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11
12 **SUPERIOR COURT OF CALIFORNIA**
13 **COUNTY OF SAN BERNARDINO**

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

17 Plaintiffs and Petitioners,

18 v.

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

21
22 Defendants and Respondents.

Case No: CIVDS1921480

**PLAINTIFFS AND PETITIONERS'
OPPOSITION TO DEFENDANTS ALEX
PADILLA AND STATE OF CALIFORNIA'S
MOTION FOR JUDGMENT ON THE
PLEADINGS**

Action Filed: July 23, 2019

Department: S-32 (Hon. Wilfred J. Schneider, Jr.)

Hearing Date: October 2, 2020

Hearing Time: 9:00 a.m.

23
24 Plaintiffs and Petitioners Jim Boydston, Steven Fraker, Daniel Howle, Josephine Piarulli, Jeff
25 Marston, Lindsay Vurek, Linda Carpenter Sexauer, and Independent Voter Project (collectively,
26 "Plaintiffs") respectfully submit this brief in opposition to the motion for judgment on the pleadings
27 filed by Defendants Alex Padilla and the State of California (collectively, "Defendants").
28

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1 I. INTRODUCTION

2 As the Court considers this motion, it must keep in mind that “no party preference” (“NPP”) voters who want to vote for the presidential candidate of their choice face barriers that party-affiliated voters do not face. Under California’s current system for conducting presidential primary elections, NPP voters may not vote for the candidate of their choice without having to take steps that party-affiliated voters need not take. Furthermore, in some cases NPP voters must surrender their constitutional rights of non-association and align themselves with a political party in order to vote for a candidate who belongs to that party. Lastly, California’s party-centric approach to conducting the presidential primary is subsidized by taxpayers, even though parties are private organizations.

10 Consequently, Defendants’ motion for judgment on the pleadings should be denied in its entirety because they have failed to demonstrate that Plaintiffs’ allegations fail to state a cause of action as a matter of law. Defendants argue that Plaintiffs’ claims are foreclosed by prior case law; specifically, they contend that *Clingman v. Beaver*, 544 U.S. 581 (2005) (“*Clingman*”), and *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (“*Jones*”), are controlling authority over ***whether NPP voters have the right to cast a vote in the State-funded presidential primary election without their having to align themselves with one of the qualified political parties.*** They are wrong.

17 Defendants misapply these cases, as did this Court in its ruling denying Plaintiffs’ preliminary injunction. While *Clingman* and *Jones* have important holdings and reasoning that bear on this case, the questions before this Court concern different litigants, a different perspective (protecting voters versus protecting political parties), and a different question. Plaintiffs agree that political parties have First Amendment rights as described in *Clingman* and *Jones*; this lawsuit does not challenge those holdings. In fact, what Plaintiffs allege is that they, as individual voters, ***also*** have First Amendment rights – rights addressed by *Clingman*, *Jones*, and other cases – within a completely different context.

24 Defendants are impermissibly infringing on those rights by and through the current modified-closed primary election system. This infringement only occurs because ***the State*** has imposed an important hurdle into the public election process that protects the rights of the private political parties to the detriment of NPP voters. In fact, every fundamental right that the State has asserted in its Motion

1 as belongs to private political parties also belongs to individuals (from whom the parties actually
2 derive their rights). And from that perspective, the State forces NPP voters to navigate confusing rules
3 and forfeit fundamental rights as a precondition to casting a primary vote for the presidential candidate
4 of their choice. It is from the perspective of these individuals – the NPP voters – that this case is
5 brought and should be adjudicated.

6 Because Plaintiffs have alleged sufficient facts to state a claim under both the state and federal
7 constitutions, Defendants’ motion should be denied.

8 II. BACKGROUND

9 The State of California, through the Secretary of State, currently administers a so-called
10 “modified-closed” presidential primary election. FAC ¶¶ 2, 39. Under this system, the State has
11 transferred control over presidential primary ballot access to the qualified political parties¹ and only
12 those voters that the political parties “approve” may participate. *Id.*; *see also id.* at ¶¶ 44-48 (describing
13 current party rules). This modified-closed primary system was devised in response to the United States
14 Supreme Court decision in *Jones* (discussed more fully below). It is against this backdrop that
15 Plaintiffs bring their claims.

16 III. ALLEGATIONS

17 Notably, Defendants do not challenge Plaintiffs’ specific factual allegations. *See generally*
18 *Motion*, pp. 9:24-11:9. Defendants simply argue that Plaintiffs’ claims are foreclosed by *Clingman*,
19 *Jones*, and other case law. Regardless of the heading Plaintiffs (or Defendants) give each claim, the
20 complaint alleges facts sufficient to support that: (1) Plaintiffs have certain rights under the California
21 and U.S. Constitutions, (2) Defendants are impermissibly and severely violating or infringing upon
22 those rights, and (3) Plaintiffs are entitled to relief under the state and federal constitutions.

23 Plaintiffs’ allegations are set forth fully in the First Amended Complaint (“FAC”) and are
24 summarized below.

25
26
27
28 ¹ Political parties are qualified by the Secretary of State. *See* FAC ¶ 40.

1 The right to vote and the right to associate (or not associate) are fundamental and are protected
2 by both the California and U.S. Constitutions. See FAC ¶¶ 4, 15, 16, 17, 20. Primary elections are an
3 integral and important stage of the public election process. See FAC ¶¶ 8, 16, 76.

4 The only criteria to be a “qualified registered voter” in California are: (1) being a U.S. citizen
5 living in California, (2) being registered where the voter currently lives, (3) being at least 18 years old,
6 and (4) not being in prison or on parole for a felony. FAC ¶ 37. There is no requirement that a registered
7 voter identify a political party preference in order to exercise the right to vote; a voter that declines to
8 associate with a political party is registered as NPP. FAC ¶ 37. NPP voters, including Plaintiffs, are
9 prohibited from casting a vote for the candidate of their choice in a presidential primary election unless
10 they (1) register with a political party or (2) request a crossover ballot from those political parties that,
11 by party rule, allow NPP voters to participate. See FAC ¶¶ 44-48.

12 Plaintiffs are all citizens and voters in the State of California. See FAC ¶¶ 29-35. Plaintiffs
13 meet all criteria to be qualified registered voters in the State of California. See *id.* ***Plaintiffs are either***
14 ***registered as NPP, or would prefer to register as NPP, and desire to participate in the presidential***
15 ***primary election without being forced to register or otherwise associate with a political party.*** See
16 FAC ¶ 36. Plaintiffs do not demand that the political parties count their vote towards the selection of
17 the parties’ respective nominees; nor could they. See *generally* FAC; see also FAC ¶¶ 14, 49 (the
18 results of the presidential primary election do not determine the political parties’ nominees). ***Plaintiffs***
19 ***merely seek an equal opportunity to exercise their fundamental right to participate in the voting***
20 ***process and to express their political views and preferences at the polls, unencumbered by the***
21 ***condition of registering with a political party.*** FAC ¶¶ 29-36.

22 Defendants failure to provide equal access to the presidential primary election process to all
23 qualified voters violates the rights of Plaintiffs and other similarly situated voters under the California
24 and U.S. Constitutions. See FAC ¶¶ 3, 16, 17, 36, 53-87.

25 In sum, the State’s effort to protect the associational rights of political parties resulted in a
26 presidential primary system that, instead, violates state and federal rights of individual voters. With
27 the percentage of voters registered as “no party preference” now approximately 25% of the electorate,
28

1 the level of *de facto* voter suppression due to the party-controlled primary election process is
2 constitutionally (and morally) untenable. FAC ¶¶ 4, 6, 13, 51.

3 **IV. STANDARD OF REVIEW**

4 “A motion for judgment on the pleadings serves the function of a demurrer, challenging only
5 defects on the face of the complaint.’ [Citation.] As with a demurrer, ‘[t]he grounds for a motion for
6 judgment on the pleadings **must appear on the face of the complaint** or from a matter of which the
7 court may take judicial notice.’ ([Citation.] citing Code Civ. Proc., § 438, subd. (d).)” *Eckler v.*
8 *Neutrogena Corp.*, 238 Cal. App. 4th 433, 439 (2015) (emphasis added). When filed by a defendant
9 (as relevant here), “a motion for judgment on the pleadings tests the sufficiency of the complaint to
10 state a cause of action.” *Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore*, 162
11 Cal. App. 4th 1331, 1337 (2008) (citations omitted); Civ. Proc. Code § 438(c)(1)(B)(ii).

12 In assessing the complaint, the Court must accept all factual allegations by Plaintiffs as true
13 and give those allegations a liberal construction. *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468,
14 515–16 (2000). A complaint’s minor imperfections will be ignored, and a motion for judgment on the
15 pleadings should be overruled if “the necessary facts are shown to exist, although inaccurately or
16 ambiguously stated, or appearing by necessary implication only.” *Anderson v. Bank of Lassen Cty.*,
17 140 Cal. 695, 699 (1903) (ruling on a general demurrer).

18 For claims pleaded under section 1983 of title 42 of United States Code, California state courts
19 apply the federal standard of review for a motion to dismiss. *Rubin v. Padilla*, 233 Cal. App. 4th 1128,
20 1144 (2015). “Under that standard, dismissal is proper only where it appears **beyond doubt** that the
21 plaintiff can prove no set of facts in support of the claims that would entitle him to relief. [Citation.]
22 Either way, [the court] must assume the truth of the complaint’s properly pleaded or implied factual
23 allegations. [Citation.] . . . In addition, [the court] give[s] the complaint a reasonable interpretation,
24 and read it in context. [Citation.]” *Id.* (internal citations and quotation marks omitted; emphasis added).
25 “In line with California practice, the court . . . construes the allegations, and any reasonable inferences
26 that may be drawn from them, in the light most favorable to the plaintiff.” *Arce v. County of Los*
27 *Angeles*, 211 Cal. App. 4th 1455, 1471 (2012).

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V. ARGUMENT & ANALYSIS

Each “citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction,” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), even though “the right to vote in state elections is nowhere expressly mentioned” in the Constitution, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966). Here in California, the right of its citizens to vote has been “recognized as one of the highest privileges of the citizen.” *Spier v. Baker*, 120 Cal. 370, 375 (1898). This privilege includes the right to vote in primary elections:

[T]he right of suffrage, everywhere recognized as one of the fundamental attributes of our form of government is guaranteed and secured by the Constitution of this state to all citizens who are within the requirements therein provided. [Citations.] This constitutional right of the individual citizen includes the right to vote ‘at all elections which are now or may hereafter be authorized by law (Const. of Calif., art. II, § 1), **including the right to vote at primary elections.** [¶] . . . the legislature has no power to deprive any citizen of the state, who fills all the requirements demanded by [the state constitution], from voting [in a primary election].

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

“The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, see *Wesberry v. Sanders*, 376 U.S. 1, 6-7 (1964), or, as here, the freedom of political association.” *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). While the right to vote may be reasonably regulated, where the regulation is challenged on constitutional grounds, “[a] court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Defendants’ motion should be denied because they misapply the law and because Plaintiffs have stated a plausible claim. First, Defendants apply the governing case law out of context and to a question not being asked by Plaintiffs. Second, Plaintiffs are only required to plead facts sufficient to

1 state a plausible claim in order to defeat a motion for judgment on the pleadings. As demonstrated
2 above and below, Plaintiffs have met their burden.

3 **A. The Governing Law Protecting the First Amendment Right of Political Parties**
4 **Does Not Foreclose Plaintiffs' Claims.**

5 This case is *not* governed by *Jones* or *Clingman* in the way Defendants describe. Those cases
6 analyzed the First Amendment association rights of the *private political parties* in *selecting the*
7 *parties' nominees* and under what circumstances burdens imposed by the state justified those burdens.
8 However, as discussed below, the fundamental right to vote and be free from forced political
9 associations are precisely the rights Plaintiff seek to vindicate in this case. Nothing about Plaintiffs'
10 claims or the relief they seek imposes on political parties in the slightest.

11 **1. Jones does not foreclose Plaintiffs' claims.**

12 Defendants argue that Plaintiffs' claims are foreclosed by the Supreme Court's decision in
13 *Jones*. Defendants' error is two-fold. First, the question answered in *Jones* was whether a *political*
14 *party* had a First Amendment right to associate (or not associate) with non-party affiliated voters *in*
15 *the process of selecting the party's nominee*, not whether an unaffiliated (NPP) voter has the right to
16 cast a vote in the public process that is the presidential primary election without the condition of having
17 to affiliate with one of the qualified political parties. Second, the legal principles in *Jones* actually
18 support Plaintiffs' claims.

19 In 1996, the voters of California passed Proposition 198 and thereby changed the state's
20 primary system from a "closed" partisan primary, where only party members can vote for candidates
21 of their party, to a "blanket" primary in which "[a]ll persons entitled to vote, including those not
22 affiliated with any political party, shall have the right to vote . . . for any candidate regardless of the
23 candidate's political affiliation." *Jones*, 530 U.S. at 570 (citing Elec. Code § 2001). Four political
24 *parties* challenged the blanket primary system, successfully arguing that it severely burdened their
25 First Amendment right to associate (or not associate) because it "force[d] the political parties to
26 associate with—to have their nominees, and hence their positions, determined by—those who, at
27 best have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." *Id.*

1 at 577 (emphasis added). The Court found “Proposition 198 forces petitioners [*i.e.*, political parties]
2 to adulterate *their candidate-selection process*—the ‘basic function of a political party,’ [citation.]—
3 by opening it up to persons wholly unaffiliated with the party.” *Id.* at 581 (emphasis added). In
4 declaring Proposition 198 unconstitutional *as applied*, the Court held that a political party has the First
5 Amendment right to not associate with voters that decline to register with the party. *Id.* at 581.
6 Therefore, the State could not require political parties, through a blanket primary system, to associate
7 with non-party affiliated voters (whether registered as NPP or with another party) in their candidate-
8 selection process. *Id.*

9 *Jones* stands for the proposition that political parties have the right to decide who their
10 nominees, their “standard-bearers,” will be. *Jones* does not stand for the proposition that the
11 constitutional rights of individual voters are secondary to those of the political parties. In fact, it’s
12 quite the contrary. The Court specifically recognized that a voter’s right “to cast a meaningful vote”
13 was a fundamental right. *Id.* at 573 n.5. The Court also recognized that the State’s interests in
14 “promoting fairness, affording voters greater choice, increasing voter participation, and protecting
15 privacy” could be compelling but were not “*in the circumstances of this case.*” *Id.* at 584 (italics in
16 original). The “constitutionally crucial” characteristic that doomed Proposition 198 was that the
17 primary voters were *choosing the political parties’ nominees*, not that affiliated and unaffiliate voters
18 were given equal opportunity to participate and express themselves. *Id.* at 585-586; *see also id.* 573
19 n.5 (“the associational ‘interest’ in *selecting the candidate* of a group to which one does not belong []
20 falls far short of a constitutional right” (emphasis added)). The Court noted that “[i]f the ‘fundamental
21 right’ to cast a meaningful vote were really at issue in this context, *Proposition 198 would be not only*
22 *constitutionally permissible but constitutionally required.*” *Id.* at 573 n. 5 (emphasis added). Indeed,
23 the Court in dicta opined that “a *nonpartisan* blanket primary” would be constitutionally permissible.
24 *Id.* at 585 (italics in original). “Under a nonpartisan blanket primary, a State may ensure more choice,
25 greater participation, increased ‘privacy,’ and a sense of ‘fairness’—all without severely burdening a
26 political party’s First Amendment right of association.” *Id.* at 586. Thus, *Jones* did not foreclose
27 Plaintiffs’ claims but rather opened the door wide open for them.

2. **Clingman does not foreclose Plaintiffs' claims.**

1 Defendants similarly argue that Plaintiffs' claims are foreclosed by *Clingman*, and they are
2 again similarly mistaken. First, the question answered in *Clingman* was whether requiring a voter to
3 disaffiliate from one political party in order to participate **in the primary election of another political**
4 **party** severely burdened the latter **political party's** First Amendment right to associate with non-party
5 affiliated voters **in the process of selecting of party's nominee**. Second, the legal principles in
6 *Clingman* also support Plaintiffs' claims.

7 In *Clingman*, the Oklahoma semi-closed primary law permitted a political party to invite its
8 own party members and voters registered as independent (similar to NPP) to participate in its primary
9 election but did not permit a political party to similarly invite members **registered to other parties** to
10 participate. *Clingman*, 544 U.S. at 585. The Libertarian Party of Oklahoma ("LPO") wanted to invite
11 **all voters** – Libertarian, independent, Republican or Democrat – to participate **in its presidential**
12 **primary election** and the state refused to allow it. *Id.* at 584-585. The question was "whether the
13 Constitution requires that voters who are registered in other parties be allowed to vote in the LPO's
14 primary." *Clingman*, 544 U.S. at 588. The Supreme Court held that this primary system did not violate
15 the free-association rights of political parties that would want to invite any and all voters to participate
16 in their primary elections and that the state's regulatory interest justified the restriction. *Id.* at 584,
17 593-594.

18 The concern in *Clingman* was the "voter who was unwilling to disaffiliate from another party
19 to vote in the LPO primary" and whether voters were "locked in" to a particular affiliation. *Id.* at 589,
20 591. The Court found that "requiring voters to register with a party [*i.e.*, disaffiliate from one party
21 and join another] prior to participating in the **party's primary** minimally burdens voters' associational
22 rights." *Id.* at 592 (emphasis added). Importantly, the result of the primary vote would "assist in
23 selecting the Libertarian Party's candidates for the general election." *Id.* at 588. For the same reasons
24 the Supreme Court struck down California's blanket primary in *Jones*, it upheld Oklahoma's semi-
25 closed primary in *Clingman*. *See id.* at 588-589. Just as in *Jones*, the focus in *Clingman* was the effect
26 of the challenged law on the **political parties'** nominee-selection process, which is similarly inapposite
27 to the questions before this Court dealing with the challenged law's impact on individual voters.
28

1 B. Plaintiffs’ FAC States a Plausible Claim as Alleged

2 1. Plaintiffs Have Alleged a Plausible Claim under the First Amendment
3 of the United States Constitution (42 U.S.C. § 1983): Denial of First
4 Amendment Right of Non-Association.

5 Plaintiffs, as individual voters, have the First Amendment right not to be forced to associate
6 with a political party as a mandatory precondition for participating in the presidential primary election
7 process. Just as the political parties have the right not to associate with voters who have not
8 demonstrated a sufficient level of commitment to the party, each individual voter has the right not to
9 associate with a political party that may hold positions antithetical to those of the voter as a
10 precondition for casting an advisory primary vote for a particular candidate for President of the United
11 States. *Jones*, 530 U.S. at 574; *see also Janus v. Am. Fed’n of State, Cty., & Mun. Employees, Council*
12 *31*, 138 S. Ct. 2448, 2463 (2018) (“The right to eschew association for expressive purposes is likewise
13 protected”); *Pacific Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 9 (1986) (“forced
14 associations that burden protected speech are impermissible”); *Roberts v. United States Jaycees*, 468
15 U.S. 609, 623 (1984) (“Freedom of association . . . plainly presupposes a freedom not to associate.”).
16 The *Jones* Court concluded that the right to associate and not to associate are fundamental and of
17 extreme importance, warranting strict scrutiny of any law that infringes upon that right. *See Jones*, 530
18 U.S. at 574; *see also Rosario v. Rockefeller*, 410 U.S. 752, 767 (1973) (“[courts] have uniformly
19 recognized that any serious burden or infringement on such ‘constitutionally protected activity’ is
20 sufficient to establish a constitutional violation.”). Given that precedent, Plaintiffs’ challenge should
21 be afforded the same level of scrutiny.

22 Defendants frame Plaintiffs’ claims as requests to infringe upon the political parties’
23 associational rights. *See* Motion, p. 15:5-6. ***This could not be further from the truth or the plain text***
24 ***of the operative complaint.*** First, Plaintiffs do not seek to associate with any political party. *See* FAC
25 ¶¶ 29-36. In fact, Plaintiffs are asking to be relieved of the unconstitutional burden of having to
26 associate with a political party – through registration with the party or through participation in the
27 ***party’s*** primary election – in order to exercise their right to vote in the taxpayer-funded public process
28 that is the presidential primary election. FAC ¶ 36. Nor are Plaintiffs asking to participate any parties’

1 presidential primary election or nominating process; the political parties' presidential nominating
2 processes are wholly separate from the presidential primary election and the election has no legal
3 bearing on those processes anyway.² See FAC ¶ 49; see also *Democratic Party of U.S. v. Wisconsin*
4 *ex rel La Follette*, 450 U.S. 107, 126 (1981) (holding that state could not bind its Democratic
5 delegation to results of open primary). Moreover, even *Jones* noted that “[w]e have consistently
6 refused to overlook an unconstitutional restriction upon some First Amendment activity simply
7 because it leaves other First Amendment activity unimpaired.” *Jones*, 530 U.S. at 581 (citing *Spence*
8 *v. State of Wash.*, 418 U.S. 405, 411 n. 4 (1974) (rejecting notion that freedom of expression is
9 “minuscule and trifling” because there are “thousands of other means available to (him) for the
10 dissemination of his personal views”)).

11 Plaintiffs allege that they have either registered for a party in order to exercise their
12 fundamental right to participate in a presidential primary election or, by virtue of their NPP status,
13 have not been afforded an equal opportunity to participate in this integral stage of the election process.
14 FAC ¶¶ 29-36. Either way, they face an unconstitutional restriction in the presidential primary that no
15 party-affiliated voter faces.

16 **2. Plaintiffs Have Alleged a Plausible Claim under Article II, Section 5(c)**
17 **of the California Constitution: Failure to Conduct an Open**
18 **Presidential Primary.**

18 Defendants erroneously contend that Plaintiffs have not alleged a violation under Article II,
19 section 5(c), of the California Constitution.

20 Section 5(c) requires the Legislature to provide *inter alia* “an open presidential primary
21 whereby the candidates on the ballot are those found by the Secretary of State to be recognized
22 candidates throughout the nation or throughout California for the office of President of the United
23 States.” Defendants claim that this only requires that a ballot be “open to all nationally-recognized
24 presidential candidates without the requirement for those candidates to gather and submit qualified
25 signatures.” Motion, p. 12:9-12. While Plaintiffs concede this history, it begs the question: what

26 ² As Plaintiffs have stated more than once thus far, they are not asking to have political parties
27 count the presidential-primary votes of NPP voters in the parties' final tallies. Plaintiffs are suing only
28 to ensure that NPP voters are given the opportunity of political expression and exercise that party-
affiliated voters are given under California's taxpayer-subsidized primary system.

1 happens when a “nationally recognized” presidential candidate does not want to affiliate with a
2 California qualified political party? There is no requirement in Section 5(c) that such a candidate
3 associate with a political party. What if the candidate is himself or herself an “independent”? On which
4 ballot would the independent candidate appear? And importantly here, which voters will have the
5 ability to cast their ballot in favor of that candidate? *See* FAC ¶ 17. Indeed, there is no mechanism for
6 a candidate who is not a member of a qualified party to participate in the primary election. *See* FAC ¶
7 42. Under the State’s current system, an “independent” voter would be registered as NPP and would
8 only receive a nonpartisan ballot which does not include an option to vote for any presidential
9 candidates, even if that candidate is also an “independent.” *See* FAC ¶ 43. A system that
10 disenfranchises independent (NPP) candidates necessarily disenfranchises the independent (NPP)
11 voters, including Plaintiffs. *See, e.g.*, FAC ¶¶ 30, 32 (“including NPP candidates”). Thus, the necessary
12 and logical extension of Section 5(c)’s requirement that any “nationally recognized” presidential
13 candidate be included on the primary ballot is that voters should have the right to vote for any candidate
14 that chooses to run, even if that candidate is an “independent.”

15 **3. Plaintiffs Have Alleged a Plausible Claim under Article I, Section 7 of**
16 **the California Constitution and the First and Fourteenth Amendments**
17 **of the United States Constitution (42 U.S.C. § 1983): Denial of**
18 **Substantive Due Process.**

19 Next, Defendants incorrectly argue that Plaintiffs fail to state a claim for denial of substantive
20 due process under the California Constitution and the U.S. Constitution.

21 Article I, section 7, of the California Constitution provides that “[a] person may not be deprived
22 of life, liberty, or property without due process of law or denied equal protection under the laws.” The
23 Fourteenth Amendment to the United States Constitution contains nearly identical language. *See* U.S.
24 Const., 14th Amend., § 1. In California courts, due-process claims under either constitution are given
25 identical treatment.

26 The due-process clause protects “fundamental rights and liberties,” which are “deeply rooted
27 in the Nation’s history and tradition.” *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997). To
28 that end, government is forbidden from infringing on one’s fundamental rights or liberty interests

1 unless the infringement is narrowly tailored to serve a compelling state interest. *Dawn D. v. Superior*
2 *Ct. (Jerry K.)*, 17 Cal. 4th 932, 939 (1998).

3 California has adopted the United States Supreme Court's methodology for assessing
4 substantive due-process claims. "First, the court must make a 'careful description of the asserted
5 fundamental liberty interest.'" *Id.* at 940 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-721
6 (1997)). "Second, the court must determine whether the asserted interest, as carefully described, is one
7 of our fundamental rights and liberties." *Id.* "Only if a court decides the asserted liberty interest is a
8 fundamental interest protected by the due process clause does it weigh the state's countervailing
9 interest . . . to justify the state's infringement of the liberty interest." *Id.* at 940-941.

10 "The right to vote freely for the candidate of one's choice is of the essence of a democratic
11 society, and any restrictions on that right strike at the heart of representative government." *Reynolds*
12 *v. Sims*, 377 U.S. 533, 555 (1964).³ And the right to associate in furtherance of common political
13 beliefs includes "the right not to associate." *Jones*, 530 U.S. at 574.

14 Defendants admit: "No one disputes that the right to vote is fundamental." Motion, p. 19:5.
15 Moreover, Defendants assert that "Plaintiffs' election claims are properly analyzed under the First
16 Amendment and Equal Protection of the Fourteenth Amendment" because those are "particular
17 Amendment[s] that provide[] an explicit textual source of constitutional protection." Motion, p. 19:6-
18 11. Yet ironically, throughout this motion, Defendants argue that Plaintiffs have no rights under the
19 First or Fourteenth Amendments. *See* Motion, p. 17:10-14. Defendants cannot have it both ways.

20 Plaintiffs are citizens and voters in California. *See* FAC ¶¶ 29-35. Plaintiffs wish to be able to
21 exercise their fundamental right to cast a vote for their candidate of choice in the presidential primary
22 election without the unconstitutional burden of having to associate with a political party. FAC ¶¶ 29-
23 36. The current modified-closed primary system prohibits Plaintiffs (and other NPP voters) from
24 participating in the presidential primary election based solely on their lack of affiliation (either through
25 formal registration with the party or affirmatively requesting a crossover ballot) with a qualified
26

27 ³ Indeed, "'the right to have one's vote counted' has the same dignity as 'the right to put a ballot
28 in a box.' And these rights must be recognized in any preliminary election that in fact determines the
true weight a vote will have." *Gray v. Sanders*, 372 U.S. 368, 380 (1963).

1 political party. *See* FAC ¶¶ 45-48. The current modified-closed primary system unnecessarily requires
2 Plaintiffs (and other NPP voters) to associate (either through formal registration with the party or
3 affirmatively requesting a crossover ballot) with a political party as precondition to participating in
4 the presidential primary election. *See id*; *see also id.* at ¶ 36. Plaintiffs have plead facts sufficient to
5 support their claims for violation of substantive due process under the California and U.S.
6 Constitutions.

7 **4. Plaintiffs Have Alleged a Plausible Claim under Article I, Section 7 of**
8 **the California Constitution and the First and Fourteenth Amendments**
9 **of the United States Constitution (42 U.S.C. § 1983): Denial of Equal**
10 **Protection.**

11 Next, Defendants mistakenly argue that Plaintiffs have failed to state a claim for denial of equal
12 protection under the laws.

13 Equal protection under the law is guaranteed by both the California Constitution and the United
14 States Constitution. *See* U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7. “Equal protection of
15 the laws simply means that similarly situated persons shall be treated in like manner unless there is a
16 sufficiently good reason to treat them differently.” *People v. Lopez*, 38 Cal. App. 5th 1087, 1108
17 (2019). “The first step in evaluating any equal protection claim is determining whether there are two
18 groups of individuals who are similarly situated with respect to the legitimate purpose of the law but
19 are being treated differently.” *Id.* (internal quotation marks omitted). Next, the Court must “ascertain
20 whether the Legislature has a constitutionally sufficient reason to treat the groups differently.” *Id.*
21 Laws that discriminate based on a “suspect classification” (*e.g.*, race, gender, national origin) or affect
22 a fundamental right – like the right to vote and the right to freedom of association – must be narrowly
23 tailored to further a compelling government interest. *Id.*

24 Here, we have two groups of similarly situated persons who receive radically different
25 treatment under the current modified-closed primary system. There are affiliated voters, those who
26 have formally registered with a qualified political party and intend to participate in that party’s primary
27 election. *See* FAC ¶ 44. These voters receive a ballot with the presidential candidates affiliated with
28 their registered party. *Id.* Then there are the voters unaffiliated with any political party. *See* FAC ¶¶
37. These voters are formally registered as NPP and receive a NPP ballot with no option to cast a vote

1 for a presidential candidate. FAC ¶ 43. NPP voters may request a crossover ballot (thereby associating
2 with the party) but the party must have a rule allowing NPP participation. See FAC ¶¶ 45-47. By way
3 of illustration, in 2020 any NPP voter wishing to participate in a Democratic presidential primary
4 election could have requested a crossover ballot but an NPP voter wishing to participate in the
5 Republican presidential primary could not request a crossover ballot. See FAC ¶¶ 46-48. Not only is
6 this access to the primary ballot inequitable, but the extra, onerous step of having to request a special
7 crossover ballot is not required for any other class of voter and must be taken by the NPP voter for
8 each primary election.

9 The State administers and conducts the presidential primary election. FAC ¶¶ 38, 50. This
10 converts the political parties' primary rules into government-sanctioned discrimination. *Jones*, 530
11 U.S. at 573 (“[W]hen a State prescribes an election process that gives a special role to political parties,
12 it endorses, adopts and enforces the discrimination [by the political parties] – so that the parties’
13 discriminatory action becomes state action under the Fifteenth Amendment.”). The purpose of the
14 primary law is to obtain an advisory vote from the electorate. See FAC ¶ 49. All votes cast in a
15 presidential primary are non-binding on the political parties in their selection of their general election
16 nominee. *Id.* By enforcing the *political parties’ rules* on who can and cannot participate in *their private*
17 presidential primary election ballot, the State is denying certain unaffiliated voters access to the *State’s*
18 public presidential primary election process and is treating similarly situated voters differently without
19 a sufficiently good reason; this is all-the-more obvious given that the State could simply provide these
20 NPP voters with a ballot of *their own*. The disparate treatment of similarly situated voters furthers no
21 legitimate state interest; any interest in limiting unaffiliated (NPP) voters’ access to the presidential
22 primary is that of the political parties, not of the State.

23 5. **Plaintiffs Have Alleged a Plausible Claim under Article XVI, Section 3**
24 **of the California Constitution: Unconstitutional Appropriation of**
Public Funds.

25 Subject to exceptions not applicable here, “[n]o money shall ever be appropriated or drawn
26 from the State Treasury for the purpose or benefit of any corporation, association, asylum, hospital, or
27 any other institution not under the exclusive management and control of the State as a state institution,
28

1 nor shall any grant or donation of property ever be made thereto by the State....” Cal. Const., art. XVI,
2 § 3.

3 The political parties are private organizations not “under the exclusive management and
4 control of the State.” Because the modified-closed primary system serves a predominantly private
5 purpose, explicitly disenfranchises a certain class of voter based solely on their political non-
6 affiliation, and is paid for by public monies appropriated from the State Treasury, Elections Code
7 section 13102(b) violates the California Constitution. Defendants contend that they are privileged and
8 even required to pay for the administration of the partisan presidential primary election. *See* Motion,
9 pp. 20:1-21:7. However, the authority cited is unavailing. First, *Burdick v. Takushi* addressed the
10 public purpose behind *general elections*. *See* Motion, p. 20:5-9. A primary election serves a
11 substantially different purpose than a general election, particularly for the position of President of the
12 United States, in that it is advisory and intended to serve only the interests of the parties. *See* FAC ¶
13 49. The modified-closed primary election, as currently conducted in California, serves only the
14 interests of the qualified political parties (an interest that is minimized by the fact that the results of
15 the partisan primary election have no legal bearing on the parties’ respective nominee-selection
16 processes). FAC ¶ 49. Second, a presidential primary system that violates the law cannot serve a
17 legitimate public purpose. Indeed, while “[t]he Legislature . . . [must] provide for registration and free
18 elections,” preventing upwards of 25% of registered voters from participating in those “free elections”
19 for the sole benefit of the political parties (who get to control voter access to the ballot without having
20 to honor the results) is an unconstitutional appropriation of public funds. *See* FAC ¶¶ 69-74. Thus,
21 Plaintiffs have sufficiently alleged a plausible claim for the misappropriation of public funds.

22 VI. CONCLUSION

23 For all the foregoing reasons, the Court should deny Defendants’ motion for judgment on the
24 pleadings in its entirety.⁴

25 ⁴ ““In the case of either a demurrer or a motion for judgment on the pleadings, leave to amend should
26 be granted if there is any reasonable possibility that the plaintiff can state a good cause of action.””
27 *Eckler*, 238 Cal. App. 4th at 439 (citations omitted); *see also* Civ. Proc. Code § 438(h)(1), (2).
28 “Liberality in permitting amendment is the rule, not only where a complaint is defective as to form
but also where it is deficient in substance, if a fair prior opportunity to correct the substantive defect
has not been given.” *McDonald v. Sup. Ct.*, 180 Cal. App. 3d 297, 304 (1986) (in the demurrer

1 Date: September 21, 2020.

Respectfully submitted,

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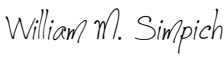
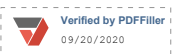
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27 context). In an abundance of caution, if the Court is in any way inclined to grant Defendants' motion,
28 Plaintiffs request leave to amend their complaint as leave to amend is routinely and liberally granted.
See id.

PROOF OF SERVICE

1. My name is Ruth Flores. I am over the age of eighteen. I am employed in the State of California, County of San Bernardino.

2. My business _____ residence address is Briggs Law Corporation, 99 East "C" Street, Suite 111 Upland, CA 91786.

3. On September 21, 2020, I served _____ an original copy a true and correct copy of the following documents: PLAINTIFFS AND PETITIONERS' OPPOSITION TO DEFENDANTS ALEX PADILLA AND STATE OF CALIFORNIA'S MOTION FOR JUDGMENT ON THE PLEADINGS

4. I served the documents on the person(s) identified on the attached mailing/service list as follows:

by personal service. I personally delivered the documents to the person(s) at the address(es) indicated on the list.

by U.S. mail. I sealed the documents in an envelope or package addressed to the person(s) at the address(es) indicated on the list, with first-class postage fully prepaid, and then I

deposited the envelope/package with the U.S. Postal Service

placed the envelope/package in a box for outgoing mail in accordance with my office's ordinary practices for collecting and processing outgoing mail, with which I am readily familiar. On the same day that mail is placed in the box for outgoing mail, it is deposited in the ordinary course of business with the U.S. Postal Service.

I am a resident of or employed in the county where the mailing occurred. The mailing occurred in the city of _____, California.

by overnight delivery. I sealed the documents in an envelope/package provided by an overnight-delivery service and addressed to the person(s) at the address(es) indicated on the list, and then I placed the envelope/package for collection and overnight delivery in the service's box regularly utilized for receiving items for overnight delivery or at the service's office where such items are accepted for overnight delivery.

by facsimile transmission. Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the fax number(s) shown on the list. Afterward, the fax machine from which the documents were sent reported that they were sent successfully.

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I declare under penalty of perjury under the laws _____ of the United States of the State of California that the foregoing is true and correct.

Date: September 21, 2020

Signature: 

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San Bernardino Superior Court Case No. CIVDS1921480

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