NO. 18-35208

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROQUE DE LA FUENTE,
Respondent,

v.

SECRETARY OF STATE KIM WYMAN,
Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF WASHINGTON
AT TACOMA

No. 16-cv-05801-BHS
The Honorable Benjamin H. Settle
United States District Court Judge

SECRETARY OF STATE KIM WYMAN'S REPLY BRIEF

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I. INTRODUCTION

De La Fuente's complaint challenged only Washington's notice requirement for minor party conventions, Wash. Rev. Code § 29A.56.620, which every other minor party candidate for President has been able to satisfy. De La Fuente now primarily complains about Washington's minor party convention requirement, rather than the notice requirement, but that is a challenge he did not bring in his complaint, nor did he seek to amend his complaint to include a challenge to the convention statute. As a result, the district court properly declined to address De La Fuente's arguments on this issue and addressed only whether Washington's notice requirement was valid.

De La Fuente has failed to show Washington's notice requirement imposes any more than a de minimis burden on minor parties seeking to place a presidential candidate on Washington's ballot. Washington's notice requirement does not dictate internal party procedures for selecting presidential and vice presidential nominees or for selecting presidential electors. Nor does the notice requirement restrict any person's speech, dictate content, or keep any person from speaking at any time. The notice requirement only minimally burdens De La Fuente's First or Fourteenth Amendment rights.

Washington has important interests that support the public notice requirement. The required notice ensures the public has information about minor party conventions, thereby ensuring the public can seek to participate in a number of ways: (1) With notice, Washington voters can attend conventions and examine various parties' and candidates' platforms and positions, information necessary for a Washington voter to choose among multiple minor parties and independent candidates where a Washington voter can sign only one nominating petition; (2) With notice, Washington voters can attend a convention and dissent in discussions of platform or compete for the minor party's nomination with other potential nominees; and (3) With notice, Washington voters can compete to be appointed as a Washington presidential elector for the minor party or independent candidate. Washington has an important interest in transparency and in protecting its voters' rights. Finally, the notice requirement is reasonable because newspaper notices are searchable on the internet and they are the type of notice the public has come to expect for electoral events.

Wash. Rev. Code § 29A.56.620 is a constitutional prerequisite to ballot access for minor party and independent candidates. This Court should reverse the district court's erroneous conclusion otherwise.

II. ARGUMENT

A. The District Court Correctly Concluded That De La Fuente Failed to Challenge Washington's Convention Requirement Because His Complaint Only Challenged Washington's Notice Requirement

The district court correctly declined to address De La Fuente's late argument that Washington's convention requirement for minor parties somehow violated his First and Fourteenth Amendment rights. This Court should reach the same conclusion.

De La Fuente appears to complain that Washington requires minor parties and independent candidates to conduct Washington conventions in order to obtain ballot access. *E.g.*, Answer Br. at 9-10, 14-15, 23, 30-31. Yet the district court dismissed this argument because it was "neither pled in Plaintiff's complaint nor raised at any time prior to [the] summary judgment proceedings." ER 32, 332-39 (complaint challenging only Wash. Rev. Code § 29A.56.620, the convention notice requirement, and failing to mention Wash. Rev. Code § 29A.56.600 or Wash. Rev. Code § 29A.56.610, the statutes requiring minor party conventions). De La Fuente did not seek to file an amended complaint to add a challenge to Washington's minor party convention requirements. ER 32. At this stage, De La Fuente did not appeal the portion of the district court's decision declining to expand his claims beyond those stated in his complaint.

This appeal is about whether Washington's minor party convention notice requirement imposes an unconstitutional restriction on the First or Fourteenth Amendment rights of minor party candidates like De La Fuente. It does not.

B. To Achieve Strict Scrutiny, De La Fuente Must Establish that Washington's Notice Requirement Imposes a Severe Burden on Minor Party Candidates and He Fails

1. Even for federal elections, states can impose reasonable restrictions on ballot access and the plaintiff must show the severity of the burden that a law imposes on his rights

The level of scrutiny that a court applies in assessing the constitutionality of an election law depends on the severity of the impact on the candidate's First and Fourteenth Amendment rights. *Ariz. Green Party v. Reagan*, 838 F.3d 983, 985 (9th Cir. 2016). "The plaintiff bears the burden of showing the severity of the burden on those constitutional rights . . . ." *Id.* The level of severity "is a factual question," "'measured by whether, in light of the entire statutory scheme regulating ballot access, "reasonably diligent" [parties] can normally gain a place on the ballot, or whether they will rarely succeed in doing so.'" *Id.* at 989 (quoting *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008) (citations omitted) (alteration in *Nader*)). Where a plaintiff has failed to show "on this record" "evidence of the specific obstacles to ballot access," this Court has

concluded that the plaintiff "did not establish that its rights are severely burdened." *Id.* at 985.

Here, De La Fuente relies on hypotheticals, rather than established facts in the record, so under the standard in *Arizona Green Party*, he fails to show a severe burden on his ballot access that warrants strict scrutiny. The record shows instead that sixteen other minor party or independent presidential candidates have easily met the notice requirement in recent years. ER 92. Minor parties have been able to structure their conventions to include multiple meetings in varying locations within multiple counties. ER 320-31. Moreover, minor parties have provided public notices that establish a time and date certain to begin a convention, but then they have extended the convention to include additional dates and locations until all convention business was complete, all without the need for a new public notice. ER 320-31; *see also* Answer Br. at 11, 18, 21, 26-27, 37 (arguing without any citation to the record that minor parties cannot continue or move locations without a ten-day waiting period). One minor party representative has commented on the comparative ease of complying with Washington's ballot access requirements for minor party presidential candidates. ER 112, 115-16. This is the evidence presented in the record about the actual

burden imposed by the convention notice requirement, and the record shows that the burden is slight.

De La Fuente alleges severe burdens in part by trying to expand the scope of his challenge to include claims not alleged in his complaint, but also through allegations unsupported by the record. "Without evidence," and "context specific analysis" the burdens De La Fuente identifies "are purely speculative" and are insufficient to warrant strict scrutiny. *See Ariz. Green Party*, 838 F.3d at 990.

2. De La Fuente's allegations that the notice requirement imposes a severe burden are speculative and unsupported by the record

De La Fuente makes multiple assertions in his attempt to establish that Washington's convention notice requirement imposes a severe burden on ballot access. All fail because he cannot rewrite Washington law and this record does not support his version of the facts.

First, Washington law legitimately distinguishes between major political parties and minor political parties, and drawing a distinction between major and minor parties is not inherently discriminatory. Wash. Rev. Code §§ 29A.04.086, .097; *Am. Party of Tex. v. White*, 415 U.S. 767, 782 n.13 (1974); Answer Br. at 20-21. Furthermore, the record shows that De La Fuente was a minor party candidate for the American Delta Party in 2016. ER 233, 270-74. He neither was

a major party candidate obtaining ballot access solely through nomination at a national convention, nor was he an independent candidate. ER 270-74. Again, his complaint challenged only the notice requirement, not the requirement that minor party candidates hold conventions. ER 332-39.

Second, under state law, minor party conventions must be "organized assemblages" of registered voters. Wash. Rev. Code § 29A.56.600. "To be valid, a convention must be attended by at least one hundred registered voters, but a minor party or independent candidate holding multiple conventions may add together the number of signatures of different individuals from each convention in order to obtain . . . the signatures of at least one thousand registered voters of the state of Washington." Wash. Rev. Code §§ 29A.56.610; .640. While De La Fuente prefers to characterize minor party conventions as simple signature gathering drives, rather than "organized assemblages" "attended by at least one hundred registered voters," e.g., Answer Br. at 18, 23, the plain language of Washington's statutes does not support his view. Wash. Rev. Code § 29A.56.600. Nor do the facts in this record. *See* ER 126; Answer Br. at 18, 23, 38 (providing no record citations). Washington's minor party convention requirements have not been "watered down" to include just "petitioning activity." *See* Answer Br. at 23; Wash. Rev. Code §§ 29A.56.600, .610.

Instead, minor political parties must determine their presidential and vice presidential nominees at their nominating conventions in Washington in order for them to appear on the Washington ballot. Wash. Rev. Code § 29A.56.600, .610. A certificate evidencing nominations for these offices must be verified by the oath of the convention's presiding officer and secretary. Wash. Rev. Code § 29A.56.640. Minor parties must also nominate their presidential electors for Washington at their Washington conventions. Wash. Rev. Code § 29A.56.320.[1] These actions extend beyond mere signature gathering.

Third, Washington's convention notice requirement, by its plain language, simply requires notice in a newspaper of general circulation in the county at least ten days before a minor party convention is to be held. Wash. Rev. Code § 29A.56.620. The notice requirement does not prevent anyone from engaging in speech to support or oppose a candidate or party during any time period before, during, or after the convention. De La Fuente admits that the State does

[1] The necessity of nominating presidential electors is a task uniquely required of parties qualifying candidates for President and Vice President. No other candidate, initiative, or referendum process requires the appointment of electors. This alone justifies the distinction between the nomination process for presidential and vice presidential candidates and the nominating process for other types of candidates. Wash. Rev. Code § 29A.56.320; *see also* Answer Br. at 36 (lamenting that there is a convention requirement for minor party and independent candidates for President and Vice President, but not for qualifying initiatives, referenda, and other types of candidates for the ballot).

not require a permit to hold a minor party convention. Answer Br. at 27-28. The State does not impose any restriction on the content of speech about presidential candidates or political parties more generally. The notice requirement in no way governs what can be said at a minor party convention, nor does it dictate what a person can say when collecting signatures on nominating petitions, nor does it significantly inhibit communication with voters.

This distinguishes Washington's convention notice statute from the laws at issue in *Meyer v. Grant*, 486 U.S. 414 (1988) (striking down a prohibition against payment of initiative petition circulators because it significantly inhibited communication with voters) and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (striking down regulations requiring signature gatherers to be registered voters, to wear identification badges, and to report their income from petition circulation). Answer Br. at 25. In Washington, *any* advocate for a minor party candidate can attend a convention and promote a candidate's nomination by collecting signatures at the convention.

Fourth, because it does not dictate *how* a minor party must nominate its presidential and vice presidential candidates or its presidential electors at its Washington convention (including the effect of any prior national convention), Washington's notice requirement does not improperly interfere with the party's

political association rights. *See* Wash. Rev. Code § 29A.56.620. Washington's notice requirement is different from the attempt through state law to dictate who could serve as a delegate to the 1972 Democratic National Convention, the state restriction at issue in *Cousins v. Wigoda*, 419 U.S. 477, 483 (1972). *See* Answer Br. at 40. Federal courts have not applied *Cousins* broadly to prevent *any* state regulation of ballot access for minor party or independent presidential candidates as De La Fuente suggests. Instead, the United States Supreme Court has more recently upheld restrictions on ballot access for presidential candidates where the restrictions are reasonable, non-discriminatory, and supported by important state interests. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Washington's notice requirement does not interfere with the inner workings of party nominations; it simply requires public notice of minor party conventions to promote transparency.

Finally, minor party nomination conventions must be held within a twelve-week window between the first Saturday in May and the fourth Saturday in July in a presidential election year. Wash. Rev. Code § 29A.56.610. The ten-day notice requirement is not unduly burdensome because it does not shorten the window during which conventions can be held. Contrary to De La Fuente's assertions, nothing prevents a minor party from publishing notice at least ten

days before the first Saturday in May to take full advantage of the available convention window. Wash. Rev. Code §§ 29A.56.610, .620; *see also* Answer Br. at 26 (without citation for the proposition that speech is limited "[f]or 10 days within the time period allowed by law"). Some reasonable diligence is required of party organizers, but that does not make the statute unconstitutional.

The notice requirement does not prevent or censor political speech before the convention, it does not impose a prior restraint on speech, nor does it impose extraordinary costs. *See* Answer Br. at 37 (complaining of notice costs generally, but failing to point to any evidence in the record). Moreover, because a party can extend the announced convention to include additional dates and locations until all convention business is complete, the notice requirement does not create the ten-day blackout period between convention events that De La Fuente fears. *See* ER 320-31; Answer Br. at 11, 18, 21, 26-27, 37 (lacking citation to the record). De La Fuente has not established a severe burden on minor parties on this record.

In sum, the district court was correct to conclude that De La Fuente has failed to show a severe burden warranting strict scrutiny of the convention notice requirement. Instead, the notice requirement imposes a de mimimis burden and is valid if it is nondiscriminatory, reasonable, and supported by important government interests.

C. The State's Interest in the Notice Requirement is Substantial Because It Ensures Voters Have Access to Information About Minor Party Conventions

1. Under *Timmons*, To Justify the Notice Requirement the State Need Not Present Empirical Evidence

De La Fuente argues that the State failed to meet its burden to show an important state interest to support the notice requirement, but he is confused about what the State is required to show. *E.g.*, Answer Br. at 13. Absent a severe burden on ballot access, the United States Supreme Court has explained that "the State's asserted regulatory interests need only be 'sufficiently weighty to justify the limitation' imposed on the party's rights." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). More importantly, the State does not have to show empirical verification of the weight of its asserted interests. *Id.* This makes sense because state legislatures should be able to govern the electoral process with foresight rather than reactively, so long as the legislature's regulation is reasonable and does not significantly impinge on constitutional rights. *Id.* (discussing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)). As a result, to support its important interests, the State need not enter empirical evidence into the record, so long as the legislature's foresight is reasonable.

The State "certainly [has] an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes," including "prevent[ing] 'frivolous or fraudulent candidacies.'" *Timmons*, 520 U.S. at 364-65 (quoting *Bullock v. Carter*, 405 U.S. 134, 145 (1972)). Ensuring voters have the information they need to evaluate minor party nominees promotes a transparent process that allows robust development of minor party candidacies. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 458 (2008); *Anderson*, 460 U.S. at 796. The State has an unquestionable interest in an informed electorate who can evaluate which minor party and minor party candidate they want to support, an important choice because voters can choose to sign only one nominating petition under Washington law. *Wash. State Grange*, 552 U.S. at 458; *Anderson*, 460 U.S. at 796; Wash. Rev. Code § 29A.56.630.

In addition, a Washington voter may desire to attend a minor party's convention to engage in debate, to compete with an anticipated nominee, or to nominate a different candidate. A Washington voter may also want to seek selection as a presidential elector for the minor party. *See* Wash. Rev. Code § 29A.56.660. While De La Fuente suggests that minor parties are entitled to hold their conventions in secret to avoid public debate and a public nomination

process, *see* Answer Br. at 44-48, he cites to nothing to support this position, which conflicts with the United States Supreme Court's recognition of the States' interest in protecting the integrity of the political process through well-informed voters. *See Wash. State Grange*, 552 U.S. at 458; *Anderson*, 460 U.S. at 796. Nor does he present an interest in such secrecy that outweighs the State's interest in transparency and open debate that is promoted by public notice of the time and location of minor party conventions. Public notice protects the integrity of Washington's election process and the evidence in the record establishing the State's interest is uncontested. ER 92-93, 126.

2. The Public Notice Requirement Is Reasonable and Nondiscriminatory, and It Need Not Be Narrowly Tailored

De La Fuente contends that the public notice requirement is so burdensome that the burden outweighs the benefit. This is belied by the fact that sixteen candidates have had no trouble complying with the notice requirement in recent years. ER 92. To the extent that De La Fuente laments the ten-day advance notice period, it is reasonable in light of the requirement that voters sign only one presidential nomination petition. *See* Wash. Rev. Code § 29A.56.630. Ten days provides sufficient time, pre-convention, for a registered voter to become aware of the convention, decide which minor party convention(s) to

attend, and arrange for transportation. De La Fuente has cited no evidence in the record to establish that the ten-day notice period is onerous. Answer Br. at 43.

Washington's requirement that the notice be made by newspaper is also reasonable in light of Washington's historical reliance on newspaper notice for electoral events. *E.g.*, Former Wash. Rev. Code § 29.24.030 (1937-1989) (showing Washington's newspaper notice requirement for conventions has been effective since 1937). Newspaper notices are searchable on the internet in a statewide database. *See* https://www.wapublicnotices.com/. And it is reasonable to conclude that newspaper notice is what Washington voters have come to expect for electoral events, as well as a whole host of other important notices including, for example, service by publication. *E.g.*, Wash. Rev. Code § 29A.56.620; *see also* Opening Br. at 27-28.

III. CONCLUSION

This Court should affirm the district court's conclusion that De La Fuente has validly challenged only Wash. Rev. Code § 29A.56.620's notice requirement. This Court should also affirm the district court's conclusion that the notice requirement does not impose a severe burden on ballot access for presidential and vice presidential candidates. Nevertheless, this court should reverse the district court's ultimate conclusion that Wash. Rev. Code

§ 29A.56.620 is unconstitutional. This Court should hold that the notice requirement is nondiscriminatory, reasonable, and that it is supported by important State interests in transparency, voter information, and voter participation.

RESPECTFULLY SUBMITTED this 9th day of October, 2018.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule of Appellate Procedure 28-2.6, Appellant, by and through her undersigned counsel, hereby states that she is unaware of any related cases to the instant appeal that are currently pending in this Court.

s/ Callie A. Castillo
CALLIE A. CASTILLO
Deputy Solicitor General

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule of Appellate Procedure 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 3285 words.

s/ Callie A. Castillo
CALLIE A. CASTILLO
Deputy Solicitor General

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that I electronically filed a true and correct copy of the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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.

DATED this 9th day of October 2018, at Olympia, Washington.

s/ Callie A. Castillo
CALLIE A. CASTILLO
Deputy Solicitor General