Scudi & Ayers, LLP
Morgan J. C. Scudi
Lucas I. Mundell
5440 Morehouse Dr. Suite 4400
San Diego, CA 92121
Tel: (858) 558-1001
Fax: (858) 558-1122
Email: Lucas@RDLFG.com
Attorneys for Plaintiff
Roque "Rocky" De La Fuente

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

(SACRAMENTO)

ROQUE "ROCKY" DE LA FUENTE, Plaintiff, v. ALEX PADILLA, California Secretary of State, Defendant.	**CASE NO.2:16-cv-02877 JAM-GGH** **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT**

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INTRODUCTION

Defendant filed a Notice of Motion and Motion to Dismiss plaintiff's amended complaint filed in the above captioned action under Fed.R.Civ.P 12(b)(6) averring that plaintiff's Equal Protection claim must be dismissed as claim and issue precluded. Defendant's pending motion to dismiss plaintiff's amended complaint must be dismissed for the flowing reasons: (1) Plaintiff's Fourteenth Amendment claim under the Equal Protection Clause was not adjudicated on the merits in plaintiff's emergency state court election law action seeking mandamus relief, as the emergency election law action was denied for failure to join the Republican Party of California as a necessary party and there was not enough time left in the 2016 election calendar to join the alleged necessary party owing to the then pending certification of California's Electoral College membership.

Furthermore, in plaintiff's 2016 state election law action plaintiff was litigating an election law issue that arose in the 2016 presidential election where he was a declared candidate for President of the United States, and was seeking an immediate remedy in that election for which he had standing to raise. Since the 2016 general election, plaintiff has announced that he is a candidate for President of the United States in the 2020 general election. Before plaintiff announced that he was a candidate for President of the United States, plaintiff lacked standing to raise (in any court) the prospective equitable relief that plaintiff now advances in the instant action.

Accordingly, the doctrines of claim and issue preclusion does not bar plaintiff's instant § 1983 equal protection claim against defendant.

ARGUMENT

I. Standard of Review.

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . .claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). In *Twombly*, the Supreme Court explained that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) citing *Twombly* 550 U.S. at 555. "The pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.* "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do." *Id.* "A claim has factual plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

A dismissal under Federal Rule 12(b)(6) is only proper where there is either a "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable

legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint, or portion thereof, should only be dismissed for failure to state a claim upon which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in support of the claim or claims that would entitle the plaintiff to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citations omitted); *Palmer v. Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a complaint under this standard, the court must accept as true all material allegations, as well as reasonable inferences to be drawn from such allegations. *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 460 (9th Cir. 1994); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *Hospital Bldg. Co. c. Rex Hosp. Trustees*, 425 U.S. 738, 740 (1976). Furthermore, the complaint must be construed in the light most favorable to the plaintiff. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Accordingly, the sole issue raised by a 12(b)(6) motion is whether the facts pleaded, if established, would support a claim for relief; therefore, no matter how improbable those facts alleged are, they must be accepted as true for purposes of the motion.

II. Plaintiff's Equal Protection Claim is Not Claim or Issue Precluded.

Plaintiff's equal protection claim for prospective equitable relief is not claim or issue precluded for the simple reason that the dismissal of plaintiff's emergency

election law claim in state court for mandamus relief in the 2016 presidential election was not adjudicated on the merits as required under California law to trigger "res judicata or claim preclusion ." *Hi-Desert Med. Ctr. V. Douglas*, 190 Cal Rptr. 3d 897, 910 (Cal. Ct. App. 2015) (citation omitted). Plaintiff's instant equal protection claim seeks prospective equitable relief enjoining defendant's conduct based on the new fact that plaintiff has announced that he is a candidate for president of the United States for the 2020 general election, a fact which was not implicated in plaintiff's 2016 emergency state election law court action.

Plaintiff's 2016 state election law action for emergency mandamus relief was dismissed by the state judge because he determined that the Republican Party of California was a necessary party to that action that had not been joined in the action. The judge further explained at the hearing conducted in plaintiff's emergency state election law action that owing to the fact that the certification of California's presidential electors was imminent and because there was insufficient time to join the Republican Party of California and thereafter adjudicate plaintiff's claims in time for the court to give meaningful relief prior to the date that California was required to certify its presidential electors, he would dismiss the case. *See*, Exhibit A, Declaration of Lucas Mundell, Esq. Moreover the judge in the state court action made no specific reference as to any adjudication of plaintiff's alleged Section 1983 claim in the state court action - it was simply ignored after the judge determined that

plaintiff failed to join the Republican Party of California as a necessary party to the 2016 state court election law action.

A final judgment on the merits does not occur when the case is settled by the parties on their own, or where the judge decides a motion or makes some other determination that does not resolve the case based on the facts and evidence of the case. Dismissal of a case because the court does not have subject matter jurisdiction, because the service of process was improper, because venue was improper, or because a necessary party has not been joined, are not judgments on the merits giving rise to claim and/or issue preclusion. As explained by the United States Supreme Court in *Semtek Int'l Inc. v. Lockeed Martin Corp.*, 531 U.S. 497 (2001), mere dismissal of a previous claim is not sufficient evidence that a previous claim was adjudicated on the merits. The Court explained in *Semtek* that:

> The prototypical judgment on the merits is one in which the merits of a party's claim are in fact adjudicated for or against the party after trial of the substantive issues. And it is, we think, the meaning intended in those many statements to the effect that a judgment "on the merits" triggers the doctrine of res judicata or claim preclusion. See e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n.5 (1979) ("Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action"); *Goddard v. Security Title Ins. & Guarantee Co.*, 14 Cal.2d 47, 51, 92 P.2d 804, 806 (1939) ("[A] final judgment, rendered upon the merits by a court having jurisdiction of the cause….is a complete bar to a new suit between [the parties or their privies] on the same cause of action" (internal quotation marks and citations omitted)).

Semtek, 531 U.S. at 501-502. However, the Court further recognized that as the meaning of the term has evolved over time even a "judgment on the merits" is no longer necessarily entitled to claim-preclusive effect. *Id.* at 503. The Court explained that a dismissal with prejudice is necessary is give a prior case preclusive effect. *Id.* at 505. The Court explained that a judgment dismissing a claim "with prejudice" is necessary to evince "[t]he intention of the court to make [the dismissal] on the merits." "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice…." *Id.*, *see also*, Fed.R.Civ.P 41(b); 18 Wright & Miller § 4435, at 329 n.4 (Both parts of Rule 41…use the phrase "without prejudice" as a contrast to adjudication on the merits).

Because plaintiff's action was dismissed for failure to join a necessary party, defendant's argument would clearly fail if plaintiff's prior action was a dismissal of a district court action as Fed.R.Civ.P 41(b) expressly excludes a dismissal for failure to join a party under Rule 19 from the universe of dismissals which operate as an adjudication on the merits. *See* Fed.R.Civ.P. 41(b). No court case has ever extended the doctrines of issue or claim preclusion to preclude a new federal action where a state court case was dismissed for failure to join a necessary party. In fact, there is no California case which would preclude re-litigation in state court of a prior state-court claim dismissed for failure to join a necessary party.

Judge Michael P. Kenny of the Superior Court of the State of California issued an Order denying plaintiff's ex parte emergency petition for *Writ of Mandamus* and application for calendar preference without expressly denominating the denial as a dismissal with prejudice. *See*, Exhibit B. Accordingly, the dismissal of plaintiff's 2016 state court election law action must be construed as a dismissal without prejudice which is not an adjudication of the case on the merits, and is, therefore not entitled to res judicata and claim-preclusive effect.

Dismissal of the 2016 state election law case without prejudice is wholly consistent with the procedural posture of the state case at the time of dismissal. It is clear that Judge Kenny's denial of plaintiff's emergency election law petition was akin to a dismissal on the pleadings and was not a dismissal on the merits of plaintiff's underlying claims. First, as the court is well aware, success on an emergency petition for mandamus implicates a higher burden of proof than a simple adjudication of the merits of the underlying claim. A court can properly refrain from granting requested emergency mandamus action without deciding or adjudicating the final merits of the underlying claim. Denial of an emergency petition for mandamus is wholly different than a final adjudication of the merits of the underlying claim(s). Second, initial denial of an emergency mandamus action has no more claim-preclusive effect that a district court's denial of a preliminary injunction or temporary restraining order. Third, there was no discovery and no trial on the merits in

plaintiff's state court petition for emergency mandamus relief, which is a necessary predicate to a full-blown final adjudication on the merits. Finally, as noted above, Judge Kenny failed to dismiss the action with prejudice which, for purposes of res judicata and claim preclusion analysis, is outcome determinative. Furthermore, as this Court also well aware, failure to appeal a court's denial of emergency relief does not implicate or trigger res judicata or claim preclusion as to the denied preliminary relief that was requested by plaintiff.[1] Accordingly, defendant's motion to dismiss plaintiff's equal protection claim under Fed.R.Civ.P. 12(b)(6) based on issue and claim preclusion must be denied.

Equally detrimental to defendant's pending motion to dismiss, plaintiff's current claim is based on the new fact that he has announced that he is a candidate for President of the United States in the upcoming 2020 general election. Plaintiff is seeking prospective equitable relief protecting his rights for the 2020 general election rather than emergency action to compel defendant to count the votes cast for plaintiff in the 2016 general election, which was the narrow emergency remedy sought in plaintiff's 2016 state law action. Prior to plaintiff's announcement that he will be a candidate for President of the United States in the 2020 general election, plaintiff did not have standing to seek a

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[1] Plaintiff's emergency state court election law action for mandamus relief was filed for the sole purpose of obtaining relief for the 2016 general election. No appeal was taken owing to the fact that the 2016 election had already occurred, accordingly, there was no mandamus relief that could be sought for the 2016 general election after the 2016 general election had already occurred and the Electoral College had been certified and was set to meet on December 19, 2016.

remedy against defendant for the 2020 general election. In 2016, plaintiff only had standing to seek a remedy to fix defendant's refusal to count the votes cast for plaintiff in the 2016 general election. Plaintiff did not have standing, prior to his announcement that he will be a candidate for President of the United States in the 2020 general election, to seek a remedy binding defendant's conduct in the 2020 general election.

Additionally, plaintiff's instant claim for prospective equitable relief based on the Equal Protection Clause newly alleges that defendant engaged in an impermissible animus toward plaintiff necessary to properly plead a class-of-one equal protection violation that was not made part of plaintiff's 2016 emergency state election law claim for mandamus relief.

No court has ever extended the doctrines of claim and issue preclusion to bar litigation of new claims based on new facts that arise after the conclusion of the prior action. Furthermore, no court has ever extended the doctrines of claim and issue preclusion to bar litigation of new claims where the plaintiff lacked standing to advance such claims in a prior litigation. Defendant's invitation to this Court to radically expand the well-settled doctrines of claim and issue preclusion should be declined by this Court.

Accordingly, while the state law equal protection law claim is styled in the same manner as the instant federal claim, plaintiff's 2016 state law action is not the same claim based on the same facts and allegations as the one now raised

in this litigation.

For all the foregoing reasons, defendant's motion to dismiss plaintiff's equal protection claims must be denied.

CONCLUSION

For all the foregoing stated reasons, defendant's motion to dismiss plaintiff's claims under Fed.R.Civ.P 12(b)(6) must be denied because plaintiff's 2016 emergency election law action was not a final adjudication on the merits and plaintiff's instant action seeks a remedy based on new facts which were not part of the plaintiff's 2016 emergency state election action.

Dated: April __, 2016

Respectfully submitted,

/s/ Lucas Mundell

SCUDI & AYERS, LLP
Morgan J.C. Scudi
Lucas I. Mundell
Attorneys for Plaintiff