
UNITED STATES COURT OF APPEALS

for the

NINTH CIRCUIT

Case No. 17-16491

LIBERTARIAN PARTY OF ARIZONA AND MICHAEL KIELSKY,

Plaintiff-Appellants,

- v. -

MICHELE REAGAN

Defendant-Appellee.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ARIZONA AT NO. 2:16-CV-
01019-DGC

BRIEF OF APPELLANTS

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STATEMENT OF JURISDICTION

This case arises from the United States District Court for the District of Arizona. Plaintiff-Appellants assert their claims pursuant to 42 U.S.C. § 1983, to challenge the constitutionality of two provisions of the Arizona Revised Statutes, which govern candidates' access to the primary election ballot. *See* A.R.S. §§ 16-321, 16-322. The District Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331.

Plaintiff-Appellants appeal from the District Court's order and judgment granting summary judgment to Defendant-Appellee. *See Arizona Libertarian Party v. Reagan*, No. 2:16-cv-01019-DGC (July 10, 2017) ("Slip Op."). Excerpts of Record ("ER") 3, 33. The order and judgment are final because they disposed of all claims in the case. This Court has jurisdiction over the instant appeal pursuant to 28 U.S.C. § 1291.

The District Court entered its final order and judgment on July 10, 2017. ER 3. Plaintiff-Appellants filed their Notice of Appeal on July 21, 2017. ER 1. This appeal is timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), because it was filed within 30 days of the order and judgment appealed from.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This case challenges the constitutionality of two provisions of Arizona election law, A.R.S. §§ 16-321 and 16-322, which govern candidates' access to the primary election ballot. The questions presented are:

- I. Whether the District Court erred by granting the Secretary summary judgment as to the Libertarians' claim that the signature requirements imposed by Sections 16-321 and 16-322 are unconstitutionally burdensome?
- II. Whether the District Court erred by granting the Secretary summary judgment as to the Libertarians' claim that Sections 16-321 and 16-322 violate the Libertarians' freedom of association?
- III. Whether the District Court erred by granting the Secretary summary judgment as to the Libertarians' claim that Sections 16-321 and 16-322 violate the Libertarians' right to create and develop a political party?
- IV. Whether the District Court erred by granting the Secretary summary judgment as to the Libertarians' claim that Sections 16-321 and 16-322 violate the Libertarians' right to equal protection of law?
- V. Whether the District Court erred by excluding evidence the Libertarians submitted in support of their motion for summary judgment, without making a finding of willfulness, fault or bad faith, and without considering the availability of lesser alternatives?

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Constitutional Provisions

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Arizona Statutory Provisions

16-321. Signing and certification of nomination petition; definition

A. Each signer of a nomination petition shall sign only one petition for the same office unless more than one candidate is to be elected to such office, and in that case not more than the number of nomination petitions equal to the number of candidates to be elected to the office. A signature shall not be counted on a nomination petition unless the signature is on a sheet bearing the form prescribed by section 16-314.

B. For the purposes of petitions filed pursuant to sections 16-312, 16-313, 16-314 and 16-341, each signer of a nomination petition shall be a voter who at the time of signing is a registered voter in the electoral district of the office the candidate is seeking.

C. If an elector signs more nomination petitions than permitted by

subsection A of this section, the earlier signatures of the elector are deemed valid, as determined by the date of the signature as shown on the petitions. If the signatures by the elector are dated on the same day, all signatures by that elector on that day are deemed invalid. Any signature by that elector on a nomination petition on or after the date of the last otherwise valid signature is deemed invalid and shall not be counted.

D. The person before whom the signatures were written on the signature sheet is not required to be a resident of this state but otherwise shall be qualified to register to vote in this state pursuant to section 16-101 and, if not a resident of this state, shall register as a circulator with the secretary of state. A circulator shall verify that each of the names on the petition was signed in his presence on the date indicated, and that in his belief each signer was a qualified elector who resides at the address given as the signer's residence on the date indicated and, if for a partisan election, that each signer is a qualified signer. The way the name appears on the petition shall be the name used in determining the validity of the name for any legal purpose pursuant to the election laws of this state. Signature and handwriting comparisons may be made.

E. A person who signs a nominating petition must use that person's actual residence address unless there is no actual residence address assigned by an official governmental entity or the person's actual residence is protected pursuant to section 16-153. The signature of a person who signs a nominating petition and who uses only a description of the place of residence or an Arizona post office box address is valid if the person is otherwise properly registered to vote, has not moved since registering to vote and is eligible to sign the nominating petition.

F. For the purposes of this article, "qualified signer" means any of the following:

1. A qualified elector who is a registered member of the party from which the candidate is seeking nomination.
2. A qualified elector who is a registered member of a political party that is not entitled to continued representation on the ballot pursuant to section 16-804.
3. A qualified elector who is registered as independent or no party preferred.

16-322. Number of signatures required on nomination petitions

A. Nomination petitions shall be signed by a number of qualified signers equal to:

1. If for a candidate for the office of United States senator or for a state office, excepting members of the legislature and superior court judges, at least one-fourth of one percent but not more than ten percent of the total number of qualified signers in the state.
2. If for a candidate for the office of representative in Congress, at least one-half of one percent but not more than ten percent of the total number of qualified signers in the district from which such representative shall be elected except that if for a candidate for a special election to fill a vacancy in the office of representative in Congress, at least one-fourth of one percent but not more than ten percent of the total number of qualified signers in the district from which such representative shall be elected.
3. If for a candidate for the office of member of the legislature, at least one-half of one percent but not more than three percent of the total number of qualified signers in the district from which the member of the legislature may be elected.
4. If for a candidate for a county office or superior court judge, at least one percent but not more than ten percent of the total number of qualified signers in the county or district, except that if for a candidate from a county with a population of two hundred thousand persons or more, at least one-fourth of one percent but not more than ten percent of the total number of qualified signers in the county or district.
5. If for a candidate for a community college district, at least one-quarter of one percent but not more than ten percent of the total voter registration in the precinct as established pursuant to section 15-1441. Notwithstanding the total voter registration in the community college district, the maximum number of signatures required by this subdivision is one thousand.
6. If for a candidate for county precinct committeeman, at least two percent but not more than ten percent of the party voter registration in the precinct or ten signatures, whichever is less.
7. If for a candidate for justice of the peace or constable, at least one percent but not more than ten percent of the number of qualified signers in the

precinct.

8. If for a candidate for mayor or other office nominated by a city at large, at least five percent and not more than ten percent of the designated party vote in the city, except that a city that chooses to hold nonpartisan elections may by ordinance provide that the minimum number of signatures required for the candidate be one thousand signatures or five percent of the vote in the city, whichever is less, but not more than ten percent of the vote in the city.

9. If for an office nominated by ward, precinct or other district of a city, at least five percent and not more than ten percent of the designated party vote in the ward, precinct or other district, except that a city that chooses to hold nonpartisan elections may provide by ordinance that the minimum number of signatures required for the candidate be two hundred fifty signatures or five percent of the vote in the district, whichever is less, but not more than ten percent of the vote in the district.

10. If for a candidate for an office nominated by a town at large, by a number of qualified electors who are qualified to vote for the candidate whose nomination petition they are signing equal to at least five percent and not more than ten percent of the vote in the town, except that a town that chooses to hold nonpartisan elections may provide by ordinance that the minimum number of signatures required for the candidate be one thousand signatures or five percent of the vote in the town, whichever is less, but not more than ten percent of the vote in the town.

11. If for a candidate for a governing board of a school district or a joint technical education district, at least one-half of one percent of the total voter registration in the school district or joint technical education district if the board members are elected at large or one percent of the total voter registration in the single member district if governing board members are elected from single member districts or one-half of one percent of the total voter registration in the single member district if joint technical education district board members are elected from single member districts. Notwithstanding the total voter registration in the school district, joint technical education district or single member district of the school district or joint technical education district, the maximum number of signatures required by this paragraph is four hundred.

12. If for a candidate for a governing body of a special district as described in title 48, at least one-half of one percent of the vote in the special district

but not more than two hundred fifty and not fewer than five signatures.

B. The basis of percentage in each instance referred to in subsection A of this section, except in cities, towns and school districts, shall be the number of qualified signers as determined from the voter registration totals as reported pursuant to section 16-168, subsection G on March 1 of the year in which the general election is held. In cities, the basis of percentage shall be the vote of the party for mayor at the last preceding election at which a mayor was elected. In towns, the basis of percentage shall be the highest vote cast for an elected official of the town at the last preceding election at which an official of the town was elected. In school districts or joint technical education districts, the basis of percentage shall be the total number of active registered voters in the school district or joint technical education district or single member district, whichever applies. The total number of active registered voters for school districts or joint technical education districts shall be calculated using the periodic reports prepared by the county recorder pursuant to section 16-168, subsection G. The count that is reported on March 1 of the year in which the general election is held shall be the basis for the calculation of total voter registration for school districts or joint technical education districts.

C. In primary elections the signature requirement for party nominees, other than nominees of the parties entitled to continued representation pursuant to section 16-804, 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 within the district. Signatures must be obtained from qualified electors who are qualified to vote for the candidate whose nomination petition they are signing.

D. If new boundaries for congressional districts, legislative districts, supervisorial districts, justice precincts or election precincts are established and effective subsequent to March 1 of the year of a general election and prior to the date for filing of nomination petitions, the basis for determining the required number of nomination petition signatures is the number of qualified signers in the elective office, district or precinct on the day the new districts or precincts are effective.

STATEMENT OF THE CASE

This case raises a constitutional challenge to A.R.S. §§ 16-321 and 16-322, which establish the requirements that Arizona imposes on candidates seeking access to the primary election ballot of a political party that is qualified to place its nominees on the general election ballot. Plaintiff-Appellants are the Arizona Libertarian Party (“AZLP”) and its Chair, Michael Kielsky (together, “the Libertarians”). ER 123 (Amended Complaint (“Am. Comp.”) ¶¶ 1-2). Defendant-Appellee Michele Reagan (“the Secretary”) is the state official with the statutory duty to enforce the challenged provisions. ER 124 (Am. Comp. ¶ 3). The Secretary is named in her official capacity only.

Prior to their amendment in 2015, Sections 16-321 and 16-322 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. ER 121-22 (Am. Comp. at 1-2). 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 they are not eligible to vote in AZLP’s closed primary. ER 122 (Am. Comp. at 2). As applied to the Libertarians – though not to the Republicans and Democrats, who are the only other ballot-qualified parties in

Arizona – this drastically increased the number of signatures required. ER 128-30 (Am. Comp. ¶¶ 19-24). 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. ER 128-30 (Am. Comp. ¶¶ 19-24). The requirements for Republicans and Democrats, by contrast, have increased only slightly for most offices, if at all, and in many cases they decreased. ER 130-32 (Am. Comp. ¶¶ 25-29).

The signature requirements that Section 16-321 and 16-322 now impose on the Libertarians are greater, by several orders of magnitude, than the highest such requirement that the Supreme Court has ever upheld. To comply with them in 2016, Libertarian candidates needed to obtain signatures amounting to as much as 30.53 percent of the eligible voters (*i.e.*, registered Libertarians) in the jurisdiction. ER 171 (Heald Dec. ¶ 171). For several offices, the signature requirement amounted to more than 20 percent of the eligible voters. ER 133-37 (Am. Comp. ¶¶ 33-40). Yet the Supreme Court has never upheld a signature requirement greater than 5 percent of eligible voters. Federal courts have thus treated any requirement in excess of that figure as constitutionally suspect, if not facially invalid, and no court has ever upheld such a requirement.

Although candidates seeking access to AZLP's primary ballot are permitted

to obtain signatures from independent and unaffiliated voters in their jurisdictions, in addition to registered Libertarians, *see* A.R.S. § 16-321, that does not alleviate the constitutional infirmity of Arizona's statutory scheme. It simply forces such candidates to choose between two unconstitutional alternatives. Either they obtain signatures exclusively from registered Libertarians, in which case they must comply with unconstitutionally burdensome signature requirements, or they obtain signatures from nonmembers, who are ineligible to vote in AZLP's closed primary, and have no reason or incentive to support the candidates' nomination. Apart from the sheer irrationality of such a scheme – Arizona has no rational basis for requiring that candidates demonstrate support from voters who are ineligible to vote for them – such compelled association violates the Libertarians' constitutional right to exclude nonmembers from the process by which they select their nominees. *See California Democratic Party v. Jones*, 530 U.S. 567 (2000).

It was only a decade ago, following remand from this Court's decision in *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277 (9th Cir. 2003), that the District Court struck down Arizona's previous statutory scheme precisely because it allowed nonmembers 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 that AZLP allow nonmembers 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 no longer required to permit nonmembers to vote in their primary, they now must rely on nonmembers to place their candidates on the primary ballot in the first instance. This enables nonmembers 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 *Jones*, 530 U.S. at 577).

The Hobson’s choice that Arizona imposes on the Libertarians under Sections 16-321 and 16-322 – either comply with unconstitutionally burdensome signature requirements or permit nonmembers to participate in the process of selecting Libertarian nominees – has had predictable results. In recent elections, AZLP has routinely placed its nominees for county, state and federal office on the general election ballot. ER 133 (Am. Comp. ¶ 32); ER 87 (Third Kielsky Dec. ¶¶ 8-10 (AZLP placed at least 35 candidates on the general election ballot in 2004; 19 in 2008; and 18 in 2012)); *see* Arizona Secretary of State, Historical Election

Information, available at <https://www.azsos.gov/elections/voter-registration-historical-election-data/historical-election-information>). But in the first election cycle following the 2015 amendments to Sections 16-321 and 16-322, that record of success came to an immediate and near-complete halt. In 2016, only one candidate was able to comply with the increased signature requirements that now apply. ER 139-40 (Am. Comp. ¶¶ 48-49). Further, despite the diligent and even Herculean efforts of many others who sought AZLP's nomination by running in the primary election as write-in candidates, not one was permitted to appear on the general election ballot, even though each of them won their primary races, because they were required to receive a number of write-in votes equal to the number of signatures they would have been required to obtain on a nomination petition. ER 34-58 (McCormick Dec.; Hamilton Dec.; Iannuzo Dec.; Fourth Kielsky Dec.; Shipley Dec.; Pepiton Dec.; Daniels Dec.); *see* A.R.S. § 16-645(E).

Through its amendments to Sections 16-321 and 16-322, Arizona has thus relegated the Libertarians to a kind of ballot access purgatory. AZLP continues to be qualified for “continued representation” on the general election ballot, by virtue of the size of its registered membership. *See* A.R.S. § 16-804(B) (providing that a political party is entitled to continued representation if its membership is “equal to at least two-thirds of one percent of the total registered electors” in the relevant

jurisdiction); ER 130 (Am. Comp. ¶ 25 (citing August 2016 voter registration report identifying 26,653 registered Libertarians statewide). As such, however, AZLP is required to hold primary elections to select its nominees, and it cannot place them on the general election ballot by any other means. *See* A.R.S. §§ 16-301, 16-302. Consequently, the Libertarians are now required, by statute, to select their nominees by means of primary elections in which it is practically impossible for their candidates to compete. This has decimated the Libertarians' constitutional right to create and develop their political party, because it prevents them from performing AZLP's "basic function" of selecting candidates for public office and offering them to voters at general elections. *Jones*, 530 U.S. at 580 (quoting *Kusper v. Pontikes*, 414 US 51, 58 (1973)).

Meanwhile, the only other ballot-qualified parties in Arizona, the Republicans and Democrats, remain largely unaffected by the amendments to Sections 16-321 and 16-322. ER 130-32 (Am. Comp. ¶¶ 25-29). That is because, while the amendments increased the size of the pool of voters who could sign a partisan candidate's nomination petitions, by adding approximately 1 million independent and unaffiliated voters, they lowered the percentage of that larger pool whose signatures a candidate is required to obtain. ER 148-49 (Am. Comp. Ex. A) (copy of legislation amending Sections 16-321 and 16-322)); *see* State of Arizona

Registration Report, August 30, 2016 (listing 1,164,373 registered independents statewide). The net effect of these changes was therefore negligible for the Republicans and Democrats, each of whom has more than 1 million members statewide. ER 130-32 (Am. Comp. ¶¶ 25-29). But for the Libertarians, who have only 26,653 members, the net effect was to raise their signature requirements exponentially. ER 128-130 (Am. Comp. ¶¶ 19-24).

Only one other political party is formally organized under Arizona law – the Arizona Green Party (“AZGP”). ER 133 (Am. Comp. ¶ 30). Because AZGP does not qualify for continued representation on Arizona’s general election ballot, it must submit a petition to qualify as a new party pursuant to A.R.S. § 16-801. ER 133 (Am. Comp. ¶ 30). Once it does so, AZGP also must select its nominees by primary election, but it need not comply with the signature requirements that Section 16-322 imposes on the Libertarians. *See* A.R.S. § 16-801. Instead, Section 16-322 imposes a separate, and much lower, signature requirement for parties that are not entitled to continued representation pursuant to Section 16-804. *See* A.R.S. § 16-322(C). As a result of this lower signature requirement, AZGP’s nominees were permitted to appear on the general election ballot in 2016, while AZLP’s nominees for the same offices were excluded from the general election ballot, despite outpolling the AZGP candidates by wide margins. ER 141 (Am. Comp. ¶¶

54-56 & Ex. F (State of Arizona Official Canvass, 2016 Primary Election)).

Proceedings Before the District Court

The Libertarians commenced this action on April 12, 2016, by filing their four-count complaint alleging violations of their First and Fourteenth Amendment rights. ER 121-186. Count I asserts that Sections 16-321 and 16-322 violate the Libertarians' freedoms of speech, petition, assembly and association, by imposing impermissibly burdensome signature requirements on them. ER 141-42 (Am. Comp. ¶¶ 57-60). Count II asserts that Sections 16-321 and 16-322 violate the Libertarians' freedom of association, by compelling them to associate with nonmembers for purposes of selecting their own partisan nominees. ER 142 (Am. Comp. ¶¶ 61-64). Count III asserts that Sections 16-321 and 16-322 violate the Libertarians' right to create and develop support for their political party, by preventing them from offering their candidates to voters at general elections. ER 142-43 (Am. Comp. 65-68). Count IV asserts that Sections 16-321 and 16-322 violate the Libertarians' right to equal protection of the law, by imposing severe and unequal burdens that fall on the Libertarians alone. ER 143-44 (Am. Comp. ¶¶ 69-75). The Libertarians supported these claims with the declarations of 8 Libertarian candidates and AZLP's Chair, each of whom attested to the specific burdens the challenged provisions imposed on them as candidates seeking access

to AZLP's primary ballot, including their difficulty in obtaining support from independent voters who are ineligible to vote for them, as well as a declaration from AZGP's Chair. ER 162-86 (Am. Comp. Ex. D, E (Allen Dec.; Fowlkes Dec.; Hancock Dec.; Heald Dec.; First Kielsky Dec.; Rike Dec.; Schlosser Dec.; Shoen Dec.; Torres Dec.)). In their prayer for relief, the Libertarians request a declaratory judgment holding Sections 16-321 and 16-322 unconstitutional as applied, a permanent injunction against the Secretary's enforcement of the increased signature requirements imposed by Section 16-322, and such other relief as the District Court deems appropriate. ER 145 (Am. Comp. ¶ 76).

As the 2016 election cycle approached, the Libertarians filed two motions for preliminary relief, which sought to enjoin the operation of Arizona's unconstitutional statutory scheme. ER 207 (Dkt. Nos. 10, 18). The first motion requested emergency relief on behalf of Libertarian candidates who intended to submit nomination petitions by the June 1, 2016 deadline, as well as relief for candidates who intended to run in AZLP's August 30, 2016 primary as write-in candidates. ER 207 (Dkt. No. 10). That motion was supported by an additional declaration from AZLP Chair Kielsky, who attested to the crippling burdens the increased signature requirements were imposing on Libertarian candidates, and to their urgent need for relief. ER 99-101 (Second Kielsky Dec.). The District Court

denied the motion on May 27, 2016, on the basis of laches, without separately addressing the relief requested on behalf of write-in candidates. ER 208 (Dkt. No. 17).

Because write-in candidates did not need emergency relief, but only an injunction prior to the primary election that was still three months hence, the Libertarians filed their second motion, which requested preliminary relief on behalf of write-in candidates only. ER 208 (Dkt. No. 18). That motion was supported by a third declaration from AZLP Chair Kielsky, who attested to the fact that AZLP had recruited no fewer than 15 candidates to run in its primary election, but none of them had come close to complying with the increased signature requirements imposed by Sections 16-321 and 16-322, and that consequently, at least a dozen had committed to run as write-ins. ER 85-86 (Third Kielsky Dec.). One such candidate, attorney Jonathan Apirion, submitted a declaration attesting in specific detail to the “sincere, diligent [and] exhausting” effort he made to obtain the necessary signatures, only to fall short. ER 89-92 (Apirion Dec.). The motion was also supported by a copy of the District Court’s prior decision in *Socialist Workers Party of Arizona v. Mofford*, No. 80-cv-293-PHXCLH (July 22, 1980) (unreported decision), which held that the minimum-vote requirement imposed by Section 16-645(E) “does not serve a compelling state interest and is unconstitutional as a

violation of the First and Fourteenth Amendments of the United States Constitution.” ER 98. The District Court thus permanently enjoined the Secretary from enforcing Section 16-645(E) against the Socialist Workers Party.

In the proceedings below, the District Court disregarded its prior decision in *Socialist Workers Party*, and denied the Libertarians’ motion for preliminary relief on behalf of write-in candidates. ER 210 (Dkt. No. 34). The District Court acknowledged that the Libertarians had “raised serious questions regarding the constitutionality” of Arizona’s statutory scheme, but it concluded that it lacked sufficient evidence of the burden that the increased requirements imposed on write-in candidates. *Id.* at 10-11 & n.3. In reaching this conclusion, the District Court did not address the complete lack of evidence that Arizona had any legitimate interest in adopting those requirements, ER 87 (Third Kielsky Dec. ¶¶ 11), nor did it identify any state interest that is served by applying the requirements to write-in candidates.

In the absence of the preliminary relief the Libertarians requested, no Libertarian candidate for state or federal office appeared on AZLP’s primary election ballot in 2016. ER 140 (Am. Comp. ¶ 49). At least 14 Libertarian candidates ran as write-ins, and although each of them won their races, none received enough votes to satisfy the minimum vote requirement imposed by

Section 16-645(E). ER 140 (Am. Comp. ¶¶ 51-52). Consequently, none appeared on Arizona's 2016 general election ballot. ER 140 (Am. Comp. ¶ 52).

By contrast, AZGP ran 10 write-in candidates in its 2016 primary, and all 10 appeared on Arizona's general election ballot. ER 140-41 (Am. Comp. ¶ 53). That is because AZGP's candidates did not need to comply with the minimum vote requirement imposed by Section 16-645(E), but only needed to obtain a "plurality" of votes in their respective races. *See* A.R.S. § 16-645(D). As a result, AZGP's write-in candidates were included on the general election ballot, while AZLP's write-in candidates for the very same offices were excluded, even though the Libertarian candidates received far more votes. For example, Libertarian Merissa Hamilton received 1,286 write-in votes for U.S. Senate, while Green Gary Swing received only 238 write-in votes for that office, but Swing appeared on the general election ballot and Hamilton did not. ER 140 (Am. Comp. ¶ 54). Libertarian Kim Allen received 144 write-in votes in Congressional District ("CD") 1, while Green Ray Parrish received only 66 write-in votes for that office, but Parrish appeared on the general election ballot and Allen did not. ER 141 (Am. Comp. ¶ 55). Libertarian Ed Tilton, Jr. received 164 write-in votes in CD 2, while Green Gary Swing received only 32 write-in votes for that office, but Swing appeared on the general election ballot and Tilton did not. ER 141 (Am. Comp. ¶ 56).

**Discovery Proceedings and the District Court's Exclusion of Evidence
Supporting the Libertarians' Motion for Summary Judgment**

Following the election, the case proceeded with the parties conducting discovery. The Libertarians accordingly submitted reports from three experts who attested to the increased difficulty of petitioning in states like Arizona, which exclude certain classes of voters from signing a candidate's nomination petitions. ER 66-79 (Redpath Report, Benedict Report and Howell Report). The Libertarians also submitted a report from Richard Winger, a leading expert in ballot access laws, who demonstrated that primary elections are ill-suited for measuring the support a minor party candidate has among the general electorate, particularly in cases such as this, where AZLP's primary is closed to nonmembers – *i.e.*, the general electorate. ER 60-66 (Winger Report). The parties also served interrogatories and requests for production on each other. ER 211 (Dkt. Nos. 49, 51). Additionally, on December 12, 2016, the Secretary noticed Plaintiff-Appellants AZLP and Kielsky for depositions to be held on January 23, 2017. At no time did the Secretary notice or attempt to notice any of the individuals who submitted declarations in support of the Libertarians' Amended Complaint or their motions for preliminary relief (except Mr. Kielsky, in his capacity as AZLP Chair). ER 214 (Dkt. 72-1 (Hall Dec. ¶ 6)).

On January 13, 2017, pursuant to a stipulation to amend the case

management order filed by the Secretary, the District Court extended the discovery period, and set a deadline of March 17, 2017 for the close of discovery. ER 212 (Dkt. Nos. 54-55). The Secretary thereafter notified the Libertarians that she would not conduct the depositions she had noticed for January 23, 2017, apparently with the intention of noticing them for a later date. As late as March 7, 2017, however, the Secretary still had not served notices of depositions, but advised the Libertarians, through counsel, that “we may want to notice additional depositions, besides Mr. Kielsky’s and the 30(b)(6) of the Party, after we review your production.” ER 214 (Dkt. 72-1 (Hall Dec. ¶ 8)). On March 14, 2017 – three days before the close of discovery, when it was too late to notice depositions – the Secretary requested the Libertarians’ consent to extend the discovery deadline again, so that she could depose AZLP and Mr. Kielsky. ER 214 (Dkt. 72-1 (Hall Dec. ¶ 9)). In a gesture of good faith, the Libertarians consented, and further agreed to allow the Secretary to depose AZLP and Mr. Kielsky on March 20, 2017. ER 214 (Dkt. 72-1 (Hall Dec. ¶ 9)). This good faith effort to accommodate the Secretary’s request came with significant prejudice to the Libertarians: due to a previously scheduled hearing before the Federal Court of Appeals for the Third Circuit in Philadelphia on March 22, 2017, their counsel was unable to fly to Arizona to attend that deposition. ER 214 (Dkt. 72-1 (Hall Dec. ¶ 11)). As a result,

the Libertarians were represented in the depositions by local counsel, who was unfamiliar with the case.

After the close of discovery, the parties filed motions for summary judgment. ER 213 (Dkt. Nos. 63, 69). The Libertarians submitted seven more declarations in support of their motion – a fourth declaration from Mr. Kielsky, as well as six more declarations from write-in candidates who ran in AZLP’s 2016 primary, won their races, but were excluded from the general election ballot. ER 34-58 (McCormick Dec.; Hamilton Dec.; Iannuzo Dec.; Fourth Kielsky Dec.; Shipley Dec.; Pepiton Dec.; and Daniels Dec.). These declarations provide still more evidence of the exhaustive, and exhausting, efforts that Libertarian candidates made to comply with the increased requirements imposed by Sections 16-321 and 16-322.

For example, Merissa Hamilton attests that she campaigned approximately 65 hours a week for six weeks, and that she had a team of 27 volunteers working for her. ER 36-39 (Hamilton Dec. ¶ 7). Kevin McCormick attests that he dedicated at least 200 hours to his campaign, and spent nearly \$1,000.00 of his own money to finance it. ER 35 (McCormick Dec. ¶ 8). James Iannuzo used his own money to finance a mailing targeting high impact Libertarian voters in his district. ER 41 (Iannuzo Dec. ¶ 7). Similarly, both AZLP and the Maricopa County Libertarian

Party exhausted their limited resources to support Libertarian candidates with mailings and other electioneering activities. ER 41 (Iannuzo Dec. ¶¶ 6-7, 9); ER 46 (Fourth Kielsky Dec. ¶¶ 3-7).

The Libertarians also submitted evidence relating to the broader consequences of the amendments to Sections 16-321 and 16-322. For example, the amendments caused confusion among voters who received “blank” ballots in the mail and did not understand that they could write in the names of Libertarian candidates. ER 44 (Iannuzo Dec. ¶ 13). Others, like AZLP’s own volunteer coordinator, made a conscious decision not to “risk[] money on almost certain failure and consequent demoralization of the volunteer base,” and thus withdrew from participation in the election. ER 54-55 (Shipley Dec. ¶¶ 6-9). Such factors undoubtedly contributed to the sharp decline in voter turnout AZLP experienced in its 2016 primary, compared with its 2014 primary, and compared with other parties 2016 primary turnout. ER 43 (Iannuzo Dec. ¶ 12). This low turnout made complying with the newly increased requirements even more onerous. ER 43 (Iannuzo Dec. ¶ 12).

The Secretary responded to the foregoing evidence not by attempting to discredit it, as she had attempted to do in response to each of the Libertarians’ prior declarations, but by moving to strike it in its entirety. ER 213 (Dkt. No. 66).

According to the Secretary, with the exception of Mr. Kielsky, each of the six individuals who submitted declarations in support of the Libertarians' motion for summary judgment was an "undisclosed witness", because they were not identified by name in the initial disclosures the Libertarians submitted on July 27, 2016, before their identities were known, or in a supplemental disclosure. The District Court initially denied the Secretary's motion, in an order entered on April 26, 2017, but only because it lacked sufficient time to rule on it before the Secretary's response to the Libertarians' motion for summary judgment was due. ER 213 (Dkt. No. 68). The District Court thus directed the Secretary to "address the permissibility" of the Libertarians' evidence in her response to their motion. ER 213 (Dkt. No. 68). The Secretary did so, and this time the Court granted her motion to strike. The Court thus began its analysis of the parties' motions for summary judgment by excluding virtually all the evidence the Libertarians submitted in support of theirs.

The District Court's Decision Denying Summary Judgment to the Libertarians and Granting Summary Judgment to the Secretary

Prior to addressing the merits of the parties' motions for summary judgment, the District Court concluded that it was required to exclude six of the seven declarations the Libertarians submitted in support of theirs, on the ground that the declarants had not been fully disclosed. ER 7-10 (Slip Op. at 5-8 & n.4) (reasoning

that “Rule 37(c)(1) sanctions are generally mandatory if a party violates its duty to disclose or supplement”). In reaching this conclusion, the District Court acknowledged that the Secretary herself had identified, in her own initial disclosures, all write-in candidates who ran in AZLP’s 2016 primary election as persons who may have discoverable information, and that “the six declarants fall within [this] description.” ER 7 (Slip Op. at 5). The District Court also acknowledged that the Secretary had requested a list of those candidates, including their contact information, and that the Libertarians had produced such a list with sufficient time to allow the Secretary to notice them for depositions. ER 7 (Slip Op. at 5). The District Court further noted that the Secretary neglected to raise the issue until the last day of discovery, when the Libertarians confirmed that they had already produced the list, and produced it again immediately. ER 7 (Slip Op. at 5). The District Court found, however, that none of this was sufficient to satisfy the Libertarians’ duties under Rule 26(a), because they did not submit a supplemental disclosure specifically stating that the six individuals would submit declarations attesting to their experiences as write-in candidates in AZLP’s 2016 primary. ER 8-9 (Slip Op. at 6-7).

The District Court next determined that exclusion of the six declarations was mandatory under Rule 37(c)(1), unless the Libertarians could show that “their

failure to disclose the six declarants was substantially justified or harmless.” ER 9 (Slip Op. at 7 (citation omitted)). It then summarily concluded that the Libertarians had not made either showing and, without further analysis, granted the Secretary’s motion to strike. ER 9-10 (Slip Op. 7-8). In a footnote, the District Court acknowledged that it was required to make a finding of “willfulness, fault or bad faith” before excluding the Libertarians’ evidence, if that sanction would “amount to dismissal of a claim.” ER 10 (Slip Op. at 8 n.4). (citation omitted). But, the District Court asserted, “the Court’s exclusion of the six declarations does not amount to dismissal of [the Libertarians’] claim[s],” because inclusion of this evidence “would not result in a different outcome.” ER 10 (Slip Op. at 8 n.4).

Turning to the merits, the District Court began its analysis with a fundamental mischaracterization of the basis for the Libertarians’ claims. According to the District Court, this case does not present a challenge to the requirements that Arizona imposes on candidates seeking access to AZLP’s *primary* election ballot, as the Libertarians assert in their Amended Complaint. ER 121 (Am. Comp. at 1). Rather, the District Court found, the gravamen of the Libertarians’ claims is a challenge to the “two-step process” that candidates must follow to appear on Arizona’s *general* election ballot. ER 16, 22 (Slip Op. at 14, 20). The District Court thus concluded that the Libertarians did not use “the correct

math” to support their claims. ER 15-16 (Slip Op. at 13-14). Although Sections 16-321 and 16-322 establish the requirements for appearing on Arizona’s primary election ballot, the District Court determined that the burden they impose should be measured not as a percentage of eligible voters in that election, but as a percentage of “qualified signers” as those provisions define the term. ER 15-16 (Slip Op. at 13-14). Despite conceding that every Supreme Court and lower federal court case analyzing the constitutionality of ballot access laws measures the burden that such laws impose “as a percentage of eligible voters,” the District Court insisted that such a standard was inapposite here, because this case arises from a closed primary. ER 20 (Slip Op. at 18). This factual difference, in the District Court’s view, made the percentage of eligible voters required by Sections 16-321 and 16-322 immaterial to its analysis of their constitutionality.

Having excluded the Libertarians’ evidence and jettisoned the standard that every other federal court has followed in reviewing the constitutionality of ballot access laws, the District Court had little trouble upholding Sections 16-321 and 16-322 as “reasonable and nondiscriminatory” regulations. ER 30 (Slip Op. at 28) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). The burden the provisions impose on the Libertarians is “reasonable,” the District Court found, “whether the percentage requirement is calculated on the basis of qualified signers or the general

electorate.” ER 30 (Slip Op. at 28). “In both instances,” the District Court reasoned, the burden imposed “is well below the 5% requirement upheld by the Supreme Court.” ER 30 (Slip Op. at 28). The District Court reached this conclusion notwithstanding its express acknowledgment that, when the burden is calculated using the standard applicable in every other ballot access case – eligible voters – the percentage required is as high as 30 percent. ER 29 (Slip Op. at 27).

The District Court also asserted that it found Sections 16-321 and 16-322 to be “nondiscriminatory” for “reasons discussed above,” but it failed to specify those reasons. Whatever they might be, the District Court did not address the arguments and evidence that the Libertarians advanced in support of their equal protection claim. ER 213 (Dkt. No 63 at 11-14). Instead, in a tacit admission that the amendments to Sections 16-321 and 16-322 “could be viewed as having a greater impact on AZLP than on other Arizona political parties,” the District Court asserted that the Libertarians’ equal protection claims nonetheless fail as a matter of law, because the Libertarians did not allege that the amendments were “enacted with a discriminatory intent.” ER 32 (Slip Op. at 30).

Because the District Court found the burden imposed by Sections 16-321 and 16-322 to be “well within the 5% requirement generally upheld by the Supreme Court,” it found no need to conduct “a detailed and extensive factual

consideration of the hours and techniques employed by each AZLP candidate to obtain signatures or write-in votes.” ER 27 (Slip Op. at 25). In other words, given its conclusion that the constitutionality of Sections 16-321 and 16-322 did not present a close question, the District Court found it unnecessary to address the Libertarians’ “evidence that some candidates struggled to satisfy” the requirements they impose. ER 27 (Slip Op. at 25) (citing *Storer v. Brown*, 415 U.S. 724, 742 (1974)). The District Court thus upheld the constitutionality of Arizona’s statutory scheme without any analysis of whether a “reasonably diligent” candidate could “be expected to satisfy the signature requirements” it imposed. *See Storer*, 415 U.S. at 742.

The District Court also rejected the Libertarians’ claim that Sections 16-321 and 16-322 violate their freedom of association. That claim relies principally upon the Supreme Court’s decision in *Jones* and this Court’s decision in *Bayless*, and the District Court found them to be distinguishable. ER 28-29 (Slip Op. at 26-27). Unlike those cases, the District Court observed, this case does not involve “the legally-mandated participation of other parties” in AZLP’s primary election. ER 29 (Slip Op. at 27). Libertarian candidates are thus able to obtain all the signatures required by Sections 16-321 and 16-322 “without looking outside their party.” ER 29 (Slip Op. 27). The District Court conceded that this could require candidates to

obtain support from as much as “30% of the registered AZLP voters in any relevant jurisdiction,” but reasoned that if the Libertarians found this “too daunting a task, they can work to increase their party membership.” ER 29 (Slip Op. at 27).

Finally, the District Court did not separately discuss the Libertarians’ claim that Sections 16-321 and 16-322 violate their right to create and develop a political party. Instead, it purported to consider that claim together with its analysis of the Libertarians’ challenge to Arizona’s increased signature requirements.

SUMMARY OF ARGUMENT

The District Court’s decision should be reversed because it conflicts with every other Supreme Court and lower federal court case analyzing the constitutionality of ballot access laws. Every one of those cases recognizes, implicitly or explicitly, that states may not require candidates to demonstrate support from more than 5 percent of eligible voters as a condition of appearing on the ballot. In this case, however, the District Court upheld a statutory scheme that requires a showing of as much as 30 percent of eligible voters. The District Court reached this erroneous result because it applied an improper standard for measuring the burden imposed by ballot access laws, which is inconsistent with the standard uniformly applied in every other ballot access case.

The District Court also abused its discretion by excluding almost all the

evidence the Libertarians submitted in support of their motion for summary judgment, without making the requisite findings or inquiry into lesser alternatives. This Court should reverse the District Court's decision and remand for further proceedings.

STANDARD OF REVIEW

This Court reviews the District Court's grant of summary judgment on each of the Libertarian's claims de novo. *See Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011). This Court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *See Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003). On review, this Court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004). The Court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. *See Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999).

This Court "review[s] the district court's rulings concerning discovery, including the imposition of discovery sanctions, for abuse of discretion." *R & R*

SAILS v. Insurance Co. of Pa., 673 F. 3d 1240, 1245 (9th Cir. 2012) (quoting *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 822 (9th Cir. 2011)). However, “[T]o the extent the imposition of sanctions turns on the resolution of an issue of law, review is de novo.” *Id.* (citation omitted).

The Libertarians’ claims that 16-321 and 16-322 are unconstitutional were initially raised in the Amended Complaint. ER 141-44. The parties filed cross-motions for summary judgment as to each of these claims. ER 213 (Dkt. Nos. 63, 69). The District Court entered judgment for the Secretary on all claims by its order dated July 10, 2017. ER 3-33 (Dkt. No. 78).

The Secretary’s request for sanctions was raised in her motion to strike. ER 213 (Dkt. No. 63). The District Court granted that motion by its July 10, 2017 order. ER 6-10.

ARGUMENT

I. The District Court’s Decision Should Be Reversed Because It Applies an Improper Standard and Conflicts With Every Supreme Court and Lower Federal Court Case Analyzing the Constitutionality of Ballot Access Laws.

In clear conflict with every Supreme Court and lower federal court case analyzing the constitutionality of ballot access laws, the District Court in this case upheld Arizona’s statutory scheme, which requires that candidates make a showing of support equal to as much as 30 percent of eligible voters in order to appear on

AZLP's primary election ballot. As the District Court itself concedes, it reached this remarkable result by rejecting the standard that every other federal court has applied in ballot access cases, and adopting a new standard it found to be warranted under the facts of this case. ER 20 (Slip Op. at 18). This was error. The District Court's decision should be reversed.

A. The District Court's Decision Conflicts With Every Other Supreme Court and Lower Federal Court Case Analyzing the Constitutionality of Ballot Access Laws.

In a previous order entered in this case, the District Court correctly observed that the purpose of a ballot access law's signature requirement is "to ensure that candidates have 'adequate support from eligible voters to warrant being placed on the ballot.'" ER 208 (Dkt. No. 17 at 2 (citing *Jenkins v. Hale*, 190 P.3d 175, 176 (Ariz. Ct. App. 2008) (quoting *Lubin v. Thomas*, 144 P.3d 510, 512, (Ariz. 2006) (emphasis added))). 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 v. Fortson*, 403 U.S. 431, 440 (1971). 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 eligible voters in the election. *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 eligible voters in an election. *See id.* at 442.

The Supreme Court 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 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 eligible voters in an election. *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 amounting to 1 percent or less of the 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 invariably struck down ballot access schemes such as Arizona's, which require a showing of support from more than 5 percent of the eligible voters in an election. *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); *see also Consumer Party v. Davis*, 633 F. Supp. 877, 891-92 (E.D. Pa. 1986) (holding Pennsylvania’s primary election statutory scheme “unconstitutional as applied to the Consumer Party and its members because it makes it effectively impossible for the Party to place candidates on the general election ballot); *Candidacy of Independence v. Kiffmeyer*, 688 NW 2d 854 (Minn. 2004) (enjoining enforcement of primary election minimum vote requirement as applied to minor political party candidates). By contrast, no court has upheld a statute such as Arizona’s, which requires a showing of support equal to more than 5 percent of the eligible voters in an election.

The foregoing precedent thus makes clear that Arizona’s signature requirements violate the limits established by the Supreme Court’s ballot access precedent, as uniformly applied by the lower federal courts. To appear on AZLP’s

primary election ballot in 2016, a Libertarian candidate needed to obtain signatures equal in number to between 11 and 30 percent of the eligible voters, depending on the jurisdiction. ER 133-37 (Am. Comp. ¶¶ 33-40). Such requirements greatly exceed the highest requirements the Supreme Court has ever upheld. The District Court's decision upholding them is in conflict with every one of the cases cited herein.

B. The District Court Upheld Arizona's Statutory Scheme Because It Applied an Improper Standard.

The District Court conceded that every other federal court case analyzing the constitutionality of ballot access laws measures the modicum of support that such laws require as a percentage of eligible voters, but it concluded that it could disregard that standard here. ER 20 (Slip Op. at 18). The standard that should apply in this case, the District Court decided, is the percentage of "qualified signers" that Sections 16-321 and 16-322 require. The District Court justified its adoption of this new standard on the ground that AZLP holds a closed primary, and "measuring support for a candidate only within his own party ... does not show the support a candidate enjoys among voters for her office in the general election." ER 22 (Slip Op. at 20).

The defect of the District Court's reasoning in this regard is that Arizona has already made a legislative determination that AZLP is entitled to continuing

representation on the general election ballot, based on the size of its registered membership. ER 3-4 (Slip Op. at 1-2) (citing A.R.S. § 16-804). The District Court insists that “the language of the statute” only entitles AZLP “to have a ‘column’ on the general election ballot,” and not to place individual candidates on it, ER 20 (Slip Op. at 18) (quoting A.R.S. § 16-801), but in making this assertion, the District Court simply cites the wrong statute. Section 16-801 applies to “new” political parties, not to parties such as AZLP, which are entitled to continuing representation based on the size of their registered membership, pursuant to Section 16-804(B). Under the terms of that provision, AZLP is expressly entitled “to continued representation as a political party on the official ballot for state, county, city or town officers...”. A.R.S. § 16-804(B). To suggest that Section 16-804(B) only entitles AZLP to be represented on the general election ballot by an empty column, and not by the candidates it nominates for state, county, city or town offices, is to deny the plain meaning of the statutory terms.

In a further effort to justify its adoption of a new standard, the District Court asserts that the Supreme Court has recognized that “states have a legitimate interest in ensuring that *candidates* – not just parties – have a significant modicum of support before their names appear on general ballots.” ER 18-19 (Slip Op. 16-17 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)); *American Party of*

Texas v. White, 415 U.S. 767, 789 (1974). But *Anderson* and *American Party of Texas* both involved ballot access challenges brought by independent candidates who were seeking placement on a state’s general election ballot. See *Anderson*, 460 U.S. at 782; *American Party of Texas*, 415 U.S. at 770. As such, the Court’s recognition that states have an interest in requiring that the candidates make a showing of support before granting them access to the general election ballot is unremarkable. But neither *American Party of Texas* nor *Anderson* supports the District Court’s contention that the State of Arizona has an interest in requiring that the individual nominees of a ballot-qualified party demonstrate support among the general electorate as a condition of their participation in the party’s closed primary election. This purported interest is not even rational: an independent voter, who has chosen not to affiliate with AZLP, has no reason or incentive to support any Libertarian candidate’s effort to win that party’s nomination. ER 138 (Am. Comp. ¶ 42 (citing declarations)).¹

¹Moreover, if Arizona’s asserted interest is in requiring that particular Libertarian candidates demonstrate a modicum of support before allowing them to appear on the general election ballot, it has chosen a particularly ill-suited means of doing so. As Arizona’s 2012 and 2014 election returns show, Libertarian candidates often receive very few votes in their primary races, but go on to receive a substantial percentage in the general election. ER 60-61 (Winger Report, 1-2 (comparing primary and general election vote totals for such candidates and concluding that “a candidate’s vote in a primary is no predictor of how many votes he or she will poll in November”). The evidence thus demonstrates that, virtually without exception, Libertarian candidates who have appeared on Arizona’s general election ballot do in fact have a modicum of support among the general electorate, even if their

The District Court also attempts to support its adoption of a new standard for reviewing Arizona's statutory scheme by imagining the supposedly "absurd results" that could ensue if it did not. ER 29 (Slip Op. at 27). "Suppose a minority political party has only five members," the District Court ventures. ER 29 (Slip Op. at 27). If Arizona could not require the party's candidates, as a practical matter, to obtain signatures from nonmembers, and the party was entitled to hold a closed primary under *Jones* and *Bayless*, "the party could place candidates on the general election ballot with support from five or fewer voters." ER 29 (Slip Op. at 27). But that is incorrect. AZLP is entitled to continuing representation on the general election ballot precisely because it has the requisite number of registered members under Section 16-804(B). By contrast, AZGP is not entitled to continued representation on the general election ballot, because its membership falls short of that number. Any political party that had only five members would be similarly barred from placing its nominees on Arizona's general election ballot.

The District Court's stated rationale for adopting its new standard thus has no merit. Arizona, like any other state, enjoys great latitude in the regulation of its elections, but it remains subject to the strictures of the Constitution. With respect to ballot access laws, Supreme Court precedent teaches that states may not require a

primary vote total was very low. *See id.* The same is true of minor party candidates that ran in other states' primary elections. *See id.*, at 2-5 (citing examples).

candidate to demonstrate support from more than 5 percent of the eligible voters. That standard applies in this case, just as it does in every other Supreme Court and lower federal court case that has addressed the issue. Because the District Court's decision conflicts with that uniform body of precedent, it should be reversed.

II. The District Court's Judgment Granting the Secretary Summary Judgment as to the Libertarians' Freedom of Association Claim Should Be Reversed.

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 real 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 nonmembers – that is equally 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”).

The District 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 the District Court's decision on remand in *Brewer*, this Court 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.” *Bayless*, 351 F.3d at 1282. 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 Amended Complaint and supporting declarations, they have provided substantial evidence to prove that independent and unaffiliated voters in fact wield significant influence over the process by which AZLP chooses its nominees. ER 123 (Am. 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.*; ER 85-86 (Third Kielsky Dec. ¶¶ 3,7); ER 89-90 (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. ER 100 (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).

The District Court nonetheless granted summary judgment to the Secretary. It reasoned that *Jones* and *Bayless* are “distinguishable” because those cases involved “the legally-mandated participation of other parties” in a party’s primary election, and because the laws at issue “permitted nonmembers of a party to participate directly in selection of the party’s candidates.” ER 28-29 (Slip Op. 26-27). Critically, however, the District Court made no attempt to explain why these distinctions were sufficient to resolve the Libertarians’ claim that Arizona’s statutory scheme violates their freedom of association. Specifically, the District Court failed to address the Libertarians’ claim that Section 16-321 and 16-322 implicate both of the potential “outcomes” this Court identified as grounds for constitutional concern under *Jones*. See *Bayless*, 351 F.3d at 1282. But the Libertarians have supported that claim with specific evidence demonstrating that Arizona’s statutory scheme does in fact allow nonmembers to influence AZLP’s choice of nominees, and to influence Libertarian candidates to take more moderate positions. The District Court’s observation that the statutory scheme challenged herein differs in certain respects from those in *Jones* and *Bayless* is therefore insufficient, as a matter of law, to support its grant of summary judgment to the

Secretary. The District Court should be reversed.

III. The District Court’s Judgment Granting the Secretary Summary Judgment as to the Libertarians’ Claim That Sections 16-321 and 16-322 Violate Their Right to Create and Develop a Political Party Should Be Reversed.

The District Court purported to consider the Libertarians’ claim that Sections 16-321 and 16-322 violate their right to create and develop a political party together with their challenge to the signature requirements imposed by those provisions, ER 11-12 (Slip Op. at 9-10 & n.6), but in fact, the District Court largely disregarded the claim, and it struck the evidence the Libertarians submitted in support of it. ER 6-10 (Slip Op. 4-8); ER 34-58 (McCormick Dec.; Hamilton Dec.; Iannuzo Dec.; Fourth Kielsky Dec.; Shipley Dec.; Pepiton Dec.; Daniels Dec.). The Supreme Court has recognized, however, the “constitutional right of citizens to create and develop new political parties,” which “derives from the First and Fourteenth Amendments, and advances the constitutional interest of likeminded voters to gather in pursuit of common political ends.” *Norman v. Reed*, 502 U.S. 279, 288 (1992). This right is “an integral part of the basic constitutional freedom” to associate for the “advancement of political beliefs and ideas.” *Kusper*, 414 U.S. at 57.

The evidence that the Libertarians submitted in support of their claim demonstrates that Sections 16-321 and 16-322 have decimated that right. In fact,

the undisputed evidence shows that these provisions have, in the course of a single election cycle, almost eliminated the Libertarians' ability to participate in Arizona's electoral process. Prior to the 2016 election, when the amendments to Sections 16-321 and 16-322 first took effect, Libertarian candidates routinely appeared on the general election ballot. *See generally*, Arizona Secretary of State, Historical Election Information, available at <https://www.azsos.gov/elections/voter-registration-historical-election-data/historical-election-information>; *see also* Third Kielsky Dec. ¶¶ 8-10 (AZLP placed at least 35 candidates on the general election ballot in 2004; 19 in 2008; and 18 in 2012). In 2016, by contrast, just one candidate qualified to appear on the AZLP primary election ballot under the new signature requirements, *see id.*, and he did so only by working on his petition drive full-time for approximately 70 days. Third Kielsky Dec. ¶ 6.

As a result of the near-total exclusion of their candidates from AZLP's 2016 primary ballot, the Libertarians attempted to qualify their candidates for the general election ballot by running them as write-ins in the primary. *See* A.R.S. § 16-345(E) (providing that write-in candidates may advance to the general election if they receive a number of votes equal to the number of signatures they would have had to collect pursuant to Section 16-322). To support this effort, AZLP spent \$7,676.26 – a significant portion of its limited resources – to print and mail a 6" x

9” full-color postcard to every address in the state where a registered Libertarian voter resided, which listed 17 declared Libertarian write-in candidates, the offices for which they were running, and urged Libertarian voters to write-in their names on the primary election ballot. ER 47 (Fourth Kielsky Dec. ¶ 7).

The Maricopa County Libertarian Party also sent a similar mailing to people who were proven to be reliable, consistent Libertarian voters. ER 41 (Iannuzo Dec. ¶ 7). Despite the foregoing efforts, not one of AZLP’s declared write-in candidates was able to garner enough votes to qualify for the general election ballot under Section 16-345(E). *See Arizona Secretary of State, 2016 General Election – November 8, 2016, available at <http://apps.azsos.gov/election/2016/General/ElectionInformation.htm>. Sections 16-321 and 16-322 have thus relegated the Libertarians to a kind of ballot access purgatory. Based on the number of registered voters belonging to their party, they are required to hold primary elections pursuant to Sections 16-804(B) and 16-301. But because the signature requirements now imposed on them by Sections 16-321 and 16-322 are so high, their candidates cannot qualify for placement on the primary election ballot, nor can their write-in candidates qualify for the general election ballot under Section 16-345(E) – despite the diligent and even Herculean efforts of those who tried. ER 34-58 (McCormick Dec.; Hamilton Dec.; Iannuzo*

Dec.; Fourth Kielsky Dec.; Shipley Dec.; Pepiton Dec.; Daniels Dec.). AZLP has become a political party that is required by statute to hold elections in which none of its candidates can realistically hope to participate.

Little citation is needed to show that such a statutory scheme violates the Libertarians' right to create and develop their political party. As the Supreme Court has recognized, "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." The District Court's judgment granting summary judgment to the Secretary as to the Libertarians' claim that Sections 16-321 and 16-322 violate their right to create and develop their political party therefore should be reversed.

IV. The District Court's Judgment Granting Summary Judgment to the Secretary as to the Libertarians' Equal Protection Claim Should Be Reversed.

This Court has concluded that Equal Protection claims asserted in ballot access cases should be analyzed under the same framework set forth in *Anderson*. See *Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011). Of particular relevance here, *Anderson* specifies that a state's "regulatory interests are generally sufficient to justify reasonable, nondiscriminatory regulations." *Anderson*, 460 U.S. at 788 & n.9 (emphasis added) (equating "nondiscriminatory" with "generally

applicable and evenhanded”). Although the 2015 amendments to Sections 16-321 and 16-322 might be considered generally applicable, in that they applied to Republicans and Democrats as well as Libertarians, they certainly do not qualify as evenhanded.

The 2015 amendments to Sections 16-321 and 16-322 generally caused little or no increase to the signature requirements that the provisions impose upon Republican and Democratic candidates, and in many cases, it lowered them. ER 130-32 (Am. Comp. ¶¶ 25-29) (citing public records available from the Secretary of State’s website). By contrast, the amendment to these provisions increased the signature requirements imposed upon Libertarian candidates anywhere from 1,000 to 3,000 percent, depending on the office. Such a gross disparity in the impact of a facially neutral statute is the very antithesis of evenhanded. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Because Sections 16-321 and 16-322, as amended, fall with unequal weight on the Libertarians, they also impose additional burdens on the Libertarians, which do not impact the Republicans and Democrats at all. Perhaps most important is the burden on the Libertarians’ freedom of association. *See supra* at Part II (citing *Jones*, 530 U.S. 567). As a small party, with just over 32,000 members statewide, relying on non-members is a practical necessity for Libertarians to comply with the

increased signature requirements imposed by Sections 16-321 and 16-322. *See* Arizona Secretary of State, Voter Registration and Historical Data, available at <https://www.azsos.gov/elections/voterregistration-historical-election-data>.

Republicans and Democrats, by contrast, each have well over one million members, *see id.*, on whom they may rely exclusively to satisfy signature requirements that remain largely unchanged.

This case thus presents an instance in which “the grossest discrimination can lie in treating things that are different as though they were exactly alike.” *Jenness*, 403 at 442. By treating the Libertarians as if they were similarly situated with the two major parties, the statute effectively compels their association with non-members, in violation of *Jones*. At the same time, Arizona’s statutory scheme treats AZLP as though it were differently situated than the only other minor party recognized by the state, AZGP. AZGP, being even smaller than the AZLP, does not qualify for continued representation on the ballot pursuant to Section 16-804(B), but rather achieves ballot status by submitting a petition to qualify as a new party pursuant to A.R.S. § 16-801. Its candidates are therefore subject to different, much lower signature requirements than those imposed on the Libertarians under Sections 16-321 and 16-322. *See* A.R.S. § 16-322(C) (establishing signature requirement of “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 within the district). Further, AZGP's write-in candidates need not comply with the minimum vote requirement imposed upon AZLP candidates pursuant to Section 16-645(E). Instead, a separate provision permits AZGP's write-in candidates to advance to the general election ballot as long as they receive a "plurality" of the vote. *See* A.R.S. § 16-645(E). As a result, although Libertarian candidates uniformly outpolled Green candidates by wide margins in the 2016 primary, in each instance the Greens were permitted to appear on the general election ballot, while the Libertarians were not. *See* Arizona Secretary of State, 2016 Election Information, available at <http://apps.azsos.gov/election/2016/Info/ElectionInformation.htm>. Because Arizona does not and cannot advance any legitimate, much less compelling, interest for imposing such disparate treatment upon these two similarly situated parties, it violates the Libertarians' right to equal protection of law.

The District Court devoted one scant paragraph to its summary disposal of the Libertarians' equal protection claims. For reasons the District Court failed to identify, it concluded that Arizona's statutory scheme is "nondiscriminatory", while disregarding the foregoing arguments and evidence demonstrating that it is not. ER 32 (Slip Op. at 30). The District Court's decision should be reversed on that basis

alone. Given that its decision expressly relies on a finding that the statutory scheme is nondiscriminatory, the District Court has an obligation to specify the evidentiary basis for that finding, particularly since it directly contradicts the evidence set forth above.

The District Court also asserted that the Libertarians' claims are legally insufficient to state an equal protection claim, because they do not allege that the amendments to Sections 16-321 and 16-322 were "enacted with a discriminatory intent." ER 32 (Slip Op. at 30) (citing *Washington v. Davis*, 426 U.S. 229 (1976)). This was error. *Washington* was a case alleging discrimination on the basis of a suspect class – race – and as such, the Court found that the plaintiff was required to allege a discriminatory intent, as well as a disparate impact, in order to state a claim. *See Washington*, 426 U.S. at 239-41. That analysis is inapposite here. The constitutionality of ballot access laws is reviewed under the analytic framework set forth in *Anderson*, 460 U.S. at 789. Whether claims are alleged under the First Amendment, the Due Process Clause or the Equal Protection Clause, the analysis is the same, and no allegation of "discriminatory intent" is required. *See Dudum*, 640 F.3d at 1106 n.15.

Accordingly, both the factual basis and the legal basis of the District Court's judgment granting the Secretary summary judgment as to the Libertarians' equal

protection claims is erroneous. It should be reversed.

V. The District Court Abused Its Discretion By Excluding the Libertarians' Evidence Without Making a Finding of Willfulness, Fault or Bad Faith and Without Considering Lesser Alternatives.

The District Court's decision to exclude six of the seven declarations the Libertarians submitted in support of their motion for summary judgment was an abuse of discretion. As the District Court conceded, where such a sanction amounts to dismissal of a claim, the sanctioning court must make a finding of willfulness, fault or bad faith. ER 10 (Slip Op. at 8 n.4 (citing *R & R SAILS*, 673 F. 3d at 1247. It also must consider the availability of lesser sanctions. *See R & R SAILS*, 673 F. 3d at 1247. Here, the District Court did neither. It simply treated the "harsh sanction" of dismissal as if it were mandatory. ER 10 (Slip Op. at 8 n.4).

The District Court declined to follow the requirements set forth in *R & R SAILS* because it determined that its exclusion of the six declarations did not amount to a dismissal of the Libertarians' claims. ER 10 (Slip Op. at 8 n.4). That is incorrect. The crux of the District Court's decision was its finding that Sections 16-321 and 16-322 are "reasonable and nondiscriminatory" regulations. ER 30 (Slip Op. at 28 (citing *Burdick* 504 U.S. at 534)). Once the District Court made that finding, its conclusion that the statutes are constitutional was almost inevitable. ER 31 (Slip Op. at 29); *see Burdick* 504 U.S. at 534 ("[W]hen a state election law

provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions") (citation and quotation marks omitted)). Had the District Court considered the Libertarians' evidence, however, it could not have made its finding that Sections 16-321 and 16-322 are reasonable and nondiscriminatory.

In *Storer*, the Supreme Court provided lower courts reviewing ballot access laws with the following guidance: "past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." *Storer*, 415 U.S. at 742. Accordingly, courts routinely inquire into the frequency with which candidates have complied with challenged ballot access laws, because the answer provides a reliable (though not unerring) indication as to whether the laws are unconstitutionally burdensome. In this case, however, the District Court expressly declined to engage in that inquiry, because it determined, without addressing the Libertarians' evidence, that the statutes are "well-within" the constitutional limits established by Supreme Court precedent. ER 27 (Slip Op. at 25). Consideration of the evidence it had excluded surely would have, or should have, given the District Court reason to reconsider that conclusion. ER 34-58 (McCormick Dec.; Hamilton Dec.; Iannuzo Dec.; Fourth Kielsky Dec.; Shipley Dec.; Pepiton Dec.; Daniels Dec.).

The District Court's failure to consider the availability of lesser sanctions is an

even clearer abuse of discretion, because one was so readily at hand: the District Court simply could have extended the discovery period to allow the Secretary to depose the Libertarians' declarants. *See R & R SAILS*, 673 F. 3d at 1248. The Libertarians certainly did not oppose that alternative, although the Secretary did. ER 213 (Dkt. No. 66). That alternative is still available, however, and it should be exercised on remand.

CONCLUSION

For the foregoing reasons, the order and judgment of the District Court entered on July 10, 2017 should be reversed, and this case should be remanded to the District Court for further proceedings.

Dated: November 30, 2017

Respectfully submitted,

s/Oliver B. Hall

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STATEMENT OF RELATED CASES

This case is related to *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277

(9th Cir. 2003), which involved a challenge to Arizona's semi-closed primary election system on the ground that it violated the Libertarians' freedom of association under the First Amendment, by requiring that AZLP allow nonmembers to participate in the process of selecting its precinct committeemen and nominees for public office. The District Court held the procedures for choosing precinct committeemen unconstitutional, and struck the statutory scheme down in its entirety, without separately analyzing the provisions relating to the selection of the party's nominees. *See id.* at 1280. This Court affirmed the District Court's ruling with respect to precinct committeemen, but remanded for further consideration of the provisions relating to partisan nominees. On remand, the District Court also held those provisions unconstitutional. *See Arizona Libertarian Party v. Brewer*, No. 02-144-TUC-RCC (D. Az. Sept. 27, 2007) (unpublished order) (permanently enjoining the Secretary from requiring that AZLP allow non-members to vote in its primary elections). The Secretary did not appeal.

This case is related to *Bayless* because it raises an issue closely related to the one this Court remanded in that case. In *Bayless*, the question was whether Arizona's statutory scheme violated the Libertarians' freedom of association by requiring that they permit nonmembers to vote in AZLP's primary election. *See id.* Here, the question is whether the statutory scheme violates the Libertarians'

freedom of association by requiring that candidates seeking access to AZLP's primary election ballot either obtain signatures from nonmembers, or comply with unconstitutionally burdensome signature requirements.

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Signature of Attorney or
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s/Oliver B. Hall

Date

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