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

REPLY BRIEF OF APPELLANTS

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Plaintiff-Appellants Arizona Libertarian Party ("AZLP") and Michael Kielsky (together, "the Libertarians") respectfully submit this Reply to the Appellee's Brief filed by Defendant-Appellee Michele Reagan ("the Secretary").

ARGUMENT

I. The Secretary's Failure to Cite a Single Case That Supports Her Position, and Her Failure to Address the Uniform Body of Precedent That Contradicts It, Confirms That the District Court's Decision Violates Supreme Court Precedent and Must Be Reversed.

The District Court's decision upholding A.R.S. §§ 16-321 and 16-322, despite the fact that they require that candidates seeking to appear on AZLP's primary election ballot show support from as much as 30 percent of the eligible voters in that election, is in clear violation of Supreme Court precedent. It is also in conflict with every lower federal court case that has considered the issue. It should be reversed.

A. The Secretary Does Not Even Attempt to Address the Precedent Demonstrating That Arizona's Primary Election Signature Requirements Are Unconstitutional.

In their opening brief, the Libertarians demonstrated that every Supreme Court and lower federal court ballot access case, except for the District Court's decision below, measures the modicum of support that a challenged law requires as a percentage of eligible voters in the election. Lib. Br. at 32-36. They further demonstrated that the Supreme Court has never upheld a statute that required a showing of support greater than 5 percent of the eligible voters in an election. *Id.*

And finally, the Libertarians demonstrated that federal courts have, without exception, followed Supreme Court precedent by invalidating statutes such as Arizona's, which require a showing of support from more than 5 percent of eligible voters. Lib. Br. at 36-37 (citing nine cases in which lower courts struck down such statutes). Based on that uniform body of precedent, the Libertarians contend, Sections 16-321 and 16-322 are unconstitutional, because they require that candidates seeking to appear on AZLP's primary election ballot show support from as much as 30 percent of the eligible voters.

In her brief, by contrast, the Secretary vaguely asserts that the Libertarians are "mistaken", Sec. Br. at 15, but she fails to explain how or why she believes that to be so. That is because the Secretary does not actually dispute any of the foregoing points – nor can she. Specifically, the Secretary does not dispute that: 1) the Supreme Court and every lower federal court, except for the District Court in this case, applies the "eligible voter" standard to analyze the constitutionality of ballot access laws; 2) the Supreme Court has never upheld a statute that required a showing of support greater than 5 percent of eligible voters; and 3) every lower federal court that has considered the issue, except for the District Court in this case, has invalidated statutes that require a showing of support greater than 5 percent of eligible voters.

The Secretary's failure to cite any cases that contradict these critical points confirms that she does not actually dispute them. The Secretary cites no case in which a court rejected the "eligible voter" standard, as the District Court did here, because there is no such case. The Secretary cites no case in which a court upheld a statute that required a showing of support greater than 5 percent of the eligible voters in an election, as the District Court did here, because there is no such case. And the Secretary makes no attempt to address the lower federal court cases that, without exception, strike down such statutes, because the District Court's decision is in direct conflict with them, and cannot be reconciled. The Constitution does not permit Arizona to require that candidates seeking to appear on AZLP's primary election ballot show support from as much as 30 percent of the eligible voters in that election, and no case says that it does. On the contrary, the cases on which the Secretary purports to rely confirm that the District Court's decision violates Supreme Court precedent.

B. None of the Cases Cited By the Secretary Hold That a State May Require That a Candidate Seeking Access to the Ballot Show Support From More Than 5 Percent of the Voters Eligible to Vote for the Candidate.

Throughout her brief, the Secretary cites to Supreme Court cases indiscriminately, without regard to whether they arise from challenges to general election ballot access requirements, or to primary election ballot access

requirements, as this case does. Because she disregards this crucial distinction, the Secretary distorts the holdings of the cases. But whether the case arises from a primary election, or a general election, none of them cases hold that a state can require a candidate to show support from more than 5 percent of the voters eligible to vote for the candidate in that election.

The Secretary begins her discussion with the misstatement of law on which her entire position relies: the Supreme Court, the Secretary avers, "has consistently upheld state laws requiring a candidate to demonstrate support of up to five percent of all registered voters or the total number of people who voted in the last election." Sec. Br. at 16 (citing *Jenness v. Fortson*, 405 U.S. 431, 438 (1971); *Storer v. Brown*, 415 U.S. 724, 730 (1974)). That statement is misleading at best, and the Libertarians certainly do not "concede as much", as the Secretary falsely asserts. Sec. Br. at 17. On the contrary, insofar as the Secretary contends that this statement applies to candidates seeking access to AZLP's primary election ballot, it is an outright falsehood.

Both *Jenness* and *Storer* involved challenges by independent candidates to the requirements for appearing on a state's general election ballot. *See Jenness*, 415 U.S. at 432-33; *Storer*, 415 U.S. at 727-28. Specifically, to appear on the general election ballot in *Jenness*, the independent candidates were required to submit a

nomination petition signed by "a number of electors of not less than five per cent. of the total number of electors eligible to vote in the last election for the filling of the office the candidate is seeking." *Jenness*, 415 U.S. at 433. To appear on the general election ballot in *Storer*, the independent candidates were required to submit a nomination petition "signed by voters not less in number than 5% nor more than 6% of the entire vote cast in the preceding general election in the area for which the candidate seeks to run." *Storer*, 415 U.S. at 726-27. In each case, therefore, the signature requirement was based on a percentage of the voters eligible to vote for the independent candidates, and it did not exceed 5 percent. *See id.*; *Jenness*, 415 U.S. at 433. Nothing in *Jenness* or *Storer* suggests that a state can require a showing of support from "up to five percent" of the entire electorate in a case such as this, where the candidates seek to appear on a minor party's primary election ballot, and where the general electorate is ineligible to vote in that primary. Rather, *Jenness* and *Storer* confirm that states may not require that candidates demonstrate support from more than 5 percent of the voters eligible to vote for them.

The other cases cited by the Secretary are no different. The statutory scheme challenged in *American Party of Texas v. White*, 415 U.S. 767 (1974), also regulated access to the state's general election ballot. In particular, the statute

provided that a minor political party could place its nominees on the general election ballot if it demonstrated "support by persons numbering at least 1% of the total vote cast for governor at the last preceding general election." *American Party of Texas*, 415 U.S. at 777. Once again, therefore, the showing of support required of the party to place its nominees on the general election ballot was derived as a percentage of voters eligible to vote in that election. *See id.* at 777-78. Additionally, the specific requirement – 1 percent of the total vote for governor in the preceding general election – was well below 5 percent of all eligible voters. Consequently, *American Party of Texas* offers no more support for the Secretary's position than does *Jenness* or *Storer* – which is to say it offers none. Like those cases, nothing in *American Party of Texas* suggests that Arizona can require candidates seeking access to AZLP's primary election ballot to show support from as much as 30 percent of the voters eligible to vote for them.

The only case the Secretary cites that involves a primary election is especially instructive, because it confirms that the Court adhered to the "eligible voter" standard it applied in *Jenness*, *Storer* and *American Party of Texas*. Sec. Br. at 20 (citing *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986)). In *Munro*, minor party candidates were nominated by convention. *Munro*, 479 U.S. at 191. The nominees were then required to run in a "blanket primary", in which "voters

may vote for any candidate of their choice, irrespective of the candidates' political party affiliation." *Id.* at 192. The challenged statute provided that a party's nominees for each office could not appear on the general election ballot unless the nominee "receive[d] at least 1% of all votes cast for that particular office at the primary election." *Id.* at 191-92. Yet again, therefore, the challenged statute measured the showing of support the candidate was required to make as a percentage of voters eligible to vote for that candidate. *See id.* And like every other case cited by the Secretary, the requirement was no more than 5 percent of the eligible voters – indeed, in *Munro*, the requirement was far less.

The Secretary's assertion that a ballot access statute is "presumptively constitutional" as long as it requires a showing of support no greater than 5 percent of the entire electorate is therefore a gross misrepresentation of the case law. Sec. Br. at 20. The cases on which the Secretary purports to rely – *Jenness*, *Storer*, *American Party of Texas* and *Munro* – say no such thing. Instead, these cases recognize that states may not require a showing of support greater than 5 percent of the voters eligible to vote for the candidate seeking access to the ballot. As applied here, that means Arizona cannot require that candidates seeking access to AZLP's primary election ballot show support from more than 5 percent of the voters eligible to vote in that primary election.

In a final effort to avoid that conclusion, the Secretary resorts to yet another misrepresentation. According to the Secretary, the Libertarians "urge a standard that no court has ever adopted—that the pool of eligible voters for signatures must be limited to party members." Sec. Br. at 12. But this assertion misstates the Libertarians' position. As they have stated repeatedly and unwaveringly throughout these proceedings, the Libertarians' position is simply that states may not require a showing of support greater than 5 percent of the voters eligible to vote for the candidate seeking access to the ballot. This is hardly controversial. As the District Court itself conceded, every Supreme Court and lower federal court ballot access case has recognized that standard, except for the District Court's own decision in this case. ER 20 (Slip Op. at 18). It is the Secretary, therefore, who runs afoul of that uniform body of precedent, by asking this Court to uphold a statute that requires a showing of support amounting to as much as 30 percent of the eligible voters in AZLP's primary.

II. The Secretary Fails to Address the District Court's Error in Misconstruing This Case as a Challenge to Arizona's General Election Ballot Access Requirements.

Because the showing of support required by Sections 16-321 and 16-322 greatly exceeds 5 percent of the eligible voters in AZLP's primary election, the District Court could not uphold the constitutionality of those provisions unless it

misconstrued the basis for the Libertarians' claims. That is what it did. According to the District Court, by asserting claims against Sections 16-321 and 16-322, the Libertarians do not challenge the requirements for appearing on Arizona's primary election ballot, but rather they challenge the "two-step process" by which Arizona regulates access to its general election ballot. ER 16 (Slip. Op. at 14). As the Libertarians have previously explained, this was error. Lib. Br. at 26, 38. Despite adopting the District Court's faulty reasoning for purposes of this appeal, however, the Secretary makes no attempt to address that error. The Secretary therefore fails as a matter of law to provide grounds for affirming the District Court's decision.

A. The Libertarians Challenge the Requirements for Appearing on Arizona's Primary Election Ballot, Not Its General Election Ballot.

As an initial matter, the District Court's conclusion that the Libertarians challenge the requirements for appearing on Arizona's general election ballot, rather than its primary election ballot, directly contradicts the allegations in their Amended Complaint. As that pleading plainly states on the very first page, the Libertarians "specifically challenge the constitutionality of two provisions of Arizona law, A.R.S. §§ 16-321 and 16-322, which establish the requirements that political parties must meet to place their candidates on Arizona's primary election ballot." ER 121 (Am. Comp. at 1); *see also* ER 141-44 (Am. Comp. ¶¶ 57-75) (asserting claims against Sections 16-321 and 16-322). Moreover, nowhere in their

Amended Complaint, or in their briefing, do the Libertarians challenge the constitutionality of the provision governing their access to the general election ballot. *See* A.R.S. § 16-804. Indeed, it would make little sense for the Libertarians to challenge that provision because, as the District Court recognized, "it is undisputed that AZLP qualifies for continued representation on the general election ballot" pursuant to Section 16-804(B). ER 4 (Slip Op. at 2).

The District Court's conclusion that the Libertarians challenge the requirements for appearing on Arizona's general election ballot also contradicts the express terms of Arizona's statutory scheme. Sections 16-321 and 16-322 appear under Chapter 3 of the Arizona Election Code, which governs the procedures by which political parties select their nominees "at a primary election". A.R.S. § 16-301. By contrast, the procedures by which political parties place their nominees on the general election ballot are governed by Chapter 5, Article 1. *See* A.R.S. §§ 16-801 et seq. And, to reiterate, the Libertarians do not assert any claim against Section 16-804(B), the provision that qualifies them to appear on the general election ballot. *See* A.R.S. § 16-804(B) (providing that a political party is entitled to "continued representation" on the general election ballot if its registered membership is "equal to at least two-thirds of one per cent of the total registered electors in such jurisdiction").

In their opening brief, Lib. Br. at 38-39, the Libertarians demonstrated that the District Court committed clear error by concluding that they are only entitled to have an empty "column on the general election ballot," and not "to have candidates on the ballot." ER 20 (Slip Op. at 18) (citing A.R.S. § 16-801(A)). The District Court simply misread Arizona's statutory scheme: AZLP qualifies for continued representation on the general election ballot pursuant to Section 16-804(B), not Section 16-801(A), as the District Court mistakenly believed. Further, unlike Section 16-801(A), Section 16-804(B) contains no reference whatsoever to a "column" on the general election ballot. *Compare* A.R.S. § 16-801(A) *with* A.R.S. § 16-804(B). Rather, Section 16-804(B) expressly states that a party is "entitled to continued representation on the official ballot for state, county, city or town officers". A.R.S. § 16-804(B). This language plainly contemplates that the party will be represented by its nominees for those offices – not by an empty column. *See also* A.R.S. § 16-301 (providing that a party entitled to representation on the general election ballot shall nominate by primary election "if it desires to have the names of its candidates printed on the official ballot at such general ... election"). Accordingly, AZLP is entitled to place its nominees on Arizona's general election ballot pursuant to Section 16-804(B).

Notably, in the proceedings below, the Secretary herself never asserted that

this case involves a challenge to the requirements for appearing on Arizona's general election ballot. On the contrary, the Secretary expressly acknowledged that the Libertarians challenge the provisions that determine which candidates may appear "on the primary election ballot." Sec. Cross-Mot. for Summ. J. at 3 [Dkt. No. 69]. Now, however, the Secretary has done an about-face, and she asserts for the first time on appeal that the Libertarians are actually challenging the requirements that a political party must meet "to qualify for the general election ballot." Sec. Br. at 3.

The Secretary's reversal on this fundamental issue merely confirms what is already obvious: the Libertarians challenge the requirements for appearing on Arizona's primary election ballot, not its general election ballot. Furthermore, the District Court's conclusion to the contrary is based on a blatant misreading of Arizona's statutory scheme, which the Secretary does not even attempt to address. Instead, she resorts to obfuscation. Perhaps most significant, the Secretary misrepresents the statutory text of Section 16-804, by asserting that it establishes the requirements for becoming an "established party" in Arizona, Sec. Br. at 3, when in fact those words do not appear in Section 16-804. Because such efforts to cloud the issues on appeal cannot remedy the District Court's errors in misconstruing the Libertarians' claims and misreading Arizona's statutory scheme,

the Secretary fails, as a matter of law, to provide this Court with grounds to affirm. The District Court should be reversed.

B. The District Court's Decision Conflicts With Precedent Recognizing the Constitutional Limits on Primary Election Ballot Access Requirements.

Among the nine lower court cases that conflict with the District Court's decision in this case are two that directly address the constitutionality of primary election, as opposed to general election, ballot access requirements. Unlike the District Court here, the courts in these cases had no trouble distinguishing between regulations that govern the primary election ballot, and those that govern the general election ballot. These cases thus stand in sharp conflict with the District Court's decision, which effectively treated Sections 16-321 and 16-322 as regulating access to the general election ballot, notwithstanding the fact that these provisions expressly regulate access to Arizona's primary election ballot.

In the most directly analogous case, the plaintiffs alleged that the challenged legislation, which substantially increased the number of signatures required to place candidates on the primary election ballot, unconstitutionally deprived the Consumer Party of the right to participate in elections. *See Consumer Party v. Davis*, 606 F.Supp. 1008, 1010 (E.D. Pa. 1985). The District Court agreed, but declined to invalidate the statute, and devised an alternate remedy. *See id.* at 1020-

23. The plaintiffs therefore appealed the District Court's decision only with respect to the remedy. *See Consumer Party v. Davis*, 778 F.2d 140 (3rd Cir. 1985). The Court of Appeals vacated the District Court's decision and remanded with instructions that it enter an appropriate remedy. *See id.* at 148. On remand, the District Court held the 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." *See Consumer Party v. Davis*, 633 F.Supp. 877, 891-92 (E.D. Pa. 1986).

Similarly, the Minnesota Supreme Court struck down a minimum vote requirement that the state imposed upon partisan primary election winners, which was much more lenient than the signature requirements imposed by Sections 16-321 and 16-322. *See In re Candidacy of Independence Party Candidates v. Kiffmeyer*, 688 N.W. 2d 854 (Minn. 2004). In order for a ballot-qualified party to place its candidates on the general election ballot, Minnesota required at least one of its primary election winners to receive votes equal to "ten percent of the average number of votes received by that party's candidates for state constitutional offices in the previous general election." *Id.* at 856. Thus, Minnesota's statute, unlike Arizona's, took account of a party's size in determining the minimum number of votes required. *See id.* Nevertheless, the state conceded that the statute served no

legitimate state purpose, and the Minnesota Supreme Court had "no difficulty concluding" that Minnesota's minimum vote requirement violated plaintiffs' "constitutional rights to vote and to associate for the advancement of political beliefs under the First and Fourteenth Amendments." *Id.* at 860.

Here, by contrast, the District Court placed the onus on the Libertarians to overcome the unconstitutional burdens that Sections 16-321 and 16-322 impose on them. The Libertarians could "reduce" that burden, the District Court suggested, "by attracting more voters to AZLP." ER 23 (Slip Op. at 21). "A party may not use its low membership to reduce the support it must show for presence on the general ballot," the District Court reasoned. ER 23 (Slip Op. at 21). But this reasoning only demonstrates, yet again, the error in the District Court's analysis. As the courts in *Consumer Party* and *Kiffmeyer* recognized, the plaintiffs in those cases – like AZLP in this case – were entitled to place their nominees on the general election ballot. The challenged statutory schemes were unconstitutional, however, because they made it difficult or impossible for the plaintiffs to do so through the primary election process. *See Consumer Party*, 633 F.Supp. at 891-92; *Kiffmeyer*, 688 N.W. 2d at 860.

Arizona's statutory scheme suffers the same constitutional defect.

III. Arizona's "Regulatory Interests" Do Not Permit It to Impose Unconstitutional Burdens on Candidates Seeking to Appear on AZLP's

Primary Election Ballot.

The Secretary attempts to justify the unconstitutional burdens imposed by Sections 16-321 and 16-322 by asserting two state interests the provisions supposedly protect. Specifically, according to the Secretary, Sections 16-321 and 16-322 help Arizona ensure that candidates have support in order "to avoid ballot confusion and sham candidates." Sec. Br. at 28. As a preliminary matter, however, the Secretary is simply incorrect that the signature requirements imposed on the Libertarians under Sections 16-321 and 16-322 "easily fall within the range of permissible ballot-access requirements that the Supreme Court has upheld." Sec. Br. at 29. They do not. *See infra* Part I.

Furthermore, the Secretary once again disregards a critical fact that is of paramount importance in this case: the State of Arizona has already made the legislative determination, based on the size of its registered membership, that AZLP has demonstrated sufficient support among the general electorate to place its nominees on the general election ballot. *See* A.R.S. § 16-804(B). In fact, the Secretary explicitly conceded this point in the proceedings below. Unlike "the Democrats, Republicans, *and the Libertarians*," the Secretary averred, "the Green Party does not have the level of support to qualify for continuing representation on the ballot." Sec. Cross-Mot. Summ. J. at 18 (emphasis original) [Dkt. No. 69].

This critical fact – that Arizona has legislatively determined that AZLP is entitled to place its nominees on the general election ballot – is what makes the Secretary's reliance on *Jenness* and *American Party of Texas* misplaced. Sec. Br. at 29. In both of those cases, the challenged requirements regulated access to the general election ballot, and the state had no other mechanism for ensuring that a candidate had a modicum of support among the general electorate. Here, by contrast, Arizona has determined that AZLP's nominees have sufficient support among the general electorate by virtue of the size of the party's membership.[1] *See* A.R.S. § 16-804(B). Sections 16-321 and 16-322 therefore do not and need not play any role in ensuring that such candidates have support among the general electorate. Section 16-804(B) performs that function.

Additionally, while the Secretary raises the specter of "an on-going and recent history" of "sham candidates" in Arizona, the record belies the state's purported concern. Sec. Br. at 30. The first supposed example the Secretary proffers – recounted by a Republican Party operative who claims to know the candidate's motivations – involved nothing more than a candidate changing his party affiliation in 2014 to obtain ballot access as a Libertarian. Sec. Br. at 30. To

1 In *Munro*, to which the Secretary also cites, the state also lacked any other mechanism for ensuring a candidate's support among the general electorate, apart from the minimum vote requirement imposed upon primary election winners, because minor party nominees could run in the primary with the support of only 100 registered voters. *See Munro*, 479 U.S. at 191. Here, by contrast, Section 16-804(B) permits AZLP's nominees to appear on the general election ballot only because AZLP's has enough registered members – and hence, sufficient support among the general electorate.

find the only other alleged instance, the Secretary finds it necessary to reach back eight years to 2010, when the Arizona Green Party ("AZGP") filed suit to enjoin certain candidates from appearing on the general election ballot as its nominees. Sec. Br. at 30 (citing *Ariz. Green Party v. Bennett*, 2010 WL 3614649 (D. Ariz. Sept. 9, 2010) (unreported)). But what the Secretary derisively labels as "gamesmanship" gave the Court in *Bennett* little cause for concern. While the alleged facts might require Green Party members to associate with candidates who do not share their views, the Court found,

> that is not uncommon in political parties. Candidates running under a particular political party name often disagree with the party on significant issues. Party leaders often must tolerate candidates who do not fully share the party views or do not embrace them as vigorously as party leaders would like. Such dissonance is common in the American party system...

Id. The Court thus denied the party's request for relief.

If such hyperbole is the best evidence the Secretary can muster to justify Sections 16-321 and 16-322, they appear to be wholly unnecessary to protect the state's asserted interests. Nor is the state interest typically asserted – in preventing ballot-overcrowding – implicated here. As the District Court acknowledged, AZLP is a small party whose candidates "typically run unopposed" in the primary. ER 19 (Slip Op. at 17). There is, however, actual and genuine evidence of ballot-overcrowding in Arizona – it just occurs in the Republican Party primary, not

AZLP's. In 2016, for example, there were 14 candidates on the Republican Party's presidential primary ballot. *See* Arizona Secretary of State, *Republican Party Candidates – Presidential Preference Election 2016*, available at https://www.azsos.gov/elections/voting-election/election-information/prespref2016rep. In 2012, 23 candidates were on the ballot in that election. *See* Arizona Secretary of State, *2012 Presidential Preference Election – Ballot Order*, available at http://apps.azsos.gov/election/2012/ppe/PPECandidatesRepublican.htm.

Despite this ongoing problem with ballot-overcrowding in the Republican Party presidential primary, the legislation amending Sections 16-321 and 16-322 did nothing to address it. ER 147-51 (text of HB 2608). Indeed, it is undisputed that the legislation left the signature requirements imposed upon the Republicans and Democrats largely unchanged, and did not affect the signature requirements that apply to the Greens at all. ER 130-32 (Am. Comp. ¶¶ 25-29); *see* A.R.S. § 16-322(C) (establishing different, and much lower, signature requirements that apply to "new" parties like AZGP). Instead, HB 2608 targeted the Libertarians with laser-like precision, and increased the signature requirements imposed upon them exponentially – between 1,000 and 3,000 percent, depending on the candidate. ER 128-30 (Am. Comp. ¶¶ 19-24). Not only do these new requirements grossly exceed

the constitutional limits established by Supreme Court precedent, but also, the Secretary has not asserted any credible, legitimate insterest that could justify such targeted legislation. Its apparent purpose was simply to terminate the Libertarians' participation in Arizona's electoral process, which it effectively accomplished in the course of a single election cycle. ER 139-40 (Am. Comp. ¶¶ 48-49).

IV. The Secretary's Attempt to Defend Sections 16-321 and 16-322 as Applied to Write-In Candidates Fails as a Matter of Law.

Sections 16-321 and 16-322 are perhaps most clearly unconstitutional as applied to write-in candidates. *See* A.R.S. 16-645(E) (requiring that write-in candidates receive at least as many votes in the primary election as the number of signatures they would have been required to obtain pursuant to Section 16-322). If write-in candidates do not receive the required minimum number of votes – which in 2016, ranged from 11 percent to 30 percent of the eligible voters, depending on the race in AZLP's primary – they are not permitted to appear on the general election ballot. As the Secretary herself appears to concede, such requirements impose an impermissible burden. Sec. Br. at 26.

The Secretary's attempt to defend Sections 16-321 and 16-322 as applied to write-in candidates boils down to her assertion that "no one has a right to be a write-in candidate in the first place." Sec. Br. at 27 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992). Since that is the case, the Secretary opines, then Arizona must be

permitted to impose any burden whatsoever on write-in candidates, "provided that the State has an otherwise constitutional path to the general election ballot." Sec. Br. at 26-27. The Supreme Court disagrees.

In its first ballot access case, the Supreme Court squarely rejected the position the Secretary adopts here. *See Williams v. Rhodes*, 393 U.S 23 (1968). The state in *Williams* asserted that, because the Constitution grants it the power to select electors, it had an "absolute power to put any burdens it pleases" on their selection. *Id.* at 29. But while the Court recognized the state's "extensive power" to regulate the selection of electors, it found that state powers "are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Id.* Therefore, the Court held, "no State can pass a law regulating elections that violates the Fourteenth Amendment's command that 'No State shall . . . deny to any person . . . the equal protection of the laws.'"

The Court reaffirmed the point in *Moore v. Ogilvie*, 394 U.S. 814 (1969). "All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgement of the right to vote," the Court observed. *Id.* at 818 (citations omitted). It is therefore a matter of settled law that if a state permits a certain voting procedure, such as write-in voting, it is required to do so in a manner that withstands constitutional scrutiny.

Arizona's treatment of the Libertarians' write-in candidates fails that test.

CONCLUSION

For the foregoing reasons, and those set forth in the Libertarians' opening brief, 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: April 6, 2017

Respectfully submitted,

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Apr 6, 2018 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/Oliver B. Hall

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CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)