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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' REPLY TO SECRETARY OF STATE MICHELE REAGAN'S RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**
v.	)	
Michele Reagan,	)	
Defendant.	)	

In her Response to Plaintiffs' Motion for Preliminary Injunction ("Resp."), Secretary of State Michele Reagan misstates several key points of fact and law, in an effort to convince the Court that A.R.S. §§ 16-321 and 16-322 only impose a "de minimis burden" on Plaintiffs Arizona Libertarian Party ("AZLP") and Michael Kielsky (together, "the Libertarians"). Resp. at 10. It would be remarkable if that were true, given that these provisions increased the ballot access requirements the Libertarians must meet by more than 2,000 or 3,000 percent in many if not most instances. Comp. ¶¶ 19-22, 28. But it isn't true. The new requirements imposed by Sections 16-321 and 16-322 exceed the constitutional limits established by Supreme Court precedent by several orders of magnitude. Because these requirements cannot be defended on their merits, Secretary Reagan resorts instead to obfuscation.

Secretary Reagan begins by asserting, falsely, that "multiple Libertarian candidates"

submitted nomination petitions for statewide and legislative races in 2016. Resp. at 3. The record to which Secretary Reagan herself cites confirms, however, that only one did – and he was removed from the ballot for failure to comply with the requirements imposed by Sections 16-321 and 16-322. Resp. at 3 (citing 2016 Election Information, *available at* http://apps.azsos.gov/election/2016/Candidates/PrimaryCandidates.htm). Secretary Reagan next speculates that many more Libertarian candidates "likely" submitted nomination petitions for city and county races. Resp. at 3. That too is incorrect, and once again the record that Secretary Reagan herself cites shows only one Libertarian candidate on the ballot for such offices, while another was removed for failure to comply with Sections 16-321 and 16-322. Resp. at 3 (citing Maricopa County 2016 Primary Election Official Candidate Listing, *available at* http://recorder.maricopa.gov/electionspdf/2016%20PRIMARY%20CANDIDATE%20LISTING.pdf).

Contrary to Secretary Reagan's assertions, therefore, the evidence confirms that Sections 16-321 and 16-322 have had an immediate and drastic impact on the Libertarians' ability to access the ballot. Prior to the amendment of these provisions in 2015, Libertarian candidates routinely appeared on the ballot in Arizona for all levels of office. Comp. ¶¶ 32-41. Yet in 2016, it appears that only one Libertarian candidate in the entire state will be on the ballot for any city, county, legislative or statewide office. And that candidate was able to comply with the new requirements imposed by Sections 16-321 and 16-322 only because he had the means and ability to "suspend" his life and work full time on his petition drive for 45 days. *See* Second Dec. of M. Kielsky ¶ 4 & Ex. A (Dkt. 10). His all-consuming effort as the single Libertarian candidate who complied with this statutory scheme is therefore the exception that proves the rule: the new requirements impose a severe burden. *See Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008)

(test is whether "'reasonably diligent' candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so") (quoting *Storer v. Brown*, 415 U.S. 724, 742 (1974)).

Reasonably diligent Libertarian candidates can no longer qualify for the ballot in Arizona because the "modicum of support" that Sections 16-321 and 16-322 now require is not in fact "reasonable", as Secretary Reagan repeatedly asserts. Resp. at 4-10. That should be almost self-evident, given that the showing required has increased 2,000 or 3,000 percent since 2014, depending on the office, and the evidence confirms that it was already sufficient to ensure an orderly ballot. *See* Arizona Secretary of State, *Historical Election Information*, available at http://www.azsos.gov/elections/voter-registration-historical-electiondata/historical-election-information (showing that Libertarian candidates almost invariably ran unopposed in past AZLP primary elections). Yet Secretary Reagan contends that despite these draconian increases, the requirements imposed by Sections 16-321 and 16-322 remain "far below" those that courts "have regularly upheld." Resp. at 8. That is incorrect.

Secretary Reagan's error boils down to basic mathematics. She asserts that the .25 percent requirement imposed by Sections 16-321 and 16-322 is necessarily constitutional, because the Supreme Court has upheld statutes imposing requirements as high as 5 percent. But these percentages cannot be meaningfully compared without quantifying the whole of which they are a part. To illustrate, .25 percent of the population of the United States (318,900,000) is 797,250, while 5 percent of the population of Arizona (6,731,000) is only 336,550. Yet Secretary Reagan would have the Court believe that the former is less than the latter, simply because .25 is less than 5. She thus attempts to bury the key fact in this case – that the modicum of support required of candidates seeking to appear on AZLP's primary ballot is now measured not as a

percentage of registered Libertarians only, but as a percentage of Libertarians, other non-ballot qualified party members, independents, and no party preferred voters. Resp. at 3 n.1 Not once in her discussion does Secretary Reagan acknowledge, much less attempt to account for, the extent to which this change increased the burden that Sections 16-321 and 16-322 impose.

An even more glaring omission is Secretary Reagan's complete failure to address the unequal impact of Sections 16-321 and 16-322 on the Libertarians. Despite exponentially increasing the requirements imposed on the Libertarians, these provisions actually lowered or only slightly increased the requirements imposed on the major parties. Comp. ¶¶ 25-31. Because Secretary Reagan makes no attempt to defend this gross inequity, the Court should treat the Libertarians' equal protection claims as conceded, and grant injunctive relief on that basis alone. This statutory scheme is not "a neutral, nondiscriminatory regulation," as Secretary Reagan suggests, Resp. at 16, but one that appears to have been carefully tailored to freeze the Libertarians out of Arizona's electoral process. It is succeeding in that impermissible purpose, and it should be enjoined.

I. The Libertarians Are Entitled to Injunctive Relief for Their Write-In Candidates, Because Arizona's New Ballot Access Requirements Impose Unconstitutionally Severe and Unequal Burdens on the Libertarians Alone.

Secretary Reagan does not dispute that A.R.S. §§ 16-321 and 16-322 exponentially increase the signature requirements imposed on the Libertarians, and thus on their write-in candidates in the primary election. Nor does she dispute that for some offices, the increased requirements amount to as much as 30 percent of the eligible voters in AZLP's closed primary, and that no Libertarian candidate actively seeking office in 2016 faces a requirement of less than 11 percent of eligible voters. Secretary Reagan also concedes that these onerous burdens fall on the Libertarians alone. Yet, Secretary Reagan contends that the Court should apply rational basis review to uphold the challenged provisions. Resp. at 6, 10-11. Secretary Reagan is incorrect.

Rational basis review of ballot access statutes is proper only where a state imposes

"reasonable, nondiscriminatory restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Here, Sections 16-321 and 16-322 increase the ballot access requirements on the Libertarians by as much as 3,000 percent or more, while lowering or increasing them only slightly for the major parties. Comp. ¶¶ 19-29. Such requirements are neither reasonable nor nondiscriminatory, and they have predictably excluded every Libertarian candidate, except one, from the ballot in 2016. Heightened scrutiny under *Anderson-Burdick* is therefore required. *See Nader*, 531 F.3d at 1035; *see also Burdick*, 504 U.S. at 434 (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992) (regulations that impose "severe" restrictions must be "narrowly drawn to advance a state interest of compelling importance").

A. The Libertarians Have Demonstrated a Likelihood of Success.

The Libertarians are likely to prevail on two grounds. First, because Secretary Reagan makes no attempt to defend the unequal impact that Sections 16-321 and 16-322 have on the Libertarians, the Court should treat their equal protection claims as conceded, and grant relief on that basis alone. Second, the requirements imposed by these provisions clearly exceed the constitutional limits established by the Supreme Court's ballot access jurisprudence. The Libertarians are therefore entitled to relief on that basis as well.

1. Arizona's Statutory Scheme Severely Burdens the Libertarians' First and Fourteenth Amendment Rights.

Secretary Reagan's assertion that "the Supreme Court has repeatedly upheld signature requirements far in excess of the requirements at issue here" is demonstrably false. Resp. at 6-7. In no case has a court ever upheld a signature requirement greater than 5 percent of the eligible voters in an election. Secretary Reagan herself does not claim otherwise. Instead, she insists that the signature requirements imposed on the Libertarians under Sections 16-321 and 16-322 – amounting to as much as 30 percent of the eligible voters – are nonetheless "far below" those that courts have upheld. Resp. at 8. This assertion misconstrues applicable precedent.

As an initial matter, Secretary Reagan cites to a number of different cases without regard

to whether they arose in the context of a general election or, like this one, a closed primary election. Resp. at 7 (citing *Jenness v. Fortson*, 403 U.S. 431 (1971) (general election case), *American Party of Texas v. White*, 415 U.S. 767 (1974) (same)). This distinction is crucial, however, because the "modicum of support" that may be required of a candidate derives from the number of voters eligible to vote for that candidate. As this Court has recognized in this very proceeding, "[t]he purpose of the signature requirement is 'to ensure that candidates have adequate support from eligible voters to warrant being placed on the ballot.'" (Dkt. No. 17, at 2) (citing *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)).

Contrary to Secretary Reagan's suggestion, therefore, *Jenness* does not hold that a state may require a candidate seeking ballot access in a closed primary election, such as AZLP's, to show support from "at least 5% of the number of registered voters at the last general election." Resp. at 7 (quoting *Jenness*, 403 U.S. at 442) (emphasis added). It should be obvious why this is so. There were 3,254,395 registered voters in Arizona in January 2016. *See State of Arizona Registration Report – 2016 January Voter Registration*, available at http://www.azsos.gov/sites/azsos.gov/files/2016_january_voter_registration_statistics.pdf. Five percent of those voters is 162,719 – or more than six times the total number of registered Libertarians in the entire state. *See id.* It would be absurd if Arizona could condition access to the AZLP primary ballot on a showing of support from six times the number of voters eligible to vote in that election.[1] But that absurdity is the necessary consequence of Secretary Reagan's erroneous position.

The next case cited by Secretary Reagan involved a "blanket primary," in which registered voters could vote for any candidate of their choice, regardless of partisan affiliation. Resp. at 7 (citing *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986)). The signature requirement upheld in *Munro* as a condition of accessing the general election ballot – 1 percent

[1]For the same reasons, *American Party of Texas* does not hold that Arizona may require candidates seeking access to the AZLP primary to show support from 22,000 voters – a requirement amounting to more than 85 percent of the eligible voters in the election.

of all votes cast for a particular office in the primary – thus derived from the pool of eligible voters in the election. In no way does *Munro* support Secretary Reagan's assertion that a state may condition access to the AZLP's closed primary ballot on a showing of support amounting to as much as 30 percent of the voters eligible to vote in that election.

Finally, Secretary Reagan quotes language from *Storer v. Brown*, out of context, in an attempt to suggest that Arizona may derive its signature requirement as a percentage of any "pool of *possible signers*." Resp. at 7 (citing *Storer*, 415 U.S. at 739) (Secretary Reagan's emphasis)). In fact, however, the "pool of possible signers" in *Storer* was – as in every other case cited by Secretary Reagan – comprised of voters eligible to vote for the candidate challenging the requirement. *See Storer*, 415 U.S. at 739. The plaintiff in *Storer* was an independent candidate for president, who sought access to the general election ballot, and had to meet a signature requirement of 5 percent of "the entire vote cast in the preceding general election in the area for which the candidate seeks to run." *See id.* at 727. In other words, the challenged statute required a showing of support from 5 percent of the voters eligible to vote for the candidate.

Accordingly, *Jenness*, *American Party of Texas*, *Munro* and *Storer* all confirm that Arizona may not require candidates seeking access to the AZLP's closed primary to show support from more than 5 percent of the eligible voters in that election. Based on this precedent, and the other cases on which the Libertarians rely, Arizona's requirements ranging from 11 percent to 30 percent of the eligible voters plainly impose a severe burden. Secretary Reagan's assertions to the contrary simply misread that precedent.

Secretary Reagan's reliance on the Ninth Circuit's decision upholding a requirement that write-in candidates in a primary receive votes "equal in number to 1 percent of all votes cast for the office at the last preceding general election at which the office was filled" is also misplaced. Resp. at 7-8 (quoting *Lightfoot v. Eu*, 964 F.2d 865, 867, 871 (9th Cir. 1992)). In *Lightfoot*, the plaintiff candidates only needed 40 or 65 signatures to appear on their party's primary ballot, depending on the office. *See id.* at 872. Because the state afforded these candidates "easy access" to the ballot, the burden it imposed on their alternative path, as write-in candidates, did not

render the statutory scheme invalid. *See id.* Here, by contrast, the severe burden imposed on the Libertarians is the same whether they submit nomination petitions or seek to run as write-in candidates. *See* A.R.S. § 16-645(E) (requiring write-in candidates to receive at least as many votes as the number of signatures required for that office under Section 16-322). *Lightfoot* is therefore inapposite, because in this case the Libertarians have no alternate path to ballot access.

The Libertarians have also established a severe burden by virtue of their compelled association with independent and unaffiliated voters. *See California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Arizona Libertarian Party v. Brewer*, No. 02-144-TUC-RCC (Sept. 27, 2007). Specifically, the Libertarians cannot realistically comply with Arizona's onerous signature requirements unless they obtain signatures from independent and unaffiliated voters, who cannot vote in the AZLP's closed primary. According to Secretary Reagan, *Jones* and *Brewer* were limited to situations in which non-party members are permitted to vote in a primary over a party's objection, and "their logic [does not] extend to nomination petition signatures." Resp. at 10 (citing *Rogers v. Corbett*, 468 F.3d 188, 198 (3rd Cir. 2006)). Once again, however, Secretary Reagan misconstrues the precedent she cites.

Rogers was a case in which minor political parties freely chose their nominees, then had to meet a signature requirement equal to 2 percent of the vote total for the candidate who obtained the most votes for statewide office at the last preceding general election, in order to place their nominees on the general election ballot. *See Rogers*, 468 F.3d at 191. The fact that any registered voter could sign the petitions did not violate the minor parties' freedom of association under *Jones*, the Third Circuit concluded, because the statutory scheme did not interfere with "the intra-party procedures to select the party's candidates." *See id.* at 198. "A minor political party is free to select anyone it chooses as its candidate," the Court found, which rendered *Jones* "inapplicable." *Id.*

Rogers does not support Secretary Reagan's sweeping assertion that the associational burden recognized in *Jones* and *Brewer* arises only where non-members are permitted to vote in a partisan primary. On the contrary, as the Ninth Circuit has explained, the constitutional

violation in *Jones* is implicated by any statutory scheme that enables non-members of a party to "influence the choice of the nominee," or to "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). Arizona's statutory scheme does both. It enables non-members to influence the Libertarians' nominating process not by voting in the primary, but by determining which candidates may appear on the AZLP primary ballot in the first instance. *Cf. Jones*, 530 U.S. at 580 (finding that challenged scheme "simply moved the general election one step earlier in the process, at the expense of the parties' ability to perform the 'basic function' of choosing their own leaders") (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)). As in *Jones*, therefore, Arizona's statutory scheme heavily burdens the Libertarians' freedom of association. *See id.* at 581-82.

Finally, Secretary Reagan challenges the sufficiency of the Libertarians' evidence on the ground that the multiple Declarations and evidentiary exhibits they submitted do not demonstrate "specific attempts" to comply with the signature requirements imposed by Sections 16-321 and 16-322. Resp. at 9 (citing Dkt. No 12 at 12-13). Even if that were correct – and it is not – it is irrelevant. As another district court in this circuit has explained, Secretary Reagan's assertion "erroneously shifts the focus from whether Plaintiffs have established the unconstitutionality of the [statutory scheme], the legal issue before the Court, to the likelihood that Plaintiffs will ever meet the qualification requirements" that it imposes. *California Justice Committee v. Bowen*, 2012 WL 5057625 *8 (C.D. Cal. 2012). "Whether Plaintiffs have met, or ever would meet" those requirements "has no bearing on determining whether" Arizona's statutory scheme "impermissibly burdens Plaintiffs' fundamental rights." *Id.*

2. **Secretary Reagan Fails to Assert Any Compelling or Legitimate State Interests to Justify the Burdens Imposed By Arizona's Statutory Scheme.**

Under the scrutiny required by the *Anderson-Burdick* analysis, the severe and unequal burdens imposed by Arizona's discrminatory statutory scheme may be upheld only upon a showing that they are "narrowly drawn to advance a state interest of compelling importance."

Burdick, 504 U.S. at 434. Secretary Reagan fails to carry this heavy burden.[2] A statutory scheme that compels the Libertarians to obtain support from non-members as a condition of placing candidates on their own partisan primary ballot is not even rationally related to any legitimate state interest. Not surprisingly, therefore, Secretary Reagan is unable to cite a single case recognizing such an interest.

In the absence of any precedent to support her position, Secretary Reagan resorts instead to cases recognizing states' general interest in "requiring a reasonable modicum of support from candidates and in preserving the integrity of the election." Resp. at 11. But the Libertarians have never suggested that Arizona may not impose reasonable requirements. They only challenge Arizona's statutory scheme insofar as it imposes signature requirements that far exceed the constitutional limits established by Supreme Court precedent. Moreover, the specific relief the Libertarians seek would subject them to the same requirements that Arizona imposed before it exponentially increased their signature requirements in 2015. And the undisputed evidence in the record demonstrates that the former signature requirements were more than sufficient to protect Arizona's legitimate regulatory interests, because they ensured that Libertarian candidates almost invariably ran unopposed in the AZLP primary in prior election cycles.

Despite her failure to assert a legitimate, much less compelling, state interest to justify the excessive burdens imposed by Sections 16-321 and 16-322, Secretary Reagan contends that Arizona "was clearly entitled to raise the ante for ballot access." Resp. at 12 (citing *Munro*, 479 U.S. at 196). She does so on the basis of speculation that unspecified "sham" candidates might attempt to run in the AZLP primary if the formerly reasonably requirements imposed by these

[2]As previously noted, Secretary Reagan completely fails to address the unequal burden that Sections 16-321 and 16-322 impose. For this reason alone, the provisions are subject to a heightened level of scrutiny. *See Anderson*, 460 U.S. at 788 (finding state's 'regulatory interests' are only sufficient to justify reasonable, non-discriminatory restrictions") (emphasis added)).

provisions remain in place. Resp. at 11-12 (citing *Arizona Green Party v. Bennett*, No. CV 10–1902 PHX DGC, 2010 WL 3614649 (D. Ariz. Sept. 9, 2010)). But in *Arizona Green Party*, this Court found that such concerns, even if proven, were insufficient to justify the relief requested. Moreover, the evidence in the record rebuts this imagined scenario. Libertarian candidates typically run unopposed in the AZLP primary, and all the available evidence – including the three sworn declarations of the AZLP chair himself – confirms that they are legitimate candidates. Secretary Reagan's speculation to the contrary cannot justify the imposition of the draconian signature increases in this case.

B. **The Balance of Equities and Public Interest Weigh in Favor of Granting the Requested Relief.**

Secretary Reagan erroneously asserts that the relief requested "prejudices candidates that gathered signatures in compliance with A.R.S. §§ 16-321 and -322." Resp. at 15. Again, however, there is only one such candidate. Furthermore, no Libertarian can challenge that candidate without submitting a nomination paper by the July 21, 2016 deadline. *See* A.R.S. § 16-312. This speculative concern also may be eliminated well before the August 30, 2016 primary election day. Therefore, the Court can grant the requested relief without causing the slightest harm to anyone else. It should do so.

CONCLUSION

For the foregoing reasons, and those set forth in Plaintiffs' Motion for Preliminary Injunction, the motion should be granted.

Dated: July 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2016, I filed the foregoing Plaintiffs' Reply to Secretary of State Michele Reagan's Response to 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
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