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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (JULY 19, 2019)

930 F.3d 1101(9th Cir. 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROQUE DE LA FUENTE, Rocky,

Plaintiff-Appellant,

v.

ALEX PADILLA, California Secretary of State; STATE OF CALIFORNIA,

Defendants-Appellees.

No. 17-56668

D.C. No. 2:16-cv-03242-MWF-GJS

Appeal from the United States District Court for the Central District of California Michael W. Fitzgerald, District Judge, Presiding

Before: J. Clifford WALLACE, A. Wallace TASHIMA, and M. Margaret MCKEOWN, Circuit Judges.

McKEOWN, Circuit Judge

We examine yet another state's regulation of ballot access as we consider a challenge to ballot qualification laws in California, the country's most populous state.

See, e.g., *Ariz. Libertarian Party v. Hobbs*, 925 F.3d 1085 (9th Cir. 2019) (addressing Arizona ballot regulations). Together, two California ballot access laws require independent candidates to collect signatures from one percent of California's registered voters—over 170,000 signatures—to appear on a statewide ballot. Independent presidential candidate Roque De La Fuente challenges these requirements as unconstitutional.

After losing the 2016 Democratic presidential primary in California, De La Fuente wanted to continue his candidacy in the general election as an independent candidate. But he faced what he argues is a "cost prohibitive" obstacle: sections 8400 and 8403 of California's ballot access laws (collectively, "Ballot Access Laws"). Cal. Elec. Code §§ 8400, 8403. Under section 8400, independent candidates running for statewide office must collect signatures from one percent of all registered voters. *Id.* § 8400 (requiring independent candidates to collect signatures from "voters of the state equal to not less in number than 1 percent of the entire number of registered voters of the state at the time of the close of registration prior to the preceding general election"). Section 8403 requires independent candidates to collect the signatures at least 88, but no more than 193, days before the election. *Id.* § 8403(a). So, in 2016, De La Fuente had to collect 178,039 valid signatures in 105 days to appear on the general election ballot.

Assuming he needed paid canvassers and twice as many signatures to ensure a comfortable margin of error, De La Fuente estimated the cost of ballot access to be three to four million dollars. He argues that such an expense makes running statewide "cost prohibitive,"

unconstitutionally burdening rights guaranteed by the First and Fourteenth Amendments. De La Fuente points out that the next highest state signature requirement is about 60,000 fewer (in Florida) and that no independent candidate has appeared on California's general election ballot since 1992. De La Fuente self-funds his campaigns, and has officially declared his 2020 presidential run.

California's Secretary of State (the "Secretary") contends that the Ballot Access Laws are reasonably related to California's regulatory interests—streamlining the ballot, avoiding ballot overcrowding, and reducing voter confusion. Following a hearing, the district court granted the Secretary's motion for summary judgment and dismissed the case.

ANALYSIS

We review de novo De La Fuente's constitutional challenge. *Nader v. Cronin*, 620 F.3d 1214, 1216 (9th Cir. 2010). But first we address De La Fuente's standing. To have Article III standing, a party must suffer an "injury in fact" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The "injury in fact" inquiry focuses on "whether the party invoking jurisdiction had the requisite stake in the outcome," although the injury "need not be actualized." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008).

De La Fuente has suffered a concrete injury that is not merely speculative. De La Fuente's declaration confirms that he is running for President of the United

States in 2020. Whether he will run as an independent or in a major political party's primary, as the Secretary argues, does not affect his injury. Either path is all but certain to lead to De La Fuente running as an independent in the general election. As many well-known and not so well-known candidates know, running in a party's presidential primary is no guarantee of running as that party's general election candidate. De La Fuente's experience in 2016 reflects this reality. After De La Fuente ran (and lost) in the Democratic primary election, the only way he could appear on California's presidential general election ballot was to run as an independent. It is likely that if De La Fuente runs in the 2020 Democratic primary, history will repeat itself. Whichever path De La Fuente chooses, he will suffer an "injury in fact." He therefore has standing. *Cf. Ariz. Green Party v. Reagan*, 838 F.3d 983, 987-88 (9th Cir. 2016).

We therefore proceed to the merits of De La Fuente's challenge. To trigger strict scrutiny of the Ballot Access Laws, De La Fuente must first show that they "seriously restrict the availability of political opportunity." Ariz. Green Party, 838 F.3d at 989 (citing *Libertarian Party of Wash. v. Munro*, 31 F.3d 759, 762 (9th Cir. 1994)). This is because the "evidence that the burden is severe, de minimis, or something in between, sets the stage for the analysis by determining how compelling the state's interest must be to justify the law in question." *Id.* at 985.

We evaluate challenges to ballot access laws under the First and Fourteenth Amendments using the balancing framework in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). *See Ariz. Libertarian Party*, 925 F.3d at

1090. The balancing framework is a "'sliding scale'—the more severe the burden imposed, the more exacting our scrutiny; the less severe, the more relaxed our scrutiny." *Id.* (citing *Ariz. Green Party*, 838 F.3d at 988). Under this "flexible standard,"

> [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.

Id. (internal citations and quotation marks omitted). In short, a state must narrowly tailor its law to advance "compelling" interests if the burden on First Amendment rights is severe, *Norman v. Reed*, 502 U.S. 279, 289 (1992), but, if the burden is minimal, the law only needs to reasonably advance "important" interests, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

Although De La Fuente argues that his individual burden is severe because *he* might not appear on the ballot, California's overall scheme does not significantly impair ballot access. *See Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 730 (9th Cir. 2015) ("[Courts] must examine the entire scheme regulating ballot access." (quoting *Cronin*, 620 F.3d at 1217)). Non-major party candidates can access California's ballot in three ways: as minor party candidates, write-in candidates, or independent candidates. Although the last independent candidate appeared on California's general

election ballot in 1992, minor party candidates have consistently appeared alongside major party candidates. De La Fuente's own expert suggested that "there's almost nobody left [for independent candidates] to petition" because voters have their choice among major and minor party candidates. Not only do these choices reduce a voter's need for independent candidates, they cut against De La Fuente's assertion that the Ballot Access Laws "seriously restrict the availability of political opportunity." *Nader*, 620 F.3d at 1217-18 (quoting *Munro*, 31 F.3d at 761-62). The inclusion of minor party candidates also distinguishes this case from others where courts have applied strict scrutiny. *See, e.g.*, *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340, 1363 (N.D. Ga. 2016) (applying strict scrutiny when "the restrictions at issue in this case serve to prevent minor parties from engaging in the fundamental political activity of placing their candidate on the general election ballot"); *cf. Williams v. Rhodes*, 393 U.S. 23, 31 (1968) ("[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.").

A plain reading of both the statutes and the record supports the conclusion that sections 8400 and 8403 are "'not severe' restrictions." *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011) (quoting *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002)). Sections 8400 and 8403 are "generally applicable, even-handed, politically neutral," and aimed at protecting the reliability and integrity of the election process. *Id.*; *see* Cal. Elec. Code §§ 8400, 8403. Because the Ballot Access Laws do not severely burden any constitutional rights, we analyze these laws under a

less exacting standard. *See Dudum*, 640 F.3d at 1106 ("Where non-severe, lesser burdens on voting are at stake, we apply less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." (internal alterations and quotations marks omitted)).

The Supreme Court has long recognized the "important state interest in requiring some preliminary showing of a significant modicum of support" and "in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). California's ballot regulations seek to protect its "important regulatory interests," *Burdick*, 504 U.S. at 434, in streamlining the ballot, avoiding ballot overcrowding, and reducing voter confusion. California is not required "to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986)).

The right to access the ballot is important to voters, candidates, and political parties alike, but it must be balanced against California's need to manage its democratic process. *See Burdick*, 504 U.S. at 441. Although the number of signatures the Ballot Access Laws require may appear high, it accounts for only one percent of California's voter pool, the largest in the country. This low percentage threshold prevents candidates without established support from appearing on the ballot—satisfying California's interests—without "seriously restrict[ing] the availability of political opportunity." *Ariz. Green Party*, 838 F.3d at 989 (quoting *Munro*, 31 F.3d at 762). These laws are also

consistent with other ballot access schemes deemed constitutional. *See, e.g.*, *Storer v. Brown*, 415 U.S 724, 740 (1974) ("Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden [and] . . . would not appear to require an impractical undertaking for one who desires to be a candidate for President."); *Jenness*, 403 U.S. at 442 (upholding law requiring independent candidates to gather signatures equivalent to five percent of the number of registered voters in the previous presidential election); *Nader*, 620 F.3d at 1217 (concluding the burden of collecting signatures equivalent to one percent of the state's voters in the previous presidential election was low).

The Ballot Access Laws reasonably relate to California's important regulatory interests in managing its democratic process and are proportionate to California's large voter population. *See Burdick*, 504 U.S. at 441. California has no constitutional obligation "to 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot." *See Munro*, 479 U.S. at 198. We affirm the district court's dismissal of the case.

AFFIRMED.

ORDER OF THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA RE: DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT [49] (OCTOBER 4, 2017)

278 F.Supp.3d 1146 (C.D. Ca. 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROQUE "ROCKY" DE LA FUENTE,

v.

STATE OF CALIFORNIA AND ALEX PADILLA,

Case No. CV-16-3242-MWF (GJS)

Before: The Honorable Michael W. FITZGERALD, U.S. District Judge.

Before the Court is the Motion for Judgment on the Pleadings or, Alternatively, Summary Judgment, filed by Defendants the State of California and Secretary of State Alex Padilla on May 4, 2017. (Docket No. 49). On June 30, 2017, Plaintiff Roque "Rocky" De La Fuente filed an Opposition, and on July 17, 2017, Defendants filed a Reply. (Docket Nos. 63, 69).

On August 14, 2017, the Court converted Defendants' Motion into a motion for summary judgment and directed Defendants to file a supplemental

brief containing citations to the evidentiary record. (Docket No. 73). On August 28, 2017, Defendants filed a Supplemental Brief in further support of their Motion. (Docket No. 76). On September 8, 2017, the Court granted Plaintiff's request to file a Supplemental Brief, and on September 25, 2017, Plaintiff filed a Supplemental Brief in further opposition to the Motion. (Docket Nos. 78, 80). The Court held a hearing on October 2, 2017.

In this action, Plaintiff challenges the constitutionality of sections 8400 and 8403 of the California Elections Code, which govern the number of voter signatures an independent presidential candidate must obtain to gain a place on the general election ballot and time frame in which the candidate must obtain them. These Elections Code provisions do not impose a severe burden on Plaintiff or his supporters and bear a reasonable relationship to California's legitimate interests in maintaining an uncluttered and manageable ballot. Accordingly, Defendants' Motion is **GRANTED**.

I. Background

On May 11, 2016, Plaintiff, a candidate running for President of the United States in the 2016 election, commenced this action to challenge the constitutionality of sections 8400 and 8403 of the Elections Code. (Complaint (Docket No. 1) ¶¶ 3, 16-22). On November 3, 2016, Plaintiff filed a First Amended Complaint challenging the same provisions. (FAC (Docket No. 30) ¶¶ 14-16).

Elections Code section 8400 governs the number of registered-voter signatures an independent (non-party) presidential candidate must obtain in order to

have his or her name printed on California's ballot. It provides, in pertinent part, that "[n]omination papers for a statewide office for which the candidate is to be nominated shall be signed by voters of the state equal to not less in number than 1 percent of the entire number of registered voters at the time of the close of registration prior to the preceding general election." (FAC ¶ 1); Cal. Elec. Code § 8400. For the 2016 presidential election, an independent presidential candidate needed to submit at least 178,039 valid signatures to satisfy Section 8400's one-percent requirement. (FAC ¶ 2).

Elections Code section 8403 governs the timeframe in which an independent presidential candidate must gather and submit voter signatures. It provides, in pertinent part, that "[f]or offices for which no filing fee is required, nomination papers shall be prepared, circulated, signed, and delivered to the county elections official for examination no earlier than 193 days before the election and no later than 5 p.m. 88 days before the election." Cal. Elec. Code § 8403; (FAC ¶ 3).

Although Plaintiff makes no such allegations in his FAC, in opposition to Defendants' Motion, he states the following with respect to his participation in the 2016 presidential campaign and his plans for the 2020 campaign:

- He qualified for the Democratic primary ballot in 40 states and six territories, including California;
- He placed third in California's Democratic primary, behind Hillary Clinton and Bernie Sanders (the State's official vote count shows

that Plaintiff finished fifth (Docket No. 52 at 11));

- Following his Democratic primary losses, he continued to campaign as an independent in all 50 states;
- Though he understood "the importance of the electoral votes in California," and "knew it would be prudent to appear on the general presidential ballot as an independent candidate," he also understood that gathering 178,039 petition signatures "was a cost-prohibitive endeavor";
- With "the understanding that [he] would need to secure up to 200% of the required number of signatures to account for rejected or disqualified signatures, [he] calculated that it would cost [his] campaign between $3-4 million" to gain a place on California's general election ballot as an independent, which "was distinctly cost prohibitive";
- He gathered more than 200,000 signatures nationwide and appeared on 20 states' ballots as an independent candidate;
- He gathered 34,804 signatures in New Mexico; 21,911 in Connecticut; 20,166 in Michigan; 18,753 in North Carolina; 18,001 in Oregon; and 11,491 in Kentucky;
- He spent more than $8,000,000 on his campaign nationwide and more than $500,000 in California, most of which was his own money; and
- He has officially declared his intention to run for President in 2020.

(Declaration of Roque "Rocky" De La Fuente ("De La Fuente Decl.") (Docket No. 63-1) ¶¶ 4-8, 11-13, 18, 19, 21).

Plaintiff alleges that, in combination, sections 8400 and 8403 violate the First and Fourteenth Amendments by "unduly burden[ing] Plaintiff and depriv[ing] him and those who would vote for him the fundamental right to vote for their candidate in public office." (FAC ¶¶ 1, 13). Plaintiff asks the Court to, among other things, enjoin the continued enforcement of Sections 8400 and 8403. (*Id.* at 6).

II. Legal Standard

In deciding a motion for summary judgment under Federal Rule of Civil Procedure 56, the Court applies *Anderson*, *Celotex*, and their Ninth Circuit progeny. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The Ninth Circuit has defined the shifting burden of proof governing motions for summary judgment where the non-moving party bears the burden of proof at trial:

> The moving party initially bears the burden of proving the absence of a genuine issue of material fact. Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. Where the moving party

> meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence. The non-moving party must do more than show there is some "metaphysical doubt" as to the material facts at issue. In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor.

Coomes v. Edmonds Sch. Dist. No. 15, 816 F.3d 1255, 1259 n.2 (9th Cir. 2016) (quoting *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010)). "A motion for summary judgment may not be defeated, however, by evidence that is 'merely colorable' or 'is not significantly probative.'" *Anderson*, 477 U.S. at 249-50.

III. Discussion

A. Legal Framework for Challenges to State Election Laws

In *Anderson v. Celebrezze*, the Supreme Court prescribed the following framework to determine the constitutionality of a state law that limits a would-be candidate's ability to have his or her name added to a ballot:

> [A] court must . . . first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and

> evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

460 U.S. 780, 789 (1983).

About a decade later, in *Burdick v. Takushi*, the Court added to the *Anderson* test:

> "Under [the *Anderson*] standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions.

504 U.S. 428, 434 (1992).

The Ninth Circuit has "summarized the Supreme Court's approach as a 'balancing and means-end fit framework.'" *Ariz. Green Party v. Reagan*, 838 F.3d

983, 988 (9th Cir. 2016) (quoting *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016) (en banc)). "This is a sliding scale test, where the more severe the burden, the more compelling the state's interest must be . . . " *Id.* In *Arizona Green Party*, the Ninth Circuit held that Arizona's statute requiring minor parties to file recognition petitions at least 180 days before the State's primary election imposed only a de minimis burden on the constitutional rights of the minor-party petitioner and its supporters, and that the statute served Arizona's important interests in avoiding voter confusion and maintaining an efficient primary system. 838 F.3d at 991-92.

If an election regulation imposes a "severe burden" on voting rights, "the state must show the law is narrowly tailored to achieve a compelling governmental interest—strict scrutiny review." *Chamness v. Bowen*, 722 F.3d 1110, 1116 (9th Cir. 2013) (affirming district court's grant of summary judgment in favor of California's Secretary of State where plaintiffs were challenging legislation that changed "the California election system by eliminating party primaries and general elections with party-nominated candidates, and substituting a nonpartisan primary and a two-candidate runoff"); *accord Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011) (affirming district court's grant of summary judgment in favor of San Francisco Director of Elections where plaintiffs were challenging city's implementation of "instant runoff voting . . . to replace [a] two-round runoff"). "Where non-severe, '[l]esser burdens' on voting are at stake, we apply 'less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" *Dudum*,

640 F.3d at 1106 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *accord Chamness*, 722 F.3d at 1116 ("Nondiscriminatory restrictions that impose a lesser burden on speech rights need only be reasonably related to achieving the state's important regulatory interests.") (internal quotation marks and citations omitted). "[V]oting regulations are rarely subjected to strict scrutiny." *Dudum*, 640 F.3d at 1106.

B. The Burden Imposed by Sections 8400 and 8403 Is Not Severe

The burden of an election regulation is considered "severe," and thus warrants strict scrutiny, where the regulation "significantly impairs access to the ballot, stifles core political speech, or dictates electoral outcomes." *Chamness*, 722 F.3d at 1116. An election regulation will not be deemed "severe," and will thus be subject to less searching scrutiny, where the restriction imposed is "generally applicable, evenhanded, and politically neutral, or if it protects the reliability and integrity of the election process." *Id.* at 1117; *accord Dudum*, 640 F.3d at 1106.

In their Motion, Defendants argue that sections 8400 and 8403 do not impose a "severe" burden, and are thus subject to "more lenient scrutiny." (*See* Mot. at 7-16). As to the applicable level of scrutiny, Plaintiff argues that, while "many cases speak in terms of strict scrutiny or reduced levels of scrutiny . . . , under any level of scrutiny authorized by the case law, [Defendants] ha[ve] not demonstrated that the statute is Constitutional as a matter of law." (Opp. at 21). It is, however, incumbent upon Plaintiff to point to specific facts supporting his contention that sections

8400 and 8403 are unconstitutionally burdensome; it is not the State's burden to marshal evidence negating every displeased citizen's bare contention that a law is unconstitutional. *See Chamness*, 722 F.3d at 1116 ("We hold that Chamness has failed to establish that [ballot regulation] SB 6 severely burdened his rights, and uphold the constitutionality of the statute . . . ").

Plaintiff does not contend that sections 8400 or 8403 stifle core political speech, dictate electoral outcomes, or are applied non-uniform or in a politically biased fashion. The crux of his argument is that these Elections Code provisions unduly impair his ability to access California's general election ballot as an independent candidate. The Court disagrees.

1. No Evidence of a Severe Burden on Plaintiff

As an initial matter, Plaintiff has not shown that sections 8400 and 8403 significantly impaired his own ability to access the general election ballot, as impairment implies a causal relationship between the provisions and Plaintiff's non-appearance on the general election ballot. Plaintiff admits that he decided against even attempting to collect signatures in California because he determined that the effort would be "distinctly cost prohibitive." (De La Fuente Decl. ¶ 8) (*see also* Pl. Supp. Br. at 7 ("he refused to spend the estimated $3,000,000 to gain access to California's 2016 general election ballot because it was, on its face, too expensive"). Plaintiff estimated that he "would need to secure up to 200% of the required number of signatures [*i.e.*, 356,078 signatures] to account for rejected or disqualified signatures," while Plaintiff's designated ballot-access expert, Richard

Winger, opined that "a prudent candidate will proactively gather a cushion of approximately 50% more signatures than required [*i.e.*, 267,058 signatures] because a percentage of signatures is generally disqualified for various reasons . . . " (*Id.* ¶ 7; Declaration of Richard Winger ("Winger Decl.") (Docket No. 63-3) ¶ 21). Neither Plaintiff nor Winger provide any basis for their opinions regarding the need for this many extra signatures or offer any reasons for the significant divergence between their opinions. "Based upon [his] signature gathering efforts during [his] 2016 campaign," and laboring under the unsupported assumption that he needed to gather twice the required number of signatures, Plaintiff "calculated that [gathering signatures in California] would cost . . . between $3-4 million." (De La Fuente Decl. ¶ 7).

Plaintiff offers no details about how he arrived at his calculation that gathering signatures in California would cost $3 million to $4 million. The co-chair of the plaintiff-minority party in *Green Party of Ga. v. Kemp*, a recent district court opinion upon which Plaintiff relies heavily, opined that "a paid petitioner charges about $2 per signature, in addition to lodging and travel expenses." 171 F. Supp. 3d 1340, 1349 (N.D. Ga. 2016). Assuming a rate of $2 per signature and assuming, *arguendo*, the reasonableness of Plaintiff's opinion that a candidate should attempt to collect up to two times the number of required signatures, Plaintiff would have needed to spend $712,156 collecting signatures in California ($2 x 356,072 signatures), not including room and board (if, for some reason, he was unable to hire local signature gatherers).

Richard Winger offers no opinion on the approximate expenditure required for each signature, and Plaintiff does not explain why he believes that a signature in California, a state with many densely populated urban centers, would cost four to five times what it would cost in Georgia. In short, there is no reason that the Court should credit Plaintiff's assertion that it would cost him between $3 million and $4 million to gather a sufficient number of signatures to appear on the 2016 general election ballot.

Moreover, Plaintiff seemingly made no effort to enlist volunteer signature gatherers and/or was unsuccessful in doing so. As Winger testified during his deposition, although 1992 independent presidential candidate Ross Perot spent money opening up offices around the country, he relied primarily upon volunteer signature gatherers to earn a place on general election ballots, including California's. (Transcript of April 7, 2017 Deposition of Richard Winger ("Winger Depo. Tr.") (Docket No. 76-2) at 59-60). Plaintiff contends that he spent more than $500,000 campaigning in California and that, while "[c]ampaigning in California, [he] was featured in excess of 50 television and radio interviews/features." (De La Fuente Decl. ¶ 20). Certainly, if Plaintiff were appealing to California voters, he could have leveraged this money and exposure to enlist at least some volunteer signature gatherers. Although Plaintiff's counsel suggested during the hearing that volunteer signature gatherers should not be considered, the lack of <u>any</u> volunteers suggests a candidate without much serious voter support—*i.e.*, precisely who the State is entitled to screen out.

During the 2016 presidential campaign, Plaintiff spent $8,075,959.73 on his campaign, $8,058,834.60

of which consisted of loans from himself, and $17,215.13 of which consisted of individual contributions from others. (*Id.* ¶¶ 10, 18, Ex. 1). This massive disparity suggests that, while Plaintiff was quite enthusiastic about his own campaign, most voters were not.

And, while Plaintiff gained a spot on the general election ballots of 20 states (*Id.* ¶ 11), he did not, by implication, gain a spot on the general election ballots of 30 states. Again, this absence from general election ballots suggests a lack of voter enthusiasm not unique to California. "The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." *Anderson*, 460 U.S. at 788 n. 9. The record suggests that Plaintiff did not enjoy anything close to "substantial support" during the 2016 campaign.

In sum, the evidence in the record indicates that the barriers to Plaintiff's gaining a spot on the general election ballot were a lack of effort, incorrect and internally conflicting budget projections, and, most prominently, a lack of voter interest and enthusiasm, not sections 8400 and 8403. Defendants were under no obligation to provide Plaintiff with an easy path to the general election ballot or to help him overcome the deficiencies in his candidacy. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 198 (1986) ("States are not burdened with a constitutional imperative to reduce voter apathy or to 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot.").

2. No Evidence of a Severe Burden on Other Candidates

Plaintiff also has not shown that sections 8400 and 8403 have unduly impaired other presidential candidates from accessing California's general election ballot. In the 11 presidential elections since sections 8400 and 8403 were enacted, there have been between five and eight candidates on each general election ballot. (Declaration of Amie Medley ("Medley Decl.") (Docket No. 51) Exs. 7-17; Winger Depo. Tr. at 99:11-99:13). For example, in the 2012 election, there were six candidates from the Democratic, Republican, American Independent, Green, Libertarian, and Peace and Freedom parties on California's general election ballot. (Medley Decl. Ex. 16). Most recently, in the 2016 election, there were five candidates from each of those parties (President Trump was listed as both the Republican and American Independent candidate) on the general election ballot. (Medley Decl. Ex. 17). During the hearing, Plaintiff's counsel acknowledged that "California allows more candidates onto the ballot than many other states."

Both in his briefing and during the hearing, Plaintiff has urged the Court to focus solely on the number of independent candidates that have appeared on recent general election ballots and to ignore the overall number of major-and minor-party candidates that have successfully accessed the general-election ballot under the current election-law regime. (*See, e.g.*, Opp. at 21 ("the proper scope of inquiry is the burden placed on a candidate seeking ballot access by a particular means (*i.e.*, as an independent candidate)")). But focusing solely on independent candidates—rather than major-party, minor-party, and independent candi-

dates—is contrary to recent Ninth Circuit authority, which provides that courts "'must examine the entire scheme regulating ballot access.'" *Ariz. Libertarian Party*, 798 F.3d at 730 (quoting *Nader v. Cronin*, 620 F.3d 1214, 1217 (9th Cir. 2010)).

During the hearing, Plaintiff's counsel invoked *Anderson* to argue that sections 8400 and 8403 reflect some level of animus towards independent candidates. In *Anderson*, the Supreme Court struck down an Ohio law that required independent presidential candidates to file a statement of candidacy 75 days before the state held its party primary elections; in effect, this prevented candidates from making any serious effort to win a party primary and then, if unsuccessful, running in the general election as an independent. *See Anderson*, 460 U.S. at 806. It also prevented all independent candidates (whether they ran in a primary or not) from waiting to *see* what happens in the party primaries before deciding whether to run as an independent. *See id.* at 799. Ohio's "early filing deadline . . . discriminate[d] against independents." *Id.* at 804. Here, Plaintiff ran in the Democratic primary and, after he lost, still had time to try to secure a spot on the general election ballot as an independent; he just chose not to. Also, Plaintiff acknowledges that "California's statute for obtaining ballot access by forming a new qualified party is even more onerous" than sections 8400 and 8403(Opp. at 30), so there is no discrimination against independent candidates vis-à-vis partisan candidates. Despite its emphasis on independent candidates, *Anderson* is not supportive of Plaintiff's position.

In the 11 elections that have taken place since sections 8400 and 8403 were enacted, six independent

candidates have appeared on California's general election ballots. (Medley Decl. Exs. 7-11). Plaintiff makes much of the fact that the most recent independent candidate to appear on California's general election ballot was Ross Perot, in the 1992 election, but does not explain why the Court should not look beyond 1992 or what, if anything, changed post-1992 that made it less likely for an independent candidate to gain a place on the ballot.

During his deposition, Winger offered a logical reason for the lack of independent candidates on the ballot in more recent elections that is unrelated to the allegedly excessive burdens imposed by sections 8400 and 8403: "Because California has these minor parties [o]n the ballot, that kind of—there's almost nobody left to petition." (Winger Depo. Tr. at 100:1-100:3). In other words, presidential candidates who might otherwise garner enough support to run as independents are opting to affiliate with lesser-known parties. Where California voters are consistently able to vote for candidates outside of the two major parties, California has no constitutional obligation to counteract the trend toward minor-party affiliation by lowering the barriers for independent candidates.

California's general election situation is a far cry from the situation in *Green Party of Georgia*, the main case on which Plaintiff relies to argue that a one-percent signature requirement may be unconstitutionally burdensome. The district court in *Green Party of Georgia* paid particular attention to the fact that Georgia's one-percent signature requirement and timing requirements led to a consistent dearth of presidential candidates from outside of the Democratic and Republican parties, even when certain third-

party or independent candidates, such as Ralph Nader, were successful in gaining spots on the ballots of almost every other state. The district court noted that "[s]ince the passage of Georgia's current code section in 1986, Ross Perot qualified as an independent presidential candidate in 1992 and 1996, as did Pat Buchanan in 2000," but that no other "'minor party' . . . has qualified a presidential candidate for ballot access by petition since Mr. Buchanan in 2000." *Green Party of Ga.*, 171 F. Supp. 3d at 1348. This absence meant that "[t]he voters of Georgia [did] not have the political choice available to citizens in other states." *Id.* at 1363. Whereas Georgia's one-percent and timing requirements led to a severe constriction of voter choice vis-à-vis other states, California's one-percent and timing requirements have not. As Winger, Plaintiff's ballot-access expert, noted during his deposition, the Constitution and Marxist parties "are about the only minor parties left that aren't on the ballot in California presidential elections." (Winger Depo. Tr. at 100:23-100:25).

Finally, California's signature-gathering requirements are not objectively unreasonable or far outside of the mainstream. California's requirement that an independent candidate obtain signatures from one percent of the electorate is in line with the requirements in other states. (*See* Medley Decl. Ex. 4) (summarizing signature requirements by percentage of registered or prior-election voters in other states, including: 3% in Arizona, New Mexico and Oklahoma; 2% in Indiana, North Carolina, Pennsylvania, and Wyoming; and 1% in Delaware, Florida, Hawaii, Maryland, Minnesota, Nevada, and Oregon). And the raw number of signatures an independent candidate would

need to collect to appear on the general election ballot is not unreasonable given California's status as the most populous state with the largest number of Electoral College votes.

Accepting as true Winger's opinion that a prudent candidate should gather 150% of the required number of signatures to account for disqualification of some of those signatures, in order to appear on the 2016 general election ballot, Plaintiff would have needed to gather 267,058 signatures in the 105-day window provided by section 8403. The Supreme Court has viewed substantially more arduous signature-gathering requirements as within the realm of reason for someone who hopes to ascend to the Presidency. *See Storer v. Brown*, 415 U.S. 724, 740 (1974) (noting that "gathering 325,000 signatures in 24 days would not appear to be an impossible burden" or "an impractical undertaking for one who desires to be a candidate for President.").

In sum, sections 8400 and 8403 do not impose a severe burden on Plaintiff or anyone else hoping to gain a place on the general election ballot as an independent presidential candidate.

C. Sections 8400 and 8403 are Reasonably Related to California's Important Regulatory Interests

In light of the fact that sections 8400 and 8403 do not impose a severe burden on those hoping to gain a place on California's general election ballot, they are subject to less exacting scrutiny, meaning that they "need only be reasonably related to achieving the state's important regulatory interests." *Chamness*, 722 F.3d at 1116; *Cf. Dudum*, 640 F.3d at 1106. Defendants have identified those interests as, *inter alia*, keeping the ballot within manageable limits,

avoiding ballot overcrowding, and avoiding voter confusion. (*See* Mot. at 16; Reply at 9). These governmental interests have consistently been recognized as important. *See, e.g., Bullock v. Carter*, 405 U.S. 134, 145 (1972); *Munro*, 479 U.S. at 194-95.

Plaintiff incorrectly suggests that California must garner evidence of actual ballot overcrowding and voter confusion to justify sections 8400 and 8403. (*See* Pl. Supp. Br. at 11) ("[I]t is insufficient for the state to merely assert a defense[;] it must present evidence of a real problem that its ballot access limiting statutes seek to address. In addition to having a legitimate reason for its practice, the state must also show that its practice actually corrects or mitigates the problem that justifies its action.")). That is not correct. California may invoke those interests generally and does not need to "prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidates as a predicate to the imposition of reasonable ballot access restrictions"; it need not "sustain some level of damage before the legislature [can] take corrective action." *Munro*, 479 U.S. at 195.

Plaintiff's attempt to challenge the relationship between sections 8400 and 8403 and California's important interests consists of little more than Winger's opinion that the State could avoid ballot overcrowding and voter confusion by requiring independent candidates to obtain something more than 5,000 signatures and something less than 1% of eligible voters' signatures. (*See* Pl. Supp. Br. at 6 ("Richard Winger's expert testimony that states with a 5,000 election petition signature requirement have not experienced 'ballot clutter' and the alleged associated risk of 'voter confusion' is left uncontested in this case.").

During the hearing, Plaintiff's counsel argued that Defendants failed to "refute" Winger's opinion that most states can avoid "ballot clutter" with something around a 5,000-signature requirement. Plaintiff misapprehends the nature of the Court's examination. Under the less searching scrutiny that non-severe ballot-access restrictions (like California's) receive, California's one-percent requirement does not need to be the best way to avoid ballot overcrowding or even a particularly good way to avoid ballot overcrowding; it just needs to be a reasonable way to avoid ballot overcrowding.

Perhaps the strongest evidence that sections 8400 and 8403 are reasonably related to California's interest in avoiding ballot overcrowding is that in each election year since their enactment, California voters have enjoyed a relatively broad choice of presidential candidates. According to Plaintiff, "California's statute for obtaining ballot access by forming a new qualified party is even more onerous tha[n] the statutory scheme challenged by Mr. De La Fuente." (Opp. at 30). Even under this "more onerous" path to the ballot for partisan candidates (*i.e.*, win an existing-party primary or form a new party), California has had between five and eight presidential candidates on each of the last 11 general election ballots. The fact that this many candidates, from both major and minor parties, have been able to consistently access the general election ballot under these more onerous requirements bolsters Defendants' position that section 8400's one-percent signature requirement is reasonably related to its important interests in maintaining a manageable and comprehendible ballot. Plaintiff has offered no evidence to suggest that the relationship between

sections 8400 and 8403 and California's legitimate interests is unreasonable.

Plaintiff's argument, ultimately, is that candidates who lack a modicum of voter support should be able to force their way onto an already full and diverse general election ballot and then attempt to gather supporters later. Common sense and legal precedent say that this argument is unavailing.

Accordingly, Defendants' Motion is GRANTED and the action is DISMISSED.

This Order shall constitute notice of entry of judgment pursuant to Federal Rule of Civil Procedure 58. The Court ORDERS the Clerk to treat this Order, and its entry on the docket, as an entry of judgment. Local Rule 58-6.

IT IS SO ORDERED.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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, § 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 Election Code Section 8400

> Nomination papers for a statewide office for which the candidate is to be nominated shall be signed by voters of the state equal to not less in number than 1% of the entire number of registered voters of the state at the time of the close of registration prior to the preceding general election. Nomination papers for an office, other than a statewide office, shall be signed by the voters of the area for which the candidate is to be nominated, not less in

number than 3 percent of the entire number of registered voters in the area at the time of the close of registration prior to the preceding general election. Nomination papers for Representative in Congress, State Senator or Assembly Member, to be voted for at a special election to fill a vacancy, shall be signed by voters in the district not less in number than 500 or 1 percent of the entire vote cast in the area at the preceding general election, whichever is less, nor more than 1,000.

California Election Code Section 8403(a)(2)

For offices for which no filing fee is required, nomination papers shall be prepared, circulated, signed, and delivered to the county elections official for examination no earlier than 193 days before the election and no later than 5 p.m. 88 days before the election.

DECLARATION OF RICHARD WINGER IN SUPPORT OF OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS/ SUMMARY JUDGMENT (JUNE 30, 2017)

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

ROQUE "ROCKY" DE LA FUENTE,

Plaintiff,

v.

STATE OF CALIFORNIA and
ALEX PADILLA, California Secretary of State,

Defendants.

Case No. 2:16-cv-03242-MWF-GJS

Before: The Hon. Michael W. FITZGERALD,
U.S. District Judge.

I, RICHARD WINGER, declare:

1. I am over the age of 18 and competent. I have personal knowledge of the facts stated in this declaration and, if sworn as a witness, could testify competently thereto. I do hereby make this declaration to be used in the above-entitled case, and being duly sworn depose and say as follows:

2. I earned my Bachelor of Arts in Political Science at University of California, Berkeley in 1966, and conducted graduate studies in Political Science at University of California, Los Angeles from 1966 through 1967. I am the creator and Editor of *Ballot Access News*, a free and non-partisan internet and paper publication regarding American ballot access news nationwide. I update the *Ballot Access News* daily, and I produce and distribute the paper publication on a monthly basis. I began *Ballot Access News* in 1985 and continue to operate the publication to date. I am currently on the Editorial Board of *Election Law Journal*, the leading peer-reviewed publication on election design and reform. A true and correct copy of my current C. V. is attached hereto as Exhibit 1.

3. I have dedicated 52 years to the study of election law and ballot access. I primarily rely on my own research and investigation, as there were very few formal resources on the topic when I began my studies in the field. My research generally consists of the following methods/practices:

4. I started in 1965 by requesting all of the election codes from each of the state government offices via mail. I researched the origin and legislative intent of each state's ballot access laws using the Stanford law library stacks. The Stanford had copies of all the past election codes and related statutes. I researched the publications of nationally organized minor parties, dating back to the late 19th century. In studying minor parties, I also examined the various ballot access struggles they encountered. I have collected election returns back to 1870 for all states, for all statewide offices, and U.S. House of Representatives. I have collected data about the number of registered voters in

each state dating back approximately 50 years (data collection beyond that time frame often does not exist is or is inaccurate). This data made it possible for me to calculate the number of signatures for all past presidential elections, as well as midterm elections, for statewide office. I have studied countless publications, academic articles, essays, compendiums on ballot access laws, including a particularly essential reference book published in the 1910's that described all the state ballot access laws.

4. Based on these methods, and additional research, I have compiled an Appendix titled "List of Instances When States Required More than 5,000 Signatures for President, Together with List of Petitioning Presidential Candidates Who Met that Requirement" which, as stated, shows historically how many independent presidential candidates and newly qualified parties have been put on state presidential ballot via petition requiring more than 5,000 signatures. A true and correct copy of that Appendix is attached hereto as Exhibit 2 (hereinafter, "Appendix").

5. I have been recognized as an expert witness in the areas of outsider candidates and ballot access by federal courts in Alabama, Arkansas, California, New York, and Oklahoma. I have appeared as a commentator on ballot access on NBC, ABC, CNN, and NPR. I have been widely published and have had the privilege of appearing in several speaking engagements. A more complete list of my publications, testimonial and expert testimonial appearances, and speaking engagements is included in Exhibit 1.

6. The purpose of this declaration is to show through historical evidence that, if a state requires

even slightly more than 5,000 signatures for an independent presidential candidate or the presidential candidate of an unqualified (*i.e.* minor) party to get on the ballot, it will never have an overcrowded presidential general election ballot. Additionally, this declaration is intended to demonstrate that, based on the historical record, the signature requirements specifically imposed by California Election Code on independent presidential candidates is wildly excessive, if the actual purpose is to prevent an overcrowded ballot or voter confusion, or to require the candidate to demonstrate a modicum of support.

7. The first presidential election in which any state used government-printed ballots was the 1892 election. When a state government takes responsibility for printing general election ballots, it must have a law governing how candidates get on the ballot. As of 2012, there were 1,459 instances when a state held a presidential general election, and used a government-printed ballot. Out of those 1,459 instances, in 1,058 of them, the state provided some means for an independent presidential candidate, or the nominee of an unqualified party, to get on the ballot with a showing of support of 5,000 voters or fewer. In other words, in these 1,058 instances, the state provided "outsider" presidential candidates with access to the general election ballot with either no petition, or a petition that required a number of signatures ranging from 25 signatures to 5,000 signatures.

8. The most crowded general election ballot for president in U.S. history was the Colorado's general ballot in 2016. That year, twenty-two candidates were listed. Colorado did not require any petition at all for an independent presidential candidate, or the presi-

dential candidate of an unqualified party; instead, the candidate simply had to pay a filing fee of $1000.

9. Arkansas, which, as recently as 1996, let any independent presidential candidate, or the presidential candidate of an unqualified party, on the ballot just by request; no fee nor petition was required. The Arkansas 1996 ballot had 13 presidential candidates. Afterwards Arkansas started requiring 1,000 signatures for such candidates.

10. However, the states that have required more than 5,000 signatures for such "outsider" candidates, but almost always far fewer than 50,000, have never had more than 8 candidates. The list of the 401 instances in which a state required "outsider" candidates to submit a petition of more than 5,000 signatures (or, in the case of California, required newly-qualifying parties to have at least 5,000 registered members) is in the Appendix.

11. The list of 401 instances where states required more than 5,000 signatures shows that, 33% of the time, no independent presidential candidate, or presidential candidate of an unqualified party, was able to complete the petition and get on the ballot (134 instances). In another 20% of the instances, only one independent candidate or unqualified party successfully completed the petition (82 instances). In yet another 20% of the instances, only two candidates qualified (also 82 instances). There were an additional 13% of the instances where three candidates were able to complete the petition and qualify (51 instances). In 8% of the instances, four candidates were able to complete the petition (33 instances). In 4% of the instances, five candidates qualified (15 instances). Finally, in 1% of the instances, six candidates completed

the petition hurdle (4 instances). There is not one single instance when more than six candidates or parties successfully completed the petition. In other words, out of the 401 historical instances where a state required more than 5,000 signatures to access the ballot by petition, no more than six independent or unqualified party candidates successfully reached the ballot.

12. Also, it is notable that all four instances in which six petitions succeeded were in Illinois, a state which considers all petitions and petition signatures to be valid if no challenge is made, even if the petition on its face obviously lacks the required 25,000 signatures. Even one signature on a petition will succeed, if there is no challenge. For example, the New Party got on the ballot in Illinois with just one signature in 2008. So, if Illinois is discounted, there are no historical instances with more than five successful "outsider" petitions on a presidential ballot, where the state required more than 5,000 signatures.

13. For the 2016 election, California required 178,039 signatures for an independent presidential candidate to get on the general election presidential ballot. It is obvious from the extensive historical record, that if the state interest in a petition requirement is to keep the ballot from being over-crowded or confusing, the 178,039 requirement far exceeds what is necessary.

14. To exacerbate this generally insurmountable requirement, California, unlike many other states, also requires that the entirety of these 178,039 signatures be gathered within a 105-day window. This equals 1696 signatures every day during that window, not counting additional signatures needed to account

for the inevitable disqualification of a portion of the signatures.

15. California's 105-day window to gather 178,039 qualified signatures is not a generous time frame, in that the majority of states do not have a "start date" before which would be candidates cannot gather signatures. The deadline to submit signatures is generally of little consequence if no start date is prescribed, as the potential candidate has a much larger window to gather signatures. Any contention that California's 105-day window is "generous", is misleading at best.

16. California allows presidential primary candidates access to the ballot with no petition whatsoever, and no fee, if they are generally advocated for or recognized throughout the United States or California as actively seeking the nomination of a major or qualified party for President. In the Libertarian presidential primary in California in 2016, twelve candidates were listed. Having twelve candidates on that presidential primary ballot did not cause voter confusion or any other apparent harm. The 2016 Democratic presidential primary in California listed seven candidates, and that does not seem to have caused confusion.

17. Reasonable requirements can, of course, be implemented by states to prevent "vanity candidates" from unnecessarily over-crowding a presidential ballot. In my opinion, a "vanity candidate" is one who lacks even a modicum of support.

18. Such presidential candidates, *i.e.* those without a modicum of support, have historically never been able to obtain even 5,000 signatures. None of the parties or candidates listed in the Appendix, all

of whom surmounted a petition hurdle of more than 5,000 signatures, were vanity candidates.

19. The only independent presidential candidates who have ever surmounted a petition hurdle greater than 5,000 signatures in United States presidential general election history were Ross Perot, John Anderson, Ralph Nader, Eugene McCarthy, and Lyndon LaRouche. Dwight Eisenhower is listed in the Appendix, because he qualified as an independent candidate in South Carolina in 1952, which required 10,000 signatures; also, Harry F. Byrd is listed, because independent electors pledged to him qualified in 1956 in South Carolina. All of the other entries in the Appendix were the presidential nominees of minor parties, and virtually all of them had historical and social significance.

20. Qualifying signatures, for petition purposes, are a recognized commodity in American political campaigns. More specifically, in modern times, signatures for political petitions are generally acquired on a "price per signature" basis. This price can vary by state, district, election cycle, and urgency (impending deadline). All national candidates, generally advocated for or recognized throughout the United States as actively seeking the office of President utilize the services of companies that gather signatures for a fee. In 2016, they included Hillary Clinton, Donald Trump, and Bernie Sanders.

21. In addition to the statutorily prescribed number of qualified signatures, a prudent candidate will pro-actively gather a cushion of approximately 50% more signatures than required, because a percentage of signatures is generally disqualified for

various reasons, such as address, identification and registration complications.

22. Based upon the 178,039 required signatures in California for an independent presidential candidate in 2016, and the prudent gathering of an additional 50% signatures within the 105-day window, an independent presidential candidate would needed to obtain 267,058 signatures in 2016. The expense of this petition circulation would have been astronomically high to qualify for the general presidential ballot in California in 2016 via petition.

23. In California, no statewide petition to place an independent presidential candidate has succeeded since 1992, when self-funded billionaire Ross Perot qualified as an independent presidential candidate.

24. California requires more signatures for independent presidential candidates than all 49 other states. Florida's petition requirement comes in a distant second at approximately 60,000 fewer signatures. California and Florida are the only two states in the nation that required more than 100,000 signatures in 2016. The lowest signature requirement for independent presidential candidates was 275 in Tennessee in 2016. The median number of required signatures throughout the United States for an independent candidate in 2016 was 5,000, some 173,039 less than California in 2016.

25. An independent presidential candidate seeking access to the general ballot in all 50 states in 2016 would have needed to gather approximately 821,368 valid signatures. However, California's 178,039 signature requirements in 2016 accounted for over 21.7% of all signatures required nationwide. Likewise, Cali-

fornia, would represent over 21.7% of the total cost of accessing the ballot in all 50 states via petition.

26. The nationwide trend regarding petition signature requirements for "outsider" candidates has been towards a significant reduction in either the required raw number of signatures, or the percentage of voters' signatures needed. For example, Pennsylvania reduced required signatures by 77%, from 21,775 to exactly 5,000. *See Constitution Party v. Cortez*, 5:12-CV-02726-LS, p. 1, ¶ 2 (E.D.P.A. June 30, 2016). In 2013, Virginia legislature pro-actively reduced the required number of signatures for an independent candidate by 50%, from 10,000 to 5,000 VA S.B. 690, Ch. 521, Reg. Sess., March 18, 2016. On April 3, the Maryland House passed HB 529. It lowers the number of signatures for a statewide independent from 1% of the number of registered voters to exactly 10,000 signatures. The Oklahoma Senate has passed two bills that improve ballot access. SB 145 passed 41-2 on March 8. It eliminates the mandatory petition for independent presidential candidates, and the presidential nominees of unqualified parties, if they pay a filing fee of $17,500.

27. This trend towards a raw number of required signatures is sound. Using a percentage of registered voters is not an accurate representation of potential support because the basis (number of registered voters) is an inherently misleading number. The sum total of registered voters in a given state is generally inaccurate because of (1) poor record keeping by the state, such as in Georgia (2) the fact that several states in recent years have not maintained precise data on the number of registered voters (such as Minnesota, Wisconsin, Mississippi, and North Dakota), and/or (3) the existence

of "deadwood". Deadwood refers to erroneous voter registrations within a state that no longer reflect one person who is alive and a resident of the state. Deadwood occurs by duplicative flings (such as married women who change their maiden name), failure to remove deceased persons, multiple filings by one individual at an updated address, and people who move out of state. A reasonable raw number of signatures, or a reasonable percentage of voters who voted in the last presidential election, more accurately reflect a 'modicum of support' and better address the state's interest in avoiding voter confusion and an overcrowded ballot.

28. Only 11 states require more than 10,000 petition signatures from an independent presidential seeking access to the general election presidential ballot. Only 7 states require more than 25,000 Signatures. Only 4 states require more than 45,000 signatures.

29. Based on the foregoing, and my decades of research into ballot access laws, it is my opinion that California's 1% of the number of registered voters signature requirement, in combination with the restrictive 105-day window, is prohibitively expensive and unduly burdensome for independent presidential candidates. It is not necessary to prevent an overcrowded ballot, voter confusion, or candidates on the ballot without some modicum of support.

29. It is also my opinion that a petition requirement of 5,000 or more raw signatures would address the state's concerns in avoiding an overcrowded ballot and voter confusion, while lowering the burden on independent and unqualified presidential candidates to a reasonable level.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

/s/ Richard Winger

Dated: 30 June, 2017