

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROQUE (“ROCKY”) DE LA FUENTE,

Plaintiff-Appellant,

v.

**ALEX PADILLA, California Secretary of
State, Sued in His Official Capacity, and
STATE OF CALIFORNIA,**

Defendants-Appellees.

No. 17-56668

On Appeal from the United States District Court,
Central District of California,
Hon. Michael W. Fitzgerald, Judge

APPELLEES’ ANSWERING BRIEF

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INTRODUCTION

Plaintiff-Appellant Roque (“Rocky”) De La Fuente was an unsuccessful candidate for the California Democratic Party nomination for President of the United States in June 2016. After that election defeat, De La Fuente still desired to present himself—this time as an independent candidate, without a political-party affiliation—to California’s voters in the general election for President in November 2016. For such a scenario, California has a specific statutory scheme (California Election Code sections 8400 and 8403; the “Ballot-Access Laws”) aimed at ensuring that general election ballots are clear and uncluttered, and that the listed candidates are the ones in which the voters already have demonstrated genuine interest. In 2016, the Ballot-Access Laws required that such a would-be independent presidential candidate, within a three-and-a-half-month period, gather and submit to a local public official about 178,000 signatures of voters supportive of the candidate’s late bid for the presidency. De La Fuente refused to try to comply with those requirements, and instead brought this lawsuit to invalidate the requirements.

De La Fuente lacks standing to bring this case, and the case lacks substantive merit. Regarding standing, it is uncertain that De La Fuente, a frequent candidate for elective office who changes political parties regularly,

will mount an independent campaign for the presidency in 2020 and thus be subject to the Ballot-Access Laws. Regarding the merits, under the relevant U.S. Supreme Court case law and case law of this Court, California's Ballot-Access Laws do not impose a cognizable, much less severe, burden on the constitutional rights of independent candidates for President; California has several legitimate rationales for the laws' requirements; and they are necessary for California to achieve its important governmental objectives. There is no constitutional infirmity here.

JURISDICTIONAL STATEMENT

Defendant-Appellee Alex Padilla, California Secretary of State, sued in his official capacity (the "Secretary"), on behalf of himself and erroneously named Co-Defendant/Co-Appellee State of California, does not contest that the district court had subject-matter jurisdiction over this case, that the Court has subject-matter jurisdiction over this appeal, or that De La Fuente timely noticed this appeal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does De La Fuente—a frequent candidate for elective office, sometimes affiliated with a political party and other times not—have standing to challenge the constitutionality of the Ballot-Access Laws, which set forth the requirements for independent candidates for President of the

United States to have their names and candidacies listed in California general election ballots?

2. Did the district court properly grant summary judgment in favor of the Secretary, and adverse to De La Fuente, holding that the Ballot-Access Laws violate neither alleged U.S. Constitution, First Amendment, “political participation” rights, or alleged Fourteenth Amendment Equal Protection Clause rights, of independent candidates for President?

STATEMENT OF THE CASE

I. RELEVANT FACTS

In 2016, De La Fuente sought the California Democratic Party nomination for President. (Suppl. Excerpts of Record (“SEOR”) at 211.) Under California Elections Code section 6041, the Secretary placed De La Fuente’s name on the June 2016 California Primary Election ballot as a Democratic Party candidate for President, because the Secretary determined that De La Fuente was “generally advocated for or recognized throughout the United States or California as actively seeking the nomination of the Democratic Party for President of the United States.” (EOR at 85, 104.) De La Fuente did not have to fulfill any substantive requirements, such as

gathering and submitting to any government official or office the signatures of supportive voters.¹

On California's Primary Election Day, June 7, 2016, De La Fuente received only about 8,000 votes (less than two-tenths of 1 percent) out of about 5,000,000 total votes cast by California Democratic Party voters; hence De La Fuente did not secure the Democratic Party's nomination for President. (SEOR at 126.) However, his competition and defeat in that contest turned out to be only part of his recent efforts as a political candidate.

Almost immediately after losing the California Democratic Party presidential primary election, De La Fuente abandoned his pursuit of the presidency, and entered the Florida Democratic Party primary race for the nomination for U.S. Senator from Florida. (SEOR at 288.) He did not prevail in that election, either. (Florida Department of State, Division of Elections, *August 30, 2016 Primary Election, Democratic Party*

¹ Had the Secretary not made that determination, and De La Fuente still wanted a place on the California primary election ballot for the Democratic Party's nomination for President, De La Fuente could have utilized California Elections Code section 6061, which sets forth a signature-gathering procedure as an alternative means for ballot placement.

(<https://results.elections.myflorida.com/Index.asp?ElectionDate=8/30/2016&DATAMODE> (last visited June 13, 2018)).)

Then De La Fuente returned his focus to the 2016 presidential campaign, which was still ongoing. This time, he desired to have his name placed on the November 2016 California General Election ballot as an independent candidate for President. (Excerpts of Record (“EOR”) at 86, 151.) Yet De La Fuente objected to—and refused to try to comply with—two of the relevant ballot-placement requirements in the Ballot-Access Laws. (EOR at 86.) The first requirement calls for preparing and submitting (to a California county elections official) nomination papers signed by registered California voters equal in number to at least 1 percent of the total number of registered California voters eligible to vote in the last general election. Cal. Elec. Code § 8400. In 2016, that requirement in raw numbers amounted to approximately 178,000 signatures. (SEOR at 2, ¶ 7.) The second requirement bounds the signature gathering inside a 105-day period, starting 193 days before the election and ending 88 days before the election. Cal. Elec. Code § 8403(a)(2). In 2016, the “start-gathering” date was April 29, 2016, and the “submission” deadline was August 12, 2016. Failing to meet those requirements or to have them timely invalidated in court, De La Fuente was not mentioned as a presidential candidate, Democrat,

independent, or otherwise, in 2016 California General Election ballots. *De La Fuente v. Padilla*, 686 Fed. Appx. 383, 383 (9th Cir. 2017) (concerning an interlocutory appeal in this case).

De La Fuente and his candidacy were listed on 2016 general election ballots for President in twenty U.S. states. (SEOR at 212, ¶ 11.) As De La Fuente stated in a declaration in this case, in 2016, he gathered over 200,000 petition signatures nationwide, to gain multiple ballot placements as an independent presidential candidate. (*Id.*) However, during that election cycle, De La Fuente also founded a new political party, the American Delta Party, and became that party's general election nominee for President in seven states. (SEOR at 212, ¶ 15.) And in the November 2016 Florida General Election, De La Fuente was the Reform Party's candidate for President. ("Florida Results," *N.Y. Times* (Feb. 2017), available online at <https://www.nytimes.com/elections/results/florida> (last visited June 13, 2018).) In eight other states, he was a qualified write-in candidate. (SEOR at 212, ¶ 14.) Consequently, De La Fuente was an independent candidate for President in only twelve states.²

² One district court arrived at a slightly different tabulation of De La Fuente's November 2016 ballot appearances. See *Kennedy v. Cascos*, 214 F. Supp. 3d 559, 561 (W.D. Tex. 2016) (American Delta Party presidential

II. RELEVANT PROCEDURAL HISTORY

De La Fuente filed the original complaint in this case in May 2016 (SEOR at 10), about a month *before* the June 2016 California Primary Election. In the complaint, De La Fuente named as defendants both the Secretary and the State of California. (SEOR at 11, ¶¶4, 5.)³ De La Fuente identified himself as a candidate for President in 2016, but failed to disclose his Democratic Party affiliation. (SEOR at 11, ¶3.) De La Fuente sought to invalidate the Ballot-Access Laws, which govern how independent candidates for President may have their names and candidacies appear in the ballots for California general elections. (SEOR at 13-14.) As noted above, De La Fuente objected to two specific requirements: (1) the compiling of the signatures of approximately 178,000 supportive voters; and (2) the 105-day period for gathering and submitting the signatures. (SEOR at 11 & n.1, 13-14.) His complaint set forth a single cause of action, for both declaratory

nominee in five U.S. states; Reform Party nominee in two states; independent candidate in eleven states).

³ Throughout the trial-level stage of this case, De La Fuente pursued the State of California as a second defendant. (See, e.g., SEOR at 42, ¶ 5.) In the opening briefing of this appeal, De La Fuente for the first time conceded that California “enjoy[s] Eleventh Amendment sovereign immunity,” and therefore is an improper defendant-appellee in this case. (Appellant’s Opening Br. (“AOB”) at 4.)

and injunctive relief, averring that the Ballot-Access Laws violate De La Fuente's "right to ballot access and to participate in the electoral process" under the U.S. Constitution's First Amendment and Fourteenth Amendment (Equal Protection Clause). (SEOR at 13 & ¶ 22(a).)⁴ De La Fuente prayed for the relief of "[e]njoining this statutory scheme." (SEOR at 14.)

In August 2016, three months after filing the complaint, De La Fuente applied for a mandatory preliminary injunction, to have his name included as an independent presidential candidate on the November 2016 California General Election ballot. *De La Fuente v. Padilla*, 686 Fed. Appx. at 383. The district court swiftly denied that application; and later, on an expedited appeal, this Court affirmed that denial on the ground of mootness, as the election was already over. *Id.* at 383-84.

In November 2016, De La Fuente filed a first amended complaint, which was almost entirely identical to the original complaint, but added a prayer for compensatory damages. (SEOR at 45, ¶ G.) The district court quickly dismissed the request for compensatory damages as prohibited by the Eleventh Amendment, returning the complaint to its original text. (SEOR at 51.)

⁴ The complaint did not mention any alleged violation of voters' rights.

In 2017, De La Fuente and the Secretary engaged in discovery, including exchanging expert reports, and deposing Richard Winger, De La Fuente's proffered expert on U.S. election data. (SEOR at 295-324, 326-28.) Winger, in his report, stated that he had reviewed many charts of U.S. election statistics and had come to believe that a ballot-access requirement of 5,000 signatures will always suffice to dissuade frivolous candidates without deterring serious candidates, who will never be so numerous as to lead to cluttered ballots. (Appellant's Opening Br. ("AOB") at 8-9, and cites therein.) On behalf of the Secretary, Dr. Colleen Kelly, Ph.D., a statistician, studied Winger's report and prepared a rebuttal report exposing that Winger did not employ any scientifically accepted methods in formulating his opinion that 5,000 signatures represents a significant threshold for ballot access, and thus did not prove that thesis—which was implausible for other reasons, too, as Dr. Kelly explained. (SEOR at 326-28 (Kelly rebuttal expert report); *see also id.* at 267-72 (setting forth detailed summary of Dr. Kelly's critiques of Winger's work).) At deposition, Winger conceded that he had arrived at the figure of 5,000 signatures by mere intuition. (SEOR at 298:21-298:23 ("It's not clear to me how 5,000 popped into my head. But I just have the impression that after decades of paying attention to this, it was kind of intuitive"); *see also id.* at 302:24-303:3 (Winger's admission that he

used no statistical modeling).) Winger also admitted being uncertain of the precise number of required signatures needed to deter frivolous candidates without dissuading serious candidates, other than that the number is less than 178,000 signatures. (SEOR at 319:2-319:15.)

Since Winger gave that testimony, De La Fuente has echoed Winger's revised view, and now takes the position that "the exact reduced number of signatures that may be required to be collected by independent presidential candidates may be the subject of further litigation and/or legislative debate. . ." (AOB at 42.) Nonetheless, De La Fuente is also now emphasizing one of Winger's more complicated arguments, barely mentioned in the briefing to the court below, to the end that any signature-gathering requirement above 99,753 signatures is excessive for California. (*Id.*)

After discovery closed, the Secretary moved for judgment on the pleadings or, in the alternative, for summary judgment. (SEOR at 52 et seq.) The trial court converted the motion into one for summary judgment. (SEOR at 250 et seq.) The parties submitted multiple rounds of briefing and evidence. (SEOR at 252 et seq.) The trial court held oral argument on October 2, 2017, and, two days later, on October 4, 2017, granted the Secretary's motion for summary judgment, thereby ending the case entirely

in favor of the Secretary, and adverse to De La Fuente. (SEOR at 9, 350 et seq.)

The trial court first determined that De La Fuente had not established that the Ballot-Access Laws impose a severe burden on an independent presidential candidate seeking access to a California general election ballot. (SEOR at 9-10.) De La Fuente, hampered by not having tried to comply with the Ballot-Access Laws, had failed to present sufficient evidence of the supposedly steep monetary expenses associated with hiring professional signature-gatherers to collect the requisite number of signatures, and also had failed to factor in how volunteer help could reduce the total expenses. (SEOR at 356-57.) Moreover, the trial court noted, in the eleven general elections that have occurred in California since the enactment of the Ballot-Access Laws, six independent candidates have met the statutes' requirements and obtained ballot placements, indicating that the laws did not erect insurmountable barriers to ballot access. (SEOR at 359-60.)

From that determination, it followed that the Ballot-Access Laws warrant relatively lenient constitutional scrutiny. (SEOR at 362-63.) The trial court accepted the Secretary's proffer of the well-established governmental interests in having the Ballot Access Laws, which have analogues all over the country, to ensure that every presidential candidate

listed in a general election ballot has already demonstrated a substantial modicum of voter support, such that voters would not become cynical about or frustrated by the election process; and to minimize ballot clutter and associated voted confusion. (SEOR at 363.) The Ballot-Access Laws further those interests, without unduly burdening ballot access, thereby affording voters a diversity of choices of presidential candidates in each general election. (SEOR at 364.)

III. RULING PRESENTED FOR REVIEW

De La Fuente is appealing that October 2017 summary-judgment ruling in the Secretary's favor, and adverse to De La Fuente. (SEOR at 350 et seq.)

STANDARD OF REVIEW

This Court reviews de novo a district court's ruling on a motion for summary judgment. *Longoria v. Pinal Cnty.*, 873 F.3d 699, 703 (9th Cir. 2017).

SUMMARY OF ARGUMENT

De La Fuente lacks standing to maintain this lawsuit. De La Fuente cannot have standing unless the Ballot-Access Laws have been or will be applied to De La Fuente, such that he has suffered or will suffer an "injury to a judicially cognizable interest." The sparse evidence in support of standing for De La Fuente consists of his assertion that he intends in 2020 to run for

President of the United States as an independent candidate, perhaps bolstered by the fact of his actual part-partisan/part-independent 2016 run for the presidency. However, in another case currently pending before another federal appellate court, De La Fuente asserts that he intends in 2020 to run for President as a party-affiliated candidate, with an independent bid as a back-up possibility. These conflicting statements of De La Fuente, and his recent history of changing party status frequently, reveal the uncertainty of his plans, meaning that he faces, at most, a hypothetical or conjectural injury caused by the Ballot-Access Laws. That kind of speculative injury does not suffice for standing purposes.

If the Court reaches the merits of the case, then the Court should affirm the district court's decision upholding the Ballot-Access Laws against De La Fuente's constitutional attack. This Court's decision in *Nader v. Cronin*, 620 F.3d 1214 (9th Cir. 2010), is directly on-point and compels affirmance of the ruling of the court below. *Nader* concerned an independent presidential candidate's constitutional challenge to Hawaii's signature-gathering statutes, whose requirements are very similar to those in California's Ballot-Access Laws. The *Nader* Court held, in essence, that the burden imposed by Hawaii's signature-gathering laws did not come close to being severe. The benefits—meaningful primary elections and general

elections, and uncluttered ballots—attributed to the laws served as counter-balances to any burden. And the laws reasonably related to the production of those benefits. This Court should replicate that analysis and reach the same conclusion with respect to California’s Ballot-Access Laws.

Even independent of the *Nader* decision, the prescribed multi-step analysis for election-law constitutional cases applied here leads inexorably to the conclusion that the district court did not err in upholding the Ballot-Access Laws against De La Fuente’s constitutional attack. The Ballot-Access Laws do not impose cognizable, much less severe, burdens on independent presidential candidates seeking ballot placement in California general elections, especially when weighed against California’s important interests in maintaining the regulations. The Ballot-Access Laws do not significantly impair ballot access, suppress core political speech, or dictate electoral outcomes. The laws are generally applicable, neutral, and even-handed, and preserve the integrity of the election process. Finally, the Ballot-Access Laws reasonably advance California’s governmental interests in regulating elections. In conclusion, any burden associated with the Ballot-Access Laws is justified, and does not infringe upon any constitutional rights.

ARGUMENT

I. DE LA FUENTE LACKS STANDING TO MAINTAIN THIS LAWSUIT

A federal court lacks jurisdiction over a lawsuit that does not meet the “case” or “controversy” requirement of Article III of the U.S. Constitution. *Davis v. Guam*, 785 F.3d 1311, 1314 (9th Cir. 2018) (*quoting Bennett v. Spear*, 520 U.S. 154, 157 (1997)). To have “Article III standing” to pursue a lawsuit, the plaintiff must have suffered, or certainly will imminently suffer, an “injury to a judicially cognizable interest.” *Davis*, 785 F.3d at 1314 (*quoting Bennett*, 520 U.S. at 157). An injury sufficient to satisfy Article III must be “actual” or “imminent,” “concrete,” and “particularized,” as opposed to “conjectural” or “hypothetical.” *Susan B. Anthony List v. Driehaus*, ___ U.S. ___, ___ [134 S. Ct. 2334, 2342] (2014) (citation omitted). It is not sufficient that there is an “objectively reasonable likelihood” that the injury will be inflicted. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410 (2013). Additionally, the injury must be “fairly traceable to the challenged action” of the defendant, and it must appear likely that the injury would be prevented or redressed by a favorable court decision. *Davis*, 785 F.3d at 1314 (*quoting Bennett*, 520 U.S. at 167).

Lack of standing may be raised at any time in a case, including for the first time on appeal. *Oakland v. Lynch*, 798 F.3d 1159, 1163 (9th Cir. 2015).

Always, the plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing the presence of each element of standing. *Susan B. Anthony List*, 134 S. Ct. at 2342. The strength of the showing required varies based on the procedural stage of the litigation. *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1085 (9th Cir. 2003).

In a pertinent case about the distinction between sufficient injuries and speculative injuries for standing purposes, *Townley v. Miller*, 722 F.3d 1128 (9th Cir. 2013), this Court held that seven individual plaintiffs lacked standing for their attempt to invalidate a Nevada law that permitted voters in statewide and presidential elections to vote for “none of these candidates” (“NOTC”), because NOTC votes were not counted in determining the winners of the races for public offices, and in effect were null votes. *Id.* at 1130-31. The standing problem arose because the plaintiffs, although they had indicated their intentions to vote in the upcoming (2012) presidential election, did not assert a definite intent to cast NOTC votes. *Id.* at 1133. Rather, each of the plaintiffs reserved the option of voting for only actual candidates, if there was a satisfactory candidate in each race. *Id.* As a result, this Court held squarely, and without much discussion, that the plaintiffs’ indefinite plans “epitomize[] speculative injury,” and the plaintiffs “therefore lack standing.” *Id.* at 1133.

For standing purposes, the seven individual plaintiffs in *Townley* are like De La Fuente here. The *Townley* plaintiffs might but also might not have cast NOTC votes, providing an uncertain basis for standing in that lawsuit. Likewise, De La Fuente may but also may not stand as an independent presidential candidate in the next presidential election (in 2020), providing uncertain grounds for standing for this lawsuit.

De La Fuente's purported standing for a cognizable, forward-looking challenge to the Ballot-Access Laws derives from his vague post-complaint declaration of an "intention to run for President of the United States in 2020" (SEOR at 213, ¶ 21), and an unsworn assertion, in the opening brief herein, "that he intends to run as an independent candidate for President of the United States in the 2020 general election." (AOB at 3.) Regardless of whether those short statements might suffice for standing purposes, there is a weakness to De La Fuente's presentation on this aspect of the case. Under Federal Rules of Evidence 201(b) and 201(c)(2), *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006), and *In re Wells Fargo & Co. Shareholder Derivative Litig.*, 282 F. Supp. 3d 1074, 1089 (N.D. Cal. 2017), this Court may and should take judicial notice of other pertinent statements that De La Fuente has made in another pending case, *De La Fuente v. Cortes*, which he is pursuing before the U.S. Court of Appeals,

Third Circuit (Case No. 17-3778). There, De La Fuente is alleging that, “at all relevant times,” he has been “a registered Democrat in the State of Florida”—and that “he will be a candidate in the 2020 primary election for President of the United States[,] and if he does not receive his party’s nomination he will again launch an independent campaign for that office in the 2020 general election.” (Appellant’s Opening Br., *De La Fuente v. Cortes*, U.S. Ct. of Appeals, 3d Cir., Case No. 17-3778, 2018 WL 1595457 *9 (Mar. 20, 2018) (emphasis added).) Given that De La Fuente is expressly planning to run for President in 2020 as a party-affiliated candidate, it is at best uncertain that De La Fuente actually will run for President in 2020—several years away—as an independent candidate.⁵ There is not even an objectively reasonable likelihood of that outcome. Under *Townley*, the

⁵ See also Felipe De La Hoz, “Removal of Last Primary Opponent Could Cost Malliotakis,” *Gotham Gazette* (Aug. 6, 2017), available online at <http://www.gothamgazette.com/city/7112-removal-of-last-republican-primary-opponent-could-cost-malliotakis> (last visited June 13, 2018) (reporting on De La Fuente’s 2017 run for Mayor of New York City, as Republican); Alex Padilla, California Secretary of State, *Statewide Direct Primary Election – June 5, 2018; Official List of Candidates* (Apr. 5, 2018) at 20-25, available online at <http://elections.cdn.sos.ca.gov//statewide-elections/2018-primary/candidate-contact-list.pdf> (last visited June 13, 2018) (reporting on De La Fuente’s 2018 run for U.S. Senator from California, as Republican).

Ballot-Access Laws cause De La Fuente only a conjectural or hypothetical injury, which does not suffice for standing in this lawsuit.

II. CALIFORNIA’S BALLOT-ACCESS LAWS DO NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF INDEPENDENT PRESIDENTIAL CANDIDATES

Should this Court reach the merits of the present appeal, a specific controlling precedent, *Nader*, and straightforward application of the pertinent three-step legal test, should guide this Court to conclude that the district court did not err in upholding the Ballot-Access Laws against De La Fuente’s attack. Indeed, De La Fuente failed to establish that the laws severely burden his constitutional rights, especially upon consideration of the countervailing governmental interests that the laws further, and because there is a reasonable fit between the laws and the achievement of the government’s meaningful objectives.

A. The U.S. Constitution Grants U.S. States Wide Latitude to Regulate Ballot Access in Presidential Elections

De La Fuente’s constitutional challenge to the Ballot-Access Laws immediately faces the headwinds of the great authority and discretion afforded U.S. states to regulate their own elections. Article II, Section 1, Clause 2, of the U.S. Constitution ascribes to each state the power to direct the manner of the appointment of electors for President from that state.

“Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections. . . if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation and some internal punctuation omitted) (upholding constitutionality of Hawaii prohibition on write-in voting)). In contrast to a state’s broad power to regulate elections, people have no fundamental constitutional right to run for elective public office. *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972); *Morial v. Judiciary Comm’n*, 565 F.2d 295, 301 (5th Cir. 1977); cf. *Timmons v. Twin Cities Area New Pty.*, 520 U.S. 351, 363 (1997) (“Ballots serve primarily to elect candidates, not as forums for political expression”).⁶

The U.S. Supreme Court has established a framework for analyzing a litigation challenge to virtually any election statute under the First Amendment or the Fourteenth Amendment, including specifically a ballot-access statutory scheme such as the Ballot-Access Laws:

When deciding whether a state election law violates First and Fourteenth Amendment speech rights, courts are to “[1] weigh [A] the character and magnitude of the burden the State’s rule imposes on those rights against [B] the interests the State

⁶ There is also no constitutional right to vote for a specific candidate. See *Burdick*, 504 U.S. at 441.

contends justify that burden, and [2] consider the extent to which the State's concerns make the burden necessary.”

Chamness v. Brown, 722 F.3d 1110, 1116 (9th Cir. 2013) (citing cases including *Timmons*, 520 U.S. at 358). This Court has summarized the Supreme Court's approach as a “balancing and means-end fit framework.” *Ariz. Green Pty. v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016).

Regarding the “balancing” part of the analysis, the party challenging the constitutionality of the election statute bears the burden of establishing that the statute imposes a cognizable, up to a severe, burden on the party's exercise of constitutional rights. *Chamness*, 772 F.3d at 1116.

A regulation imposes a severe speech restriction if it [1] significantly impair[s] access to the ballot, [2] stifle[s] core political speech, or [3] dictate[s] electoral outcomes. A regulation imposes a permissible restriction on speech when [A] it is generally applicable, evenhanded, [and] politically neutral, or if [B] it protects the reliability and integrity of the election process. This is true even when the regulations have the effect of channeling expressive activities at the polls.

Id. at 1116-17 (some internal punctuation modified or omitted; citations omitted). “Channeling expressive activities,” which is lawful, includes deliberately limiting the number of candidates on the ballot. *See Timmons*, 520 U.S. at 369 (citing *Burdick*, 504 U.S. at 437-38).

Regarding the choice and application of the appropriate level of constitutional scrutiny, when an election regulation imposes a severe burden

on First Amendment rights or other constitutional rights, strict scrutiny is warranted, and the defense must show that the law is narrowly tailored to achieve a compelling governmental interest. *Chamness*, 722 F.3d at 1116 (citations omitted). However, a non-discriminatory restriction that imposes a lesser burden on free-speech or other constitutional rights need be only reasonably related to achieving the state’s important regulatory interests. *Id.* (citations omitted). This approach is a sliding-scale test, where the more severe the burden, the more compelling the state’s interest must be, and vice versa. *Ariz. Green Pty.*, 838 F.3d at 988. Furthermore, the mere fact that a U.S. state’s election system creates barriers tending to limit the field of candidates from which voters might choose does not of itself compel close scrutiny. *Burdick*, 504 U.S. at 433.

Ultimately, “the function of elections is to elect candidates,” and the U.S. Supreme Court has “repeatedly upheld reasonable, politically neutral regulations. . .” *Timmons*, 520 U.S. at 369 (citing *Burdick*, 504 U.S. at 437-38). “[V]oting regulations are rarely subject to strict scrutiny.” *Chamness*, 722 F.3d at 1116 (citations omitted).

B. This Court Already Has Upheld the Constitutionality of Another Law Very Similar to the Ballot-Access Laws Challenged Here

In *Nader*, this Court applied the same substantive legal test just restated in analyzing—and upholding—the constitutionality of Hawaii’s signature-gathering laws for independent presidential candidates. 620 F.3d at 1216-19. In two key aspects, Hawaii’s signature-gathering laws are very similar to the Ballot-Access Laws. First, the Hawaii laws required that any independent candidate for President, to have his or her name and candidacy printed in a general election ballot, must gather and submit to the Chief Election Officer a petition containing the signatures of registered Hawaii voters at least equal in number to 1 percent of the number of votes cast statewide in the last presidential election. *Nader*, 620 F.3d at 1215-16. Under California Elections Code section 8400, the 1 percent figure is again used, albeit derived from all people registered to vote in the last California general election.⁷ Second, the Hawaii laws required an independent presidential candidate to submit his or her supportive-voter signatures to the relevant public official no later than 60 days before the general election.

⁷ A general election in California happens every two years and thus half the time does not include voting for President. Cal. Elec. Code, § 324(a)(1).

Nader, 620 F.3d at 1216. Under California Elections Code section 8403, the deadline is 88 days before the general election. Because of the close similarity between Hawaii’s laws and California’s Ballot-Access laws, the *Nader* opinion is directly on-point here and should control the outcome here, leading similarly to the vindication of the Ballot-Access Laws despite De La Fuente’s constitutional attack.

The *Nader* Court held that the Hawaii signature-gathering laws imposed only a “minimal” burden on constitutional rights—and emphasized that the Court “had little trouble concluding” as much. 620 F.3d at 1217. As support for that holding, the *Nader* Court cited multiple cases, including *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), in which the U.S. Supreme Court upheld the constitutionality of a Georgia statute providing that an independent candidate for public office seeking to have his or her name and candidacy printed on a general election ballot must supply to the relevant public servant a nominating petition signed by at least 5 percent of the number of registered Georgia voters at the last general election for the office in question. One reason that such a relatively high percentage is constitutionally acceptable is as follows:

There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a . . . 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, 403 U.S. at 442 (emphasis added).⁸

Like the Hawaii law's percentage requirement from the *Nader* case, California's percentage-based signature-gathering requirement imposes much less than a severe burden on constitutional rights. Although the raw number of signatures—roughly 178,000 in 2016—may seem high, it must be remembered that California has many millions more people, and thus many millions more voters, than any other U.S. state has.⁹ That raw number of required signatures still amounts to only 1 percent of the eligible voters. And, compared to an independent presidential candidate in Hawaii, an independent presidential candidate in California has many millions more voters from whom to request signatures.¹⁰

⁸ De La Fuente's repeated use of the phrase "modicum of support" (AOB at 5, 18, 37), instead of "significant modicum of support," understates the level of support that an independent presidential candidate may be lawfully required to show, to gain a place on a general election ballot.

⁹ At this time, it is not known precisely how many signatures of registered California voters will be needed to qualify an independent presidential candidate for the general election ballot in 2020, as the figure will be derived from how many voters are on the California rolls in November 2018, several months in the future, as of this writing.

¹⁰ Winger expressly acknowledged as much, testifying, ". . . I would say, yes, it's more difficult to get 5,000 signatures if [sic] Wyoming than it is in California." (SEOR at 301:3-301:5.)

The *Nader* Court recognized the legitimacy of several reasons for Hawaii to have put into place those requirements, which reasons include the following:

- (1) confirming that the candidate enjoys a significant modicum of support among the voters,
- (2) regulating the number of candidates on the ballot,
- (3) preventing clogging of the election machinery,
- (4) avoiding voter confusion, and
- (5) assuring that the winner of the election is the choice of a majority or at least a strong plurality of the voters, without the expense and burden of runoff elections. 620 F.3d at 128. The Secretary has invoked each of these reasons, as well, and this Court should readily accept the reasons as legitimate and sufficient.

The *Nader* Court went the next step and readily concluded, without much analysis, that the reasons “justify” Hawaii’s regulations. 620 F.3d at 128, citing *Bullock*, 405 U.S. at 145. This Court should follow suit and recognize the valid justifications for the Ballot-Access Laws.

Finally, the *Nader* Court considered and rejected an Equal Protection Clause claim, predicated on the supposedly easier access to the ballot for party-affiliated presidential candidates compared with independent

presidential candidates. 620 F.3d at 1218. Preliminarily, the *Nader* Court doubted that those two different kinds of candidates were similarly situated, as needed for a viable equal-protection argument, but also found unproven the contention that the different ballot-access requirements for those different kind of candidates were unequally burdensome. *Id.*, at 1218-19.

De La Fuente's claim under the Equal Protection Clause repeated the same flaws seen in the plaintiff's equal-protection argument in the *Nader* case.

First, De La Fuente, at page 20 of his opening brief herein, erroneously attributed significance in the present case to the U.S. Supreme Court's statement in *Storer v. Brown*, 415 U.S. 724, 745 (1974), that "the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." (AOB at 20.) According to De La Fuente, ballot-access schemes must impose equal burdens on party-affiliated presidential candidates and independent presidential candidates, to comply with the Equal Protection Clause. (*Id.*) However, the *Storer* quote addressed a different legislative scheme, known as a "sore-loser" law, whereby a political candidate who had participated in a party primary election was flatly forbidden from running in the subsequent general election as an independent. 415 U.S. at 732. The Ballot-Access

Laws contain no such prohibition. A candidate, such as De La Fuente, who participated in a party primary election but did not prevail, may still run in the subsequent general election as an independent candidate—provided that he or she demonstrates a “significant modicum of support” from the voters (*id.*), in this case by gathering and submitting to the appropriate election official the signatures of a certain number of supportive voters. In this way, the Ballot-Access Laws are more accommodating than sore-loser laws of candidates who lost in primary elections. In sum, the *Storer* case does not help, but rather undercuts, De La Fuente’s equal-protection claim.

Second, De La Fuente has shown neither (A) that political-party nominees for President and independent presidential candidates are similarly situated in the relevant ways, nor (B) that California’s election laws make it easier for the former kind of candidate versus the latter kind of candidate to attain a ballot spot in a general election. Indeed, and on the contrary, the two sets of requirements, while different in nature from each other, impose comparable burdens. A political-party nominee faces the obstacle of prevailing in a primary election against opposing candidates, to obtain a spot on the general election ballot, whereas an independent candidate does not need to participate in primary elections at all, but must meet the signature-gathering requirements of the Ballot-Access Laws. Each set of requirements

ensures that every candidate on the general election ballot has a substantial modicum of voter support.

In conclusion, the on-point, controlling reasoning in the *Nader* decision should be applied in the present case, and should lead to the upholding of the Ballot-Access Laws against both the First Amendment attack and the Equal Protection Clause claim.¹¹

C. The Prescribed Three-Step Constitutional Analysis of the Ballot-Access Laws Exonerates Them at Each Step

Assuming *arguendo* that the Court does not consider the *Nader* decision to control the outcome of this case, the Secretary will now proceed through the prescribed three-step analysis without further reference to the *Nader* case. There is obviously some burden in gathering signatures from thousands of people. But that burden, imposed by the Ballot-Access Laws, is not severe. De La Fuente cannot establish that those laws unduly burden a reasonably diligent independent candidate for President in obtaining a place on a California general election ballot, outweighing California's interests in maintaining the requirements—meaning that the Court should apply

¹¹ Additionally, a Ninth Circuit district court—obviously not a source of binding precedent on this Court—already has convincingly upheld as constitutional a prior, only slightly different, version of the Ballot-Access Laws. *See Cross v. Fong Eu*, 430 F. Supp. 1036 (N.D. Cal. 1977).

relatively lenient constitutional scrutiny to the Ballot-Access Laws, which scrutiny the laws easily withstand. Consequently, the district court did not err in upholding the Ballot-Access Laws against De La Fuente's constitutional attack.

1. The Ballot-Access Laws Do Not Impose a Severe Burden on the Constitutional Rights of Independent Candidates for President

a. The Ballot-Access Laws Do Not Significantly Impair Access to the Ballot

(1) In Primary Elections

The Ballot-Access laws do not significantly impair access to the ballot. Foremost, these laws do not apply at all in primary elections. As noted above, with virtually no effort, De La Fuente secured a place and appeared on the ballot as a presidential candidate in the June 2016 California Primary Election. De La Fuente thus has been easily able to participate in the political process, as a presidential candidate, in California.

Access to the primary election ballot renders less relevant or irrelevant any higher burden of access to the general election ballot. “The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process.” *Storer*, 415 U.S. at 735. “The function of the election process is to winnow out and finally

reject all but the chosen candidates.” *Burdick*, 504 U.S. at 438. A candidate has no inherent right to skip the primary election, or to make a poor showing there, yet to be given a place on the general election ballot, without demonstrating a significant modicum of voter support.

(2) In General Elections

For three reasons, the Ballot-Access Law do not significantly impair access to general election ballots, either.

First, as the district court noted, evidence from recent history shows that independent presidential candidates can and do make general election ballots in California. In the eleven presidential elections that have transpired since the Ballot-Access Laws went into effect, six different independent presidential candidates (John Anderson, Peter Camejo, Lenora Fulani, Gus Hall, Roger MacBride, and Ross Perot) have appeared on California general election ballots. (SEOR at 173 (Camejo), 174 (Hall), 175 (MacBride), 176 (Anderson), 180 (Fulani), 182 (Perot).) Obviously, it is possible for an independent presidential candidate to meet the requirements of the Ballot-Access Laws. And, objectively, six independent presidential candidates qualifying for general election ballots over eleven elections (and forty years) amounts to “qualif[y]ing with some regularity,” which *Storer* set as a benchmark for a constitutional regulation. 415 U.S. at 742-43.

In opposition, De La Fuente emphasizes that only one independent candidate for President of the United States, Ross Perot, has obtained a place on the California general election ballot since 1992. (AOB at 5, 11, 35.) Of course, De La Fuente draws an arbitrary line at 1992, inexplicably refusing to look slightly earlier in time for independent presidential candidates on California general election ballots. De La Fuente attributes Perot's success to the fact that he was a "self-funded billionaire" (*id.* at 10), implying that anybody with less than one billion dollars cannot achieve that same feat, and that the Ballot-Access Law's requirements are therefore too burdensome (*id.* at 36-37).

The indisputable evidence, subject to judicial notice under Federal Rule of Evidence 201(b), belies De La Fuente's claim. Perot's 1992 presidential campaign was not bought and paid for, but rather run by "a large group of volunteer activists." Andrew D. Martin and Brian E. Spang, "A Case Study of a Third Presidential Campaign Organization: Virginians for Perot," in Ted G. Jelen, ed., *Ross the Boss: The Perot Phenomenon and Beyond* ("Jelen") 35-36 (State University of New York Press, 2001). Perot kick-started his campaign by proclaiming that he would run for the presidency only if committed volunteers got his name placed on the ballots of all 50 U.S. states. Tom Fiedler, "Floridians Working to Get Billionaire Perot on

Ballot,” *Miami Herald* (Apr. 8, 1992) (“Perot, 61, has said he will seek the presidency as an independent if volunteer committees can get his name on the ballot in each of the 50 states”). And Perot’s supporters met that challenge. *See, e.g.*, Andrew Miga, “Calif. Suburbs Boost Perot,” *Boston Herald* (May 31, 1992) (“Supporters already have reportedly collected 500,000 signatures in California. . .”). Memorably, Perot actually dropped out of the presidential race for a stretch before the November 1992 election date—yet “[h]is volunteer organization. . .continued the state-by-state petition drives to put the Texas billionaire’s name on presidential ballots. By mid-September, the goal of placing Perot on the presidential ballots in all fifty states was met.” Jelen at 21. The key to Perot’s success was not his wealth but his ability to motivate many volunteers to work for the campaign. Another independent presidential candidate with Perot’s appeal, whether or not as financially well-off as Perot, could and would be able to get on the ballot in California. A less appealing candidate may have more difficulty, but that is not the fault of the Ballot-Access Laws. “States are not burdened with a constitutional imperative to reduce voter apathy or to ‘handicap’ an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot.” *Munro v. Socialist Workers Party*, 479 U.S. 189, 198 (1986) (upholding constitutionality of Washington statute

requiring minor-party candidate for elective office to receive at least 1 percent of all votes cast in primary election, to have name placed on ballot in general election).¹²

Second, a key question with respect to the burden imposed by an election regulation is whether a potential candidate is unable—as opposed to just unwilling—to comply with regulation. *Bullock*, 405 U.S. at 145-46 (“[T]he candidates in this case affirmatively alleged that they were unable, not simply unwilling, to pay the assessed fees”); *Raza Unida Party v.*

¹² De La Fuente faults the lower court for observing that De La Fuente submitted no evidence of how volunteer supporters could have reduced the amount of money that De La Fuente would have had to spend to gather the requisite number of supportive signatures. (OBA at 26.) Supposedly, the lower court had no business examining the matter of volunteer support. (*Id.*) However, the district court was merely following the Supreme Court, in *Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983), which expressly contemplated how volunteers might help a political campaign. Essentially, the entirety of De La Fuente’s (non-expert) showing of burden is his guesstimate as to the total amount of money that he would have to pay to professional signature-gatherers to gather the signatures needed to secure ballot placement in California. (SEOR at 212.) De La Fuente does not address how volunteer signature-gatherers could change the amount of money that he would have to expend. However, this factor truly should be considered, because a candidate who enjoys a substantial modicum of support could inspire volunteers to do the work of signature gathering, or to donate money to pay the costs for professional signature-gathering. By ignoring the possible role of campaign volunteers, De La Fuente’s showing of burden is simpler, but it is also woefully incomplete. Consequently, the district court was entitled to reject De La Fuente’s showing of burden for being “hamstrung by a lack of evidence.” *Ariz. Green Pty.*, 838 F.3d at 990.

Bullock, 349 F. Supp. 1272, 1284 (W.D. Tex. 1972) (“[I]nability, rather than unwillingness, to comply is crucial here”), *aff’d in part, vacated in part sub nom.*, *Am. Party of Texas v. White*, 415 U.S. 767, 790 (1974); *Libertarian Pty. of Fla. v. Florida*, 710 F.2d 790, 794 (11th Cir. 1983) (“Some of the plaintiffs in this case testified they had not even attempted to undertake a petition drive because in their view the 3% requirement simply was impossible to meet. Plaintiffs failed to present factual evidence that they were precluded from obtaining ballot status by the challenged regulations”).

It is undisputed that De La Fuente deliberately declined to make any effort to gather the signatures necessary under the Ballot-Access Laws, to have his name included on the general election ballot for President in California in 2016. (SEOR at 211-12.) Thereby, De La Fuente “failed to present factual evidence that [he was] precluded from obtaining ballot status by the challenged regulations.” *Am. Party of Texas*, 415 U.S. at 781.¹³

¹³ Additionally, it is noteworthy that California’s 1-percent requirement for gathering supportive signatures falls in the middle of the range of, or is less than, what other U.S. states require. Many of them have signature-gathering requirements that are, proportionally, much higher than 1 percent of the number of eligible voters in the last general election. (National Association of Secretaries of State, *Summary: State Laws Regarding Presidential Ballot Access for the General Election* (Feb. 2016) (“NASS Summary”; SEOR at 144, 147 (summarizing Montana’s 5-percent requirement; New Mexico’s 3-percent requirement; etc.).) Moreover, the Ballot-Access Laws provide a relatively generous 105-day period for an

According to De La Fuente, because he has asserted that the Ballot-Access Laws impose a severe burden on independent presidential candidates seeking to have their names appear on general election ballots, and he has submitted some evidence related to the burden, the court below should have accepted, for purposes of adjudicating the motion, that the Ballot-Access Laws actually do impose a severe burden. (AOB at 24-25.) However, at the summary-judgment stage, a court must view the facts in the light most favorable to the non-moving party only if there is a genuine dispute over material facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007). On an issue for which the non-moving party would bear the burden of proof at trial, the moving party needs to show just that there is an absence of evidence, or only a scintilla of evidence, upon which a reasonable trier of fact could render a verdict in favor of the non-moving party. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). Under *Oracle*, the Secretary was right to point out the sparse showing that De La Fuente had made regarding the

independent candidate for President to gather the signatures needed for general election ballot access. California's submission date, 88 days before the general election (or approximately mid August in most years) is similar to or later than the analogous dates in many states. (*NASS Summary*; SEOR at 132, 140 (summarizing Colorado's submission date of 155 days before the general election; Michigan's 110-days-before submission date; etc.).)

severity of the burden of the Ballot-Access Laws on constitutional rights.

The court below appropriately agreed with the Secretary's point.

In further arguing for the severity of the Ballot-Access Laws' alleged burden on independent presidential candidates seeking ballot access, De La Fuente claims to find support in *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340, 1363 (N.D. Ga. 2016), *aff'd*, 674 Fed. Appx. 974 (11th Cir. 2017). (AOB at 26-32.) But that case is off-point. The *Kemp* Court considered a Georgia ballot-access scheme that systematically excluded third-party candidates. 171 F. Supp. 3d at 1363 ("[T]he restrictions at issue in this case serve to prevent minor parties from engaging in the fundamental political activity of placing their candidate on the general election ballot"). That problem most certainly does not exist in California. It is indisputable that presidential candidates representing the Green, Libertarian, Reform, and Peace and Freedom Parties, among others, have routinely appeared on California general election ballots for many years. (SEOR at 170-94.) Hence there is no need to apply *Kemp*'s solution for a Georgia problem to California's different situation.

b. The Ballot-Access Laws Do Not Suppress Core Political Speech or Dictate Electoral Outcomes

The Ballot-Access Laws do not suppress, or even affect, core political speech, as is demonstrated by De La Fuente’s failure to make any allegations of that sort, or to present any evidence to that effect.¹⁴ In fact, De La Fuente boasted as follows, “Campaigning in California, I was featured in [sic] excess of 50 television and radio interviews/features.” (SEOR at 213.)

Likewise, De La Fuente does not try to, and could not, make the case that the Ballot-Access Laws affected the outcome of the 2016 presidential contest, either in California or nationwide. Belying De La Fuente’s related argument that the Ballot-Access Laws unfairly burden the “availability of political opportunity” (AOB at 41), between five and eight candidates for President have appeared on the California general election ballot during each of the eleven elections that have taken place while the Ballot-Access Laws have been in effect. (SEOR at 170-94; *see also id.* at 311:5-311:18 (Winger’s discussion of this topic).) California law sets out several paths to the ballot for presidential candidates, and consequently California voters get

¹⁴ See *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214 (1989), for an example of a regulation that restricted core political speech, by prohibiting the governing bodies of political parties from endorsing candidates in primary elections.

to choose from a plethora of presidential candidates in both primary and general elections.

c. The Ballot-Access Laws Are Generally Applicable, Neutral, and Evenhanded

Furthermore, the Ballot-Access Laws are generally applicable, evenhanded, and politically neutral. These laws cover all similarly situated people—aspiring independent presidential candidates seeking ballot placements. The laws are evenhanded, treating all such candidates in the same way. The laws are politically neutral, not favoring conservatives or liberals, libertarians or statist, etc. The laws serve the practical, apolitical purposes of keeping general election ballots uncluttered and easy to comprehend, and winnowing down the candidates from the primary contests, so that the voters may focus on their few favorite candidates to assume the presidency. Conspicuously, De La Fuente makes no contrary arguments and cites no contrary evidence or information regarding the Ballot-Access Laws.

In sum, for any one or more of those reasons, this Court should affirm the district court's holding that De La Fuente did not establish that the Ballot-Access Laws impose a severe burden on constitutional rights, resolving this part of the appeal even before considering California's counter-weighting justifications for the laws.

2. The Ballot-Access Laws Serve Important Governmental Interests, Counteracting Any Burden that the Laws Impose

As noted above, under *Chamness*, 722 F.3d at 1116, this Court should weigh De La Fuente's presentation of the alleged burden imposed by the Ballot-Access Laws against the interests that the Secretary contends justify the laws, in determining the overall impact of the burden.

In *Bullock*, the U.S. Supreme Court recognized that a U.S. state's interest in keeping its ballots within manageable, comprehensible limits is of the highest order. 405 U.S. at 144-145. Other relevant, recognized state interests include the avoidance of general election ballot overcrowding and voter confusion, and the removal of frivolous candidates from the general election ballot. *Munro*, 479 U.S. at 194-95. *Chamness* also endorses the importance of an interest in the stability of the political system. 722 F.3d at 1117 (citation omitted). Therefore, it is entirely appropriate, and far from constitutionally suspect, for California to establish a substantive "support" requirement for a candidate to meet to obtain a place on a general (as distinct from a primary) election ballot.

[T]he State can properly reserve the general election ballot "for major struggles," . . . by conditioning access to that ballot on a showing of a modicum of voter support. In this respect, the fact that the State is willing to have a long and complicated ballot at the primary provides no measure of what it may require for access to the general election ballot. The State [i]s clearly entitled to raise the ante for ballot access, to simplify the

general election ballot, and to avoid the possibility of unrestrained factionalism at the general election.

Munro, 479 U.S. at 197; *see also id.* at 193 (using term “significant modicum of support”); *accord, Anderson*, 460 U.S. at 788 n.9 (“The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates”; invalidating Ohio election law requiring independent presidential candidates to file statements of candidacy and nominating petitions nine months before general election); *Burdick*, 504 U.S. at 440 (acknowledging legitimacy of governmental interest in preventing maneuvering by unsupported independent candidates to gain ballot placements). Indeed, a state’s interest in requiring that a candidate demonstrate a significant modicum of support to obtain a place in the general election ballot is strong enough to justify refusing to place the candidate on that ballot at all, unless he or she can make that showing. *Lightfoot v. Eu*, 964 F.2d 865, 871 (9th Cir. 1992). If a candidate cannot make such a showing because of the difficulty or costs involved in motivating voters to support the candidate, “that voter apathy was not an

impediment created by the State,” and there is no obligation of the government to lessen that burden on the candidate. *Id.* at 870.

In the district court, the Secretary invoked all the state interests articulated in *Bullock*, *Munro*, and *Keith*, in defense of the Ballot-Access Laws against the charge of imposing a severe burden, and for other reasons. (SEOR at 103-05, 239-40, 273.) Under *Munro*, 479 U.S. at 195-96, the Secretary does not need to do more to secure the benefits of having important justifications for the law: “To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the ‘evidence’ marshaled by a State to prove the predicate.”¹⁵

In this Court’s balancing analysis, the Court should recognize that California’s articulation of well-recognized important interests justifying the Ballot-Access Laws neutralizes or outweighs the alleged burden that De La Fuente claims that the laws impose on him and similarly situated independent presidential candidates. Therefore, whether viewed in isolation or balanced against the governmental interests undergirding the Ballot-

¹⁵ De La Fuente concedes this point, about the lack of need for an evidentiary showing in this context, at page 32 of the opening brief herein.

Access Laws, the Ballot-Access Laws do not impose a cognizable, much less severe, burden on independent presidential candidates seeking ballot access.

3. Any Burden Created by the Ballot-Access Laws Is Necessary to Protect California's Important Interests

It follows from the fact that the Ballot-Access Laws do not severely burden constitutional rights that the laws warrant relatively lenient scrutiny under the First Amendment and the Fourteenth Amendment.¹⁶ At that level of scrutiny, the precise *Chamness* test considers the following two questions: (A) whether California has a sufficiently important governmental objective for the Ballot-Access Laws; and (B) whether the Ballot-Access Laws reasonably relate to that objective. 722 F.3d at 1116.

Because California has nearly 20 million registered voters, a candidate for President could convince tens of thousands of people in the Golden State

¹⁶ De La Fuente makes a dubious assertion that the Ballot-Access Laws warrant strict constitutional scrutiny because those statutes allegedly limit political speech, and “any limits on speech in the context of a political campaign is subject to strict scrutiny. *Citizens United v. FEC*, 558 U.S. 50 [. . .] (2010).” (AOB at 17.) Likewise, De La Fuente claims, “[s]trict scrutiny applies whenever impairment to fundamental rights are implicated.” (AOB at 21.) De La Fuente’s overly simple prescription misrepresents the relevant decisional law’s instruction that courts must evaluate election laws case by case, based on actual circumstances and contexts, in selecting the appropriate level of constitutional scrutiny to apply.

to support the campaign, and yet the candidate would still have nothing more than a miniscule chance at capturing California's fifty-five electoral votes.

If all such candidates made the general election ballots, then the ballots would quickly and regularly become overcrowded, to the point of confusing the voters. For general elections, California reasonably wants to avoid such overcrowding and confusion, by presenting the candidates of most interest to the electorate, and excluding the other, failed candidates. Still, with several recognized political parties in California, for many decades, five or more candidates for President have appeared on each California general election ballot. (SEOR at 170-94.) The Ballot-Access Laws set an appropriately, reasonably high hurdle to general election ballot access for presidential candidates who did not prevail in partisan primary contests. In this way, a "sore loser" from one of those primary contests cannot thwart the will of the voters, and create chaos and confusion, by reappearing on the general election ballot without a showing of true voter support. Michael S. Kang, "Sore Loser Laws and Democratic Contestation," 99 *Georgetown L. J.* 1013, 1042-58 (2011) (discussing sore-loser laws).

In sum, California, in the Ballot-Access Laws, has carefully balanced the interests of the state and its voters, on one side, and candidates not

affiliated with one of the two major political parties, on the other side, imposing a meaningful yet relatively light burden on those candidates.

III. DE LA FUENTE’S COUNTER-ARGUMENTS ARE UNAVAILING

In this brief so far, the Secretary has often responded to De La Fuente’s arguments in the course of presenting the defense case. See, for example, footnote 12, *infra*. De La Fuente has made several other sustained counter-arguments that the Secretary has not yet addressed, because the counter-arguments do not fit neatly into the pertinent multi-step balancing analysis called for by the case law. For the remainder of this brief, the Secretary will address all the remaining counter-arguments, and explicate why they are unavailing.

A. The New Mathematical Formula that De La Fuente Touts Lacks Legal Significance

Winger introduced a complex mathematical formula for determining a fair signature-gathering figure for a U.S. state to impose on independent presidential candidates seeking general election ballot placements. The formula does not produce a meaningful result, or expose any flaw in the Ballot-Access Laws.

Winger pointed out that adding up the numbers of voter signatures called for in 2016 by all the statutes, throughout the country, setting forth

signature-gathering requirements for independent presidential general election candidates yields the total of about 821,000 signatures. (AOB at 10-11.) Winger further noted that California's version of that requirement, in the Ballot Access Laws, was 178,000 signatures, which is 21.7 percent of the total. (AOB at 11.) Comparing that percentage, 21.7, with the percentage ratio of California's human population to the overall U.S. human population, 12.1 percent, Winger concluded that California imposes a disproportionately high signature-gathering burden on independent presidential candidates to attain placement in general election ballots. (AOB at 11.)

From that information, De La Fuente argues for the first time on appeal that the U.S. Constitution prohibits California from requiring a number of signatures that is more than 12.1 percent of the total number of signatures required in all states.¹⁷ For 2016, the formula works out such that California may require up to 99,753 signatures. (AOB at 38.) Put another way, De La Fuente contends that it would have been acceptable for California to require independent presidential candidates to gather 99,753 signatures of supportive registered voters, but it was unconstitutional for California to

¹⁷ De La Fuente had this information when this case was in the trial court, but did not make any arguments based thereon.

require independent presidential candidates to gather 178,000 signatures of supportive registered voters. (*Id.*)

It is hard to discern a legally significant distinction between 99,753 signatures and 178,000 signatures. Both figures are many multiples higher than the 5,000 signatures that Winger intuited would suffice to weed out all non-serious independent presidential candidates (in any U.S. state in any election year). (AOB at 23.) And, using De La Fuente's own estimates (SEOR at 212, ¶ 8), it would take more than one million dollars for a hypothetical candidate, lacking volunteer support, to employ paid professional signature-gatherers to gather enough signatures to surpass either threshold.

De La Fuente's argument suffers the additional flaw of incompleteness, by focusing exclusively on the numbers of signatures called for by the various analogous statutes around the country. De La Fuente ignores, and thus fails to quantify the burdens associated with, other kinds of requirements in other U.S. states' analogous statutes. For example, the State of Washington requires independent presidential candidates to organize assemblies of certain numbers of supportive people between mid May and early June of the election year, and thereafter to gather signatures from supportive voters. (SEOR at 158.) That is another kind of burden.

California has no such “preliminary assemblies” requirement. Also, many states, such as Colorado, require independent presidential candidates to submit to election officials the supportive voter signatures 110 or more days before the general elections. (SEOR at 131-32.) As noted above, California affords independent presidential candidates at least three extra weeks to submit signatures. Finally, some states require notarization of the signatures, *see Tripp v. Scholz*, 872 F.3d 857 (7th Cir. 2017), certainly adding to the burden of compiling the signatures. California has no such requirement. Without accounting for these other kinds of burdens, De La Fuente’s analysis compares apples with oranges and is fatally defective.

B. De La Fuente Misstates or Misapplies the Legal Standards for Motions for Summary Judgment

1. Regarding the Effects of Expert Opinions

De La Fuente alleges that because the Winger declaration contains multiple indisputable facts regarding ballot access, the district court should not have entered summary judgment for the defense in this case. (AOB at 32-37.) It is true that “expert opinion may defeat summary judgment if it appears the expert is competent to give an opinion and the factual basis for the opinion is disclosed.” *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 122 (9th Cir. 1995) (citing *Rebel Oil Co. v. Atlantic Richfield Co.*, 51

F.3d 1421, 1435 (9th Cir. 1995) (emphasis added)). However, it is axiomatic that, under Federal Rule of Civil Procedure 56(a), an expert opinion must generate a material issue of disputed fact to have an effect on a motion for summary judgment. It simply does not matter how many indisputable facts an expert witness cites. Therefore, De La Fuente's argument has no force.¹⁸

2. Regarding Conflicting Evidence Presented by One Side of the Case

De La Fuente purports to generate a material issue of disputed fact, precluding summary judgment, in a disagreement between himself and his own expert witness, Winger, relating to the amount of the financial costs that enforcement of the Ballot-Access Laws supposedly imposes on an independent presidential candidate seeking ballot placement. (AOB at 25-

¹⁸ Even conflicting expert opinions, from the opposing sides of a case, do not necessarily create material fact disputes that preclude summary judgment. *Gable v. Nat'l Broad. Co.*, 727 F. Supp. 2d 815, 836-37 (C.D. Cal. 2010). Federal appellate courts regularly affirm district court's rulings granting defense motions for summary judgment in constitutional-law cases, even though the record contains expert evidence supportive of the plaintiff's position, or conflicting evidence related to the merits of the dispute. See, e.g., *Kachalsky v. County of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012) (affirming grant of summary judgment for defense in Second Amendment case, while acknowledging existence of conflicting social-science evidence regarding alleged justifications for firearms law in question; *Heller v. Dist. of Columbia*, 801 F.3d 264, 267-72, 277-28 (D.C. Cir. 2015) (similar); *Kolbe v. Hogan*, 849 F.3d 114, 124 & n.3 (4th Cir. 2017) (similar).

26.) However, *Pirante v. U.S. Postal Service*, 542 F.3d 202, 207 (7th Cir. 2008), as well as the only reasonable interpretation of Federal Rule of Civil Procedure 56(a), indicates that a party's own inconsistent positions cannot generate a material issue of disputed fact that would defeat an adverse motion for summary judgment; the dispute has to be between opposing parties.

De La Fuente has asserted that a prudent independent presidential candidate should gather signatures of supportive voters totaling at least 200 percent of the number required in the pertinent statute(s), because inevitably some of the signatures will be invalid, and the candidate needs a cushion. (SEOR at 211-12, ¶7.) Based on that assumption, De La Fuente guesstimated that, in 2016, the total cost to gather the relevant number of California supporting voter signatures, more than 350,000, using professional signature-gatherers would have been approximately 3 to 4 million dollars. (*Id.*) Meanwhile, Winger had declared that a prudent independent presidential candidate should gather signatures of supportive voters of at least 150 percent of the number required in the statutes. (SEOR at 224, ¶22.) When deposed, Winger changed the estimate, testifying that “[t]here’s probably at least a 25 percent change [a petition signature] is invalid,” which would indicate that an additional 25 percent of the required

signatures should be gathered as a cushion against invalid signatures.

(SEOR at 310:3-310:8.) Pointing to De La Fuente's disagreement with Winger, De La Fuente argues that "[t]he factual dispute as to how many additional signatures need to be collected to pad petitions for independent candidates[,] to protect them against invalid signatures, is material," and should have precluded the entry of summary judgment for the defense.

(AOB at 25.)

However, under *Pirante*, De La Fuente's argument cannot be correct. De La Fuente cannot generate a material issue of disputed facts based on his own side's dispute with itself. The Secretary has not disputed either De La Fuente's opinion or Winger's contrary opinion. There is no genuine issue of material fact that could preclude summary judgment here.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this

Court affirm the lower court's decision granting the Secretary's motion for summary judgment, adverse to De La Fuente.

Dated: June 13, 2018

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROQUE (“ROCKY”) DE LA FUENTE,
Plaintiff-Appellant,

v.

**ALEX PADILLA, California Secretary of
State, Sued in His Official Capacity, and
STATE OF CALIFORNIA,**
Defendants-Appellees.

STATEMENT OF RELATED CASES

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

Dated: June 13, 2018

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