IN THE SUPREME COURT
STATE OF GEORGIA

ROQUE "ROCKY" DE LA FUENTE,	)	
	)	
Appellant,	)	CIVIL ACTION NO.:
	)	
v.	)	S17A0424
	)	
BRIAN KEMP, in his official capacity as Secretary of State of Georgia;	)	
	)	
	)	
Appellee.	)	

BRIEF OF APPELLANT

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INTRODUCTION

This appeal concerns the Secretary of State's statutory duty to review nomination petitions submitted by independent candidates who seek to appear on the general election ballot. As one such independent candidate, Roque "Rocky" De La Fuente properly submitted his nomination petition to the Secretary of State's office for review. It was then the explicit statutory duty of the Secretary of State pursuant to O.C.G.A. § 21-2-171(a) to examine De La Fuente's petition "to the extent necessary to determine if it complies with the law," including whether the petition "contains a sufficient number of signatures of registered voters as required by law."

The Secretary of State did not verify the signatures in this case, however, but rather delegated with no uniform instructions the task to county election officials in each Georgia county in which a voter signed De La Fuente's nomination petition. After his petition was rejected, De La Fuente inspected the review methods used by county election officials. In doing so, De La Fuente found various flaws in the disparate methods used to verify petition signatures. De La Fuente sought judicial review of the Secretary of State's failure to properly verify the signatures through an action for writ of mandamus pursuant to O.C.G.A. § 21-2-171(c). However, De La Fuente was not afforded the opportunity to present the Secretary's flaws

because the lower court ruled that the Secretary of State had no duty to review signatures.

Now before the Supreme Court of Georgia, De La Fuente seeks review of the lower court's ruling in light of the time-sensitive[1] and constitutionally important issues arising from the Secretary of State's failure to perform his duty to review De La Fuente's nomination petition. Without intervention by this Court, the many flaws in the Secretary of State's process for verifying petition signatures will proceed without review. These flaws harm De La Fuente, to be sure, but they also harm Georgia voters and should not go unchecked.

STATEMENT OF THE PROCEEDINGS BELOW

De La Fuente ("Appellant") brought an action before the Superior Court of Fulton County seeking a writ of mandamus as well as declaratory and injunctive relief for the Secretary of State's ("Appellee") improper performance of his duty under O.C.G.A. § 21-2-171 to review De La Fuente's nomination petition to be

[1] With the general election mere weeks away, De La Fuente is sensitive to the fact that any challenge to a pre-election issue, such as this case, may be rendered moot by the occurrence of the general election. *See Cook v. Bd. of Registrars of Randolph Cty*, 291 Ga. 67, 727 S.E.2d 478 (2012); *see also Scoggins v. Collins*, 288 Ga. 26, 701 S.E.2d 135 (2010); *Bodkin v. Bolia*, 285 Ga. 758, 759-760, 684 S.E.2d 241 (2009); *Randolph Cnty v. Johnson*, 282 Ga. 160, 161(1), 646 S.E.2d 261 (2007). In addition, Georgia's election procedures are based on "an underlying policy that election-related appeals must be timely considered […] to settle challenges to a candidate's qualifications prior to the time that voters exercise their constitutional right to vote." *Jordan v. Cook*, 277 Ga. 155, 587 S.E.2d (Ga., 2003). *See also Payne v. Chatman*, 267 Ga. 873, 48 S.E.2d 723 (1997).

placed on the general election ballot as an independent candidate for President of the United States. Under O.C.G.A. § 21-2-171(c), an individual seeking nomination by petition may challenge the Secretary of State's decision to deny a petition by applying for a writ of mandamus to compel the granting of the petition.

De La Fuente filed said petition and complaint in the Superior Court of Fulton County on September 6, 2016. R. 11. The Secretary of State then filed a motion to dismiss on September 14, 2016. R. 48. De La Fuente responded on September 26, 2016, by filing a brief in support of the court granting mandamus nisi and in opposition to the Secretary of State's motion to dismiss. R. 97. Specifically, De La Fuente asserted that, in failing to delegate a uniform method for review and to review the counties' disparate processes, the Secretary of State abused his discretion under O.C.G.A. § 21-2-171 to verify signatures in accordance with the law.

On September 26, 2016, both parties appeared before the Superior Court of Fulton County on De La Fuente's petition for writ of mandamus as well as on defendant's motion to dismiss. After hearing from both parties on the motion to dismiss, the Court ruled that the petition had been timely filed. The Court granted defendant's motion to dismiss, however, on a ground not even raised by the Secretary of State, finding that the petition was subject to dismissal based on De La

Fuente's failure to file a separate notice of candidacy within the time frame required under O.C.G.A. § 21-2-132(d)(1). The Court held that De La Fuente's nomination petition did not "comply with the law" as set forth in O.C.G.A. § 21-2-171(a). R. 204.

De La Fuente promptly filed his notice of appeal with the Fulton County Superior Court, followed by filing an Emergency Petition with this Court, seeking expedited review of the case given its time-sensitive pre-election issues. The Supreme Court of Georgia dismissed without prejudice the Appellant's Emergency Petition because the case was not yet docketed, due to administrative delays at the lower court level.

This appeal now raises a straightforward question of statutory interpretation—whether the "complies with the law" provision of the statute governing nomination petitions refers to the deadlines for filing a notice of candidacy set out in a completely different code section.

STATEMENT OF FACTS

In order to appear on the general election ballot as an independent candidate for President of the United States, a person must file with the Secretary of State a notice of candidacy setting forth a slate of presidential electors and a nomination petition containing the required number of signatures of registered voters, 7,500

registered voters under a recent ruling by U.S. District Judge Richard Story, that number is 7,500. *Green Party of Georgia v. Kemp*, 1:12-CV-01822-RWS (N.D. Ga. Mar. 17, 2016).

De La Fuente hired professional petition circulators to gather approximately 14,500 signatures in support of his nomination. De La Fuente submitted those signatures and his notice of candidacy to the Secretary of State on July 12.[2]

The Secretary delegated the task of verifying signatures to county election officials in each Georgia county in which a voter signed the Plaintiff's nomination petition by sending a duplicate of the petition to each such official along with a one-page letter asking them to use certain codes on the petition when verifying signatures to indicate why a particular signature was deemed invalid. He provided no instructions on how to go about the verification process, nor any guidance on what the law requires for a signature to be considered valid, leading to a crazy-quilt of inconsistent approaches throughout the counties.

On Monday, August 29, 2016,[3] the Secretary of State notified De La Fuente that his petition to appear on the ballot in Georgia was denied because the total

[2] There is an on-going dispute in federal court over whether De La Fuente timely filed his notice of candidacy. The Secretary of State rejected De La Fuente's notice of candidacy as untimely and the candidate is now challenging the constitutionality of that decision. *See De La Fuente v. Kemp* 1:16-cv-02937 MHC (N.D. Ga.), *appeal docketed* 16-15880 (11th Cir. 2016).

number of verified signatures was only 2,964. The review process yielded a signature validation rate of just around 20%—well below industry norms of 65% or more—despite the fact that the candidate had used professional, experienced petition circulators. De La Fuente then filed this action to challenge the Secretary's decision.

Since then, the Secretary of State, who did no independent verification of county tallies, provided De La Fuente with copies of his petitions as marked up by county officials. But the Secretary denied De La Fuente access to the signatures and birth dates on file in the state's computerized voter registration records, thus making it impossible for the candidate to verify additional petition signatures. Nonetheless, even without access to signatures and birth dates, review of petitions themselves indicates serious flaws in the Secretary's verification process. Even the limited data provided strongly suggests (1) that the verification process violated Georgia law; and (2) that De La Fuente's petitions contain well more than the required number of valid signatures.

With no uniform methodology provided by the Secretary of State to instruct counties on how to properly review petition signatures, counties made four broad

[3] The notice letter is dated Friday, August 26, but it was not sent until Monday, August 29. Even though the Secretary was fully aware that De La Fuente was represented by counsel, the candidate's attorneys did not receive a copy until Wednesday, August 31.

errors in failing to: (i) verify inactive voters, (ii) verify voters with differing addresses from their registration applications, (iii) verify unique voters who could have otherwise been identified with birth date information, and (iv) provide any markings at all to justify a signature being invalid.

In so failing to both delegate a uniform method for review and to review the counties' disparate processes, the Secretary of State did not properly verify signatures on De La Fuente's petition, as prescribed in his duties under O.C.G.A. § 21-2-171(a).

STANDARD OF REVIEW

The review of a lower court's granting of a motion to dismiss based solely on a question of law is subject to *de novo* review. *See Suarez v. Halbert,* 543 S.E.2d 733, 246 Ga App. 822 (2000).

STATEMENT OF PRESERVATION OF ERROR

This appeal is properly brought as a direct appeal of a final order from Fulton County Superior Court. This Court, rather than the Court of Appeals of Georgia, has jurisdiction over this appeal as it concerns a pre-election contest as to the review of a nomination petition for an individual seeking candidacy in an upcoming election cycle. Ga. Const. of 1983, Art. VI, Sec. VI, Par. II(2); *See Cook*

v. Bd. of Registrars of Randolph Cty, 291 Ga. 67, 727 S.E.2d 478 (2012); *Bodkin v. Bolia*, 285 Ga. 758, 684 S.E.2d 241 (2009).

De La Fuente's Notice of Appeal was timely filed within five days of the Trial Court's order granting the defendant's motion to dismiss. "From any decision of the superior court an appeal may be taken within five days after the entry thereof to the Supreme Court." O.C.G.A. § 21-2-171(c).

ENUMERATION OF ERROR

1. Whether the trial court erred when it granted the Secretary of State's Motion to Dismiss on the ground that De La Fuente's nomination petition failed to comply with law.[4]

ARGUMENT & CITATION OF AUTHORITIES

THE TRIAL COURT ERRED IN RULING THAT THE SECRETARY OF STATE DOES NOT HAVE A DUTY TO REVIEW DE LA FUENTE'S NOMINATION PETITION BECAUSE IT FAILED TO COMPLY WITH THE LAW.

This case concerns only the Appellant's nomination petition, and a separate case currently on appeal in the Eleventh Circuit concerns the notice of candidacy. The trial court erroneously held that the standard for assessing the legality of a nomination petition under O.C.G.A. § 21-2-171(a) incorporates the deadline for

[4] The trial court did not rule on the issue of whether De La Fuente's claims for declaratory and injunctive relief are barred by the doctrine of sovereign immunity. The Appellant incorporates by reference its argument on the issue. R. 114-115.

filing a notice of candidacy set forth in O.C.G.A. § 21-2-132(d)(1), and that, as a result, the Secretary of State had no duty to review De La Fuente's petition. De La Fuente's nomination petition does not fail to comply with the law and ought to have been properly reviewed by the Secretary of State—particularly in view of the on-going dispute over the constitutionality of the deadline for an independent presidential candidate to file a slate of electors. Nothing about the separate notice of candidacy requirements he is currently challenging in federal court changes that. Moreover, review by the Secretary of State to verify petition signatures to determine if signatures are in compliance with the law is a distinct statutory duty which implicates a petitioner's and the voting public's due process rights.

A. As De La Fuente's nomination petition complies with the law, the trial court's error does not remove the Secretary of State's duty to review the nomination petition.

The trial court erroneously held that the standard for assessing the legality of a nomination petition under O.C.G.A. § 21-2-171(a) incorporates the deadline for filing a notice of candidacy set forth in O.C.G.A. § 21-2-132(d)(1). Both the statutory language and our United States Supreme Court support the conclusion that De La Fuente's nomination petition complies with the law.

First, as a statutory matter, nothing in O.C.G.A. § § 21-2-170 or 21-2-171 makes the Secretary's duty to verify signatures contingent upon the notice of

candidacy. When a nomination petition is submitted to the Secretary of State, "it shall be the duty of such officer to examine the same…" That was the basis for De La Fuente's original state challenge: to seek a remedy for the improper review of his nomination petition.[5] Although O.C.G.A. § 21-2-132(e) lays out that "each candidate required to file a notice of candidacy by this Code section shall […] file with the same official whom he or she filed his or her notice of candidacy a nomination petition in the form prescribed in Code Section 21-2-170 …", nothing in either code provision suggests that the Secretary of State's mandatory verification duty of a nomination petition is contingent upon the notice of candidacy – especially where, as here, the adequacy of the notice of candidacy is the subject of ongoing litigation.

Second, as the United Stated Supreme Court has ruled, "the name of the nominee […] will be printed only if nominating petitions have been filed that contain the requisite number of signatures." *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971). None of our Georgia case law challenging either the constitutionality of the number of required signatures under O.C.G.A. §

[5] O.C.G.A. § 21-2-171(c) grants a right of action by way of mandamus for an individual seeking to challenge the denial of his or her nomination petition. That very right of action – through which the remedy is compelled granting of a petition – supposes that a challenge to the denial of a nomination petition may be examined by the court to determine if the officer's decision was improper.

21-2-170 or other requirements for candidates' nomination petitions predicate those requirements on the notice of candidacy requirements under O.C.G.A. § 21-2-132(e). *See Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002); *Bergland v. Harris*, 767 F.2d 155 (11th Cir., 1985); *Bodkin v. Bolia*, 285 Ga. 758, 684, S.E.2d 241 (2009).

The trial court's error here does not remove the Secretary of State's statutory duty to properly review the petition signatures. In addition, the Secretary of State's own contested determination that De La Fuente failed to timely his file notice of candidacy also does not relieve him of his duty to properly review De La Fuente's nomination petition.[6] As the record reflects, it is undisputed that the Secretary *did* review the nomination petition (albeit, improperly), and he *did* notify De La Fuente of his decision to deny it for lack of enough signatures. Under O.C.G.A. § 21-2-171(c), that decision was reviewable. De La Fuente had to file this action within five days of that decision, or his opportunity to challenge it would forever be lost. Nothing about the on-going legal dispute in federal court over the timeliness of De La Fuente's notice of candidacy changes that. It was therefore no basis to dismiss

[6] In the written notification to De La Fuente of the Secretary's decision to deny his nomination petition, the Secretary expressly stated that the reason for the denial was due to lack of enough signatures. Nothing in the letter references the petition being noncompliant with the law or failing to satisfy outside requirements such as notice of candidacy.

the mandamus action before the lower court.[7] In fact, if De La Fuente prevails in his federal litigation on the notice of candidacy, he must also be able to test the validity of the determination on his nomination petition. Both are required to reach the ballot, and the Superior Court essentially assumed that the Secretary of State would prevail on his federal appeal.[8] The Appellant never received proper review of his petition by the Secretary of State nor did the lower court provide judicial review of the Secretary's failure to perform his duty when it erroneously held that the petition failed to comply with the law.

B. De La Fuente's nomination petition contains enough signatures for the petition to have been accepted by the Secretary of State.

The review of De La Fuente's nomination petition must occur irrespective of other code provisions; yet, that review was originally encumbered by the Secretary of State's unwillingness to provide De La Fuente with the state's voter database.[9]

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[7] At best, the Secretary's argument might give this Court a reason to delay a ruling until after resolution of the dispute in federal court. But given the statutory command to resolve a petition challenge "as soon as practicable," this Court should not delay. O.C.G.A. § 21-2-171(a).

[8] Irrespective of whether a potential candidate who collected petition signatures does in fact end up with his or her name on the ballot, code provisions such as O.C.G.A. § 21-2-235(a) mandate that the Secretary of State has a duty to review petition signatures for other purposes related to the voters who sign these petitions. Yet, a petition signer has no right of action to challenge the Secretary of State's review process under any of these provisions; only a candidate may do so and only under O.C.G.A. § 21-2-171(c).

[9] Since 2013, the Secretary of State has maintained the state's voter registration database, called E-Net, that contains detailed information on every registered voter.[9] *See Project Vote v. Kemp*, No. 1:16-cv-2445 (WSD) (N.D. Ga. Sept. 20, 2016). Despite the fact that voter registration information should be made publicly available under O.C.G.A. § 21-2-225(b), the Secretary of

Upon remand for further review, the Secretary of State still has a duty to properly verify signatures. Even without the state's database for use in verifying signatures, De La Fuente has been able to discover enough new validated signatures to be certain that the nomination petition ought to have been accepted by the Secretary of State.

De La Fuente submitted approximately 14,500 signatures collected by professional, experienced circulators. County officials validated only about 20% of them. That validation rate is much lower than usual in the petition-circulation industry, where yields of 65 to 75% are standard. Without access to the signatures on file in the state's computerized voter registration database, De La Fuente cannot with complete certainty validate additional signatures. However, De La Fuente's attorneys have reviewed copies of the petitions as marked up by county officials.

State has routinely denied any public access to E-Net. Just last month, the Northern District of Georgia found no legitimate reason for the Secretary of State's denial of public access to E-net. Judge Duffey ordered in *Project Vote v. Kemp* that "[w]hile Defendant maintains that providing the records in database format would be prohibitively expensive and may compromise Database security, Defendant does not appear to provide any reason why he could not provide the records on an individual basis…" and, thus, ordered voter registration records be made available. *Project Vote v. Kemp*, at 68. In this case, counsel for the candidate have requested special access to the signatures in E-Net and are willing to conduct any review subject to a protective order to safeguard sensitive personal information, but the Secretary has refused, contrary to both O.C.G.A. § 21-2-225(b) and to recent case precedent granting public disclosure of registration information. *See Project Vote v. Kemp*, No. 1:16-cv-2445 (WSD) (N.D. Ga. Sept. 19, 2016). Nor has the Secretary of State agreed to perform this additional review with his own staff. The Secretary simply refuses to give De La Fuente access to the very evidence he needs to show with certainty that his petitions contained enough matching signatures.

They also obtained a copy of the publicly-available statewide voter list, which contains information on registered voters but does not include an image of the voter's signature. This limited data available to the candidate and the Court strongly suggests (1) that the Secretary's verification process was haphazard and violated Georgia law in several respects; and (2) that the petition contains more than enough signatures to qualify for the ballot.

After the Secretary of State denied De La Fuente's petition, the same professional petition circulators who had collected the signatures also led the effort to check the Secretary of State's validations. Because they did not have access to signature records, they could not actually check signatures. But they did have access to copies of the petitions as validated by county officials, and they had access to a secure website where they could search the state's publically-available voter list. Using just the information appearing on the face of the petitions, the validators were able to find unique voter registration numbers for over 1,200 voters after reviewing just a fraction of the petitions. The likelihood is very high that the signatures on file will match the signatures on the petitions for these voters. Just these voters alone brought the effective validation rate above 50% for the petitions they reviewed.

Many of the voters identified by the validators were marked "NR" (presumably "not registered") or "UK" (meaning that the voter could not be identified) by county officials who had unfettered access to the full voter registration E-net database. Yet the Plaintiff's validators could find those voters.

It is important to note that these 1,200 are only the ones for which the validators could find a *unique* voter registration record based on publicly available data. With access to the full database, including dates of birth and signatures, however, they would likely have been able to validate many more. With more detailed voter information like birth dates, they could have identified more unique voters. For example, there might be 5 registered voters with the name "James Johnson" and a birth year of 1955. But there is likely to be only one with the specific date of birth listed on the petition if the signer gave truthful information. In addition, with better data the validators could have checked multiple records for each signer. For example, they could have checked 5 or 10 signatures of "Mary Smith" to find the one who signed a petition. Had the validators been granted access to the voters' birth dates and signatures, they would likely have validated these and many more signatures.

These results strongly suggests that the actual validation rate for De La Fuente's petition would have been in line with industry norms of between 65 and

75% if the Secretary of State and his delegees had done their jobs in accordance with the law. That would have been enough to compel the Secretary to accept De La Fuente's petition. Yet, due to the trial court erroneously granting the State's motion to dismiss, De La Fuente never received review of the Secretary's improper review process.

C. The Secretary of State's failed to properly verify signatures and violated Georgia law, subject to review on remand.

After learning that over 80% of the signatures on his petitions were not verified, De La Fuente worked with professional petition circulators to conduct an independent review of the petition copies – namely, to better understand why the verification rate from the Secretary of State had been so low.

It became clear from this review process that the Secretary of State had given no meaningful instruction to counties, apart from a table of markers for county reviewers to mark up petition signatures as they verified them. As our Georgia Supreme Court has noted, "the Secretary of State has the duty of making this decision [regarding the method of verification]" and thus it follows that "the Secretary of State must exercise his discretion in determining which method can reasonably be expected to operate in a thorough and professional way so as to produce accurate results." *Anderson v. Poythress*, 271 S.E.2d 834, 246 Ga. 435

(Ga., 1980). Yet, with no guidance on such a method for verification of signatures, the counties made at least four broad errors under Georgia law.

First, some counties did not verify inactive voters. This is not proper under O.C.G.A. § 21-2-235, which allows a voter's status to be re-activated once they sign a petition. Under O.C.G.A. § 21-2-235(a), "any elector whose name appears on the inactive list shall be eligible to sign a petition and such petition signature, if valid and regardless of the validity of the petition as a whole, shall be sufficient to return the elector to the official list of electors." Here, the denial of inactive voters was both improper under the National Voter Registration Act and O.C.G.A. § 21-2-235(a), as well as an unconstitutional denial of the rights of registered voters who engaged with the State by signing these petitions.

Second, other counties did not verify signatures where the corresponding address was different from the address listed on an individual's registration form. This too is improper under O.C.G.A. § 21-2-235: the new address a registered voter provides on a petition form serves as notice to the state of their change of address. Defendant Kemp and his delegees—particularly those delegees of the DeKalb County Board of Registration and Elections—failed to properly verify voters who had registered addresses in other counties. For a voter who registered in one county but was residing in and had signed the petition belonging to another

county, that individual's signature must be considered valid and ought to have been verified by Defendant and his delegees.

Third, some counties failed to look at birth date information to identify unique voters. Under O.C.G.A. § 21-2-171, a signature on a nomination petition is valid and must be counted if it matches the signature on file of a duly qualified and registered voter who is eligible to vote for the office to be filled. Voters who are registered but inactive are eligible to sign a petition and to have their signatures counted. In fact, O.C.G.A. § 21-2-170(c) prescribes that the Secretary of State use birth date information for verification purposes. The very reason that a voter signs a petition and includes their birth date is so that SOS can use that information to confirm their identity.

Finally, many counties failed to mark the petition forms at all. More often than not, the unverified signatures were not marked with a reason as to why they had been rejected. Together, the errors across counties yielded inconsistent review, resulting in a crazy-quilt of verification methodologies and rates. Clearly, the Secretary of State did not review the counties' methods before notifying De La Fuente that his nomination had been rejected. In so failing to delegate a uniform method for review and to review the counties' processes, the Secretary of State

abused his discretion under O.C.G.A. § 21-2-171 to simply verify signatures in accordance with the law.

De La Fuente's only opportunity for a review of this improper verification method was through a writ of mandamus, which he properly filed in Fulton County Superior Court. Yet, the trial court never reached the merits of the mandamus petition, having erroneously held that De La Fuente's nomination petition did not comply with the law. The trial court's error both (i) set an improper standard for assessing the legality of a nomination petition under O.C.G.A. § 21-2-171(a) and (ii) denied De La Fuente the chance for judicial review and for a remedy following the Secretary of State's failure to perform his non-discretionary duty.

CONCLUSION

For the reasons set forth above, the Court should reverse the trial court's order granting Defendant's Motion to Dismiss, and remand for expedited further proceedings on the merits.

Respectfully submitted, this 24th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **BRIEF OF APPELLANT**, prior to the filing of the same, electronically via the Supreme Court of Georgia's SCED: E-Filing System, upon:

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