

1 **I. FACTUAL SUMMARY**

2 1. Plaintiff, Roque “Rocky” De La Fuente is a citizen of the United States and is
3 registered with the Federal Election Commission as a presidential candidate. Plaintiff is
4 a well-known business owner who meets the qualification prescribed in Article 2, Section
5 1 of the United States Constitution for election to the office he seeks in that he is a
6 natural-born citizen of the United States, is over the age of 35, and has been a resident
7 within the United States for 40 years. Plaintiff is seeking access to the 2016 Presidential
8 ballot in California by circulating nominating petitions pursuant to California Election
9 Code §8400.

10 2. Defendant, Alex Padilla, is the Secretary of State of California and is the
11 supervisor and director of all election matters in California.

12 3. The State of California is responsible for the statutory scheme in question.

13 4. Plaintiff has hired a campaign staff and is in the process of seeking compliance
14 with §§8400-8409 of the California Election Code.

15 5. The 2016 Presidential election will take place on November 8, 2016.

16 6. The State of California and its counties will begin preparation for the election
17 before the election date and will soon start printing the ballots to be used in the election.

18 **II. LEGAL STANDARD FOR INTERIM INJUNCTIVE RELIEF**

19 The primary purpose of a preliminary injunction is to preserve the *status quo* until
20 a court can make a final determination on the merits of the action. *See Continental Baking*
21 *Co. v. Katz*, 68 Cal. 2d 512, 67 Ca. Rptr. 761, 439 P.2d 889 (1968). A temporary
22 restraining order (“TRO”) is properly granted on *ex parte* notice in order to maintain the
23 *status quo* or to prevent irreparable injury pending a hearing on the Application for a
24 preliminary injunction. Code Civ. Proc., Section 527(c); see also 6 Witkin, Cal.
25 Procedure (4th ed. 1997) Provisional Remedies, Section 286, p. 27. A plaintiff seeking
26 a TRO and/or preliminary injunctive relief must establish that A) he is likely to succeed
27 on the merits; B) he is likely to suffer irreparable harm in absence of preliminary relief;
28 C) the balance of equities tips in his favor; and D) an injunction is in the public interest.

1 See *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008); *Munaf v. Geren*, 553 U.S. 674, 689-690
2 (2008); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987).

3 **A. Plaintiff is likely to succeed on the merits because he satisfies both the**
4 **“serious questions” standard and the “likely to succeed” standard**

5 Plaintiff satisfies both the “serious question going to the merits” and the “likely to
6 succeed on the merits” standards used in considering issuance of a preliminary injunction
7 when proper application of the three factors set out in *Anderson v. Celebrezze*, 460 U.S.
8 780 (1983), is undertaken.¹ In *Winter*, the Supreme Court established that a plaintiff must
9 show that he is likely to succeed on the merits for a court to grant a preliminary
10 injunction. *Winter*, 555 U.S. at 20. However, subsequent opinions rendered in the Ninth
11 Circuit have noted that *Winter* does not discuss the continuing validity of the “sliding
12 scale” approach employed by the Ninth Circuit and other circuit courts. *Alliance for the*
13 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Under the sliding scale
14 approach, the elements of the preliminary injunction test are balanced, so that a stronger
15 showing of one element may offset a weaker showing of another. Consequently, the
16 sliding scale approach permits a court in the Ninth Circuit to issue a preliminary
17 injunction in a scenario where the likelihood of success is such that “*serious questions*
18 *going on the merits* were raised and the balance of hardships tips sharply in [plaintiff’s]
19 *favor.*” *Alliance for the Wild Rockies*, 632 F.3d 1127, 1132; *Clear Channel Outdoor, Inc.*
20 *v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003) (emphasis added).

21 The Ninth, Seventh, and Second Circuits use the sliding scale approach, and have
22 determined that the lessened “serious question” standard is still applicable in light of
23 *Winter*. See *Alliance for the Wild Rockies*, 632 F.3d at 1134-5; *Hoosier energy Rural*
24 *Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009); *Nken*
25 *v. Holder*, 556 U.S. 418 (2009). The Ninth Circuit has held that questions regarding

26 ¹ As discussed in Section 2, the three Anderson factors are where a court must 1) evaluate the character
27 and magnitude of the asserted injury to rights protected by the First and Fourteenth Amendments; 2)
28 identify the interests advanced by the State as justifications for the burdens imposed by its rule; and 3)
evaluate the legitimacy and strength of each asserted state interest and determine the extent to which
those interests necessitate the burdening of the Plaintiff’s rights.

1 contractual claims, and copyright claims constitute “serious questions” under the
2 preliminary injunction sliding scale approach. See *Alliance for the Wild Rockies*, 632 F.3d
3 at 1136; *Gershwin v. Whole Thing Co.*, No. CV 80-569, 1980 U.S. Dist. LEXIS 16465,
4 at *11-12 (C.D. Cal. Mar. 10, 1980). As presented herein, Plaintiff will be able to satisfy
5 both the “serious questions” standard and the heightened “likely to succeed on the merits”
6 standard.

7 **1. “Serious Questions” Standard**

8 Plaintiff presents “serious questions” sufficient to satisfy the sliding scale approach
9 used by the Ninth Circuit because a state law depriving citizens of their Constitutional
10 rights poses a serious question worthy of litigation, as the rights protected by the
11 Constitution are fundamental for the preservation of a democracy. The right to vote, the
12 right to associate for political purposes, and the right to be a political candidate are
13 fundamental Constitutional rights protected by the First and Fourteenth Amendments.
14 See *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Eu v. San Francisco County*
15 *Democratic Central Committee*, 489 U.S. 214, 224 (1989); *Tashjian v. Republican Party*
16 *of Conn.*, 479 U.S. 208, 214 (1986); *Anderson v. Celebreze*, 460 U.S. 780, 787 (1983).
17 First Amendment rights are implicated whenever a state action imposes a barrier to the
18 free exercise of the voting franchise. Such a barrier does not have to wholly prevent
19 voters from exercising a First Amendment right to be found unconstitutional, but a “[First
20 Amendment] right is burdened when the state makes it more difficult for these voters to
21 cast ballots.” See *Morlinari v. Bloomberg*, 564 F.3d 587, 604 (2nd Cir. 2009). The First
22 Amendment creates an open marketplace where ideas, particularly political ideas, may
23 compete without government interference. See *N.Y. State Bd. Of Elections v. Lopez*
24 *Torres*, 552 U.S. 196, 208 (2008).

25 Plaintiff poses “serious questions” because the issue at hand concerns violations
26 of constitutionally protected rights essential for the proper functioning of a democracy.
27 The ability for a free people to express their opinion via the ballot box and enhance the
28 diversity in the marketplace of ideas safeguards the principle that a democratic

1 government is ultimately beholden to its citizens. As such, the issues Plaintiff brings
2 before the court are of the utmost importance as they concern questions regarding the
3 very foundations of our system of government, and certainly pose more serious questions
4 than contractual and intellectual property disputes.

5 **2. “Likely to Succeed on the Merits” Standard**

6 Plaintiff also meets the heightened “likely to succeed on the merits” standard
7 espoused in *Winter* because, on application of the three factors set out in *Anderson v.*
8 *Celebrezze*, 460 U.S. 780, 789 (1983), the California ballot access statute is
9 unconstitutional. In determining whether a ballot access law violates the First and
10 Fourteenth Amendments, a court must 1) evaluate the character and magnitude of the
11 asserted injury to rights protected by the First and Fourteenth Amendments; 2) identify
12 the interests advanced by the State as justifications for the burdens imposed by its rule;
13 and 3) evaluate the legitimacy and strength of each asserted state interest and determine
14 the extent to which those interests necessitate the burdening of the Plaintiff’s rights. *Id.*

15 16 a. First Anderson Factor

17 The character and magnitude of the asserted injury to protected rights are great
18 because the California ballot access statute limits Plaintiff’s First and Fourteenth
19 Amendment rights of expression and speech by requiring Plaintiff to expend considerable
20 time, energy, and money to meet one of the most restrictive ballot access requirements
21 in the country.² The concept of “liberty” assured by the Due Process Clause of the
22 Fourteenth Amendment embraces those rights and freedoms which are “so rooted in the
23 traditions and conscience of our people as to be ranked as fundamental.” *Palko v.*
24 *Connecticut*, 302 U.S. 319, 325 (1937) (citation omitted). Among these most
25 fundamental rights and freedoms are those that derive from the First Amendment,
26 including the freedom of speech and the freedom “to engage in association for the

27 ² Of the other 49 states, signature requirements range from 250 (in Tennessee) to 119,316 (in Florida),
28 with the mean of all 50 states plus DC being approximately 11,695 after removing the outliers of Florida
and California (the only states with a signature requirement of over 100,000)

1 advancement of beliefs and ideas.” *Gitlow v. New York*, 268 U.S. 652, 666 (1925);
2 *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

3 California’s ballot access statute is the most restrictive statute in the country
4 because it requires an independent candidate to gather signatures equaling 1% of the total
5 number of registered voters, equal this year to 178,039 signatures. See California Election
6 Code §8400. This ballot access statute for independent Presidential candidates burdens
7 two distinct and fundamental rights. First, it burdens the Plaintiff’s fundamental right to
8 run for political office. See *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) (finding
9 that Ohio’s ballot access law preventing plaintiff from appearing on the ballot diminishes
10 a candidates’ First Amendment rights of expression and association). Here, Plaintiff has
11 undertaken a tremendous effort to mobilize staffers across the country in order to meet
12 several requirements imposed by statute statutes for ballot access and to promote his
13 message to the electorate, yet the California statute imposes a uniquely prohibitory hurdle
14 keeping Plaintiff’s name from appearing on the ballot.

15 The signature requirement also burdens “two different, although overlapping kinds
16 of rights- the rights of individuals to associate for the advancement of political beliefs,
17 and the right of qualified voters regardless of their political persuasion, to cast their votes
18 effectively. Both of these rights, of course, rank among our most precious freedoms.”
19 *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). The Supreme Court has recognized that
20 “it is to be expected that a voter hopes to find on the ballot a candidate who comes near
21 to reflecting his policy preferences on contemporary issues.” *Lubin v. Panish*, 415 U.S.
22 709, 716 (1974). Additionally, the right to vote is “heavily burdened” if that vote may
23 be cast only for major party candidates at a time when other parties or other candidates
24 are “clamoring for a place on the ballot.” *Lubin v. Panish*, 415 U.S. 709, 716 (1974);
25 *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). As has been evident in the recent election
26 cycle, many voters are increasingly frustrated with their limited choices for political
27 office. Onerous state statutes, such as California’s signature requirement, contribute to
28 this problem.

1 At least one other court has ruled that an overwhelmingly high signature
2 requirement is tantamount to an unconstitutional constraint on the manner in which a
3 State regulates a federal election. *Green Party of Ga. v. Kemp*, 2016 U.S. Dist. LEXIS
4 34355, *74, 2016 WL 1057022 (N.D. Ga. Mar. 17, 2016) provides persuasive authority
5 where the court determined that Georgia’s requirement of 50,000 signatures for minor
6 party ballot access imposed an unconstitutional requirement infringing upon plaintiff’s
7 First and Fourteenth Amendment rights. In *Green Party of Ga.*, the requirement of
8 50,000 signatures was found to place an extreme financial burden on those seeking ballot
9 access as the costs associated with collecting the requisite amount of valid signatures
10 could generate costs of up to \$350,000. See *id.* at *18 (finding that candidates must
11 generally collect a substantially higher number of “raw” signatures in order to ensure that
12 they reach the necessary threshold of “valid” signatures, since “raw” signatures may be
13 invalidated for a number of different reasons).

14 California’s 178,039 signature requirement poses a higher financial hurdle than the
15 Georgia statute deemed to be unconstitutional in *Green Party of Ga.* In addition to
16 having a signature requirement more than three times the number required by Georgia,
17 California also restricts signature gathering to a 105-day window in which to procure
18 signatures. Cal. Elec. Code 8406. This limited time frame is generally associated with
19 even higher cost because petition gathering companies increase their rates for a “rush”
20 job, driving up the already high cost of meeting the prohibitively high signature
21 requirement.

22 b. Second Anderson Factor

23 California must identify and evaluate the precise interests put forth by its signature
24 requirement statute and provide concrete evidence that the problem addressed by the
25 statute is legitimate. With respect to ballot access statutes, the Supreme Court has
26 consistently held that states have “a legitimate interest in regulating the number of
27 candidates on the ballot... to prevent the clogging of its election machinery, avoid voter
28 confusion, and assure that the winner is the choice of a majority, or at least a strong

1 plurality, of those voting, without the expense and burden of runoff elections.” *Bullock*
2 *v. Carter*, 405 U.S. 134, 145 (1972).

3 A court may not accept at face value any justification a state may give for its
4 practices but must instead “identify and evaluate the precise interest put forward by the
5 State as justifications for the burden imposed by the rule.” *Reform Party of Allegheny*
6 *Cty. v. Allegheny Cty. Dep’t of Elections*, 174 F.3d 305, 315 (3d Cir. 1999) (quoting
7 *Anderson*, 460 U.S. at 789); *accord Libertarian Party of Ohio v. Blackwell*, 462 F.2d 579,
8 593 (6th Cir. 2006) (“Reliance on suppositions and speculative interests is not sufficient
9 to justify a severe burden on First Amendment rights.”); *McLain v. Meier*, 637 F.2d 1159,
10 1165 (8th Cir. 1980) (“The remote danger of multitudinous fragmentary groups cannot
11 justify an immediate and crippling effect on the basic constitutional right to vote for a
12 third party candidate.”). Even an otherwise legitimate state concern cannot be accepted
13 without evidence that the problem the state is asserting is real. See *Washington State*
14 *Grange v. Washington State Republican Party*, 552 U.S. 442, 457 (2008). Aside from the
15 state presenting additional interests and compelling evidence supporting these interests,
16 the aforementioned interests should be subject to strict scrutiny, as discussed in the third
17 *Anderson* factor.

18 c. Third Anderson Factor

19 The state interests put forward by California as justifications for the burden
20 imposed by the high signature requirement do not pass Constitutional muster as the
21 statute is not narrowly tailored to meet the state interest of seeking an efficient and
22 orderly elections process. When an election law imposes a severe burden to plaintiff’s
23 fundamental rights, strict scrutiny applies. *Nader v. Brewer*, 531 F.3d 1028 (9th Cir.
24 2008); *Green Party of Ga. v. Kemp*, 2016 U.S. Dist. LEXI 34355, *42 (N.D. Ga. Mar. 17,
25 2016). Because California’s petition signature requirement requires a citizen to meet the
26 highest signature requirement in the country to partake in a constitutionally protected
27 activity, strict scrutiny applies and the statute must be narrowly tailored to advance a
28 compelling state interest. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (where a law

1 places “severe” burdens on First and Fourteenth Amendment rights, “the regulation must
2 be ‘narrowly drawn to advance a state interest of compelling importance.’” (quoting
3 *Norman v Reed*, 502 U.S. 279, 289 (1992)). The Supreme Court has provided further
4 guidance on the topic by stating that “if there are other, reasonable ways to achieve those
5 goals with a lesser burden on constitutionally protected activity, a State may not choose
6 the way of greater interference. If it acts at all, it must choose ‘less drastic means.’” *Dunn*
7 *v. Blumstein*, 405 U.S. 330, 343 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488
8 (1960)); accord *Ill. State Bd. Of Elections*, 440 U.S. 173, 185 (1979) (“we have required
9 that States adopt the least drastic means to achieve their ends... where restrictions on
10 access to the ballot are involved”).

11 States are able to achieve the goals of preventing clogging of its election
12 machinery, avoiding voter confusion, and assuring that the winner is the choice of a
13 majority or strong plurality without the expense and burden of runoff elections by
14 lowering the signature requirement to 5,000 signatures. Richard Winger, a renowned
15 ballot access expert, has provided data that states requiring more than 5,000 signatures
16 for ballot access have never had a crowded general election ballot. See Winger Affidavit
17 at 3. There has not been a single instance when more than six candidates or parties
18 successfully completed the petition when the statute requires, at minimum, 5,000
19 signatures when observing a data set comprising every instance where a state held a
20 presidential general election and used a government-printed ballot. See Winger Affidavit
21 at 4. Therefore, California’s excessively high signature requirement only serves to
22 impose an extreme financial burden on independent candidates seeking to have their
23 name place on the ballot because California’s interests in promoting an orderly and
24 efficient election can be met by lowering the signature requirement from 178,039 to
25 5,000.

26
27 **B. Plaintiff is likely to suffer irreparable harm in the absence of preliminary**
28 **relief**

1 Unless this court promptly acts, plaintiff will lose an opportunity to participate in
2 an upcoming election, constituting an irreparable harm for which no alternate remedy
3 exists other than an injunction. “No damages or other compensation can compensate for
4 a missed election.” *Duke v. Connell*, 790 F. Supp. 50, 52 (D.C. R.I. 1992) See also
5 *Libertarian Part of Ohio v. Brunner*, 567 F. Supp. 1006, 1014 (S.D. Ohio 2008)
6 (concluding that “denial of access to the ballot” constitutes irreparable harm). A
7 presumption exists that any loss in First Amendment rights constitutes irreparable harm.
8 *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673 (1976). The California statutory
9 requirement of 178,039 signatures functions as a deprivation of plaintiff’s right to
10 participate in the political process by imposing an overwhelmingly burdensome
11 petitionary requirement on an Independent presidential candidate. The requirement acts
12 as a bar to ballot access by forcing candidates to spend a significant amount of time,
13 money, and resources to satisfy the signature requirement. Furthermore, other courts
14 have agreed that an overwhelmingly high signature requirement constitutes a deprivation
15 of Constitutional rights and have ruled to lower their respective States’ signature
16 requirements. See, e.g., *Citizens to Establish a Reform Party in Ark. v. Priest*, 970
17 F.Supp. 690, 691, 698-99 (E.D. Ark 1996) (invalidating a requirement of 21,505
18 signatures to form a new party); *Libertarian Party of Ohio*, 462 F.3d at 595 (invalidating
19 an early petition deadline requiring 32,290 signatures); *Nader v. Brewer*, 531 F.3d 1028,
20 1031 (9th Cir. 2008) (invalidating Arizona’s independent Presidential petition procedure
21 requiring 14,694 signatures due in June); *McLain v. Meier*, 637 F.2d 1159, 1161, 1170
22 (8th Cir. 1980); *Green Party of Ga. v. Kemp*, 2016 U.S. Dist. LEXIS 34355, *18, 2016
23 WL 1057022 (N.D. Ga. Mar. 17, 2016) (invalidating a requirement of over 50,000
24 signatures for minor political parties and independent candidates); *Constitution Party of*
25 *Pa. v. Cortes*, 116 F. Supp. 3d 486 2015 U.S. Dist. LEXIS 96637, (E.D. Pa. 2015)
26 (invalidating requirement of over 21,775 signatures for minor party ballot access).

27 **C. The Balance of Equities Tips in Favor of Plaintiff**
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1 A temporary injunction should be granted as the balance of equities tip in favor of
2 Plaintiff. When determining whether the issuance of an injunction is proper, the court
3 “must balance the competing claims of injury and must consider the effect on each party
4 of the granting or withholding of the requested relief.” *Amoco Prod. Co. v. Will of*
5 *Gambell*, 480 U.S. 531, 542 (1987). Defendants’ interest in upholding the statutory
6 signature requirement is to maintain a practical and orderly ballot. See *Bullock v. Carter*,
7 405 U.S. 134, 145 (1972). However, as previously mentioned, Defendants will suffer no
8 harm if relief is granted because Defendants’ sole interest in keeping a manageable ballot
9 will be preserved with a reasonable signature requirement of 5,000. See Winger Affidavit
10 at 8. Denial of a timely preliminary injunction will cause Plaintiff irreparable harm as he
11 will not have his name printed on the ballot in the upcoming election, effectively
12 depriving him of his constitutionally protected rights. Therefore, a lowered signature
13 requirement would best serve the state’s interest while allowing Plaintiff to fully
14 participate in the electoral process.

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16 **D. Injunction is in the Public Interest**

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18 Granting a preliminary injunction is in the public interest as an injunction will
19 serve to enhance the political process by providing voters with a greater variety of
20 choices reflecting the varied and diverse viewpoints held by the electorate in California.
21 The Supreme Court has noted the important role third parties have played in the
22 development of the country in stating, “The States’ interest in screening out frivolous
23 candidates must be considered in light of the significant role that third parties have played
24 in the political development of the Nation. Abolitionists, Progressives, and Populists
25 have undeniably had influence, if not always electoral success.” *Illinois State Board of*
26 *Elections v. Socialist Workers Party*, 440 U.S. 173, 185-86 (1979). Here, Plaintiff seeks
27 to further the political dialogue across the country and provide an alternative viewpoint
28 from those of the major political parties. Hence, a preliminary injunction would be in the

1 public interest and the populace would be better able to support a candidate that better
2 represents their views.

3 **III. Conclusion**

4 For the reasons stated in Plaintiff's Application for a Temporary Restraining Order,
5 this Memorandum, and the Complaint, the court should grant Plaintiff's application.

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7 Respectfully submitted,

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9 SCUDI & AYERS, LLP

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11 By: */Signature/*
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