 1452, 1481.) A superior court must evaluate "two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial." (*Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 433, quoting *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.) "The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm the defendant is likely to suffer if the preliminary injunction were issued." (*Ibid.*) Courts must also consider the public interest—in fact, where "the plaintiff seeks to enjoin public officers and agencies in the performance of their duties, the public interest *must* be considered." (*O'Connell v. Sup. Ct.*, *supra*, 141 Cal.App.4th at 1471 (citations omitted).)

The United States Supreme Court has developed a balancing test for considering constitutional challenges to a state election law. Courts must "weigh the character and magnitude of the burden the State's rule imposes on [constitutional] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." (*Timmons v. Twin Cities Area New Party* (1997) 520 U.S. 351, 358.) "The same balancing test is employed to decide election law issues arising under the California Constitution." (*Field*, *supra*, 199 Cal.App.4th at p. 356; see also *Edelstein v. City & County of*

San Francisco (2002) 29 Cal.4th 164, 168 ["In analyzing constitutional challenges to election laws, [the California Supreme Court] has followed closely the analysis of the United States Supreme Court."].) Under this balancing test, regulations "imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest," while lesser burdens "trigger less exacting review." (*Field*, *supra*, 199 Cal.App.4th at p. 356.) A "State's important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions." (*Ibid.*) In fact, "voting regulations are rarely subject to strict scrutiny." (*Chamness v. Bowen* (2013) 722 F.3d 1110, 1116 (citations omitted)).

ARGUMENT

I. Plaintiffs Are Not Likely to Succeed on the Merits

A. The Current System Does Not Burden Plaintiffs' Right of Political Association Under the First Amendment

California's current modified closed primary system for presidential primary elections does not burden Plaintiffs' First Amendment right to political association. And even if there is some minimal burden, it is justified by important state interests. To be sure, "the First Amendment protects political association, including association through political parties." (*Unger v. Super. Ct.* (1984) 37 Cal.3d 612, 636.) "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." (*Kusper v. Pontikes* (1973) 414 U.S. 51, 57, citing *Williams v. Rhodes* (1968) 393 U.S. 23, 30.)

However, individual voters' rights of political association are not absolute. (*Socialist Workers etc. Comm. v. Brown* (1975) 53 Cal.App.3d 879, 888.) The Supreme Court has rejected the suggestion that individual voters have a right to affiliate with one political party but still vote in another party's primary election, or a right to refrain from declaring a party preference but vote in a party's primary anyway. "As for the associational 'interest' in selecting the candidate of a group to which one does not belong, that falls far short of a constitutional right, if indeed it can even fairly be characterized as an interest." (*California Democratic Party v. Jones* (2000) 530 U.S. 567, 573 n.5 (*Jones*).) The NPP voter "who feels himself disenfranchised" by being excluded from a party primary "should simply join the party. That may put him to a hard choice,

but it is not a state-imposed restriction upon *his* freedom of association, whereas compelling party members to accept his selection of their nominee *is* a state-imposed restriction upon theirs." (*Id.* at p. 584.) Thus, an NPP voter's "desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." (*Id.* at p. 583; *Tashjian v. Republican Party of Connecticut* (1986) 479 U.S. 208, 215, n.6 *(Tashjian).*)

The United States Supreme Court upheld a primary system very similar to California's against a First Amendment challenge in *Clingman.*[2] There, registered members of the Republican and Democratic parties challenged Oklahoma's law allowing political parties to open their primary elections to independent voters but not to voters registered with another party. (*Clingman, supra,* 544 U.S. at pp. 584-85.) The Court reasoned that "[r]equiring voters to register with a party prior to participating in the party's primary minimally burdens voters' associational rights." (*Id.* at p. 592.) This is particularly the case where voters "are not 'locked in' to an unwanted party affiliation" and "with only nominal effort they are free to vote in [another party's] primary." (*Id.* at p. 591.)

California's system is markedly less burdensome than the one at issue in *Clingman.* California voters are free to change their party preference up until fifteen days before an election by submitting an affidavit of registration to their county elections official and will then be able to vote in the corresponding party primary. (§ 2119.) Even if a voter misses the deadline to change their registration, they may still do so and cast a ballot in a party primary using the conditional voter registration (CVR) process. (§ 2107; Lean Decl. ¶ 7.) The CVR process allows a voter to submit an affidavit of registration to their county elections official during the fourteen days leading up to the election or even on election day. (§ 2170, sub. (a).) The voter may then cast a conditional ballot that will be counted upon verification of the voter's eligibility to vote. (*Id.* at subd. (b) & (d)(5).) Like the Oklahoma voters in *Clingman*, California voters have the ability to easily change their party preference and vote in the primary of their choice.

[2] The Supreme Court noted in *Clingman* that it granted certiorari in that case because the same issue might arise with regard to "the semiclosed primary laws of 23 other States" including California. (*Clingman, supra*, 544 U.S. at 586 & n.1.)

1 Because the California's modified closed primary system "places no heavy burden on
2 associational rights," the State's important regulatory interests are "enough to justify reasonable,
3 nondiscriminatory restrictions." (*Clingman*, *supra*, 544 U.S. at p. 593.) Those interests the
4 Supreme Court recognized as important in *Clingman* are also present here: preserving political
5 parties as viable and identifiable interest groups, insuring that the results of a primary
6 election accurately reflect the voting of the party members, enhancing parties' electioneering and
7 party-building efforts, and guarding against party raiding. (*Clingman*, *supra*, 544 U.S. at pp. 594-
8 97; see also *Anderson v. Celebrezze* (1983) 460 U.S. 780, 788 n.9 [State has an important interest
9 in "prevent[ing] distortion of the electoral process by the device of 'party raiding,' the organized
10 switching of blocks of voters from one party to another in order to manipulate the outcome of the
11 other party's primary election"].)
12 The Supreme Court has repeatedly affirmed the associational rights of political parties.
13 "The freedom of association protected by the First and Fourteenth Amendments includes partisan
14 political organization" and "[t]he right to associate with the political party of one's choice is an
15 integral part of this basic constitutional freedom." (*Tashjian*, *supra*, 479 U.S. at p. 214.)
16 "Freedom of association also encompasses a political party's decisions about the identity of, and
17 the process for electing, its leaders." (*Eu v. San Francisco County Democratic Cent. Com.* (1989)
18 489 U.S. 214, 229.) "[A] State cannot justify regulating a party's internal affairs without showing
19 that such regulation is necessary to ensure an election that is orderly and fair." (*Id.* at p. 233.)
20 Critical to a political party's freedom of association is the ability to decide who may
21 participate in its primary elections. "In no area is the political association's right to exclude more
22 important than in the process of selecting its nominee." (*Jones*, *supra*, 530 U.S. at p. 575.) By
23 allowing political parties to determine which voters will select the party's candidate, the
24 Legislature has complied with the Supreme Court's holdings regarding the political association
25 rights of political parties. Plaintiffs recognize the parties' associational rights in their opening
26 brief, and appear to have fashioned their request for injunctive relief to avoid the constitutional
27 issue: "Defendants will surely argue that Petitioners are asking the Court to compel them to
28 infringe on the rights of political parties" but "Petitioners are not asking the Court to require

political parties themselves to count the NPP voters' votes; each party has the right to establish its own rules for recognizing or ignoring the votes for their candidates." (Op. Brief at 1.)

But that concession only underscores that California's current presidential primary system is not subject to attack on the grounds asserted by Plaintiffs. It does not burden Plaintiffs' right to political association under the First Amendment. And even if a minimal burden does exist, it would be amply justified by the State's important regulatory interests.

B. The Current System Does Not Burden Plaintiffs' Right to Political Association Under the California Constitution

Plaintiffs contend that their right to political association, in addition to being protected under the First Amendment of the United States Constitution, is protected by the California Constitution's guarantee of secrecy in voting and general right to privacy. (Op. Brief at pp. 6-7.) The California Constitution provides that "voting shall be secret." (Cal. Const., art. II § 7.) But, as the California Supreme Court first held long ago, in primary elections "it is the secrecy of the ballot which the law protects, and not secrecy as to the political party with which the voter desires to act." (*Katz v. Fitzgerald* (1907) 152 Cal. 433, 434.) This proposition is so well-accepted that it has rarely been considered by federal or California courts since the *Katz* decision, though several state Supreme Courts have since interpreted similar state constitutional provisions similarly. (*O'Callaghan v. State* (Alaska 2000) 6 P.3d 728, 731 ["in the context of primary elections—elections whose central purpose is to select parties' nominees" disclosure of party preference "falls well outside the Constitution's core concern for preserving the secrecy of voting, as opposed to the secrecy of party preference"]; *Id.* at p. 731 n.16, citing cases from Alabama, Kansas, and Michigan.) Plaintiffs offer no authority to the contrary.

The California Constitution also protects a separate right to privacy. (Cal. Const., art. I, § 1.) Plaintiffs rely on *N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 462, a case that involved not a privacy right protected by a state constitution, but by the due process clause of the Fourteenth Amendment, for the proposition that state action compelling "disclosure of membership in an organization engaged in advocacy of particular beliefs" operates as a restraint of the freedom of association. (Op. Brief at p. 6.) But the issue presented in that case—supported by an

uncontroverted showing of exposure "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" (*N.A.A.C.P v. Alabama*, *supra*, 357 U.S. at p. 462)—is a far cry from Plaintiffs' demand to vote in a partisan party primary without registering as preferring that party. And the disclosure of information regarding the political affiliations of voters is limited to specific persons and committees authorized by statute to receive that information.[3] Besides, "[p]rivacy concerns are not absolute; they must be balanced against other important interests." (*Hill v. Nat'l Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 37.) The State's interests in maintaining the current partisan presidential primary system have already been discussed in detail. Those interests justify the minimal invasion of privacy that may occur when an NPP voter requests the ballot of one of the political parties.

C. The Current System Does Not Burden Plaintiffs' Right to Vote

"No one disputes that the right to vote is fundamental." (*Short v. Brown* (9th Cir. 2018) 893 F.3d 671, 676, citing *Harper v. Va. State Bd. of Elecs.* (1966) 383 U.S. 663, 667.) However, it does not follow that "the right to vote in any manner" is absolute. (*Burdick v. Takushi* (1992) 504 U.S. 428, 433 (*Burdick*).) In fact, "[e]lection laws will invariably impose some burden upon individual voters." (*Ibid.*) The United States Supreme Court has held that "in facilitating the effective operation of [a] democratic government, a state might reasonably classify voters or candidates according to political affiliations" which necessarily includes the authority "to limit voters' ability to roam among parties' primaries." (*Clingman*, *supra*, 544 U.S. at pp. 595-96.) The purposes of primary and general elections differ. "[T]he effect of a primary election is not to elect any person to the office . . . but merely to nominate persons who should be candidates at the ensuing election at which the office holder would actually be chosen and elected." (*Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 510 (citations omitted).) A State "may insist that intraparty

[3] Such records are maintained by county elections officials as required by section 13101, subdivision (d), which provides that "[t]he record shall be made available to any person or committee who is authorized to receive copies of the printed indexes of registration for primary and general elections." The persons and committees authorized to receive the information are members of the Legislature, members of Congress, the campaign committees of candidates running for office, and committees for or against a ballot measure, referendum, or initiative measure. (§ 2184.) A voter's affidavit of registration is otherwise confidential, as provided by section 2194.

competition be settled before the general election by primary election." (*Green Party of California v. Jones* (1995) 31 Cal.App.4th 747, 755, quoting *Am. Party of Texas v. White* (1974) 415 U.S. 767, 781.) And "[t]he power is vested in the Legislature . . . to determine the tests and conditions upon which participation in a primary election may be had." (*Communist Party of U.S. of Am. v. Peek* (1942) 20 Cal.2d 536, 544.)

One such "test or condition" that has been widely accepted for voting in a party primary is party registration. "The purpose of party registration is to provide a minimal demonstration by the voter that he has some commitment to the party in whose primary he wishes to participate." (*Clingman*, *supra*, 544 U.S. at p. 595 (citations omitted).) Plaintiffs argue that the inability of NPP voters to vote in a party primary without joining that party violates the one person, one vote principle first announced in *Reynolds v. Sims* (1964) 377 U.S. 533. In support of this argument, they rely on various cases in which a certain group of voters was disenfranchised or had less weight attributed to its members' votes because of their race or county of residency. (Mot. at p. 8, citing *Moore v. Ogilvie* (1969) 394 US. 814; *Gray v. Sanders* (1963) 372 U.S. 368, 380.) But in those cases, "there was no way in which the members of that class could have made themselves eligible to vote." (*Rosario v. Rockefeller* (1973) 410 U.S. 752, 757.) That is not the case here. Under California's current system, in order to vote, Plaintiffs may either change their party registration or request the ballot of one of the political parties that allows NPP voters to vote in its primary. As discussed above, Plaintiffs do not have a right to vote in any primary election they choose regardless of their party affiliation. (*Jones*, *supra*, 530 U.S. at 573-74 n.5.)

Plaintiffs contend that the current system "is neither reasonable nor non-discriminatory" because it "creates two classes of voters wanting to participate in presidential primaries." (Op. Brief at p. 7.) They also contend that "[w]hen the law applies differently to pre-existing classes of similarly situated citizens seeking to exercise their fundamental rights . . . the distinction will be subjected to strict scrutiny." (*Id.* at p. 8.) It is true that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." (*Dunn v. Blumstein* (1972) 405 U.S. 330, 336.) And if distinctions are drawn "on the basis of wealth or race" strict scrutiny is applied. (*McDonald v. Bd. of Elec. Comms. of Chicago* (1969)

394 U.S. 802, 807.) That is not the case here—the distinction Plaintiffs point to is between NPP voters and party-registered voters. The United States Supreme Court has specifically held that "[i]n facilitating the effective operation of [a] democratic government, a state might reasonably classify voters or candidates according to political affiliations." (*Clingman, supra*, 544 U.S. at p. 594, quoting *Nader v. Schaffer* (D. Conn. 1976) 417 F.Supp. 837, 845-46 and *Ray v. Blair* (1952) 343 U.S. 214.) California's classification of voters into those who have registered with a party preference and those who have not is reasonable and follows Supreme Court precedent.

In fact, Plaintiffs' proposed primary system for NPP voters would result in the opposite problem: NPP voters would receive a ballot that lists all of the candidates for all of the qualified political parties and be able to cast a vote for any of them, while voters registered as preferring a party would continue to receive a ballot listing only the candidates for their preferred party and be limited in the candidates for whom they could cast a vote. Once again, Plaintiffs' proposed remedy serves only to underscore the lack of merit in their underlying claims.

II. PLAINTIFFS' HAVE NOT DEMONSTRATED THAT THEY WILL BE HARMED IN THE ABSENCE OF AN INJUNCTION

Plaintiffs argue that they will suffer irreparable harm because "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (Op. Brief at p. 14.) But, as described above, California's current system of presidential primary elections does not violate Plaintiffs' First Amendment rights. And California's significant interest in preserving political parties, insuring primary elections that accurately reflect the voting of party membership, and guarding against party raiding justifies any minimal burden that may exist. Plaintiffs have not established that they have suffered or will suffer a violation of their constitutional rights; thus they will not be harmed in the absence of the injunction they seek. Although "[a]n alleged constitutional infringement will often alone constitute irreparable harm" for purposes of a preliminary injunction, the element of harm is not met where "the constitutional claim is too tenuous." (*Goldie's Bookstore v. Sup. Ct.* (9th Cir. 1984) 739 F.2d 466, 472.)

Plaintiffs indicate in their opening brief that the low return rate for vote-by-mail presidential primary ballots from NPP voters shows that these voters are disenfranchised by the

need to request a ballot be mailed to them for the party primary in which they wish vote. (Op. Brief at 4.) But county election officials mail a notice to all NPP permanent vote-by-mail voters informing them of their options for voting in partisan primaries, as well as an application to request a party's ballot. (§ 3205, subd. (b).) Completing and returning the application is neither onerous nor burdensome. Plaintiffs also assert that NPP voters are disenfranchised because poll workers are not required to inform NPP voters that they may request the ballot of a political party that has authorized their participation. But the Elections Code, requires notice of this option:

> "[a]t a partisan primary election, before providing a voter who has declined to disclose a political party preference with a nonpartisan ballot or before the voter enters the voting booth . . . a member of the precinct board shall provide a uniform notification to the voter informing him or her that he or she may request a political party's ballot and the name of each political party that has authorized a voter who has declined to disclose a political party preference to vote in its ballot."[4]

(§ 14227.5, subd. (a).) "A county elections official shall train the members of a precinct board regarding their duties under subdivision (a)." (§ 14227.5, subd. (b).) The information must be included in the state Voter Information Guide and each county's nonpartisan voter information guide, and it must be posted on the Secretary of State's website and each county elections official's website. (§ 13501.) And the Secretary of State must provide posters containing the same information to precinct officers, which must be conspicuously posted both inside and outside every polling place. (§§ 14105, subd. (n); 14105.2.) Information about voting options is made available to NPP voters in various ways, and NPP voters are not harmed by having to make minimal efforts to cast their votes.

III. If the Requested Relief Were Granted, the Public Interest Would Be Harmed

In contrast, the public interest weighs against granting the relief Plaintiffs seek. Plaintiffs' proposed NPP primary system would impose extraordinary burdens on State and County elections officials, overturning established procedures in an election process already underway.

[4] Section 14227.5 went into effect January 1, 2018. (Assem. Bill No. 837 (2017-2018 Reg. Sess.) § 4.) Thus, Plaintiffs' reliance on a 2016 brief filed by the Attorney General's Office in a separate case (Op. Brief at 4) is inapposite, as is the example described in the Declaration of Svetlana Chyette regarding her experience as a poll worker in 2016.

Each county across the State conducts its elections using electronic voting systems certified by the Secretary of State's office.[5] (Declaration of Susan Lapsley (Lapsley Decl.) at Ex. 1.) The systems used are not uniform throughout the State—there are several approved options. The vendors that provide voting technology would need to develop programming for each of those systems to accomplish the creation of a separate NPP ballot listing all qualified presidential candidates for all parties. (*Id.* at ¶ 3.) The programming would also need to accomplish the tabulation of those ballots and ensure that votes for a candidate belonging to a party that allows NPP voters to participate would be counted, but other votes would not. (*Ibid.*) Once developed, the new software would need to be tested for accuracy, security and functionality. (Id at ¶ 4.) The software would then be hand delivered to the county elections officials for each of the 58 counties to be implemented on their voting machines. (*Id.* at ¶ 6.) The timeline for completing these tasks before the March primary would be very short—counties can begin mailing out ballots to military and overseas voters on January 3, 2020, and the reprogramming of county voting machines would need to be completed before those ballots can be generated and printed. (*Id.* at ¶ 7.) Rushing to implement the changes Plaintiffs request would be difficult and could put the smooth functioning of the election at risk. (*Ibid.*) This is especially the case in counties that are already upgrading their systems and would have to implement additional changes. (*Ibid.*)

Aside from the technological difficulties with implementing Plaintiffs' proposed system, extensive voter education efforts would be required to ensure that NPP voters understand that they would be able to request an NPP ballot and cast a vote for any party's candidate, but that, depending on which candidate they vote for, their vote may not be counted. Adding to the difficulty of this task, efforts to educate NPP voters about their options for primary voting under the current system are already underway. The Secretary issued a press release on October 21, 2019, announcing which parties have authorized NPP voters to participate in their primaries in March. (Lean Decl., Ex. 2.) That announcement, as expected, triggered media coverage explaining that NPP voters may vote in the Democratic, Libertarian, and American Independent

[5] Before the Secretary may approve a voting system, he must provide for a 30-day public review period and conduct a public hearing. (§ 19211; Lapsley Decl. at ¶ 5.)

Party primaries, but not in the Republican, Peace and Freedom, or Green Party primaries. (*Id.*, Exs. 3 & 4.) Despite any efforts the Secretary and county elections officials could make to educate voters about the new system were Plaintiffs' requested relief to be granted, it is highly likely that some NPP voters would receive a ballot listing all candidates for all parties and cast their ballot for a candidate whose party will not count NPP votes without realizing that their vote will not be counted.[6]

In addition, current law requires county elections officials to mail notices to all permanent vote-by-mail NPP voters informing them that they may request a vote-by-mail ballot for a political party if the party has authorized NPP voters to participate in its primary election. (§ 3205, subd. (b); Lean Decl., ¶ 5.) Counties could have begun mailing those notices on October 21 and may continue until December 14, 2019. (Lean Decl., ¶ 5.) Some counties have opted to provide such notices to all NPP voters, not just those on the list of permanent vote by mail voters. (*Ibid.*) As such, many notices are likely to have gone out before the Court even hears Plaintiffs' motion. To change course now would be sure to result in increased voter confusion.

IV. PLAINTIFFS' REQUESTED REMEDY WOULD VIOLATE THE ELECTIONS CODE AND THE CALIFORNIA CONSTITUTION AND IS NOT SUPPORTED BY ANY AUTHORITY

Plaintiffs do not ask this Court to invalidate section 13102, which details the procedure for California's presidential primaries. Instead, they ask the Court to order the Secretary to conduct a primary different than that described in section 13102. Under the Plaintiffs' proposal, NPP voters would be given a ballot that includes the names of all presidential candidates who have qualified in the primary, that vote would be tallied, and the political parties could choose to include those votes in their official count or not. (Op. Brief at p. 1.) This system would directly contradict section 13102, which requires that NPP voters receive a nonpartisan ballot that includes only "the names of candidates for nonpartisan offices, voter-nominated offices, and measures to be voted for at the primary election" but allows NPP voters to request the ballot of a political party if the

[6] It is not entirely clear from Plaintiffs' briefing whether the primary system they propose would require NPP voters to use the new NPP ballot listing all candidates for all parties, or whether NPP voters could still request a ballot for one of the parties that has authorized them to vote in its primary as currently provided by statute.

party has authorized NPP voters to participate. The law is clear that "a public official faithfully upholds the Constitution by complying with the mandates of the Legislature, leaving to courts the decision whether those mandates are invalid." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1100 (citations omitted).) And "[a] court has no power to order a public official to commit an act in violation of a valid statute." (*Sonoma County Nuclear Free Zone v. Sup. Ct.* (1987) 189 Cal.App.3d 167, 178.) Even if the Court saw fit to invalidate section 13102, the proper remedy would not be to impose a new primary election system, but to give the Legislature an opportunity to adopt a different statutory scheme.

Granting the requested relief would also require the Secretary to violate the California Constitution's guarantee that "[a] voter who casts a vote in an election in accordance with the laws of the State shall have that vote counted." (Cal. Const. art. II, § 2.5.) Plaintiffs' proposed method of NPP primary voting would violate this provision because NPP voters who cast a ballot for a candidate from a political party that opts to count NPP ballots would not have their votes counted. One California Court of Appeal previously rejected a request to compel the Secretary of State to allow voters to cast write-in votes in general elections even though those votes would not be counted. (*Field, supra*, 199 Cal.App. at p. 366.) The plaintiff in that case argued that the law at issue "preserve[d] the right to *cast* write-in votes in the general election for voter-nominated offices, even though [the law] prohibit[ed] those votes from being *counted*." (*Ibid.*) But the Court stated that "[i]t would make no sense to authorize the voters to cast votes that cannot be counted," and that, in any event, the law at issue did not require such a system. (*Id.* at p. 367.) It makes no more sense to allow voters to cast votes that will not be counted in this case than it did in *Field*. The Secretary should not be required to allow NPP voters to cast ballots that will not actually be considered by the relevant political party. Nor should he be required to provide a separate ballot for those who choose to remain free of any association with a political party simply so they can express their views about those parties' candidates.

CONCLUSION

For the foregoing reasons, the motion for preliminary injunction should be denied.

Dated: November 5, 2019

Respectfully Submitted,

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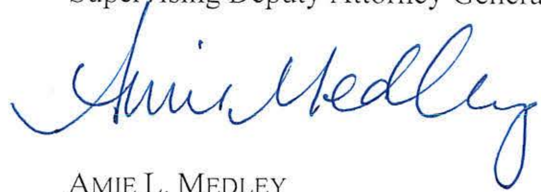

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DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

Case Name: **Boydston, Jim, et al. v. Alex Padilla, et al**
Case No.: **CIVDS1921480**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the **Golden State Overnight [GSO]**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On November 5, 2019, I served the attached **DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 5, 2019, at Los Angeles, California.

Beth L. Gratz
Declarant

Signature

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