NO. 23-_____

In the Supreme Court of the United States

JIM BOYDSTON, ET AL.,

Petitioners,

v.

SHIRLEY N. WEBER, AS CALIFORNIA SECRETARY OF STATE,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where, under State law, the selection of a political party's presidential nominee is governed by internal party rules and procedures and ***not*** by the results of the State-administered presidential-primary election, may the State—consistent with the First and Fourteenth Amendments—lawfully require registered voters wanting to participate in the State-administered presidential-primary election to, as a condition of participating, formally associate with the political party of the nominee for whom the voters desire to cast a vote?

2. Did the California Court of Appeal err in concluding that primary votes cast by non-partisan ("no party preference" or "NPP") voters in California's presidential primary are not subject to constitutional protection under this Court's *Anderson/Burdick* framework merely because one or more political parties may choose not to consider those votes during their candidate-nomination process?

PARTIES TO THE PROCEEDINGS

Petitioners

- Jim Boydston, California registered voter
- Steven Fraker, California registered voter
- Daniel Howle, California registered voter
- Josephine Piarulli, California registered voter
- Jeff Marston, California registered voter
- Independent Voter Project ("IVP"), non-profit, non-partisan 501(c)(4) corporation dedicated to informing voters about important public-policy issues and encouraging non-partisan voters to participate in the State's electoral process.

Respondent

- Shirley N. Weber,
  California Secretary of State

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner INDEPENDENT VOTER PROJECT states that it is a not-for-profit entity that has not issued shares to the public and has no affiliates, parent companies, or subsidiaries that have issued shares to the public, and no publicly traded company owns a stake in it.

LIST OF PROCEEDINGS

California Supreme Court

No. S279767

Jim Boydston, Et Al., *Plaintiffs and Appellants,* v. Shirley N. Weber, as Secretary of State, etc., Et Al., *Defendants and Respondents.*

Denial of Petition for Review: July 19, 2023

California Court of Appeal, Fourth Appellate District

No. D080921

Jim Boydston, Et Al., *Plaintiffs and Appellants,* v. Shirley N. Weber, as Secretary of State, etc., Et Al., *Defendants and Respondents.*

Final Opinion: April 14, 2023

California Superior Court, San Bernadino County

Case No. CIVDS1921480

Jim Boydston; Steven Fraker; Daniel Howle; Josephine Piarulli; Jeff Marston; Lindsay Vurek; Linda Carpenter Sexauer, and Independent Voter Project, a Non-Profit Corporation, *Plaintiffs and Petitioners,* v. Alex Padilla, in His Official Capacity as California Secretary of State; State of California, and Does 1 through 1,000, *Defendants and Respondents.*

Final Judgment: April 28, 2021

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OPINIONS BELOW

Petitioners seek review of the modified Opinion of the California Court of Appeals, Fourth Appellate District, dated April 14, 2023, which is included in the Appendix ("App.") at App.2a. The original opinion was issued on March 21, 2023, but was subsequently modified in two orders included at App.30a, 34a. This opinion is published as *Boydston v. Weber*, 90 Cal. App. 5th 606 (Fourth App. Dist., Mar. 21, 2023, *as modified on denial of rehearing* Apr. 11, 2023, *as modified on* Apr. 14, 2023)

That opinion affirmed the ruling and judgment of the San Bernardino County Superior Court on the Demurrer to the Second Amended Complaint. *Boydston v. Padilla*, No. CIVDS1921480 (Cal. Super. Ct., County of San Bernardino, Jan. 29, 2021), which is included at App.38a, 41a.

The California Supreme Court entered an order denying a petition for review on July 19, 2023 which is included at App.1a. *Boydston v. Weber*, Docket No. S279767 (Cal. Sup. Ct., July 19, 2023) (*en banc*).

JURISDICTIONAL STATEMENT

The California Supreme Court summarily denied Petitioners' timely petition for review on July 19, 2023. (App.1a). This petition for writ of certiorari is timely filed and this Court has jurisdiction under 28 U.S.C. § 1257(a). *See also* 28 U.S.C. §§ 2101(c), 2104; U.S. Sup. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Elections Code Section 13102(b)

> At partisan primary elections, each voter not registered disclosing a preference for any one of the political parties participating in the election shall be furnished only a nonpartisan ballot, unless the voter requests a ballot of a political party and that political party, by party rule duly noticed to the Secretary of State, authorizes a person who has declined to disclose a party preference to vote

> the ballot of that political party. The nonpartisan ballot shall contain only the names of all candidates for nonpartisan offices, voter-nominated offices, and measures to be voted for at the primary election. Each voter registered as preferring a political party participating in the election shall be furnished only a ballot for which the voter disclosed a party preference in accordance with Section 2151 or 2152 and the nonpartisan ballot, both of which shall be printed together as one ballot in the form prescribed by Section 13207.

STATEMENT OF THE CASE

A. Introduction

California has millions of "no party preference" or "NPP" voters. With an increasing number of voters opting to register as NPP,[1] a substantial segment of California's electorate is effectively disenfranchised from the first integral stage of the presidential-election process: the presidential primary.

Under California's current so-called "semi-closed" presidential-primary system, NPP voters can only participate in the State-administered presidential-primary election if: (1) they formally associate with one of the qualified political parties or (2) their preferred candidate happens to be associated with one

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[1] Voters opt to register as NPP for a variety of reasons including (but not limited to) political ideology, dissatisfaction with the political parties, concerns for privacy, confusion, or some combination thereof.

of the three (of six) qualified political parties[2] that, under internal party rules, allow NPP voters to submit a so-called "crossover" ballot. If any NPP voters do not want to formally associate with a political party and their preferred candidate is not associated with one of the political parties that allows crossover voting, then those voters are out of luck.

What's more: The political parties can change their internal rules regarding crossover voting at virtually any time.[3] The political parties that allow crossover voting today may amend their internal rules to disallow crossover voting tomorrow (and vice-versa), leaving NPP voters who desire to exercise their constitutional rights to vote but do not want to associate with a political party in the lurch at this integral stage. This disenfranchisement of NPP voters has far-reaching negative consequences on political discourse, on voter turnout, and perhaps most importantly on faith in the electoral process.

In response to this Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) ("*Jones*"), California modified its presidential-primary system from one that violated the constitutional rights of the plaintiffs in that case—private political parties (the "blanket" primary)—to a system that

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[2] California recognizes six "qualified political parties": American Independent Party, Democratic Party, Green Party, Libertarian Party, Peace and Freedom Party, and Republican Party. *See Qualified Political Parties*, California Secretary of State, https://www.sos.ca.gov/elections/political-parties/qualified-political-parties (last visited Oct. 5, 2023).

[3] But they must follow the applicable procedures. *See* Cal. Elec. Code § 13102(c).

violates the constitutional rights of the plaintiffs in this case—private individuals consisting of NPP voters (the "semi-closed" primary). The "constitutionally crucial" detail in *Jones* was that the State's blanket presidential primary selected the political parties' nominees. That is no longer the case; under the current system, the political parties' nominees are not selected by primary voters but through the parties' respective internal rules and procedures. The question is then: *Why does the State continue to enforce a formal party-association requirement against NPP voters as a condition of participating in the State-administered presidential-primary election process?*

Petitioners' position in this case stems from a truly simple premise: If the State's presidential-primary system cannot force political parties to associate with certain voters in the context of a primary election, then it surely cannot force certain voters to associate with political parties in that same context. If the political parties have the constitutional right not to associate with certain voters, then so too must voters have the right not to associate with political parties, and the State must justify any burden on that right with a narrowly tailored law that serves a compelling state interest. The California Court of Appeal concluded that Petitioners and other NPP voters have no fundamental right to vote at an integral stage of the State's election process. The conclusion was erroneous, and this Court should grant certiorari.

B. Statement of the Case

Petitioners commenced this action against the then-Secretary of State Alex Padilla[4] and the State of California (the "State"[5]) alleging that the semi-closed presidential-primary election system it administered unconstitutionally burdened the voting and associational rights of "no party preference" or "NPP" voters by requiring them to associate with a political party in order to participate in the State-administered presidential-primary election. *See* App.43a.

The Superior Court of San Bernardino County sustained the State's general demurrer to the second amended complaint without leave to amend on the grounds that the operative pleading did not allege facts sufficient to state a cognizable constitutional claim. *See* App.55a, 57a, 58a-59a. Petitioners timely appealed the trial court's ruling and judgment to the California Court of Appeal, Fourth Appellate District.[6] *See* App.12a

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[4] *But see* App.31a (Court of Appeal ordering caption to be updated to reflect that Shirley N. Weber is the current Secretary of State for California).

[5] Based on the Court of Appeal's ruling, Petitioner acknowledges that the Secretary of State is the only proper defendant/respondent in this matter. *See* App.5a n.1. Petitioner nonetheless refers to the Secretary of State as the "State" because it is the State's regulatory scheme that is being challenged here.

[6] Petitioners' appeal was originally filed in Division Two of California's Fourth Appellate District pursuant to California Rule of Court 8.100(a)(2) ("appeal . . . taken to the Court of Appeal for the district in which the superior court is located"). After the appeal was briefed, it was transferred to Division One of the Fourth Appellate District for consideration and oral argument. *See* App.2a.

(deeming Petitioners' notice of appeal as being timely taken from the subsequently filed judgment).

In affirming the trial court's judgment, the Court of Appeal held:

> In this case, we reject the [Petitioners'] assertion of a novel and peculiar constitutional right to vote in California's presidential primary for the candidate of a political party they have chosen not to join—without having their votes count for anything other than their expressive value.

App.3a.

In particular, the Court of Appeal held that requiring NPP voters to register with a political party or request a crossover ballot was only a "slight burden" on their constitutionally protected associational rights (App.21a); that the additional "hoops" that NPP voters must jump through in order to participate in a presidential-primary election did not support a finding that the burdens on associational, substantive due process, and equal-protection rights were severe (App.24a); that the State had important regulatory interests that justified the "minimal burdens" placed on NPP voters' constitutional rights (App.26a); and that the State's primary election system did not exclusively benefit the political parties in violation of the State's constitutional prohibition on the use of public funds for a predominantly private purpose (App.27a-29a).

Petitioners timely sought rehearing in the Court of Appeal. (App.34a). The Court of Appeal denied rehearing but modified its opinion with no change in the judgment. (App.34a). The following day, at the

request of the State, the Court of Appeal certified its modified opinion for publication. (App.32a). The Court of Appeal modified its opinion a second time to replace "ALEX PADILLA" with "SHIRLEY N. WEBER" in the caption. (App.30a-31a). For ease of reference, Petitioners cite the published modified opinion, reprinted at (App.2a).

Petitioners timely sought review in the California Supreme Court on both procedural and constitutional grounds. (App.1a). On July 19, 2023, the California Supreme Court summarily denied Petitioner's petition for review without discussion. (App.1a). This petition for writ of certiorari follows.[7]

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[7] It is important to emphasize the procedural posture of this case: This case was decided on demurrer (*i.e.*, a motion to dismiss akin to a Rule 12(b)(6) motion under the Federal Rules of Civil Procedure) and was not permitted to advance beyond the pleading stage. No discovery has been conducted by either party. No evidence has been offered by either party. The "facts" of this case are those that have been alleged by Petitioners in their second amended complaint, which all courts were required to accept as true and liberally construe. *See Rubin v. Padilla*, 233 Cal. App. 4th 1128, 1144 (2015); *Arce v. Cty. Of Los Angeles*, 211 Cal. App. 4th 1455, 1471 (2012); *see also Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). Petitioners have maintained that, given the opportunity, they could offer admissible evidence showing the unconstitutional burden that California's semi-closed presidential-primary system places on NPP voters (including Petitioners) and the lack of a compelling state interest for maintaining that system.

REASONS FOR GRANTING THE PETITION

A. The Court of Appeal Erred in Concluding that the State May Lawfully Require NPP Voters to Associate with the Political Party of the Voters' Preferred Candidate as a Condition of Participating in the State-Administered Presidential-Primary Election.

1. *Anderson/Burdick* Balancing Test

The analytical framework used to decide constitutional challenges to state election laws is well-established.

> 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)); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213-214 (1986)). This analytical framework is known as the *Anderson/Burdick* test.

Importantly, "'[t]his is a sliding scale test, where the more severe the burden, the more compelling the state's interest must be.'" *Mecinas v. Hobbs*, 30 F.4th

890, 904 (9th Cir. 2022) (quoting *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018); citing *Burdick*). Even if the constitutional burden imposed by an election law or regulation is "'not severe enough to warrant strict scrutiny' [it] may well be 'serious enough to require an assessment of whether alternative methods would advance the proffered government interests.'" *Id.*, at 905 (declining to rule in the State's favor at the pleading stage).

Therefore, contrary to the Court of Appeal's assertion (App.24a), a finding that the alleged constitutional burdens are not "severe" does not mean that those burdens are automatically "minimal and reasonable" and/or not subject to judicial scrutiny.

B. The Court of Appeal Erred in Concluding that the Constitutional Burdens Imposed on NPP Voters Are Minimal and Reasonable.

1. The U.S. Constitution protects the right to vote.

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).

> In this country the right to vote is recognized as one of the highest privileges of the citizen. It is so recognized, not only by the citizen, but by the law; and any infringement by legislative power upon that right as granted by the constitution is idle legislation. If the legislature by this act has deprived citizens

> of the right to participate in the elections therein provided, who are qualified to participate under the constitution,—aye, even if the legislature has deprived one citizen so qualified of such right,—the act is void, as an attempted exercise of power it does not possess.

Spier v. Baker, 120 Cal. 370, 375 (1898).

In California, 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), <u>including the right to vote at primary elections</u>. [¶] . . . <u>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]</u>.

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

Moreover, this Court has recognized "the 'fundamental right' to cast a meaningful vote" for the candidate of one's choice. *See Jones*, 530 U.S. at 573 n.5.

Here, the Court of Appeal agreed: "There is no dispute that the right to vote is fundamental." (App. 16a) (citing *Burdick*, 504 U.S. at 433).

2. The U.S. Constitution protects the right to associate (or not associate).

The U.S. Constitution protects the right of citizens to freely associate. *See* U.S. Const., amends. I, XIV; *Jones*, 530 U.S. at 574; *accord* Cal. Const., art. I, §§ 2 & 7. "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." *Tashjian*, 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. *See Jones*, 530 U.S. at 574 ("That is to say, a corollary of the right to associate is the right not to associate."); *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").

In the context of voting regulations, this Court has held that

> [T]he Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives," [U.S. Const.] Art. I,

> § 4, cl. 1, which power is matched by state control over the election process for state offices. But this authority does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens. 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, . . . , or, as here, the freedom of political association.

Tashjian, 479 U.S. at 217 (internal citations omitted; emphasis added).

3. The State's semi-closed presidential-primary system imposes an unconstitutional burden on NPP voters' right to participate in a presidential-primary election.

State law requires an otherwise duly qualified and registered voter[8] to associate with one of the qualified political parties[9] in order to receive a primary ballot with any presidential candidates listed on it. *See* Cal. Elec. Code § 2151(b)(1) ("a person shall not be entitled to vote the ballot of a political party at a primary

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[8] 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. *See* Cal. Const., art. II, §§ 2, 4; Cal. Elec. Code §§ 2000, 2101(a). 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*.

[9] *See* note 2, *supra*.

election for President of the United States or for a party committee unless he or she has disclosed the name of the party that he or she prefers"). A political party may, by internal party rule, permit unaffiliated (*i.e.*, NPP) voters to cast a vote for a candidate listed on its presidential-primary ballot, known as "crossover" voting. *See id.* (a person who has "declined to disclose a party preference" may cast a primary vote for a presidential candidate if "the political party [of that candidate], by party rule duly noticed to the Secretary of State, authorizes a person who has declined to disclose a party preference to vote the ballot of that political party").

If a registered voter does not associate with one of the qualified political parties and his or her preferred candidate is not associated with one of the political parties that allows crossover voting, that voter will not receive a primary ballot containing any presidential candidates and, therefore, cannot participate in the State-administered presidential-primary election. *See* Cal. Elec. Code § 13102(b) ("At partisan primary elections, each voter not registered disclosing a preference for any one of the political parties participating in the election shall be furnished only a nonpartisan ballot, unless the voter requests a ballot of a political party and that political party, by party rule duly noticed to the Secretary of State, authorizes a person who has declined to disclose a party preference to vote the ballot of that political party. The nonpartisan ballot shall contain only the names of all candidates for nonpartisan offices, voter-nominated offices, and measures to be voted for at the primary election.").

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 advisory vote) for one of the parties' primary candidates. *See generally* Cal. Elec. Code § 6000 *et seq*. And then there is the larger public-election process administered by the State. *See* Cal. Const., art. II, §§ 1, 2; *see also* Cal. Elec. Code § 2300 (Voter Bill of Rights). The State's obligations to individual voters are the same regardless of whether the voter is party-affiliated or unaffiliated (NPP): the State 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. *See id.*; *see also* Cal. Const., art. II, § 2.5 ("A voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted."), § 3 ("The Legislature shall . . . provide for registration and free elections."). What the political parties do with primary votes cast in favor of their candidates as tallied by the State is left entirely to these parties' respective rules; the results of the primary election do not determine the political parties' presidential nominees. *See generally* Cal. Elec. Code § 6000 *et seq*.

If the right to vote is constitutionally protected and the right to freely associate (or not) is also constitutionally protected, then the State's semi-closed presidential-primary system—which requires (at least some) NPP voters to formally associate with one of the qualified political parties as a condition of participating the State-administered presidential-primary election—imposes an unconstitutional burden on those NPP voters' constitutional rights. *Accord Tashjian*, 479 U.S. at 213-217 & nn. 5, 7 (holding that burdens on the right to vote in a primary election and the freedom to associate were significant enough to require the state

to articulate a compelling state interest to justify the burdens).

In *Tashjian*, this Court invalidated Connecticut's "closed" primary statute on the grounds that it unconstitutionally burdened the associational rights of both political parties and individual voters. *Tashjian*, 479 U.S. at 215-217. There, the Court rejected the state's contention that requiring voters to formally affiliate with a political party as a condition of participating in a primary election was only a *de minimis* infringement on the voters' associational rights. *See id.*, at 216 n.7; *see also id.*, at 215 n.5 (recognizing that "acts of public affiliation may subject the members of political organizations to public hostility or discrimination."). The Court distinguished between voters merely notifying the state authorities of their intention to vote in a particular party's primary (such as by requesting a crossover ballot) and formally affiliating with the political party: "'[t]he problem is that the State is insisting on a public act of affiliation . . . joining the [political party] as a condition of this association.'" *Id.*, at 216 n.7 (citation omitted).

Of course, not all NPP voters who do not want to associate with one of the qualified political parties are similarly burdened. However, this Court has held: "We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." *Jones*, 530 U.S. at 581 (citations omitted).

The Court of Appeal incorrectly asserted that an NPP voter could merely request a crossover ballot from one of the qualified political parties, thereby reducing or eliminating the burden of the State's associational requirement. *See* App.21a ("Requiring

voters to associate with a party—whether by registering or requesting a crossover ballot—to participate in a partisan primary is thus, at most, a slight burden."), App.29a ("To the extent that NPP voters feel disenfranchised by the primary system, they may simply join the party or request a crossover ballot."); *see also id*., at App.7a (noting the trial court stating the same). However, this overlooks that (1) not all qualified political parties permit crossover voting—as of 2020 only half of the qualified political parties allowed crossover voting—and (2) the political parties can change their internal rules regarding crossover voting at virtual any time. *See* Cal. Elec. Code § 13102(c).

NPP voters who wish to cast a primary vote for a candidate associated with the American Independent, Libertarian, or Democratic parties have the ability to request a crossover ballot from the State. *See* App.53a. However, NPP voters who which to cast a primary vote for a candidate associated with the Green, Peace & Freedom, or Republican party do not have the ability to request a crossover ballot from the State; they are simply barred from participating unless they formally associate with the political party of their preferred candidate. *See id.* For those NPP voters, including Petitioners, who want to participate in the State-administered presidential-primary election by casting a vote for a candidate belonging to one of the three qualified political parties that do not allow crossover voting, there is no alternative or recourse other than to formally associate with that political party. This is an unconstitutional burden on their constitutionally protected right to vote and to not associate. *See Tashjian*, 479 U.S. at 216 n.7 & 217.

Whether this burden is sufficiently severe to warrant strict scrutiny is, perhaps, beside the point; what is clear is that the burden is more than minimal or *de minimis*. And given that the *Anderson/Burdick* test is a "sliding scale," the State was required to offer more than ideas and platitudes about its interests as its rational basis to justify this burden on NPP voters (including Petitioners). Once the burden on NPP voters is seen as constitutionally significant, the State's "compelling interests" crumble under even a minimal amount of scrutiny. *See id.*, at 217-225 (dismissing State's asserted interests).

4. Governing Law Protecting First Amendment Rights of Political Parties Does Not Hold that the Burdens on NPP Voters' Associational Rights Are Minimal.

The Court of Appeal incorrectly held that *Jones* and *Clingman v. Beaver*, 544 U.S. 581 (2005), are dispositive on the character and magnitude of burdens on Petitioners and other NPP voters and thus foreclosed Petitioners' claims. There is a crucial difference between those cases and the situation in California today, which the Court of Appeal failed to appreciate. Unlike the situation in those cases, voters in California's presidential primary no longer choose the political parties' nominees; those decisions are ultimately made based on the parties' respective internal rules. This "constitutionally crucial" difference therefore compels a different result.

In *Jones*, this Court invalidated California's Proposition 198, a citizens' initiative providing for a "blanket" primary to determine the party's nominees for the general election, on the grounds that it unconstitutionally burdened the associational rights of the

political parties. *Jones*, 530 U.S. at 581-582. Indeed, this Court found the burden to be severe.

> 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. Such forced association has the likely outcome—indeed, in this case the *intended* outcome—of changing the parties" message. We can think of no heavier burden on a political party's associational freedom.

Id., at 581-582. "[B]eing saddled with an unwanted, and possibly antithetical, nominee would not destroy the party but severely transform it." *Id.*, at 579. In this context, the Court held: "The voter who feels himself disenfranchised should simply join the party. That may put him to a hard choice, but it is not a state-imposed restriction upon *his* freedom of association, whereas compelling party members to accept his selection of their nominee *is* a state-imposed restriction upon theirs." *Id.*, at 584 (italics in original).

Importantly, at the time *Jones* was decided, Section 15451 of the California Elections Code stated:

> The person who receives the highest number of votes at a primary election as the candidate of a political party for the nomination to an office is the nominee of that party at the ensuing general election.

Cal. Elec. Code § 15451 (1994) (prior to 2009 amendment); *see Jones*, 530 U.S. at 569. In 2011, the amended Section 15451 took effect and now currently reads:

> The nominees for a voter-nominated office shall be determined in accordance with Section 8141.5 and subdivision (b) of Section 8142.

Cal. Elec. Code § 15451 (2023)[10]; *accord Rubin*, 233 Cal. App. 4th at 1138 ("The primary election does not,

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[10] Cal. Elec. Code § 8141.5 reads in full:

> Except as provided in subdivision (b) of Section 8142, only the candidates for a voter-nominated office who receive the highest or second highest number of votes cast at the primary election shall appear on the ballot as candidates for that office at the ensuing general election. More than one candidate with the same party preference designation may participate in the general election pursuant to this subdivision. Notwithstanding the designation made by the candidate pursuant to Section 8002.5, no candidate for a voter-nominated office shall be deemed to be the official nominee for that office of any political party, and no party is entitled to have a candidate with its party preference designation participate in the general election unless that candidate is one of the candidates receiving the highest or second highest number of votes cast at the primary election.

Cal. Elec. Code § 8142 reads in full:

> (a) In the case of a tie vote, nonpartisan candidates receiving the same number of votes shall be candidates at the ensuing general election if they qualify pursuant to Section 8141 whether or not there are more candidates at the general election than prescribed by this article. In no case shall the tie be determined by lot.
>
> (b) In the case of a tie vote among candidates at a primary election for a voter-nominated office, the following applies:
>
> (1) All candidates receiving the highest number of votes cast for any candidate shall be candidates at the ensuing general election whether or not there are more candidates at the general election than prescribed by this article.

however, result in the selection of party 'nominees,' which are defined by statute as party-affiliated candidates 'who are entitled by law to participate in the general election for that office."); Cal. Const., art. II, § 5; Cal. Elec. Code § 332.5.[11]

Similarly, in *Clingman*, this Court upheld Oklahoma's "semi-closed" primary on the grounds that "requiring voters to register with a party prior to participating in the party's primary minimally burdens voters' associational rights." *Clingman*, 544 U.S. at 592. Importantly, the "voters" at issue in *Clingman* were voters already registered/associated with other

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(2) Notwithstanding Section 8141.5, if a tie vote among candidates results in more than one primary candidate qualifying for the general election pursuant to subdivision (a), candidates receiving fewer votes shall not be candidates at the general election, even if they receive the second highest number of votes cast.

(3) If only one candidate receives the highest number of votes cast but there is a tie vote among two or more candidates receiving the second highest number of votes cast, each of those second-place candidates shall be a candidate at the ensuing general election along with the candidate receiving the highest number of votes cast, regardless of whether there are more candidates at the general election than prescribed by this article.

(4) In no case shall the tie be determined by lot.

11 Cal. Elec. Code § 332.5 states in full:

"Nominate" means the selection, at a state-conducted primary election, of candidates who are entitled by law to participate in the general election for that office, but does not mean any other lawful mechanism that a political party may adopt for the purposes of choosing the candidate who is preferred by the party for a nonpartisan or voter-nominated office.

political parties: "At issue here are voters who have *already* affiliated publicly with one of Oklahoma's political parties." *Id.* (italics in original). This Court held that requiring those voters already willing to be publicly affiliated with a non-Libertarian party to change their party affiliation in order to participate in the Libertarian Party's primary was only a minimal burden on those voters' associational rights. *Id.*

Notably, in *Clingman* the Court distinguished *Tashjian* (discussed above) on the ground that the law challenged in *Tashjian* operated as a barrier to participating in the primary election:

> Oklahoma's semiclosed primary imposes an even less substantial burden than did the Connecticut closed primary at issue in *Tashjian*. In *Tashjian,* this Court identified two ways in which Connecticut's closed primary limited citizens' freedom of political association. The first and most important was that it required Independent voters to affiliate publicly with a party to vote in its primary.

Id. (emphasis added).

In California, the ultimate selection of each political party's presidential nominee is conducted according to private party rules, not the presidential-primary election conducted by the State. *See*, *e.g.*, Cal. Elec. Code §§ 6002 (Democratic Party primary selects "delegates"); 6300 (Republican Party primary selects delegates; Republican Party rules apply to any qualified parties for which no other provisions apply (*i.e.*, Libertarian)), 6480(b) (Republican presidential-primary ballot to state "presidential preference"); 6520(a)

(American Independent Party uses "presidential preference ballot"); 6720 & 6820 (Peace & Freedom Party uses "presidential preference ballot"); 6850, 6850.5, 6861.5(b) (Green Party uses "presidential preference primary ballot"); *see also* Cal. Elec. Code § 13103(b)(1) & (2).[12] The State-administered presidential primary only selects (unnamed) delegates that go on to select/pledge support for the respective parties' presidential nominees at party conventions. *See id.*

Importantly, this Court has held that a state cannot require the delegates to the national party convention to vote in accordance with the presidential-primary results if doing so would violate the party's rules; how the delegates are selected and for whom those delegates are to pledge their support are entirely governed by the political parties' internal rules and procedures. *See Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 126 (1981) ("*La Follette*"); *accord*, *e.g.*, Cal. Elec. Code § 6461(c) (releasing Republican delegate from obligation to pledge support to a particular candidate under various circumstances).

As such, all votes cast in a presidential-primary election in California are advisory and non-binding on the political parties in their selection of their respective presidential nominees for the general election. *See La Follette*, 450 U.S. at 126.

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[12] Cal. Elec. Code § 13103 reads in relevant part:

> Every ballot shall contain all of the following:
>
> (a) The title of each office, arranged to conform as nearly as practicable to the plan set forth in this chapter.
>
> (b) The names of all qualified candidates, except that:

In comparison, candidates for congressional and state elective offices in California are nominated directly by the voters. *See* Cal. Const., art. II, § 5(a).

> A political party or party central committee shall not nominate a candidate for any congressional or state elective office at the voter-nominated primary. [. . .] A political party or party central committee shall not have the right to have its preferred candidate participate in the general election for a voter-nominated office other than a candidate who is one of the two highest vote-getters at the primary election, as provided in subdivision (a).

Cal. Const., art. II, § 5(b).

Thus, the "constitutionally crucial" characteristic in *Jones* and *Clingman*—that the unaffiliated primary voters were choosing the political parties' nominees—is not present here. *See Jones*, 530 U.S. at 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)) & 585-586; *Clingman*, 544 U.S. at 590. Absent that "constitutionally crucial" distinction, *Jones* and *Clingman* are not dispositive and do not foreclose Petitioners' claim that the State's semi-closed presidential-primary system impermissibly burdens the constitutional rights of Petitioners and other NPP voters in California.

C. The Court of Appeal Erred in Concluding that Presidential-Primary Votes Cast by NPP Voters Do Not Receive Constitutional Protection unless the Political Parties Consider Those Votes in Their Candidate-Nominee Process.

The Court of Appeal agreed that "[t]here is no dispute that the right to vote is fundamental." MOD OPN 619; *accord Communist Party*, 20 Cal. 2d at 542-543 (every citizen has the constitutional right to vote at primary elections). But then the Court of Appeal went on to conclude that the right to vote that Petitioners seek to enforce is not constitutionally protected because that vote would not be counted by the political parties in their respective nominee-selection processes, characterizing the vote as having only "expressive" or "symbolic" value. *See* App.3a ("[W]e reject the [Petitioners'] assertion of a novel and peculiar constitutional right to vote in California's presidential primary for the candidate of a political party they have chosen not to join without having their votes count for anything other than their expressive value."); App.23a ("Not only is [Petitioners'] desire to express themselves via the polls without having their votes count in determining the result not a constitutional right. . . ."); App.23a n.6 ("[Petitioners'] desire to express themselves via the presidential primary process without actually assisting in the selection of a party's nominee does not implicate any constitutional right."); App.27a ("The State's strong interest . . . outweighs any interest of NPP voters to cast purely symbolic votes . . . ."). According to the Court of Appeal, having the vote be counted by the political parties in their candidate or nominee selection process was a

defining feature of a constitutionally protected primary vote.

As discussed above and codified in the California Elections Code, the State-administered presidential-primary election does not select the political parties' presidential nominees. *See*, *e.g.*, Cal. Elec. Code §§ 6002, 6300, 6480(b), 6520(a), 6720, 6820, 6850, 6850.5, 6861.5(b); *see also* Cal. Elec. Code § 13103(b)(1) & (2); *accord La Follette*, 450 U.S. at 126.[13] The State nonetheless sends out presidential-primary ballots and then collects, tallies, and reports the votes cast therein every four years, but only for voters who—willingly or begrudgingly—associate with a political party (or happen to want to cast a primary vote for a candidate whose political party allows crossover voting).

The Court of Appeal ignored a crucial truth: as far as California law—as opposed to internal party rules and procedures—is concerned, all presidential-primary votes are "expressive" or "symbolic." Thus, there is no difference for California, as a state government, between the "value" of a presidential-primary vote cast by a party-affiliated voter or one that would be cast by an NPP voter. Both are "expressive" or "symbolic" votes that the State is required to collect,

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[13] Indeed, not even California's "top-two" primary system—which applies to all statewide executive offices and state and federal legislative offices—chooses a political party's "nominees," even though it does decide which candidates will appear on the general election ballot. *Rubin*, 233 Cal. App. 4th at 1138 ("The primary election does not, however, result in the selection of party 'nominees,' which are defined by statute as party-affiliated candidates 'who are entitled by law to participate in the general election for that office.'); Cal. Const., art. II, § 5; Cal. Elec. Code §§ 332.5, 8141.5.

tally, and report the results of and that the political parties are free to consider or not in their candidate-nominating process. There is no legally justified basis for the State to recognize the constitutional right of a party-affiliated voter to cast a vote in the State-administered presidential-primary election but not recognize that same right with respect to an NPP voter.

D. The Court of Appeal Erred in Concluding that the Interests Proffered by the State Justify the Burdens on NPP Voters.

Because the Court of Appeal concluded that the rights Petitioners seek to enforce are not constitutionally protected and/or that the burden on those rights was only "minimal," it then concluded that the State's regulatory interests provided a sufficient rational basis to justify the burdens. (App.24a). In particular, the Court of Appeal held that the State's interests in curtailing "party raiding" and in "'the integrity of the primary system' and 'avoid[ing] primary election outcomes which would tend to confuse or mislead the general voting population'" would be undermined by a system that simultaneously recognizes the rights of individual voters and the political parties. *See* App.25a-27a.

As discussed above, the unconstitutional burdens here are more than minimal. *Accord Tashjian*, 479 U.S. at 217-225. In *Tashjian*, the Court did not characterize the burden as "severe" but nonetheless went on to find that the proffered state interests—some of the same interests invoked here—were not sufficient to justify the burden. *See id.*; *accord Mecinas*, 30 F.4th at 904 (*Anderson/Burdick* test is a "flexible standard" on a "sliding scale"; citing *Burdick* and *Timmons*).

For example, in *Clingman*, this Court held that the state interest in preventing party raiding was sufficient to justify the burdens on individual voters—because the results of the primary vote dictated the political party's presidential nominee. *See Clingman*, 544 U.S. at 593-597. In *Tashjian*, however, the Court found that the same state interest was not sufficient to justify requiring formal association with a political party as a condition of participating in the primary election. *See Tashjian*, 479 U.S. at 219 & n.9. Although not exact, the instant case is more analogous to *Tashjian* than it is to *Jones* and *Clingman* with regard to the rights it seeks to protect (*see* discussion of *Tashjian*, *supra*).

Ironically, several remedies for the burden 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 candidate-nomination process as their only means of participating in a presidential-primary election just to drop out afterward.

Similarly, *Tashjian* rejected that state's "voter confusion" argument, finding that it was not sufficient to justify formal association with a political party in order to vote in the primary election:

> [The state's] concern that candidates selected under the Party rule will be the nominees of an "amorphous" group using the Party's name is inconsistent with the facts. The Party is not proposing that independents be allowed to choose the Party's nominee without Party

> participation; on the contrary, to be listed on the Party's primary ballot continues to require, under a statute not challenged here, that the primary candidate have obtained at least 20% of the vote at a Party convention, which only Party members may attend. [Citation]. [Under that state's law] [i]f no such candidate seeks to challenge the convention's nominee in a primary, then no primary is held, and the convention nominee becomes the Party's nominee in the general election without any intervention by independent voters.

Tashjian, 479 U.S. at 220-221; *Anderson*, 460 U.S. at 796-797 ("There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election. *** [¶] [But] [o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues."); *see also* Cal. Elec. Code § 332.5.

In California, the political parties' nominees are selected at the national party conventions, not the State-administered presidential-primary election. Yet the State continues to send out primary ballots listing presidential-primary candidates (not delegates), giving the impression that a vote for a presidential-primary candidate decides who the political parties' nominee will be in the general election. *See* Cal. Elec. Code § 13103(b). If Petitioners were to succeed in their legal challenge, California's presidential primary would be no more confusing than the State has already made it.

Moreover, the State is capable of counting and classifying votes cast by its electorate; in fact, it

already does. Technology exists to create and track different ballots and to quickly count and classify votes not only by party affiliation (or non-affiliation), county, and other demographic categories (*e.g.*, by city, by district), but also by whether the ballot was cast in-person or by mail and whether the ballot is provisional or not. Indeed, there is already a separate primary ballot that is sent and/or provided to NPP voters (albeit without an option to vote for all presidential candidates). *See* Cal. Elec. Code § 13102(b). Therefore, the State is capable of giving NPP voters a unique, trackable ballot; of collecting, counting, and reporting the votes cast on NPP ballots; and of publicly reporting the vote totals under the various classifications. And, as always, the political parties are free to do what they will with that information.

Therefore, given the character and magnitude of the burden imposed on NPP voters as a condition of participating in the State-administered presidential-primary election, the mere assertion of the State's interest, without any specific evidentiary support, cannot and does not justify those burdens and the Court of Appeal erred in concluding otherwise.

E. The Court of Appeal Erred in Concluding that the Application of the *Anderson/Burdick* Test Did Not Require a Factual Record

Separately, the Court of Appeal held that a factual or evidentiary record was not required in this case to assess the constitutional burdens or the proffered state interests under the *Anderson/Burdick* test. However, this Court has repeatedly held that "[c]onstitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions."

Tashjian, 479 U.S. at 213 (quoting *Anderson*, 460 U.S. at 789). Instead, the *Anderson/Burdick* test requires the court to "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 justifications for the burden imposed by its rule." *Id.*, at 214 (quoting *Anderson*, 460 U.S. at 789).

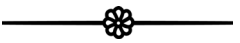
This necessarily requires an evaluation of a factual record. Whether or not the rights and/or burdens that Petitioners describe are ultimately "outweighed by the State's countervailing interest" involves factual determinations and a review of the evidence that goes beyond the face of the pleadings. Indeed, the leading case law was all decided after some form of evidentiary hearing and not through a pleading challenge. *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).

Furthermore, as the case law demonstrates, the State's asserted interests may be sufficient to justify certain burdens but not others depending on the facts of the case. For example (as discussed above), *Clingman* held that preventing so-called "party raiding" was a legitimate state interest that was served by the challenged statute, but that same interest was dismissed in *Tashjian* as "provid[ing] no justification for the statute challenged here." *Compare Clingman*, 544 U.S. at 593-597, *with Tashjian*, 479 U.S. at 219 & n.9.

The Court of Appeal dismissed the fundamental constitutional rights Petitioners seek to vindicate as

"novel" and their theories as "inventive." (App.3a, 4a). While the Court of Appeal may have used those terms pejoratively, it is a tacit acknowledgement that no prior case law is on point and a review of the factual record in this case may yield a different conclusion.[14] Petitioners should have been provided that opportunity.

[14] The Court of Appeal overstated Petitioners' concerns regarding the premature disposition of their claims; Petitioners have never asserted that election-law challenges "can *never* be decided on the pleadings."(App.18a) (emphasis in original). Petitioners have only ever asserted that it would be inappropriate to decide this case on the pleadings because the precise legal issue raised here has not been raised before.



CONCLUSION

For these reasons, Petitioners respectfully ask this Court to grant their petition for writ of certiorari.

Respectfully submitted,

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October 17, 2023