

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THE PEACE AND FREEDOM PARTY,
PETA LINDSAY, and RICHARD
BECKER,

Plaintiffs,

v.

DEBRA BOWEN, in her official
capacity as Secretary of State
of California,

Defendant.

2:12-cv-00853-GEB-GEB-EFB

ORDER GRANTING MOTION TO
DISMISS

California Secretary of State Debra Bowen ("Defendant") moves for an order under Federal Rule of Civil Procedure ("Rule") 12(b)(6) dismissing with prejudice the claims filed against her by The Peace and Freedom Party, Peta Lindsay, and Richard Becker (collectively "Plaintiffs"). Plaintiffs allege that the Secretary violated their First, Fourteenth, and Twentieth Amendment constitutional rights by failing to list Peta Lindsay on the presidential primary ballot for the Peace and Freedom Party. Defendant contends Lindsay was not entitled to be placed on the ballot since she is ineligible to serve as president of the United States due to her age.

I. LEGAL STANDARD

Decision on a Rule 12(b)(6) dismissal motion requires determination of "whether the complaint's factual allegations, together

1 with all reasonable inferences, state a plausible claim for relief."
2 Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d
3 1047, 1054 (9th Cir. 2011) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678-
4 79 (2009)). "A claim has facial plausibility when the plaintiff pleads
5 factual content that allows the court to draw the reasonable inference
6 that the defendant is liable for the misconduct alleged." Iqbal, 556
7 U.S. at 678 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556
8 (2007)).

9 In evaluating a Rule 12(b)(6) motion, the court "accepts the
10 complaint's well-pleaded factual allegations as true and draws all
11 reasonable inferences in the light most favorable to the plaintiff."
12 Adams v. U.S. Forest Serv., 671 F.3d 1138, 1142-43 (9th Cir. 2012)
13 (citing Twombly, 544 U.S. at 555-56). However, this tenet does not apply
14 to "legal conclusions . . . cast in the form of factual allegations."
15 Fayer v. Vaughn, 649 F.3d 1061, 1064 (9th Cir. 2011) (internal quotation
16 marks omitted). "Therefore, conclusory allegations of law and
17 unwarranted inferences are insufficient to defeat a motion to dismiss."
18 Id. (internal quotation marks omitted); see also Iqbal, 556 U.S. at 678
19 (quoting Twombly, 550 U.S. at 555) ("A pleading that offers 'labels and
20 conclusions' or 'a formulaic recitation of the elements of a cause of
21 action will not do.'").

22 Dismissal with prejudice is appropriate when a "'pleading
23 could not possibly be cured by the allegation of other facts.'" Watison
24 v. Carter, 668 F.3d 1108, 1117 (9th Cir. 2012) (quoting Doe v. United
25 States, 58 F.3d 494, 497 (9th Cir. 1995)); see also Klamath-Lake Pharm.
26 Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983)
27 ("Futile amendments should not be permitted.").

28 /

II. JUDICIAL NOTICE

Defendant requests that the Court take judicial notice of the following: (1) Plaintiffs' Motion for Preliminary Injunction (ECF No. 7); (2) the Order, filed on April 26, 2012, denying Plaintiffs' motion for preliminary injunction (ECF No. 13); and (3) a letter, dated February 13, 2012, from the Peta Lindsay for President 2012 Campaign (the "Campaign") to Defendant, in which the Campaign's attorney recounts that in a conversation with a representative from Defendant's office he "admitt[ed] that Ms. Lindsay is 27-years-old."

As a general rule, a district court "'may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.'" United States v. Corinthian Colls., 655 F.3d 984, 998 (9th Cir. 2011) (quoting Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)). However, judicial notice may be taken of the existence of court filings, which are not subject to reasonable dispute over their authenticity. E.g., Holder v. Holder, 305 F.3d 854, 866 (9th Cir. 2002); Lee, 250 F.3d at 690. Accordingly, Defendant's first and second requests for judicial notice are granted.

A court may also take judicial notice of non-hearsay evidence that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2); United States v. Isaacs, 359 Fed. App'x 875, 877 (9th Cir. 2009). Plaintiffs neither contest the accuracy of the letter of February 13, 2012, nor the fact that it was from the Campaign's attorney. Further, there can be no dispute that the Campaign's attorney, who wrote the letter to Defendant advocating for Lindsay's inclusion on the ballot, acted on behalf of Plaintiff Lindsay. Accordingly, the attorney's statement "admitting that Ms. Lindsay is 27-years-old" is judicially

1 noticeable non-hearsay since it "is offered against an opposing party"
2 and "was made by a person whom the party authorized to make a statement
3 on the subject" or "was made by the party's agent . . . on a matter
4 within the scope of that relationship." Fed. R. Evid. 801(d)(2)(C)-(D).
5 Plaintiffs argue that consideration of Lindsay's age "is not appropriate
6 at this stage of the case" since it is "outside the pleadings." (Opp'n
7 5:3.) However, Plaintiffs cannot preclude dismissal by selectively
8 omitting this crucial fact from their pleadings and then arguing that
9 consideration of this judicially noticeable fact is inappropriate at
10 this stage of the case. Accordingly, Defendant's final request for
11 judicial notice is granted.

12 **III. BACKGROUND**

13 This lawsuit concerns Defendant's failure to place Lindsay's
14 name on the 2012 presidential primary ballot in California as a
15 candidate for President of the United States. Lindsay filed with
16 Defendant nomination papers for inclusion of her name on the Peace and
17 Freedom Party's presidential primary ballot (the "ballot") on February
18 1, 2012. (Compl. ¶ 8.) As Secretary of State, Defendant publicly
19 distributes the names of the Peace and Freedom Party's presidential
20 primary candidates and provides elections officials with the final
21 certified list of such candidates. Cal. Elec. Code §§ 6722, 6951.
22 Defendant did not include Lindsay, who is twenty-seven years old, on the
23 certified list of Peace and Freedom Party presidential primary
24 candidates. (Compl. ¶¶ 10-12; ECF No. 15-1.) The U.S. Constitution
25 states "no person . . . shall be eligible to the Office of President
26 . . . who shall not have attained the Age of thirty five Years." U.S.
27 Const. art. II, § 1, cl. 4.
28

Lindsay subsequently brought suit against Defendant together with the Peace and Freedom Party, and Richard Becker, a California resident who supports Lindsay's inclusion on the ballot. Plaintiffs also moved for a preliminary injunction to enjoin the Secretary from excluding Lindsay from the ballot. (Mot. for Prelim. Inj., 1:18-20.) That motion was denied. (Order Den. Mot. for Prelim. Inj. ("Order") 13:22-23.)

IV. DISCUSSION

A. First and Fourteenth Amendments¹

Defendant seeks dismissal of Plaintiffs' First and Fourteenth Amendment claims without leave to amend, arguing that "the Secretary's generally-applicable, even-handed, and non-discriminatory decision not to place Peta Lindsay"—who is ineligible to serve as president due to her age—on the presidential primary ballot is "reasonable and justified" by important state interests such as "protecting the integrity of the election process and avoiding voter confusion." (Mot. to Dismiss ("Mot.") 7:18-19, 7:9-10.) Plaintiffs counter that, by virtue of its use of the word "shall," Cal. Elec. Code § 6720 requires Defendant to list on the ballot all "generally advocated for or recognized" candidates, and by failing to list Ms. Lindsay, who meets this criterion, Defendant acted outside the scope of her statutorily "cabined discretion" and without "lawful authority." (Opp'n 4:16, 3:19.)²

¹ Plaintiffs do not suggest separate analyses for their First Amendment and Due Process claims. The Supreme Court and the Ninth Circuit have "addressed such claims collectively using a single analytic framework. . . . [This Court] do[es] the same here." Dudum v. Arntz, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011) (citation omitted).

² Plaintiffs do not explain their basis for asserting individual claims for violations of Cal. Elec. Code § 6720, and they have not shown that this statute authorizes a private right of action. Section 6720 (continued...)

1 “The impact of candidate eligibility requirements on voters
 2 implicates basic constitutional rights. . . . [I]t ‘is beyond debate
 3 that freedom to engage in association for the advancement of beliefs and
 4 ideas is an inseparable aspect of the “liberty” assured by the Due
 5 Process Clause of the Fourteenth Amendment, which embraces freedom of
 6 speech.’” Anderson v. Celebrezze, 460 U.S. 780, 786–87 (1983) (quoting
 7 NAACP v. Alabama, 357 U.S. 449, 460 (1958)). Further, “States may, and
 8 inevitably must, enact reasonable regulations of parties, elections, and
 9 ballots to reduce election-and campaign-related disorder.” Timmons v.
 10 Twin Cities Area New Party, 520 U.S. 351, 358 (1997).

11 When deciding whether a state election law violates
 12 First and Fourteenth Amendment associational rights,
 13 we weigh the “‘character and magnitude’” of the
 14 burden the State’s rule imposes on those rights
 15 against the interests the State contends justify
 16 that burden, and consider the extent to which the
 17 State’s concerns make the burden necessary.
 18 Regulations imposing severe burdens on plaintiffs’
 19 rights must be narrowly tailored and advance a
 20 compelling state interest. Lesser burdens, however,
 21 trigger less exacting review, and a State’s
 22 “‘important regulatory interests’” will usually be
 23 enough to justify “‘reasonable, nondiscriminatory
 24 restrictions.’” No bright line separates permissible
 25 election-related regulation from unconstitutional
 26 infringements on First Amendment freedoms.

21 ²(...continued)
 22 provides:

23 The Secretary of State *shall* place the name of a
 24 candidate upon the Peace and Freedom Party
 25 presidential preference ballot when the Secretary of
 26 State has determined that the candidate is generally
 27 advocated for or recognized throughout the United
 28 States or California as actively seeking the
 presidential nomination of the Peace and Freedom
 Party or the national party with which the Peace and
 Freedom Party is affiliated.

Cal. Elec. Code § 6720 (emphasis added).

1 Timmons, 520 U.S. at 358-59 (citations and internal quotation marks
2 omitted).

3 "Under the First Amendment, [P]laintiffs bear the initial
4 burden of demonstrating that a challenged election regulation severely
5 burdens their First Amendment rights. [If this burden is sustained, t]he
6 burden then falls on the state to demonstrate either that the regulation
7 is narrowly tailored to achieve a compelling state interest or, if the
8 regulation imposes only a modest burden on First Amendments rights, that
9 the regulation furthers the state's important regulatory interests.
10 Here, it was the [P]laintiffs' burden to demonstrate [that the
11 Secretary's action significantly restricted the availability of
12 political opportunity], not the [D]efendant['s] burden to demonstrate
13 its absence." Wash. State Republican Party v. Wash. State Grange, 676
14 F.3d 784, 791 n.4 (9th Cir. 2012) (citation omitted); see also Nader v.
15 Cronin, 620 F.3d 1214, 1217-18 (9th Cir. 2010).

16 Plaintiffs have not met their burden. "That a particular
17 individual may not appear on the ballot as a particular party's
18 candidate does not severely burden that party's associational rights."
19 Timmons, 520 U.S. at 359. Indeed, "limiting the choice of candidates to
20 those who have complied with state election law requirements is the
21 prototypical example of a regulation that, while it affects the right to
22 vote, is eminently reasonable." Burdick, 504 U.S. at 440 n.10; see also
23 Anderson v. Celebrezze, 460 U.S. 780, 791 n.12 (1983) (noting voters
24 "remain free to support and promote other candidates who satisfy the
25 State's . . . requirements" for candidate eligibility). Further, the
26 Secretary regulated only what was listed on the ballot, which is not a
27 forum for political expression, and which is subject to a flexible
28 balancing approach. See Caruso, 422 F.3d at 856. Since the Secretary's

1 action does not impose a severe burden on Plaintiffs' fundamental
2 rights, it is analyzed using rational basis review. It "will survive
3 review as long as [it] further[s the] state's 'important regulatory
4 interest.'" Wash. State Republican Party, 676 F.3d at 793-94 (quoting
5 Brewer, 531 F.3d at 1035).

6 "[T]he State understandably and properly [may] seek[] to
7 prevent the clogging of its election machinery [and] avoid voter
8 confusion" by restricting who is listed on the ballot to persons
9 eligible to assume the presidential office. Bullock v. Carter, 405 U.S.
10 134, 145 (1972); see also Timmons, 520 U.S. at 358; Burdick, 504 U.S. at
11 433; Storer v. Brown, 415 U.S. 724, 733 (1974). Further, an "age"
12 requirement is a "neutral candidacy qualification," which "the State
13 certainly has the right to impose." Bates v. Jones, 131 F.3d 843, 847
14 (9th Cir. 1997); see also Socialist Workers Party v. Ogilvie, 357 F.
15 Supp. 109, 113 (N.D. Ill. 1972) (holding state's refusal to certify
16 candidacy of underage presidential candidate "violates no federal right
17 of Plaintiffs"). In this case, the Secretary states she did not list
18 Lindsay on the ballot "to ensure that the primary election [wa]s
19 conducted legally, fairly and efficiently," (Mot. 6:22-23); to
20 "protect[] the integrity of the election process," (Mot. 7:9); and to
21 "avoid[] voter confusion." (Mot. 7:10.) Plaintiffs have not shown that
22 "the state's important interests [do not] justify this minimal burden on
23 [P]laintiffs' rights" caused by Defendant's exclusion of an admittedly
24 ineligible presidential candidate from the ballot. Lemons v. Bradbury,
25 538 F.3d 1098, 1102 (9th Cir. 2008). Accordingly, this portion of
26 Defendant's dismissal motion is granted. Further, since Plaintiffs'
27 "'pleading could not possibly be cured by the allegation of other
28 facts,'" Watison, 668 F.3d at 1117 (quoting Doe, 58 F.3d at 497),

1 Plaintiffs' First Amendment and Due Process Clause claims are dismissed
2 with prejudice.

3 **B. Equal Protection Clause**

4 Defendant asserts that Plaintiffs' Equal Protection Clause
5 claim fails because "[t]he Complaint does not identify . . . a candidate
6 that is, like Ms. Lindsay, manifestly and indisputably unqualified to be
7 President." (Mot. 8:27-9:1.) Defendant argues Plaintiffs "'have not
8 shown that [the Secretary] treated Lindsay differently from any other
9 presidential candidate who was similarly situated.'" (Id. 8:28-9:1.)
10 Plaintiffs rejoin that Defendant's argument about Lindsay's age
11 improperly "assumes facts outside the pleadings, which is not
12 appropriate at this stage of the case." (Opp'n 5:3.) Additionally,
13 Plaintiffs assert that the Secretary "has not been given the lawful
14 authority" to consider a candidate's age in fulfilling her statutory
15 duties, because "the Twentieth Amendment to the Constitution gives this
16 authority to Congress." (Id. 5:13-16.)

17 "In making an equal protection challenge, it is the
18 [Plaintiffs'] burden to 'demonstrate in the first instance a
19 discrimination against [them] of some substance.'" Clements v. Fashing,
20 457 U.S. 957, 967 (1982) (quoting Am. Party of Tex. v. White, 415 U.S.
21 767, 781 (1974)). "'Statutes create many classifications which do not
22 deny equal protection; it is only 'invidious discrimination' which
23 offends the Constitution.'" Am. Party of Tex., 415 U.S. at 781 (quoting
24 Ferguson v. Skrupa, 372 U.S. 726, 732 (1963)). To allege a viable equal
25 protection claim, Plaintiffs must demonstrate that they were treated
26 differently from those similarly situated. See N. Pacifica LLC, v. City
27 of Pacifica, 526 F. 3d 478, 486 (9th Cir. 2008) ("In order to claim a
28 violation of equal protection in a class of one case, the [P]laintiffs

1 must establish that [Defendant] intentionally . . . treated the
 2 [P]laintiffs differently from others similarly situated."); Freeman v.
 3 City of Santa Ana, 68 F.3d 1180, 1187 (9th Cir. 1995) ("To establish
 4 impermissible selective [enforcement],'" Plaintiffs must show that
 5 Defendant did not take action against "'others similarly situated'" and
 6 that the selective action "'is based on an impermissible motive'"
 7 (quoting United States v. Lee, 786 F.2d 951, 957 (9th Cir. 1986)).

8 Defendant argues "the Complaint fails to establish that Ms.
 9 Lindsay was treated differently from any other candidate who was
 10 similarly situated (in that the candidate was also manifestly and
 11 indisputably unqualified to be President)." (Reply 2:16-18.) Plaintiffs
 12 argue that Defendant has no authority to "distinguish[] Ms. Lindsay as
 13 not similarly situated because of her age" and that Defendant has not
 14 been given the lawful authority to make that determination because the
 15 Twentieth Amendment to the Constitution gives this authority to
 16 Congress." (Opp'n 5:9-16.) The allegations in Plaintiffs' Complaint
 17 are woefully conclusory and insufficient to allege an Equal Protection
 18 Clause claim. See generally Bates v. Jones, 131 F.3d 843, 847 (9th Cir.
 19 1997) (stating "age" minimums are "neutral candidacy qualification[s]"
 20 that "the State certainly has the right to impose"); Socialist Workers
 21 Party, 357 F. Supp. at 113 ("Amendment XX, Section 3 of the United
 22 States Constitution does not foreclose the Defendant[] from precluding
 23 from [the] ballot a would-be candidate for President who does not
 24 fulfill the eligibility requirements specified in Article II, Section 1
 25 of the United States Constitution.") Plaintiffs' arguments in their
 26 opposition brief also conflate a conclusory allegation referencing
 27 Lindsay's age with the Twentieth Amendment. Plaintiffs have not stated
 28 an Equal Protection Clause claim and would be unable to do so even if

1 given the opportunity to amend. See Lipton v. Pathogenesis Corp., 284
 2 F.3d 1027, 1039 (9th Cir. 2002). Therefore, this portion of Defendant's
 3 motion is granted with prejudice.

4 **C. Twentieth Amendment**³

5 Defendant also moves for dismissal of Plaintiff's remaining
 6 claim arguing it is without factual support. Plaintiffs allege in that
 7 claim that the Secretary acted beyond the scope of her authority since
 8 Congress is vested with the "exclusive" power to "determin[e] the
 9 qualifications of . . . Presidential" candidates. (Compl. ¶ 21.)
 10 Specifically, Plaintiffs argue that the U.S. Constitution "does not
 11 allow or authorize exclusion from a primary ballot" of "an underage
 12 Presidential candidate" by "individual state officers," since Section 3
 13 of the Twentieth Amendment empowers Congress to "'by law provide for the
 14 case wherein neither a President elect nor a Vice President elect shall
 15 have qualified.'" (Opp'n 6:9-11, 5:28-6:2 (quoting U.S. Const. amend.
 16 XX, § 3).) Plaintiffs cite no authority beyond Section 3 of the
 17 Twentieth Amendment in support of their argument. Defendant counters
 18 that Section 3 of the Twentieth Amendment "does not confine to Congress
 19 the exclusive power to decide whose names shall be placed upon all, or
 20 any, of the ballots of the United States. Indeed, the states have wide-

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 22
 23 ³ In their brief, Plaintiffs defend their "Qualification Clause"
 24 claim. (Opp'n 5:21.) "The provisions that are generally known as the
 25 Qualifications Clauses" of the U.S. Constitution are "Art. I, § 2, cl.
 26 2, . . . Art. I, § 3, cl. 3, . . . [and Art. I,] § 6, cl. 2." U.S. Term
 27 Limits, Inc. v. Thornton, 514 U.S. 779, 867 (1995); see also Schaefer v.
 28 Townsend, 215 F.3d 1031, 1034 (9th Cir. 2000) (quoting the
 "Qualifications Clause" as U.S. Const. art. I, § 2, cl. 2). However,
 Plaintiffs' "Qualification Clause" argument concerns section three of
 the Twentieth Amendment, which Plaintiffs call the "Qualifications
 clause of the Twentieth Amendment." (Opp'n 6:8.) Therefore, for purposes
 of clarity, this claim is redesignated as Plaintiffs' Twentieth
 Amendment claim.

1 ranging authority to regulate the elections process, including the
2 ballot." (Reply 3:17-19.)

3 Plaintiffs' argument is unsupported by the text or history of
4 Section 3 of the Twentieth Amendment. Section 3 was intended to provide
5 for a then-unprovided for contingency: the selection and succession of
6 the presidency in the event that the president elect, vice president
7 elect, or both could not assume office. See, e.g., 75 Cong. Rec. 3831
8 (1932) (statement of Rep. Cable) ("The [current] law dealing with
9 succession applies to the President, not the President elect. Sections
10 3 and 4 of the House resolution provide remedies against the[se]
11 contingencies"); id. at 3881 (statement of Rep. Reilly) (emphasizing
12 that "[t]his situation is not covered by any provision in the present
13 Constitution"). Nothing in the legislative history of Section 3 suggests
14 Congress intended to limit state election officials' power to exclude
15 ineligible candidates from a ballot involved in a Presidential election.
16 Indeed, state election officials can and do prohibit certain candidates
17 from appearing on the ballot, including those "who d[o] not satisfy the
18 age requirement for becoming a member of Congress" or for becoming
19 president of the United States. Storer, 415 U.S. at 736-37 (stating that
20 a candidate "who did not satisfy the age requirement for becoming a
21 member of Congress" may be "absolutely and validly barred from the
22 ballot" by California election officials). Therefore, Plaintiffs have
23 not alleged facts giving rise to a reasonable inference that the
24 Defendant unlawfully excluded Lindsay from the ballot. Accordingly, this
25 portion of Defendant's motion is granted without leave to amend.

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V. CONCLUSION

For the reasons set forth above, Plaintiffs' claims are dismissed with prejudice for failure to state a claim. Judgment shall be entered in favor of Defendant.

Dated: December 11, 2012



GARLAND E. BURRELL, JR.
Senior United States District Judge