

William M. Simpich SB #106672
Attorney at Law
1736 Franklin Street, 10th Floor
Oakland, CA 94612
Telephone (415) 542-6809
E-mail: bsimpich@gmail.com

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VOTING RIGHTS DEFENSE PROJECT, et
al.,

Plaintiffs,

v.

ALEX PADILLA, et al.,

Defendants.

Case No. C-16-02739

PLAINTIFFS' OPPOSITION TO MOTIONS
TO DISMISSAL BY ALL DEFENDANTS
AND REQUEST FOR LEAVE TO AMEND
COMPLAINT TO CONFORM WITH PROOF

Date: 7/12/16

Time: 11:00 am

Dept: 8, Hon. William Alsup

Plaintiffs respectfully ask the court to determine at the July 12 hearing if this case can go any further. Plaintiffs waive any defect caused by San Francisco's filing on June 20 and ask the court for guidance now. Plaintiffs will move the court separately to accept this larger-than-15 page brief.

The 2016 primary election is over – but its legacy continues. Millions of Californians now feel let down by their voting system. The battle for the no-party-preference voters continues.

The best remedy for their plight is uniform voting standards consistent with 52 USC 10101(a)(2)(A). For this reason, Plaintiffs seek to continue this lawsuit, and to amend the complaint before San Francisco's motion is heard on August 18, 2016. Otherwise, the discriminatory treatment of the NPPs will be repeated in 2020.

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**I. PLAINTIFF’S REQUEST TO AMEND THE COMPLAINT TO
CONFORM
WITH PROOF**

**A. This lawsuit began with realizing how San Francisco had misled its
voters**

Plaintiffs seek leave to amend the complaint to conform with the documents submitted prior to the injunction hearing on June 1, 2016. In the week after the complaint was filed, Plaintiffs learned first-hand about a raft of abuses involving the poll workers in the County of Alameda.

This case was filed following the revelations about the City and County of San Francisco, as documented in the previously filed declaration of counsel.

As stated in Exhibit 11A-D of the Roguski Declaration, counsel has provided documents that are a major basis of the contentions regarding San Francisco. Exhibit 11A is a notice informing the voters how “to request a ballot that includes the presidential primary contest of one of these parties, mark the name of the party on the attached postage-paid postcard, and sign and return the postcard no later than April 18. If you do not request the ballot of one of these parties, your ballot will not include a contest for President.” The impact to the reasonable voter is clear – if you don’t return the postcard by April 18, your ballot will not include a contest for President. Ms. Mena, in her declaration, explains that she changed her registration from NPP to Democrat to heighten the chance she could vote for President after seeing this notice shortly after April 18.

1 Counsel went to the Elections office on Thursday, May 19 and obtained a copy of
2 the postcard that was attached to Exhibit 11-A by showing 11-A to the election
3 worker and asking for a copy of the attached postcard. That copy is attached as
4 Exhibit 11B to the Roguski Declaration. It contains a request for a vote-by-mail
5 ballot but provides the wrong date – pursuant to Elections Code 3006, any application
6 for a vote by mail ballot such as Exhibit 11B must be requested by May 31. This
7 application states that the deadline is June 1. The consequence of missing this
8 deadline will mean that voters by mail will not receive by mail their ballot to vote for
9 President, even though they are expecting it. It is a matter of common knowledge
10 that a high percentage of California voters vote by mail. On information and belief,
11 plaintiffs believe that the number varies between ½ to 2/3 of the populace. Similarly,
12 it is common knowledge that a substantial number of voters in the state are no party
13 preference; my understanding is that number is somewhere between 23% to 25%.
14 This indicates that hundreds of thousands of NPP votes are at stake in this primary
15 election; especially in light of a recent May 25 US News & World Report article
16 stating that at that time 50% of the NPP voters are Democrats, but only 14% of them
17 at that time had received vote-by-mail ballots back in the mail.

18 These statistics are found in this widely circulated US News and World Report
19 article: [http://www.usnews.com/news/articles/2016-05-24/bernies-ballot-burden-in-](http://www.usnews.com/news/articles/2016-05-24/bernies-ballot-burden-in-california)
20 [california.](http://www.usnews.com/news/articles/2016-05-24/bernies-ballot-burden-in-california)

21 The next problem manifested when the City and County of San Francisco sent out
22 the Voter Information Pamphlet and Sample Ballot in early May. Counsel discussed
23 his problem with Mr. White in mid-May in a letter exchange. Mr. White took the
24 position that the Elections Code 3006(c) to all voter only needed to be given to NPP
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1 voters. It is counsel's belief it needs to be given to all voters pursuant to the statute
2 and the statutory scheme of which 3006 is a part. Section 3000 states in essence that
3 it is to be construed in a light most helpful to voters.

4 Counsel believes that all voters need to have access to the 3006 notice in the
5 statute, because some of those voters may have switched to NPP status or may be
6 considering such a switch, and they are entitled to this information in order to make
7 an informed decision. Mr. White is of the completely opposite opinion, saying that
8 providing such a notice in an application to vote by mail would be more confusing to
9 voters.
10

11 A document contrasting the party and NPP sample ballot in San Francisco is
12 attached as Exhibit 11C in the Roguski declaration. Counsel provided these materials
13 in Exhibit 11 to Mr Roguski for inclusion in his declaration.
14

15 A problem with both defendant counties is that they are distributing the
16 applications to vote by mail by electronic mail on their website. See Exhibit 8-9,
17 Roguski Declaration. Defense counsel for both counties state that in both counties, if
18 you enter your data into the form, then the NPP data is provided to you and you get
19 that information. However, it is a "distribution" to post these forms on a public
20 website where citizens perusing the website and trying to make intelligent decisions
21 are not given the NPP information unless they log their data into the site and
22 push"submit". This violates Election Code 3006(c) and 3007.7, which incorporates
23 3006(c) in its provisions in the electronic context of "distribution".
24

25 Counsel was unable to get San Francisco or Alameda to change this practice, but
26 counsel did convince San Mateo County to do so and Plaintiffs did not sue them as a
27 result of that positive gesture. The Roguski Declaration, as a general matter,
28
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1 chronicles from Exhibits 1-14 defects in applications pursuant to 3006 as well as
2 faulty instructions throughout the state.

3 It should be added that San Francisco failed to inform their voters pursuant to
4 3006(b)(3) that voters applying to vote by mail have the right to deliver their
5 application directly to the elections county office by May 31. They are not limited to
6 having to do it by mail. What made it worse is that San Francisco informed the voters
7 that the deadline to return the vote-by-mail application was June 1 – another act of
8 potential disenfranchisement.
9

10
11 **B. It became clear that voters and poll workers were suffering from mass**
12 **confusion**

13
14 Voters suffered from mass confusion. Besides the aforementioned Ms. Mena's
15 confusion that led to her switch from NPP to Democratic, plaintiff and NPP registrant
16 Ms. Daims was concerned as well about whether she will be able to vote the
17 Democratic ballot. Also concerned was Gary Remer, a voter in Monterey, whose
18 declaration shows that he made a similar switch and witnessed great confusion in this
19 county board of elections about who gets to vote in this election for President and
20 how. Also concerned was Richard Troy, a voter in Alameda County: His detailed
21 declaration shows that despite his deep interest in the process of voting, his
22 experiences with the county board of elections in Alameda left him completely
23 confused.
24

25 Mimi Kennedy, a veteran poll worker in Los Angeles County, recounted how
26 many people made mistakes in the past about thinking that the American Independent
27 Party was the same as no party preference; how many voters are forced to vote
28
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1 provisionally due to failure to bring their vote-by-mail ballots with them to the polls
2 to “surrender” for a replacement ballot; and several other issues that illustrate why
3 voters are suffering from great confusion with this primary.

4 As counsel never heard from Alameda County counsel despite his post and his
5 call to the defendant Tim Dupuis on May 13, 2016, Plaintiffs filed suit against both
6 entities and the Secretary of State on May 20. Plaintiffs learned that there was an
7 issue in counties about forcing NPP voters to vote provisionally if they wanted to vote
8 for President, as in San Diego (see Declaration of Jennifer Abreu and Exhibits – even
9 the training materials include this admonition to give NPP presidential voters
10 provisional ballots – on information and belief, these votes are not included in the
11 count until two to four weeks after the election, and only 85% of the time according
12 to leading voter analyst Paul Mitchell), so Plaintiffs amended the complaint to include
13 that issue.
14

15
16 However, in the days ahead counsel was provided a number of very serious
17 reports stating that in some counties the poll workers were being trained to not inform
18 NPP voters that they had the right to receive a Presidential primary ballot. Counsel
19 sifted through these numerous reports and obtained declarations from the
20 aforementioned Ms. Abreu of San Diego, Jeff Lewis of Santa Clara County, and
21 Ashley Beck of Orange County. All of them said that they were told not to inform
22 the voter of this right, but to provide the Presidential primary ballot only when the
23 voter asked for it.
24

25 Conversely, witnesses such as Michelle Jenab of Los Angeles stated that they
26 were trained to ask the NPP voter if they would like a Presidential primary ballot.
27 (Note that despite counsel’s best efforts counsel was able to include where she signed
28
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1 the document, but she informed counsel that she signed it in the County of Los
2 Angeles on May 26 – the date is reflected in the electronic signature.) Joshua White,
3 the attorney for the City and County of San Francisco on election matters as counsel
4 understands it from his conversations with him, has told counsel that the City is
5 informing NPP voters that they can request a Presidential primary ballot, and that it is
6 reflected in their training materials, and counsel presently has no evidence to dispute
7 this assertion and does not make this request regarding the San Francisco defendants.
8

9 However, the Secretary of State’s counsel Ms. Sharon O’Grady informed counsel
10 on May 27 that it is her understanding that the law is that the voter must request the
11 ballot and that there is no duty of the official to offer the ballot – that was counsel’s
12 understanding of counsel’s conversation with her on that point. Her own training
13 materials illustrate that her office states that NPP voters should be advised of the right
14 to obtain a Presidential ballot, a copy is attached as Exhibit 1 to this declaration, see
15 page 3.
16

17 However, the Secretary’s brief at the time of the injunction hearing stated that
18 “The Secretary of State’s poll workers instruction guide encourages poll workers to
19 affirmatively ask NPP voters if they wish to request a party presidential ballot. But
20 the fact that the Secretary of State encourages, and elections officials may choose to
21 instruct poll workers to do more than is legally required does not mean that a failure
22 to do so a violation of the Elections Code.” (Docket 36, pp. 14-15)
23

24 The Secretary of State has offered a blueprint for gaming the system.

25 **C. After the complaint was filed, Alameda’s intra-county problems emerged**

26 The County of Alameda has written counsel and states that their training materials
27 show that poll workers are trained to inform the NPP voter of their right to receive a
28
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1 Presidential ballot. Plaintiffs' two Alameda County poll worker witnesses are
2 Gabrielle Dolphin (who is a poll worker judge) and pollworker Dawn DelMonte. Ms.
3 Dolphin came away from her training with the understanding that individual poll
4 workers were free to do as they liked – to inform or not to inform the NPP voter that
5 they had the right to request a Presidential party ballot. Ms. DelMonte had the
6 experience of her trainer contradicting the training video which said that the poll
7 worker shall inform the NPP voter of the right to request a Presidential party ballot.
8 She says the trainer said do not provide that information, but wait for the voter to
9 request a Presidential party ballot. The trainer's denial of Ms DelMonte's
10 recollections does not negate Plaintiffs' right to rely on her account in this suit.

11
12 Plaintiff's suit, if amended, will allege that poll workers must be uniformly
13 trained to ask NPP voters whether they want to vote for a presidential candidate in
14 any of the three crossover parties. A training manual doesn't provide a remedy for an
15 NPP voter who doesn't know their rights. The manual is not dispositive of what is
16 actually said to voters at the polling places, or how the trainers were actually trained.
17 The words in the manual do not prove what words are said to the voter in the polling
18 place, or what words were said to the trainer in the training.

19
20 The content of the pages relating to crossover voting for nonpartisan voters in
21 the Alameda County poll worker clerk manual (pp 43-44, see exhibit 1 to Gabrielle
22 Dolphin's declaration at docket numbers 14 and 20) is the same as the one for
23 judges/inspectors (pp 67-70), except visually more material is crammed onto one
24 page for the clerks. In two instances, at the bottom of the respective slides, poll
25 workers are told to "advise the Nonpartisan voters they are entitled to vote
26 nonpartisan or in one of the following parties: American Independent, Democratic,
27
28
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1 Libertarian." The "Roster-Index Page: Crossover Voting for Nonpartisan Voters"
2 page of the inspector manual appears to be an empty green field below the title. (Page
3 70 in the judge/inspector manual, and not in the clerk manual at all).

4 In both of the Alameda County poll worker training manuals, there is no mention
5 of Presidential candidates in the nonpartisan crossover voting, unlike in the Los
6 Angeles poll worker training handbook, which specifically instructs poll workers to
7 ask NPP voters whether they wish to vote for the Presidential candidate for the
8 American Independent, Democratic or Libertarian party. This subtle difference points
9 to an example of how low information voters can be confused. They might not
10 understand that their No Party Preference / NP/ Nonpartisan ballot is missing a
11 Presidential candidate, and most importantly, that the only way they get to vote for a
12 Presidential candidate is by casting one of the crossover ballots. They might not
13 realize that the crossover ballots simply only add the Presidential candidate to their
14 choice of down ballot nonpartisan candidates and that they are not betraying their
15 independent status by choosing a crossover ballot.

16 It is entirely possible that the County of Alameda is working very hard to make
17 the voting experience a positive one – and the same for San Francisco, and their
18 positive efforts should be commended, however, it is in these subtle wording and
19 visual choices involving both the training materials and the applications to vote for
20 mail and attendant instructions that have important information has been omitted (or
21 ambiguously phrased) to the serious detriment of nonpartisan voters. We have
22 identified these subtle differences, and are concerned that many nonpartisan voters
23 are not informed in a sufficiently clear manner what their rights and duties are. We
24 realize it is a daunting task, but we also wish to help those voters get all the
25
26
27
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information they need, in as clear and accurate way as possible, to successfully vote according to their wishes.

II. THEORIES BEHIND PLAINTIFFS' CAUSES OF ACTION

This action is brought pursuant to 42 U.S.C. § 1983 to secure equitable relief from Defendants' unlawful deprivation of Plaintiffs' rights, privileges and immunities guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; Section 2 of the Voting Rights Act of 1965, 52 U.S.C. 10101(a)(2)(A) and (B). Plaintiff is not seeking a writ of mandamus at this time, and seeks to dismiss this cause of action with leave to amend.

"No right is more precious in a free country than that of having a voice in the election of those who make the laws..." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Plaintiffs bring the instant lawsuit to protect the right to vote by mail, early voting, registration, and informational voting rights of millions of California voters. Nearly 70% of ballots cast in the 2014 California special election were by mail, and over 65% of the ballots cast in the 2012 presidential preference primary were by mail.

<http://www.sos.ca.gov/elections/historical-absentee/>

The impact of failure to inform NPP voters (no party preference voters) of their right to obtain a "crossover ballot" and to vote in the Presidential primary was significant, as is the failure to inform party-affiliated voters of their right to re-register as no party preference voters and still receive the Presidential primary ballots of the Democratic, American Independent, and Libertarian parties. All Californians' voting rights have been and will continue to be denied or unreasonably infringed upon due to the lack of oversight of the California Secretary of State and county Boards of Elections.

This action seeks injunctive relief to redress the widespread and ongoing

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1 failure to provide information regarding the protected voting rights of “no party
 2 preference” voters to receive a Democratic, American Independent or Libertarian
 3 presidential ballot. Inadequate information has also been provided regarding the right of
 4 “no party preference voters” to personally deliver their application to vote by mail to the
 5 county board of elections office by May 31, 2016 in order to mail their ballot in by the
 6 last day of the primary on June 7.

8 This failure to provide adequate information is in violation of the Voting Rights
 9 Act of 1965, 52 U.S.C.A. § 10101 *et seq*, California Elections Code Section 3000 *et seq.*,
 10 and the U.S. Constitution’s guarantee of Equal Protection, applied to states pursuant to
 11 the Fourteenth Amendment. Plaintiffs are eligible California voters (one Democratic and
 12 one no party preference); Voting Rights Defense Project (an organization campaigning to
 13 heighten voter education and voter turnout for their candidate Bernie Sanders); and the
 14 American Independent Party itself.

16 **III. FIRST CAUSE OF ACTION – 52 USC 10101(a)(2)(A)**

17 Defendants’ actions violate 52 USC 10101(a)(2), generally known as “Section 2” of the
 18 Voting Rights Act of 1965. 52 U.S.C. § 10301(a) grants rights to voters by providing, in relevant
 19 part: (2) No person acting under color of law shall – (A) in determining whether any individual is
 20 qualified under State law or laws to vote in any election, apply any standard, practice, or procedure
 21 difference from the standards, practices or procedures applied under such law or laws to other
 22 individuals within the same county, parish, or similar political subdivision who have been found by
 23 State officials to be qualified to vote. . .

24 Private litigants may enforce their rights under 52 U.S.C. § 10101(a) by
 25 bringing a suit under 42 U.S.C. § 1983. Defendants, acting under color of state law, applied different
 26 standards, practices, or procedures in determining whether party voters would be given voter
 27

1 informational rights than were applied to no party preference voters. [Jeffers v. Clinton, 730 F.](#)
 2 [Supp. 196, 204 \(E.D. Ark. 1989\)](#) (three-judge court) (Arnold, J.) (finding that section 2 of the
 3 Voting Rights Act "should be construed liberally in favor of its object, which is to open up the
 4 electoral process to full participation"). There is nothing in the statute that limits this cause of
 5 action to "voter registration". The facts here illustrate a long series of intra-county and inter-
 6 county practices where some counties provide the necessary NPP information to NPP voters and
 7 some do not; some provide the requisite vote by mail information to all voters and some do not;
 8 and some poll workers provide the information needed to NPP voters and some do not. This is
 9 an elementary violation of the statute. Compare the declarations of the poll workers in San
 10 Diego, Orange, and Santa Clara (no notice given) with the policies of San Francisco and Los
 11 Angeles (notice given) with the custom of Alameda (Plaintiffs' evidence indicates that poll
 12 workers decide for themselves whether or not notice will be given).

13
 14
 15 The Secretary of State Alex Padilla is named as an indispensable party. The Secretary of
 16 State created the regulations that the Elections Code rely on. On information and belief, the Secretary
 17 of State failed to properly advise the other Defendants, despite the enormous autonomy that the
 18 Defendants enjoy in running their own affairs free of interference from the Secretary. The
 19 Secretary's role in encouraging the counties to "game the system", as described in Docket 36, pp. 14-
 20 15, is illustrative.

21
 22 In [Wash. Ass'n of Churches v. Reed, 492 F. Supp. 2d 1264, 2006 U.S. Dist. LEXIS](#)
 23 [96444 \(W.D. Wash. 2006\)](#) the court addressed defendant's argument that he is not the proper
 24 defendant to this action. Defendant initially asserted that, while he maintains the voter statewide
 25 registration list, the counties actually register voters, and therefore he has no direct control over
 26 the 39 separately-elected county auditors. Defendant further asserted that these county auditors
 27

1 are not his "agents," such that he could somehow order the counties to register mismatched
 2 applicants.

3
 4 Plaintiffs responded that defendant had undersold his , and that he indeed is the proper
 5 defendant. As in Washington state, the Secretary of State is the chief elections officer of the
 6 state, and he has supervisory control over local elections officials, including the power and
 7 responsibility to issue instructions and promulgate rules to ensure that elections are conducted in
 8 a uniform manner. The powers are not as strong as in Washington state, but the facts in this case
 9 from the poll workers and the applications to vote by mail show that the Secretary of State is not
 10 conducting sufficient guidance in a uniform manner.
 11

12 **IV. SECOND CAUSE OF ACTION (52 USC 10101(a)(2)(B) and 42 USC 1983)**

13 52 USC 10101(a)(2)(B) grants rights to voters by providing, in relevant part: "No person
 14 acting under color of state law shall ... deny the right of any individual to vote in any election
 15 because of an error or omission on any record or paper relating to any application, registration, or
 16 other act requisite to voting, if such error or omission is not material in determining whether such
 17 individual is qualified under State law to vote in such election." See *Schwier v. Cox*, 412 F.
 18 Supp. 2d 1266 (N.D. Ga. 2005) (finding a Georgia requirement that voting registrants disclose
 19 Social Security number before voting violated materiality provision of Voting Rights Act), aff'd,
 20 439 F.3d 1285 (11th Cir. 2006).
 21

22 Certain Plaintiffs – or the individuals that they represent - are in imminent danger
 23 of being denied the right to vote in the Presidential primary election because of the errors and
 24 omissions contained in the mandatory notices containing crucial information necessary in order
 25 to obtain the ballot. These errors or omissions are not material in determining whether these
 26 individuals are qualified under State law to vote in the June 2016 Presidential primary election.
 27

28 **PLAINTIFFS' MOTION FOR LEAVE TO AMEND AND OPPOSING DISMISSAL**

1 [Friedman v. Snipes, 345 F. Supp. 2d 1356, 2004 U.S. Dist. LEXIS 23739, 18 Fla. L.](#)
2 [Weekly Fed. D 63 \(S.D. Fla. 2004\)](#) offers the best guidance in this situation. After analysis, the
3 court ruled against the Plaintiffs because the errors or omissions did not happen in a record or
4 paper. In this instance, the 3006 and 3007.7 violations occurred in precisely this manner. The
5 fact that Defendants got it right sometimes does not excuse the statutory violation. It is a
6 serious error and omission that fundamentally impacts the voter's rights to information. Voters
7 have informational rights that must be assiduously respected.

9 Plaintiffs' theory is that defendants have violated Section 10101(a)(2)(B) by omitting the
10 statements regarding no-party- preference voters from materials distributed to voters that had
11 indicated a party preference. Dkt. 46 at 4.

13 Section 10101(a)(2)(B) applies when there is some error or omission in any record or paper
14 relating to any application, registration, or other act requisite to voting. 52 USCS §
15 10101(a)(2)(B). In applying §10101(a)(2)(B), courts consider state voter qualification law and
16 whether the alleged error or omission is material to that law. It should not be material, i.e.,
17 section 10101(a)(2)(B) applies in the presence of an immaterial requirement that only serves to
18 disfranchise voters. See, e.g., Churches, 492 F. Supp. 2d 1264; Schwier, 412 F. Supp. 2d 1266.

20 The other prong of the inquiry is whether said error or omission
21 causes an individual to be denied the right to vote. 52 USCS § 10101(a)(2)(B).

23 Case law is somewhat disfavorable based on the facts at hand. In Friedman v. Snipes, the
24 plaintiffs were unable to vote by mail because of delays at the registrar's office. 345 F. Supp. 2D
25 1356, 1358 (S.D. Fla. 2004). The court held that, "because the error and omission alleged here
26 did not occur on any record or paper and did not occur in relationship to a determination of the
27

1 Plaintiffs' eligibility to vote, Plaintiffs have not established a substantial likelihood of success on
2 the merits of a claim of violation of 42 U.S.C. § 1971(a)(2)(B). Id. at 1373.

3
4 The court reasoned: "Nothing in my review of the case law in this jurisdiction or in other
5 jurisdictions indicates that section 1971(a)(2)(B) was intended to apply to the counting of ballots
6 by individuals already deemed qualified to vote." Id. At 1371. "This is especially true in the
7 context of absentee ballots, because there is no fundamental right to vote by absentee ballot." Id.
8 at 1370. Further, omitting the ballot as a whole from the batch of absentee ballots was not a
9 qualifying error or omission because it was not "on" a record or paper. Id. At 1373.
10

11 In every case in which relief was granted based on section 10101(a)(2)(B), the error or omission
12 was related to a registration form with a nonmaterial requirement such as a social security
13 number. *Schwier*, 412 F. Supp. 2d at 1276–77 (holding defendant violated Voting Right Act in
14 denying plaintiffs right to register to vote because they refused to disclose their SSNs);
15 *Churches*, 492 F. Supp. 2D at 1271 (holding plaintiffs demonstrated strong likelihood of success
16 on merits of claim that matching requirement is in direct conflict with "materiality" provision);
17 *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1182-83, 1188 (11th Cir. Fla. 2008)
18 (holding Voting Rights Act violated by registration requirement for driver's license, last four
19 digits of social security number, and matching).
20

21
22 However, we argue that the present situation differs from that in *Friedman* because the errors or
23 omissions at issue here did occur on paper and did occur in relationship to a determination of the
24 Plaintiff's eligibility to vote for president. Additionally, in the 9th circuit case, *Churches*, the
25 court applied 10101(a)(2)(B) more liberally than the court in *Friedman*.
26

27 ANALYSIS

1 First, we argue that Defendants have misconstrued our 10101(a)(2)(B) argument to be about
 2 “failing to tell voters who have disclosed a preference for a qualified political party that that they
 3 “have declined to disclose a preference for a qualified political party,” Arntz MTD, Dkt. 51 at 10
 4 (quoting Compl. ¶ 8) or that they should have “given no-party- preference voter information to
 5 party-affiliated voters.” Padilla MTD, Dkt. 48 at 11.

7 The primary error or omission was Defendants’ “failure to inform NPP voters (no party
 8 preference voters) of their right to obtain a ‘crossover ballot’ and to vote in the Presidential
 9 primary.” Amended Compl. ¶ 3. Specifically, Defendants Tim Dupuis and John Arntz . . .
 10 distributed to the voters an electronic application to vote for mail on Dupuis’ Oakland website
 11 and Artznz’s San Francisco website that violated Elections Code § 3006(c) and 3007.7(e). Both of
 12 these applications failed to provide the mandatory notice to all voters of their right to state no
 13 party preference; and, further, that a no party preference voter shall be provided with a
 14 Democratic, American Independent Party or a Libertarian Party Presidential primary ballot.”
 15 Id. ¶ 8. Registrars around the state failed to inform NPP voters how they could vote for a
 16 presidential candidate, as is required by the Elections code. Another huge problem related to
 17 registration happened in the interim when thousands of voters went missing from the registration
 18 rolls or had their registrations inexplicably changed. At best, this was an “error or omission” on
 19 the part of registrars. See Stephanie Dube Dwilson, Election Fraud: Why Are Voter Registrations
 20 Changing?, HEAVY, [http://heavy.com/news/2016/04/election-fraud-voter-registration-changed-](http://heavy.com/news/2016/04/election-fraud-voter-registration-changed-suppression-party-affiliation-sanders-clinton-ca-ny-az-md-pa-what-to-do/)
 21 [suppression-party-affiliation-sanders-clinton-ca-ny-az-md-pa-what-to-do/](http://heavy.com/news/2016/04/election-fraud-voter-registration-changed-suppression-party-affiliation-sanders-clinton-ca-ny-az-md-pa-what-to-do/) (April 13, 2016);
 22 California Primary - A Case of Highway Robbery,
 23 <http://www.caucus99percent.com/content/california-primary-case-highway-robbery> (June 8,
 24 2016).

1 Many people were in fact denied the right to vote for a presidential candidate because of this
2 omission. Exit polls point to massive numbers of NPP voters who were unable to vote for
3 president because they were not properly instructed how to do so: Exit polling of independent,
4 vote-by- mail voters is showing that 40 percent wanted to vote for a Democratic presidential
5 candidate, but only 15 percent requested a Democratic ballot, Political Data, Inc. Vice President
6 Paul Mitchell said. “They just didn’t have the Democratic candidates on their ballot and didn’t
7 know how to get them, get the right ballot or get their ballot replaced, Mitchell said.
8

9 Sharokina Shams, Many CA independent voters left out of presidential primary, KCRA NEWS,
10 [http://www.kcra.com/news/many-ca-independent-voters-left-out-of-presidential-](http://www.kcra.com/news/many-ca-independent-voters-left-out-of-presidential-primary/39854480)
11 [primary/39854480](http://www.kcra.com/news/many-ca-independent-voters-left-out-of-presidential-primary/39854480) (June 1, 2016).
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13
14 An early exit poll conducted by Capitol Weekly found that 60 percent of nonpartisan voters
15 either thought they would automatically receive a Democratic ballot or didn’t understand the
16 process. Indeed, an analysis of the 322,000 nonpartisan mail ballots turned in by last Thursday
17 show that only 40 percent of them even cast a vote for president.
18

19 John Fund, California’s Crazy Election Quirks Limit Voter Choices and Create Chaos,
20 NATIONAL REVIEW, [http://www.nationalreview.com/article/436220/californias-presidential-](http://www.nationalreview.com/article/436220/californias-presidential-primary-rules-are-crazy)
21 [primary-rules-are-crazy](http://www.nationalreview.com/article/436220/californias-presidential-primary-rules-are-crazy) (June 5, 2016). Thus, millions of NPP voters were in fact deprived of
22 their right to vote because of the omission of information on how to obtain a crossover ballot.
23

24 The need for a crossover ballot is just the sort of unnecessary, immaterial hurdle that section
25 10101(a)(2)(B) was enacted to avoid. Being able to use a crossover ballot instead of the one
26 distributed to NPP voters in no way reads on “whether such individual is qualified under State
27 law to vote in such election.” 52 USC § 10101(a)(2)(B). To the contrary, we are witnessing
28

PLAINTIFFS’ MOTION FOR LEAVE TO AMEND AND OPPOSING DISMISSAL

1 “state and local government tactics of using, among other things, burdensome registration
 2 requirements to disenfranchise” certain voters. NAACP, 522 F.3d at 1173. This “trivial
 3 information served no purpose other than as a means of inducing voter-generated errors that
 4 could be used to justify rejecting applicants.” Id. In sum, the wrongs being committed are exactly
 5 the sort 52 USC § 10101(a)(2)(B) is intended to remedy.
 6

7
 8 **V. THIRD CAUSE OF ACTION (First and Fourteenth Amendments, and 42**
 9 **USC 1983)**

10 Defendants’ actions violated the 1st Amendment to the United States Constitution and the
 11 equal protection clause of the 14th Amendment to the United States Constitution, as the acts of
 12 the defendants towards the no party preference voters constituted arbitrary discrimination of
 13 these plaintiffs as well as the associational classes that Voting Rights Defense Project and
 14 American Independent Party represent.
 15

16 The First and Fourteenth Amendments of the Constitution require that courts closely
 17 scrutinize challenged election regulations, weighing “the character and magnitude of the asserted
 18 injury . . . against the precise interests put forward by the State as justifications for the burden
 19 imposed by its rule.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).
 20

21 The facts here illustrate arbitrary discrimination. Some CA counties send complete
 22 information to NPP voters while others fail to do so. Similarly, there is a failure to treat similarly
 23 situated parties equally under the Elections Code. California has a very high incidence of by-
 24 mail voters compared to other states. Nearly 70% of ballots cast in the 2014 California special
 25 election were by-mail, and over 65% of the ballots cast in the 2012 presidential preference
 26 primary were by-mail. <http://www.sos.ca.gov/elections/historical-absentee/> Therefore, the
 27

1 impact of failure to inform NPP voters of their right to vote a Presidential party ballot is
 2 significant.

3
 4 Even after the enactment of the federal Voting Rights Act (VRA) eligible citizens have
 5 had to navigate "a complicated maze of local laws and procedures" creating obstacles to
 6 voting sometimes "as restrictive as the outlawed practices." H.R. REP. NO. 103-9, at 3.

7 "Voting is of the most fundamental significance under our constitutional structure."

8 [Burdick v. Takushi, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 \(1992\)](#)

9 (quoting [Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184, 99](#)
 10 [S. Ct. 983, 59 L. Ed. 2d 230 \(1979\)\)](#).

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 12 *Griffin v. Burns*, (D.R.I. 1977) 431 F.Supp. 1361, 1366 (D.R.I. 1977) is an illustrative
 13 case, even when Plaintiffs must hurdle the more difficult argument of equal protection as
 14 contrasted to the Voting Rights Act. The facts concern failure to properly notify and
 15 issue absentee ballots in a Rhode Island primary election. "The Court rejects any
 16 contention that no relief is justified. Plaintiffs have been deprived of a valuable, and
 17 fundamental, right. The Court ought to remedy this loss if it can do so equitably. The
 18 defendants did not present, and the Court cannot find, any compelling equitable reasons
 19 to deny relief" at 1368.

20 "[T]here is an undoubted right, guaranteed by the constitution, to vote in primary
 21 elections on an evenhanded basis together with other qualified voters." Citing *Smith v.*
 22 *Allwright*, 321 U.S. 649, 660-662, 64 S.Ct. 757, 88 L.Ed. 987 (1944); *United States v.*
 23 *Classic*, 313 U.S. 299, 318, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941))

24 The right to vote on an equal basis with other citizens is a fundamental right in a free
 25 society; indeed, in any viable form of representative government. It is preservative of all
 26 governmental rights. *Yick Wo. v. Hopkins*, 1886, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220,
 27 226. "The right to vote freely for the candidate of one's choice is of the essence of a democratic
 28 society, and any restrictions on that right strike at the heart of representative government." Citing

1 *Harman v. Forssenius*, 1965, 380 U.S. 528, 537, 85 S.Ct. 1177, 1183, 14 L.Ed.2d 50, 57 (poll
2 tax).

3
4 **CONCLUSION**

5
6 There is no reason for the voter to have to drink from a firehose by absorbing 100 pages
7 of information from the Voters Information Pamphlet circulated in May 2016 to learn how to
8 vote. Conversely, if the court is convinced that the Plaintiffs cannot make their case, the court
9 is asked to dismiss the entire case at the July 12 hearing.
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14 _____/s/
15 WILLIAM SIMPICH
16 Attorney for Plaintiffs
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