Docket No. E076797

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

JIM BOYDSTON, STEVEN FRAKER, DANIEL HOWLE, JOSEPHINE PIARULLI, JEFF MARSTON, and INDEPENDENT VOTER PROJECT,
Plaintiffs and Appellants,

v.

ALEX PADILLA, as SECRETARY OF STATE; and STATE OF CALIFORNIA
Defendants and Respondents.

San Bernardino County Superior Court
Case No. CIVDS1921480
(Judge Wilfred J. Schneider, Jr. – Department S-32)
From Judgment after Court Trial

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL FOURTH **APPELLATE DISTRICT, DIVISION** TWO	COURT OF APPEAL CASE NUMBER: E076797
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 176284 NAME: Cory J. Briggs (State Bar no. 176284)//Janna M. Ferraro (State Bar no. 328921) FIRM NAME: Briggs Law Corporation STREET ADDRESS: 99 East "C" Street, Suite 111 CITY: Upland STATE: CA ZIP CODE: 91786 TELEPHONE NO.: 909-949-7115 FAX NO.: E-MAIL ADDRESS: cory@briggslawcorp.com ATTORNEY FOR (*name*): Plaintiffs and Petitioners Jim Boydston, et al	SUPERIOR COURT CASE NUMBER: CIVDS1921480
APPELLANT/ PETITIONER: JIM BOYDSTON; STEVEN FRAKER, et al. RESPONDENT/ REAL PARTY IN INTEREST: ALEX PADILLA, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party *(name*): Jim Boydston

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest *(Explain):*
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[ ] Continued on attachment 2.

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Date: January 20, 2022

Cory J. Briggs
(TYPE OR PRINT NAME)

Cory J. Briggs
(SIGNATURE OF APPELLANT OR ATTORNEY)

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1. This form is being submitted on behalf of the following party *(name*): Steven Fraker

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1. This form is being submitted on behalf of the following party *(name*): Daniel Howle

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ATTORNEY FOR (*name*): Plaintiffs and Petitioners Jim Boydston, et al

SUPERIOR COURT CASE NUMBER: CIVDS1921480

APPELLANT/ PETITIONER: JIM BOYDSTON; STEVEN FRAKER, et al.

RESPONDENT/ REAL PARTY IN INTEREST: ALEX PADILLA, et al.

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1. This form is being submitted on behalf of the following party *(name*): Josephine Piarulli

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CERTIFICATION OF WORD COUNT
(Cal. R. of Court 8.204(c)(1).)

I, Cory J. Briggs, hereby certify, pursuant to California Rule of Court 8.204(c)(1), that this Appellants' Opening Brief is set in 13-point Century Schoolbook font and contains under 9,230 words, as counted by the Microsoft 365 Word word-processing program used to generate the brief.

Dated: January 20, 2022.

Cory J. Briggs

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I. INTRODUCTION

The State has millions of "no party preference" or "NPP" voters. The question presented here is whether the State may lawfully require any registered voter wanting to vote in the presidential-primary election for a candidate who belongs to a political party of which the voter is not a member to associate with that party as a condition to receiving a ballot with the preferred candidate's name on it.

With an ever-increasing number of voters opting to register as NPP – for a variety of reasons, almost all of which boil down to dissatisfaction with the political parties, concerns for privacy, or both – a substantial segment of the State's electorate is effectively disenfranchised from the first integral stage of the presidential-election process. These voters either associate against their wishes with the political party to which their preferred candidate belongs – in order to obtain from the State a ballot with that candidate's name on it – or they cannot vote for their preferred candidate. This disenfranchisement has far-reaching negative consequences on political discourse, on voter turnout, and perhaps most importantly on faith in the electoral process.

Contrary to the trial court's assertion, the State's current presidential-primary system has never been given the stamp of approval by the U.S. Supreme Court. Rather, in response to the High Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), the State simply modified its presidential-primary system from one that violated the rights of the plaintiffs in that case – namely, private political parties – to a system that violates

the rights of the plaintiffs in this case – namely, private individuals consisting of NPP voters.

Plaintiffs' position in this case is truly modest: It is entirely possible for the State to administer a presidential-primary system that protects the rights of both political parties and individual voters. Because it is easy enough to do, there is no good reason to force non-partisan individuals to associate against their wishes with a political party in order to exercise their right to vote for the candidate of their choice in the presidential primary.

Rather than articulating the ***State's*** interests in defending this case, Respondents invoke the interests of ***political parties*** "to limit the voters' ability to roam among political parties." Ironically, several remedies for the infringement on the individual's right to vote, like giving NPP voters their own NPP primary ballot, not only would respect non-partisan individuals' constitutional rights against forced political associations, but also would significantly reduce the number of NPP voters forced to roam into a political party's private-nomination proceedings as their only means of participating in presidential-primary election just to drop out afterward.

For the reasons discussed herein, the trial court erred in sustaining the demurrer and dismissing the operative complaint because Plaintiffs have alleged facts sufficient to state a claim and their novel claims deserve to be heard on the merits.

II. STATEMENT OF THE CASE

A. Factual Allegations[1]

Both the right to vote and the right to associate – or not associate – are protected by the U.S. and California Constitutions. *See* II AA 805 (¶ 5), 808-809 (¶¶ 16, 17, 18, 21). Primary elections are an integral and important stage of the public-election process. *See* II AA 805 (¶ 2), 806 (¶ 9), 808 (¶ 17), 818 (¶ 87). The State's only criteria to be a "qualified registered voter" – and, thus, participate in the public-election process – are that the individual must be: (1) a U.S. citizen living in California, (2) registered where he or she currently lives, (3) at least 18 years old, and (4) not in prison or on parole for a felony. II AA 812 (¶ 38). There is ***no requirement*** that a registered voter identify a political party preference – that is, to associate with a political party – in order to exercise the right to vote. *Id*. A voter who declines to associate with a political party is registered as "no party preference" (*i.e.*, NPP). *Id*.

Defendants and Respondents Alex Padilla, as Secretary of State,[2] and the State of California (hereinafter collectively,

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[1] For purposes of demurrer, Plaintiffs' factual allegations must be accepted as true and given a liberal construction. *Gerwan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 515-16 (2000); Civ. Proc. Code § 452.

[2] Since the filing of this lawsuit, Alex Padilla was appointed by California's governor in 2020 to fill the U.S. Senate seat vacated by former Senator (and now Vice-President) Kamala Harris. *See* ALEX PADILLA: U.S. SENATOR FOR CALIFORNIA, *About*, https://www.padilla.senate.gov/about/ (last visited Dec. 2, 2021).

"Respondents" or the "State") are required to administer the presidential-primary election. *See* II AA 814 (¶¶ 51, 53). The Secretary of State is the chief elections officer tasked with "adopting regulations to assure the uniform application and administration of state election laws." *Id.* (¶ 53). Presidential-primary elections are publicly funded from county treasuries. *Id.* (¶ 51).

In 2016, approximately 4.7 million voters – nearly 25 percent of the electorate – were registered as NPP. *See* II AA 807 (¶ 14), 814 (¶ 52). Whether or not those voters could cast a vote for a presidential-primary candidate was completely controlled by the private political parties. *Id.*; II AA 807-808 (¶¶ 15-16), 809 (¶ 23); *see also* II AA 812 (¶¶ 41-43; only presidential candidates that are members of qualified political parties can participate as candidates in the primary election).

NPP voters are not given the same access to the State's presidential-primary process. By default, NPP voters receive a "non-partisan" primary ballot ***from the State***, but the ballot ***omits*** all candidates for President of the United States. II AA 812 (¶ 44). NPP voters can gain access to the presidential-primary process in only two ways: (1) they can waive or relinquish their unaffiliated status and register with the political party of their

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Assemblywoman Dr. Shirley N. Weber was appointed to succeed Mr. Padilla and is the current Secretary of State. *See* CALIFORNIA SECRETARY OF STATE, *Dr. Shirley N. Weber: Biography*, https://www.sos.ca.gov/administration/about/ (last visited Dec. 2, 2021).

preferred candidate; or (2) they can request a crossover ballot from a political party, but only if that party, by its own internal rules, allows NPP voters to participate.[3] *See* II AA 812-813 (¶¶ 44-49). Said another way, NPP voters can participate in the presidential primary ***only if authorized by the private political party***. II AA 813 (¶ 46); *see also* II AA 805 (¶ 4).

In 2016 and 2020, only three of the six qualified political parties[4] (American Independent, Libertarian, and Democratic) allowed NPP voters to even request a crossover ballot from the State; the other three political parties (Green, Peace & Freedom, and Republican) did not. *Id*. (¶¶ 47-49). Therefore, NPP voters who wanted to participate in the presidential-primary election but did not want to formally register with a political party could only cast a vote for those candidates appearing on the American Independent, Libertarian, and Democratic primary ballots (and even then only if they went through the process for requesting a crossover ballot); and were precluded from casting a vote for those candidates appearing on the Green, Peace & Freedom, and Republican primary ballots unless they formally associated (*i.e.*, registered) with the respective political party. *Id*.

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[3] NPP voters that want to cast a vote for a presidential candidate associated with one of the political parties that does not permit crossover voting have no other options but to formally associate with the party. *See* II AA 813 (¶ 49).

[4] Political parties are "qualified" by the Secretary of State. *See* II AA 812 (¶ 41).

The process by which an NPP voter can request a crossover ballot ***from the State*** has its own constitutionally concerning burdens. NPP voters must individually request a crossover ballot, either from their poll worker or, if voting by mail, by requesting one by a certain deadline in advance of the primary election. *See id*. (¶ 48); *see also* II AA 814-815 (¶¶ 54, 55).[5] However, if NPP voters do not request the ballot using the correct terminology (*i.e.*, requesting a "crossover" ballot), they will not receive it and poll workers are barred from making any suggestions or providing additional information to these voters about their options. II AA 815 (¶ 56). In contrast, party-affiliated voters are automatically provided a ballot ***by the State*** that includes at least some of the presidential-primary candidates. *See id*. (¶ 57); *but see* II AA 813 (¶ 45) (party-affiliated voters can only vote for candidates in the primary of the political party for which they are registered).

Even where a crossover ballot is available to an NPP voter, the burdens imposed ***by the State*** on voters obtaining that crossover ballot creates confusion and imposes additional, onerous steps on NPP voters desiring to cast a vote in a primary election. *See* II AA 814-815 (¶¶ 54-59). For example, NPP voters who vote by mail (also known as "absentee voters") must either (a) respond to an innocuous postcard to request a crossover ballot; (b) bring their NPP ballot to their polling place, surrender it, and request a crossover ballot at the polling place; or (c) register with one of the

[5] When an NPP voter does request a crossover ballot, their names and contact information are provided to that political party for future marketing. *See* II AA 50:14-16.

qualified private political parties. II AA 814 (¶ 54). Respondents are aware that many counties, when they send out the aforementioned postcards (which often resemble junk mail) to NPP voters, set arbitrary deadlines for NPP voters to respond with what type of crossover ballot they want in order for them to receive that ballot. II AA 814-815 (¶ 55). Reasonable NPP voters are led to believe that if they miss the deadline, they have lost their right to vote in the presidential-primary election, which is not the case. *Id*. Furthermore, Respondents fail to adequately inform NPP voters of their options and poll workers are barred from making any suggestions or providing additional information to these voters about their options. II AA 815 (¶ 56).

The result of these burdens is confusion and the disenfranchisement of NPP voters. *See* II AA 805 (¶ 4), 807 (¶ 13). Respondents have an obligation to provide a free and fair election equally to every qualified registered voter, regardless of party affiliation (or lack thereof) and regardless of what the political parties do with the results. *See* II AA 815 (¶ 59).

Plaintiffs are all citizens living in California. *See* II AA 811 (¶¶ 30-36). Plaintiffs meet all criteria to be qualified registered voters in the State. *See id*. ***Plaintiffs are either registered as NPP, or would prefer to register as NPP, and desire to cast a vote for a presidential-primary candidate without being forced to register or otherwise associate with a political party***. *See* II AA 811-812 (¶ 37). In 2016 and 2020, each individual Plaintiff was unable to vote for the candidate of their choice in the presidential primary election unencumbered by the condition to

declare a party preference or otherwise associate with a political party. *Id*.

Plaintiffs do not demand that the political parties ***use*** their vote ***in selecting the parties' respective nominees***; nor could they. *See generally* II AA 820 (Prayer). The ultimate selection of each political party's nominee is conducted according to private party rules, not the presidential primaries conducted by the several states. *See* II AA 807-808 (¶ 15), 813-814 (¶ 50), 815 (¶¶ 58, 61). ***Plaintiffs merely seek an equal opportunity to exercise their fundamental right to participate in the presidential-primary process the State has established and to express their political views and preferences at the polls, unencumbered by the condition of registering or otherwise associating with a political party***. II AA 811-812 (¶¶ 30-37).

Respondents fail to provide equal access to the presidential primary election process to all qualified voters. *See* II AA 805 (¶ 4), 808-809 (¶¶ 17, 18), 811-812 (¶ 37), 815-820 (¶¶ 62-100). Regardless of how the private political parties ultimately select their nominees, Respondents have the same obligations to NPP and party-affiliated voters alike: provide free and fair elections that are accessible by all qualified voters; and accept, tally, and report the result of each validly cast vote. II AA 815 (¶ 59).

Respondents' perverse efforts to protect the associational rights of ***political parties*** has resulted in a presidential-primary system that violates state and federal constitutional rights of ***individual voters***, including Plaintiffs. *See* II AA 805 (¶ 4), 808-809 (¶¶ 16-18). With NPP voters now approximately 25 percent of

the electorate in 2020 (and growing), the level of *de facto* voter suppression due to the party-controlled primary-election process is constitutionally (and morally) untenable. II AA 805-806 (¶¶ 5, 7), 807 (¶¶ 13-14), 814 (¶ 52).

California's primary elections are paid from county treasuries. II AA 814 (¶ 51; citing Elec. Code § 13001). As a result of this transferring of control of the primary-election process to the political parties and prioritizing the rights of political parties over the rights of individual voters, California's current presidential-primary system serves a predominantly private purpose – *i.e.*, to wholly benefit the private political parties – and unconstitutionally appropriates public funds for a private purpose. *See* II AA 817-818 (¶¶ 81-85); Cal. Const., art. XVI, § 3.

B. Procedural Background

Plaintiffs filed their complaint for declaratory and injunctive relief in July 2019. I AA 13. Respondents answered generally denying Plaintiffs' allegations and asserting seven affirmative defenses. I AA 34-36.

Plaintiffs filed a motion for preliminary injunction seeking to require Respondents to administer a presidential-primary election in 2020 where any registered voter could cast a ballot for his or her candidate of choice without having to declare or otherwise associate with a political party. *See* I AA 38-39. The motion was briefed, and the trial court denied the motion. *See generally* I AA 43 (opening brief), 285 (opposition brief), 354 (reply brief), 390-398 (ruling on motion dated Nov. 19, 2019).

The parties stipulated to allow Plaintiffs to file a first amended complaint to add an additional plaintiff. I AA 331-334. The first amended complaint was filed on December 6, 2019. I AA 339. Because the amendment only added an additional plaintiff and made no other changes, Respondents' original answer was deemed their answer to the first amended complaint. I AA 332.

Thereafter, Respondents filed a motion for judgment on the pleadings ("MJOP") as to the first amended complaint. I AA 425. The motion was briefed, and the trial court granted the motion with leave to amend. *See* II AA 429 (opening brief), 759 (opposition brief), 781 (reply brief), 793-803 (ruling on motion dated Oct. 2, 2020). Plaintiffs filed their second amended complaint ("SAC") on October 22, 2020. II AA 804.

Respondents demurred to Plaintiffs' SAC on the ground that each and every cause of action failed to state facts sufficient to constitute a cause of action against Respondents. *See* II AA 824-825. The demurrer was briefed, and the trial court sustained the demurrer without leave to amend. *See* II AA 827 (opening brief), 860 (opposition brief), 885 (reply brief), 895-910 (minute order and ruling on demurrer dated Jan. 29, 2021). The trial court directed counsel for Respondents to prepare the order or judgment of dismissal after hearing; however, Respondents did not comply. *See* II AA 895.

On March 29, 2021, Plaintiffs filed their notice of appeal despite no judgment being entered in order to preserve their appeal rights. *See* II AA 911. On April 26, 2021, this Court ordered Plaintiffs to file and serve a file-stamped copy of the judgment.

Pursuant to the direction of this Court, Plaintiffs prepared a proposed judgment that was subsequently signed and entered by the trial court on April 28, 2021. II AA 936-937.

C. Statement of Appealability

The trial court granted Respondents' demurrer without leave to amend on January 29, 2021. *See* II AA 895. On March 29, 2021, Plaintiffs filed their notice of appeal despite no judgment being entered in order to preserve their appeal rights. *See* II AA 911. Thereafter, pursuant to the direction of this Court, Plaintiffs caused a judgment of dismissal to be entered by the trial court on April 28, 2021. II AA 936-937. A copy of the judgment was filed with this Court on April 30, 2021. *See* Cal. R. Ct. 8.104(d)(2) ("The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment."); *Los Altos Golf & Country Club v. Cty. of Santa Clara*, 165 Cal. App. 4th 198, 202–03 (2008) (liberally construing premature appeal of an order sustaining a demurrer as being taken from the later filed judgment of dismissal) ("*Los Altos Golf*"). Thus, this appeal is timely.

III. STANDARD OF APPELLATE REVIEW

The appellate court's review from a judgment of dismissal following the sustaining of a demurrer is de novo. *Los Altos Golf*, 165 Cal. App. 4th at 203. The appellate court examines the operative complaint to determine whether it "states facts sufficient

to state a cause of action under any possible legal theory" and is "not limited to plaintiffs' theory of recovery or 'form of action' pled in testing the sufficiency of the complaint." *City of Dinuba v. Cty. of Tulare*, 41 Cal. 4th 859, 870 (2007).

IV. DISCUSSION

A. Standard of Review on Demurrer

A demurrer is limited to defects ***on the face*** of the complaint. Civ. Proc. Code § 430.30; *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985). The court determines whether the operative complaint alleges facts stating a cause of action under ***any theory*** and "give[s] the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." *Los Altos Golf*, 165 Cal. App. 4th at 203. A plaintiff need not allege each evidentiary fact that might eventually form part of the plaintiff's proof. *C.A. v. William S. Hart Union High Sch. Dist.*, 53 Cal. 4th 861, 872 (2012).

The court also considers matters judicially noticed and, "to the extent that the issues involve the interpretation of statutory provisions, [the court] review[s] the parties' arguments independently, as statutory construction is a question of law." *Los Altos Golf*, 165 Cal. App. 4th at 203.

For claims pleaded under section 1983 of title 42 of the United States Code, California's state courts apply the federal standard of review for a motion to dismiss. *Rubin v. Padilla*, 233 Cal. App. 4th 1128, 1144 (2015). "Under that standard, dismissal is proper only where it appears ***beyond doubt*** that the plaintiff

can prove no set of facts in support of the claims that would entitle him to relief. [Citation.] Either way, [the court] must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] ... In addition, [the court must] give the complaint a reasonable interpretation, and read it in context. [Citation.]" *Id*. (internal citations and quotations omitted; emphasis added). "In line with California practice, the court ... construes the allegations, and any reasonable inferences that may be drawn from them, in the light most favorable to the plaintiff." *Arce v. Cty. of Los Angeles*, 211 Cal. App. 4th 1455, 1471 (2012).

B. Plaintiffs' Second Amended Complaint Alleges Facts Sufficient to State a Claim

Accepting Plaintiffs' allegations as true and giving the SAC a liberal construction, as the Court must, the SAC contains facts sufficient to state claims under both the state and the federal Constitutions.

1. Plaintiffs Adequately Allege California's Presidential-Primary System Violates Both State and Federal Constitutions

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) ("*Communist Party*").

"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).

California's presidential-primary system impermissibly infringes on the constitutional rights of Plaintiffs and other similarly situated NPP voters. It is true that courts have recognized that participating in elections will impose some

burdens on individual voters, but California's current system goes beyond the minimal burdens that are constitutionally permissible, resulting in widespread (and ever-increasing) NPP voter disenfranchisement.

i. California's Presidential-Primary System Violates Plaintiffs' First Amendment Right to Freedom of Association

Plaintiffs' sixth cause of action alleges violations of Plaintiffs' First Amendment right ***not*** to associate. II AA 819-820.

Both the U.S. and California Constitutions protect the right of citizens to freely associate. U.S. Const., amends. I, XIV; Cal. Const., art. I, §§ 2 & 7; *see also Jones*, 530 U.S. at 574. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Tashijian*, 479 U.S. at 214 (citations omitted). "'The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.'" *Id*. (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)). This right is understood to include the right ***not*** to associate. *Jones*, 530 U.S. at 574; *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *see also Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018) ("The right to eschew association for expressive purposes is likewise protected"); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 9 (1986) ("forced associations that burden protected speech are impermissible").

Here, Plaintiffs, as individual voters, have the constitutional right to participate in all integral stages of the election process, including primary elections. II AA 808 (¶ 17), 818 (¶ 87); *see Communist Party*, 20 Cal. 2d at 542-543. Plaintiffs also have the right to associate – or not associate – for political purposes. *Jones*, 530 U.S. at 574-575; *Tashijian*, 479 U.S. at 214. All Plaintiffs are qualified registered voters in California. *See* II AA 811-812 (¶¶ 30-37). Plaintiffs were unable to vote for the candidate of their choice in the 2016 and 2020 presidential-primary elections unencumbered by a condition of declaring a party preference or otherwise associating with a political party. *Id.* (¶ 37).[6]

There are two separate processes in play when it comes to primary elections. There is the process by which the political parties' respective members cast a vote (albeit a non-binding

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[6] For example, Plaintiffs Howle, Boydston, and Fraker are all registered as NPP and in 2016 and 2020 they were unable to cast a vote for any presidential candidate without first associating – either through formally registering or requesting a crossover ballot – with one of the qualified political parties. II AA 811 (¶¶ 30-33). As a further example, Plaintiff Piarulli would prefer to be registered as NPP but has affiliated with the Democratic Party to ensure that she has full opportunity to cast a vote for a presidential candidate in the next primary election. *Id.* (¶ 35). In the first example, the Plaintiffs have been denied their right to participate in the presidential primary because they exercised their right not to associate with a qualified political party. In the second example, the Plaintiff has been forced to waive their right not to associate in order to exercise their right to participate in the presidential primary. This is precisely the kind of unconstitutional condition on the exercise of a fundamental right that is impermissible. *See also supra* note 5.

advisory vote) for their parties' respective nominees. *Cf. Jones*, 530 U.S. at 572-573. And then there is the larger public-election process administered by the State. *See* Cal. Const., art. II, §§ 1, 2; *see also* Elec. Code § 2300 (Voter Bill of Rights). Respondents are responsible for administering the State's primary-election process. *See* II AA 805 (¶¶ 2, 6), 814 (¶ 53). In this respect, Respondents' obligations to individual voters are the same regardless of party-affiliation or non-affiliation: Respondents "must provide free and fair elections that are accessible by all qualified voters, and they must accept, tally, and report the results of each validly cast vote." II AA 815 (¶ 59). "What the political parties do with primary votes cast in favor of their candidates is left entirely to these parties' respective rules." *Id.*, ¶ 58; *see also*, *e.g.*, Elec. Code §§ 6002(b), 6300(b), 6461(c).

In sustaining Respondents' demurrer, the trial court held that the association requirement about which Plaintiffs complain "is coming from the political parties themselves to which they are authorized to do under [*Jones*]." II AA 906:18-20. However, that holding was erroneous. "[W]hen a State prescribes an election process that ***gives a special role to political parties***, it 'endorses, adopts and enforces [the discriminatory acts]' that the parties … bring into the process – so that the parties' discriminatory action becomes state action under the Fifteenth Amendment." *Jones*, 530 U.S. at 573 (emphasis added). Therefore, when ***Respondents*** – on behalf of the political parties – require voters to register (*i.e.*, associate or affiliate) with a political party

(or request a crossover ballot[7] if allowed by the political party) to participate in the presidential-primary election or relinquish the right to participate in that primary process altogether, the requirement is the result of ***state action***. *See id*. Such requirements must then fall within the strictures of the U.S. and California Constitutions and, as alleged by Plaintiffs, where California's presidential primary system as currently administered does not so fall. *See generally* II AA 804-820 (SAC).

Just as political parties have the right not to associate with voters who have not demonstrated a sufficient level of commitment to the party, ***each individual voter*** has the right not to associate with a political party that may hold positions antithetical to those of the voter as a precondition for casting an ***advisory*** vote for a particular primary candidate for President of the United States (who by law must be party-affiliated or meet other qualifying conditions, *see* II AA 812 (¶¶ 41-43)). The State, through Respondents, has made party-affiliation a mandatory precondition for participating in the public process that is the State's component of the presidential-primary election (which Respondents administer using public monies; *see* section IV-B-2, *infra*). II AA 809 (¶ 19).

The freedom to associate – or not – is a protected constitutional right. Accepting Plaintiffs' allegations as true, as the Court must, Plaintiffs' SAC alleges facts sufficient to state a

[7] As discussed below, this is not a simple process, not available in all circumstances, and itself an unconstitutional burden.

claim that California is violating those rights through its ***semi-closed*** presidential-primary system. Thus, the demurrer should have been overruled.

ii. California's Presidential-Primary System Violates Plaintiffs' Right to Equal Protection

Plaintiffs' third cause of action alleges that California's presidential-primary system violates Plaintiffs' equal-protection rights. II AA 817.

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

Here, NPP voters (like Plaintiffs) are similarly situated to party-affiliated voters in that all must be qualified voters in California, all have the constitutional rights to vote (including presidential-primary elections), and no vote cast in favor of any presidential-primary candidate is binding on a political party. *See* II AA 812 (¶ 38), 813 (¶ 50), 815 (¶¶ 58, 59, 61); *see also Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 126 (1981) (holding that state could not bind its Democratic delegation to results of open primary) ("*La Follette*"). Moreover, the State's obligations to voters – whether NPP or party-affiliated – are the same. *See* II AA 815 (¶ 59).

There can be little argument that party-affiliated voters and NPP voters receive different treatment under California's system for presidential-primary elections. *See*, *e.g.*, II AA 812-813 (¶ 44), 814-815 (¶¶ 54-57). In the context of ***private political parties*** selecting ***their*** respective nominee, this disparate treatment serves a legitimate purpose and is perfectly legal. *See Jones*, 530 U.S. at 575, 577. However, when ***the State*** is discriminating in this manner and disparately treats qualified registered voters in the public-primary process, such treatment is constitutionally impermissible and violates equal protection. *See* II AA 817 (¶¶ 76-79). While the political parties have a valid reason for treating voters differently, ***the State*** does not.

First, in denying NPP voters (like Plaintiffs) the opportunity to cast a vote in a presidential primary, Respondents are obstructing NPP voters' access to an integral stage of the presidential-election process merely because they chose to not

associate with a political party. In this respect, the U.S. Supreme Court's legislative-apportionment cases (*i.e.*, upholding the "one person, one vote" rule) are analogous and instructive as they speak to the same rights and principles that underlie Plaintiffs' claims.

> ***No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live***. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964) (emphasis added). Elsewhere, the High Court has held Alabama's apportionment scheme based on population data that were over 60 years old violated equal protection because it ***did not consider population shifts and growth***, reasoning:

> Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And ***the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged***. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live.

Reynolds v. Sims, 377 U.S. 533, 565 (1964) (emphasis added). Similarly, the Court has rhetorically observed: "How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area, or because he lives in the smallest rural county?" *Gray v. Sanders*, 372 U.S. 368, 379 (1963).

California's system does not consider that the rise or shift in the number of voters who register as NPP (and the corresponding reduction in the number of voters registering with the political parties) is creating similar inequity. *See* I AA 72-73 ("Other" column), 75 ("No Party Preference" column). Providing political parties and their voters with State-administered presidential primary ballots but not providing NPP voters with ballots giving them presidential choices dilutes the NPP voters' voice and expression of political preference. California's understanding of party affiliation as a minimal burden within the context of participating in a political party's nomination proceedings cannot be squared with the ever-increasing number of voters who do not want to associate with any of the political parties or participate in their private nomination processes at all.

As alleged in the SAC, the presidential primary is scarcely more than a State-sponsored straw poll. II AA 813 (¶ 50). By a private party's internal rules, it is not required to accept the results of the primary election. *Id.*; Elec. Code §§ 6002(b), 6300(b), 6461(c); *see also La Follette*, 450 U.S. at 126. How the private political parties select their "standard bearer" is a wholly separate process; the State cannot interfere with the private affairs of the

political parties. *See Jones*, 530 U.S. at 575; *see also*, *e.g.*, Elec. Code §§ 6002(b), 6300(b), 6461(c).

Respondents already send out various forms of the primary ballot and report separate primary results by party. *See* II AA 815 (¶¶ 59, 60). Thus, there is no legitimate reason to deny NPP voters the right to express their political preference in the same way that party-affiliated voters can. All things being equal and assuming all other requirements for being a qualified registered voter are met, ***Respondents*** lack a sufficient reason to treat these two similarly situated groups of voters – party-affiliated and NPP – differently.

By denying NPP voters the right to participate in the presidential-primary election – *i.e.*, giving NPP voters no voice or opportunity to express themselves at this integral stage of the election process unless they are willing to waive or relinquish their constitutional right not to associate with a political party – undermines NPP voters' right to vote in a primary election. *Cf. Wesberry*, 376 U.S. at 17-18.

Next, Respondents also treat NPP voters differently by requiring them to jump through additional, onerous hoops in order to participate in the presidential-primary election as crossover voters without a sufficiently good reason for doing so.

The presidential-primary system imposes burdens on NPP voters' ability to cast a vote in the public presidential-primary election that are not borne by party-affiliated voters. *See* II AA 814-815 (¶¶ 54-57). Party-affiliated voters ***by default*** get to participate in the presidential-primary election. II AA 815 (¶ 57). NPP voters ***by default*** do ***not*** get to participate; instead, NPP voters are

provided a nonpartisan ballot which does not include an option to cast a vote for any presidential candidate. Elec. Code § 2151(b)(1); II AA 812 (¶ 44). Setting aside the fact that forced association with a political party as a precondition for exercising one's right to vote is also constitutionally impermissible (*see* section IV-B-1-i, *supra*), the confusing steps that an NPP voter needs to navigate in order to cast a crossover vote in a presidential-primary election without sacrificing their non-partisan status are unduly burdensome and have the effect of disenfranchising millions of voters each election cycle.[8] *See* II AA 805 (¶ 4), 807 (¶¶ 13-14), 814-815 (¶¶ 54-57).

The State administers and conducts the presidential-primary election in accordance with the private political parties' rules, including the exclusion of NPP voters. *See* II AA 812 (¶ 44), 813 (¶¶ 46-49), 814 (¶ 54), 815 (¶ 57). This converts the political parties' rules into government-sanctioned discrimination. *Jones*, 530 U.S. at 573. Yet the purpose of the presidential-primary election is to obtain an ***advisory vote*** from the electorate. *See* II AA 813-814 (¶ 50). All votes cast in a presidential primary are nonbinding on the political parties in their selection of their general-election nominee. *Id.*; *see also La Follette*, 450 U.S. at 126 (holding that state could not bind Democratic delegation to result

[8] Reporting from the 2020 primary election is that, despite polls showing 75% of NPP voters wanted to vote for a Democratic presidential candidate, the statewide crossover ballot request rate was only 9%. *See* Sam Metz, *California crossover ballot rules leave millions of votes uncast?* Desert Sun (March 3, 2020, 11:16 a.m.), https://amp.desertsun.com/amp/4628142002.

of open primary). Therefore, by enforcing the ***political parties' rules*** on who may and may not participate in presidential-primary elections, ***the State*** is denying NPP voters' equal access to ***the State's*** public presidential-primary process without a sufficiently good reason for doing so. *See also* II AA 907:8-9 ("Plaintiffs [*sic*] allegations demonstrate they are treated differently than members of political party members [*sic*]."). The disparate treatment of similarly situated voters furthers no legitimate ***State interest***; even if the political parties have an interest in limiting NPP voters' access to the presidential primary election process, ***the State*** has no such interest. *See* II AA 815 (¶ 59), 817 (¶¶ 76-77), 906:4-8.

Plaintiffs allege that they have either reluctantly registered for a political party in order to exercise their fundamental right to participate in the presidential-primary elections or, by virtue of their NPP status, have not been afforded an equal opportunity to participate in this integral stage of the presidential-election process. II AA 811-812 (¶¶ 30-37). Either way, NPP voters face unconstitutional burdens on their ability to participate in the presidential-primary process that no party-affiliated voter faces. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Thus, Plaintiffs have alleged facts sufficient to support their claim for violation of equal protection under the U.S. and California Constitutions and the demurrer should have been overruled.

iii. California's Presidential-Primary System Violates Plaintiffs' Right to Substantive Due Process

Plaintiffs' second and fifth causes of action allege violations of their substantive due-process rights under the state and federal constitutions, respectively. II AA 816-817.

Article I, section 7, of the California Constitution provides that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection under the laws." The Fourteenth Amendment to the United States Constitution contains nearly identical language. *See* U.S. Const., amend., XIV § 1. The federal due-process clause protects "fundamental rights and liberties," which are "deeply rooted in the Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) ("*Glucksberg*"). To that end, government is forbidden from infringing on one's fundamental rights or liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. *Dawn D. v. Superior Ct. (Jerry K.)*, 17 Cal. 4th 932, 939 (1998).

California has adopted the U.S. Supreme Court's methodology for assessing substantive due-process claims. "First, the court must make a 'careful description of the asserted fundamental liberty interest.'" *Id*. at 940 (quoting *Glucksberg*, 521 U.S. at 720-721). "Second, the court must determine whether the asserted interest, as carefully described, is one of our fundamental rights and liberties." *Id*. "Only if a court decides the asserted liberty interest is a fundamental interest protected by the due

process clause does it weigh the state's countervailing interest ... to justify the state's infringement of the liberty interest." *Id*. at 940-941.

Here, Plaintiffs allege that they have the constitutionally protected rights not to associate with a political party if they so prefer and to vote for the candidate of their choice in the public-election process, including the presidential-primary election. II AA 808-809 (¶ 18), 818 (¶ 87). These are the fundamental liberty interests at stake in this lawsuit. *See Reynolds*, 377 U.S. at 555 ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); *accord Moore v. Ogilvie*, 394 U.S. 814, 818 (1969) ("*Ogilvie*"); *see also Jones*, 530 U.S. at 574 (the right to associate in furtherance of common political beliefs includes "the right not to associate.").[9]

Plaintiffs further allege that Respondents' administration of the presidential-primary system infringes upon these liberty interests held by Plaintiffs and other similarly situated voters. *See* II AA 811-812 (¶¶ 30-37), 816-817 (¶¶ 70-75), 818-819 (¶¶ 86-95). Plaintiffs go on to describe how their fundamental rights are being infringed by Respondents. *See*, *e.g.*, II AA 805-806 (¶¶ 5-9), 808 (¶ 16), 809 (¶¶ 21, 22), 811-812 (¶ 37), 812-814 (¶¶ 44-50), 814-815 (¶¶ 54-61). These allegations – which must be accepted as true and given a liberal construction – are sufficient to state a due-process

[9] These principles of law were confirmed by the trial court in its ruling on the MJOP. *See* II AA 797:5-11.

claim. *See Gerawan Farming, Inc.*, 24 Cal. 4th at 515-516. Therefore, this Court should reverse the trial court's order sustaining Respondents' demurrer and find Plaintiffs' SAC sufficiently alleges their due process claim.

2. Plaintiffs Allege Facts Sufficient to State a Claim under Article XVI, Section 3, of the California Constitution: Unconstitutional Appropriation of Public Funds

Plaintiffs' fourth cause of action alleges violations of Section 3 of Article XVI of the California Constitution, which prohibits the appropriation of public funds for any private purpose. This claim dovetails from the constitutional violations described above because it is the constitutionally infirm presidential-primary system administered by Respondents that causes the appropriation of public funds in support of that system to be, likewise, constitutionally infirm.

Subject to exceptions not applicable here, the California Constitution states: "No money shall ever be appropriated or drawn from the State Treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a state institution, nor shall any grant or donation of property ever be made thereto by the State…." Cal. Const., art. XVI, § 3. Notably, the political parties are private organizations ***not*** "under the exclusive management and control of the State." *See id*. They

serve their own purposes. *Accord Jones*, 530 U.S. at 573 (party affairs are not public affairs).

California's presidential-primary system violates the California Constitution because it (*i*) serves a predominantly private purpose, (*ii*) explicitly disenfranchises a certain class of voter (*i.e.*, NPP voters) based solely on their political non-affiliation or requires the relinquishment of constitutional rights to participate, and (*iii*) is financed by public monies appropriated from the State Treasury.

California's presidential-primary system only serves the interest of the political parties and their voters; in fact, the results are ***merely advisory*** (*i.e.*, not binding) in the ultimate selection of the parties' respective nominees at party conventions. *See* II AA 813-814 (¶ 50), 815 (¶¶ 58, 61). A public presidential-primary system that provides no non-partisan benefit cannot serve a legitimate public purpose. Indeed, while "[t]he Legislature ... [must] provide for registration and free elections," preventing upwards of 25 percent of registered voters from participating in those "free elections" for the sole benefit of the political parties (who get to control voter access to the ballot without having to honor the results) is an unconstitutional appropriation of public funds. *See* II AA 817-818 (¶¶ 80-85). Moreover, Respondents have the ability to administer a presidential-primary election in a manner that does not violate the rights of NPP voters. *See*, *e.g.*, II AA 815 (¶ 60).

NPP voters have to bear the tax burden for an election that serves private political parties (to which they don't belong), not the

public. While taxpayers often must pay for programs that they may not support, taxation should never be levied in a manner that creates inequitable representation. II AA 809 (¶ 19).

The allegations in the SAC are sufficient to state a claim for unconstitutional appropriation of public funds for a private purpose. Accordingly, Respondents' demurrer should have been overruled.

C. Governing Law Protecting First Amendment Rights of *Political Parties* Does Not Foreclose Plaintiffs' Claims

Both Respondents and the trial court believed that *Jones* and *Clingman* were dispositive and foreclosed Plaintiffs' claims. *See*, *e.g.*, II AA 832:22-28, 901:2-6. However, this lawsuit is ***not*** governed by *Jones* or *Clingman* in the way Respondents and the trial court described. Those cases analyzed the associational rights of ***private political parties*** in ***selecting their respective nominees*** and under what circumstances burdens imposed by the state on those rights were justified. The fundamental right to vote and to be free from forced political associations – both of which were held protected by *Jones* and *Clingman* – are precisely the rights that Plaintiffs seek to vindicate here. Nothing about Plaintiffs' claims or the relief they seek imposes anything – not a burden, and not a benefit – on political parties.

1. Jones *Does Not Foreclose Plaintiffs' Claims and Actually Strengthens Them*

Both Respondents' and the trial court agreed that Plaintiffs' claims are foreclosed by the Supreme Court's decision in *Jones*. Their error is two-fold.

First, the question answered in *Jones* was whether a ***political party*** had a First Amendment right to associate (or not) with voters not affiliated with that party ***in the process of selecting that party's nominee***. *Jones* did not consider whether a non-partisan (*i.e.*, NPP) voter has the right to participate in the State's presidential-primary election without the State-mandated condition of having to affiliate with one of the qualified political parties. Cases are not authority for propositions not considered. *In re Marriage of Cornejo*, 13 Cal. 4th 381, 388 (1996).

Second, the legal principles in *Jones* actually support Plaintiffs' claims. In 1996, California voters passed Proposition 198 and thereby changed the State's primary system from a "closed" partisan primary, in which only party members can vote for candidates of their party, to a "blanket" primary in which "'[a]ll persons entitled to vote, including those not affiliated with ***any*** political party, shall have the right to vote … for any candidate regardless of the candidate's political affiliation.'" *Jones*, 530 U.S. at 570 (citing Elec. Code § 2001). Four ***political parties*** challenged the blanket-primary system, successfully arguing that it severely burdened ***their*** First Amendment right to associate (or not) because it "force[d] the political parties to associate with – ***to have their nominees, and hence their positions, determined***

by – those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." *Id*. at 577 (emphasis added). The Supreme Court found that "Proposition 198 forces [the political parties] to adulterate ***their candidate-selection process*** – the 'basic function of a political party,' [citation] – ***by opening it up*** to persons wholly unaffiliated with the party." *Id*. at 581 (emphasis added). In declaring Proposition 198 unconstitutional ***as applied***, the Supreme Court held that a political party has the First Amendment right not to associate with voters who decline to register with that party. *Id*. at 581. Therefore, the State could not require political parties, through a blanket-primary system, to associate with non-party-affiliated voters (whether registered as NPP or with another party) ***in their candidate-selection process***. *Id*.

Jones stands for the proposition that political parties have the right to decide who their nominees – their "standard-bearers" – will be. *Jones* does not stand for the proposition that the constitutional rights of individual voters are ***secondary or subordinate*** to those of the political parties; in fact, it's quite the contrary. The Court specifically recognized that a voter's right "to cast a meaningful vote" was a fundamental right. *Id*. at 573 n.5. The Court also recognized that the State's interests in "promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy" could be compelling but were not "*in the circumstances of this case*." *Id*. at 584 (italics in original).

The "constitutionally crucial" characteristic that doomed Proposition 198 was that the primary voters were ***choosing the political parties' nominees***, not that affiliated and unaffiliated voters were given equal opportunity to express their preferred candidates for President of the United States. *Id*. at 585-586; *see also id*. 573 n.5 ("the associational 'interest' in ***selecting the candidate*** of a group to which one does not belong [] falls far short of a constitutional right" (emphasis added)).

The *Jones* Court shrugged off "the plight of the non-party-member" in dicta: "The voter who feels himself disenfranchised should simply join the party" if the voter wants to participate in that party's affairs. *Jones*, 530 U.S. at 584. But here, Plaintiffs are not looking to participate in the affairs of private political parties but only to express themselves in the public presidential-primary process. *See* II AA 805-806 (¶ 7), 807-808 (¶ 15), 811-812 (¶¶ 30-37).[10] This distinction was specifically recognized by the Court: "[i]f the 'fundamental right' to cast a meaningful vote were really at issue in this context, ***Proposition 198 would be not only constitutionally permissible but constitutionally required***." *Id*. at 573 n.5 (emphasis added). Indeed, the Court in dicta opined that "a *nonpartisan* blanket primary" would be constitutionally

[10] Plaintiffs' claims have evolved since the commencement of this lawsuit. To the extent any of Plaintiffs' claims can be construed as seeking to participate in affairs of political parties, such a construction is not intended as even the primary votes of party-members are non-binding on the political parties and are merely advisory. *See* II AA 813-814 (¶ 50), 815 (¶¶ 58, 61).

permissible. *Id*. at 585 (italics in original). "Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased 'privacy,' and a sense of 'fairness' – all without severely burdening a political party's First Amendment right of association." *Id*. at 586. Thus, *Jones* did not foreclose Plaintiffs' claims but rather opened the door wide open for them.

The question before the *Jones* Court focused on the rights that ***political parties*** have to control their nomination process. Here, in contrast, the question focuses on the rights that ***individual voters*** have to participate in the State's presidential-primary process without having to sacrifice political independence. Such a question is ripe for review. *See Jones*, 530 U.S. 581 ("We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired."); *accord Spence v. State of Wash.*, 418 U.S. 405, 411 n.4 (1974) (rejecting notion that freedom of expression is "minuscule and trifling" because there are "thousands of other means available to (him) for the dissemination of his personal views" … "'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'"). Plaintiffs believe that if faced with the question presented in this case, the nation's highest court would not be so dismissive of the rights of individual non-partisan voters.[11]

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[11] A similar declaration of "standing precedent" was made by a district court in *Moore v. Shapiro*, 293 F.Supp. 411, 414 (N.D. Ill. 1968). There the plaintiffs urged the district court to hold prior

2. Clingman *Does Not Foreclose Plaintiffs' Claims and Actually Strengthens Them*

Respondents similarly argued and the trial court ruled that Plaintiffs' claims are foreclosed by *Clingman*, and they are again similarly mistaken.

First, the question answered in *Clingman* was whether requiring a voter to disaffiliate from one political party ***in order to participate in the primary election of another political party*** burdened ***the latter political party's*** First Amendment right to associate with non-party-affiliated voters ***in the process of selecting of the latter party's nominee***. That decision had nothing to do with burdens imposed on non-partisan voters.

Second, the legal principles in *Clingman* also support Plaintiffs' claims. There, Oklahoma's semi-closed primary law permitted a political party to invite its own party members and voters registered as "independent" (similar to NPP in California) to participate in its primary election but did not permit a political party to similarly invite members ***registered to other parties*** to participate. *Clingman*, 544 U.S. at 585. The Libertarian Party of Oklahoma ("LPO") wanted to invite ***all voters*** – Libertarian, independent, Republican and Democrat – to participate ***in its presidential-primary election*** but the state refused to allow it. *Id*. at 584-585. The question was "whether the Constitution

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precedent not to be controlling and the district court declined. *Id*. When that case reached the U.S. Supreme Court, it reversed the district court's ruling and explicitly overruled the prior precedent (as plaintiffs had been urging). *See Ogilvie*, 394 U.S. at 819.

requires that voters who are registered in other parties be allowed to vote ***in the LPO's primary***." *Clingman*, 544 U.S. at 588 (emphasis added). Concluding that the answer was "no," the Court held that Oklahoma's primary system did not violate the free-association rights of the Libertarian Party, which wanted to invite any and all voters to participate in its primary election, because the state's regulatory interest justified the restriction. *Id.* at 584, 593-594.

The *Clingman* Court was concerned with the "voter who was unwilling to disaffiliate from another party to vote in the LPO primary" and whether voters were "locked in" to a particular affiliation. *Id.* at 589, 591. The Court found that "requiring voters to register with a party [*i.e.*, disaffiliate from one party and join another] prior to ***participating in the party's primary*** minimally burdens voters' associational rights." *Id.* at 592 (emphasis added). Importantly, the result of the primary vote would "assist in selecting the Libertarian Party's candidates for the general election." *Id.* at 588. For the same reasons the Court struck down California's blanket primary in *Jones*, it upheld Oklahoma's semi-closed primary in *Clingman*. *See id.* at 588-589. Just as in *Jones*, the focus in *Clingman* was on the effect of the challenged law on the ***political parties' nominee-selection process***. Again, Plaintiffs are not looking to participate in the affairs of the private political parties but rather to express themselves in the State-funded presidential-primary process. *See*

II AA 805-806 (¶ 7), 807-808 (¶ 15), 811-812 (¶¶ 30-37).[12] Political parties will remain just as free to ignore the votes cast by NPP voters, but at least NPP voters will have had their preferences tallied and reported by the State.

D. Plaintiffs' Claims Should Be Decided on the Merits

In cases like this one, the U.S. Supreme Court has laid out the analytical framework to be followed:

> "[C]onstitutional challenges to specific provisions of a State's election laws … cannot be resolved by any 'litmus-paper test' that will separate valid form invalid restrictions." [Citations.] "Instead, a court … must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justification for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights."

Tashjian, 479 U.S. at 213-214; *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Whether or not the rights and/or burdens that Plaintiffs describe in the SAC are ultimately "outweighed by the State's

[12] *See supra* note 9.

countervailing interest" involves factual determinations and a review of the evidence that goes beyond the face of the pleadings. *See Rawls v. Zamora*, 107 Cal. App. 4th 1110, 1115 (2003) ("the constitutionality of election laws can only be determined by a complete weighing of interests given the high-stake goal that elections be fair and honest."); *Nealy v. Cty. of Orange*, 54 Cal. App. 5th 594, 597 (2020), *review denied* (Dec. 16, 2020) ("In reviewing a trial court's ruling sustaining a demurrer, [the court's] focus is limited to the facts alleged on the face of the pleadings and its exhibits, and any facts subject to judicial notice."). Indeed, the cases cited by the trial court in its demurrer ruling were all decided after some form of ***evidentiary hearing*** (*i.e.*, motion for summary judgment or trial) and not through a challenge to the pleadings. *See*, *e.g.*, *Tashjian*, 479 U.S. at 211 (decided on motion for summary judgment); *Burdick*, 504 U.S. at 432 (decided on motion for summary judgment); *Jones*, 530 U.S. at 599 (decided after bench trial); *Clingman*, 544 U.S. at 584 (decided after bench trial). Implicit in these holdings is that the burdens and countervailing governmental interests cannot be determined on the pleadings. As such, this case should be permitted to advance beyond the pleadings stage and should be heard on the merits.

In its ruling sustaining Respondents' demurrer, the trial court stated: "the law is clear that the semi-closed primary system in California is constitutional and elections law will invariably impose some burden on individual voters. Plaintiffs have still failed to allege facts to demonstrate ***arbitrary acts*** on the part of the State or showing the State ***unreasonably*** deprived them of

life, liberty or property without due process." II AA 900:2-6 (underline in original; emphasis added). The trial court's ruling has two problems.

First, in stating that California's primary system is constitutional, the trial court was referring to the Supreme Court's decision in *Clingman*, which was decided on its merits based on the facts before the Court. Plaintiffs' case should be afforded the same opportunity. *Cf. Ogilvie*, 394 U.S. at 819 (overruling prior precedent based on few facts and circumstances).

Second, the trial court erroneously required a higher level of pleading that is not required by law. *See C.A.*, 53 Cal. 4th at 872 (a plaintiff need not allege each evidentiary fact). The SAC was only required to allege facts sufficient to state a claim, not allege facts sufficient to prove a claim. A liberal reading of the SAC discloses that Plaintiffs obviously believe the acts of Respondents are arbitrary and unreasonable. *See generally* II AA 804-823. Moreover, the SAC seeks declaratory relief under Code of Civil Procedure section 1060 (and analogous federal authority). In declaratory-relief actions, any doubts as to the propriety of declaratory relief should be resolved in favor of Plaintiffs. *See Filarsky v. Superior Ct.*, 28 Cal. 4th 419, 433 (2002).

Because Plaintiffs' SAC alleged facts sufficient to state a claim that California's presidential-primary system violates the U.S. and California Constitutions, Respondents' demurrer should have been overruled.

V. CONCLUSION

Plaintiffs' SAC alleged facts sufficient to state their claims and the trial court erred in holding otherwise and in requiring a heightened level of pleading to survive Respondents' demurrer. Whether or not the claimed burdens are constitutionally permissible goes beyond the face the pleadings and to the merits of Plaintiffs' claims. Plaintiffs deserve the opportunity to present their evidence of unconstitutional burdens and to have their claims heard on their merits. For these reasons, this Court should reverse the trial court's ruling that sustained Respondents' demurrer and find that Plaintiffs sufficiently alleged the claim in the SAC.