No. 19-524

IN THE

Supreme Court of the United States

ROQUE DE LA FUENTE, AKA ROCKY,

Petitioner,

v.

ALEX PADILLA, CALIFORNIA SECRETARY OF STATE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* PROFESSORS OF POLITICAL SCIENCE AND HISTORY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are distinguished professors of political science and history who specialize in the study of American political history, and, in-particular are experts on the two-party system and the burden that ballot access and petitioning laws place on minor political party, minority voters and their candidates, and independent candidates.

Amici wish to bring to the Court's attention the extensive political and legal history amongst the various states leading to highly inconsistent results, confusion, ballot exclusion, and undue burdens on independent candidates. The history shows that inconsistences at times within the same state.

These *Amici* are:

1. Omar H. Ali, Ph.D., Columbia University; Professor of African American and African Diaspora Studies and History, University of North Carolina-Greensboro. Prof. Ali's teaching and research include the topic of independent black political movements in U.S. Prof. Ali is the biographer of the first black female candidate

1. Amici support Petitioner. This brief was not authored, in whole or in part, by counsel for either party, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Costs for printing and filing of this brief were paid for by the Coalition for Free and Open Elections, which is a wholly non-affiliated organization to any party to this case. The parties have been given at least 10 days notice of amici's intention to file and have consented to the filing of this brief.

to make ballots of all 50 states (Lenora Fulani). He is the author of *In the Balance of Power: Independent Black Politics and Third-Party Movements in the U.S.*

2. John C. Berg, Ph.D., Harvard University; Professor of Government, Emeritus, Suffolk University; Past President, New England Political Science Association. Prof. Berg has authored numerous publications featuring research on third or minor political parties.

3. Steven R. Brown, Ph.D., University of Missouri; Professor of Political Science, Emeritus, Kent State University. Prof. Brown is the author of over 100 publications on policy, political psychology, other topics. He has won awards from the International Society of Political Psychology, International Society for the Scientific Study of Subjectivity, Kappa Tau Alpha, others for contributions to science in many disciplines and contributions to the scientific study of subjectivity.

4. Adam Sander Chamberlain, Ph.D., University of North Carolina-Chapel Hill; Associate Professor of Political Science and Chair, Department of Political Science, Coastal Carolina University. Prof. Chamberlain's research and teaching interests include political parties (especially minor parties).

5. Charles E. Cottle, Ph.D., Kent State University; Professor of Political Science, Emeritus, University of Wisconsin-Whitewater. Prof.

Cottle's research interests are primarily in political philosophy. He is the author of numerous academic articles on diverse topics. He is the founding co-editor of Wise Guys, an online journal of scholarship and culture.

6. Jonathan Earle, Ph.D., Princeton University; Dean of the Roger Hadfield Ogden Honors College and Professor of History, Louisiana State University; author of book on the politics of the Free Soil Party and the Democratic schismatics that led to the antislavery Republican Party in the 1850s.

7. J. David Gillespie. Ph.D., Kent State University; Dana Professor of Political Science, Emeritus, and former college Vice President for Academic Affairs, Presbyterian College; retired political science faculty member, College of Charleston and The Citadel; author of *Challengers to Duopoly: Why Third Parties Matter in American Two-Party Politics* and *Politics at the Periphery: Third Parties in Two-Party America.*

8. J. Chris Grant, Ph.D., University of Georgia, Professor and Chair, Department of Political Science, Mercer University. Fulbright Professor, Moldova (2006). Prof. Grant's research and teaching specialties include electoral politics.

9. James (Jim) Hedges, Master's, University of Maryland; career veteran of Marine Corps and Marine Band. Mr. Hedges is a prolific published author on the topics of politics and other related

fields. He is the Editor of *Prohibition Party Newsletter*. Mr. Hedges serves as Secretary of Partisan Prohibition History Society. Mr. Hedges was the Prohibition Party presidential nominee in 2016.

10. Booker T. Ingram, Ph.D., Ohio State University; Dana Professor of Political Science and Director of Diversity and Inclusion, Presbyterian College. Prof. Ingram teaches in areas of American politics and political theory. His research focuses on African American politics; media and politics; and democratic theories, practices, and institutions.

11. William P. Kreml, J.D., Northwestern University, Ph.D., Indiana University, Distinguished Professor of Political Science, Emeritus, University of South Carolina. Professor Kreml is the past principal drafter of first charter of National Democratic Party. He finished second as candidate in Green presidential primaries of 2016.

12. Jerome S. Legge, Jr., Ph.D, Emory University; Professor Emeritus in the School of Public and International Affairs at University of Georgia; past service as Associate Provost for Academic Planning, Associate Dean, and Director of Master of Public Administration program at UGA. Prof. Legge's specializations are in European and American Public Policy and Holocaust Studies.

13. Jonathan H. Martin, Ph.D., Brandeis University; Professor of Sociology, Framingham State

University. Prof. Martin's research and writing interests include progressive and third party politics.

14. Greg Orman, Kansas entrepreneur and author of the 2016 book *A Declaration of Independents*. Mr. Orman is a contributor to notable national media in politics, including Real Clear Politics and others. Mr. Orman was a former independent candidate for Governor and for Senator of his state.

15. Erin S. McAdams, Ph.D., The Ohio State University; Associate Professor of Political Science at Presbyterian College. Prof. McAdams teaches courses related to legal studies, Constitutional Law, campaigns and elections, and political parties

16. Scot Schraufnagel, Ph.D., Florida State University; Professor and Chair in Department of Political Science at Northern Illinois University. Among his published research is his well-received 2011 book, *Third Party Blues: the Truth and Consequences of Two-Party Dominance*.

17. David Whiteman, Ph.D, University of North Carolina-Chapel Hill; Professor of Political Science, Emeritus, at the University of South Carolina. Prof. Whiteman's research and teaching interests include congressional elections, the use of policy analysis in congressional decision-making, and the political impact of documentary film.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court issued a clear guideline for determining the constitutionality of ballot access restrictions in *Storer v Brown,* 415 US 724 (1974). At page 742, the Court wrote, "In the context of California politics, could a reasonably diligent independent candidate be expected to satisfy the signature requirement, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not."

The Court repeated this teaching in *Mandel v Bradley,* 432 U.S. 173 (1977). At page 177, it repeated the *Storer* test, saying "The appropriate inquiry was set out in *Storer v Brown, supra,* at 742." The decision then quoted the portion of *Storer* set forth in the preceding paragraph.

The *Storer* test is clear and objective. Nevertheless, in recent years, some lower courts have not abided by that test. This amicus describes lower court decisions that used the *Storer* test, and lower court decisions that disregarded it. Because there is disagreement in the lower courts over whether to use the *Storer* test or not, this Court should grant the writ, to resolve whether the *Storer* test is still to be used or not.

The Ninth Circuit opinion acknowledges the usage test: "Although the last independent candidate appeared on California's general election ballot in 1992, minor party candidates have consistently appeared alongside major

party candidates." The Ninth Circuit thereupon seemed to merge minor party candidates with independent candidates, when it considered the usage test, which is contrary to this Court's teaching in *Storer v Brown, supra,* at p. 745, "But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." Furthermore, the Ninth Circuit implication that California has lenient procedures for minor parties is factually incorrect. California has kept the presidential candidate who came in third or fourth in the national popular vote off its ballot in 1912, 1920, 1928, 1932, 1936, 1944, 1948, 1956, 1960, 1964, 1968, 1972, 1976, 1984, and 2004. In 2016, it kept Evan McMullin, who placed fifth and polled 731,733 votes in the nation, off its ballot.

ARGUMENT

I. CERTIORARI IS DESIRABLE BECAUSE THERE IS CONFUSION AMONG LOWER COURTS OVER WHETHER THE APPLY THE USAGE TEST.

Since 1977, many lower courts have followed the *Storer* usage test:

Alabama: the Eleventh Circuit affirmed an unpublished opinion of a U.S. District Court striking down the March petition deadline for petitions for new parties and non-presidential independent candidates in *New Alliance Party of Alabama v Hand,* 933 F.2d 1568 (1991). The Eleventh Circuit adopted the District Court's opinion as its own. It noted that since 1982, when that deadline was created, only a small number of such petitions for statewide office had succeeded.

Arkansas: a U.S. District Court struck down the number of signatures for new parties to get on the ballot, 7% of the last gubernatorial vote, in *American Party v Jernigan,* 424 F.Supp. 943 (e.d. Ark. 1977). The Court noted on page 949, "Since the enactment of the seven percent requirement (in 1971), no new political party has been formed in the State of Arkansas."

Arkansas (2): a U.S. District Court struck down the number of signatures for new parties to get on the ballot, 3% of the last gubernatorial vote, in *Citizens to Establish a Reform Party in Arkansas v Priest,* 970 F.Supp.690 (e.d.Ark. 1996). The Court noted in numbered paragraph 31, on page 695, that no new party had appeared on the ballot since 1970, except for President, for which the new party requirements were considerably easier and did not require any petition.

Arkansas (3): a U.S. District Court enjoined the number of signatures for new parties to get on the ballot, 3% of the last gubernatorial vote, in *Libertarian Party of Arkansas v Thurston,* decision of July 3, 2019, case no. e.d., 4:19cv-214. Numbered paragraphs 13-14 set forth the fact that no new party ever qualified by petition in Arkansas, except in the years 2007-2018 when the petition was 10,000 signatures (no petition had been required before 1971). The 2019 session of the legislature had increased the requirement from 10,000 signatures to 3% of the last gubernatorial vote (26,945 signatures) and that requirement was enjoined in the 2019 lawsuit.

Georgia: the Eleventh Circuit evaluated the number of signatures for new parties and independent presidential candidates to get on the ballot for president in *Bergland v*

Harris, 767 F.2d 1551 (1985), a requirement of 2.5% of the number of registered voters. On page 1555 the decision quotes from the usage tests of *Storer* and *Mandel.* The decision noted that the necessary historical data was not in the record, and remanded the case to develop the usage history. However, no meaningful further proceedings were held in the case, because in 1986 the legislature lowered the petition for all statewide office, minor party and independent alike, to 1% of the registered voters. If the record had been developed, it would have shown that the 2.5% petition, which existed from 1979 through 1985, had been used only twice, both times in 1980.

Georgia: as noted in the cert petition in this case, in 2016 a U.S. District Court struck down the petition of 1% of the registered voters, for minor party and independent presidential candidates, and in 2017 the Eleventh Circuit confirmed. *Green Party of Georgia v Kemp,* 171 F.Supp.3d 1340 (n.d. 2016); 674 F, App'x 974 (2017). The decision notes that in the years after 2000, no candidate had complied with the requirement.[2]

Illinois: the Seventh Circuit ruled in *Lee v Keith,* 463 F.3d 763 (2006) that the petition of 10% of the last vote cast for independent candidates for state legislature was unconstitutional. The decision notes on page 765 that the requirement had been enacted in 1979, and except in 1980, no independent candidate had ever complied with it.

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2. The Ninth Circuit opinion says that the Georgia decision is not in conflict with *De La Fuente v Padilla,* because in Georgia there were no minor parties on the Georgia ballot. The Ninth Circuit made a factual error. The Libertarian Party was on the ballot in all statewide Georgia elections, for all statewide office, 1988 through the present. The New Alliance Party was on in 1988; and the Reform Party was on in 1996 and 1998.

Maryland: after *Mandel v Bradley, supra,* was remanded back to the U.S. District Court, the District Court determined that in the years with a March petition deadline, starting in 1969, no statewide independent had managed to qualify, and struck down the March petition deadline. There had been some successful petitions by candidates for district office. *Bradley v Mandel,* 449 F.Supp.983 (1978).

Michigan: a U.S. District Court in 2016 enjoined the statewide independent petition requirement of 30,000 signatures in *Graveline v Johnson,* 336 F.Supp.3d 801 (e.d. Mi. 2018), affirmed, 747 Fed.App'x. 408 (Sixth circuit 2018). Both courts noted that since the requirement had been created in 1988, only two statewide independent petitions had succeeded, both for president. None had succeeded for statewide office other than president.

New York: a U.S. District Court in 1996 enjoined the petition requirements for Republican Party delegates to national party conventions. *Rockefeller v Powers,* 917 F.Supp. 155 (e.d.N.Y.). The Second Circuit affirmed the decision, 78 F.3d 44 (Second Circuit, 1996). The requirements were the lesser of 1,250 signers within a U.S. House district, or 5% of the number of registered voters in the party. The decisions noted that no Republican slate of delegates had managed to qualify in most of the state, except for the delegates pledged to Bob Dole, who had the support of the party organization.

North Dakota: the Eighth Circuit struck down the petition requirement for a new party, 15,000 signatures, in *McLain v Meier,* 637 F.2d 1159 (1980), because it noted that since the law had been created in 1939, only one group had ever been able to complete that petition, in 1976.

Ohio: in 2006 the Sixth Circuit reversed a U.S. District Court and struck down the petition deadline for new parties, November of the year before the election, in *Libertarian Party of Ohio v Blackwell,* 462 F.3d 579. The decision noted on page 589 that no new parties had qualified in 1992, 1994, 2002, and 2004.

Many other courts have chosen not to follow the usage test, or have interpreted it to mean that even one or two successes over a period of many years is good enough:

Alabama: a U.S. District Court, and the Eleventh Circuit, both upheld the petition requirement for new parties and non-presidential statewide candidates, in *Stein v Chapman,* 774 F 3d 689 (2014). The requirement was 3% of the last gubernatorial vote. Neither the unreported U.S. District Court opinion, nor the Eleventh Circuit opinion, noted that the statewide requirement had been in effect since 1997 and had only been used once, in 2000.

Arizona: a U.S. District Court upheld the independent presidential petition requirement of 3% of the number of registered independents in *De La Fuente v Hobbs,* decision of June 11, 2019, case no. 2:16cv-2419. The requirement had been created in 1993. Currently, 3% of the number of registered independent voters is approximately 1% of all registered voters. The decision notes that only one independent presidential candidate had successfully completed the petition since the law had been created, so it did acknowledge the *Storer* usage test. But it said that was not significant because there had been no independent presidential candidates of note. The decision ignored a long list of significant presidential candidates who failed to get on the Arizona ballot during those years, including

Ralph Nader in 2004, Evan McMullin in 2016, all of the Constitution Party presidential nominees in the period 1996-2016, the Natural Law Party presidential nominee in 1992 and 1996, and the Green Party nominee in 2004.

Florida: the Eleventh Circuit upheld the petition requirement for new parties, 3% of the number of registered voters, in *Libertarian Party of Florida v State of Florida,* 710 F.2d 790 (1983). The requirement had existed since 1970. The decision noted that the petition had been used successfully by the American Party in both 1974 and 1976. Those had been the only two successful uses of the procedure, but the court felt that two successful instances in a period of twelve years satisfied the usage test.

Georgia: the Eleventh Circuit upheld the petition requirement for new party and independent candidates for U.S. house, 5% of the number of registered voters in *Coffield v Kemp,* 599 F.3d 1276 (2010). The decision acknowledged on page 1277 that no petition for U.S. House had succeeded in Georgia since 1964, but said perhaps that is because no independent (except the plaintiff) had attempted the petition.

Georgia(2): a U.S. District Court upheld the petition for U.S. House, 5% of the number of registered voters, in *Cowen v Raffensperger,* n.d., 1:17cv-4660. The evidence showed that approximately twenty petitioning candidates had attempted to qualify for U.S. House over the last few decades, but no minor party candidate had ever qualified in the history of the law (which was created in 1943), and no independent had succeeded since 1964. The opinion does not mention this usage history, although it does say,

"Thus, while Plaintiffs present a robust record and some compelling arguments, the Court cannot ignore the fact that similar challenges to the Georgia Election Code have been rejected by higher courts."

Hawaii: the Ninth Circuit upheld the petition requirement for independent presidential candidates in *Nader v Cronin,* 620 F.3d 1214 (2010), a petition of 1% of the last presidential vote. The plaintiffs showed that no independent presidential candidate had managed to qualify since 1992, but the decision did not mention that fact, or contain any information about how often the requirement had been used.

Louisiana: the Fifth Circuit upheld the requirement that a new party either have registration membership of 5% of the state total, or that its presidential nominee poll 5% of the vote in the last election, in *Dart v Brown,* 717 F.2d 1491 (1983). The lengthy decision did not include the fact, which was in the evidence, that no group except George Wallace's American Party, in 1968, had ever met either of these requirements.

North Carolina: the Fourth Circuit upheld the requirement that an independent U.S. House candidate submit a petition of 4% of the number of registered voters, in *Greene v Bartlett,* unpublished decision of October 13, 2011, no. 10-2068. The requirement had existed since 1991. The decision acknowledges the usage test but felt the fact that one petition for U.S. House had succeeded satisfied the usage test.

North Dakota: the Eighth Circuit upheld a requirement that no party could nominate a candidate for the legislature

unless a number of voters equal to 1% of the population had chosen the party's ballot in the open primary, in *Libertarian Party of North Dakota v Jaeger,* 659 F.3d 689 (2011). One percent of the population sometimes is equivalent to 15% of the number of voters who cast a vote in any party's primary. The evidence showed that the law, which had existed since 1925, had only been successfully used once, by the American Party in 1976. The decision, on page 703, acknowledges this point, and mentions the usage test, but says perhaps the only reason no party had surmounted the requirement is that no minor party candidates (except for the plaintiff-candidates) had tried and failed.

Oklahoma: the Tenth Circuit upheld a requirement that a new party submit a petition of 5% of the last vote cast in *Arutunoff v Oklahoma State Election Board,* 687 F.2d 1375 (1982). The requirement had existed since 1975 and had only been used once. The majority decision did not mention this fact. The dissent did mention it, and also pointed out that in the 30 years before 1975, when the requirement had been 5,000 signatures, only once had any party completed the petition.

Tennessee: the Sixth Circuit three times had the lawsuit *Green Party of Tennessee v Hargett* before it. The case concerned the petition for new parties, 2.5% of the last gubernatorial vote, a law that has existed since 1972 and has never been used. The first two times, the Sixth Circuit didn't decide if the law were constitutional or not, and remanded it for more fact-finding. In the U.S. District Court, twice the law was held unconstitutional, based largely on the usage test. But after the second remand, the case went back to a different U.S. District Court Judge,

who upheld the law. The Sixth Circuit then refused to disturb his opinion. Thus there were six opinions: (1) 882 F.Supp.2d 959, m.d. (Feb. 3, 2012); (2) 700 F.3d 816 (Nov. 30, 2012); (3) 953 F.Supp.2d 816, m.d. (June 17, 2013); (4) 767 F.3d 533 (Aug. 22, 2014); an unreported decision of the U.S. District Court, m.d., 3:11cv-692 (Aug. 17, 2016); an unreported decision of the Sixth Circuit, 16-6299 (May 11, 2017). The last two decisions, the ones that upheld the law, did not mention that the law had never been used successfully.

II. THE NINTH CIRCUIT ERRONEOUSLY STATED THAT BECAUSE MINOR PARTY PRESIDENTIAL CANDIDATES HAVE APPEARED ON THE CALIFORNIA BALLOT, THEREFORE IT IS NOT SIGNIFICANT THAT NO INDEPENDENT PRESIDENTIAL CANDIDATE HAS QUALIFIED SINCE 1992.

The Ninth Circuit opinion states, "Although the last independent candidate appeared on California's general election ballot in 1992, minor party candidates have consistently appeared alongside major party candidates." This conclusion is flawed for two reasons. The first is that this Court said in *Storer v Brown, supra,* at p. 745, "But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other."

The second reason the Ninth Circuit sentence is flawed is that California historically, and currently, has excluded many minor party presidential candidates of significance from its ballot. California has never had lenient ballot

access for minor party or independent presidential candidates.[3]

The original California ballot access law, passed in 1891[4], required a petition for independent candidates, and the nominees of previously unqualified parties of 5% of the last vote cast. For the presidential election of 1892, this required 12,115 signatures. In the entire nation in1892, the total number of signatures to get on the ballot in all states (using the easier method, independent or minor party) was only 38,601 signatures.[5] California's petition burden was 38% of the entire national total, even though California only cast 2.2% of the national presidential vote in 1892. Ohio required the second highest number of signatures, 7,957 (1% of the last vote cast). No other state required more than 3,000 signatures. Although the California ballot access laws were revised in various ways after 1892, the state never had an easy requirement. Consequently, through the years, many significant minor party and independent candidates were excluded from the California ballot, and this continues to the present time.

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3. The Ninth Circuit opinion says, "De La Fuente's own expert suggested that 'there's almost nobody left (for independent candidates) to petition", but that quote, from a deposition, only referred to the 1996 and 2000 elections, not to California elections in general.

4. California Session Laws 1891, ch. 130, p. 166.

5. The number of signatures to get on the ballot for president in each state, 1892 through 2004, can be seen in the Appendix of an *Election Law Journal* article, "How Many Parties Ought to be on the Ballot?", page 170, in Volume 5, number 2, 2006. The Appendix is on pages 194-197.

However, California law has generally made it easy for a party that was already on the ballot to continue to be ballot-qualified, which has ameliorated the difficult requirements for a new party to get on the ballot, to a certain extent. For example, California still recognizes the American Independent Party, which was put on the ballot in 1967 in order to enable George Wallace to run for President. Wallace created new parties in many states for his presidential run, but none of his state parties outside California continues to be on the ballot. Also, the Prohibition Party continued to be on the ballot continuously in California before the government-printed ballot came into existence, through all elections until 1964. It was disqualified in 1964 because its registration had dropped below one-fifteenth of 1% of the state total.[6]

In 1912, Republican nominee William Howard Taft was excluded from the California ballot, because in September the state Republican Party chose presidential elector candidates pledged to Theodore Roosevelt, even though the national Republican convention had chosen Taft.[7] In order for Taft to qualify as an independent in 1912, he would have needed 11,570 signatures, due September 26 (40 days before the election). He did not complete this petition, and instead filed for write-in status.

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6. See the Secretary of State's publication *Report of Registration, January 1964*, "Preface" page.

7. See page 185, *The California Progressives,* by George E. Mowry (1951: U.C. at Berkeley Press). The Progressive Party decided not to use the petition procedure to qualify Roosevelt as the Progressive nominee in California because, under California election laws, the Roosevelt slate of presidential electors would have been placed in an unfavorable position on the ballot.

In 1920, the new Farmer-Labor Party, modeled on the British Labour Party, ran Parley P. Christensen for President. Even though he placed fourth in the nation, he did not qualify for the California ballot. He would have needed 20,651 signatures.[8]

In 1924, Robert La Follette, who placed third in the nation and won the electoral votes of Wisconsin, ran as an independent progressive presidential candidate. He attempted to petition in California, but the State Supreme Court ruled that the independent petition procedure could not be used for presidential elections[9]. The Socialist Party was already on the ballot, and it nominated La Follette, so he did appear on the ballot, but La Follette proclaimed throughout his campaign that he was not a socialist, and he was uncomfortable that California voters could not vote for him except under the "Socialist" label. California is the only state in which voters couldn't vote for La Follette except under that label (although there was one state in which he was not on the ballot at all, Louisiana, although Louisiana voters could write him in).

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8. See *A Statistical History of the American Presidential Elections* by Svend Petersen (1963: Frederick Unger Publishing Co.) for election returns for all presidential elections through 1960. For more recent years, see any edition of *America Votes* (authors variously Richard Scammon, then Rhodes Cook). A new version of *America Votes* is published every two years, and all volumes have complete presidential national vote totals back to 1960. Also starting in 1980 the Federal Election Commission had published presidential and congressionalelection returns, in volumes that appear every two years. The title is always *Federal Elections* followed by a particular election year.

9. *Spreckles v Graham,* 194 C. 516 (1924). In 1927 the legislature amended the law to provide for independent presidential candidates.

In 1928, William Z. Foster, the Communist Party nominee for President, placed fourth in the national popular vote, but was unable to get on in California.

In 1932, again, William Z. Foster placed fourth, but again he was not on in California.

In 1936, Congressman William Lemke ran as the presidential nominee of the new Union Party, and he placed third, but he was unable to get on the California ballot.

In 1944, Norman Thomas, Socialist Party nominee, placed third in the nation, but was unable to get on in California.

In 1948, Strom Thurmond placed third in the national popular vote, but he was unable to get on in California, although generally he did not try to get on the ballot in states outside the South.

In 1956, independent conservative T. Coleman Andrews placed third in the nation, but was unable to get on in California.

In 1960, Eric Hass, Socialist Labor Party nominee, placed third among all declared candidates in the nation, but was unable to get on in California.

In 1964, again, Eric Hass placed third, but was not on in California.

In 1968, Henning Blomen, Socialist Labor nominee, placed fourth but was not on in California.

In 1976, independent candidate Eugene McCarthy placed third but was unable to get on the California ballot.

In 1984, independent candidate Lyndon LaRouche placed fourth in the nation but did not qualify in California.

In 2004, independent candidate Ralph Nader placed third in the nation but did not qualify in California.

In 2016, independent Evan McMullin placed fifth, with 731,733 votes, but did not qualify in California.

In 2019, a new party, the Common Sense Party, headed by former Republican Congressman Tom Campbell, attempted to qualify in California, but failed to do so by the October 2, 2019 deadline. However, California has a later deadline for parties that only want to qualify for the presidential ballot, and it is possible the party will qualify for that office later.

CONCLUSION

A free election requires that voters be permitted to vote for the candidate of their choice. In 1990 the United States signed the Copenhagen Document of the Conference on the Human Dimension of the CSCE. The United States, and certain other nations, agreed "to respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination."[10]

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10. Point 7.5 of the Document, which can be seen at osce.org/documents/odihr/2006/06/19392_en.pdf

This Court's *Storer* usage test provides an excellent method for courts to determine whether ballot access laws are too severe or not. This Court should grant the writ and should set forth its opinion on whether the usage test is still to be used to adjudicate ballot access cases. It should also grant the writ because despite the dozens of ballot access constitutional lawsuits filed every election year, this Court has not taken a ballot access case brought by a new or minor party, or an independent candidate, since it agreed to hear *Norman v Reed,* 502 U.S. 279, in 1991.

For these reasons, Amici respectfully urge this Court to hear De La Fuente v. Padilla.

Respectfully Submitted,

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