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Attorney for Plaintiffs Arizona Libertarian Party and Michael Kielsky

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

The Arizona Libertarian Party and Michael Kielsky,	)	**No. 2:16-cv-01019-DGC**
Plaintiffs,	)	**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**
v.	)	**Oral Argument Requested**
Michele Reagan,	)	
Defendant.	)	

Pursuant to Fed. R. Civ. P. 65(a), Plaintiffs Arizona Libertarian Party ("AZLP") and Michael Kielsky (together, "the Libertarians") respectfully move the Court for a preliminary injunction to enjoin Defendant Michele Reagan ("Secretary Reagan") from enforcing A.R.S. §§ 16-321 and 16-322, as amended in 2015 by the enactment of HB 2608, against write-in candidates in AZLP's August 30, 2016 primary election. The Libertarians further request that the Court order Secretary Reagan to issue letters declaring nomination to their primary election write-in candidates pursuant to A.R.S. § 16-645(E), provided that such candidates win their respective races and receive at least as many votes as the number of signatures that Section 16-322 would have required them to submit on nomination petitions prior to its amendment in 2015.

In support of this motion, the Libertarians submit the attached Memorandum of Law, and

state that all relevant factors weigh in favor of granting the relief requested. The Libertarians also submit the Declaration of Jonathan Apirion and the Third Declaration of Michael Kielsky, attached as Exhibit A. Finally, the Libertarians incorporate by reference evidentiary Exhibits A, B, C, D, and E attached to their Complaint (Dkt. No. 1), and the Second Declaration of Michael Kielsky, which they submitted in support of their Emergency Motion for Temporary Restraining Order and Preliminary Injunction (Dkt. No. 10).

On May 27, 2016, the Court denied the Libertarians' aforementioned emergency motion for preliminary relief on the basis of laches, without reaching the merits of their claims. (Dkt. 17.) Unlike that motion, however, which sought relief in time for a June 1, 2016 filing deadline, the instant motion only seeks relief in time for the primary election on **August 30, 2016** – nearly three full months from the date of this filing. The instant motion therefore may be briefed, argued and decided under the ordinary timeframe established by the Court's Local Rule of Civil Procedure 7.2, without causing any prejudice to the parties, to the Court, or to the orderly administration of justice. Consequently, the considerations that led the Court to deny the Libertarians' emergency motion for preliminary relief are not implicated here. The instant motion for a preliminary injunction thus should be granted for the reasons set forth herein.

Dated: June 4, 2016

Respectfully submitted,

/s/Oliver B. Hall
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

The Arizona Libertarian Party and Michael Kielsky,	)	**No. 2:16-cv-01019-DGC**
Plaintiffs,	)	**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**
v.	)	
Michele Reagan,	)	
Defendant.	)	

INTRODUCTION

In this action, the Libertarians seek relief from two provisions of Arizona law, A.R.S. §§ 16-321 and 16-322, which establish the requirements that qualified political parties must meet to place their candidates on Arizona's primary election ballot. Prior to their amendment in 2015, these provisions enabled candidates to appear on the primary ballot by submitting nomination petitions with a number of signatures defined as a percentage of their party's registered voters in the relevant jurisdiction. As amended, however, the provisions define the signature requirements as a percentage of all "qualified signers" in the relevant jurisdiction – a pool that includes independent and unaffiliated voters, even though these voters are not eligible to vote in AZLP's closed primary. As applied to the Libertarians – though not to the major parties – this drastically increased the number of signatures required. The new requirements for the Libertarians are generally at least 20 times greater than the old ones, depending on the office, and in many cases much greater. The requirements for Republicans and Democrats, by contrast, have increased only slightly for most offices, if at all, and in many cases they decreased.

The signature requirements that Section 16-321 and 16-322 now impose on the Libertarians are clearly unconstitutional under the settled precedent of the Supreme Court of the

United States and lower federal courts. To comply with them in 2016, Libertarian candidates must obtain signatures amounting to as much as 30.53 percent of the registered Libertarians in the jurisdiction. For several offices, the signature requirement amounts to more than 20 percent of the registered Libertarians in the jurisdiction. Among those Libertarians actively seeking access to AZLP's 2016 primary election ballot, none may do so without obtaining signatures equal to at least 11 percent of the registered Libertarians in their jurisdiction. Yet the Supreme Court has never upheld a signature requirement greater than 5 percent of the pool of eligible voters. Federal courts have thus treated any requirement in excess of that figure as constitutionally suspect if not facially invalid, and no statute imposing such a requirement has survived scrutiny.

The Libertarians are permitted to obtain signatures from independent and unaffiliated voters as well, of course – and in fact, as a practical matter they must do so, because the signature requirements imposed by Section 16-321 and Section 16-322 are otherwise all but impossible to meet. But this forces the Libertarians to associate with non-members, who are not eligible to vote in AZLP's closed primary, for the purpose of choosing their own partisan nominees. The Libertarians object to such compelled association on principle, and they have a constitutionally protected right not to engage in it. In fact, less than a decade ago, this Court struck down Arizona's previous statutory scheme precisely because it allowed non-members to vote in the AZLP primary, over the objections of the Libertarians themselves. *See Arizona Libertarian Party v. Brewer*, No. 02-144-TUC-RCC (D. Az. Sept. 27, 2007) (unpublished order) (permanently enjoining Arizona's Secretary of State from requiring AZLP to allow non-members to vote in its primary elections).

The statutory scheme challenged herein violates the clear purpose, if not the precise letter, of the permanent injunction granted in *Brewer*. Although the Libertarians are not required to permit non-members to vote in their primary, they must rely on non-members to place their candidates on the primary ballot in the first instance. This enables non-members to play a substantial if not dispositive role in determining which candidates AZLP may nominate. Consequently, as in *Brewer*, "the Arizona primary system 'forces [the Libertarians] to associate with – to have their nominees, and hence their positions, determined by – those who, at best, have refused to affiliate with the party, and at worst, have expressly affiliated with a rival.'" *Id.* (quoting *California Democratic Party v. Jones*, 530 U.S. 567, 577 (2000)).

Accordingly, the Libertarians seek a declaratory judgment holding Section 16-321 and Section 16-322 unconstitutional as applied, and an injunction prohibiting Secretary Reagan from enforcing those provisions against them. In the instant motion, the Libertarians seek preliminary injunctive relief as necessary to enable write-in candidates who win their respective races in AZLP's August 30, 2016 primary election to appear on Arizona's November 8, 2016 general election ballot pursuant to A.R.S. § 16-645(E). That provision allows such candidates to appear on the general election ballot if they receive at least as many write-in votes in the primary election as the number of signatures that Section 16-322 would have required had they submitted a nomination petition. *See* A.R.S. § 16-645(E). The Libertarians thus request that the Court enjoin enforcement of the increased signature requirements imposed by Section 16-322 against their write-in candidates in the primary election, and order Secretary Reagan to issue these candidates letters declaring nomination, provided that they receive the number of write-in votes that 16-645(E) would have required prior to the amendment of Section 16-322 in 2015.

The Libertarians have already recruited 12 members to run in AZLP's primary election as write-in candidates, and they are in the process of recruiting many more. Third Kielsky Dec. ¶¶ 4-5. In the absence of the relief requested herein, however, these write-in candidates will be barred from appearing on Arizona's 2016 general election ballot pursuant to Section 16-645(E), even if they win their respective races, due to the unconstitutional signature requirements that Section 16-322 now imposes. This will deny the Libertarians an historic opportunity to build support for their party by capitalizing on the unprecedented interest in their presidential ticket in this election cycle. Third Kielsky Dec. ¶ 12. As set forth below, therefore, all relevant factors weigh decisively in favor of granting the relief requested herein.

FACTUAL AND PROCEDURAL BACKGROUND

The Libertarians commenced this action on April 12, 2016, by filing their Complaint for declaratory and injunctive relief from Sections 16-321 and 16-322. (Dkt. No. 1) ("Comp."). The relevant facts are alleged in the Complaint and incorporated herein by reference. Comp. ¶¶ 6-47. Based on those allegations, the Complaint asserts four claims for relief from the challenged provisions: Count I asserts that the signature requirements they impose are unconstitutional; Count II asserts that the compelled association they necessitate is unconstitutional; Count III asserts that their interference with the Libertarians' effort to establish a political party is unconstitutional; and Count IV asserts that they violate the Equal Protection Clause by imposing severe burdens that fall on the Libertarians alone. Comp. ¶¶ 48-66. Each of these claims warrants the preliminary relief requested herein.

LEGAL STANDARD

A plaintiff seeking a preliminary injunction must establish "that he is likely to succeed on

the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Thalheimer v. City of San Diego*, 645 F. 3d 1109, 1115 (9th Cir. 2011) (citation omitted). A plaintiff also may obtain such relief by showing that there are "serious questions going to the merits," the balance of hardships tips sharply in his favor, there is a likelihood of irreparable injury, and the injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this "sliding scale approach," a plaintiff may make a lesser showing of likelihood of success provided he will suffer substantial harm in the absence of relief. *Id*. at 1133.

In the First Amendment context, once the plaintiff "bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement … the burden shifts to the government to justify the restriction." *Thalheimer*, 645 F.3d at 1116 (citation omitted). To determine whether the Libertarians have carried their burden, the Court may rely on the sworn Declarations they have submitted. *See id.* (citing *Ross-Whitney Corp. v. Smith Kline & French Labs.*, 207 F.2d 190, 198 (9th Cir. 1953) (explaining that "a requirement of oral testimony would in effect require a full hearing on the merits and would thus defeat one of the purposes of a preliminary injunction which is to give speedy relief from irreparable injury")). The Court also may rely on the public records submitted as Exhibits A, B and C to the Complaint. *See Dudum v. Arntz*, 640 F.3d 1098, 1101 n.2 (9th Cir. 2011) (taking judicial notice of elections records available on governmental websites); *see also Santa Monica Food Not Bombs v. Santa Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006) (citation omitted); *American-Arab Anti-Discrimination v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995).

ARGUMENT

I. All Relevant Factors Weigh in Favor of Granting the Libertarians Preliminary Injunctive Relief.

A. The Libertarians Are Likely to Prevail on the Merits, Because Arizona's Statutory Scheme Imposes Severe and Unequal Burdens on Them But Does Not Further Any Compelling or Legitimate State Interest.

The Supreme Court has recognized that constitutional challenges to state election laws "cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). It therefore established an analytical process that courts must follow in deciding such cases. Specifically, a reviewing court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (quoting *Anderson*, 460 U.S. at 789). The severity of the burdens the election law imposes on the plaintiff's rights dictates the appropriate level of scrutiny. *See id.* (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). An election law that imposes severe burdens "is subject to strict scrutiny and will be upheld only if it is narrowly tailored to serve a compelling state interest," *see id.*, whereas an election law that imposes "reasonable, nondiscriminatory restrictions" is subject to a lesser standard of review. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. At 788). Under this analysis, Arizona's statutory scheme cannot be sustained.[1]

1. Arizona's Statutory Scheme Imposes Severe and Unequal Burdens on the Libertarians' First and Fourteenth Amendment Rights.

a. The Signature Requirements Established By Sections 16-321 and 16-322 Violate the Limits Established By Supreme Court Precedent.

1 The Ninth Circuit has construed the *Anderson-Burdick* analysis to apply to both First Amendment and Fourteenth Amendment Equal Protection claims. *See Dudum*, 640 F.3d at 1106 n.15.

It is well-settled that states may require that candidates demonstrate a "modicum of support" among the electorate before placing them on the ballot. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Most states do so by requiring that candidates submit a nomination petition with a specified number of signatures from eligible voters. *See id.* The purpose of the signature requirement, as this Court observed in its May 27, 2016 order (Dkt. No. 17 at 2), is "to ensure that candidates have 'adequate support from eligible voters to warrant being placed on the ballot.'" *Jenkins v. Hale*, 190 P.3d 175, 176, ¶ 6 (Ariz. Ct. App. 2008) (quoting *Lubin v. Thomas*, 144 P.3d 510, 512, ¶ 15 (Ariz. 2006)). The number of signatures that states may require is limited, however, by the First and Fourteenth Amendment rights of the candidates and their supporters. *See Jenness*, 403 U.S. at 440. And while there may be no "litmus-paper test" for determining the constitutionality of ballot access statutes, *Storer*, 415 U.S. at 730, the Supreme Court has never upheld a statute that imposed a signature requirement amounting to more than 5 percent of the pool of eligible voters. *See id.* at 739 (citing *Jenness*, 403 U.S. 431).

In *Jenness*, the Supreme Court upheld Georgia's requirement that minor party and independent candidates submit nomination petitions with signatures equal in number to 5 percent of the eligible voters in the last election. *See Jenness*, 403 U.S. at 432. The Court made clear, however, that this "somewhat higher" percentage was permissible because it was "balanced" by the fact that Georgia's law did not impose many other restrictions, and allowed any registered voter to sign the petitions. *Id*. at 438, 442. *Jenness* thus established that states may not require candidates to show support from substantially more than 5 percent of the pool of eligible voters in order to access the ballot. *See id.* at 442.

The Supreme Court recognized and reaffirmed that limit in *Storer*. *See Storer*, 415 U.S. at

739. *Storer* involved a challenge to California's requirement that independent candidates obtain signatures equal in number to 5 percent of the total vote in the last general election. *See id.* The Court acknowledged that this percentage did not appear to be unconstitutional on its face, but remanded for a determination of whether the requirement was impermissibly burdensome, given that partisan primary voters were ineligible to sign the candidates' petitions. *See id.* Exclusion of those voters might make California's signature requirement "substantially more than 5% of the eligible pool," the Court reasoned, which "would be in excess, percentagewise, of anything the Court has approved." *Id.*

Three Justices dissented in *Storer* on the ground that remand was unnecessary, because the record demonstrated that the exclusion of primary voters resulted in a requirement that independent candidates demonstrate support from 9.5 percent of the pool of eligible voters. *See id*. at 764 (Brennan, J. dissenting). Thus, Justice Brennan wrote, the available evidence left "no room for doubt that California's statutory requirements are unconstitutionally burdensome." *Id*. at 763. Despite dividing on the need for remand, however, both the majority and dissent in *Storer* reaffirmed what the Court had previously established in *Jenness*: states may not require that candidates seeking ballot access show support from substantially more than 5 percent of the pool of eligible voters. *See id*. at 739, 763-64; *Jenness*, 403 U.S. at 442.

Even prior to *Storer* and *Jenness*, the Supreme Court had made clear that the First and Fourteenth Amendments limit the showing of support that states may require of candidates seeking ballot access. *See Williams v. Rhodes*, 393 U.S. 23 (1968) (striking down Ohio statute requiring signatures equal in number to 15 percent of the vote in the preceding gubernatorial election). In *Williams*, the Court held Ohio's entire ballot access scheme unconstitutional on

equal protection grounds, because in its totality, it practically guaranteed a monopoly to the two major parties. *See id.* at 32, 34. Justice Harlan wrote separately, however, to emphasize that Ohio's 15 percent signature requirement also "violates the basic right of political association assured by the First Amendment." *Id.* at 41 (Harlan, J. concurring). Both Justice Harlan and the majority observed that 42 states imposed relatively lenient signature requirements of 1 percent or less of the pool of eligible voters, whereas only four states imposed a requirement of 3.1 to 5 percent, while Ohio's draconian 15 percent requirement was in a class by itself. *See id.* at 33 n.9, 47 n.10. "Even when regarded in isolation," Justice Harlan therefore concluded, Ohio's 15 percent requirement "must fall." *Id.* at 46 (Harlan, J. concurring).

Following *Jenness*, *Storer* and *Williams*, federal courts have routinely invalidated ballot access schemes such as Arizona's, which require a showing of support from more than 5 percent of the pool of eligible voters. *See*, *e.g.*, *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006) (striking down Illinois law requiring showing of support equal to 10 percent of last vote); *Obie v. North Carolina State Bd. of Elections*, 762 F. Supp. 119 (E.D.N.C. 1991) (striking down North Carolina law requiring showing of support equal to 10 percent of registered voters); *Greaves v. State Bd. of Elections of North Carolina*, 508 F. Supp. 78 (E.D.N.C. 1980) (striking down North Carolina law requiring showing of support equal to 10 percent of last gubernatorial vote); *Lendall v. Jernigan*, 424 F. Supp. 951 (E.D. Ark. 1977) (striking down Arkansas law requiring showing of support equal to 10 percent of last gubernatorial vote); *American Party of Arkansas v. Jernigan*, 424 F. Supp. 943 (E.D. Ark. 1977) (striking down Arkansas law requiring showing of support equal to 7 percent of last gubernatorial vote); *Lendall v. Bryant*, 387 F. Supp. 397 (E.D. Ark. 1974) (striking down Arkansas law requiring showing of support equal to 15 percent of last

gubernatorial vote); *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262 (S.D. Oh. 1970) (striking down Ohio law requiring showing of support equal to 7 percent of last gubernatorial vote). By contrast, no court has upheld a statute that requires a showing of support from more than 5 percent of the pool of eligible voters.

The foregoing precedent thus makes clear that Arizona's signature requirements violate the limits established by the Supreme Court's ballot access jurisprudence, as uniformly applied by the lower federal courts. To appear on the AZLP primary election ballot in 2016, a Libertarian candidate in Legislative District ("LD") 18, for example, must obtain signatures equal in number to 30.53 percent of the registered Libertarians – who are the only voters eligible to vote in AZLP's closed primary – in that district. Comp. ¶ 36. A Libertarian candidate in Congressional District ("CD") 4 must obtain signatures equal in number to 28.10 percent of the registered Libertarians in that district. Comp. ¶ 38. Libertarian candidates in several other jurisdictions must obtain signatures equivalent to more than 20 percent of the eligible Libertarian voters. Comp. ¶¶ 33, 39, 40. In fact, every candidate actively seeking access to the AZLP 2016 primary ballot faces a signature requirement equal to at least 11.18 percent of the pool of eligible voters. Comp. ¶¶ 33-40. Such excessive burdens are constitutionally suspect, if not facially invalid.

b. Compelling the Libertarians to Obtain Signatures From Independent and Unaffiliated Voters Violates Their Freedom of Association.

Because the signature requirements imposed by Sections 16-321 and 16-322 are all but insurmountable when measured as a percentage of Libertarians alone, candidates seeking to appear on the AZLP primary ballot have no choice but to obtain signatures from both Libertarians and independent and unaffiliated voters. But this does not lessen the burden that Arizona's statutory scheme imposes on the Libertarians. It just exposes them to another burden –

opening their candidate-selection process to non-members – that is even more severe. *See Jones*, 530 U.S. at 581-82 ("We can think of no heavier burden on a political party's associational freedom" than forcing it "to adulterate [its] candidate-selection process … by opening it up to persons wholly unaffiliated with the party").

This Court relied squarely on *Jones* when it struck down Arizona's previous statutory scheme, which forced the Libertarians to allow independent voters to participate in the AZLP primary. *See Brewer*, No. 02-144-TUC-RCC (unpublished order entered Sept. 27, 2007). The facts in this case differ from *Brewer*, in that the AZLP primary remains closed to non-members, but the concerns implicated remain the same. As the Supreme Court explained in *Jones*:

> a corollary of the right to associate is the right not to associate. Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being. … In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views.

Jones, 530 U.S. at 574-75 (citations and quotation marks omitted). These concerns are implicated here because candidates cannot realistically appear on the AZLP primary ballot unless they obtain support from voters who do not belong to the AZLP. Arizona's primary system thus "encourages candidates … to curry favor with persons whose views are more 'centrist' than those of the party base." *Id.* at 580.

In the appeal that preceded this Court's decision on remand in *Brewer*, the Ninth Circuit identified two potential "outcomes" of Arizona's primary system that would raise constitutional concern under *Jones*: that non-members of a party could "influence the choice of the nominee," or that they could "cause partisan candidates to change their message to appeal to a more centrist

voter base." *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277, 1282 (9th Cir. 2003). Minor parties such as the AZLP "are at a greater risk" of suffering both harms, the Court found. *Id.* But the Court concluded that whether the AZLP actually faces such a risk is "a factual issue, with [the Libertarians] having the burden of establishing that risk."

The Libertarians have carried that burden. In their Complaint and sworn Declarations, they have provided substantial evidence to prove that independent and unaffiliated voters in fact wield significant influence over the process by which the AZLP chooses its nominees. Comp. ¶¶ 42-43 (citing Declarations). Specifically, Libertarian candidates who formerly obtained ballot access are now finding it impossible to do so, and their efforts are hindered by their difficulty in obtaining support from independent and unaffiliated voters. *See id.*; Third Kielsky Dec. ¶¶ 3,7; Apirion Dec. ¶¶ 3-8. Plaintiff Kielsky, for example, received a letter from a supporter who reported that "I couldn't interest any independents (other than my family) to sign" his nomination petitions. *See* Second Kielsky Dec. ¶¶ 7-8. Such evidence demonstrates that candidates seeking access to the AZLP primary ballot have a strong incentive "to change their message to appeal to a more centrist voter base." *Bayless*, 351 F.3d at 1282. This "potential distortion forced on the Libertarian party" by Arizona's statutory scheme thus "imposes a severe burden on the [AZLP]," in violation of the Libertarian's freedom of association. *Brewer*, No. 02-144-TUC-RCC (Sept. 27, 2007).

c. The Severe Burdens Imposed By Sections 16-321 and 16-322 Fall on the Libertarians Alone.

The 2015 amendments to Sections 16-321 and 16-322 generally caused little or no increase to the signature requirements that Republican and Democratic candidates must meet, and in many cases, it lowered them. Comp. ¶¶ 25-29 (citing public records available from the

Secretary of State's website). Additionally, the only other politically party formally recognized under Arizona law, the Arizona Green Party ("AZGP"), is not subject to the signature requirements imposed by the provisions challenged herein. Comp. ¶ 30. The severe burdens identified above – the unconstitutionally burdensome signature requirements, and the compelled association with non-members – thus fall on the Libertarians alone.

2. The Severe and Unequal Burdens Imposed By Arizona's Statutory Scheme Are Not Necessary to Further Any Compelling or Legitimate State Interest.

The interests typically asserted by states to justify regulations limiting the number of candidates that may appear on the ballot are not implicated in this case. The Supreme Court has recognized, for example, that a state properly may seek "to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections," and also that a state has "an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock v. Carter*, 405 U.S. 134, 145 (1972). None of these interests are implicated, however, for the simple reason that Libertarian candidates almost always run unopposed in the AZLP primary. This may be confirmed by reference to the public records available on the Secretary of State's website, which list every primary election candidate on the ballot dating at least to 1996. *See* Arizona Secretary of State, *Historical Election Information*, available at http://www.azsos.gov/elections/voter-registration-historical-electiondata/ historical-election-information (last visited May 12, 2016). Consequently, the foregoing interests, which might otherwise justify a state's decision to increase signature requirements, cannot do so here.

The state interests typically asserted to justify ballot access requirements are particularly

unsuited to justify the minimum vote requirement imposed upon write-in candidates pursuant to Sections 16-322 and 16-345(E), because write-in candidates do not appear on the primary election ballot at all. As a result, there is no danger that they will "clog" Arizona's election machinery or confuse voters in that election. And since only one candidate in each race can win the primary election and advance to the general election, there is no threat to the integrity of the general election ballot, either. For these reasons, this Court has previously held that Section 16-645(E) "does not further a compelling state interest and is unconstitutional as a violation of the First and Fourteenth Amendments." *Socialist Workers Party of Arizona v. Mofford*, No. 80-cv-293-PHX-CLH (July 22, 1980) (unpublished order enjoining enforcement of Section 16-645(E)) (attached as Exhibit B).

B. The Libertarians Will Suffer Irreparable Harm in the Absence of Preliminary Relief.

The Ninth Circuit has recognized the "long line of precedent establishing that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury'" for purposes of a preliminary injunction. *Thalheimer*, 645 F.3d at 1128 (citing *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir.2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). "The harm is particularly irreparable" in the context of an election, because "'timing is of the essence in politics' and '[a] delay of even a day or two may be intolerable.'" *Id.* (quoting *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1020 (9th Cir.2008)). The Libertarians will therefore suffer irreparable harm in the absence of the relief requested herein.

C. The Balance of Equities Weighs in Favor of Granting the Libertarians Relief.

The balance of equities in this case also weighs in favor of granting the Libertarians

relief. Whereas the Libertarians will suffer serious harm to their voting rights, *see Williams*, 393 U.S. at 30, associational rights, *see Bullock*, 405 U.S. at 143, and their right to establish and build support for their party, *see Norman v. Reed*, 502 U.S. 279, 288 (1992), the foregoing discussion demonstrates that Secretary Reagan cannot assert any countervailing concern. Arizona's legitimate interests were adequately protected prior to the 2015 amendments to Sections 16-321 and 16-322. Enjoining their enforcement against write-in candidates in AZLP's 2016 primary election will therefore do the state no harm.

D. Granting an Injunction Is in the Public Interest.

Finally, the public interest also weights in favor of granting the Libertarians relief, because "courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Thalheimer*, 645 F.3d at 1129 (citation omitted); *see Collins v. Brewer*, 727 F. Supp. 2d 797, 814 (D. Az. 2010) ("It would not be in the public's interest to allow the State to violate the plaintiffs' rights … when there are no adequate remedies to compensate plaintiffs for the irreparable harm caused by such violation.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction should be granted.

Dated: June 4, 2016

Respectfully submitted,

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2016, I filed the foregoing Plaintiffs' Motion for Preliminary Injunction, by means of the Court's CM/ECF system, which will effect service upon all counsel of record.

/s/Oliver B. Hall
Oliver B. Hall

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

The Arizona Libertarian Party and Michael Kielsky,	)	
Plaintiffs,	)	**No. 2:16-cv-01019-DGC**
v.	)	**ORDER**
Michele Reagan,	)	
Defendant.	)	

AND NOW, this _____day of _____, 2016, upon consideration of Plaintiffs' Motion for Preliminary Injunction, and any Opposition filed thereto, IT IS HEREBY ORDERED that the motion is GRANTED.

IT IS FURTHER ORDERED that Defendant Michele Reagan and her agents are hereby ENJOINED from enforcing A.R.S. §§ 16-321 and 16-322, as amended in 2015, against Plaintiffs Michael Kielsky, the Arizona Libertarian Party, and their write-in candidates for public office in the August 30, 2016 primary election ballot of the Arizona Libertarian Party.

IT IS FURTHER ORDERED that Defendant Michele Reagan shall place write-in candidates who run in the August 30, 2016 primary election of the Arizona Libertarian Party on Arizona's November 8, 2016 general election ballot pursuant to A.R.S. § 16-645(E), provided that the candidates receive at least as many votes in the primary election as the number of signatures that A.R.S. §§ 16-321 and 16-322 would have required on a nomination petition prior to their amendment in 2015.

EXHIBIT A

Declaration of Jonathon Apirion; Third Declaration of Michael Kielsky

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE ARIZONA LIBERTARIAN PARTY, et al.	)	
Plaintiffs,	)	
v.	)	**No. 2:16-cv-01019**
MICHELE REAGAN,	)	
Defendant.	)	

THIRD DECLARATION OF MICHAEL KIELSKY
(pursuant to 28 U.S.C. § 1746)

I, Michael Kielsky, hereby declare as follows:

1. I am 51, and competent to state the following.

2. I currently serve as Chair of the Arizona Libertarian Party ("AZLP").

3. AZLP has recruited no fewer than 15 candidates to run for office in Arizona's 2016 election, but almost none of them even came close to complying with the increased signature requirements imposed by A.R.S. §§ 16-321 and 16-322 as amended in 2015. As a result, they must run in AZLP's August 30, 2016 primary election as write-in candidates.

4. The following individuals have committed to run in AZLP's primary election as write-in candidates:

i. Kim Allen (U.S. House, Congressional District 1)
ii. Joe Cobb (U.S. House, Congressional District 7)
iii. Mike Shipley (U.S. House, Congressional District 9)
iv. Kimberly Richards (Corporation Commissioner)

v. Lew Levenson (Corporation Commissioner)
vi. Eric Tannehill (State Senate, Legislative District 12)
vii. Chris Will (State Senate, Legislative District 26)
viii. Chad Wolett (State Senate, Legislative District 17)
ix. Dr. Peter J. Wegner (State House, Legislative District 26)
x. Robert A. Pepiton II (State House, Legislative District 27)
xi. Jonathan Apirion (Coconino County Attorney)
xii. Michael Kielsky (Maricopa County Attorney)

5. AZLP is actively recruiting additional candidates to run as write-ins in its 2016 primary, and we expect that many more will commit to do so before the July 21, 2016 deadline for filing their statements of candidacy forms. We expect to have a candidate for every federal office (6 more), about 10 more for the Arizona legislative offices, and about another 3 candidates for county level offices, for a slate comparable to prior Presidential election year cycles.

6. Three candidates also submitted nomination petitions to appear on AZLP's primary ballot prior to the June 1, 2016 deadline. Gregory Kelly submitted 620 signatures to meet the 436-signature requirement for candidates for Maricopa County Justice of the Peace, but was able to do so only by working on his petition drive full-time for approximately 70 days. Chad Thomas Lisk filed 1,888 signatures on his nomination petitions for Maricopa County Sheriff – only seven more than the 1,881-signature requirement. And Frank Tamburri filed nomination petitions to run for U.S. Senate, but was able to meet the requirement only through the use of a professional signature-gathering firm using a dozen signature-gatherers – something few AZLP members are able to do.

7. My own signature drive as a candidate for Maricopa County Sheriff fell far short of the 1,881-signature requirement. Despite working diligently and consistently (but not full time – I work full time, and have numerous other leadership duties with various bar, civic, and

political groups), I was only able to gather approximately 450 signatures in total. I collected the vast majority myself, though I had some assistance from the occasional volunteer.

8. In 2004, AZLP had no fewer than 35 candidates on the general election ballot.

9. In 2008, AZLP had no fewer than 19 candidates on the general election ballot.

10. In 2012, AZLP had no fewer than 18 candidates on the general election ballot.

11. In 2004, 2008 and 2012, there were no serious complaints – much less any evidence – of overcrowded ballots, voter confusion, or any of the other reasons asserted to justify restrictions on ballot access.

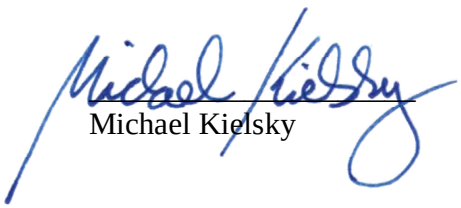
12. AZLP intends to make the 2016 election a turning point in our growth as a party, by building on the increased interest the Libertarian Party is generating among voters nationwide. Polls routinely show unprecedented levels of voter dissatisfaction with the two major parties' presumptive presidential nominees, while showing more support than ever for the Libertarian Party ticket. The 2016 election cycle thus presents AZLP with an historic and perhaps unique opportunity to break through the barriers that inhibit the growth of new parties in the United States – but we cannot seize this opportunity if we are substantially prevented from placing our candidates on the ballot. It is therefore imperative that our write-in candidates advance beyond the primary election and appear on the general election ballot, so that voters recognize AZLP as a viable alternative to the two major parties.

13. The statements and matters alleged herein are within my personal knowledge, and true and correct to the best of my knowledge and belief, except as to those allegations stated upon information and belief, and, as to those allegations, I believe them to be true.

Third Declaration of Michael Kielsky

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: June 3, 2016



Michael Kielsky

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

THE ARIZONA LIBERTARIAN PARY, et al. **Plaintiffs,** **v.** **MICHELE REAGAN,** **Defendant**	**No. 2:16-cv-01019**

DECLARATION OF JONATHAN APIRION

(pursuant to 28 U.S.C. § 1746)

I, Jonathan Apirion, hereby declare as follows:

1. I am 50 years old, and competent to state the following:
2. I am an attorney and member of the Arizona Bar (Bar # 019655) in good standing.
3. I am registered to vote as a Libertarian and I have been attempting to secure a place on the Arizona Libertarian Party's primary ballot as a candidate for Coconino County Attorney. The primary will take place August, 30, 2016.
4. I obtained a complete list from the Coconino County Elections office of voters who were registered as Libertarians in Coconino County on April 11, 2016. It contained 699 names along with their addresses and other information. Coconino County is large geographically and the Libertarians are spread out over all of it.
5. The minimum number of signatures required to appear on the 2016 primary ballot as a Libertarian in Coconino County for County wide office was 238. In 2012 it was 15. My wife, several volunteers and myself succeeded in obtaining 289 signatures, but after checking the majority of them against the database of registered voters at the County Elections office before the Memorial Day

weekend when we collected more, I determined that while the margin was close, our petitions included too many invalid signatures to successfully defend against what I believed would be an inevitable challenge, and that it would therefore be inappropriate for me to submit them. (Although this is partly a projection and estimate, I believe that approximately 210 of the signatures are valid.)

6. Our efforts to obtain the required number of valid signatures were sincere, diligent, exhausting and ended up taking far more time than I expected. I left my last job at the Coconino County Attorney's office December 31, 2015. I expected to have sufficient time this spring while conducting the campaign to either start a solo practice or pursue other employment options, but time spent attempting to gather signatures hindered those efforts.

7. In addition to the list of registered Libertarians in Coconino County I bought some precinct lists for Independent and unaffiliated voters. My wife and I spent several weekends as well as many afternoons walking door to door with these lists, knocking on the doors of Independents and the occasional Libertarian. As a very rough estimate, I believe that my wife and I knocked on between eight hundred and a thousand different doors. As a rough estimate, there seemed to be around three to six Independents per block. Often no one was home or the appropriately registered voter was out. Sometimes Independents were not willing to support a Libertarian. The process was very slow, and even though we were leap-frogging houses rather than going to them together, we netted an average of around three or four per hour. This was not only inefficient, it was also extremely demoralizing. Another tactic we tried was only going to the homes of registered Libertarians. This was less demoralizing, because the Libertarians were always supportive and enthusiastic when they were home, but it was even less efficient. (Efficiency was not enhanced by the phenomenon of the Libertarians wanting to spend more time talking about policy issues than was the case with most other voters.) Because Libertarians are few and spread out, it required a lot of driving. I also tried sending out e-mails to all the registered libertarians who included their e-mail addresses with their registrations, inviting them to meet me at particular places where I would spend the day, with some gratifying, but limited success.

8. My wife and I, as well as other volunteers also spent time collecting signatures at public events including Earth day, Farmer's markets, outside the post office, at the entrance to Buffalo Park, at gun shows, etc.. I think it was under these circumstances where most of the invalid signatures were collected. Despite our best efforts to limit signers to those that are allowed under the statutes, sometimes people sign who are not clear about their registration status. Some do their best, but still write illegibly, and then there is no way to verify their status. It took time to explain why we were limited in which signatures we could accept and why we needed to focus on Independents to get on the primary ballot, despite the fact that Independents can't actually vote in the Libertarian's closed primary. This does not make much sense, and trying to summarize the political manipulations that caused it without sounding bitter was difficult for all of us. Many independents wanted to talk about being excluded from the presidential primary, a subject about which they are often still bitter. During such conversations at public events, twenty or thirty potential signers might pass by, so a circulator tries to loosen up a little and just get some signatures with a more minimal introduction and explanation.
9. I would like to continue with the campaign. I was a prosecutor for 15 years. I am a dedicated Libertarian and some of my writings related to my policy positions are on my web sit at apirion.org. Even if my chances of winning the general election are small, I am a serious candidate. I am not aware of any one else attempting to run for Coconino County Attorney as a Libertarian. Many people have expressed support for my positions and a desire to see Libertarian perspectives voiced as a part of the discussion during the general election. However, right now the only option for continuing is as a write in candidate in the primary election and I would need 238 registered Libertarians to write my name in. That is 238 out of the 699 registered Libertarians. The rules concerning primaries are supposed to prevent frivolous candidates from crowding the ballots, not make candidacy effectively impossible for qualified individuals who have serious intentions.

10. The statements and matters alleged herein are within my personal knowledge, and true and correct to the best of my knowledge and belief, except as to those allegations stated upon information and belief, and, as to those allegations, I believe them to be true.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the forgoing is true and correct.

DATE: 06-02-2016

Jonathan Apirion

EXHIBIT B

***Socialist Workers Party of Arizona v. Mofford*, No. 80-cv-293-PHX-CLH (July 22, 1980)**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FILED

JUL 22 1980

W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY _____ DEPUTY CLERK

SOCIALIST WORKERS PARTY OF ARIZONA; ROB ROPER,

Plaintiffs,

vs.

ROSE MOFFORD, in her official capacity as Secretary of State of Arizona,

Defendant.

No. CIV 80-293 PHX CLH

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

FINDINGS OF FACT

1. The State of Arizona comprehensively regulates the manner in which elections are conducted by an Election Code which includes the following provisions:

a. A.R.S. §16.801 provides that a new political party may become eligible for recognition and shall be represented by an official party ballot at the next ensuing regular primary election and accorded a column on the official ballot at the succeeding general election upon filing with the Secretary of State a petition (1) signed by a number of qualified electors equal to not less than two percent of the total votes cast for governor or presidential electors at the last preceding general election, (2) bearing the certification of the county recorder of each county that the signatures on the petition have been examined and that they are signatures of qualified electors of the county and (3) verified by the affidavit of ten qualified electors of the state, asking that the signers thereof be recogniz as a new political party.

b. A.R.S. §16-314 requires any person desiring to become a candidate of a political party at a primary election and to have his name printed on the official ballot to file a nomination petition.

c. A.R.S. §16-322D requires a candidate of a new political party to obtain signatures on a nomination petition equal to at least one-tenth of one percent of the total vote for the winning candidate or candidates for governor or presidential electors the last general election.

d. A.R.S. §16-467B provides that only voters who are registered as members of a political party are eligible to vote in that party's primary election.

e. A.R.S. §16-322D provides that only voters who are registered as members of a political party are eligible to sign a party nomination petition.

f. A.R.S. §16-311C provides that the nomination petition of a candidate for the office of presidential elector, United States Senator, representative in congress or for a state office, including a member of the legislature, shall be filed with the Secretary of State.

g. A.R.S. §16-312 provides that any person desiring to become a write-in candidate for an elective office in a primary or general election shall file a nomination paper no later than the Wednesday before the election in the same manner as prescribed in A.R.S. §16-311 and that any person not filing such a statement shall not be counted in the tally of ballots.

h. A.R.S. §16-645 provides (with certain exceptions not material to the issues in this case) that a certificate of nomination shall not be issued to a write-in candidate unless he receives a number of votes equivalent to at least the same number of signatures required by A.R.S. §16-322 for nominating petitions for the same office.

i. A.R.S. §16-302 provides that if no candidate is nominated in the primary election for a particular office, then no candidate for that office for that party may appear on the general election ballot.

2. The defendant Rose Mofford is the Secretary of State of Arizona.

3. On June 3, 1980, the plaintiff Socialist Workers Party was recognized by the Defendant Secretary of State as a new political party in Arizona because it had complied with the requirements of A.R.S. §16-801.

4. The plaintiff Rob Roper is registered to vote as a member of the Socialist Workers Party and desires to be that party's candidate for election as a presidential elector in 1980.

5. In order for the plaintiff Roper to have his name printed on the official ballot of the Socialist Workers Party for the primary election in 1980 he would have to file a nomination petition containing the signatures of at least 283 persons who were registered to vote as members of the Socialist Workers Party.

6. There are only 106 persons in Arizona who are registered as members of the Socialist Workers Party.

7. The plaintiffs have not sustained their burden of proving that voters in Arizona have been deterred from

registering as members of the Socialist Workers Party because of a sustained campaign of government harassment directed against members of that party.

8. The State of Arizona has failed to sustain its burden of proving that there exists a compelling interest which would justify the requirement that a write-in candidate for a new party's nomination in the primary election of 1980 must receive a minimum of 283 votes.

CONCLUSIONS OF LAW

1. The Socialist Workers Party is entitled to a place on the ballot for the primary and general elections in Arizona in 1980.

2. To avoid a cluttered primary ballot the State of Arizona may impose reasonable requirements on [illegible] who desire to have their names printed on the [illegible] ballot.

3. The requirement of A.R.S. §16-322D that a nominating petition of a party nominee of a new party must contain a number of signatures which is at least one-tenth of one percent of the total vote for the winning candidate or candidates for governor or presidential electors at the last general election is not unreasonable.

4. Where a political party has demonstrated sufficient community support to attain ballot status in Arizona, no compelling state interest is served by the requirement of A.R.S. §16-645E that a write-in candidate for a new party's nomination must receive a number of votes equivalent to at least one-tenth of one percent of the total vote for the winning candidate or candidates for governor or presidential electors at the last general election.

5. Declaratory judgment should be entered declaring that A.R.S. §16-322D is constitutional.

6. Declaratory judgment should be entered declaring that A.R.S. §16-645E does not further a compelling state interest and is unconstitutional as a violation of the First and Fourteenth Amendments of the United States Constitution.

7. An injunction should issue enjoining the defendant Secretary of State from refusing to issue a certificate of nomination to a write-in candidate of the Socialist Workers Party as a result of the primary election in 1980 because that candidate did not comply with the requirements of A.R.S. §16-645E.

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That A.R.S. §16-322D is constitutional.

2. That A.R.S. §16-645E does not further a compelling state interest and is unconstitutional as a violation of the First and Fourteenth Amendments of the Constitution of the United States.

3. That the defendant Secretary of State is permanentl enjoined from refusing to issue a certificate of nomination to a write-in candidate of the Socialist Workers Party as a result of the primary election in 1980 because that candidate did not comply with the requirements of A.R.S. §16-645E.

4. Denying plaintiffs' prayer for an award of attorneys' fees.

DATED this 22nd day of July, 1980.

CHARLES L. HARDY
UNITED STATES DISTRICT JUDGE

cc: all counsel of record