

No. 18-55457

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL MERRITT,

Plaintiff / Appellant,

-v.-

ALEX PADILLA, in only his official capacity as Secretary of State of California

Defendant / Appellee

*ON APPEAL FROM CENTRAL DISTRICT OF CALIFORNIA'S GRANT OF DEFENDANT'S
MOTIONS TO DISMISS* (D.C. No. 8:16-cv-00606-DOC-JCG)

PLAINTIFF PAUL MERRITT'S REPLY BRIEF

GAUTAM DUTTA

Business, Energy, and Election Law, PC

Attorneys for Plaintiff Paul Merritt

1017 El Camino Real # 504

Redwood City, CA 94063

415.236.2048

213.405.2416 fax

Dutta@BEELawFirm.com

TABLE OF CONTENTS

<u>Item</u>	<u>Page</u>
Table of Contents	2
Table of Authorities	3
Introduction	4
Conclusion	8
Certificate of Service	9
Word Count	10

TABLE OF AUTHORITIES

Federal Cases

<i>Brewster v. Bd. of Education of Lynwood USD</i> , 149 F.3d 971, 982 (9 th Cir. 1998).....	7
<i>Cogswell v. City of Seattle</i> , 347 F.3d 809, 814 (9 th Cir. 2003)	5, 6
<i>Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.</i> , 473 U.S. 788, 808 (1985).....	6
<i>Lee v. City of Los Angeles</i> , 250 F.3d 668, 688 (9 th Cir. 2001).....	7
<i>Rubin v. City of Santa Monica</i> , 308 F.3d 1008, 1016 (9 th Cir. 2002)	5, 6
<i>Williams v. Rhodes</i> , 393 U.S. 23, 31 (1968)	6

Statutes

Cal. Elections Code §13105.....	5
Cal. Elections Code §9084(i).....	6

I. Introduction

Tellingly, the Secretary of State concedes a core part of Mr. Merritt's claims. Namely, under this Court's holding in *Chamness v. Bowen*,¹ candidates like Mr. Merritt may freely state, in their candidate statements, that they are "Independent". The Secretary of State also concedes that he was legally required to file a lawsuit in order to alter Mr. Merritt's candidate statement, but did not file such a lawsuit in connection with Mr. Merritt's candidate statement.

There can be no doubt that Mr. Merritt had the fundamental right to state, in his candidate statement, that he was "Independent". There can also be no doubt that Mr. Merritt's right to Due Process was violated when the Secretary of State censored his candidate statement. Accordingly, the Court must reverse the erroneous dismissal of Mr. Merritt's lawsuit and remand it to the district court.

II. The Secretary of State Fails to Justify the Dismissal of Mr. Merritt's First Amendment and Equal Protection Claims

Simply put, the Secretary of State fails to justify the district court's erroneous dismissal of Mr. Merritt's First Amendment and Equal Protections claims. Although he misstates the law that previously regulated ballot labels,² the Secretary of State does not dispute – and thus concedes – a core

¹ *Chamness v. Bowen*, 722 F.3d 1110, 1117 (9th Cir. 2013).

² Contrary to the Secretary of State's claim, candidates were in fact permitted to use the ballot label of "Independent" before California's Top Two Primary Law was enacted. *See id.* at 1112. When the Top Two Primary law was enacted in 2010, candidates who did not identify with a state-recognized political party had the option of using a "blank" ballot label. *Id.* at 1113 (*citing* former version of Cal. Elections Code §13105). Subsequently, in 2012, the Legislature deprived candidates of that option: candidates who do not identify with a state-recognized political party must now use the ballot label of "Party Preference: None". *Id.* at 1116 n.4 (*citing*

part of Mr. Merritt’s claims. Namely, under *Chamness*,³ candidates like Mr. Merritt may freely state, in their candidate statements, that they are “Independent”. Specifically, *Chamness* held that the First Amendment and the Equal Protection Clause permitted the Secretary of State to bar the ballot label of “Independent” – in part because candidates can freely express their political views *elsewhere*: on their candidate statements.⁴

Yet instead of addressing the relevant – and controlling – part of *Chamness*, the Secretary of State insists on arguing that he had the power to censor the first line of Mr. Merritt’s candidate statement.⁵ That argument fails for three main reasons. *First*, as shown earlier, *Chamness* made it clear that candidates have the right to state, in their candidate statements, that they are “Independent”.⁶

current Cal. Elections Code §13105). *Contra*, Secretary of State’s Opposition, at 17 n.5.

³ *Chamness*, 722 F.3d at 1117.

⁴ *Id.* at 1117 (outside of the ballot, candidate had “an *alternative way* to express his views through a candidate’s statement distributed prior to the election.”) (italics added) (citing *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1016 (9th Cir. 2002)). *See also* Secretary of State’s July 11, 2016 Motion to Dismiss Second Amended Complaint, ER 170:13-170:14 (unlike the State Voter Guide, “the ballot is *not a forum for speech*[.]”) (italics added).

⁵ The Secretary of State does not (and cannot) dispute that, under this Court’s holding in *Cogswell v. City of Seattle*, a voter guide “constitutes a limited public forum” as a matter of law. *Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003). In an apparent bid to restrict *Cogswell*’s scope, the Secretary of State cites *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.* for the proposition that the State Voter Guide constitutes a non-public forum, “[e]xcepting only the *candidate statements themselves*[.]” Secretary of State’s Opposition, at 15 (italics added). However, *Cornelius* does not apply here, for it did not address voter guides. *See Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985).

⁶ *See* note 4 *supra*.

Second, with respect to Mr. Merritt’s First Amendment claim, the Secretary of State unlawfully restricted Mr. Merritt’s access to a limited public forum, for the Secretary of State thereby (1) discriminated against a class of candidates like Mr. Merritt who do not identify with any state-recognized political party⁷ (in contrast, candidates identifying with state-recognized parties were allowed to state their party affiliation);⁸ and (2) frustrated, instead of “further[ing]”, the State Voter Guide’s purpose of enabling candidates to discuss and share their “background” with the voters.⁹

Finally, the Secretary of State’s inequitable enforcement of Elections Code 9084(i) violated Mr. Merritt’s rights under the Equal Protection Clause. Namely, while he permitted Mr. Merritt’s state-recognized-party *competitors* to express their background and political beliefs, the Secretary of State banned Mr. Merritt from stating that he was a “Registered Independent voter”.¹⁰

Accordingly, this Court must reverse the district court’s erroneous dismissal of Mr. Merritt’s First Amendment and Equal Protection claims.

III. The Secretary of State Fails to Justify the Dismissal of Mr. Merritt’s Due Process Claims

Similarly, the Secretary of State fails to justify the district court’s erroneous dismissal of Mr. Merritt’s Due Process claims. It is beyond question that, by altering the first line of Mr. Merritt’s candidate statement, the Secretary of State deprived Mr. Merritt of three protected liberty

⁷ See *Cogswell*, 347 F.3d at 815-16.

⁸ Opening Brief (Dkt. 8), at 10-11; *see also* Mr. Merritt’s July 9, 2018 Supplemental Request for Judicial Notice (Dkt. 10), at 2-3 & Exh. 2.

⁹ See *Cogswell*, 347 F.3d at 817; Cal. Elections Code §9084(i).

¹⁰ See *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

interests: (1) Mr. Merritt’s fundamental rights under the First Amendment, (2) his fundamental rights under the Equal Protection Clause, and (3) his right to have his candidate statement published *in toto* pursuant to Section 9084(i).¹¹ Furthermore, it is undisputed that the Secretary of State also denied Mr. Merritt “adequate procedural protections”, for he deleted a phrase from Mr. Merritt’s candidate statement without filing a lawsuit for that purpose during the “public examination” period.¹²

Accordingly, this Court must reverse the district court’s erroneous dismissal of Mr. Merritt’s Due Process claims.

IV. Invoking Disputed Facts Will Not Prevent Reversal

In a last-ditch effort to salvage his case on appeal, the Secretary of State argues that the first line of Mr. Merritt’s candidate statement was not part of his candidate statement – an “alternative fact” that Mr. Merritt vigorously disputes.¹³ As this Court has admonished, a party moving to dismiss a complaint is barred from relying on disputed, extrinsic facts.¹⁴ Accordingly, the Secretary of State’s invocation of alleged, disputed facts fails to prevent this case from being reversed and remanded.

¹¹ See *Brewster v. Bd. of Education of Lynwood USD*, 149 F.3d 971, 982 (9th Cir. 1998).

¹² See *id.* at 982.

¹³ See Mr. Merritt’s objections raised (but not ruled on) in the district court, at ER 39:14-39:16 & ER 108:9-109:9; see also Mr. Merritt’s July 26, 2018 Evidentiary Objections, at 3.

¹⁴ E.g., *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

V. Conclusion

The State must not be allowed to discriminate against unorthodox candidates and the voters who support them. By reversing and remanding the district court's erroneous dismissal, this Court will not only vindicate Mr. Merritt's fundamental rights, but send a clear message: in a democracy, all voices must be *heard*.

Sept. 26, 2018

Respectfully submitted,

____s/_Gautam Dutta_____

GAUTAM DUTTA
Business, Energy, and Election Law, PC
Attorneys for Plaintiff Paul Merritt
1017 El Camino Real # 504
Redwood City, CA 94063
415.236.2048
213.405.2416 fax
Dutta@BEELawFirm.com

CERTIFICATE OF SERVICE

On Sept. 26, 2018, I electronically filed, via CM/ECF, a copy of the foregoing document with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Gautam Dutta

GAUTAM DUTTA

FRAP 32(a)(7)(B)(iii) CERTIFICATE OF COMPLIANCE

I certify that the foregoing document contains 1,093 words.

s/_Gautam Dutta_____

GAUTAM DUTTA

No. 18-55457

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL MERRITT,

Plaintiff / Appellant,

-v.-

ALEX PADILLA, in only his official capacity as Secretary of State of
California

Defendant / Appellee

*ON APPEAL FROM CENTRAL DISTRICT OF CALIFORNIA'S GRANT OF
DEFENDANT'S MOTIONS TO DISMISS (D.C. No. 8:16-cv-00606-DOC-JCG)*

PLAINTIFF PAUL MERRITT'S EVIDENTIARY OBJECTIONS

GAUTAM DUTTA
Business, Energy, and Election Law, PC
Attorneys for Plaintiff Paul Merritt
1017 El Camino Real # 504
Redwood City, CA 94063
415.236.2048
213.405.2416 fax
Dutta@BEELawFirm.com

Plaintiff Paul Merritt **objects** to evidence proffered by the Secretary of State's Opposition¹ on three grounds: (1) untimeliness, (2) impropriety, and (3) irrelevance.

The Secretary of State's Proffered Evidence. After the trial court did not rule on Mr. Merritt's Dec. 6, 2017 Objections to the Secretary of State's improper reply evidence,² the Secretary of State has *renewed* his improper bid to introduce the same, irrelevant evidence. According to the Secretary of State, the following "evidence" proves that the first line of Mr. Merritt's candidate statement was *not* part of his candidate statement:

- The purported fact that the first line of Mr. Merritt's candidate statement was not included in the Secretary of State's word count.³

Mr. Merritt's Objections to the Secretary of State's Proffered Evidence. During briefing for his Motion to Dismiss, the Secretary of State was barred from making such a proffer of evidence for three reasons. *First*, a court should not consider evidence that is submitted at the close of briefing a motion, when the non-moving party no longer has the opportunity to respond.⁴ Here, the Secretary of State first proffered his evidence as part of

¹ Dkt No. 16.

² ER 38-40.

³ Secretary of State's Sept. 5, 2018 Opposition (Dkt. 16), at 13-14; *see also* Secretary of State's Reply in Support of Motion to Dismiss, at ER 45:15 n.4 (*citing* "Dkt. 10", but not the Third Amended Complaint [Dkt. 53]).

⁴ *E.g., Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) ("Where new evidence is presented in a reply to a motion for summary judgment, the district court *should not consider* the new evidence without giving the non-movant an opportunity to respond.") (italics added, internal quotation marks and citation omitted); *see also Golden West Fin. v. WMA Mortgage Svcs., Inc.*, No. C 02-05727 CRB, 2003 WL 1343019, at *4 (N.D. Cal. Mar. 12,

his district-court reply papers for his Motion for Dismiss. Because that evidence was proffered at the close of briefing, it must be summarily disregarded.

Second, a party moving to dismiss a complaint may not rely on disputed, extrinsic facts.⁵ Mr. Merritt vehemently disputes the purported fact (which was *not* alleged by his operative complaint) that the first line of his candidate statement was not part of his candidate statement.⁶ Indeed, the first line of Mr. Merritt's candidate statement constituted a *critical* part of his candidate statement, for that line concisely communicated to voters his core political beliefs.

Finally, the proffered evidence is irrelevant, for it does *not* show that Mr. Merritt intended for the first line of his candidate statement to be excluded from his candidate statement.

Accordingly, the Court must **disregard** the untimely, improper, and irrelevant evidence again proffered by the Secretary of State.

2003) (Breyer, J.) (striking evidence submitted for the first time in reply papers).

⁵ *E.g., Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

⁶ *See* ER 39:14-39:16.

Date: Sept. 26, 2018

Respectfully submitted,

____s/_Gautam Dutta_____

**BUSINESS, ENERGY, AND
ELECTION LAW, PC**

Attorneys for Plaintiff-Appellant Paul Merritt

1017 El Camino Real # 504

Redwood City, CA 94063

415.236.2048; 213.405.2416 fax

Dutta@BEELawFirm.com

CERTIFICATE OF SERVICE

On Sept. 26, 2018, I electronically filed, via CM/ECF, a copy of the foregoing document with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Gautam Dutta

GAUTAM DUTTA

No. 18-55457

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL MERRITT,

Plaintiff / Appellant,

-v.-

ALEX PADILLA, in only his official capacity as Secretary of State of
California

Defendant / Appellee

*ON APPEAL FROM CENTRAL DISTRICT OF CALIFORNIA'S GRANT OF
DEFENDANT'S MOTIONS TO DISMISS (D.C. No. 8:16-cv-00606-DOC-JCG)*

**PLAINTIFF PAUL MERRITT'S NOTICE OF NON-OPPOSITION
TO HIS SUPPLEMENTAL
REQUEST FOR JUDICIAL NOTICE**

GAUTAM DUTTA
Business, Energy, and Election Law, PC
Attorneys for Plaintiff Paul Merritt
1017 El Camino Real # 504
Redwood City, CA 94063
415.236.2048
213.405.2416 fax
Dutta@BEELawFirm.com

TO THE COURT, THE PARTIES, AND COUNSEL OF RECORD:

Please take notice that no Opposition has been filed to Plaintiff Paul Merritt's Supplemental Request for Judicial Notice (filed July 9, 2018).

Accordingly, Plaintiff Paul Merritt respectfully asks the Court to take judicial notice of the following two documents:

<u>Exhibit No.</u>	<u>Document Description</u>
1	The candidate statement submitted by Mr. Merritt to the California Secretary of State's Office, in connection with the June 7, 2016 California Primary Election (ER 206)
2	Candidate statements of every U.S. Senate candidate, including that of Mr. Merritt (at ER 83), as published on the June 7, 2016 California Primary Election's Voter Information Guide ("State Voter Guide") (ER 80-90)

Date: Sept. 26, 2018

Respectfully submitted,

____s/_Gautam Dutta_____

**BUSINESS, ENERGY, AND
ELECTION LAW, PC**

*Attorneys for Plaintiff-Appellant Paul Merritt
1017 El Camino Real # 504
Redwood City, CA 94063
415.236.2048; 213.405.2416 fax
Dutta@BEELawFirm.com*

CERTIFICATE OF SERVICE

On Sept. 26, 2018, I electronically filed, via CM/ECF, a copy of the foregoing document with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Gautam Dutta

GAUTAM DUTTA