UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17-56668

ROQUE "ROCKY" DE LA FUENTE

Plaintiff-Appellant,

v.

STATE OF CALIFORNIA and ALEX PADILLA,

Defendants-Appellees.

Appeal from the Final Order of the
United States District Court for the Central District of California
Dated October 4, 2017, Civil Action No. 2:16-cv-03242-MWF-GS

APPELLANT'S REPLY BRIEF

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I. APPELLANT HAS STANDING

Appellees' open their answering brief with a weak stab at raising the issue of standing for the first time in these proceedings. Appellant satisfies Article III standing requirements because he has suffered an injury to rights guaranteed to him under the First Amendment to the United States Constitution as a direct and proximate result of the challenged ballot access laws faces certain and immediate harm against in the quickly advancing 2020 presidential campaign. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61(1992)). Furthermore, the "injury required for standing need not be actualized." *Davis v. Federal Election Com'n*, 552 U.S. 1135, 128 S.Ct. 2759, 2769 (2008). Rather, a plaintiff may bring suit based on a prospective injury provided that the threat of enforcement is sufficiently "real, immediate, and direct." *Id*. at 128 S.Ct. at 2769.

In *Daien v. Ysursa*, 711 F.Supp. 2d 1213 (D. Idaho 2010), the district court rejected Defendant's argument that the plaintiff lacked standing to challenge Idaho's out-of-state circulator ban for independent presidential candidates because there was no guarantee that there would be an independent candidate for the plaintiff to support rendering his claimed injury speculative. *Id.* at 1222-23. The district court explained that "when plaintiffs seek to establish standing to challenge

a law or regulation that is not presently being enforced against them, they must demonstrate 'a realistic danger of sustaining a direct injury as a result of the statute's operation and enforcement." *LSO, Ltd.v. Stroh*, 205 F.3d 1146, 1154-55 (9th Cir. 2000)(quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). The *Daien* court further explained that the Ninth Circuit stated that, "it is sufficient for standing purposes that the plaintiff intends to engage in 'a course of conduct arguably affected with a constitutional interest' and that there is a credible threat that the challenged provision will be invoked against the plaintiff." *LSO, Ltd*, 205 F.3d at 1145-55 (quoting *Babbitt*, 442 U.S. at 298). The *Daien* Court further explained that "[o]ther courts specifically examining a claimant's stated desire to engage in a course of conduct with a constitutional interest find standing where there is proof that the plaintiff: (1) has engaged in the type of speech affected by the challenged governmental action, (2) indicates a desire to engage in such speech in the future, and (3) has made a plausible claim that he will not do so because of a credible threat that the challenged regulation will be enforced." *Marjiuana Policy Project v. Miller*, 578 F.Supp.2d 1290, 1301 (D.Nev. 2008); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006)(en banc).

As applied to the instant case, it is not disputed that Plaintiff was an independent candidate for the office of President of the United States in the 2016

general election and appeared on twenty-nine state general election ballots. (Appellant's Brief at p. 3.) Appellees do not contest that Appellant was an independent candidate for the office of President in the 2016 general election or that he appeared on twenty-nine state general election ballots. Appellees also acknowledge that Appellant announced that he intends to be and is an independent candidate for the office of President of the United States in the 2020 general election. (Appellees' Answer at p. 17, SEOR at 213 ¶21) Plaintiff has plead that California's challenged signature requirement of collecting 178,039 valid signatures in just 105 days in 2016, and the time and expense that it would have taken to attempt comply with California's ballot access requirements as an independent presidential candidate forced Appellant to abandon California in 2016. Appellant, as an announced independent candidate for the 2020 presidential election, now faces the certainty of either complying with California's most stringent and expensive ballot access requirement or abandoning California in the 2020 general election. Further, it is clear that the challenge statute will be applied against independent presidential candidates in the 2020 presidential election.

With respect to Appellant's previous representation that he intends to be a candidate seeking the 2020 Democratic Party nomination for president, that representation has no bearing on the instant case as Appellant has switched his party registration to the Republican Party and can no longer seek the Democratic

Party nomination for president, and as a result of that switch to the political party of the current sitting President, Appellant arrived at the decision that his only viable option for launching a campaign for President in 2020 is as an independent candidate.

In fact, what Appellees are attempting to do is make an ill-fated mootness argument without calling it such so as to avoid the "capable of repetition yet evading review" exception to the mootness doctrine that always applies to challenges to ballot access laws that extent beyond the election cycle in which the complaint was brought. *See, Moore v. Ogilvie*, 394 U.S. 819, 816 (1969). This action was initiated by Appellant during the 2016 presidential election in the hope that the district court would timely enjoin California's excessive signature requirement during the short 105 day circulation period imposed by the State to permit Appellant to appear on California's 2016 general election ballot. Accordingly, Appellant had standing at the outset of this litigation to challenge California's ballot access requirements and continues to maintain standing – separate and apart from the standing that Appellant has as an announced independent candidate for the 2020 presidential election cycle – under the repetition yet evading review exception to the mootness doctrine established in *Ogilvie*. Additionally, this Court has established that any voter, of which

Appellant is one, has standing to challenge ballot access restrictions in this Circuit. *See, Erum v. Cayetano*, 881 F.2d 689, 691 (9th Cir. 1989).

Therefore, Appellant has standing to challenge the constitutionality of California's signature requirements as an independent presidential candidate in the 2020 general election.

II. CALIFORNIA'S BALLOT ACCESS LAWS SEVERELY IMPAIR APPELLANT'S RIGHTS AS AN INDEPENDENT PRESIDENTIAL CANDIDATE GUARANTEED UNDER THE FIRST AND FOURTEENTH AMENDMENTS

A. California's Right to Regulate Presidential Ballot Access is Limited.

While states have latitude to regulate access to their general election ballots, their latitude ends where the First Amendment begins. Furthermore, the right of states to impose ballot access restrictions are at its minimum when dealing with access to the presidential ballot. *See*, *Anderson v. Celebrezze*, 460 U.S 780, 794-95 (1983).

As Appellees acknowledge at page 21 of their brief, this Court has established that a ballot access law imposes a severe burden to speech if it (1) significantly impair[s] access to the ballot **OR** (2) stifles core political speech **OR** (3) dictate[s] electoral outcomes. *Chamness v. Brown*, 722 F.3d 1110, 1116-17 (9th Cir. 2013). The challenged signature requirement in conjunction with the short 105 day circulation period clearly significantly impairs independent presidential candidate's access to the California general election ballot and in so doing stifles

core political speech of independent presidential candidates as independent candidates. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Supreme Court established the right (and the historical importance) of independent presidential candidates to have a legitimate avenue to ballot access and that state have a limited interest to impose restrictions which have an impact on the only national election where the results are decided beyond the confines of any one state *See*, Appellant's Brief at pp. 16-17; *Anderson v. Celebrezze*, 460 U.S. at 793-95.

B. The Magnitude of The Injury to Appellant is Severe and Strict Scrutiny Applies.

Green Party of Georgia v. Kemp, 171 F.Supp. 3d 1340 (N.D. Ga. 2015) and upheld by the Eleventh Circuit, No. 16-11689 (11th Cir. Feb. 1, 2017) is directly on point. Appellees do not dispute that no independent candidate for president has appeared on the California general election ballot since Ross Perot in 1992. First. Amend. Compl. ¶5, EOR-108. In *Green Party of Georgia*, the district court held the magnitude of Georgia's requirement to collect valid signatures equal to 1% of the entire number of registered voters constitutes a severe impairment "of the right to vote effectively" was not "theoretical" because "the voters of Georgia have not had the opportunity to cast their ballots for third-party or independent presidential candidates and where plaintiffs:

> [H]ave put forth evidence showing that Georgia's ballot access signature requirements are substantially higher than those in most other states. Georgia has had fewer presidential candidates access its

> ballot as a result, with the last candidate successfully petitioning for access over fifteen years ago. Additionally, Georgia's laws operated to prohibit ballot access to a candidate that enjoyed widespread national support. This political landscape is a product of not only the challenged one percent signature requirement of O.C.G.A. § 21-2-170, but also of the other provisions providing for alternative access by petition that impose the same one percent requirement. In other words, the 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 in hopes of winning votes and, ultimately, the right to govern. The restrictions also limit the ability of voters to cast their votes effectively….Accordingly, strict scrutiny applies.

Green Party of Georgia, 171 F.Supp. 3d 1340 at 1362-63.

Appellees' attempt to distinguish *Green Party of Georgia* from the instant case because the Georgia excluded both third parties and independent candidates is off the mark because the one percent signature gathering requirement struck down as unconstitutional in *Green Party of Georgia* applied with equal force to ballot access for independent presidential candidates who were also excluded from Georgia's presidential ballot since Ross Perot's second presidential bid in 1996.

In fact, to be precise, the court in *Green Party of Georgia* based its opinion on the fact that no third party or independent presidential candidate had gained access to the Georgia ballot through the petition process. The court in *Green Party of Georgia* noted that the Libertarian Party enjoys "automatic" ballot access through other statutory provisions. *Green Party of Georgia*, 171 F.Supp. 3d at 1350. That is exactly what has occurred in California. While there are third

parties on the California presidential ballot they do not appear through the petitioning process, they enjoy ballot access through other statutory provisions. Whereas Pat Buchanan qualified as the Reform Party candidate in Georgia through the petitioning process as late as 2000, no third party or independent presidential candidate has ever successfully gained access to the California ballot through the petitioning process under the one percent of registered voter rule challenged in this action.

Accordingly, third party access to the California general election ballot through means other than the petitioning process is no defense to the unconstitutional one percent signature requirement that have blocked all third party and independent presidential candidates from gaining access to the California ballot and is not a basis to distinguish the strict scrutiny analysis applied to the one percent of registered voter signature requirement struck down as unconstitutional in *Green Party of Georgia*.

Under strict scrutiny, a statute can be upheld only if it is designed to achieve its objective in the least restrictive means. *Illinois State Bd. Of Elections v. Socialist Worker's Party*, 440 U.S. 173, 185 (1979). Strict scrutiny "requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United v. FEC*, 558 U.S. 50, 130 S.Ct. 876, 882 (2010). Furthermore, ballot access limiting statutes must be

considered in the aggregate: "The concept of totality is applicable…in the sense that a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer v. Brown*, 415 U.S. 724, 737 (1974). "A court should examine the cumulative burdens imposed by the overall scheme of electoral regulations…." *Clingman v. Beaver*, 544 U.S. 581, 608 (2005)(O'Connor concurring).

In terms of ballot access, California now ranks as the most restrictive by imposing both a limited 105 circulation period with the requirement to collect valid signatures equal to a full 1% of all registered voters in the state. Only California's petitioning scheme has resulted in preventing any independent presidential candidate from appearing on its general election ballot. No other state's petitioning scheme has preventing any independent presidential candidate from appearing on its general election ballot since 1992. Thirty-five states either do not require an independent candidate to collect signatures or do not impose a limit on the time period for the collection of election petition signatures.[1] Of the fourteen

[1] The following 35 states either do not require any petition signatures to be filed or do not impose a limit as to how soon a nomination petition for an independent presidential candidate may be circulated: Alabama - *See*, Ala. Code §17-14-31; Alaska - *See* Alaska Stat. §15.30.025; Arizona - *See*, Ariz. Rev. Stat. Ann. §16-341-E; Arkansas - *See*, Ark. Code Ann. §7-8-302; Colorado - *See*, Colo. Rev. Stat. §1-4-801; Delaware - *See*, Title 15 §3002; Florida - *See*, Fla. Stat. §103.021(3); Georgia - *See*, O.C.G.A. §21-2-132(i)(B)(3); Hawaii - *See*, H.R.S. Title 2, §11-113(2)(B); Idaho - *See*, Idaho Code §34-708A; Indiana - *See*, Ind. Code §3-8-6-3; Iowa - *See*, Iowa Code Title 4 §45.1; Kansas - *See*, Kan. Stat. Ann. §25-303;

states that impose a circulation period, only 8 impose a circulation period shorter than California, and of these 8 states, no state's circulation period requires the collection of more valid signatures per day than California (i.e. number of days in the circulation period ÷ number of valid signatures required). Only Texas comes anywhere close California's requirement to collect over 1,695 valid signatures per day, and Texas requires the collection of 554 fewer valid signatures per day than California! In short, of the states than have shorter circulation periods than California, all of them require the filing of far fewer valid signatures than California – both in terms of raw numbers and the number of valid signatures that must be collected each day of the circulation period, and none of them require independent presidential candidates to collect signatures equal to a full 1% of the

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Kentucky - *See*, Ky. Rev. Stat. Ann. Title 10 §118.315(2); Louisiana - *See*, La. Rev. Statutes Title 18, §465C; Maryland - *See*, Md. Ann. Code Art. 33 §5-703(e); Michigan - *See*, Mich. Comp. Laws §168.590 b(2); Mississippi - *See*, Miss. Code Ann. §23-15-359; Missouri - *See*, Mo. Rev. Stat. Title 9, §115.321; Montana - *See*, Mont. Code Ann. §13-10-601; Nebraska - *See*, Neb. Rev. Stat. §32-620; Nevada - *See*, Nev. Rev. Stat. Title 24, §298-109; New Hampshire - *See*, N.H. Rev. Stat. Ann. Title 4, §655:42; New Jersey - *See*, N.J.S.A. §19:13-5; New Mexico - *See*, N.M. Stat. Ann. §1-8-51; North Carolina - *See*, N.C. Gen. Stat. §163-122; Ohio - *See*, Ohio Rev. Code Ann. §3513.257; Oklahoma - *See*, Oklahoma Statutes, Title 26, §10-101; Oregon - *See*, Or. Rev. Stat. Ann. §249.735; South Carolina - *See*, S.C. Code Ann. §7-11-70; Tennessee - *See*, Tenn. Code Ann. §2-5-101; Utah - *See*, Utah Code Ann. §20A-9-502; Vermont - *See*, Vt. Stat. Ann. Title 17, §2402(b); West Virginia - *See*, W.Va. Code §3-5-23; Wyoming - *See*, Wyo. Stat. Ann. §22-5-304.

state's voter registration.[2] California's 1% of registered voters signature requirement working in tandem with the imposition of the 105-day circulation period with the resulting evidence that California's ballot access rules have prevented any independent presidential candidate from appearing on its general election ballot through petition clearly justifies the imposition of strict scrutiny analysis to the challenged statutory provisions.

C. California's Ballot Access Scheme by Petition is Not Narrowly Tailored to Advance a Compelling Governmental Interest.

[2] Connecticut, 221 day circulation period to get 7,500 valid signatures (33.93 valid signatures per day) *See*, Conn. Gen. Stat. §§9-453(b), (i); Illinois, 90 day circulation period to get 25,000 valid signatures (166.66 valid signatures per day) *See*, 10 ILCS 5/10-4(3); Maine, 213 day circulation period to get 4,000 valid signatures (18.77 valid signatures per day) *See*, Title 21-A Me. Rev. Stat. Ann. §§354(6), (8-A); Massachusetts, 190 day circulation period to get 10,000 valid signatures (52.63 valid signatures per day) *See*, Mass. Gen. Laws Chapter 53, §6; Minnesota, 92 day circulation period to get 2,000 valid signatures (21.72 valid signatures per day) *See*, Minn. Stat. §§204B.08, 204B.09; New York, 42 day circulation period to get 15,000 valid signatures (357.14 valid signatures per day) *See*, N.Y. Election Law §6-138(4); North Dakota, 249 days to collect 4,000 valid signatures (16.06 valid signatures per day) *See*, N.D. Cent. Code §16.1-12-02; Pennsylvania, 154 days to collect 5,000 valid signatures (32.46 signatures per day) *See*, 25 P.S. §2913(b); Rhode Island, 65 days to collect 1,000 valid signatures (15.38 valid signatures per day) *See*, R.I. Gen. Stat. §17-14, *see also* http:sos.ri.gov/assets/downloads/document/RI-Run-For-Office-2016.pdf; South Dakota, 215 days to collect 2,775 valid signatures (19.90 valid signatures per day); Texas, 70 days to collect 79,939 valid signatures (1,141 valid signatures per day) *See*, Tex. Elections Code Ann. §192.032; Virginia, 239 days to collect 5,000 valid signatures (20.92 valid signatures per day) *See*, Va. Code Ann. §24.2-543; Washington, 78 days to collect 1,000 valid signatures (12.82 valid signatures per day) *See*, RCW 29A.56.610; Wisconsin, 33 days to collect 2,000 valid signatures (60.60 valid signatures per day) *See*, Wis. Stat. Title 2, §8.20(8)(am).

As set forth fully in Appellant's Opening Brief, Appellant's expert witness, Richard Winger has demonstrated that there is ample historical evidence that a state need not require more than a 5,000 signature requirement to prevent ballot clutter and voter confusion. *See*, Appellant's Opening Br. at pp. 31-38, EOR-65 through EOR-70. Furthermore, as detailed in footnotes 1 and 2 above, a state imposing signature requirements greater than 5,000 or 10,000 without imposing a short circulation period more narrowly advances the state's interest in avoiding ballot clutter and voter confusion while still permitting a legitimate avenue for independent presidential candidates to secure ballot access in an election where a state's interest in restricting ballot access is at a minimum. *See*, *Anderson v. Celebrezze*, 460 U.S. at 795.

D. This Court Has Never Upheld a One Percent of Registered Voters Signature Requirement.

Contrary to Appellees' brief, this Court has not upheld a law similar to California's one-percent of registered voters signature requirement limited to a 105 day collection period. In *Nader v. Cronin*, 620 F.3d 1214 (9th Cir. 2010), this Court upheld the constitutionality of a requirement to collect 1% of the number of votes cast statewide in the last presidential election – which is a far smaller number of signatures than California's requirement to collect valid signatures equal to a full 1% of all registered voters. A signature gathering requirement of 1% of votes cast is far less than 1% of all registered voters because, even in presidential

elections, barely ½ of registered voters cast ballots, and this is especially true since the advent of federal rules restricting the purging of voter registration rolls which has led to a dramatic inflation in the number of registered voters, an inflation which is not reflected in the number of votes cast at any election (this is true for the simple reason that registered voters who move but remain on California's voter registration rolls do not show up to cast a ballot at the election). Furthermore, in *Nader v. Cronin*, Hawaii's requirement to collect 1% of votes cast was not further limited by the imposition of a limited circulation period. Unlike California, which requires independent presidential candidates to collect signatures equal to 1% of all registered voters within a short 105 day circulation period, Hawaii does not impose any limit on the amount of time that election petition can be circulated. Accordingly, *Nader v. Cronin* clearly does not control in this case.

III. APPELLANT DOES NOT ADVANCE AN EQUAL PROTECTION CLAIM IN THIS APPEAL

Appellees attempt to confuse this Court at pages 26 through 29 of their Answering brief to argue that Appellant makes an equal protection claim in this appeal. Appellant does not.

Appellant advances the First Amendment right to appear on California's general election ballot as an independent candidate , as explained in *Storer*, and is not advancing an equal protection argument. Appellees and the lower court accepted that because candidates can appear on California's general election ballot

as the candidate of several third parties that have automatic ballot access through other statutory provisions that the petitioning process for candidates who want to maintain their independence can be as severe as the State of California want to make it. *See*, EOR12-13. Appellant cites to the language in *Storer*, at page 20 of Appellant's Opening Brief, that forcing a candidate to associate with a third political party in order to gain access to the ballot is no substitute to permitting independent presidential candidates the ability to gain access to the ballot as independent candidates. This is not an equal protection argument. Accordingly, Appellant does not advance an equal protection argument and Appellees' briefing to the contrary can only be viewed as an attempt to cause the court to ignore what Appellees cannot directly refute – that the State of California is not permitted under the First Amendment to force independent presidential candidates to accept the nomination of a minor political party to gain ballot access in California.

IV. NO INDEPENDENT PRESIDENTIAL CANDIDATE HAS APPEARED ON CALIFORNIA'S GENERAL ELECTION BALLOT SINCE 1992

No independent presidential candidate has appeared on California's general election ballot since Ross Perot in 1992 – a dearth of independent presidential candidates longer than in Georgia prompting the 1% of registered voters signature requirement to be ruled unconstitutional in *Green Party of Georgia v. Kemp*,

171 [3]F.Supp. 3d 1340 (N.D. Ga. 2015). All of the independent presidential candidates who secure access to California's general election ballot occurred in 1992 or before and each of those candidates needed only 99,000 or fewer signatures to gain access to the general election ballot. Ross Perot's 1992 appearance on California's general election ballot marks a chasm in the history of ballot access for independent presidential candidates because after 1992, federal laws restricting the purging of voter registration rolls has resulted in voter registration inflation such that independent presidential candidates in California now require over 179,000 valid signatures, collected during a 105-day circulation period to gain access to the ballot. The 1% voter registration signature requirement formula used by California has resulted in an unsustainable increase in the raw number of valid signatures required for independent candidates to gain access to the ballot and will continue to do so unless enjoined.

V. CALIFORNIA'S ONE-PERCENT OF VOTER REGISTRATION SIGNATURE REQUIREMENT IS AT THE EXTREME EDGE OF BALLOT ACCESS REQUIREMENTS

Appellees incorrectly argue that California's 1% of voter registration signature requirement "falls in the middle of the range of , or is less than, what other states require. First, Appellees cite a National Association of Secretaries of

[3] Fulani gained access to the California ballot because she successfully challenged the state's short circulation period and was awarded as a settlement the ability to appear on the ballot with just 66,000 signatures.

State ("NASS"), *Summary: State Laws Regarding Presidential Ballot Access for General Elections* (Feb. 2016) which contains significant errors. [4] When alerted by Appellant's expert Richard Winger, the NASS emailed:

> "Mr. Winger – thank you for your message. The summary you are referring to is intended to provide general information about the process. **It is not intended as a procedural guide or legal resource. We make this clear in the paragraph at the top of the document.** We also make it clear that ballot access laws may change at any time based on new state laws and/or court decisions, The document indicates when it was last updated."

Email, dated June 18, 2018, from John Milhofer, NASS Policy Analyst, Attached as Exhibit A.

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[4] The NASS report cited by Appellees in footnote 13 of their Answering Brief, contains significant errors: (1) the NASS report lists Arizona's presidential petition as 3% of the number of registered voters when, in fact it is only 3% of the total number of voters registered as independents; (2) the NASS report show's Georgia's independent presidential petition requirement as 1% of registered voters but was reduced to 7,500 as a result of *Green Party of Georgia v. Kemp*, 171 F.Supp. 3d 1340 (N.D. Ga. 2015); (3) the NASS report lists Maryland's independent petition requirement as 1% of the number of registered voters, but has been lowered in 2017 by House Bill 529 to a flat 10,000 signatures; (4) the NASS report lists North Carolina as requiring signatures for independent presidential candidates equal to 2% of the last gubernatorial vote for independent presidential candidates when it is was lowered in 2017 by Senate Bill 656 to 1.5% of the last gubernatorial vote; (5) the NASS report fails to report that Oklahoma now permits independent presidential candidates to pay a filing fee rather than circulate any election petitions; (6) the NASS report shows that Pennsylvania requires independent presidential candidates to collect valid signatures equal to 2% of the winner's vote for the highest vote getter in the previous statewide election when that signature requirement was lowered to 5,000 signatures by court order in *Constitution Party of Pennsylvania v. Aichele*, 116 F.Supp. 3d. 486 (E.D. Pa. 2015); (7) the NASS report incorrectly shows Virginia requiring independent presidential candidates to collect 10,000 signatures when the total was lowered in 2013 by Senate Bill 690 to 5,000 signatures.

Furthermore, the fib of characterizing California's signature gathering requirement as "in the middle of the range" is demonstrated by the signature totals required by the other 49 states. In 2016, the other 49 states required only 580,940 valid signatures to be filed to gain access to the all of their presidential ballots.[5]

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[5] Alabama, 5,000 signatures (number stated in statute) *See,* Ala. Code §17-14-31; Alaska, 3,005 signatures (1% of 2012 votes cast) *See*, Alaska Stat. §15.30.025; Arizona, 35,514 signatures (3% of registered independents) *See*, Ariz. Rev. Stat. Ann. §16-341-E; Arkansas, 1,000 signatures (number stated in statute) *See*, Ark. Code Ann. §7-8-302; Colorado, 0 signatures (just pay filing fee) *See*, Colo. Rev. Stat. §1-4-801; Connecticut, 7,500 signatures (maximum number stated in statute) *See*, Conn. Gen. Stat. §9-453(d); Delaware, 6,526 signatures (1% of December 2015 registration) *See*, Title 15 §3002; Florida, 119,316 signatures (1% of October 2014 registration) *See*, Fla. Stat. §103.021(3); Georgia, 7,500 signatures (reduced from 1% of registered voters to 7,500 by *Green Party of Ga. V. Kemp*, ruling that 1% registration number unconstitutional as no third party presidential candidate on ballot this century); Hawaii, 4,347 signatures (1% of 2012 presidential vote) *See*, H.R.S. Title 2, §11-113(2)(B); Idaho, 1,000 signatures (number stated in statute) *See*, Idaho Code §34-708A; Illinois, 25,000 signatures (number stated in statute) *See*, 10 Ill. Comp. Stat. §5/10-3; Indiana, 26,700 signatures (2% of 2014 vote for Secretary of State) *See*, Ind. Code §3-8-6-3; Iowa, 1,500 signatures (number stated in statute) *See*, Iowa Code Title 4 §45.1; Kansas, 5,000 signatures (number stated in statute) *See*, Kan. Stat. Ann. §25-303; Kentucky, 5,000 signatures (number stated in law) *See*, Ky. Rev. Stat. Ann. Title 10 §118.315(2); Louisiana, 0 signatures (just pay filing fee) *See*, La. Rev. Statutes Title 18, §465C; Maine, 4,000 signatures (number stated in statute) *See*, 21-A Me. Rev. Stat. Ann. §354; Maryland, 10,000 signatures (number stated in statute) *See*, Md. Ann. Code Art. 33 §5-703(e); Massachusetts, 10,000 signatures (number stated in statute) *See*, Mass. Gen. Laws Chapter 53, §6; Michigan, 30,000 signatures (number stated in statute) *See*, Mich. Comp. Laws §168.590 b(2); Minnesota, 2,000 signatures (number stated in statute) *See*, Minn. Stat. §204B.08; Mississippi, 1,000 signatures (number stated in statute) *See*, Miss. Code Ann. §23-15-359; Missouri, 10,000 signatures (number stated in statute) *See*, Mo. Rev. Stat. Title 9, §115.321; Montana, 5,000 signatures (number stated in statute) *See*, Mont. Code Ann. §13-10-601; Nebraska, 2,500 signatures (number stated in statute) *See*, Neb. Rev. Stat. §32-620; Nevada, 5,431 signatures (1% of 2014 U.S. House vote) *See*, Nev. Rev. Stat. Title 24, §298-

California, on its own required 178,039 signatures to be collected during a 105-day time period. California's signature requirement is twice as large in proportion with its population of any other state. California's signature requirement for independent presidential candidates is over 121.5% higher, based on its population, than the signatures required by the other 49 states based on their combined populations. Accordingly, contrary to Appellees' argument, California's signature

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109; New Hampshire, 3,000 signatures (number stated in statute) *See*, N.H. Rev. Stat. Ann. Title 4, §655:42; New Jersey, 800 signatures (number stated in statute) *See*, N.J.S.A. §19:13-5; New Mexico, 15,388 signatures (3% of 2014 gubernatorial vote) *See*, N.M. Stat. Ann. §1-8-51; New York, 15,000 signatures (number stated in statute) *See*, N.Y. Election Law §6-142; North Carolina, 67,025 signatures (1.5% of 2012 gubernatorial vote) *See*, N.C. Gen. Stat. §163-122; North Dakota, 4,000 signatures (number stated in statute) *See*, N.D. Cent. Code §16.1-12-02; Ohio, 5,000 signatures (number stated in statute) *See*, Ohio Rev. Code Ann. §3513.257; Oklahoma, 0 signatures (just pay large filing fee) *See*, Oklahoma Statutes, Title 26, §10-101; Oregon, 17,893 signatures (1% of 2012 presidential vote) *See*, Or. Rev. Stat. Ann. §249.735; Pennsylvania, 5,000 signatures (number set by court order in *Constitution Party of Pennsylvania v. Cortes*, holding Pennsylvania's 2% vote total formula unconstitutional in conjunction with other ballot access provisions); Rhode Island, 1,000 signatures (number stated in statute) *See*, R.I. Gen. Stat. §17-14-7; South Carolina, 10,000 signatures (number stated in statute) *See*, S.C. Code Ann. §7-11-70; South Dakota, 2,775 signatures (1% of 2014 gubernatorial vote) *See*, S.D. Codified Laws §12-7-7; Tennessee, 275 signatures (number stated in statute) *See*, Tenn. Code Ann. §2-5-101; Texas, 79,939 signatures (1% of 2014 gubernatorial vote) *See*, Tex. Elections Code Ann. §192.032; Utah, 1,000 signatures (number stated in statute) *See*, Utah Code Ann. §20A-9-502; Vermont, 1,000 signatures (number stated in statute) *See*, Vt. Stat. Ann. Title 17, §2402(b); Virginia, 5,000 signatures (number stated in statute) *See*, Va. Code Ann. §24.2-543; Washington, 1,000 signatures (number stated in statute) *See*, RCW §29A.20.121(2); West Virginia, 6,705 signatures (1% of 2012 presidential vote) *See*, W.Va. Code §3-5-23; Wisconsin, 2,000 signatures (number stated in statute) *See*, Wis. Stat. Title 2, §8.20(4); Wyoming, 3,302 signatures (2% of 2014 U.S. House vote) *See*, Wyo. Stat. Ann. §22-5-304.

gathering requirement is at the extreme edge of ballot access requirements for independent presidential candidates and is the reason why no independent presidential candidate has appeared on California's general election ballot since 1992, including Evan McMullin who, in 2016, finished in 5th place nationally based on the presidential popular vote.

VI. VOLUNTEERS ARE NOT NECESSARY TO GAIN BALLOT ACCESS NOR IS IT A VALID FACTOR IN CONSTITUTIONAL ANALYSIS OF CHALLENGED BALLOT ACCESS RESTRICTIONS

Appellees argue at great length that volunteer support is somehow necessary to both show a modicum of support for independent presidential candidates to gain access to California's general election ballot and to also moderate the costs imposed by the signature gathering requirement challenged in this action. Appellees' Opening Br. at pp. 32-34 and footnote 12. Neither argument is correct and is a sideshow designed to cast aspersion on Appellant that, despite having gained access to twenty-nine state general election ballots, in California if you don't take the time to develop a large volunteer support base to help defray the costs imposed by the same ballot access restrictions which are alleged to be unconstitutional (in part, by the excessive campaign fund needed to be expended by an independent candidate just to get on the California ballot), then the complaining candidate must not have the necessary "modicum of support" worthy of ballot access. It is a wonderfully circular argument that has no support in a

proper analysis as to whether or not the ballot access requirements are excessive to protect the state's interest against ballot clutter and voter confusion under strict scrutiny analysis, which as the record shows is satisfied at a 5,000 signature requirement.[6] In other words, according to Appellees, Appellant is required to expend resources to reduce the costs imposed by the signature requirement, which

[6] Appellant points out in his brief that if California were to have a signature requirement roughly equivalent with other states based on a *per capita* basis, California's signature requirement for independent presidential candidates would be about 99,753 signatures. Appellees now falsely argue in their opening brief that "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." Appellees' Opening Br. at p. 46. Appellant made no such constitutional claim. Appellees' averment is an intentionally false statement. The argument that Appellant was making was to show how out-of-line California is in rebuttal to Appellees argument raised in the lower court (incorrectly) that California's signature requirement was consistent with its large population. Appellant does not argue that any signature requirement greater than a state's proportionate population in relation to the signatures required by all other states and their population is constitutionally mandated. However, what is constitutionally mandated is that a state may not impose such an excessive signature requirement as to prevent any independent presidential candidate from ever again appearing on its general election ballot – and signature requirements that exceed what is necessary to prevent ballot clutter and voter confusion is excessive and 5,000 signatures has been shown historically to be the threshold signature requirement that prevents ballot clutter and voter confusion as established by Appellant's expert witness Richard Winger. Furthermore, Appellant concedes that any remedy in this case will likely require an independent presidential candidate to collect more than 5,000 signatures as there is no such thing as a bright line test in ballot access cases. However, any significant reduction, such as signature requirements of 10,000 to 25,000 in the Court's discretion will clearly vindicate California's legitimate interests without imposing such excessive signature requirements that will continue to prevent any independent presidential candidate from ever again appearing on California's ballot.

is one of the reasons that makes the signature requirement so severe and unconstitutional.

Furthermore, the showing of a "modicum of support" which requires ballot access is demonstrated solely by filing the number of required signatures which is necessary to avoid ballot clutter and voter confusion. While volunteers are helpful, they are not a required constitutional predicate or a factor as to whether or not a state's signature requirement and circulation period exceed what is necessary for the state to protect its interest against ballot clutter and voter confusion.

Additionally, Appellees argue that:

> 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 May and early June of the election year, and thereafter to gather signatures from supportive voters. That is another kind of burden. California has no such "preliminary assemblies" requirement.

Appellees' Opening Br. at pp. 46-47. As an instant matter, the "preliminary assemblies" referenced by Appellees in their Opening Brief has, in fact, been held unconstitutional in a challenge brought by Appellant in the State of Washington in the United States District Court for the Western District of Washington, No.16-5801, *Roque De La Fuente v. Wyman*. Judge Benjamin H. Settle enjoined

enforcement of this odd requirement on March 7, 2018. Appellant's counsel in this appeal argued the case in Washington. A little research by Appellees should have uncovered this judgment.

But even more to the point, Appellant in this case specifically argues that ballot access requirements working in combination act to impair Appellant's constitutional rights. Ballot access limiting statutes must be considered in the aggregate: "The concept of totality is applicable…in the sense that a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer v. Brown*, 415 U.S. 724, 737 (1974). "A court should examine the cumulative burdens imposed by the overall scheme of electoral regulations…." *Clingman v. Beaver*, 544 U.S. 581, 608 (2005)(O'Connor concurring). Appellant argues that history now shows (in a way that it did not in the early days of ballot access litigation) that California's excessive signature collection requirement acting in concert with the 105-day circulation window has prevented any independent presidential candidate from gaining access to California's general election ballot, and threatens to prevent any independent presidential candidate from ever again appearing on California's ballot as the number of required signatures increases with the voter registration inflation resulting from federal laws prohibiting routine purging of the voter registration rolls.

CONCLUSION

For all the above stated reasons, and the reasons set forth in Appellant's Opening Brief, the lower court's dismissal of Appellant's complaint should be reversed and the case remanded for further proceedings.

Dated: August 6, 2018

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STATEMENT OF RELATED CASES PURSUANT TO NINTH CIRCUIT RULE 28-2.6

Appellant is unaware of any pending related cases before this Court as defined pursuant to Ninth Circuit Rule 28-2.6.

Dated: August 6, 2018

/s/ *Paul Rossi*
Paul A. Rossi, Esquire
Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I certify, pursuant to the Federal Rules of Appellate Procedure, Rule 32(a)(7)(C), that the attached Reply Brief of Plaintiff-Appellant:

(1) Complies with Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,156 words, excluding parts of the brief expressly excluded by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure; and,

(2) Complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Time New Roman font,

Dated: August 6, 2018

/s/ *Paul Rossi*
Paul A. Rossi, Esquire
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2018, I electronically filed the foregoing "Appellant's Reply Brief" with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM?ECF system.

I further certify that all participants in this appeal are registered CM/ECF users and that service will be automatically accomplished on all participants via this Court's appellate CM/ECF system.

Dated: August 6, 2018

/s/ *Paul Rossi*
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