No. 24-563

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NO LABELS,
Plaintiff-Appellee,

v.

ADRIAN FONTES, in his official capacity as Arizona Secretary of State,
Defendant-Appellant,

On Appeal from the United States District Court
for the District of Arizona, No. 23-CV-02172

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This case should re-affirm the wide-spread and repeatedly upheld practice of political party members selecting their nominees, and not return control of political parties to party bosses in smoke-filled back rooms. Because Plaintiff-Appellee No Labels, sought to prohibit its own members from running as candidates and voting in their own party's primary, this case does not allege a cognizable freedom of association claim. Rather, the district court's decision disenfranchises No Labels members from participating in primary elections—as candidates or as voters—in Arizona. This Court should therefore reverse.

Since Arizona entered the Union as a state, it has frequently been on the leading edge of direct democracy, including by adopting a constitutional provision requiring direct primaries. For example, Arizona law required a popular recommendation vote for the United States Senate when Senators were still selected by state legislators. And its constitution provides for citizen initiatives and popular recall of state officials. In more recent years, Arizona has implemented a number of progressive electoral measures, including creating bipartisan entities like the Independent Redistricting Commission to draw congressional and legislative district lines and the Citizens' Clean Elections Commission to publicly finance candidate campaigns and enforce campaign finance law. In taking the actions that precipitated this suit, Defendant-Appellant

Secretary of State has acted only to protect the constitutional rights of all Arizona voters, regardless of their partisan affiliation.

The district court agreed that the Secretary was at all times following Arizona law and was compelled to do so. Plaintiff brought two claims: a state law claim and a freedom of association claim. Plaintiff lost the state law claim, but prevailed on the freedom of association claim. The only question for this Court is whether the First and Fourteenth Amendments' protection of freedom of association allows a party to adopt rules *post hoc* in an antidemocratic manner, enabling the party to determine the extent that members of its political association may participate in primary elections. The Constitution's protections for freedom of association do not require this, and because Arizona's policy position has long been that political parties select a standard bearer through direct primaries, the district court's decision was in error.

This Court should reverse the district court's order regarding the freedom of association claim for the following reasons:

First, binding precedent from this Court requires that a political party cannot avoid the State's interest in ensuring democratic participation by the party's members in choosing its candidates by vetoing participation in the primary election. *See Alaskan Indep. Party v. Alaska*, 545 F.3d 1173 (9th Cir. 2008).

Second, even if this Court's binding precedent were distinguishable, the district court incorrectly applied the *Anderson/Burdick* test when it found that the Secretary's interests in ensuring voter participation in the political process, avoiding voter confusion, and preventing party corruption were minimal. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *see also Burdick v. Takushi*, 504 U.S. 428, 439 (1992). This Court and the United States Supreme Court have consistently and repeatedly found those interests to be important and compelling. Additionally, the district court erred by finding that the burden on No Labels' interest was "substantial" when the Secretary's only action was to follow state law and allow No Labels members to participate in the primary election as voters and candidates.

Third, a political party's associational interest is minimal when it comes to controlling its own members. Here, No Labels asserts a right to prevent its own members from participating in its own candidate selection process, which, regardless of how the argument is framed, is an attack on Arizona's constitutional direct primary system.

Fourth, the district court's order disrupts the balance that Arizona lawmakers created and threatens to extend to all political parties in Arizona the ability to "opt out" of participating in primary elections at any time and for any reason. This turns on its head states' rights to control how they run their elections,

including Arizona's constitutional guarantee of a direct primary. *See* U.S. Const. art. I, § 4, cl. 1; Ariz. Const. art. VII, § 10.

Fifth, the district court incorporated this flawed methodology to find in No Labels' favor for the remainder of the *Winter* factors for providing injunctive relief, using a few sentences to explain its reasoning for finding that No Labels prevailed in demonstrating irreparable harm and that the balance of equities and the public interest tipped in No Labels' favor. *Winter v. Nat. Res. Def. Council,* 555 U.S. 7 (2008). Because this point was merely a recitation of a single factor that the district court incorrectly decided, this too was error.

This Court should reverse the district court's order regarding the federal constitutional claim.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this 42 U.S.C. § 1983 action under 28 U.S.C. §§ 1331 and 1343. The district court granted injunctive relief and entered final judgment in Plaintiffs' favor on January 16, 2024. (ER 45.) The Secretary filed a timely notice of appeal on January 26, 2024. (ER 13.) This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Did the district court err by declining to follow *Alaskan Independence Party v. Alaska*, 545 F.3d 1173 (9th Cir. 2008), to resolve this case?

2. Did the district court correctly apply the *Anderson/Burdick* standard when it found that the State's interest in protecting Arizona's century-old direct primary statutes, which ensure that members of a political party have the right to participate in the primary election as candidates and as voters, was "minimal," while finding that No Labels' right to bar its own members from participating in the primary election as candidates and as voters was "substantial"?

3. Did the district court err in applying the remainder of the *Winter* factors when it devoted only three sentences to analyzing the irreparable harm, balance of hardships, and public interest factors?

STATEMENT OF THE CASE

No Labels bills itself as a political party with the intent of running a presidential-vice presidential "unity ticket with a bipartisan consensus-oriented person fulfilling each role." (ER 446.) No Labels collected 56,971 signatures on petition sheets to become a recognized political party under Arizona law. (ER 116-17.) The petition sheets that No Labels distributed—and that Arizona voters signed to signify their support for recognition of the new party—all included the following language:

> I, the undersigned, a qualified elector in the county of Pima, state of Arizona, hereby petition that a new political party become eligible for recognition, and be represented by an official party ballot at the next ensuing regular primary election, to be held on the August 6, 2024 and

> accorded a column on the official ballot at the succeeding general election to be held on the 5th of November, 2024.

(ER 119.) The underlined words in the preceding quote indicate blanks on a form that the submitting party must fill in before circulating.

Of the nearly 57,000 signatures that No Labels submitted on these petitions, 41,663 signatures were found to be those of properly registered Arizona voters after the statutorily mandated sampling process was completed. (ER 116-17.) The 41,663 valid signatures exceeded the 34,127 signatures that A.R.S. § 16-801(A) requires to create a new party, and as a result, No Labels became a political party in Arizona on March 7, 2023. (ER 116-17.)

It was not until August 11, 2023, that No Labels appointed a state committee that accepted and adopted a constitution and bylaws. (ER 106-114.) These bylaws state that the No Labels political party is "a state-level affiliate of No Labels, Inc." and that No Labels, Inc., a Washington, D.C., based 501(c)(4) organization, has the sole right to appoint state committee members and officers. (ER 110-11.) Moreover, No Labels, Inc. appoints those members to "serve[] a term that lasts until the Committee member dies, resigns, becomes ineligible, or is removed by No Labels," and they must be No Labels party members. (*Id.*) No Labels, Inc. appointed the state committee of three Arizona voters—only one of whom was registered with No Labels from the time of his appointment through the entry of

the order below—to adopt rules purporting to "ensure that only one candidate may be nominated for each office" for President and Vice President only. (ER 113.)

Once No Labels became a political party in Arizona, it experienced rapid growth. As of October 1, 2023, less than seven months after it received official recognition, there were 18,799 voters registered as No Labels members. (ER 241.) As of January 2, 2024, that number had surged to 25,924.[1] The number of No Labels members continues to climb, as predicted at argument. (ER 73 at 27:18-25; ER 82 at 36:11-14.) (*See also* ER 307-08 [charting the rise in No Labels voters and comparing it to other new parties in Arizona]). As of March 19, 2024, there were 27,631 No Labels voters. While No Labels is entitled to new party status through 2026 by operation of statute, because of the membership growth, No Labels will be entitled to continuing representation unless its voter registration numbers fall below "two-thirds of one percent of the total registered electors" by October 1, 2027. A.R.S. § 16-804(B).

As it has attracted voters, it has also attracted the interest of potential candidates. Before the district court's January 16, 2024, decision, five candidates

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[1] Arizona Voter Registration Report (2024) *available at* https://apps.azsos.gov/election/VoterReg/2024/State_Voter_Registration_April_2024.pdf. This report is information recorded and provided by the Secretary of State to the general public pursuant to A.R.S. § 16-168. This Court can take judicial notice of the voter registration statistics pursuant to Rule 201 of the Federal Rules of Civil Procedure.

had filed statements of interest, the precursor paperwork that must be filed before a potential candidate can begin collecting nomination signatures. (ER 194-202; ER 71 at 25:11-23.) Two of these No Labels members who hoped to become No Labels candidates filed their statements of interest before No Labels adopted its bylaws stating that the three appointed party leaders did not want to hold a primary election. (ER 194, 196; *see also* ER 59 at 13:3-23.) No Labels did not contact the candidates to express its disagreement with their candidacies. (ER 92-94.) Nor did it send any correspondence to its membership or engage in any activity with its membership to inform them that their affiliation would prevent them from voting for No Labels candidates or from running as a No Labels candidate, despite the language on the petitions that had been circulated only a few months before stating that No Labels would "be represented by an official party ballot at the next ensuing regular primary election." (ER 119.)

Instead, No Labels demanded that the Secretary "refuse to accept Statements of Interest or nominating petitions from Mr. Draper, Mr. Grayson, and any other person who would seek to use No Labels' ballot line in contravention of No Labels' stated intentions and desire." (ER 133.) In response, the Secretary informed No Labels that he has a "nondiscretionary duty to accept candidate filings" pursuant to A.R.S. § 16-311. (ER 136.) After receiving the Secretary's letter, No Labels brought this suit in district court. (ER 443-54.)

On October 19, 2023, No Labels filed a Complaint alleging that Arizona law allowed it to decide whether it would participate in a primary election or in the alternative, that Arizona law allowing No Labels members to run as candidates of their chosen party violated the party's freedom of association. (ER 443-54.) In addition, it filed a Motion for Preliminary Injunction asking the district court to prohibit the Secretary from accepting Statements of Interest from any No Labels members intending to run as candidates with their party and prohibiting the Secretary from "printing or distributing, or causing or assisting in the printing or distribution of, ballots that include No Labels Arizona candidates for any office" in the primary and general elections. (ER 442.)

The Secretary asserted three important state interests in his Response to the Motion for Preliminary Injunction: protecting Arizona voters' right to participate in their chosen party's primary election, eliminating fraud and corruption by selecting nominees through the direct primary process, and protecting candidates' right to run with their chosen party affiliation under Arizona law. (ER 302-03, 305-08.) Additionally, at oral argument, the Secretary asserted voter confusion as another important state interest because of the misleading new party petition forms and the expectation that voters who were on Arizona's Active Early Voter List ("AEVL") would receive primary ballots automatically. (ER 79 at 33:9-23.) The motion for preliminary injunction was fully briefed, the request for preliminary

relief was consolidated with a hearing on the merits pursuant to Federal Rule of Civil Procedure 65, and the parties provided a Joint Statement of Stipulated Facts and Exhibits. (ER 99-266.) After oral argument on January 5, 2024, the district court took the matter under advisement.

On January 16, 2024, the district court issued its order concluding that No Labels' state law claim failed, but that Arizona law allowing No Labels members to participate in the primary election as candidates and as voters when party leadership preferred to "opt out" of the primary election violated the United States Constitution's freedom of association protection. (ER 001-012.) The district court found that A.R.S. § 16-301(A)'s language did not mean that the party could unilaterally decide whether it "'intend[s] to make nominations' and 'if it desires to have the names of the candidates printed [on ballots].'" (ER 005.) Rather, the district court "agree[d] with the Secretary that, considered within the statutory framework as a whole, § 16-301(A) merely requires parties to nominate candidates though the primary election process and not in another way." (ER 006.) However, the district court found that No Labels prevailed on the claim that the state law allowing No Labels members to participate in the primary election as voters or as candidates "infringes on the Party's associational rights" under the First Amendment. (ER 010-011.)

The district court did not cite *Anderson/Burdick*, but did recite the elements of the balancing test in evaluating the association claim. (ER 010.) It found that the Secretary's interest in allowing No Labels members to engage in a primary as voters and candidates was "minimal," while No Labels' desire to preclude its members from participating in the primary election was "substantial." (ER 008-011.) The Secretary timely appealed. (ER 013-15.)

SUMMARY OF THE ARGUMENT

States enjoy wide latitude in establishing the rules for participating in the electoral process to ensure that it does not descend into chaos. *Storer v. Brown*, 415 U.S. 724, 729 (1974). "Not every electoral law that burdens associational rights is subject to strict scrutiny." *Clingman v. Beaver*, 544 U.S. 581, 592 (2005). Because every rule governing elections may be said to impose some limits on some individuals or organizations, the courts have long employed the familiar *Anderson/Burdick* balancing test, wherein the state's interests are weighed against the interests of the plaintiffs bringing the suit. If the burden that the statute imposes is not severe, then the state's important regulatory interests are generally sufficient to support the rule. *Anderson*, 460 U.S. at 788; *see also Burdick*, 504 U.S. at 439. This is particularly true when, as here, that rule is applied in a consistent and nondiscriminatory manner. *Anderson*, 460 U.S. at 788. Indeed, "it is beyond question 'that States may, and inevitably must, enact reasonable

regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.'" *Clingman*, 544 U.S. at 593 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), and *Storer*, 415 U.S. at 730).

The district court upended Arizona's careful ballot access balance, thrusting the federal judiciary into an issue that had already been resolved in favor of democratic principles. Here, the district court erred by failing to follow binding precedent, instead opting to follow an inapposite case from another circuit. The district court also misapplied the *Anderson/Burdick* test by finding that voters' and candidates' interests in having access to primary election participation were minor, but that party bosses' interests in having absolute power over candidate and voter participation was substantial. (ER 007-011.) Finally, by failing to properly analyze the remaining *Winter* factors, the district court failed to conduct the inquiry necessary to impose an injunction. *Winter v. Nat. Res. Def. Council,* 555 U.S. 7 (2008). For these reasons, this Court should reverse.

STANDARD OF REVIEW

This Court reviews legal issues, such as whether the *Anderson/Burdick* test has been correctly applied, de novo. *See United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000) (explaining that because the district court did not seem to rely on any controverted facts, the decision was an issue of law and the standard of review was de novo); *see also All. for the Wild Rockies v. Cottrell*, 632 F.3d

1127, 1131 (9th Cir. 2011) (discussing the standard of review in a preliminary injunction case).

ARGUMENT

This Court should reverse the district court. The district court improperly found that No Labels was likely to succeed on the merits of its constitutional claim, which led the court to incorrectly decide the other *Winter* factors in No Labels' favor. Moreover, by giving three of the four *Winter* factors a mere sentence each, the district court failed to show that it had actually analyzed those factors as the Supreme Court requires. Analysis, rather than three conclusory sentences, is particularly important when a federal court exercises injunctive control to override even-handed, nondiscriminatory state election laws and the terms upon which voters can participate in state elections.

No Labels does not have a constitutional right to disenfranchise its members. Because that is not a cognizable right, No Labels should not have prevailed on the merits and it did not suffer irreparable harm "by way of the loss of its First Amendment rights." (ER 011.) The district court's analyses of the other *Winter* factors were likewise based on the court's incorrect weighing of the parties' asserted interests, leading the court to conclude that "Arizona and its voters have minimal interests," while No Labels had "substantial" interests. (*Id.*) This in turn led the district court to conclude that "[t]he balance of equities [and the public

interest] tips in favor of the Party." (*Id.*) This Court should reverse the district court's order regarding No Labels' federal constitutional claim.

I. Controlling Precedent Bars the Result that the District Court Reached.

Binding precedent from this Court requires reversing the decision below. This Court should not enable a political party to undermine the State's interest in ensuring democratic participation by the political party's own members. But by allowing the party to unilaterally veto candidate participation in a primary election, that is precisely what the district court did. Contrary to the district court's order, this Court's precedent governs this case and forecloses No Labels' requested relief. It is immaterial whether No Labels chooses to entirely prohibit its members' right to vote and be a candidate for one office or, as here, refuses to let its voters and candidates participate in *any* primary election for their party. No Labels had the ability to endorse, support, or disclaim association with any particular candidate; it does not have the right to block ballot access and prohibit voter participation in the primary election.

The case that should have governed the district court's decision here is *Alaskan Independence Party v. Alaska* ("*AIP*"), wherein minor parties sued to enjoin Alaska's open primary law because it "force[d] parties to associate with undesired candidates who appear on the primary ballot and seek their parties' nominations." 545 F.3d 1173, 1175 (9th Cir. 2008). This language is not

meaningfully distinguishable from the language that No Labels used, and the relief sought is the same. (ER 447-48 [alleging that the Secretary intends to "force" No Labels to run candidates]; ER 390-92 [same].) Presumably, No Labels was aware of this binding precedent and chose to mount this indirect attack on Arizona's direct primary. Regardless of the framing, No Labels' Complaint raises the same argument that the plaintiff parties in *AIP* did, accusing the Secretary of "forcing No Labels Arizona to participate in an election" over No Labels' objections to associating with or nominating any candidate for those offices. (ER 445.) In *AIP*, this Court upheld Alaska's election laws as a minimal burden on associational rights that satisfied even strict scrutiny. 545 F.3d at 1180. This Court should reverse the district court's injunction in this case using the same sound reasoning that it employed in *AIP*.

In every material respect, the laws at issue in *AIP* were the same as Arizona's laws. The *AIP* district court decision explains the specific laws governing Alaska elections in considerable detail and contrasts them with a Washington initiative that was found to be unconstitutional. *Alaskan Indep. Party v. Alaska*, No. CV06-00040-TMB, 2007 WL 9747596 (D. Alaska Feb. 20, 2007). Under Alaska law, a person had to become a member of the political party from which the person wished to receive a nomination. *Id.* at *4. Alaska law also authorized the political parties to determine which voters were allowed to

participate in their primaries by letting parties have either an "open" primary, which included voters from that political party as well as voters who were not affiliated with another party, or a "closed" primary, which allowed only voters who had registered as a member of that party to participate in the party's primary. *Id.* This Court affirmed the district court's decision, which found that the state's open primary laws were constitutional, despite the party's argument that Alaska law "allows persons to declare themselves candidates for public offices representing Alaska political parties over the parties' objections or when the candidates violate the political parties' bylaws or rules relating to candidate selection." *Id.* at *1. This is the same general claim that No Labels asserted in this case.

While No Labels tried to distinguish its suit from *AIP* by claiming that it was not challenging Arizona's primary statutes, that argument is a red herring for a few reasons. The party leadership is attempting to do indirectly what it could not do directly by blocking candidacies that it cannot unilaterally decide. The district court's order gives the party bosses sole discretion to decide whether or not the party's members may participate in a primary election. The fact that the party's leadership would choose to stifle *all* debate within its own party by sitting out a primary, thereby depriving its members—its own voters and potential candidates—of the opportunity to participate in the primary election rather than allowing them

to participate in the political process imposes significant burdens on the State's interests.

The core of No Labels' asserted interest is to be a political party in Arizona, completely free of Arizona's primary election laws and ballot access requirements. No court has ever recognized this as being a "substantial" interest. The result of the district court's order is that all No Labels voters will be prevented from voting in a No Labels primary and all No Labels candidates will be prevented from participating in a No Labels primary, because there will not be any No Labels primary. This deprives No Labels voters of the ability to vote in their party's primary election and completely blocks No Labels candidates from obtaining ballot access. Giving three people appointed to lead No Labels' Arizona affiliate the right to block the voting rights and of tens of thousands of people and candidacies of other No Labels members is antidemocratic—and ultimately dangerous—ground.

No matter how No Labels' argument is framed, it is an attack on the validity of Arizona's primary and ballot access statutes, which this Court has already approved as constitutional. The parties in *AIP* sought a judgment that the "political parties themselves, and not the State of Alaska have the right to determine how their candidates to appear on Alaska election ballots are to be selected." 545 F.3d at 1176. The right that No Labels seeks here includes the right to veto individual

candidacies or all candidacies that the party does not approve. This Court explicitly rejected that "right" in *AIP*, and this Court should reverse the district court's injunction in No Labels' favor for the same reason.

Notably, No Labels did not limit its argument to the presidential election, but specifically brought up other races, like the state mine inspector race. (ER 064-66.) In other words, No Labels sees this injunction's scope as extending a political party's ability to choose whether to participate in an election to all elected offices. While No Labels contends that this injunction implicates different interests than the ones in *AIP*, this is not the case. Under the rationale of the district court's order, the leadership—not the membership—of any political party could choose to forego an election for any reason and to thereby deprive its own membership of the right to participate in the political process.

The district court erred in distinguishing—and thus ignoring—the rule in *AIP*. In particular, the district court distinguished *AIP* on the basis that "the [*AIP*] court addressed whether a political party *that intended to run a candidate for an office* could pre-select its candidates for the primary election in contravention of the mandatory primary system." (ER 008.) The district court found that *AIP* was inapposite because the State does not have an interest in "eliminating corruption in a party's selection of its primary candidates because the Party intends not to run any candidates in the primary" and because "Arizona voters do not have the right

to select a nominee for an office the Party is not seeking." (ER 010.) Indeed, the district court asserted without citation that "Party members and *voters do not have rights*, associational or otherwise, in selecting a nominee for an office the Party is not seeking." (*Id.* [emphasis added].) This assertion is wrong. *See, e.g.*, *Anderson*, 460 U.S. at 794, 806 (explaining that the Supreme Court's "primary concern is . . . the interests of the *voters* who chose to associate together to express their support" for a candidate); *United States v. Classic*, 313 U.S. 299, 319 (1941) ("Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice . . . [the] right of participation [in the primary] is protected just as is the right to vote at the election.").

The district court further erred in relying on *Libertarian Party of Illinois v. Scholz*, 872 F.3d 518 (7th Cir. 2017), a case that even the district court recognized was evaluating a ballot access restriction that "is not at issue here." (ER 009.) To begin with, *Scholz* is a Seventh Circuit case, and reliance on this nonbinding precedent from another circuit instead of on this Court's precedent was error. Moreover, the requirement at issue in *Scholz* obviously imposed a severe burden on any political party. "Unlike in any other state, new parties in Illinois must submit a full slate of candidates, one for each race in the relevant political

subdivision."[2] *Scholz*, 872 F.3d at 521. Arizona has no such requirement, which was explained at oral argument and which the district court understood. (ER 069 at 23:5-14.)

Finally, *Scholz* is inapplicable because it is not a forced-association case, like *AIP*, but was instead decided as a pure ballot access case. In *Scholz*, the Libertarian party of Illinois could not put its preferred candidate on the ballot for one race without fielding candidates, *and providing support for*, a full slate of candidates for a given jurisdiction. *See id.* at 524 (explaining that the full slate requirement "forces minor parties to find and recruit candidates" and also "devote to each candidate the funding and other resources necessary to operate a full-fledged campaign.") The facts of *Scholz* are inapposite, and the district court erred when relying on it in reaching its decision.

This Court can easily restore the constitutional balance between associational freedoms on one hand and candidate ballot access and voter participation in primary elections on the other by simply applying *AIP*. This Court should reaffirm its solid principle that "the State's interest in enhancing the democratic character of the election process overrides whatever interest the Party

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[2] The Illinois statute included further requirements, such as a minimum number of signatures for each candidate on nomination petitions, and it also required that the full slate and nomination petitions be submitted 134 to 141 days before the election. *Scholz*, 872 F.3d at 521. However, because the district court relied solely upon the full-slate requirement, that requirement is what is addressed here.

has in designing its own rules for nominating candidates" and should acknowledge that this principle holds true whether the party wants to require an antidemocratic nomination process for certain candidates or to foreclose all electoral participation. *AIP*, 545 F.3d at 1178 (internal quotation marks omitted). Furthermore, it should reject the district court's reliance on *Scholz* because it is inapplicable to this case. This ground is sufficient on its own to reverse the district court's decision on No Labels' constitutional claim.

II. The Burden on the State Is Significant, While the Burden on No Labels Is Minimal, at Best.

Decades ago, the Supreme Court disavowed the idea that "a political party could invoke the powers of the State to assure monolithic control over its own members and supporters." *Anderson*, 460 U.S. at 804. This Court has also adopted that view, settling the dispute between "the party's wish to enforce greater top-down control and the state's mandate that rank-and-file party voters have the opportunity to consider and vote for any affiliated party member who seeks the nomination" in the voters' favor. *AIP*, 545 F.3d at 1179. Although here, it is the self-appointed party leadership—*not the State*—that is seeking to impose unduly restrictive rules upon its own membership, that distinction does not provide cover for No Labels' party bosses' decisions. As the district court noted, No Labels is "putting the onus on the Secretary to enforce the Party's bylaws in lieu of

following the existing procedures implementing the statutory framework for elections in Arizona." (ER 006.) In other words, No Labels is harnessing the State's power to enforce its antidemocratic desires, in direct contravention of state law. (ER 006-07.) The United States Constitution does not protect that choice.

Even if this Court's binding precedent were distinguishable, the district court inappropriately applied the *Anderson/Burdick* test. Although the court purported to apply that test, it found that the Secretary's interest in ensuring voter and candidate participation in the democratic process, avoiding voter confusion, and limiting opportunities for fraud and corruption was minimal, when this Court and the United States Supreme Court have routinely found those interests to be important and compelling. The district court further erred by finding that the burden on No Labels' interest was "substantial" when the Secretary's only action was to follow a neutral, even-handed state law and to allow No Labels members to participate in the primary election as voters and candidates.

A. Democratic Participation and Avoiding Voter Confusion Are Some of the Important State Interests that Justify Regulating Elections.

This Court and the United States Supreme Court have provided the contours of the associational right that impacts the right to vote in an election. Specifically, political parties have an interest in ensuring that their members and other voters of their choice choose the party's nominees. *Tashjian v. Republican Party of Conn.*,

479 U.S. 208, 215-16 (1986). A political party's freedom of association, however, is not absolute. A state may prohibit so-called "fusion" candidacies, where a political party endorses its chosen candidate by using the party's ballot line to provide a position for that candidate, when that candidate has chosen to affiliate with another party. *See Timmons*, 520 U.S. at 353-54. States often also have "sore loser" provisions that prohibit a candidate who lost a primary election from running as a write-in candidate for that party or for another party. *Storer*, 415 U.S. at 735. States may, within certain limits, require a closed primary, an open primary, or a blanket primary without violating the associational rights of the party, the party's voters, or candidates. *Am. Party of Tex. v. White,* 415 U.S. 767, 781 (1974); *Tashjian*, 479 U.S. at 215. And States may even circumscribe the party's ability to open its primary to members of other political parties without violating freedom of association rights. *Clingman*, 544 U.S. at 595-96 (explaining that states have an interest in requiring political-party affiliation to assist in administering primary elections). Importantly, the associational interests of political parties that the Supreme Court has found compelling have hinged on "prevent[ing] the disruption of the political parties from without"—not from within their own membership. *Tashjian*, 479 U.S. at 224.

The Supreme Court had the following to say about a voter who desired to vote in a different party's primary, but who was prohibited from doing so unless she went one primary election without voting:

> Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections. A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process. By preventing appellee from participating at all in Democratic primary elections during the statutory period, the Illinois statute deprived her of any voice in choosing the party's candidates, and thus substantially abridged her ability to associate effectively with the party of her choice.

Kusper v. Pontikes, 414 U.S. 51, 58 (1973); *see also Clingman*, 544 U.S. at 599 (O'Connor, J., concurring in part). Because "voters can assert their preferences only through candidates or parties," their right to vote "is heavily burdened if that vote may be cast only for major-party candidates at a time when other parties or other candidates are clamoring for a place on the ballot." *Anderson*, 460 U.S. at 787.

The Supreme Court has recognized a number of interests as being important, substantial, and compelling when deciding whether a state's burden on associational rights is warranted. Courts have recognized that it is "too plain for argument, for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *Cal. Democratic Party v. Jones*, 530 U.S. 567,

572 (2000). States may also impose restrictions to prevent "voter confusion, ballot overcrowding, or the presence of frivolous candidacies." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). These restrictions are permissible because states have a "compelling interest in maintaining the integrity of [their] political processes." *Id.* Likewise, states may adopt election codes to "remove party nominating decisions from the infamous 'smoke-filled rooms' and place them instead in the hands of a party's rank-and-file, thereby destroying "'the corrupt alliance' between wealthy special interests and the political machine.'" *AIP*, 545 F.3d at 1177 (quoting *Lightfoot v. Eu*, 964 F.2d 865, 872 (9th Cir. 1992)). The direct primary limits "opportunities for fraud and corruption by preventing party leadership from controlling nomination decisions, while promoting democratic decisionmaking." *Id.*

The Secretary correctly identified the importance of avoiding corruption and voter confusion and of encouraging voters and candidates to participate in primary elections. In an appropriate *Anderson/Burdick* analysis, No Labels' interest in dictating to its own members who the party's only two nominees would be, and its interest in barring any No Labels voter or candidate from participating in its primary election, is woefully insufficient to override the interests that the Secretary identified.

B. The Secretary's Interests in Ensuring that No Labels Members Are Able to Participate in the Democratic Process Are Significant and Compelling.

Despite these well-recognized limits on a political party's associational desires, the district court dismissed the interests of Arizona voters who had chosen to affiliate with No Labels as "minimal" by baldly asserting that "Arizona voters do not have the right to select a nominee for an office the Party is not seeking." (ER 010.) That statement finds no support in law. Dismissing voters' rights to participate in a primary election directly contravenes longstanding and well-established precedents. The district court erred in refusing to recognize the important right of citizens who have formed an association with a party to participate in a primary election.

Far from dismissing the associational rights of voters as the district court did, the United States Supreme Court has repeatedly referred to the rights of voters to exercise political influence in association with a political party as "of particular importance" and has stated that "our primary concern is . . . the interests of the voters who chose to associate together to express their support for Anderson's candidacy." *Anderson*, 460 U.S. at 794, 806.

Under the district court's ruling in this case, there is no apparent limit to which primaries a party could choose to sit out and no way to determine whether a party made that decision for an improper purpose, such as the race or religious

affiliation of candidates or potential voters. *See Smith v. Allwright*, 321 U.S. 649, 657-60 (1944) (describing Texas' repeated attempts to block Black voters from voting in primary elections). Under the district court's rationale, a party may decide to sit out a primary because there is more than one candidate running in the race and it does not want to have a primary election in which its candidates are attacking each other. Or it could choose to sit out an election because the party bosses dislike the only candidate running or the candidate who is forecasted to win. The ability to foreclose democratic competition in this fashion directly implicates the State's interest in clearing the smoke-filled back rooms—an interest that has governed Arizona's electoral processes since statehood. (ER 294-95, 306). This is unquestionably a significant state interest. *AIP*, 545 F.3d at 1177-78 (*citing Clingman*, 544 U.S. 599 and other cases).

Courts recognize that political parties' rights are derived from the rights of the voters, and it is indeed the *voters*' rights that the courts are protecting in their freedom of association jurisprudence concerning political parties. "Our *primary concern* is with the tendency of ballot access restrictions to limit the field of candidates from which *voters* might choose. Therefore, . . . it is essential to examine in a realistic light the extent and nature of their *impact on voters*." *Anderson*, 460 U.S. at 786 (emphasis added; internal quotation marks omitted). Here, No Labels has harnessed the district court's power to force the Secretary to

disenfranchise Arizona voters and to limit the field of candidates. This violates an indisputably important state interest. It is obvious that "[t]he exclusion of candidates also *burdens voters'* freedom of association." *Id.* at 788-89 (emphasis added). The Secretary correctly identified as an important state interest the right of No Labels members—all of whom are also Arizona voters—to participate in a primary election, and the district court was wrong to minimize it.

Nothing in the Constitution requires Arizona to honor No Labels' antidemocratic choice. "When the State gives the party a role in the election process . . . by giving certain parties the right to have their candidates appear with party endorsement on the general-election ballot[,] . . . then also the State acquires a legitimate governmental interest in ensuring the fairness of the party's nominating process, enabling it to prescribe what that process must be." *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 203 (2008). Indeed, "a democratic primary is narrowly tailored to advance the[] state['s] interests." *AIP*, 545 F.3d at 1180.

Under the district court's sweeping rationale, a political party may form and adopt rules, *post hoc*, that limit candidates to the party leaders' friends and family or to graduates of a certain university or fraternity in light of what the district court described as "the Party's associational rights to structure itself, choose a standard bearer who speaks for the party, and decide where to devote its resources." (ER

011.) But no constitutional rule allows the party to trample the rights of its own members in contravention of state law, and requiring "intraparty competition [to be] resolved in a democratic fashion" has repeatedly been affirmed. *Cal. Democratic Party*, 530 U.S. at 572. The even-handed candidate nomination process that enables political party members to select their nominees does not burden freedom of association. Indeed, federal courts are concerned about unreasonable interference with "the right of the *voters* to associate and have candidates of their choice placed on the ballot." *Burdick*, 504 U.S. at 434. No existing binding precedent countenances No Labels' asserted interest in eliminating its members' ability to participate in building a party as voters and candidates. This Court should not be the first to adopt such a rule.

In addition to imposing a severe burden on voters and candidates who may wish to participate in the electoral process, the district court's order invites fraud and corruption and sows voter confusion because it is based on *post hoc* policies that No Labels' party bosses adopted. If a political party may *at any time* alter its bylaws and narrow its participation in the democratic process by appointing a select handful of people, then whoever controls the party leadership has a stranglehold on candidate selection. This necessarily creates, at minimum, a bottleneck because the primary is not a dress rehearsal for the general election, but "is an integral part of the entire election process." *Storer*, 415 U.S. at 735.

Furthermore, the party bosses adopted No Labels' rules behind closed doors, without notice to No Labels' own members and in contravention of long-established state laws allowing "any person" to run for office after meeting minimum requirements. A.R.S. § 16-311. The district court's order enabling No Labels to change its bylaws at-will and without notice to its voters will sow voter confusion in 2024 and for years to come.

Indeed, the district court's decision is already feeding such confusion. In particular, all No Labels voters who are on the AEVL will receive blank primary ballots.[3] These blank ballots are being sent to provide additional opportunities for No Labels voters to avoid removal from the AEVL. *See* A.R.S. § 16-544(H)(4) (requiring a voter's removal from AEVL after the voter "fails to vote an early ballot in all elections for two consecutive election cycles" and defining election to include "any regular primary or regular general election" with a federal election). However, receiving a blank ballot is obviously very likely to confuse voters. This is a basis for voter confusion independent of the confusing or misleading new party petitions that No Labels circulated in its bid for party recognition.

[3] Nicole Ludden and Hank Stephenson, *A blank ballot?*, *Ariz. Agenda* (May 7, 2024) *available at* https://arizonaagenda.substack.com/p/a-blank-ballot (quoting Cochise County Recorder David Stevens and Maricopa County Recorder Stephen Richer regarding the No Labels primary ballot). The Court can take judicial notice of this fact pursuant to Federal Rule of Evidence 201.

The Secretary has asserted significant, important, and compelling interests. Ensuring democratic participation by voters and candidates through a primary election framework that is in all material respects identical to Arizona's is a well-recognized, "compelling" state interest. *AIP*, 545 F.3d at 1180. Avoiding voter confusion is also an important state interest. *Timmons*, 520 U.S. at 364 ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials.") (collecting cases). Because the district court did not recognize these important state interests, this Court should reverse the district court's order as to No Label's constitutional claims.

C. No Labels' Interest Is Minimal.

Simply put, no court has ever held that complying with constitutional ballot access requirements and a direct primary law is a substantial burden on an individual's or an organization's freedom of association. Indeed, "[w]e have considered it 'too plain for argument,' for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *Calif. Democratic Party*, 530 U.S. at 572. The burden that No Labels asserts is that the Secretary is "forcing" it to participate in elections that it wants nothing to do with. (ER 388.) This alleged burden is no different than the burden that the minor parties in *AIP*

asserted. *AIP*, 545 F.3d at 1174-75 (stating that political parties alleged Alaska law "force them to associate with candidates"). It is antithetical to a political party's purpose to prohibit *all* of its voters and candidates from participating in the primary election. A political party is "[a]n organization of voters formed to influence the government's conduct and policies by nominating and electing candidates to public office." *Political party*, *Black's Law Dictionary* (11th ed. 2019). Voter and candidate participation is a political party's entire purpose, therefore it is not a burden for the political party's members to participate in the political process. *See Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 615-16, 618 (1996) (explaining the "important and legitimate role for political parties in American elections" which "seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible . . . .").

Moreover, No Labels had an alternative under Arizona law that would provide it exactly the relief it sought in court. No Labels could have structured itself so that only its preferred presidential and vice-presidential candidates, identified as "No Labels" candidates, would appear on the ballot, without depriving No Labels' members of the rights to participate in the 2024 primary election as voters or candidates. A.R.S. § 16-341. Arizona law provided a method

for No Labels to achieve its stated intentions, but No Labels chose to forego that option. Because Arizona law provided No Labels the flexibility to avail itself of a status that would have provided the relief the party now seeks through a lawsuit, the state's ballot access framework imposes, at most, a minimal burden on No Labels.

The district court erred when it found that No Labels' "substantial" (not "severe") burden was sufficient to negate the Secretary's interests here under the *Anderson/Burdick* test. In *Burdick*, the Supreme Court wrote that "we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (internal quotation marks omitted). Anything less than a severe burden, such as the alleged substantial burden here, does not require the challenged regulation to satisfy strict scrutiny. *See id.* (explaining that when a state imposes "reasonable, nondiscriminatory restrictions, then the State's interests are generally sufficient to justify the regulation").

Indeed, the burden on No Labels is now nonexistent because its aspirations of creating a "unity ticket" have proven to be a mirage.[4] Instead, it has blocked

[4] Leila Fadel & Danielle Kurtzleben, *No Labels Will Not Nominate a Third-Party Presidential Candidate for 2024 Election*, National Public Radio (April 5, 2024) *available at* https://www.npr.org/2024/04/05/1242977812/no-labels-will-not-

Arizona voters who joined the party from participating as primary voters or as candidates, while not being able to attract *anyone* to participate as its standard bearer in the only race in which its leaders wanted to participate. The Secretary's concern that Arizona voters and candidates would be disenfranchised in the 2024 primary was thus proven correct, while No Labels' interests—which were at best minimal in January 2024—have now proven to be completely illusory.

The district court misapplied the *Anderson/Burdick* test because it ignored the Secretary's important state interests and improperly weighed No Labels' asserted interests. Because correctly applying that test would compel the conclusion that the Secretary's important interests more than justify the State's neutral restrictions, this Court should reverse the district court order's regarding No Labels' constitutional claim.

III. No Associational Freedom Is Implicated When the Association Is Not Being Forced to Associate with Nonmembers.

Political parties' interests are minimal at best when it comes to controlling their own members, and this Court has narrowly construed such interests as applying only to presidential elections because of the national interests that those elections implicate, which are not at issue here. *See Cousins v. Wigoda*, 419 U.S.

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nominate-a-third-party-presidential-candidate-for-2024-electi (last visited May 15, 2024).

477, 490 (1975) (explaining that the national interest in selecting presidential and vice presidential nominees "is greater than any interest of an individual state"). In this case, No Labels asserts a right to prevent its *own* members from participating in its *own* candidate selection process, which, regardless of how the argument is framed, is an attack on Arizona's constitutional direct primary system. But "political parties' rights to nominate whomever they want, however they want, is not sacred." *Lightfoot v. Eu*, 964 F.2d 865, 872 (9th Cir. 1992). This Court should not create a new rule that would elevate the party bosses' desires over the choices of the majority of the political party's members.

Not a single case supports the proposition that a political party may disenfranchise its own members in selecting the party's nominees for state and local offices. Rather, the jurisprudence on this matter nearly always involves situations in which the state is attempting to force a political party to allow nonmembers to participate in selecting its standard bearer. *See, e.g. Cal. Democratic Party*, 530 U.S. at 577 ("California's blanket primary . . . forces political parties 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."); *Ariz. Libertarian Party v. Hobbs*, 925 F.3d 1085, 1094 (9th Cir. 2019) ("Although the Constitution protects a political party's right to not associate with *non-members*, that right has

its limits.”). A logical extension of this precept is that the political party’s freedom of association is more circumscribed when three appointed political party bosses seek to restrict the political rights of the other members of their own political party. This principle is particularly acute in a situation like the one here, where the association’s appointed leaders have asserted one thing in their new party recognition petitions to garner the voters’ support, but have reneged on that commitment after securing the benefits of that support. (ER 059 at 13:3-23.) No Labels’ about-face is compounded by the fact that No Labels’ leadership never attempted to tell its own members—or even the handful of people who were attempting to build the party by running as candidates—that the party neither supported their candidacies nor intended to participate in the primary election. (ER 092-94.)

Unlike the states in other true forced-association cases, Arizona is not imposing an associational requirement or intricate rules regarding how the party must structure itself. Arizona political parties are free to structure themselves as they see fit, to support and endorse candidates, and to encourage political participation by their voters and candidates. So long as those candidates meet a signature threshold that demonstrates the constitutionally permissible “modicum of support,” they are entitled to ballot access under the U.S. Constitution. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

Indeed, this Court has found freedom of association violations only when state law has imposed intricate restrictions and rules structuring ballot eligible parties. In *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 217 (1989), California's election code prohibited political parties from endorsing candidates in their own primary elections. The code further "dictate[d] the size and composition of the state central committees; set forth rules governing the selection and removal of committee members; fix[ed] the maximum term of office for the chair of the state central committee," imposed geographic restrictions on party chairs, and even specified the time and place of committee meetings and limited dues. *Id.* at 218. The Supreme Court reaffirmed the longstanding view that "[d]epriving a political party of the power to endorse suffocates" the party's First and Fourteenth Amendment rights. *Id.* at 224. As to the rules regarding the structure of the political party's various bodies, the Court found that the laws imposed a burden on the freedom of association because "[e]ach restriction thus limits a political party's discretion in how to organize itself, conduct its affairs, and select its leaders." *Id.* at 230. The Supreme Court stressed that "party members do not seek to associate with nonparty members, but only with one another in freely choosing their party leaders." *Id.* at 230-31. A state cannot control the particulars of the "internal party structure," but that does not prevent a state from "preserving

the integrity of its election process" and "prevent[ing] the derogation of the civil rights of party adherents." *Id.* at 231-32.

Arizona's laws are nothing like the restrictions in *Eu*. They simply provide an opportunity for ballot access for candidates, A.R.S. § 16-311-312, & -341, and require parties to select their candidates through a direct primary, A.R.S. § 16-302. These laws do not impose an unconstitutional burden on a political party's internal processes, and the district court erred when it held that No Labels' three appointed state committee members have veto power over the party's entire membership. (*See* ER 304, 366 [identifying earlier litigation in which No Labels urged an Arizona court to recognize "that persons signing a petition to create a new party intend to constitute the party they are helping create."]). This is undermined if the political party does not need to participate in the democratic process to select its nominees. This Court should reverse the district court's order regarding the federal constitutional claim because No Labels does not have a right to disenfranchise its own members in the association's name.

IV. The District Court's Order Barring Candidates and Voters from Participating in No Labels' Primary Conflicts with Ballot Access Requirements.

The district court's order disrupts the balance that Arizona lawmakers created and threatens to extend the ability to "opt out" of participating in elections to all Arizona political parties at any time and for any reason. But voters and

candidates have a constitutionally protected right to participate in elections. *Anderson*, 460 U.S. at 788-89. Arizona's ballot access framework has been carefully calibrated with controlling constitutional protections in mind. By allowing No Labels to bar No Labels voters and candidates from participating in the primary election, the district court's order completely upends that framework.

Arizona's ballot access framework has frequently been litigated in this Court. *E.g.*, *Ariz. Libertarian Party v. Hobbs*, 925 F.3d 1085 (9th Cir. 2019); *Ariz. Green Party v. Reagan*, 838 F.3d 983 (9th Cir. 2016); *Ariz. Libertarian Party v. Bennett*, 784 F.3d 611 (9th Cir. 2015); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008). Arizona's current ballot access laws—unmodified by the district court's order—do not violate the Constitution. *Hobbs*, 925 F.3d at 1090. However, that determination was based on the ready ballot access that the laws provided for political party candidates who obtained the required number of signatures under A.R.S. § 16-322, before the district court entered the order disrupting this balance and giving No Labels a special status that allows it to prevent its registered members from speaking "for the Party in the way members of other parties do." (ER 006.)

Because the district court has prohibited the Secretary from accepting candidate filings from any No Labels member—even if the filings facially comply with the requirements of Arizona law—the State is left open to an accusation that

the Secretary is violating a long-recognized threshold for ballot access. States generally may not require a candidate to obtain more than signatures from five percent of the state's registered electors to demonstrate the modicum of support necessary for ballot access absent a compelling interest and narrow tailoring. *Hobbs*, 925 F.3d at 1091. Given the district court's order, No Labels candidates are barred from ballot access entirely, regardless of their support among No Labels voters. (ER 012) (requiring the Secretary to reject any Statements of Interest from No Labels candidates).

There is no need for this radical rule, and no interest that can justify such a requirement. Simply put, citizens who have affiliated with a party have a protected constitutional interest in participating in the political arena in furtherance of their political goals. *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *Anderson*, 460 U.S. at 787. And so long as the State imposes only even-handed, nondiscriminatory restrictions, the political party must follow the State's law. *Burdick*, 504 U.S. at 438. No Labels has *not* asserted that the State has taken any form of discriminatory action with respect to it. Indeed, it cannot make such an assertion. The Secretary seeks only the uniform and constitutional application of ballot access laws to all entities that choose to organize as a political party.

The district court's order—which allows No Labels to pick and choose which elections to participate in a la carte—inappropriately disturbs the careful

balance of Arizona's ballot access laws. *See Calif. Democratic Party*, 530 U.S. at 572 (recognizing that "States have a major role to play in structuring and monitoring the election process, including primaries."). While the district court appears to have attempted to cabin its relief by claiming that No Labels is "unlike other political parties" and that it is "a party in which its registered members do not speak for the Party" and by entering an injunction that only directly blocks candidates in the 2024 elections, these attempts at limiting the relief were insufficient for at least two reasons. (ER 006).

First, the district court's order allowed No Labels to *post hoc* bar its members from participating as candidates and voters from participating in its primary, and consequently from moving on to the general election. No Labels represented to Arizona voters in its new party petitions that it would participate in the 2024 primary, and the voters had a right to rely on these representations and on established Arizona law. Based on No Labels' representations, voters would reasonably have believed that they were joining a *political party* to participate in the political process, not to be disenfranchised entirely. Moreover, No Labels did not adopt the rules prohibiting party members from participating in any candidate selection process until after No Labels members had already filed statements of interest for candidacy. (*See, e.g.*, ER 092-94 [questioning by the district court regarding the fact that No Labels did not adopt by-laws until two candidates filed

statements of interest and only communicated to the Secretary regarding its desires].) While the injunction on its face applies to the 2024 elections, the temporal limitation on it is illusory because the district court issued this order despite the fact that the bylaws purporting to require it were adopted after two candidates already filed statements of interest.

If No Labels were to send the Secretary a letter in 2026 stating that it wanted to run a candidate only for state mine inspector and for no other race, the Secretary would be forced to decide whether to abide by that choice or to face another potential lawsuit and a possible attorneys' fee award. The fact that the district court ruled in No Labels' favor even though the party's decision to change the party rules did not occur until after the widespread dissemination of inconsistent and potentially misleading information leads to the conclusion that if this Court does not reverse the district court on the constitutional claim, No Labels will remain free to veto candidacies and its members' participation in primary elections at will.

The district court faults the Secretary for failing to provide evidence that any voter was actually confused, but that is not required, and voter confusion is the obvious and direct result of No Labels' own choices here. Under the *Anderson/Burdick* test, the Secretary is not required to prove *actual* voter confusion. *Munro*, 479 U.S. at 195 ("To require States to prove actual voter

confusion . . . as a predicate to the imposition of reasonable ballot access restrictions . . . . would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action."). Moreover, No Labels was not a political party until after the 2022 elections, and the 2024 partisan elections have not yet occurred, so it is not yet possible to produce No Labels voters who have been confused in an election (although this will likely change by the end of 2024).

But even if the Secretary needed to provide a specific showing of actual confusion, the facts substantiating voter confusion here are obvious. At least 41,663 Arizona voters signed petitions supporting No Labels' formation that specifically stated that the party would be represented on a 2024 primary election ballot in Arizona. (ER 116-17.) Months after widely circulating these petitions, the party changed its mind and took no steps whatsoever to inform No Labels members—not even its own candidate hopefuls—of this change. (ER 099-104 [identifying correspondence between No Labels' attorneys and the Secretary, but none with any of the political party's potential candidates or voters].) These facts are *at least* proof of circumstances that would cause voter confusion, if not proof of an outright act of intentional deception by No Labels, which *now* claims that it had always intended to run candidates only for President and Vice President and not to allow its members to play any role in choosing any candidates for any offices.

(*Compare* ER 132-134 [disclaiming any association with candidates not hand-picked by party bosses in a letter to the Secretary on August 14, 2023] *with* ER 0367, 71 [urging a state court not to invalidate No Labels' new party status because to do so would "impose unlawful constraints on voters' constitutional rights to form a party of their choice" in a motion to dismiss filed April 19, 2023].)

Finally, this Court should disregard the district court's attempt to distinguish No Labels from other parties because No Labels has now crossed the threshold for a party to be entitled to continuing representation. A.R.S. § 16-803(B). In other words, far from being "unlike other political parties," No Labels will be entitled to the same rights as the Democratic, Libertarian, and Republican parties in Arizona unless its voter registration numbers drop below the statutory cut-off number. *See* A.R.S. § 16-804 (explaining that a party is entitled to continuing representation if by the October 1 of the year before a general election a political party has registered voters "equal to at least two-thirds of one percent of the total registered electors"). If No Labels is allowed to decide that "its registered members do not speak for the Party in the way members of others parties do" and that it may "not allow its registered members to run for public office in Arizona under the Party insignia" (ER 006), there is no principle in the district court's order that would limit the other parties from imposing similar restrictions on their own members.

The State has an interest in protecting *all* of its voters and ensuring their right to participate in the state-run primary election. *Tashjian*, 479 U.S. at 214 ("The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."). No Label's argument that it is "hav[ing] these candidates forced on [it] by state law" is wrong because the candidates in question are its own members who are entitled to ballot access and because "[h]owever framed, . . . [its argument is] an attack on the mandatory direct primary itself." *See AIP*, 545 F.3d at 1178. This Court should reverse the district court's decision on No Labels' constitutional claim because its decision impermissibly intrudes upon the State's exercise of authority to control its own elections.

V. The District Court Erred in Analyzing the Remaining Factors for Granting Injunctive Relief.

The district court failed to conduct the analysis required to support the injunctive relief that it ordered. To obtain injunctive relief, a plaintiff must demonstrate: (1) the likelihood of success on the merits; (2) likely irreparable harm; (3) that the balance of hardships tips in the plaintiff's favor; and (4) that the injunction serves the public interest. *Winter*, 555 U.S. at 20. This Court applies these factors on a sliding scale, where a stronger showing on some of the factors

may offset a weaker showing on the others. *All. for the Wild Rockies*, 632 F.3d at 1131. The district court failed to conduct the analysis required to provide injunctive relief, and to the extent it did perform the *Winter* analysis, its conclusions were wrong.

A. The District Court Failed to Analyze the Case as Required by *Winter*.

In *Alliance for the Wild Rockies*, this Court engaged in a detailed, substantial analysis of the issues that the parties had raised below before determining whether each of the four *Winter* factors had been satisfied, unlike the district court here. *Id.* In its analysis, the Court noted that the Forest Service maintained that only six percent of the park land at issue would be affected by the planned logging and development, but that the plaintiffs had explained that their members used the forest, "including the areas subject to logging under the Project, for work and recreational purposes." *Id.* at 1135. The Court also carefully balanced the different interests that the parties had raised below when determining which party had provided a better argument for likelihood of success on the merits, including analyzing the potential loss of receipts to the government because of the injunction, the loss of opportunity, and the importance of the Forest Service's proposed project to the local economy. *Id.* at 1136-37. The Court engaged in the same detailed analysis for the remaining *Winter* factors, identifying the specific facts that both

sides had raised before making its final determination. *Id.* at 1137-39. The Court engaged in this fulsome analysis to ensure that injunctive relief complied with *Winter*'s requirements. The district court in this case failed to undertake this analysis.

Unlike this Court in *Alliance for the Wild Rockies,* the district court did not meaningfully engage in any analysis of the *Winter* factors here other than likelihood of success on the merits. (*Compare* ER 007-011 [explaining why the district court decided No Labels would prevail on the merits of its constitutional claim] *with* ER 011 [dedicating a few sentences to "The Other *Winter* Factors"].) Because the district court erred in finding that No Labels was likely to prevail on the merits of its claim that No Labels members were not entitled to participate in the primary, the district court also found that Arizona's direct primary and ballot access laws constituted irreparable harm to No Labels.

The district court's failure to meaningfully analyze the remaining factors was error for at least two reasons. First, by relying entirely on its determination that "Arizona and its voters have minimal interest" in constitutional ballot access and democratic selection of candidates for the general election, while the party has "substantial First Amendment rights to structure itself," the district court did not follow *Winter*'s requirement that the sliding scale test can be applied only if all four elements of the standard for injunctive relief are shown. *All. for the Wild*

Rockies, 632 F.3d at 1132 (holding that the sliding scale approach survives *Winter* "when applied as part of the four-element *Winter* test."). Second, because the district court was incorrect as a matter of law in assessing the burdens at issue in this case—dismissing the concerns of "Arizona and its voters" while finding violations of No Labels rights where none existed—its analysis was similarly flawed.

Because the district court relied on the exact same points—boiled down to a mere two sentences—in its insufficient analysis of the irreparable harm and the balance of public interest factors (ER 011), it is not at all clear that the district court actually applied the *Winter* factors. The Supreme Court and this Court have been very clear about the necessity of conducting a full analysis of all four *Winter* factors. *All. for the Wild Rockies*, 632 F.3d at 1135 ("To the extent prior cases . . . have held that a preliminary injunction may issue where the plaintiff shows only that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor, without satisfying the other two prongs, they are superseded by *Winter*, which requires the plaintiff to make a showing on all four prongs."). But the district court devoted just two sentences to explaining why it would find that the "balance of equities thus tips in favor of the Party," for a total of just three sentences if the district court's finding of irreparable harm is included. (ER 011.) That is a total of three sentences to explain why No Labels prevailed on

the three remaining *Winter* factors. This is at best giving only lip service to applying binding Supreme Court precedent.

In *Alliance for the Wild Rockies*, this Court stressed the importance of analyzing and applying all four *Winter* preliminary injunction factors before providing injunctive relief to preserve the flexible sliding scale approach to injunctive relief. The district court did not perform that analysis in this case and instead devoted a mere two sentences to addressing the last two factors of balance of hardships and public interest. (ER 011.) The district court's consideration of the *Winter* factors increases to three sentences if the irreparable harm factor is included. The district court sums up the section dedicated to the *Winter* factors with: "For all of these reasons, the Court finds that No Labels Arizona succeeds on the merits of its claim that the Secretary's conduct infringes and will infringe on its First Amendment rights (Count 2) and that it is entitled to the preliminary and permanent injunctive relief requested." (ER 011). This ignores, rather than applies, the remaining *Winter* factors. The district court's order does not provide sufficient analysis to satisfy the Court's requirements for granting injunctive relief.

B. The District Court's *Winter* Factors Analysis Was Incorrect.

Not only did the district court fail to engage in the required *Winter* analysis, the district court's determination regarding the *Winter* factors was wrong. The court's irreparable harm determination relies entirely on its erroneous conclusion

that Arizona law—which allows political party members to run for office and vote in their party's primary to determine their nominees for public office—violates the Constitution. As explained, *supra*, that conclusion is incorrect. (*See* Part II [explaining that *AIP* forecloses No Labels' argument], Part III [balancing the State's interest compared to No Labels' interest and explaining that the State easily satisfies *Anderson/Burdick* in this case]). If the district court's decision regarding No Labels' First Amendment interest was wrong, then the party will *not* suffer irreparable harm. The sole basis for the district court's irreparable harm determination was that No Labels "is likely to suffer irreparable harm by way of the loss of its First Amendment rights in the absence of injunctive relief." (ER 011.) This was error.

The public interest and balance of equities strongly favor the Secretary, not No Labels. Arizona "has made the primary an integral part of the procedure of choice" to choose political party nominees, and thus the State and its voters have a significant interest in ensuring participation in the process. *Classic*, 313 U.S. at 318-19; *see also AIP*, 545 F.3d at 1176 (explaining that when the State gives a political party a role in the election process, "the State acquires a legitimate governmental interest in assuring the fairness of the party's nominating process, enabling it to prescribe what that process must be."). There is a compelling government interest in the ensuring elections are "fair and honest" and that "order,

rather than chaos, is to accompany the democratic processes." *Storer*, 415 U.S. at 729. "Avoiding fraud and corruption and promoting democratic decisionmaking" are additional compelling public interests that favor the Secretary. *AIP*, 545 F.3d at 1181. Arizona citizens are entitled to participate as candidates; not guaranteed a chance to win, but deserving of an opportunity to access the ballot and win election. Ariz. const. art VII, § 2 (providing the right to vote and hold office shall not be abridged on the basis of sex); Ariz. const. art. VII, § 10 (requiring the selection of party nominees by direct primary rather than any other means); *see also* A.R.S. § 16-311(A) (providing a process for "*[a]ny person* desiring to become a candidate at a primary election" to run for office as a member of their preferred political party). "The state's goals would clearly be impeded if party leaders could either opt out of the primary altogether or interfere with the democratic process by exercising veto power over the candidates that might seek the nomination." *AIP*, 545 F.3d at 1177. The public interest and the balance of equities merge, *Nken v. Holder*, 556 U.S. 418, 435 (2009), and tip strongly in favor of the Secretary.

The district court's determination that the public interest favors No Labels is incorrect. The district court found No Labels "has substantial First Amendment rights to structure itself, speak through a standard bearer, and allocate its resources," to decide that the balance of equities favored No Labels. But none of these rights are implicated by allowing No Labels members to participate in the

democratic process through the political party. No Labels was free to structure itself and elect a standard bearer through democratic means, as allowed under this Court's precedents. *See, e.g. AIP*, 545 F.3d at 1178 ("[T]he State's interest in enhancing the democratic character of the election process overrides whatever interest the Party has in designing its own rules for nominating candidates"). And Arizona law does not dictate how No Labels should allocate its own resources. Even if a No Labels candidate qualified for the ballot, No Labels is under no obligation to provide that candidate with any support, and would even be free to campaign against that candidate, or try to have that candidate removed from the ballot through a candidate challenge. *See* A.R.S. § 16-351 (providing the right to challenge a candidate to "any elector").

In sum, the district court's *Winter* factors analysis was not only inadequate to ensure an injunction is an appropriate remedy, the few sentences of analysis it included were wrong. For this reason, the Court should reverse the district court's injunction.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision regarding the federal constitutional claim and vacate the injunction that it entered.

Respectfully submitted this 20th day of May, 2024.

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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, Defendant-Appellant Arizona Secretary of State Adrian Fontes hereby informs the Court that he is not aware of any related cases pending in this Court.

/s/Kara Karlson

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2024, 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. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF.

/s/Kara Karlson
Kara M. Karlson

CERTIFICATE OF COMPLIANCE

I am the attorney for the Defendant-Appellant Arizona Secretary of State Adrian Fontes in the above-captioned action. The Secretary's opening brief contains 12,426 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief complies with the word limit of Cir. R. 32-1.

/s/ Kara Karlson