16-15895

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INDEPENDENT PARTY and WILLIAM LUSSENHEIDE,

Plaintiffs and Appellants,

v.

ALEJANDRO PADILLA, in his official capacity as Secretary of State of California,

Defendant and Appellee.

On Appeal from the United States District Court
for the Eastern District of California

No. 2:16-cv-00316-WBS-CKD
Hon. William B. Shubb, Judge

RESPONSE BRIEF OF ALEJANDRO PADILLA CALIFORNIA SECRETARY OF STATE

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INTRODUCTION

This case is brought by a nonqualified political body (and a supporter) that seeks to use the name "Independent Party" in an attempt to qualify as a political party that can participate in the State's elections process. By their own admission, the political body was formed, and this name was selected, to allow any candidate to have the word "Independent" appear next to his or her name on the ballot, if they choose. Appellants admit that their intent is to circumvent California law, which reserves the label "Independent" to presidential and vice presidential candidates who qualify for the ballot through an independent nomination process. California law does not permit other candidates to identify themselves as "Independent" on the ballot.

Respondent Secretary of State, who is responsible for the conduct of California elections, denied Appellants' application to use the proposed name. Appellants challenged the denial, alleging it violated their rights of speech, association, ballot access, and equal protection. The trial court correctly dismissed each of Appellants' claims with prejudice. Any burden on Appellants' First and Fourteenth Amendment rights caused by the denial of their use of the name "Independent Party" is slight and is outweighed by the State's compelling and overriding interests in avoiding electoral confusion and deception, preventing misrepresentation, and ensuring the efficiency, integrity, and fairness of the ballots.

Appellants intend to use the name "Independent Party" in a way that would confuse, mislead, and deceive voters in at least three ways. First, if Appellants are permitted to use the proposed name, their presidential nominee, and a candidate who qualifies for the presidential ballot by way of an independent nomination process, would both confusingly appear on the ballot as "Independent." Second, the proposed name is so similar to the name of an existing party, the American Independent Party, that it is likely to mislead voters by causing confusion and conflict with the existing qualified political party. And third, if Appellants are permitted to use the proposed name, voters could be misled or deceived into believing that a candidate designated as "Independent" affirmatively rejects all political parties, while the candidate indicates instead a preference for the "Independent Party."

JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question). The Secretary of State agrees with sections (b), (c), and (d) of Appellants' jurisdictional statement.

ISSUES PRESENTED FOR REVIEW

Appellants seek to use the name "Independent Party" in qualifying for elections so that any candidate may use the ballot label "Independent." Under California law, only presidential and vice presidential candidates who qualify for the ballot through an independent, non-party nomination process may use the "Independent" ballot label. Appellants are free to choose any other name, and are free to support and vote for any candidate of their choice.

The appeal presents the following issues:

1. Whether the denial of Appellants' request to use the name "Independent Party" severely burdened their First and Fourteenth Amendment rights of free speech, association, ballot access, and equal protection.

2. Whether the State's compelling interests in preventing the electoral confusion, deception, and misrepresentation justify the burden on Appellants' First and Fourteenth Amendment rights.

STATEMENT OF THE CASE

I. CALIFORNIA'S ELECTION SYSTEM

A. Proposition 14 Established a "Top Two" Primary System

In 2010, California voters enacted Proposition 14, which amended the California Constitution to replace a closed partisan primary with an open nonpartisan primary leading to a "top two" runoff general election. Cal. Const., art. II, § 5; *see generally, Rubin v. Padilla* 233 Cal.App.4th 1128, 1137-38 (Cal. App. 2016). Under Proposition 14's "top two" primary system, candidates for voter-nominated offices may list their qualified party preferences on the ballot and "[a]ll voters may vote at a voter-nominated primary election for any candidate for congressional and state elective office without regard to the political party preference disclosed by the candidate or the voter."[1] Cal. Const., art. II, § 5(a) & (b); Cal. Elec. Code § 13105(a) (West 2016)[2]. "The candidates who are the top two vote-getters at a voter-

[1] "Voter-nominated offices" include: (1) Governor; (2) Lieutenant Governor; (3) Secretary of State; (4) State Treasurer; (5) Controller; (6) State Insurance Commissioner; (7) Member of the Board of Equalization; (8) Attorney General; (9) State Senator; (10) Member of the Assembly; (11) United States Senator; (12) Member of the U.S. House of Representatives. Cal. Elec. Code § 359.5.

[2] Unless otherwise noted, all statutory references herein are to the California Elections Code.

nominated primary election . . . shall, regardless of party preference, compete in the ensuing general election." *Id.* A political party may endorse, support or oppose a candidate, but "shall not nominate a candidate for any congressional or state elective office at the voter nominated primary," and "shall not have the right to have its preferred candidate participate in the general election for a voter-nominated office other than a candidate who is one of the two highest vote-getters at the primary election." Cal. Const., art. II, § 5(b).

Proposition 14 leaves in place partisan primary elections for presidential candidates, political party committees and party central committees, and preserves the right of political parties to participate in the general election for the office of President. Cal. Const., art. II, § 5(c), (d).

B. Political Parties Must Qualify to Appear on the Ballot

Under both the prior closed partisan primary system, and the current top two primary system, political bodies may participate in elections only if they qualify to do so by demonstrating a minimal level of voter support. The Elections Code expressly defines "party" to mean "a political party or organization that has qualified for participation in any primary or presidential general election." § 338. Thus, any political body that has not qualified to participate in elections is not a "party" within the meaning of the Elections Code.

For a political body to participate either in the primary election or the general election as a qualified political party, the Elections Code's requirements are clear and straightforward. The organization must hold a caucus or convention to elect temporary officers and designate a party name, which "shall not be so similar to the name of an existing party so as to mislead the voters, and shall not conflict with that of any existing party" or political body that has previously filed notice. § 5001(a). The political body must then file a formal notice with the Secretary of State to qualify a political party for the primary election or the general election. § 5001(b). After the Secretary of State receives the notice, he would notify county election officials of the political body's intent to qualify for the next primary or presidential general election, and the county election officials would tabulate the political affiliation of registered voters who are members of that political body. § 5002.

There are two applicable ways a political body that desires to qualify for the presidential general election, but did not participate in the primary election, may qualify to participate in the election:[3] (1) 123 days before the presidential general election, 0.33 percent of registered voters declare a preference for the party; or (2) 135 days before the presidential general election, a petition is filed with the Secretary of State bearing signatures equal to at least 10 percent of the state's vote at the preceding gubernatorial election, declaring they represent a proposed party. § 5151(c), (d).

C. A Candidate's Party Preference Is Identified on the Ballot, but Only a Presidential Candidate May be Identified as "Independent" on the Ballot

For a candidate running for a voter-nominated office in a primary election, a general election, or a special election, the designation "Party Preference: [qualified party name]" would be placed next to the candidate's name on the ballot if the candidate designates a preference for a qualified political party in the candidate's affidavit of registration. § 13105(a)(1). If, on the other hand, the candidate does not state a preference for a qualified political party, the designation "Party Preference: None" would be placed next to the candidate's name. § 13105(a)(2). California law does not permit

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[3] The Elections Code provides two other ways for a political body to qualify to participate in the presidential general election, but they do not apply to Appellants. *See* § 5151(a) (for parties that were qualified to participate in the presidential primary election preceding the presidential general election); § 5151(b) (for parties that participated in the last preceding gubernatorial primary election).

a candidate to designate the word "Independent," or any other word, in lieu of the party preference designation.

In a presidential general election, which is not governed by the top-two primary system, the party name of the presidential or vice presidential candidate would be placed next to the candidate's name. § 13105(b). In addition to the party nomination process for a presidential or vice presidential candidate, a presidential or vice presidential candidate may also be placed on the ballot by way of independent nomination. § 8300, et seq. If a presidential or vice presidential candidate qualified for the ballot through the independent nomination process, the word "Independent" would be printed next to the name of the candidate instead of the name of a political party. § 13105(c).

II. Appellants' Allegations[4]

Mr. Charles Deemer, Chairman of Appellant non-qualified political body, submitted to the Secretary of State a notice of intent to qualify the political body as a political party in California under Section 5001 with the

[4] The Secretary of State notes that Appellants do not cite to the actual record of the case, and have not included the Complaint in the Excerpts of Record. Instead, Appellants rely only on their characterization of the Complaint's allegations made in their motion papers below. The Secretary of State includes the Complaint in the Supplemental Excerpts of Record.

name "Independent Party." SER002. The reason Mr. Deemer, and presumably others, organized as a political body was not based on any particular shared political ideology, but to "make it possible for candidates who wish to be identified as 'independent candidates' to be able to run for office with the label, 'Independent.'" *Id.* California law no longer permits candidates unaffiliated with any qualified political party to use the term "Independent" as their ballot label, but requires them to use the label "Party Preference: None" on the primary and general election ballots. *Id.* Therefore, Appellants believe that "[i]f the Independent Party was ballot-qualified, then candidates could register into it and if they ran, their ballot label would state, 'Party preference: Independent.'" *Id.*

In February 2015, Appellants submitted the paperwork to the Secretary of State indicating their intent to qualify as a political party to place their candidate on the ballot. SER004, ¶ 6. Their paperwork was rejected because the name "Independent Party" is too similar to the name of the existing American Independent Party. *Id.*, ¶¶ 7 & 9.

III. Procedural History and Ruling Presented for Review

In February 2016, Appellants filed a Complaint alleging that the Secretary of State's denial of their use of the name "Independent Party" in attempting to qualify for the June primary violated their First and Fourteenth

Amendment rights of free speech, association, ballot access, and equal protection, and voting rights. SER001-008. Appellants also filed a motion for preliminary injunction. Dkt. No. 6. The Secretary of State opposed the motion, answered the Complaint, and moved for judgment on the pleadings. Dkt. Nos. 5, 9, 10. The district court denied Appellants' motion for preliminary injunction, granted the Secretary's motion for judgment on the pleadings, and dismissed the Complaint with prejudice. EOR5-21.

The district court found that the burden on Appellants' First Amendment rights is not severe and does not demand heightened scrutiny. Appellants' members "are still free to run for office, campaign, express their political ideas, and endorse other candidates." EOR12. Appellants' candidates "are not being excluded from the ballot or prevented from expressing their political views through election campaigns." *Id.* And while candidates may not use the ballot label of their preference, it does not constitute a severe burden because ballots "serve to elect candidates, not as forums for political expression." *Id.* (citation and quotation omitted).

The district court further found that the State has "important, if not compelling, interests" that justify the denial of Appellants the use of their preferred name. EOR13. "[T]he name 'Independent Party' is so similar to the name of the existing American Independent Party that voters might be confused and misled." *Id.* There would also be "significant risk of confusion if there is both a presidential nominee of the Independent Party and a presidential candidate who is independently nominated and thus designated as 'Independent' on the ballot pursuant" to the elections law. EOR14.

With respect to Appellants' Fourteenth Amendment equal protection claim, the district court held that Appellant failed to establish that it was treated differently from similarly-situated political groups. EOR16-17.

Appellants appeal only the district court's judgment on the pleadings, and not the denial of preliminary injunction, as it is too late for Appellants to qualify for the 2016 general election. AOB at 5.

STANDARD OF REVIEW

Appellate review of a district court's dismissal of claims under Federal Rule of Civil Procedure 12(c) motion for judgment on the pleadings is *de novo*. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). In reviewing the dismissal of a complaint, the court must inquire "whether the complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief." *Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). The court accepts as true all material allegations in the complaint and construes those allegations in the light most favorable to the plaintiff. *Fleming*, 581 F.3d at 925. However, the court need not accept as true legal conclusions, conclusory allegations, unwarranted deductions of fact, or unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988, *amended by* 275 F.3d 1187 (9th Cir. 2001).

SUMMARY OF ARGUMENT

Appellants' inability to use the name "Independent Party" in their attempt to qualify as a political party is not a severe burden on their asserted rights. Appellants may choose any name that is not likely to cause voter confusion, deception, or misrepresentation. The name "Independent Party" is not such a name. Appellants do not dispute that they are able to organize and express their political beliefs (to the extent they have any). They do not dispute that they may still support, endorse, vote for, or campaign on behalf of any candidate, including any candidate who may wish to run for office without declaring a preference for an existing qualified political party. They also do not dispute that they may even use a name that includes the word "independent" without running afoul of Section 5001. Appellants' asserted rights of speech, association, ballot access, equal protection, and voting rights are thus not severely burdened.

The State's compelling interests in preventing voter confusion, deception, and misrepresentation justify any slight burden on Appellants' First and Fourteenth Amendment rights. The State's interests are implicated here in at least three ways. First, under California law, the "Independent" ballot label is reserved for presidential and vice presidential candidates who qualify for the ballot through an independent, non-party nomination process. If Appellants' nominees also appear on the ballot as "Independent," significant voter confusion is likely to result. Second, the name "Independent Party" is similar to the name of the existing "American Independent Party," and voters would be likely to confuse the ballot labels of the two parties. Third, Appellants' preferred ballot label is likely to deceive voters because candidates for voter-nominated offices who indicate their preference for the "Independent Party" would have the ballot label "Independent." This label would suggest to voters that the candidate rejects all political parties, while it would actually be indicating a candidate's preference for Appellants' political party.

ARGUMENT

I. A Flexible Balancing Standard Applies to This Case

The Constitution "provides that States may prescribe 'the Times, Places and Manner of holding Elections for Senators and Representatives.'"

Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting U.S. Const. art. I, § 4, cl. 1 (brackets omitted)). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Id.*

In examining challenges to state election laws based on First and Fourteenth Amendment rights, the Supreme Court has developed a flexible balancing and means-end fit standard: when state election laws impose only "'reasonable, non-discriminatory restrictions . . . the State's important regulatory interests are generally sufficient to justify' the restrictions," but when those rights are subject to "severe restrictions," strict scrutiny is appropriate. *Burdick*, 504 U.S. at 434 (quotations omitted); *see Public Integrity Alliance v. City of Tucson*, ---F.3d---, 15-16142, 2016 WL 4578366, *3 (9th Cir. Sept. 2, 2016) (en banc).

To apply this standard, courts must weigh "the character and magnitude" of the asserted injury against the "interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration the extent to which the State interests make the burden necessary. *Burdick*, 504 U.S. at 434. Accordingly, the Supreme Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." *Id.* at 438 (citing

Munro v. Socialist Workers Party, 479 U.S. 189, 199 (1986)). But when those rights are subject to "severe restrictions," the law must be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. Applying these precepts, this Court has "repeatedly upheld as 'not severe' restrictions that are generally applicable, evenhanded, politically neutral, and protect the reliability and integrity of the election process," *Public Integrity Alliance*, 2016 WL 4578366, at *3 (quotation omitted) and has "noted that 'voting regulations are rarely subject to strict scrutiny'" *Chamness v. Bowen*, 722 F.3d 1110, 1116 (9th Cir. 2013) (citing *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011)).

II. APPELLANTS SUFFER AT MOST A SLIGHT BURDEN TO THEIR FIRST AMENDMENT RIGHTS FROM THE INABILITY TO USE THE "INDEPENDENT" DESIGNATION

Appellants do not allege any specific injury other than the inability to use the name "Independent Party" in their attempt to qualify as a political party. This alleged injury causes an insignificant burden to Appellants' rights of free speech, association, and ballot access. The "character and magnitude" of the alleged injury is particularly frivolous in the context of this case. Under the Elections Code, the designation "Independent" is reserved for a presidential or vice presidential candidate who qualifies for the general election through the independent nomination process, and no other candidate in either the primary or general election may use that designation. Here, Appellants' admitted purpose for seeking to use the name "Independent Party" is to circumvent the restriction and allow any candidate who wishes to be identified on the ballot as "Independent" to do so. This objective is inherently deceptive, and the Secretary of State's denial of Appellants request to use the "Independent Party" name should be upheld.

A. Appellants' Inability to Use the Designation "Independent Party" Does Not Impose a Severe Burden on Their First Amendment Rights

Appellants claim that the denial of their proposed political body designation of "Independent Party" violates their rights of free speech, association, and ballot access. SER006-7, ¶¶ 13, 15, & 18. Any burden on those rights, however, is insubstantial and not severe. Instead, the denial of Appellants' use of the name "Independent Party" is an even-handed, politically neutral application of Section 5001 intended to protect the integrity of the election process and the State's compelling interests in avoiding electoral confusion and deception, preventing misrepresentation, and ensuring the efficiency, integrity, and fairness of the ballot.

1. Appellants' Right of Free Speech Is Not Severely Burdened

The denial of Appellants' use of the name "Independent Party" does not impose a severe burden on their speech rights. The denial is viewpoint neutral, and allows Appellants to express their political views in any public forum. Any suggestion that the ballot itself is a forum for the expression of political views is contrary to the law.

Appellants' complaint does not allege that Section 5001 was applied to them based on their political ideology or viewpoint, or on the content of their speech. Indeed, by their own admission, Appellants have no particular political ideology but seek only to provide a mechanism for candidates who wish to have the "Independent" designation on the ballot, regardless of the candidates' political beliefs. SER002, 003, ¶ 1; SER010, ¶ 3; SER014, lns. 16-20 ("[T]here are candidates that want to be designated as independent, so this political body was formed for those candidates to be a part of because they - - they actually by political context are independent").

Apparently recognizing this motivation appears duplicitous, Appellants now claim that they chose the name "Independent Party" because it most accurately represents their political beliefs. AOB at 19. The Court should not give any credence to this new allegation because it was not pled in the

Complaint.[5] *Lee v. Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) ("when the legal sufficiency of a complaint's allegations is tested by a motion under Rule 12(b)(6), '[r]eview is limited to the complaint.'") (quotation omitted), *overruled in part on other grounds by Galbraith v. City of Santa Clara*, 307 F.3d 1119, 1125-26 (9th Cir. 2002). Even if the Court considers this new motivation, and it is assumed to be true, Appellants' claims still fail for the reasons stated herein.

The alleged burden placed on Appellants' speech rights by their inability to use their preferred name is similar to one this Court has previously held to be "slight." In *Chamness v. Bowen*, this Court held that a state prohibition against a primary election candidate designating himself as "Independent," and requiring him to state that he has "No Party Preference,"

[5] Appellants do not cite to the allegation in the Complaint but cite to the declaration of Richard Winger, which Appellants submitted in opposing the motion for judgment on the pleadings. *See* AOB at 19 (citing EOR 43). Mr. Winger is unaffiliated with Appellants, and lacks qualification to testify as to their motivation for organizing and for selecting their chosen name. *See* EOR 43. Indeed, he does not provide any testimony specific to Appellants but testifies generally that in eleven other states, parties had "sometimes" chosen the name "Independent Party" because the party founders had felt it reflected the parties' values. *Id.* at ¶ 2. Even Mr. Winger admits that the name was also chosen "sometimes because the founders of such a party simply wanted to assist independent candidates in getting on the ballot." *Id.*

did not violate his First Amendment speech rights.[6] *Chamness*, 722 F.3d at 1119. The Court found the prohibition to impose only a "slight speech burden" because there is no "real difference" between the labels "Independent" and "No Party Preference." *Id.* at 1117-18. The Court further found the fact that the prohibition is viewpoint neutral supports the conclusion that it imposed only a slight burden on speech. *Id*. at 1118. Similarly here, the denial of Appellants' preferred name is viewpoint neutral and Appellants are free to choose any name that meets the requirements of Section 5001 and would not confuse or mislead the voters.

Appellants are free to express their political views in every forum available except on the ballot. Appellants may support, endorse, vote for, or campaign on behalf of any candidate, including candidates who wish to run for office without declaring a preference for an existing qualified political party. To the extent Appellants' claim is based on an assertion that they have the right to use the ballot for their expressive activity, through the use of their proposed name, "Independent Party," it must fail. The ballot is not a forum for speech. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351,

[6] Candidates running for voter-nominated offices who do not indicate a preference for a qualified political party would be designated with the label "Party Preference: None." § 13105(a)(2).

362-63 (1997) ("Ballots serve primarily to elect candidates, not as forums for political expression"). As the Supreme Court held in *Timmons*, a political party does not have the right to use the ballot to send a message to the voters about the nature of its support for a candidate. *See id.*, at 363. And as this Court has recognized, "[a] ballot is a ballot, not a bumper sticker. Cities and states have a legitimate interest in assuring that the purpose of a ballot is not 'transform[ed] . . . from a means of choosing candidates to a billboard for political advertising." *Rubin*, 308 F.3d at 1016 (citing *Timmons*, 520 U.S. at 365).

Appellants argue that they are not attempting to use the ballot to promote a political message. AOB at 23. However, their attempt to use the ballot label “Independent” is itself a political message that their candidates “affirmatively reject[] the politics of the other parties.” *See Chamness*, 722 F.3d at 1117. Appellants’ argument is also belied by their assertion on appeal that they desire to use the name “Independent Party” because “they believe this name most accurately represents their closely held political beliefs.” AOB at 19.

2. Appellants' Right of Association and Voting Rights Are Not Severely Burdened

The denial of Appellants' use of the name "Independent Party" does not impose a severe burden on their associational and voting rights. This conclusion is supported by logic—the Secretary of State has not prevented Appellants from associating as they choose—and by an analysis of the two principal cases the parties have cited on this issue.

The First Amendment protects the right of citizens to associate and to form political parties. *Timmons*, 520 U.S. at 537. Here, Appellants are free to associate and organize and form a political body under any name designation that complies with Section 5001 and would not confuse or mislead voters. They simply may not use the name "Independent Party" because it would cause confusion. Appellants may even use a name that includes the word "independent" without running afoul of Section 5001. Indeed, the Secretary of State had approved the name "Independent California Party" for a political body that had attempted to qualify for the 2016 general election.[7] Thus, Appellants' associational and voting rights are

[7] California Secretary of State, http://elections.cdn.sos.ca.gov/ror/15day-presprim-2016/non-qual-chairs.pdf (last visited Oct. 20, 2016).

not severely burdened because it is free to associate with any candidate it supports, and vice versa, and the voters are free to vote for any candidate who indicates a preference for it.

In *Timmons*, the New Party challenged Minnesota's law prohibiting candidates from listing more than one party affiliation on the ballot. *Timmons*, 520 U.S. at 362. The New Party argued that the ban violated its right of association. The Supreme Court, however, found that the burden imposed by the state law was not severe. *Id.* at 363. As the Court reasoned, Minnesota had not directly precluded the parties from developing and organizing, and the New Party "remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen." *Id.* at 361. Members of the New Party are likewise free to endorse, support, or vote for anyone they like. *See id.* at 363. Similarly here, the denial of Appellants the use of the name "Independent Party" does not impose a severe burden on their associational and voting rights because Appellants remain free to organize and associate with whom they like and their supporters are free to endorse, support, or vote for anyone they like.

Appellants' reliance on *Anderson v. Celebrezze* is misplaced. AOB at 25-26. In *Anderson*, the Supreme Court struck down an Ohio law that required independent candidates to file their candidacy five months earlier than party nominees. *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The court found that requiring independent candidates to file earlier than party nominees burdened the associational right of independent-minded voters because it limited their opportunity to associate and act on developments that might occur in the five months between the different filing deadlines. *Id.* at 790-92. The court's rationale in *Anderson* does not apply here for two reasons.

First, Appellants are seeking to qualify as a political party. Their nominees, by definition, are not "independent" candidates. To the extent independent-minded voters in California wish to vote for independent presidential candidates, they are free to vote for candidates who qualify for the presidential general election by way of independent nomination. And to the extent voters want to vote for candidates nominated by Appellants, they are also free to do so. Second, in *Anderson*, the court had found that the burden on the associational right of independent-minded voters was not outweighed by Ohio's interests because it found that those asserted interests had "no merit" and did not justify the burden. *See id.* at 796-805. In contrast, the State's asserted interests in this case are compelling, and justify and outweigh the denial of Appellants' use of the name "Independent Party" in their attempt to qualify as a political party.

3. Appellants' Right of Ballot Access Is Not Severely Burdened

The denial of Appellants the use of the name "Independent Party" does not impose a severe burden on their ballot access rights. In examining challenges to ballot access, the Supreme Court focuses on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. *Clements v. Fashing* 457 U.S. 957, 964 (1982). "The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" *Id*. (quoting *Lubin v. Panish*, 415 U.S. 709, 716 (1974)). Here, Appellants and their prospective candidates' access to the ballot have not been directly limited. Appellants must fulfill the same requirements for qualification as all other political bodies seeking to qualify as a political party. *See* § 5151. Candidates who prefer the political party Appellants are attempting to qualify have the same access to the ballot as any other candidate.[8] Instead, Appellants have only been denied the use of the name "Independent Party" in their attempt to qualify as a political party. The resulting burden on Appellants' ballot access right is not severe.

B. Appellants' Inability to Use Their Preferred Ballot Label Does Not Deny Them Equal Protection of the Law or Impose a Severe Burden on Their Equal Protection Rights

Appellants assert a "class of one" Equal Protection claim under the Fourteenth Amendment, alleging that the denial of their use of the name "Independent Party" constitute unlawful discrimination. SER007; AOB 26. The purpose of the equal protection clause of the Fourteen Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (citation omitted). To prevail on such a "class of one" equal

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[8] Any candidate for statewide, legislative, or congressional offices may be placed on the primary election ballot merely by filing a declaration of candidacy and nomination papers with up to 100 voter signatures, and paying a filing fee of 1 percent (2 percent for United States Senator and statewide candidates) of the office's salary. § 8062, § 8103. In lieu of a filing fee, any candidate may submit a petition with 1,500 to 10,000 signatures, depending on the office sought. § 8106. A candidate for the presidential general election who wishes to have the ballot label "Independent" may qualify for the ballot under the independent nomination process. § 13105(c); *see* § 8300, et seq.

protection claim, the plaintiff must allege that he or she has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* Appellants' class of one claim fails on both prongs.

On the first prong, Appellants do not cite any specific allegation to support their claim that they have been intentionally treated differently. *See*, *generally*, AOB 24-26. Instead, Appellants refer generally to "decades of precedents" and "decisions of the previous California Secretary of State regarding the Americans Elect Party." AOB 26. Although it is not entirely clear, Appellants appear to claim that the Secretary of State has permitted other political parties in California to use common words in their party names. AOB 16-17. This does not establish intentional discrimination against Appellants, or that Appellants are similarly situated to these alleged past examples. It is true that the Secretary of State has permitted different political parties to use a common word in their names, including the word "independent." For example, the Secretary of State permitted a political body that was attempting to qualify for the 2016 general election to use the name "Independent California Party." *See*, *supra*, p. 21, n. 7. However, Appellants attempt to use *only* the word "independent" as their party name. Additionally, the Secretary of State has previously defended the application of the elections laws and denied a candidate's attempt to use the label "Independent" on ballots where not permitted by law. *See Chamness*, 722 F.3d at 1118. Thus, Appellants fail to show that they have been treated differently than others in similar situations.

On the second prong, the Secretary of State's denial of Appellants the use of their preferred name is supported by compelling reasons that far exceed the rational basis that is required to uphold the law, as explained in Section III below.

After the Opening Brief was submitted, this Court, sitting *en banc*, held that the *Burdick* balancing test, and not rational basis review, applied to the analysis of an alleged violation of the "one person, one vote" principle under the Equal Protection Clause of the Fourteenth Amendment. *Public Integrity Alliance*, --- F.3d---, 2016 WL 4578366, *3-4. The Court did not address whether the *Burdick* test applies to all elections law challenges under the Equal Protection Clause, including a "class of one" equal protection challenge. Nonetheless, Appellants' equal protection claim fails under both the traditional rational basis test for a "class of one" equal protection claim and the *Burdick* balancing test. The denial to Appellants use of the name "Independent Party" in their attempt to qualify as a political party does not place a severe burden on their Fourteenth Amendment rights. Appellants were not treated differently than others who sought to use the "Independent" ballot label against California law. There was no discrimination based on Appellants' political views. There is no impediment to Appellants' ability to express their views and to organize, or to campaign for and to associate with any candidate, or to vote for any candidate. And there is no impediment for any candidate to associate with Appellants. Any burden on Appellants' Fourteenth Amendment rights is far from severe.

III. COMPELLING STATE INTERESTS JUSTIFY ANY BURDEN ON APPELLANTS BASED ON THEIR INABILITY TO USE THE "INDEPENDENT" DESIGNATION

Balanced against the slight burden placed on Appellants' rights is the State's compelling interest in conducting a fair election in which the voters are not confronted by a misleading and deceptive ballot. The State's interests in denying Appellants the use of the "Independent Party" designation include avoiding electoral confusion and deception, preventing misrepresentation, and ensuring the efficiency, integrity, and fairness of the ballots. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (The State has important interests in "avoiding confusion, deception, and even frustration of the democratic process at the general election."). Any slight burden imposed on Appellants' rights as alleged by the Complaint is justified and outweighed by at least three compelling State interests.

A. The State Has a Compelling Interest to Prevent the Voter Confusion and Misrepresentation Likely to Result if Appellants' Presidential Nominee and Presidential Candidates Who Qualify by Way of Independent Nomination are Both Designated "Independent" on Ballot

For a presidential or vice presidential candidate in the general election, the name of the candidate's party would appear next to the candidate's name. § 13105(b). If Appellants qualify as a political party for the general election with the name "Independent Party," and nominates a presidential candidate, its candidate would be eligible to appear on the ballot next to the word "Independent."[9] § 13105(b). California, however, has reserved the ballot label "Independent" for presidential and vice-presidential candidates who qualify for the ballot through an independent nomination process. § 13105(c); *see* § 8300, et seq.

The State has compelling interests in avoiding voter confusion and misrepresentation that could result if a presidential candidate of the "Independent Party," and a presidential candidate who qualified for the general election by way of independent, non-party nomination, are both designated "Independent" on the ballot. The ballot would not inform voters

[9] Indeed, this was Appellants' express intent in choosing its preferred name. SER002 & 003, ¶ 1.

whether a candidate qualified for the presidential election ballot through the independent nomination process, or is a nominee of the "Independent Party." The designation could also mislead voters into believing that a nominee of the "Independent Party" actually qualified not by party nomination but through the independent nomination process, and vice versa.

Appellants' attempt to counter the State's compelling interests fails. Appellants first contend that there is no evidence that voters confuse presidential candidates who qualified for the ballot through the independent nomination process with nominees of the American Independent Party. AOB at 16. But this argument is off-base because nominees of the American Independent Party use the ballot label "American Independent," not "Independent." Furthermore, the State does not have the burden to provide empirical evidence or to prove the existence of electoral problems before remedying the problem. *Munro*, 479 U.S. at 195. Requiring the State to do so "would invariably lead to endless court battles over the sufficiency of the 'evidence marshaled by a State to prove the predicate." *Id.* Instead, the State is "permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.* at 195-96.

Appellants also argue that the Secretary of State can remedy the perceived problem by changing the ballot label for independent presidential candidates. AOB at 16. This argument is faulty for several reasons. The requirement that the label "Independent" be placed next to the names of independent presidential candidates on the ballot is not an exercise of the Secretary of State's discretion but is mandated by statute. § 13105(c); *see* Cal. Const. art. III, § 3.5. More significantly, the State need not narrowly tailor its elections law when there is a less than severe burden on Appellants' asserted rights, and need not alter its laws to suit Appellants' preference absent a constitutional violation. *See Timmons*, 520 U.S. at 358 ("Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions") (citation and internal quotation marks omitted).

The Constitution provides that states may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," and the Supreme Court has recognized that states retain the power to regulate their own elections. *Burdick*, 504 U.S. at 433 (citation omitted). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections" and "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* (citation omitted). Here, the State's elections laws provide for the qualification of presidential and vice presidential candidates through the independent nomination process and the appropriate ballot label for those candidates. *See* § 8300, et seq.; § 13105(c). The constitutionality of those laws is not at issue, and the State need not alter them for Appellants to use a name that is likely to confuse and mislead voters.

B. The State Has a Compelling Interest to Prevent the Voter Confusion and Deception Likely to Result From Appellants' Preferred Party Name Being Too Similar to the Name of the American Independent Party

The State has compelling interests in avoiding the voter confusion and deception that could result if candidates for voter-nominated offices indicate a preference for the "Independent Party" because that proposed party name is too similar to the name of the "American Independent Party," an existing, qualified political party. This Court has previously observed the similarity between the names, and has anticipated that electoral confusion could result if a candidate has the word "Independent" next to his or her name.

In *Chamness v. Bowen*, a candidate who sought to run for office in the primary election wanted to have the ballot state "Independent" in his party preference space. *Chamness*, 722 F.3d at 1114. He argued that the State's prohibition against the use of the ballot label "Independent" violated his First Amendment rights. *Id.* at 1116. This Court held that the statute that prohibited the candidate from designating him as "Independent" and required him to state that he has "No Party Preference" did not violate his First Amendment rights. *Id.* at 1119. In reaching that holding, this Court found that the State has an interest in preventing the confusion that could result if a candidate is permitted to use the ballot label "Independent." As this Court observed, "[t]he term 'Independent,' if listed next to a candidate's name on the ballot, might be confused with the name of a political party, such as the 'American Independent' Party—one of California's 'qualified' political parties." *Id.* at 1118.

The Secretary of State reached the same conclusion. Under Section 5001, a proposed party name "must not be so similar to the name of an existing party so as to mislead the voters, and shall not conflict with that of any existing party." The Secretary of State determined that the proposed name "Independent Party" would be similar to that of the existing

"American Independent Party," and may mislead voters. SER004-005, ¶¶ 7 & 9.

Appellants argue that numerous states, including California, have permitted two parties to be placed on a ballot in the same election when their names shared a common word. AOB at 16-17 (comparing the American Independent Party with, for example, the American National Socialist Party and the American Resurrection Party). This argument fails because there is no absolute bar against two political parties using a common word in their party names. Appellants are prohibited from using the name "Independent Party" not because it shares a word in common with the American Independent Party, but instead because the name is too similar to the name American Independent Party, and is likely to confuse and mislead voters. The State has a compelling interest to avoid that result.

C. The State Has a Compelling Interest to Prevent Voter Deception Caused by "Independent Party" Candidates Professing Independence From Political Parties

The State also has a compelling interest in preventing voter deception. Appellants seek to use the name "Independent Party" for the express purpose of enabling candidates to place the ballot label "Independent" next to their names. SER002, SER003 ¶ 1. In *Chamness*, it was suggested to the Court that having the word "Independent" next to a candidate's name "may evoke a positive view—that the candidate affirmatively rejects the politics of the other parties." *Chamness*, 722 F.3d at 1117. Appellants presumably intend for their candidates to be able to latch onto this "positive view" perceived to be evoked by the word "Independent." If Appellants prevail, however, a candidate having the word "Independent" next to his or her name on the ballot would actually be indicating a preference for the "Independent Party" and not rejecting all political parties or political ideology. Thus, the denial of Appellants' use of the designation, "Independent Party" protects voters. A voter seeing the word "Independent" next to a candidate's name, could be deceived and misled into believing that the candidate affirmatively rejects all political parties.[10] *See id.*

These important state interests in avoiding electoral confusion and deception, preventing misrepresentation, and ensuring the efficiency, integrity, and fairness of the ballots justify and outweigh any burden on Appellants caused by their inability to use the proposed name "Independent Party."

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[10] The disingenuous nature of Appellant political body in selecting their preferred name is highlighted by ideological paradox in creating a political party for candidates who wish to be free from political parties and to inform voters of their lack of party affiliation by the party's ballot label.

CONCLUSION

For reasons stated above, the District Court's judgment should be affirmed.

Dated: October 21, 2016

Respectfully submitted,

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16-15895

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INDEPENDENT PARTY and WILLIAM LUSSENHEIDE,

Plaintiff and Appellant,

v.

ALEJANDRO PADILLA, in his official capacity as Secretary of State of California,

Defendant and Appellee.

STATEMENT OF RELATED CASES

To the best of Appellee's knowledge, there are no related cases.

Dated: October 21, 2016

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16-15895

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Defendant and Appellee.

ADDENDUM OF PERTINENT AUTHORITY

California Elections Code § 5001

California Elections Code § 5002

California Elections Code § 13105

Dated: October 21, 2016

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West's Annotated California Codes
Elections Code (Refs & Annos)
Division 5. Political Party Qualifications (Refs & Annos)
Chapter 1. New Party Qualifications (Refs & Annos)

West's Ann.Cal.Elec.Code § 5001

§ 5001. Political party; qualification; formation of political body; caucus or convention; filing formal notice

Effective: January 1, 2015
Currentness

Whenever a group of electors desires to qualify a new political party meeting the requirements of Section 5100 or 5151, that group shall form a political body by:

(a) Holding a caucus or convention at which temporary officers shall be elected and a party name designated. The designated name shall not be so similar to the name of an existing party so as to mislead the voters, and shall not conflict with that of any existing party or political body that has previously filed notice pursuant to subdivision (b).

(b) Filing formal notice with the Secretary of State that the political body has organized, elected temporary officers, and declared an intent to qualify a political party pursuant to either Section 5100 or 5151, but not both. The notice shall include the names and addresses of the temporary officers of the political body.

Credits
(Stats.1994, c. 920 (S.B.1547), § 2. Amended by Stats.1996, c. 724 (A.B.1700), § 3; Stats.2013, c. 511 (A.B.1419), § 4; Stats.2014, c. 71 (S.B.1304), § 50, eff. Jan. 1, 2015.)

West's Ann. Cal. Elec. Code § 5001, CA ELEC § 5001
Current with urgency legislation through Chapter 893 of 2016 Reg.Sess., Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

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West's Annotated California Codes
Elections Code (Refs & Annos)
Division 5. Political Party Qualifications (Refs & Annos)
Chapter 1. New Party Qualifications (Refs & Annos)

West's Ann.Cal.Elec.Code § 5002

§ 5002. Notification to county elections official upon receipt by Secretary of State of notice of intent to qualify a new political party; statement of voters; political affiliations

Effective: January 1, 2014
Currentness

Upon receipt of the notice specified in Section 5001, the Secretary of State shall notify each county elections official of the name of the political body, its intent to qualify as a political party, and whether it intends to qualify for the next primary election or for the next presidential general election.

In preparing the statement of voters and their political affiliations, the county elections officials shall tabulate by political affiliation the affidavits of registration of members of political parties qualified pursuant to Section 5100 or 5151, and political bodies formally declaring an intent to qualify as political parties pursuant to Section 5001. All other affidavits of registration, except those of persons declining to state a political affiliation, shall be tabulated as miscellaneous registrations.

Credits

(Stats.1994, c. 920 (S.B.1547), § 2. Amended by Stats.2013, c. 511 (A.B.1419), § 5.)

West's Ann. Cal. Elec. Code § 5002, CA ELEC § 5002
Current with urgency legislation through Chapter 893 of 2016 Reg.Sess., Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

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Elections Code (Refs & Annos)
Division 13. Ballots, Sample Ballots, and Voter Pamphlets (Refs & Annos)
Chapter 2. Forms of Ballots: Ballot Order (Refs & Annos)

West's Ann.Cal.Elec.Code § 13105

§ 13105. Voter-nominated offices; political party preference designation; independent candidates for President or Vice President of the United States

Effective: February 10, 2012
Currentness

(a) In the case of a candidate for a voter-nominated office in a primary election, a general election, or a special election to fill a vacancy in the office of United States Senator, Member of the United States House of Representatives, State Senator, or Member of the Assembly, immediately to the right of and on the same line as the name of the candidate, or immediately below the name if there is not sufficient space to the right of the name, there shall be identified, as specified by the Secretary of State, the designation made by the candidate pursuant to Section 8002.5. The identification shall be in substantially the following form:

(1) In the case of a candidate who designated a political party preference pursuant to Section 8002.5, "Party Preference: ______."

(2) In the case of a candidate who did not state a preference for a political party pursuant to Section 8002.5, "Party Preference: None."

(b) In the case of candidates for President and Vice President, the name of the party shall appear to the right of and equidistant from the pair of names of these candidates and on the same line as the name of the candidate for President, or immediately below the name of the vice presidential candidate if there is not sufficient space to the right of the name.

(c) If for a general election any candidate for President of the United States or Vice President of the United States has received the nomination of any additional party or parties, the name(s) shall be printed to the right of the name of the candidate's own party. Party names of a candidate shall be separated by commas. If a candidate has qualified for the ballot by virtue of an independent nomination, the word "Independent" shall be printed instead of the name of a political party in accordance with the above rules.

Credits
(Stats.1994, c. 920 (S.B.1547), § 2. Amended by Stats.2009, c. 1 (S.B.6), § 46, operative Jan. 1, 2011; Stats.2012, c. 3 (A.B.1413), § 35, eff. Feb. 10, 2012.)

West's Ann. Cal. Elec. Code § 13105, CA ELEC § 13105
Current with urgency legislation through Chapter 893 of 2016 Reg.Sess., Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 16-15895

I certify that: (check (x) appropriate option(s))

[X] Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **answering** brief is

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October 21, 2016
Dated

/s/ Peter H. Chang
Peter H. Chang
Deputy Attorney General

9th Circuit Case Number(s) 16-15895

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) 10/21/2016.

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