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**UNITED STATES COURT OF APPEALS**

*for the*

**NINTH CIRCUIT**

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Case No. 17-16491

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LIBERTARIAN PARTY OF ARIZONA AND MICHAEL KIELSKY,

*Plaintiff-Appellants,*

- v. -

KATIE HOBBS,  
in her official capacity as Secretary of State of Arizona

*Defendant-Appellee.*

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

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**APPELLANTS' PETITION FOR REHEARING  
AND PETITION FOR REHEARING EN BANC**

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## **STATEMENT THAT REHEARING EN BANC IS WARRANTED**

Pursuant to Fed. R. App. P. 35(b) and Circuit Rule 35-1, Appellants respectfully state that rehearing *en banc* should be granted for the following reasons:

1. The Panel Opinion finds that Arizona's statutory scheme imposes a minimal burden, but fails to address the Libertarians' evidence demonstrating that it imposes a severe burden, in violation of Supreme Court precedent and 9th Circuit precedent. *See Storer v. Brown*, 415 U.S. 724 (1974); *Arizona Green Party v. Reagan*, 838 F.3d 983 (9th Cir. 2016).
2. The Panel holds that the State may compel the Libetarians either to associate with non-members, in violation of *California Democratic Party v. Jones*, 530 U.S. 567 (2000), or to comply with signature requirements amounting to as much as 30 percent of eligible voters, in violation of every Supreme Court and lower federal court case that has addressed the issue;

Pursuant to Fed. R. App. P. 35 and Fed. R. App. P. 40, Appellants Arizona Libertarian Party and Michael Kielsky (“the Libertarians”) respectfully submit this Petition for Rehearing and Rehearing En Banc of the Panel Opinion entered on May 31, 2019 (“Slip Op.”).

## **ARGUMENT**

### **I. Rehearing Should Be Granted Because the Panel Opinion Violates Supreme Court and Ninth Circuit Precedent By Failing to Address the Libertarians’ Evidence Demonstrating That Arizona’s Statutory Scheme Severely Burdens Their Constitutional Rights.**

The Supreme Court and this Court have both repeatedly recognized that a court cannot determine the severity of the burden imposed by a ballot access statute without addressing the evidence that a plaintiff presents to demonstrate that burden. *See generally Arizona Green Party v. Reagan*, 838 F.3d 983, 989-91 (9th Cir. 2016) (McKeown, J.). In direct violation of this well-settled precedent, the Panel Opinion fails to address any of the evidence that the Libertarians submitted in support of their motion for summary judgment, but nonetheless concludes that such evidence is insufficient to establish a “severe burden” on their constitutional rights. Slip Op. at 11-12. The Panel thus finds that Arizona’s statutory scheme only imposes “a minimal burden” – again, without addressing the Libertarians’ evidence contradicting that finding – and upholds it under a “less exacting” standard of review.

Slip Op. at 13-14. The Panel Opinion is therefore in clear conflict with controlling precedent. It should be vacated.

Time and time again, the Supreme Court has emphasized that decisions in ballot access cases require careful consideration of “the facts and circumstances behind the law.” *Storer v. Brown*, 415 U.S. 724, 730 (1974) (citations omitted). The “inevitable question for judgment” in each case is whether “a reasonably diligent ... candidate [can] be expected to satisfy” the challenged requirements, or whether it will be “only rarely” that such candidates “succeed in getting on the ballot.” *Id.* at 742. Examination of the evidence relating to candidates’ efforts to comply with a statutory scheme is therefore critical to a court’s analysis of the constitutionality of ballot access laws. *See id.* (“Past experience will be a helpful, if not always an unerring, guide: it will be one thing if ... candidates have qualified with some regularity and quite a different matter if they have not”).

This Court has been even more explicit in holding that proper adjudication of ballot access cases requires an analysis of the evidence demonstrating candidates’ success or failure in complying with the challenged requirements. *See Arizona Green Party*, 838 F.3d at 991 (“To determine the severity of the burden, ... past candidates’ ability to secure a place on the ballot can inform the court’s analysis’ of whether a state election law passes constitutional muster”) (quoting *Nader v. Brewer*,

531 F.3d 1028, 1035 (9th Cir. 2008)). Judge McKeown thus admonished the plaintiffs in *Arizona Green Party* for failing to present evidence to support their claims. *See id.* at 989-90 (“Analogy and rhetoric are no substitute for evidence”).

As Judge McKeown observed:

The Supreme Court and our sister circuits have emphasized the need for context-specific analysis in ballot access cases. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 578 (2000) (“The *evidence* in this case demonstrates that under California’s blanket primary system, the prospect of [harm] is far from remote—indeed, it is a clear and present danger.” (emphasis added)); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 587 (6th Cir. 2006) (“In determining the magnitude of the burden imposed by a state’s election laws, the Supreme Court has looked to the associational rights at issue, including whether alternative means are available to exercise those rights; the effect of the regulations on the voters, the parties and the candidates; *evidence of the real impact the restriction has on the process*; and the interests of the state relative to the scope of the election.” (emphasis added)); *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1122 (9th Cir. 2016) (“Because the ... Party has not presented any evidence to meet its burden, its facial challenge fails.”). The balancing test rests on the specific facts of a particular election system, not on “strained analog[ies]” to past cases. *Libertarian Party of Wash. v. Munro*, 31 F.3d 759, 762 (9th Cir. 1994).

*Id.* at 990.

Because the Panel Opinion fails to address the evidence the Libertarians submitted in support of their motion for summary judgment, it cannot be reconciled with the foregoing precedent. Specifically, the Libertarians submitted seven declarations in support of their motion for summary judgment, each of which provides detailed and extensive evidence relating to the extraordinary efforts that

Libertarian candidates made to comply with Arizona’s statutory scheme. [Dckt. No. 63, Ex. A.] Such evidence is set forth in the Libertarians’ opening brief, [Lib. Br. at 22-23], and it is more than sufficient to establish a severe burden under the standard established in *Storer* and the cases following it – that is, the evidence shows that “reasonably diligent” candidates cannot in fact comply with Arizona’s statutory scheme. *See Storer*, 415 U.S. at 742.

In particular, the evidence demonstrates that in 2016, when the challenged requirements first took effect, multiple Libertarian candidates not only made diligent but Herculean efforts to qualify for Arizona’s primary election ballot, yet none of them were able to do so. The Panel Opinion fails to address that evidence or explain why, in the Panel’s view, it fails to establish a severe burden. Instead, the Panel asserts, in conclusory fashion, that the Libertarians’ evidence is “limited” and demonstrates only that they made “modest efforts” to comply with the challenged requirements. Slip Op. at 13. But such bald assertions contravene this Court’s own admonition in *Arizona Green Party*. Just as a plaintiff cannot rely on an unsupported allegation that the burden imposed by Arizona’s statutory scheme is severe, the Panel itself cannot rely on an unsupported finding that the burden is minimal. *See Arizona Green Party*, 838 F.3d at 989-91. The Panel Opinion thus fails, as a matter of law, to conduct the “context-specific analysis” required by the binding precedent of this

Court and the Supreme Court. *See id.* at 990 (citations omitted). To secure uniformity with that precedent, therefore, the Court should grant rehearing.

**II. Rehearing Should Be Granted Because the Panel Opinion Incorrectly Attributes the Unconstitutionality of Arizona’s Statutory Scheme to the Libertarians’ Actions.**

The Court should also grant rehearing because the Panel Opinion incorrectly attributes the unconstitutionality of Arizona’s statutory scheme to the Libertarians’ actions. “Where, in this scheme, is the offensive state action?” the Panel inquires. Slip Op. at 12. “There is no question that the signature requirement would be constitutional,” the Panel reasons, “if the Libertarian Party permitted non-members to vote in its primary.” Slip Op. at 12. In the Panel’s view, it follows that “a political party cannot manipulate its internal preferences and processes to transform a constitutional statute into an unconstitutional one.” Slip Op. at 12. That is incorrect as a matter of fact and as a matter of law.

As an initial matter, the suggestion that the Libertarians “manipulated” their internal processes to render Arizona’s signature requirement unconstitutional is simply false. The Libertarians did not permit non-members to vote in their primary in 2016, when the new requirement first took effect. Consequently, that requirement was unconstitutional from day one – not because the Libertarians took some action to “transform” the statute into an unconstitutional one.

More important, the Panel errs by characterizing the Libertarians' exercise of their First Amendment freedom of association – including their freedom not to associate – as a mere policy preference. On the contrary, as the Supreme Court has recognized, the Libertarians' decision to exclude non-members from the process by which they select their nominees is a core First Amendment right. *See Cal. Democratic Party*, 530 U.S. 567. The offensive state action, therefore, is the choice Arizona forces upon the Libertarians: either they exclude non-members from their primary, thus subjecting themselves to unconstitutional signature requirements, or they include non-members, thus violating their freedom of association. As the Supreme Court has observed, however, “It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution.” *Harman v. Forssenius*, 380 US 528, 540 (1965).

Accordingly, rehearing is warranted on the merits, because Arizona's statutory scheme impermissibly burdens the Libertarians' core First Amendment rights.



## CONCLUSION

For the foregoing reasons, the Panel Opinion entered on May 31, 2019 should be vacated, and the Court should grant rehearing.

Dated: June 14, 2019

Respectfully submitted,

s/Oliver B. Hall

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