16-55758

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMIDIO SOLTYSIK,

Plaintiff - Appellant,

v.

ALEX PADILLA, official capacity as Secretary of State; DEAN LOGAN, official capacity as Registrar-Recorder County Clerk of the County of Los Angeles,

Defendants - Appellees,

and

CALIFORNIANS TO DEFEND THE OPEN PRIMARY,

Intervenor – Defendant -Appellee.

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

No. 2:15-cv-07916
The Honorable Andre Birotte, Jr., Judge

ANSWERING BRIEF OF DEFENDANT-APPELLEE ALEX PADILLA, CALIFORNIA SECRETARY OF STATE

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INTRODUCTION

The California Elections Code requires the State to place a party preference label on the ballot next to the name of each candidate in voter-nominated elections. If a candidate discloses on his or her voter registration form a preference for a political party that is qualified to participate in the election, the label must state "Party Preference: [name of the qualified political party]." On the other hand, if the candidate makes no such disclosure, or discloses a preference for a political body that is not qualified to participate in the election, the label must state "Party Preference: None." The distinction between a qualified political "party" and a nonqualified political body is embedded within the Elections Code, and is a viewpoint-neutral distinction based on objective indicia of electoral support that is intended to assist the State in conducting fair and orderly elections.

This action is brought by Emidio Soltysik, a member of the Socialist Party USA, which is a nonqualified political body. Soltysik claims that sections 8002.5(a) and 13105(a) of the California Elections Code ("Statutes"), which bar the identification of his preference for the Socialist Party USA on the primary ballot, violates his associational and equal protection rights under the First and Fourteenth Amendments and his rights

against viewpoint discrimination and compelled speech under the First Amendment.

Each of Soltysik's claims fail. The ballot is not a public forum for candidate speech. It is a government document intended to assist in the conduct of an orderly and fair election. California did not create a forum on the ballot simply by requiring the State to print a party preference label there based on information provided by candidates on their voter registration forms. Furthermore, the Statutes do not discriminate against Soltysik or others based on their viewpoints. Instead, the prohibition against identifying nonqualified political bodies on the ballot is viewpoint-neutral and based solely on objective measures of electoral support. And any slight burden on Soltysik's asserted rights are justified by the compelling governmental objectives of conducting orderly elections, preventing misrepresentation, avoiding electoral confusion and deception, and preserving the simplicity of the ballot, in order to ensure efficiency, integrity, and fairness in the election process.

The district court's final judgment should be affirmed.

JURISDICTIONAL STATEMENT

The Secretary of State agrees with Soltysik's jurisdictional statement.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly held that the Statutes impose only a slight burden on Soltysik's rights of association and equal protection by requiring the label "Party Preference: None" next to his name on the ballot rather than the name of a political body Soltysik prefers that is not qualified to participate in elections.

2. Whether the district court correctly held that the Statutes do not constitute viewpoint discrimination because party preference information printed on the ballot is determined by objective, viewpoint-neutral criteria, not Soltysik's viewpoint.

3. Whether the district court correctly held that the Statutes do not compel speech by requiring the State to place a party preference label on the ballot next to Soltysik's name.

4. Whether the district court correctly held that the State's asserted interests in preventing misrepresentation, avoiding electoral confusion and deception, preserving the simplicity of its ballots, and establishing minimum qualifications for political parties to appear on the ballot, are sufficiently

weighty to justify the slight burden the Statues impose on Soltysik's rights of association and equal protection.

STATEMENT OF THE CASE

I. CALIFORNIA'S ELECTION SYSTEM

A. The "Top Two" Primary System and the Party Qualification Requirement

In 2010, California voters enacted Proposition 14, the Top Two Candidates Open Primary Act, 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*, 183 Cal. Rptr. 3d 373, 378-380 (Cal. Ct. App. 2015). Under the prior closed partisan primary system, only candidates and voters registered with qualified political parties could participate in primary elections. The top voter-getter in each qualified party's primary would advance to the general election as that party's candidate. Voters not affiliated with a qualified political party (including voters affiliated with nonqualified political bodies) could vote in the primary election only in limited circumstances.

Under Proposition 14's top two primary system, candidates may disclose their political party preferences, 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." Cal. Const. art. II, § 5(a) & (b); Cal. Elec. Code § 13105(a) (West 2016).[1, 2] "The candidates who are the top two vote-getters at a voter-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).

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[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; and (12) Member of the U.S. House of Representatives. Cal. Elec. Code § 359.5. 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).

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

Under both the prior closed partisan primary system and the current top two primary system, political bodies could and can participate in the primary election only by qualifying to do so by demonstrating a minimal level of voter support.[3] The California 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. The California Legislature has provided two ways for a new political body to qualify to participate as a "party" in a primary election: (1) 154 days before the primary election, at least 0.33 percent of all registered voters declare their preference for that party; or (2) 135 days before the primary election, a petition is filed with the Secretary of State bearing signatures equal to at least 10 percent of the statewide vote at the previous gubernatorial election, declaring that they represent a proposed party. § 5100(b) and (c).[4]

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[3] Soltysik does not challenge California's party qualification requirement or the ways in which political bodies may qualify for the primary ballot.

[4] Section 5100(a) provides a third way to qualify political parties but it applies only to qualified political parties seeking to maintain their qualified status.

At the time Soltysik filed his complaint, there were six political parties qualified to participate in California elections: the American Independent Party, the Democratic Party, the Green Party, the Libertarian Party, the Peace and Freedom Party, and the Republican Party.[5] And there were seven political bodies attempting to qualify as political parties for either the June 2016 primary election or the November 2016 general election: the American Freedom Party, the Transhumanist Party, the Veterans' Party of America, the California National Party, the UCES' Clowns, the Constitution Party of California, and the Independent California Party.[6] The Socialist Party USA was not a qualified political party in 2016 and did not attempt to qualify as a political party for the 2016 elections. The Socialist Party USA was also not a political party qualified to participate in the 2014 elections, and Soltysik did not allege that the Socialist Party USA attempted to qualify to participate as a political party for the 2014 elections.

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[5] *See* California Secretary of State, Jan. 6, 2016 Report of Registration, Qualified Political Parties, *http://elections.cdn.sos.ca.gov//ror/ror-pages/qual-pol-parties.pdf* (as of Mar. 6, 2017).

[6] *See* California Secretary of State, Jan. 6, 2016 Report of Registration, Political Bodies Attempting to Qualify, *http://elections.cdn.sos.ca.gov//ror/ror-pages/non-qual-chairs.pdf* (as of Mar. 6, 2017.)

B. California Elections Code Sections 8002.5(a) and 13105(a)

Soltysik challenges the constitutionality of California Elections Code sections 8002.5(a) and 13105(a) relating to the indication of party preference on the ballot. Under section 8002.5(a), a candidate for a voter-nominated office shall indicate on the declaration of candidacy either

> (1) "Party Preference: ___ (insert the name of the qualified political party as disclosed upon your affidavit of registration)"; [or]
>
> (2) "Party Preference: None (if you have declined to disclose a preference for a qualified political party upon your affidavit of registration)."

The information provided by the candidate on the declaration of candidacy must be consistent with the corresponding information on the candidate's voter registration affidavit. § 8002.5(a).

Section 13105(a) provides that, on the ballot, next to or below the name of a candidate, "there shall be identified, as specified by the Secretary of State, the designation made by the candidate pursuant to Section 8002.5." This identification must take one of two forms:

> (1) In the case of a candidate who designated a political party 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."

§ 13105(a).[7]

C. Soltysik's Allegations

Soltysik is a member of a political body called the Socialist Party USA. ER 78-79, ¶ 13. He ran unsuccessfully for a State Assembly seat in the June 2014 Primary Election. *Id.* Since the Socialist Party USA was not a party qualified to participate in the June 2014 Primary Election, it was not identified on the primary election ballot as Soltysik's preferred party. *Id.* Instead, the label "Party Preference: None" was placed next to his name on the ballot. *Id.*; ER 85, ¶ 45. Soltysik instead would have preferred to have the label "Party Preference: Socialist Party USA" next to his name on the ballot. ER 85, ¶ 42. He alleged that the label "Socialist Party USA" next to his name on the ballot would convey his political beliefs to the voters. *Id.*

[7] Under Proposition 14's initial implementing legislation, Senate Bill 6, which was passed in 2009 but became operative only upon the passage of Proposition 14, candidates who did not indicate a preference for a qualified political party were given the label "No Party Preference," and all candidates could choose to leave the party designation space blank. ER 116 (Sen. Bill 6 (2009-2010 Reg. Sess.) Cal. Stats. 2009, ch. 1, § 46 ("SB 6")). The Legislature amended Elections Code section 13105(a) in 2012 to remove the option to leave the party designation space blank and instead to apply the label "Party Preference: None" to all candidates who did not indicate a preference for a qualified political party. ER 154 (Assem. Bill 1413 (2011-2012 Reg. Sess.), Cal. Stats. 2012, ch. 3, § 35).

Soltysik alleged that he was compelled to falsely identify as having "no party preference," which caused confusion among the limited number of voters to whom he spoke. ER 78-79, ¶ 13. Soltysik, however, had actively campaigned for the State Assembly as a member of the Socialist Party USA. ER 78-79, ¶ 13. And when campaigning, he informed many voters that he would appear with the "Party Preference: None" label on the ballot. ER 85, ¶ 45.

Soltysik contends that the Statutes are unconstitutional, both facially and as applied, by infringing upon his First and Fourteenth Amendment rights of association and equal protection, and First Amendment rights to be free from viewpoint discrimination and to be free from compelled speech. ER 90-92, ¶¶ 66-67.

D. Procedural History and Ruling Presented for Review

Soltysik filed his complaint on October 8, 2015. ER 93. The group Californians to Defend the Open Primary ("CDOP") intervened. Dkt. No. 32. The Secretary of State and CDOP filed motions to dismiss, which

Soltysik opposed.[8] On April 22, 2016, the district court granted the motions to dismiss Soltysik's three claims. ER 17.

First, regarding Soltysik's equal protection and associational rights claim, the district court held that Soltysik failed to state a claim for relief. The court found that the Statutes do not place a severe burden on Soltysik's rights to equal protection and association as a matter of law. ER 11. The Statutes "do[] not bar access to anyone, including Plaintiffs, and do[] not restrict their ability to associate with the Socialist Party USA." *Id.* at 10. The Statutes are "also viewpoint neutral because *no* non-qualified political organization can appear on the ballot, regardless of its viewpoint, nor does it infringe on core political speech because Plaintiff can communicate their message in any way they like—except by using the ballot." *Id.* at 11. The district court further found that the State's interests in protecting the integrity, fairness, and efficiency of its ballots and election processes, in preventing frivolous or fraudulent candidacies or misrepresentation, and in establishing minimum qualifications for political parties to appear on the ballot to avoid confusion, deception, and frustration of the democratic

[8] Dean Logan, the Los Angeles County Registrar-Recorder/County Clerk ("Registrar"), was also named as a defendant. ER 79, ¶16. The Registrar did not take a position on the merits and did not oppose the motions to dismiss. Dkt. Nos. 11, 45, 46.

process are served by the party preference label restrictions in the Statutes. ER 11-12. These interests are sufficiently weighty to justify the slight burden that the party designation restrictions place on Soltysik's rights to association and equal protection. ER 13.

Second, regarding Soltysik's viewpoint discrimination claim, the district court held that the appropriate analysis is the *Burdick* balancing test, and not the public-forum strict scrutiny analysis urged by Soltysik. ER 13. And under the proper *Burdick* analysis, Soltysik has failed to state a claim. *Id.* Since "any candidate can be placed on the ballot and the term 'No Party Preference' designates all candidates who don't express a preference for a qualified political party regardless of their political viewpoint," the court held that the Statutes impose "no burden" on Soltysik by way of viewpoint discrimination. ER 13-14.

Third, regarding Soltysik's compelled speech claim, the district court held that Soltysik's claim fails insofar as it rests on his assertion that stating "Party Preference: None" next to his name is false, as the statement is true. ER 14. The court held that Soltysik's claim also fails because ballots are not candidate speech, but are documents attributed to governments. ER 15. Finally, regarding Soltysik's argument that party preference label is candidate speech because the Statutes refer to "selection made by a

candidate," the court found that Soltysik's reading takes the cited clause "out of context." ER 16. The Statutes require the label on the ballot to be the name of the qualified party, if any, on the candidate's most recent affidavit of voter registration, and do not allow the candidate to select some different party just for the sake of the ballot. *Id.* The court thus held that Soltysik failed to plead any restriction on his right to be free from compelled speech. ER 17.

STANDARD OF REVIEW

"A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quotation omitted). Appellate review of a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is de novo. *Papa v. U.S.*, 281 F.3d 1004, 1008-09 (9th Cir. 2002). This Court may affirm a dismissal based on any ground supported by the record. *Id.*

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." The court accepts as true all material allegations in the complaint and construes those allegations in the light most favorable to the plaintiff.

Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008). 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

The Court should affirm the district court's dismissal of each of Soltysik's asserted claims. The Statutes place little to no burden on Soltysik's asserted rights, and any minimal burden is outweighed by the State's important interests.

First, the district court correctly applied the *Burdick* balancing standard to its analysis of Soltysik's challenge to California's election law. The Supreme Court and this Court have consistently applied the *Burdick* standard to challenges to voting regulations based on the First and Fourteenth Amendments.

Second, the Statutes impose at most a slight burden on Soltysik's rights of association and equal protection by precluding him from identifying his preferred political body on the ballot when that political body is not qualified, based on objective measures of electoral support, to be identified on the ballot. Soltysik has no right to express his political association on the

ballot because the ballot is not a forum for speech, but a document prepared and distributed by the government to conduct elections. And the State has not opened any part of its ballot for candidates to express their political views or association to the voters. Instead, the State identifies each candidate's party preference on the ballot based on information the candidate initially provided on his or her voter registration form, and further based on whether the identified political body has been qualified to participate in the election. Any slight burden on Soltysik's asserted rights are further mitigated by his ability to inform voters of his views and party preference in every imaginable forum for political speech.

Third, the Statutes do not burden Soltysik's right to be free of viewpoint discrimination because the ballot is not a forum for speech and the Statutes do not deny ballot access to Soltysik based on his viewpoint. Rather, the Statutes distinguish qualified political parties from nonqualified political bodies based on objective measures of electoral support and not on viewpoint.

Fourth, the Statutes do not burden Soltysik's right not to have his speech compelled, because he is not permitted, much less compelled, to "speak" on the ballot. The Statutes require the government to identify a candidate's qualified party preference, or lack thereof, on the ballot

depending on whether the candidate disclosed a preference for a qualified political party. The Statutes thus do not require candidates to express their political views on the ballot.

Finally, any burden placed on Soltysik's asserted rights are justified by important State interests in avoiding electoral confusion and deception, and maintaining the party qualification system. If candidates are permitted to freely identify with any nonqualified political body they prefer, whether existent or not, the ballot could become a platform for political or commercial expression or advertising, which could sow chaos and confusion in the electoral process.

ARGUMENT

I. SOLTYSIK'S EQUAL PROTECTION AND ASSOCIATIONAL RIGHTS CLAIMS WERE PROPERLY DISMISSED

A. The District Court Correctly Applied the Flexible Balancing Standard Applicable to This Case

1. The *Burdick* Standard Applies to Challenges to Election Laws

In examining constitutional challenges to specific provisions of a State's election laws, the Supreme Court has developed a flexible balancing standard: a court 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 v. Takushi*, 504 U.S. 428, 434 (1992) (internal quotation marks omitted) (citing *Anderson v. Celebreeze*, 460 U.S. 780, 789 (1983)). This Court has recently reaffirmed the application of the *Burdick* test to challenges to voting regulations. *Public Integrity Alliance, Inc. v. City of Tucson*, 836 F.3d 1019, 1024-25 (9th Cir. 2016) (en banc), petition for cert. filed, (U.S. Dec. 5, 2016) (No. 16-730).

"[*E*]*very* law regulating elections, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Arizona Libertarian Party v. Reagan*, 798 F.3d 723, 729 (9th Cir. 2015) (emphasis in original) (internal quotation marks omitted). However, under the *Burdick* standard of review, when a state election law imposes only "'reasonable, non-discriminatory restrictions . . . the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). Accordingly, the Supreme Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." *Burdick*, 504 U.S. at 438 (citing *Munro v. Socialist Workers Party*,

479 U.S. 189, 199 (1986)). But when the asserted 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. This Court has "noted that 'voting regulations are rarely subject to strict scrutiny.'" *Chamness v. Bowen*, 722 F.3d 1110, 1116 (9th Cir. 2013) (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011)).

2. The District Court Correctly Applied the *Burdick* Legal Standard in Dismissing Soltysik's Equal Protection and Associational Right Claims

The district court held that Soltysik's equal protection and associational rights claims fail as a matter of law. The court found that the Statutes do not place a severe burden on the asserted rights and that the slight burden placed on those rights by the Statutes is justified by the State's interests. ER 9-13. Soltysik contends that the court erred because it "failed to affirmatively determine the degree of burden actually imposed." AOB 18. Contrary to Soltysik's argument, the district court did determine the degree of burden imposed.

Specifically, the court found that the burden placed on Soltysik's asserted rights by the Statutes is "not severe" (ER 9) and also described the degree of burden variously as "lesser" (ER 11) and "slight" (ER 13). Once the court determined that the Statutes do not impose a "severe" restriction on

the asserted rights, there is no requirement for the court to assign a numerical value or some specific language to characterize the precise degree of burden, as Soltysik appears to demand. Rather, courts need only 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. The district court has done just that.

As to "the character and magnitude" of the alleged burden, the court found that the Statutes do not bar ballot access to anyone, including Soltysik, and do not restrict Soltysik's ability to associate with the Socialist Party USA. ER 10. The Statutes are viewpoint-neutral because "*no* non-qualified political party organizations can appear on the ballot, regardless of its viewpoint . . . ." ER 10-11 (emphasis in original). The Statutes also do not infringe core political speech because Soltysik "can communicate [his] message any way [he] like[s]—except by using the ballot," which he has no right to use to convey a political message. ER 11 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362-63 (1997)). The district court then correctly balanced this "character and magnitude" of the alleged burden against the State's proffered interests for the Statutes, and found that those

interests are sufficiently weighty to justify the alleged burden. ER 11-13. Thus, the district court correctly applied the *Burdick* legal standard to its analysis of Soltysik's claims.

B. The District Court Correctly Held That the Statutes Impose Only a "Slight" Burden on Soltysik's Asserted Rights

The Statutes are reasonable, nondiscriminatory measures that impose at most a slight burden on Soltysik's rights of association and equal protection.[9] The First Amendment protects the right of citizens to associate and to form political parties. *Timmons*, 520 U.S. at 357. While the Statutes limit Soltysik's ability to identify his preference on the ballot for a political body that has not been qualified to appear on the ballot, he has no constitutional right to communicate his party preference or association to voters through the ballot. Furthermore, he is free to associate with the

[9] Soltysik's equal protection claim should be analyzed collectively with his associational rights claim. Where a claim for violation of the Equal Protection Clause is based on violation of First Amendment rights, it is unnecessary to conduct a separate equal protection analysis, as the First Amendment provides the strongest protections of the right to free speech. *Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001). "In election cases, free speech and equal protection analysis generally work in tandem." *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019 (9th Cir. 2002); *see Dudum*, 640 F.3d at 1106 n.15 ("The Supreme Court has addressed such claims using a single analytic framework."). Soltysik also does not make separate arguments to support his equal protection claim.

political body of his preference in every way that counts, by campaigning, by publication, and otherwise.

1. Soltysik Has No Constitutional Right to Communicate to Voters Through the Ballot

Soltysik alleges that the Statutes deprived him of a voter "cue" associated with a party label on the ballot. AOB at 6; ER 90, ¶ 68. Assuming this to be true, as a matter of law it does not add to his constitutional burden. A candidate does not have the constitutional right to use the ballot to send a message to voters about the candidate's political ideology based on the candidate's political body or party preference. *See Timmons*, 520 US at 363 (political party does not have right to use ballot to send message to voters about nature of its support for a candidate). 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). While having a qualified party name beside the name of a candidate may give some information to voters that is not provided to candidates without a party name, this result is "implicit in and essential to an electoral

system that places minimum qualifications upon parties to achieve qualified status." *Libertarian Party of Cal. v. Eu*, 620 P.2d 612, 617 (Cal. 1980).

Courts in California and around the country have repeatedly rejected attempts by candidates affiliated with nonqualified parties to use the ballot to promote political messages in the form of party identification. Indeed, the precise issue presented in this case has been addressed in California and other federal circuits. In *Field v. Bowen*, aspiring candidates challenged section 13105(a), as Soltysik does here, alleging that their inability to indicate a preference for an unqualified political body violated the First and Fourteenth Amendments, the Free Speech Clause, the Federal Elections Clause, and the California Equal Protection Clause. *Field v. Bowen*, 131 Cal. Rptr. 3d 721, 727 (Cal. Ct. App. 2011). Relying on U.S. and California Supreme Court precedents, the California court of appeal held that "California's law preventing candidates from using nonqualified party labels on the ballot imposed only an insubstantial burden on constitutional rights." *Id.* at 361 (citing *Timmons*, 520 U.S. at 358, and *Libertarian Party*, 620 P.2d at 617).

In *Schrader v. Blackwell*, the Sixth Circuit upheld an Ohio law that denied candidates who are members of nonqualified political parties a partisan cue (in the form of the names of those political parties) on the ballot.

Schrader v. Blackwell, 241 F.3d 783 (6th Cir. 2001). As the Sixth Circuit declared, "states have significant authority to regulate the formation of political parties and the identification of candidates on the ballot," and where the regulations are reasonable and non-discriminatory, those contesting such regulations "bear[] a heavy constitutional burden." *Id.* at 790-91.

In *Rubin*, this Court upheld a California city's ban on candidates using "status designations" on the ballot. *Rubin*, 308 F.3d at 1012.[10] Specifically, the Court held that a city's restriction on a candidate's ability to designate himself as "peace activist" did not severely burden his First Amendment rights because it did not hinder core political speech. *Id.* at 1016. The restriction did not prevent the candidate from supporting or discussing peace activism during his candidacy—it merely placed a limit on how his occupation would appear on the ballot. *Id.* Similarly, the Statutes do not restrict Soltysik from campaigning or otherwise informing the voters of his

[10] Under California election law, a candidate may designate his or her vocation, profession, or occupation on the ballot, but not "status." *Rubin*, 308 F.3d at 1011-12 (citing 2 Cal. Code Reg. tit. 2, § 20716(b)(3)). "Status" is defined as "a state, condition, social position, or legal relation of the candidate to another person, persons, or the community as a whole," such as "philanthropist, activist, patriot, taxpayer, concerned citizen, husband, wife, and the like." *Id.*

political association, but merely limits the presentation of such information on the ballot.

Soltysik relies heavily on *Rosen v. Brown*, in which the Sixth Circuit held that an Ohio law prohibiting the candidate designation "Independent" from the ballot violated candidates' First and Fourteenth Amendment rights. *See* AOB 27-28 (citing *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992)). *Rosen* is clearly distinguishable on two grounds.

First, the Sixth Circuit's holding in *Rosen* is limited to independent candidates. *See Schrader*, 241 F.3d at 789. In a later challenge to the same Ohio law brought by a political party and its nominee, the Sixth Circuit itself distinguished *Rosen* based on the different roles played by independent candidates and political parties in our election system. *Schrader*, 241 F.3d at 789 (citing *Storer v. Brown*, 415 U.S. 724, 745 (1974)). The narrow holding of *Rosen* thus does not apply to Soltysik.

Second, the Sixth Circuit in *Rosen* appropriately did not end its analysis after concluding that *some* burden was imposed by the challenged law.[11] It held the Ohio law to be unconstitutional because the burden imposed by the law *outweighed* the justification advanced for the burden. *Rosen*, 970 F.2d

[11] The court in *Rosen* did not find the challenged Ohio law to impose a severe burden on the asserted rights. *Rosen*, 970 F.2d at 176.

at 176. Significantly, the court found that Ohio's asserted interests were "nothing more than a deliberate attempt by the State to protect and guarantee the success of the Democratic and Republican parties." *Id*. The court further viewed the interests advanced by the state with skepticism because of Ohio's history of using its election laws to deny candidates unaffiliated with the Democratic and Republican parties a place on the ballot. *Id.* at 177. The court cited *Williams v. Rhodes*, 393 U.S. 23 (1968), in which the Supreme Court overturned a series of Ohio election laws that limited political participation of the third party and independent candidates so dramatically that it was "virtually impossible" for those candidates to be placed on the ballot, providing the Republicans and Democrats a "complete monopoly." *Rosen*, 970 F.2d at 177.

In contrast, the Statutes challenged in this case do not draw a distinction between major and minor parties, and Soltysik has alleged no invidious intent in the enactment of the Statutes. Indeed, there are currently six qualified parties in California, four of which are "minor" parties.[12] The

[12] These are the American Independent Party, Green Party, Libertarian Party, and Peace and Freedom Party. California Secretary of State, Qualified Political Parties, http://www.sos.ca.gov/elections/political-parties/qualified-political-parties/ (as of Mar. 6, 2017.)

sole requirement for a political body to be identified on the ballot is that it qualify for the ballot by showing that it possesses a sufficient modicum of voter support. *See* § 5100(b), (c). Unlike the Ohio law challenged in *Rosen*, there is no basis to suggest that the Statutes sought to protect any particular political party or parties.

In *Chamness*, this Court expressly distinguished *Rosen* on that basis. In upholding SB 6, including former section 13105(a) and its restriction on a plaintiff's ability to designate himself as an "Independent" on the ballot, the Court found that there was no legitimate argument that SB 6 sought to insulate any political party or parties from competition, much less the major parties. *Chamness*, 722 F.3d at 1120.[13] To the contrary, as this Court pointed out, a well-supported candidate with a "No Party Preference" label could theoretically benefit from the State's scheme, since it allows multiple candidates to state they prefer a single qualified political party, which may dilute the party's support among those candidates. *Id.*

[13] The version of section 13105(a) considered by the Court in *Chamness* also permitted a candidate who prefers a non-qualified party to leave the party preference space blank. That option is not available under the current version of section 13105(a). However, this difference does not serve to insulate any political party from competition, and there is no allegation that it does.

Therefore, the district court correctly found, as a matter of law, that the burden imposed on Soltysik's asserted associational and equal protection rights by the Statutes are only "slight."

2. Soltysik Has All Other Means to Campaign and Inform Voters of His Party Preference

"A restriction is particularly unlikely to be considered severe when a candidate is given other means of disseminating the desired information." *Rubin*, 308 F.3d at 1014. Soltysik does not dispute that he is free to promote his political preferences to the voters in every way other than on the ballot itself, or that his ability to do so mitigates the burden on his associational rights. Soltysik is free to associate with the Socialist Party USA by campaigning and informing the voters of his association with or preference for the party. Soltysik may submit a statement for publication in the Voter Information Pamphlet. Cal. Gov't Code § 85601(a) (for state and legislative offices); Cal. Elec. Code § 13307.5 (for federal offices); *Rubin*, 308 F.3d at 1016 (candidate's ability to submit statement in a voter information pamphlet "greatly decreases the burden imposed" because candidate could use statement to communicate to public). The Socialist Party USA is also free to associate with Soltysik by endorsing him and promoting their endorsement of him. And the voters are free to associate with Soltysik by

voting for him. On this basis alone, any burden the Statutes place on Soltysik's associational rights would be only slight.

The Supreme Court, this Court, and the California Supreme Court have all determined that a party or candidate's ability to freely communicate with voters outside of the ballot mitigates any burden imposed on a party or candidate's associational rights by restricting the association between the party and the candidate on the ballot. In *Timmons*, a political party challenged a state law that prohibited candidates from listing more than one party affiliation on the ballot, and argued that it violated the party's right to associate with the candidate. *Timmons*, 520 U.S. at 354, 363. The Supreme Court upheld the prohibition in part because the party retained great latitude in its ability to communicate its support for that candidate notwithstanding the minor ballot prohibition. *Id.* at 363.

In *Lightfoot*, a decision rendered by this Court under California's closed partisan primary system, a candidate won the Republican primary for a State Assembly seat and was identified on the general election ballot as a Republican. *Lightfoot v. Eu*, 964 F.2d 865, 869 (9th Cir. 1992). The same candidate was also the highest vote-getter in the Libertarian Party primary as a write-in candidate to the same office, but failed to meet the statutory requirement to be identified as a Libertarian Party candidate on the general

election ballot. *Id*. The Libertarian Party sued, arguing that the statutory requirement infringed on its freedom to associate with the candidate because it prevented the candidate from being designated "Libertarian." *Id.* This Court found that the statutory requirement placed only a slight burden on the Libertarian Party's associational rights because, since the candidate was on the ballot, the Librarian Party was free to associate with the candidate "in every way that counts." *Id.* at 871. The party was free to endorse the candidate, and the party members were free to vote for him. *Id.*

In reaching its holding in *Lightfoot*, this Court relied on *Libertarian Party of California v. Eu*, a California Supreme Court case directly applicable to Soltysik's claim here. In *Libertarian Party*, the California Supreme Court considered whether the Libertarian Party had a First Amendment right to have two independent candidates designated as Libertarian candidates on the general election ballot. *Libertarian Party*, 620 P.2d at 612. The two candidates qualified to appear on the ballot as independent candidates, and the Secretary of State refused to designate them as "Libertarian" because the Libertarian Party was not a "qualified party" under California law at the time. *Id.* The Libertarian Party sued, arguing that the denial of its candidates' right to be listed on the ballot as "Libertarian" was an unconstitutional impairment of the fundamental right to

associate for political activity and to vote. *Libertarian Party*, 620 P.2d at 612. The Court rejected the Libertarian Party's argument. It held that the burden imposed by the challenged statute was "insubstantial" because the Libertarian Party was "in no way restricted in its associational activities or in its publication of the affiliation or of its candidates," and upheld the challenged statute. *Id*.

As Soltysik is free to promote his political preferences to the voters in every way other than on the ballot itself, the district court correctly found that the Statutes impose only a slight burden on Soltysik's associational and equal protection rights.

3. The Statutes Are Viewpoint-Neutral and Even-Handed

Any burden would also be slight because the Statutes are viewpoint neutral and even-handed. *See Chamness*, 722 F.3d at 1116 (a regulation "imposes a permissible restriction on speech if it is generally applicable, evenhanded, and politically neutral, or if it protects the reliability and integrity of the election process"). The Statutes are neutral, nondiscriminatory regulations, and provide the same opportunity for all candidates to compete on an equal basis. They do not treat any candidate differently based on his or her speech or beliefs and do not allow any

candidate to be identified on the ballot with a political body that has not been qualified to participate in the election as a "party." *See id.* at 1118 (holding that section 13105(a) imposed only slight burden on speech because it did "not allow *any* candidates to term themselves 'Independents' and does allow *all* candidates to put themselves forward on the primary ballot and gather votes" (emphasis in original)).

Whether a candidate's preferred political body is identified on a ballot depends on an objective, viewpoint-neutral criterion: whether the political body has demonstrated sufficient electoral support to qualify as a political party to participate in the elections. §§ 338, 5100. Section 5100 provides different ways for a political body to qualify for placement on the ballot, and any political organization, regardless of its political ideology, that meets one of the minimum standards is considered a qualified political party for purposes of the Statutes and may be identified on the ballot as a candidate's preferred party. Therefore, the Statutes place at most a slight burden on Soltysik's equal protection and associational rights. And any slight burden is justified by the State's interests, described in § IV, *infra*.

II. THE STATUTES DO NOT DISCRIMINATE BASED ON VIEWPOINT

Soltysik claims that the Statutes violate his First Amendment rights by providing a forum for speech only to candidates whose viewpoints the State

has approved, while preventing candidates with disfavored viewpoints from expressing themselves. ER 91, ¶ 72; AOB at 44. This claim fails because the ballot is not a forum for candidate speech and because the Statutes are viewpoint neutral and nondiscriminatory. The Statutes thus do not burden Soltysik's right against viewpoint discrimination.

A. The *Burdick* Balancing Standard, Not Limited Public Forum Analysis, Is the Proper Legal Standard

Soltysik's challenge to the Statutes, as a challenge to state regulation of the election process, is properly analyzed under the *Burdick* balancing standard. *See Burdick*, 504 U.S. at 434 (court considering a challenge to state election law must apply the flexible standard); *Dudum*, 640 F.3d at 1106 ("Recognizing the need of States and municipalities 'to assure that elections are operated equitably and efficiently' we apply a 'flexible standard' when considering constitutional challenges to election regulations . . . ." (internal citation omitted)). Soltysik, however, urges the Court to apply the traditional forum analysis in this context. AOB 44-45.[14]

[14] Contrary to the position Soltysik takes here, he had previously agreed that the flexible balancing standard is the appropriate legal test to be used in this case. Dkt. No. 38, Joint Rule 26(f) Report at 3 ("The parties agree the Supreme Court's balancing test will govern the analysis in this case.").

This Court addressed that precise issue in *Rubin v. City of Santa Monica*. In *Rubin*, a candidate challenged a city's prohibition against candidate "status designation" on the ballot. *Rubin*, 307 F.3d at 1012-13. The plaintiff argued—just as Soltysik argues here—that the ballot is a limited public forum requiring strict scrutiny. *Id.* at 1014. The Court, however, explained that "the issue is not whether a ballot is some sort of public forum, but whether, applying Supreme Court election law, California ballot regulations constitute 'severe burdens' on free speech rights." *Id.* (citing *Timmons*, 520 U.S. at 358).

Another reason the traditional forum analysis does not apply is because, as Soltysik acknowledges, it applies only to private speech. *PMG Int'l Div. LLC v. Rumsfeld*, 303 F.3d 1163, 1169 (9th Cir. 2002); *see* AOB 45. And to the extent any messages are conveyed by information the government places next to a candidate's name on the ballot, it is not "speech" by the candidates, but information provided by the government to voters. *See Caruso v. Yamhill County ex rel. County Com'r*, 422 F.3d 848, 858 (9th Cir. 2005) (law "provides for the State's message to be transmitted through ballots, documents prepared printed, and distributed by—and therefore attributed to—State and local governments").

The district court thus correctly applied the *Burdick* standard and found that the Statutes are viewpoint and content-neutral, do not treat Soltysik differently based on his viewpoint or political ideology, and do not burden Soltysik's right against viewpoint discrimination. ER 13-14.

B. The Ballot Is Not a Forum for Speech, and Candidates Have No Right to Express Their Viewpoints on the Ballot

1. The Ballot Is Not a Forum for Speech

Soltysik's viewpoint discrimination claim is based on the erroneous premise that the ballot is a "limited public forum" for candidates "to express their political party affiliation for the information and benefit of voters." AOB 44-45; *see* ER 85, ¶ 46-47. The Supreme Court has stated, however, that the ballot is not a forum for political expression and political parties do not have the right to use the ballot to send particularized messages to the voters. *Timmons*, 520 U.S. at 363 ("Ballots serve primarily to elect candidates, not as a forum for political expression."); *see also NAACP v. Jones*, 131 F.3d 1317, 1323 (9th Cir. 1997) ("Elections do not have a general expressive function."). "[The] State controls the content of the ballot, which [the Supreme Court has] never considered a public forum." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 461 (2008) (Roberts, J., concurring). "Neither the candidate nor the party

dictates the message conveyed by the ballot." *Id.*; *Cf. Greer v. Spock*, 424 U.S. 828, 836 (1976) (the State has power to preserve property under its control for use to which it is lawfully dedicated) (citation omitted).

Soltysik cites no case in which a court has found any portion of a ballot to be a limited public forum, but instead characterizes as dictum the Supreme Court's statement in *Timmons* that the ballot is not "a forum for political expression." AOB at 47. Contrary to Soltysik's assertion, this portion of *Timmons* is not dictum but is central to the Supreme Court's holding that Minnesota's fusion ban did not severely burden the political party's associational rights.[15] In *Timmons*, the New Party challenged Minnesota's fusion ban, which prohibited a candidate from appearing on the ballot as the candidate of more than one party. *Timmons*, 520 U.S. at 354. The New Party made arguments similar to those Soltysik asserts. It contended that the fusion ban burdened its right to "communicate its choice of nominees on the ballot on terms equal to those offered other parties, and the right of the party's supporters and other voters to receive that information." *Id.* at 365. The New Party further argued, as Soltysik does,

[15] "Fusion . . . is the electoral support of a single set of candidates by two or more parties." *Timmons*, 520 U.S. at 353 n.1 (citation and internal quotation marks omitted).

that communication on the ballot of a party's candidate is "a critical source of information for the great majority of voters who rely upon party 'labels' as a voting guide." *Id.* (internal ellipses omitted).

In response to these arguments, the Supreme Court acknowledged that the fusion ban did prevent the New Party from using the ballot to communicate to the public; however, the Court determined that a party did not have the "right to use the ballot to send a particularized message, to its candidates and to the voters, about the nature of its support for the candidate." *Timmons*, 520 U.S. at 362-63. "Ballots serve primarily to elect candidates, not as forums for political expression." *Id.* at 363.

2. The State Has Not Created a Forum for Candidate Speech on Its Ballot by the Party Preference Label

Citing the Statutes and Proposition 14, Soltysik argues that the State has *created* a limited public forum on the ballot by providing a space for candidates to indicate their party preferences. AOB at 44-46. However, as the district court found, Soltysik's argument is based on a reading of the law taken "out of context." ER 16.

A government's "decision to create a public forum must [] be made 'by intentionally opening a nontraditional forum for public discourse.'" *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680

(1992) (quotation omitted)). The plain text of the Statutes confirms that California has not opened up its ballot for public discourse. Strictly speaking, the Statutes do not permit any candidate to write their party preference on the ballot. Section 8002.5(a) directs candidates on how they must prepare their declarations of candidacy:

> A candidate for a voter-nominated office shall indicate one of the following upon his or her declaration of candidacy, *which shall be consistent with what appears on the candidate's most recent affidavit of registration*:
>
> (1) "Party Preference: ____ (insert the name of the qualified political party as disclosed upon your affidavit of registration)."
>
> (2) "Party Preference: None (if you have declined to disclose a preference for a qualified political party upon your affidavit of registration)."

§ 8002.5(a) (emphasis added). A candidate may not freely choose what he or she indicates on the declaration of candidacy. Instead, the candidate's indication must be consistent with the information on the candidate's affidavit of registration. *Id.* In other words, the candidate's selection under section 8002.5 is dictated by the information the candidate previously disclosed when he or she registered to vote.

Section 13105 then provides that the government must identify on the ballot the information provided by the candidate on his or her declaration of

candidacy pursuant to section 8002.5, which again must be based on the information provided in the voter registration affidavit as just described. § 13105(a); *see* § 8002.5(a).

The Statutes thus provide candidates with no opportunity to express their viewpoint on the ballot. When a candidate discloses a preference for a qualified political party on his or her voter registration affidavit, then the phrase "Party Preference: [name of the qualified political party]" appears on the ballot. When a candidate does *not* disclosed a preference for a qualified political party on his or her voter registration affidavit, then the phrase "Party Preference: None" appears on the ballot. The party preference label on the ballot thus corresponds with the information a candidate provides on the voter registration affidavit when he or she registers to vote.[16] As the district court observed, under section 8002.5, the candidate's role is merely to complete the declaration of candidacy with information reflecting a fact

[16] Proposition 14 states in its initial findings that candidates shall have the choice to declare a party preference when they file to run for public office. Proposition 14, subsection (d), available at http://vig.cdn.sos.ca.gov/2010/primary/pdf/english/text-proposed-laws.pdf#prop14 (as of Mar. 6, 2017). As seen in the text of section 8002.5, however, the "choice" takes place when the candidate registers to vote. While candidates do select between two available options on their declaration of candidacy, they do not have a true "choice" as their selection must be consistent with the information in their voter registration affidavit.

established when the candidate registered to vote. ER 16. The government then includes that information on the ballot. This is not candidate "speech."

C. Even If the Ballot Were Considered a Forum for Candidate Speech, Soltysik's Claim Fails Because the Statutes Do Not Discriminate Based on Viewpoint and Do Not Burden Soltysik's Right Against Viewpoint Discrimination

As an initial matter, the bulk of Soltysik's arguments are based on applying strict scrutiny under the incorrect traditional First Amendment analysis. *See* AOB at 50-53. As discussed above, the traditional two-step analysis does not apply to challenges to election laws. *See*, *supra*, § II.A. Strict scrutiny also does not apply because Soltysik is not severely burdened by the Statutes. And even if the ballot were treated as a limited nonpublic forum (which it is not), Soltysik's claim fails. Viewpoint discrimination occurs when the government "denies access to a speaker *solely* to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806 (1985) (emphasis added). The Statutes do not deny Soltysik access to the ballot based on his viewpoint and do not discriminate based on viewpoint.

1. The Statutes Distinguish Between Qualified Political Parties and Nonqualified Political Bodies, Not Between Candidates or Their Views

Soltysik argues that the Statutes are not viewpoint-neutral because they discriminate against those whose viewpoints do not align with those of qualified parties. AOB at 51. The Statutes, however, are viewpoint-neutral because, regardless of any candidate's political ideology or policy platform, if the political body that the candidate prefers (or desires to disclose that he or she prefers) has been qualified by meeting one of the two objective criteria set forth in section 5100, the political body may be identified on the ballot. Whether Soltysik's party preference is identified on the ballot thus does not depend on his viewpoint, but on whether the political body he prefers has garnered sufficient electoral support to be identified on the ballot.[17] Soltysik does not challenge the California party qualification system, or suggest that minor political parties are not able qualify for the ballot.

[17] To highlight the Statutes' viewpoint neutrality, if indeed either the Republican or Democratic Party fails to qualify by one of the methods provided by section 5501, then candidates who prefer *that* party will have the label "Party Preference: None" placed next to their names on the ballot.

2. The Label "Party Preference: None" Is Viewpoint-Neutral

This Court has previously held that the term "No Party Preference" (which was previously used in California to identify candidates now identified as "Party Preference: None") was viewpoint neutral and placed only a slight burden on speech. *Chamness*, 722 F.3d at 1118 ("That candidates not identified on the ballot as preferring a particular party must use the term 'No Party Preference' . . . has no viewpoint implications, and so, for that reason as well, imposes a [l]esser burden []' on speech."). Soltysik does not articulate any distinction between the terms "No Party Preference" and "Party Preference: None." The latter term, at issue in this case, is similarly viewpoint and content neutral.

Soltysik argues that the holding in *Chamness* should be limited to candidates that do not prefer any political party, i.e., the "independent" candidates. AOB at 55. However, in *Chamness*, the Court held that the term "No Party Preference" was viewpoint-neutral based on the fact that the restriction did not allow any candidates to be identified "Independent." Similarly, here the Statutes do not permit any candidate to be identified on the ballot as preferring a nonqualified political body. The label "Party Preference: None" is thus likewise viewpoint-neutral.

Further highlighting the Statutes' neutrality with respect to candidates' viewpoints is that the "Party Preference: None" label applies also to candidates who, regardless of their viewpoint, choose not to disclose their party preference. *See* § 8002.5(a)(2). In other words, a candidate who prefers a qualified political party is not required to disclose that preference on his or her voter registration affidavit. And if that disclosure is not made, the label "Party Preference: None" will be placed next to that candidate's name, regardless of the candidate's actual party preference or viewpoint.

For these reasons, the district court correctly dismissed Soltysik's viewpoint discrimination claim because the Statutes are viewpoint-neutral and nondiscriminatory, and do not burden Soltysik' right against viewpoint discrimination. *See Burdick*, 504 U.S. at 428 (state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions); *id.* at 434 ("we have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls"). Any slight burden arising from the Statutes is justified by the State's interests, described in § IV, *infra*.

D. The District Court Properly Dismissed Soltysik's Claim on the Pleadings Without Permitting Soltysik to Conduct a Fishing Expedition

Soltysik argues that dismissal of his viewpoint discrimination claim is inappropriate on a Rule 12(b)(6) motion because "discovery *may* reveal evidence that the Statutes were merely a facade for viewpoint-based discrimination." AOB at 57 (quotation omitted) (emphasis added). Further, discovery would allow Soltysik to "probe" the reasonableness of the challenged Statutes. *Id.* at 58. These statements demonstrate that Soltysik intends to conduct unnecessary fishing expeditions since his allegations do not support his claims. Soltysik misunderstands the role of a Rule 12(b)(6) motion.

A Rule 12(b)(6) motion tests the legal sufficiency of the complaint. *North Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). For purposes of the Rule 12(b)(6) motion, all of Soltysik's fact allegations are assumed to be true. *Lazy Y Ranch*, 546 F.3d at 588. The district court correctly determined that Soltysik's allegations, assumed to be true, fail to state a claim to relief as a matter of law. ER 6, 17.

The *Cornelius* decision, which Soltysik relies on to support his request to seek discovery on remand, is distinguishable in two respects. First, in *Cornelius* the plaintiff had alleged that the purpose of the law at issue was to

suppress their particular point of view. *Cornelius*, 473 U.S. at 812-13. Here, in contrast, Soltysik does not allege that the Statutes were enacted to suppress his viewpoint. Indeed, Soltysik has examined over 1,000 pages of relevant legislative history and has not identified any suggestion that the Statutes were enacted as a facade for viewpoint-based discrimination. AOB at 22 n.5. Second, *Cornelius* involved a charity drive aimed at federal employees, not a state law. *Id.* at 790. Where state laws are concerned, legislative motive is not subject to discovery. *City of Las Vegas v. Foley*, 747 F.2d 1294, 1986-97 (9th Cir. 1984). Otherwise, legislators could be deposed in every case where the government interest in a regulation is challenged. *Id.* Such practice would be contrary to the Supreme Court's longstanding rejection of the use of legislative motives. *Id.* Any discovery would be irrelevant to the determination the Court must make and thus futile.

III. SOLTYSIK'S COMPELLED SPEECH CLAIM FAILS BECAUSE THE BALLOT IS NOT A FORUM FOR SPEECH AND THE STATUTES DO NOT COMPEL CANDIDATES TO SPEAK ON THE BALLOT

Soltysik contends that the Statutes compel him to falsely state on the ballot that he has "Party Preference: None." AOB at 36; *see* ER 91-92, ¶ 75. Soltysik's claim fails as a matter of law. The ballot is not a forum for speech. Although a candidate preferring a qualified party has the party name

placed on the ballot, that information is provided by the State. *Candidates* are not permitted, much less compelled, to express their political views on the ballot. Furthermore, the label "Party Preference: None" accurately describes Soltysik's party preference because the term "party" is a term of art defined by the Elections Code as a political body qualified to participate in a given election. Therefore, the Statutes do not burden Soltysik's speech rights by placing the label "Party Preference: None" next to his name on the ballot, when he did not indicate a preference for a qualified political party on his voter registration affidavit. This scheme does not compel speech in any form, and certainly does not implicate false speech.

A. The District Court Correctly Analyzed Soltysik's Compelled Speech Claim Under the *Burdick* Balancing Standard

Soltysik asserts, for the first time on appeal, that the district court should have applied a four-factor test to determine whether the party preference label on the ballot is government or private speech. AOB at 39. While Soltysik never suggested to the district court that it should have applied a four-factor test, the district court correctly applied the *Burdick* balancing standard to its analysis of Soltysik's claim. The *Burdick* standard applies to all challenges to voting regulations. *Public Integrity Alliance*, 836 F.3d at 1024-25; *see*, *supra*, § I.A.1.

The district court needed not conduct an exhaustive examination of whether the ballot is a forum for speech (it is not) and whether information on ballots constitutes government speech or private speech. The Supreme Court and this Court have repeatedly held that the ballot is not a forum for speech but is instead an instrument used by the state and local governments to elect candidates. *See Timmons*, 520 U.S. at 362-63; *see*, *supra*, § II.B.1. To the extent any messages are conveyed by the ballot, it is by the government, and does not constitute speech by the candidates. *See Caruso*, 422 F.3d at 858.

Soltysik, on appeal, urges application of a four-factor test to determine whether the information on the ballot is government speech or private speech. AOB at 39. The test, however, applies only to fora for speech, and not to ballots.[18] Furthermore, Soltsyik does not actually argue according to the four-factor test he urges this Court to apply. Instead, Soltysik argues

[18] All of the cases Soltysik relies on involve fora specifically designated for speech. *See*, *e.g.*, *Walker v. Tex. Div. Sons of Confederate Veterans, Inc*., 135 S. Ct. 2239 (2015) (specialty license plate); *Arizona Life Coal. v. Stanton*, 515 F.3d 956 (9th Cir. 2008) (same); *Charter v. U.S. Dept. of Agric*., 412 F.3d 1017 (9th Cir. 2005) (advertising paid for by beef producers); *A.N.S.W.E.R. Coal. v. Jewell*, 153 F. Supp. 3d 392 (D.D.C. 2016) (set aside along a parade route for speech); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) (advertising paid for by beef producers); *Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004) (Adopt-A-Highway signs).

only that a "reasonable person" would consider the party preference label to be candidate speech. AOB at 41.[19] Soltysik did not make this allegation in his complaint, and even if he had, the Court need not accept it as true because it would be a conclusory allegation, unwarranted deduction of fact, or unreasonable inference. *See Sprewell*, 266 F.3d at 988. But even assuming this allegation is true, it does not follow that the possibility of some voters mistakenly believing Soltysik had self-selected the term "Party Preference: None" on the ballot, means that he was compelled to do so by the Statutes. Supreme Court precedents "reflect a greater faith in the ability of individual voters to inform themselves about campaign issues," and the court must assume that "the ballot was presented to a well-informed electorate, familiar with the qualified political parties it has seen on past

[19] Soltysik appears to argue that the Court must consider whether "under all circumstances, a reasonable person would consider a candidate's party preference on the ballot to be government speech or private speech." AOB at 43; *see id.* at 41. This standard suggested by Soltysik appears to be an attempt to reference the summary inquiry suggested by the Seventh Circuit: "*Under all the circumstances*, would a reasonable person consider the speaker to be the government or a private party." *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) (emphasis added). Soltysik's formulation of this inquiry omits the article "the" in the phrase "under all the circumstances." Compare *id.* with AOB at 43. To be clear, under the Seventh Circuit's formulation the inquiry is whether a reasonable person would consider the speaker to be the government or a private party under all the circumstances, not in every single circumstance.

ballots." *Chamness*, 722 F.3d at 1118 (citing *Wash. State Grange*, 552 U.S. at 454-55).

In short, the Court should not apply a four-factor test to determine whether the party preference label on the ballot is private or government speech. The ballot is not a forum speech and the *Burdick* standard properly applies.

B. The Statutes Do Not Compel Candidate Speech and Impose No Burden on Soltysik's Right to Be Free from Compelled Speech

Soltysik's claim is based on the allegation that the Statutes compel him to state whether he prefers a qualified political party or he has no party preference. ER 91-92, ¶ 75. Soltysik's claim fails because the Statutes do not permit, much less require, *him* to state anything on the ballot. Rather, under the Statutes, the government would identify a candidate's qualified party preference, or lack thereof, on the ballot depending on whether the candidate disclosed a preference for a qualified political party on his or her candidacy declaration pursuant to section 8002.5(a). § 13105(a). This disclosure, if one is made, must be consistent with the candidate's disclosure of his or her party preference on the voter registration affidavit. § 8002.5(a). In other words, the information placed on the party preference label by the government is based on the information the candidate had provided when he

or she registered to vote. The Statutes thus do not compel candidates to provide any information to the electorate by the ballot.

The government's indication of a candidate's qualified party preference, or lack thereof, on the ballot can be distinguished from compelled speech cases. Federal courts have found regulations to compel speech typically when states have required owners to use their private property to transmit the state's message. *See Caruso*, 422 F.3d at 858. Examples include laws that require individuals to drive with license plates with mottos that they despise or to wear uniforms that express a particular viewpoint. *See*, *e.g.*, *Wooley v. Maynard*, 430 U.S. 705 (1977); *Frudden v. Pilling*, 742 F.3d 1199 (9th Cir. 2014). In those cases, the individuals were forced to use their private property "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Frudden*, 742 F.3d at 1205 (quotation and citation omitted); *see Pacific Gas and Elec. Co. v. Pub. Utilities Com'n of California*, 475 U.S. 1 (1986) (invalidating a requirement that a utility company provide space in its billing envelope for another party's views).

In contrast, the Statues do not require candidates to use their private property to transmit any message from the government. *See Timmons*, 520 U.S. at 362-63 (political party has no right to use the ballot to send

particularized messages to voters about the nature of its support for a candidate); *Caruso*, 422 F.3d at 855 (case not analyzed as compelled speech case because challenged regulation did not require owners to use their private property to transmit State's message). This case is thus not a compelled speech case and this cause of action should be dismissed.

C. The District Court's Decision Properly Included Analysis of the Accuracy of the Party Preference Label as Applied to Soltysik, Because Soltysik's Claim Is Based on the Allegation That the Statement Was False

The Statutes do not impose a burden on Soltysik by placing the label "Party Preference: None" next to his name on the ballot because, as the district court correctly determined, that label accurately identifies him as not having disclosed a preference for any qualified political parties. ER 14. Soltysik argues that the accuracy of a compelled statement is irrelevant to the compelled speech analysis, and the district court erred to the extent it dismissed Soltysik's compelled speech claim because the label "Party Preference: None" is accurate when applied to him. AOB 36-38. As an initial matter, the label is accurate when applied to Soltsyik. And the district court addressed the issue only because Soltysik raised it, and dismissed the claim only "insofar as it rests on [an] assertion" that was false.

1. The Label "Party Preference: None" Is Accurate When Placed Next to Soltysik's Name

The ballot indicates a candidate's "party" preference as that term is defined by the Legislature for the electoral process in California. And the California Legislature has defined "party" to mean "a political party or organization that has *qualified* for participation in any primary or presidential general election." § 338 (emphasis added). Until a political body is qualified pursuant to the procedures and regulations provided by the Legislature, it is not a *party* that can be identified on the ballot. *See Libertarian Party*, 620 P.2d at 616 (political body that has not been qualified for the ballot is not a "party" whose access to the ballot has been secured for nomination of qualified party candidates). "A state may in good faith choose a term of art to categorize its candidates without impermissibly burdening their rights or the rights of those who vote for or associate with them. That some voters may mistake the term does not in itself make this categorization a substantial burden." *Socialist Workers Party v. Eu*, 591 F.2d 1252, 1261-62 (9th Cir. 1978), *cert. denied*, 441 U.S. 946 (1979).

A candidate's party preference is only indicated on the ballot if the preferred party has been qualified by demonstrating a sufficient level of voter support in one of the ways provided by section 5100. Because

Soltysik's preferred political body has not qualified to participate in the election, it cannot be identified on the ballot as a "party"—any such identification would be false. This precise issue has been examined by a California court of appeal, which found that candidates who did not identify themselves with any qualified political parties could accurately be described as having "No Party Preference." *Field*, 131 Cal. Rptr. 3d at 732 ("[T]he candidates here can be described as having 'No Party Preference' because they have not identified themselves with any qualified political party.").

While the Statutes do not require ballots to explain the meaning of the term "party," as defined by the Elections Code, no such explanation is required. Supreme Court precedents "reflect a greater faith in the ability of individual voters to inform themselves about campaign issues," and the Court must assume that "the ballot was presented to a well-informed electorate, familiar with the qualified political parties it has seen on past ballots." *Chamness*, 722 F.3d at 1118 (citing *Wash. State Grange*, 552 U.S. at 454-55). This assumption is particularly suitable here. California has required political parties to qualify to participate in elections by showing some minimum level of voter support since at least 1913. Cal. Stats. 1913 ch. 690, § 9 (defining "party" as a "political party or organization of electors which has qualified, as herein provided, for participation in any primary

election," and providing different ways for a party to qualify for participation in primary election).

And even if some voters may construe the ballot label incorrectly, it does not impose a severe burden on Soltysik's rights if it can be read to be an accurate statement. *Caruso*, 422 F.3d at 851 ("we may not declare a State's ballot language unconstitutionally burdensome merely because it could conceivably mislead some individuals and could have been drafted more adroitly"). Here, the term "Party Preference: None" is accurate when placed next to Soltysik's name on the ballot because he did not disclose a preference for a qualified political party on his affidavit of registration and declaration of candidacy. Even if some voters may mistakenly believe "Party Preference: None" means the candidate has no political philosophy, it would not impose a severe burden on Plaintiffs' associational rights.[20]

2. The District Court Properly Dismissed Soltysik's Compelled Speech Claim on Numerous Legal Grounds

The district court analyzed the accuracy of the label "Party Preference: None," as applied to Soltysik, only because Soltysik repeatedly alleged in

[20] The court should assume that most of the voters would not be misled by the term "Party Preference: None," but would understand the correct meaning of the term under California's election laws. *See Chamness*, 722 F.3d at 1118.

the complaint that the Statutes compelled him to make a "false" statement. *See* ER 77, ¶ 5; ER 79, ¶ 13; ER 86; ER 87, ¶¶ 51 & 52; ER 91-92, ¶75. The district court thus held that Soltysik's compelled speech claim fails "insofar [as] it rests on the assertion that stating 'Party Preference: None' next to [his] name is false." ER 14. The district court dismissed Soltysik's compelled speech claim on the additional bases that Soltysik has no right to use the ballot to send a message to the voters, and that the party preference label placed next to candidates' names on the ballot is not candidate speech. ER 15-16. The district court's determination as to the accuracy of the party preference label is thus not a proper basis for reversal.

IV. THE STATUTES SERVE IMPORTANT STATE INTERESTS SUFFICIENTLY WEIGHTY TO JUSTIFY ANY BURDEN IMPOSED ON SOLTYSIK

Any burden imposed by the Statutes on Soltysik's rights as alleged in the Complaint is justified by important, indeed compelling, state interests. The State's interests in permitting candidates to identify on the ballot only political parties that have qualified to participate in an election include ensuring that candidates appear on the ballot in an orderly manner, preventing misrepresentation, avoiding electoral confusion and deception, preserving the simplicity of its ballots, and ensuring the efficiency, integrity, and fairness of the ballots. Each of these state interests has been found by

the Supreme Court or this Court to be sufficient justification for burdens imposed by ballot regulations. The district court thus correctly found that there is "no question" that states have these interests, and that the Statutes serve these interests. ER 11-12.

A. State Has Interests in Avoiding Electoral Confusion and Deception, Preserving the Simplicity of Its Ballots, and Protecting Electoral Integrity

It is well settled that a state has a compelling interest in regulating the method by which candidates appear on the ballot and "protecting the integrity, fairness, and efficiency of their ballots and election processes as a means of electing public officials." *Timmons*, 520 U.S. at 364. "[A]s 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." *Storer*, 415 U.S. at 730. The State also has an important interest in preserving the simplicity of its ballots. *Rubin*, 308 F.3d at 1011.

Given the ease by which the State permits candidates to appear on the primary ballot,[21] if candidates are free to identify whichever nonqualified political body they prefer, the ballot could easily be manipulated to send political or even commercial messages to voters. The ballot could be exploited to associate candidates' names with popular slogans and catchphrases or political ideologies and statements, couched as the names of their preferred (but previously nonexistent) political bodies.

For example, candidates could indicate a preference for a "No New Taxes Party," or "Stop Crime Now Party," or "Conserve Our Environment Party." *See Timmons*, 520 US at 365. Or a candidate could choose to use an anti-party or anti-individual message, such as "Do Not Vote for [Opponent] Party." While these exemplars may not, in themselves, be inappropriate

[21] 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.

names for political bodies,[22] they would suggest the existence of a party organization even where none exists. This, as the Supreme Court observed in *Timmons*, would "undermine the ballot's purposes by transforming it from a means of choosing candidates to a billboard for political advertising." *Id.* California has a weighty and compelling interest in protecting the integrity, fairness, and efficiency of its ballots and election process by ensuring its ballots do not become a vehicle for advertising, political or otherwise.

Furthermore, if the State were to allow candidates to designate on the ballot a preference for any political body, regardless of how little voter support it has, it becomes a self-designation system that obliterates the State's ability to manage its ballots. *See Chamness*, 722 F.3d at 1118-19. If any political party label may be used on the ballot, then it could also allow candidates to circumvent the prohibition against "status designations" upheld by this Court in *Rubin*. *See Rubin*, 308 F.3d at 1019. For example,

[22] For example, if a political body attempts to qualify as a political party using the name "No New Taxes Party," the name alone would not be a basis for disqualification. Any proposed name would have to meet the requirements set forth in the Elections Code. *See*, *e.g.*, § 5001(a) (any proposed party 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).

instead of using an impermissible status designation such as "peace activist," a candidate could instead identify his or her preferred party as the "Peace Activist" party and seek to have the term "Peace Activist" placed next to his or her name on the ballot, even if that party does not exist.

Permitting candidates to use self-designated names of nonqualified political bodies could also lead to the display of party names on the ballot that contain profanity or promote racism or sexism, or could create voter confusion. For example, a candidate could indicate a preference for the nonqualified (and nonexistent) "Independent Party" or "Democratic Party USA," or in the district court's example, "Replublican Party" (ER 12), in a fraudulent effort to split bona fide votes.[23] Limiting the ballot designations to qualified political parties "avoids both the problems of allowing questionable self-designation and the alternative prospect of having to make case-by-case governmental decisions regarding the acceptability of various self-designations." *Chamness*, 722 F.3d at 1119.

[23] Soltysik suggests that a candidate would commit perjury if he or she indicates a preference for a political party that does not exist. AOB at 33. But if nonqualified political bodies may be identified on the ballot, then a candidate could simply "create" a new political body with the name of his or her choice and have it identified on the ballot without committing perjury.

Soltysik does not deny that the State has compelling interests in preventing political advertising on the ballot, preventing misrepresentation, and avoiding confusion and deception. These important interests sufficiently justify the burden, if any, on Soltysik's asserted rights.

B. The State Has an Interest in Establishing Minimum Qualifications for Political Parties to Appear on the Ballot

1. The State Has an Important Interest in Requiring a Political Body to Show a Significant Modicum of Support Prior to Printing Its Name on the Ballot

The Supreme Court has held that there is an "important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (upholding Georgia's system that distinguishes between candidates of "political parties" and unrecognized "political bodies"). The California Supreme Court has also recognized the importance of this state interest. *Libertarian Party*, 28 Cal. 3d at 546. It would wholly subvert this state interest if nonqualified political bodies could circumvent the qualification requirement and achieve ballot status simply by

having their candidates designate a wholly unauthorized political body on the ballot. *Id.*

2. Maintaining the Party Qualification System Furthers State Interests in Avoiding Electoral Confusion and Deception, and Frustration of the Democratic Process

Soltysik argues that, under California's top two primary system, there is no justification for requiring political bodies to be qualified before allowing them to be identified on the ballot as parties preferred by candidates. AOB at 35. However, if candidates may identify a preference for any political body they choose (regardless of how little voter support, if any, it has), the ballot could be manipulated to send political messages to the voters or be used as a vehicle for political advertising. *Id.* Candidates may also use the party label to circumvent the State's prohibition against status designations, which this Court upheld in *Rubin*. *See Rubin*, 308 F.3d at 1019. Candidates may also identify preferences for party names, such as "Replublican Party," that could create voter confusion. *See*, *supra*, § IV.A.; ER 12. Therefore, the State's interest justifies any slight burden the Statutes place on Soltysik's asserted rights.

Soltysik claims his argument is supported by dictum in *Chamness*. The Court in *Chamness* stated that it was not relying on the State's interest in

maintaining the distinction between qualified political parties and nonqualified political bodies in its decision. AOB at 35 (citing *Chamness*, 722 F.3d at 1118 n.5). The Court observed that while the California Supreme Court previously found this State interest to be compelling, the analysis there was not "fully transferable" because the case was decided under the prior election system in which only one endorsed candidate per party appeared on the final ballot. *Chamness*, 722 F.3d at 1118 n.5 (citing *Libertarian Party*, 28 Cal. 3d at 545-46). In *Chamness*, however, the parties did not raise, and the Court did not consider the State's interests in avoiding electoral confusion and deception, and frustration, as stated above, which continues to be applicable under the top two primary system.

These compelling and weighty state interests thus justify and outweigh the burden, if any, the Statutes impose on Soltysik's asserted rights.

C. The District Court Properly Considered the State's Proffered Interests

Soltysik contends that the district court erred in considering the State's proffered state interests because they were not specifically identified in the legislative history of the Statutes as the reasons for their enactment. AOB at 20, 22. But courts are not limited, in election process challenges such as this, to considering only those state interests identified in the legislative

history. Instead, the State need only "put forward" interests as justifications for the burden imposed by its regulation. *Anderson*, 460 U.S. at 789. Indeed, in *Timmons* the Supreme Court expressly relied on a state interest not even advanced in the parties' briefs. *Timmons*, 520 U.S. at 366 n.10.

Courts must "determine the legitimacy and strength" of the State interests, and consider the extent to which those interests make it necessary to burden plaintiff's rights. *Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 439 (analyzing "interests asserted by Hawaii to justify the burden imposed by its prohibition of write-in voting"). The proffered interests must be legitimate and substantially related to the regulation. *See San Francisco County Democratic Cent. Committee v. Eu*, 489 U.S. 214, 226 (1989); *Eu v. San Francisco County Democratic Cent. Committee*, 826 F.2d 814, 832 (9th Cir. 1987). But they need not have been expressly identified in the legislative history as the legislature's basis for enacting the law. *Cf. U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("this Court has never insisted that a legislative body articulate its reasons for enacting a statute").

In *Dudum*, the plaintiff objected that the interests relied on by the defendant city were not advanced upon adoption of the challenged proposition, and so were impermissible post hoc rationales. *Dudum*, 640 F.3d at 1116 n.28. This Court first expressed skepticism that "the normal

ability of litigants to advance arguments justifying their out-of-court behavior is suspended in election challenges . . . ." *Id.* The Court then observed that the Supreme Court in *Timmons* had expressly relied on a state interest that was likely not cited in the legislative history. *Id.* (citing *Timmons*, 520 U.S. at 366 n.10); *see also Libertarian Party of New Hampshire v. Gardner*, 843 F.3d 20, 31 (1st Cir. 2016) (relying on statements of state's interest first identified in litigation briefs where burden imposed by challenged law is minimal).

Soltysik cites no voting regulation case in which a court has required a state defendant to rely solely on justifications identified in the legislative history, and the Secretary has found none.[24] The decision in *Public Integrity Alliance*, cited by Soltysik, was a voting regulation case, but it does not stand for the proposition that this Court prohibits the consideration of state interests not cited in legislative history. *See* AOB at 22. The passage Soltysik relies on in *Public Integrity Alliance* merely states the unremarkable

[24] *Citizens for Clean Government v. City of San Diego* is inapposite because it was a case involving campaign contribution limits, which are subject to a different legal standard from election law cases. *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 650-51 (9th Cir. 2007) (limits on political campaign contributions are analyzed under the "less rigorous" scrutiny test).

proposition that rational basis review does not apply under *Burdick*. *See Public Integrity Alliance*, 836 F.3d at 1025 ("But *Burdick* calls for neither rational basis review nor burden shifting.").

In the absence of case support, Soltysik's argument boils down to a flawed syllogism. From the premises that (1) under rational basis review, courts may rely on all conceivable reasons for a regulation and (2) the *Burdick* test does not call for rational basis review, Soltysik concludes that *Burdick* requires states' proffered interests to have been first identified in the legislative histories. *See* AOB at 21. The logic does not hold up, and is in any event refuted in the case law.

Here, each of the State's proffered interests is substantially related to the Statutes, and justifies any slight burden imposed by the Statutes.

CONCLUSION

For the reasons stated above, the district court's judgment should be affirmed.

Dated: March 6, 2017

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SA2016102199

16-55758

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMIDIO "MIMI" SOLTYSIK,

Plaintiff and Soltysik,

v.

ALEX PADILLA, in only his official capacity as Secretary of State; DEAN LOGAN, in only his official capacity as Registrar-Recorder / County Clerk of the County of Los Angeles,

Defendants-Appellees,

CALIFORNIANS TO DEFEND THE OPEN PRIMARY,

Intervenor-Appellee.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: March 6, 2017

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CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULES 32-1 FOR CASE NUMBER 16-55758

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 13,959 words excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: March 6, 2017

Respectfully Submitted,

/S/ PETER H. CHANG

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Deputy Attorney General

9th Circuit Case Number(s) 16-55758

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