No. 24-563

United States Court of Appeals
for the Ninth Circuit

THE NO LABELS PARTY OF ARIZONA,
an Arizona political party,

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
Case No. 23-cv-02172-PHX-JJT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellee The No Labels Party of Arizona states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

This case concerns whether a State can force a minor political party to participate in races for all federal, state, and local offices even when the party has chosen a narrower focus. Here, the district court correctly held that the United States Constitution reserves that decision to the party, and enjoined Arizona's Secretary of State (the "Secretary") from forcing the No Labels Party of Arizona ("No Labels Arizona" or the "Party") to nominate candidates for offices the Party decided not to seek. The district court's permanent injunction against the Secretary, and its judgment for the Party on the constitutional claim, should be affirmed.

At trial, No Labels Arizona asserted, and the Secretary did not contest, that the Party's only objective was to nominate candidates for President and Vice President; that to achieve that objective, the Party did not intend to use its ballot line for any down-ballot offices; that the Party believed its goals would be undermined by participating in any other election; that the Party's Constitution and Bylaws prohibited the Party from nominating candidates for other races; that the Party structured itself this way because it determined this was the best way to pursue its associational goals; and that the Party believed its participation in other races would require it to allocate resources differently and stray from its objectives. The Secretary attempted to force No Labels Arizona to nominate candidates for down-

ballot races anyway—against the Party's wishes, and contrary to its organizational structure and purpose.

The district court correctly concluded that No Labels Arizona has associational rights, guaranteed by the First and Fourteenth Amendments to the Constitution, to define the boundaries and structure of its association, including what offices it intends to seek. The court correctly found that the Secretary's acts substantially burdened the Party's associational rights, and that the State's countervailing interests were minimal in this context. And so the court correctly determined that the Secretary's acts infringed the Party's constitutional rights. The court also concluded that depriving No Labels Arizona of its associational rights would irreparably harm the Party, and that the balance of equities and public interest favored an injunction. The district court therefore entered a permanent injunction against the Secretary, and entered judgment for No Labels Arizona on its constitutional claim.

The Secretary cannot show that any legal error underlies the district court's decision, that the court clearly erred in finding a substantial burden on the Party's constitutional rights or minimal state interests, or that the court abused its discretion in enjoining him. This Court should affirm.

JURISDICTIONAL STATEMENT

No Labels Arizona agrees with the Secretary's statement of jurisdiction. AOB4.

ISSUES PRESENTED

1. Under the U.S. Constitution, it is well established that a political party has the right to determine the structure and boundaries of its association that best allow it to pursue its political goals. Did the district court correctly conclude that the Secretary unconstitutionally burdened a minor political party's associational rights by forcing the party to participate in down-ballot elections against the party's stated goals and purpose?

PERTINENT CONSTITUTIONAL PROVISIONS

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

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

I. Relevant factual background.

The pertinent background facts are undisputed. No Labels Arizona is a state-level affiliate of No Labels, a 501(c)(4) nonprofit headquartered in Washington, D.C., that was established in 2009 to bridge the partisan divide. 2-ER-0262 ¶¶3–4; *see also* 2-ER-0103 ¶ 25 (stipulating to the admission of the Declaration of Gail Koshland Wachtel); 2-ER-0097 (admitting the Wachtel Declaration into evidence). In February 2023, No Labels "filed a petition for political party recognition" with the Secretary; the following month, the Secretary informed No Labels that No Labels Arizona had qualified as "a new party for federal, statewide, and legislative races in the 2024 Primary and General Elections under Arizona law." 1-ER-0002 (quoting 3-ER-0345).

In early June 2023, No Labels' counsel wrote the Secretary to emphasize that No Labels' "ballot-access efforts across the country relate exclusively to the federal offices of President and Vice President and not to any state or local office," and to give the Secretary "formal notice that (1) No Labels' activities in Arizona pertain only to the federal offices of President and Vice President; and (2) the No Labels Party will nominate candidates only for federal office and not for any state or local

office in Arizona." 2-ER-0120; *accord* 2-ER-0124 ("No Labels has, again, been clear that its ballot-access efforts relate exclusively to the federal offices of President and Vice President and not to any state or local office.").

The letter explained why, under both state law and the federal Constitution, No Labels Arizona "has the right to choose the public offices for which it wants to put forward a nominee to appear on the general election ballot." 2-ER-0123–24. It confirmed that "the No Labels Party will nominate a Presidential ticket 'as provided in [Arizona Revised Statutes ("A.R.S.")] § 16-344,' but it does *not* desire to have the names of any other candidates printed on the official ballot at the 2024 general election and will therefore not hold a primary election for any office." 2-ER-0123. And it made clear the Party "would actively oppose any potential attempt by the Secretary to place a [No Labels Arizona] candidate on the general-election ballot for any down-ballot office." 2-ER-0124.

Beginning in late July 2023, several weeks after the Secretary was directly informed that No Labels Arizona would nominate candidates only for the offices of President and Vice President, five individuals filed statements of interest to run as No Labels Arizona candidates for down-ballot offices—offices for which No Labels Arizona had expressly disclaimed any intent of nominating candidates.[1]

[1] On July 21, 2023, Tyson Draper declared his interest to run for the U.S. Senate as a No Labels Arizona candidate. 2-ER-0193. On August 6, 2023, Richard Grayson declared his interest to run for the state office of Corporation Commissioner. 2-ER-0195. Omar "That Guy" Farooq declared his interest in

On August 11, 2023, pursuant to A.R.S. § 16-821 *et seq.*, the initial members of the Party's state committee adopted No Labels Arizona's Constitution and Bylaws. 2-ER-0105–07. Under the Constitution and Bylaws, the Party was authorized to "obtain ballot access for candidates nominated by No Labels for the federal offices of President and Vice President," but was "not authorized and shall not nominate, support, or oppose any candidate for a state, county, municipal, school, or district office or position." 2-ER-0109 § 2(b).

The Secretary thereafter stipulated that "No Labels Arizona, as expressed in its Constitution and Bylaws, does not intend or desire to use its ballot line for an election for any office other than President or Vice President." 2-ER-0099 ¶ 9. And "for purposes of this litigation the Secretary does not contest[] that (a) No Labels Arizona has structured itself this way because it has determined that this is the best way to pursue its associational goals; and (b) No Labels Arizona believes its participation in other races would require it to allocate resources and stray from its objectives." 1-ER-0099 ¶ 8.

The same day the Party adopted its Constitution and Bylaws—and consistent with them—the Party's state chair informed the Secretary that "the No Labels Party will nominate candidates only for the offices of President and Vice President, and

running for U.S. Congress on November 16, 2023. 2-ER-0197. Michael Bishop declared his interest in running for State Representative on November 28, 2023. 2-ER-0199. Sam Huang declared his interest in running for State Representative on December 8, 2023. 2-ER-0201.

does not desire to have the names of candidates for any other office printed on the general-election ballot at the 2024 general election." 2-ER-0129.

Three days later, after No Labels Arizona learned that two individuals had filed statements of interest "on a No Labels party line" for "public offices that are not authorized by No Labels," the Party's counsel wrote to the Secretary. 2-ER-0131. Consistent with what No Labels had told the Secretary months earlier, the Party reiterated that the Party "does not intend to make nominations for any public office other than President and Vice President in 2024," again explained why "it would violate both Arizona law and the United States Constitution to force No Labels to participate in an election for any other public office against its will," and asked the Secretary to "reject the[] Statements of Interest." 2-ER-0131–33.

The Secretary refused. In September 2023, the Secretary's State Elections Director wrote that the Secretary "has the nondiscretionary duty to accept candidate filings" for down-ballot offices under state law, and would deem the "candidate who receives the highest number of votes in the Primary Election [to] be the political party nominee and appear on the General Election ballot" for those down-ballot offices. 2-ER-0135.

II. This lawsuit.

No Labels Arizona filed this lawsuit in response. Count 1 of the complaint asserted that the Secretary was violating state law by "forcing No Labels Arizona to

nominate candidates for elections in which it has no intent or desire to participate." 3-ER-0449 ¶ 30. Specifically, the Party alleged the Secretary was violating A.R.S. § 16-301(A), which requires a political party to nominate its candidates at a primary election *if* the party "intend[s] to make nominations for the ensuing general or special election" and "desires to have the name of its candidates printed on the official ballot for that general or special election." 3-ER-0449 ¶¶ 24–26. No Labels Arizona alleged it was not such a party, because it "does not intend to make nominations in the ensuing general election" for any down-ballot races, and consequently "does not desire to have the names of any candidates" for such races "printed on the general election ballot." 3-ER-0449 ¶¶ 27–28. By forcing No Labels Arizona to nominate candidates anyway, the Party asserted, the Secretary was violating § 16-301(A). 3-ER-0449 ¶ 30.

Count 2 of the complaint asserted that the Secretary's actions had also violated the First and Fourteenth Amendments to the United States Constitution. 3-ER-0453 ¶ 44. No Labels Arizona alleged the Secretary was "forcing [it] to associate with and nominate candidates for elections in which it had no desire to participate," "[i]gnoring No Labels Arizona's considered judgment and the constitutional guarantees" of the Party's associational rights. 3-ER-0452 ¶ 40. The Party made clear it was "not seeking protection against unaffiliated voters or candidates who are ideologically incompatible." 3-ER-0452 ¶ 37. Instead, the Party "object[ed] to the

Secretary's acceptance of statements of interest . . . because it does not want to nominate *anyone* or participate in *any* election for these or any other down-ballot offices." *Id.* "No Labels Arizona's objective," it alleged, was "to nominate consensus candidates for President and Vice President"; it had "deliberately structured itself to best pursue its goals"; and "[i]ts goals would be undermined by participating in any other election." 3-ER-0452 ¶ 38.

No Labels Arizona sought declaratory and injunctive relief, 3-ER-0453, and moved for a preliminary injunction, 3-ER-0388.

To expedite matters, the parties agreed to consolidate the hearing on the preliminary-injunction motion with a trial on the merits under Rule 65(a)(2) of the Federal Rules of Civil Procedure. Doc. 10 at ¶ 6.[2] Before the trial, the parties also filed a Joint Statement of Stipulated Facts and Exhibits, agreeing to certain facts and requesting the admission of all the parties' exhibits. Doc. 19.

The district court held a bench trial on January 4, 2024. Doc. 20. On January 16, 2024, the district court entered an order concluding that while No Labels Arizona's state-law claim failed, "No Labels Arizona succeeds on the merits of its claim that the Secretary's conduct infringes and will infringe on [the Party's] First Amendment rights (Count 2)." 1-ER-0008, 12.

[2] Citations of Doc. ___ at ___ refer to the district court's electronic docket in this case.

The court concluded that "the Party has First Amendment rights to define the boundaries and structure of its association, including what offices it intends to seek," and determined that "[t]he Secretary's acts leading to placement of candidates on the primary election ballot under the Party's insignia for offices the Party does not intend to seek infringes on the associational rights to structure itself, choose a standard bearer who speaks for the Party, and decide where to devote its resources." 1-ER-0011–12 (citations omitted). Applying the familiar *Anderson-Burdick* framework—in which "the Court must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by the rule'"—the district court found that "the burden on the Party is substantial." 1-ER-0011 (quoting *Libertarian Party of Ill. v. Scholz*, 872 F.3d 518, 523 (7th Cir. 2017)). In contrast, the court "[found] that Arizona's interests are minimal in this context," carefully considering and rejecting each of the interests the Secretary asserted. 1-ER-0011. The court explained that "[s]imply because the state may disagree with the Party's choices in structuring or setting boundaries for itself does not entitle the state to constitutionally substitute its judgment for the Party's judgment." 1-ER-0012 (citation omitted).

Having concluded that "No Labels Arizona succeeds on the merits of its [constitutional] claim," the district court also concluded that the Party was "likely to

suffer irreparable harm by way of the loss of its First Amendment rights in the absence of injunctive relief," and that "[t]he balance of equities . . . tips in favor of the Party." 1-ER-0012.

The court therefore entered a permanent injunction against the Secretary relating to the 2024 primary and general elections. 1-ER-0013. The court then entered judgment in favor of the Secretary as to Count 1, and in favor of No Labels Arizona as to Count 2. 2-ER-0044.

The Secretary's appeal followed.

SUMMARY OF ARGUMENT

The district court correctly determined that a political party "has First Amendment rights to define the boundaries and structure of its association, including what offices it intends to seek." 1-ER-0011. (Argument § I.A.1.) The court also correctly found that forcing No Labels Arizona, a minor political party, to compete for offices the Party had decided not to seek would substantially burden the Party's associational rights. (Argument § II.A.2.) And the court correctly found, as a factual matter, that whatever countervailing interests the State asserted were "minimal in this context." 1-ER-0011. (Argument § II.A.3.) Balancing the substantial burden on No Labels Arizona against the State's minimal interests, the district court correctly concluded that the Secretary's acts would infringe No Labels Arizona's constitutional rights. (*Id.*) Having concluded that No Labels Arizona succeeded on

the merits of its constitutional claim, the district court also rightly found that the Party would be irreparably harmed absent an injunction, and that the balance of equities and public interest favored enjoining the Secretary. (Argument §§ II.B, II.C.)

None of the Secretary's arguments to the contrary is persuasive. (Argument § II.D.) The Secretary cannot show, as a legal matter, that No Labels Arizona lacks an associational right to decide what offices the Party wants to pursue. (Argument § II.D.2.) He also fails to show that the district court clearly erred by finding that the Secretary's acts substantially burden No Labels Arizona's constitutional rights. (Argument § II.D.3.) He likewise fails to show that the district court clearly erred by finding that the State's interests are minimal in this case. (Argument § II.D.4.) The Secretary therefore fails to show that No Labels Arizona should not have prevailed on the merits. Nor does he show that the district court abused its discretion in determining that the other factors justified the issuance of an injunction. (Argument § II.D.5.)

This Court should affirm.

ARGUMENT

I. Standard of review.

The Secretary's statement of the standard of review is incomplete. AOB12–13. Although the Court "reviews questions of law underlying the district court's

decision *de novo*," it "review[s] the district court's decision to grant a permanent injunction for abuse of discretion." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 965 (9th Cir. 2017).

The district court's factual findings—including its decision "identifying," "assessing," and "determin[ing]" the burden imposed by an election regulation, and its findings regarding the State's asserted interests in that regulation—are all reviewed for clear error. *Feldman v. Ariz. Sec'y of State's Off.*, 843 F.3d 366, 375, 390, 393 (9th Cir. 2016). "[A] decision is not clearly erroneous unless it strike[s] us as wrong with the force of a five-week-old, unrefrigerated dead fish." *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1253 (9th Cir. 2020) (citation and quotation marks omitted).

"If the district court identified and applied the correct legal rule to the relief requested, we will reverse only if the court's decision resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Ariz. Dream Act Coal.*, 855 F.3d at 965 (citation and quotation marks omitted). Said otherwise, "[t]he grant of a permanent injunction will be reversed only when the district court based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 941 (9th Cir. 2002). This "review is limited and deferential." *Hendricks v. Bank of Am., N.A.*, 408 F.3d 1127, 1139 (9th Cir. 2005).

II. The district court correctly concluded that forcing the Party to participate in elections against its wishes and contrary to its stated objectives unconstitutionally burdens the Party's associational rights.

The district court correctly concluded that No Labels Arizona has the right under the First and Fourteenth Amendments to decide which offices it wants to seek, that forcing the Party to compete for offices it does not want to seek substantially burdens the Party's constitutional rights, and that the Secretary's countervailing interests are minimal at best. 1-ER-0011–12. The court therefore correctly determined that No Labels Arizona succeeded on the merits of its constitutional claim, that the Party would be irreparably harmed absent injunctive relief, and that the balance of equities tipped in the Party's favor. 1-ER-0012. The district court properly entered a permanent injunction, and this Court should affirm.

A. The district court correctly concluded that No Labels Arizona succeeded on the merits.

A plaintiff seeking a permanent injunction must show "actual success" on the merits. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success."). The district court correctly concluded 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)." 1-ER-0012.

1. No Labels Arizona has a constitutional right to decide which offices it wants to seek.

As a threshold matter, the district court correctly concluded that the associational rights guaranteed by the First and Fourteenth Amendments include a political party's right to decide which political offices it wants to pursue. No Labels Arizona sued the Secretary under 42 U.S.C. § 1983, and, as the district court explained, "[t]o state a § 1983 claim, a plaintiff 'must allege the violation of a right secured by the Constitution and laws of the United States,' committed by 'a person acting under color of state law.'" 1-ER-0008 (quoting *West v. Atkins*, 487 U.S. 48, 48 (1988)). The Secretary did not dispute that he was acting under color of state law. *Id.*; *see also* 2-ER-0098 ¶ 1 (stipulating that "Secretary Fontes acted in his official capacity as the Secretary of State of Arizona at all times relevant to this action."). And the district court correctly concluded that "the Party has First Amendment rights," enforceable against the State through the Fourteenth Amendment, "to define the boundaries and structure of its association, including what offices it intends to seek." 1-ER-0008, 11 (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986)).

The Supreme Court has long held that the Constitution protects "a political party's 'determination . . . of the structure which best allows it to pursue its political goals.'" *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989) (quoting *Tashjian*, 479 U.S. at 224). A party thus has an associational right to decide

"how to organize itself, conduct its affairs, and select its leaders," the regulation of which "may . . . color the parties' message and interfere with the parties' decisions as to the best means to promote that message." *Id.* at 230 & n.21.

More specifically, the Supreme Court has described candidate-selection as "the 'basic function of a political party.'" *Cal. Democratic Party v. Jones*, 530 U.S.567, 581 (2000) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)). Further, the right to "nominate candidates for political office is at the very heart of the freedom of assembly." *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (Rehnquist, J., concurring in the result). "The moment of choosing the party's nominee . . . 'is the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.'" *Jones*, 530 U.S. at 575 (quoting *Tashjian*, 479 U.S. at 216). Just like infringing the parties' right to structure themselves and choose their leaders would color their message, the Supreme Court recognizes that interfering with candidate-selection "has the likely outcome . . . of changing the parties' message." *Id.* at 581–82. A political party's process for selecting a standard bearer to serve as its nominee for a particular office is accorded a "special place" and a "special protection" under the First Amendment. *Id.* at 575 (quoting *Eu*, 489 U.S. at 224). This "special protection" allows an organization to "choose a candidate-selection process that will in its view produce

the nominee who best represents its political platform." *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 202 (2008).

A party's rights in this respect can be "circumscribed" only if the organization chooses to avail itself of "the right to have [its] candidates appear with party endorsement on the general-election ballot." *Id.* at 203. At a fundamental level, a party has a core right to structure itself and choose for itself the public offices for which it will put forward a nominee to appear on the general-election ballot and thereby accept or reject "circumscription" from the state. This decision is, by its nature, entirely private and internal to an organization and cannot be overridden. As the district court correctly recognized, 1-ER-0011, the decision of whether to nominate a candidate for an office in the first place is inseparable from "[t]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals," which the Constitution protects. *Tashjian*, 479 U.S. at 224. Obviously, a political party that decides to nominate a candidate for an office to appear with party insignia on Arizona's general-election ballot must select that nominee through a primary election. But the antecedent decision of *whether* to nominate a candidate for an office at all is for a political party to determine for itself, since that decision is inextricably bound up with a party's associational right to determine *what* its message and mission are. *See Jones* 530 U.S. at 581–82; *Eu*, 489 U.S. at 231 n.21.

2. Forcing No Labels Arizona to participate in elections against its will would severely burden the Party's associational rights.

The district court correctly concluded not only that No Labels Arizona "has First Amendment rights" to determine "what offices it intends to seek," but also that "[t]he Secretary's acts leading to placement of candidates on the primary election ballot under the Party insignia for offices the Party does not intend to seek infringes on the Party's associational rights." 1-ER-0011–12 (citing *Tashjian*, 479 U.S. at 224; *Libertarian Party of Ill. v. Scholz*, 872 F.3d 518, 524 (7th Cir. 2017)). The court then turned to the *Anderson-Burdick* analysis, and correctly found that the Secretary's actions would impose a "substantial burden on the Party." 1-ER-0012. That factual finding was correct and certainly not clearly erroneous. *See Feldman*, 843 F.3d at 392.

At trial, the Secretary did not contest that:

- "No Labels Arizona was established for the purpose of placing yet-to-be-identified nominees for President and Vice President on the 2024 general-election ballot in Arizona";
- providing this option was the Party's "only current objective";
- "to accomplish this objective, No Labels Arizona wishes not to use its ballot line in primary elections and in the 2024 general election for any offices besides United States President or Vice President";

- "No Labels believes its goals would be undermined by participating in any other election";
- "Under its Constitution and Bylaws, No Labels Arizona is to 'obtain ballot access for candidates nominated by No Labels for the federal offices of President and Vice President' and 'shall not nominate' a 'candidate for a state, county, municipal, school, or district office or position";
- "No Labels Arizona structured itself this way because it has determined that this is the best way to pursue its associational goals"; and
- "No Labels Arizona believes its participation in additional races would require it to allocate resources and stray from its objectives."

2-ER-0098–99 ¶¶ 3–8. In other words, the Secretary did not dispute that forcing No Labels Arizona to participate in elections other than those for President and Vice President would violate the Party's goals, governing documents, and organizational structure, which—in the Party's judgment—would cause No Labels Arizona to divert its resources and stray from its mission. Given these concessions, it should come as no surprise that the district court concluded that "[t]he Secretary's acts . . . infringe[d] on the Party's associational rights to structure itself, choose a standard bearer who speaks for the Party, and decide where to devote its resources." 1-ER-0011–12.

The Seventh Circuit's decision in *Scholz* amply supports that conclusion. As

the district court explained, 1-ER-0010, *Scholz* concerned Illinois' "full-slate requirement," under which a new party wanting to run a candidate for any one office was required to "submit a full slate of candidates, one for each race in the relevant political subdivision." 872 F.3d at 521. The Seventh Circuit had "little difficulty concluding that the full-slate requirement severely burdens the First Amendment rights of minor parties," including by "forc[ing] [them] to find and recruit candidates for races they want nothing to do with" and to "devote to each candidate the funding and other resources necessary to operate a full-fledged campaign." *Id.* at 524.

As the district court recognized, the Secretary's acts here—placing "candidates on the primary election ballot under the Party insignia for offices the Party does not intend to seek"—imposed a similarly heavy burden on No Labels Arizona. 1-ER-0012. Like the new party in *Scholz*, No Labels Arizona would be forced to run candidates "for races [the party] want[s] nothing to do with" and "devote . . . resources" that the Party, left to its own associational choices, would otherwise use elsewhere. 872 F.3d at 524. The Secretary did not contest this as a factual matter. 2-ER-0099 ¶¶ 4–5, 7–9. The district court's factual finding that this would impose a "substantial" burden on No Labels Arizona was thus well supported. 1-ER-0011, 12.

3. The State's asserted interests are minimal at best.

The district court's finding that the State's countervailing "interests are

minimal in this context" was also correct (and not clearly erroneous). 1-ER-0011; *Feldman*, 843 F.3d at 392.

Before trial, the Secretary suggested three state interests: (1) a "compelling interest in 'eliminating the fraud and corruption that frequently accompanied party-run nominating conventions,'" 3-ER-0302 (quoting *Alaskan Indep. Party v. Alaska*, 545 F.3d 1173, 1177 (9th Cir. 2008)); (2) "the state's interest in regulating elections," 2-ER-00302; and (3) the interests of "candidates and voters," 3-ER-0305. The district court correctly found that these asserted interests were "minimal in this context." 1-ER-0011.

To begin, the court correctly found that "this case does not implicate the interests at issue in *Alaskan Independence Party* of eliminating corruption in a party's selection of its primary candidates because the Party intends not to run *any* candidates in the primary." *Id.* In other words, the Secretary was putting the cart before the horse. The Party does not dispute that if it wanted to nominate down-ballot candidates to appear with Party insignia on the general-election ballot, Arizona could require those candidates to be nominated in a primary election (rather than a party convention) in an effort to avoid fraud and corruption affecting the process for selecting a nominee. But the State can have no interest in preventing fraud and corruption when a political party has decided that no nominee will be selected and no process will exist. A State's power to determine the method by which

a nominee is selected, in other words, does not give it license to also make the upstream decision of whether a political party should put forward a nomination in the first place.

For the same reason, the State's general "interest in regulating elections," 3-ER-0302 is, at most, minimal here. No Labels Arizona's choice to sit out the primary election by not competing in down-ballot races means the State's generalized interest in regulating that election is not implicated at all.

Next, the district court correctly found that the interests of "candidates and voters" that the Secretary tried to assert were unavailing. 3-ER-0305; 1-ER-0011. The Secretary argued that if the Party prevailed, its registered members "would have no option to vote for federal, statewide, or legislative candidates in the 2024 Primary Election because they are only eligible to vote in their own party's primary." 3-ER-0305–06 (citing A.R.S. § 16-467). As the district court explained, however, "Arizona voters do not have the right to select a nominee for an office the Party is not seeking." 1-ER-0011. *See, e.g.*, *Duke v. Cleland*, 954 F.2d 1526, 1531 (11th Cir. 1992) (a candidate does not have a First Amendment right to be the nominee of a particular party). And, of course, a voter who feels himself disenfranchised by party rules may simply leave the party and join another (or none at all). *Cf. Jones*, 530 U.S. at 584 ("The voter who feels himself disenfranchised" by not being able to vote in a party's closed primary "should simply join the party.").

The Secretary also tried to assert the interest of "a candidate running for office as a member of a party [who] must be registered with that party under Arizona law." 3-ER-0306 (citing A.R.S. § 16-311(A)). But as the district court correctly pointed out, case law does not support "the idea that registered members of the Party, as individual citizens, have the right to appear on a ballot as the Party's candidate." 1-ER-0011. The Supreme Court has rejected the notion that candidates have a constitutional right to have a "fair chance of prevailing in the parties' candidate-selection process." *Lopez Torres*, 552 U.S. at 203–04, 205. "[E]ven political parties do not have the 'right to have their nominees designated as such on the ballot.'" 1-ER-0011 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 453 n.7 (2008)); *accord Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (even a political party is not constitutionally "entitled to have its nominee appear on the ballot as that party's candidate").

And, as the district court rightly noted, "[t]o the extent an individual citizen has the right to appear on the ballot at all, the citizen can appear on the ballot without party affiliation (or in the primary of another political party) after meeting the state's requirements to do so." 1-ER-0011. *Accord Belluso v. Poythress*, 485 F.Supp.904, 912 (N.D. Ga. 1980) (noting that a candidate could seek office "independently or as the candidate of [another] party"). The voters could still support those individuals. *See Duke v. Massey*, 87 F.3d 1226, 1234 (11th Cir. 1996) ("Duke's supporters were

not foreclosed from supporting him as an independent candidate, or as a third-party candidate."). So any burden on voters or candidates is, at most, minimal.

Finally, at trial, "the Secretary also raised concerns that No Labels Arizona voters might expect to receive primary ballots and will be confused when they do not receive them, and that such confusion could lead to threats against election workers." 1-ER-0011. As the district court noted, however, "the Secretary provided no evidentiary or legal support for these suggested interests." *Id.* The Supreme Court has made clear that "sheer speculation" about voter confusion (or its imagined consequences) is not enough. *See Wash. State Grange*, 552 U.S. at 454.

Under these circumstances, the district court correctly found (and certainly did not clearly err in finding) that the State's interests are "minimal." 1-ER-0012. Then, "[w]eighing the state's minimal interest against the substantial burden on the Party," the court properly "conclude[d] that the Secretary's acts in furtherance of placing Party candidates on the primary ballot infringe on the Party's First and Fourteenth Amendment rights." *Id.*

B. The district court correctly concluded that No Labels Arizona would suffer irreparable harm absent an injunction.

Having determined that No Labels Arizona succeeded on the merits of its constitutional claim, the district court turned to the other factors under *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008), and reasoned that "No Labels Arizona . . . is likely to suffer irreparable harm by way of the loss of its First Amendment

rights in the absence of injunctive relief." 1-ER-0012 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). That conclusion was also correct.

In *Elrod*, the Supreme Court explained that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. at 373. And this Court, quoting *Elrod*, has noted that "[i]t is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

Because the district court concluded that the Secretary's actions would "infringe on" No Labels Arizona's constitutional rights, it correctly determined that No Labels Arizona would suffer irreparable injury unless the Secretary were enjoined. 1-ER-0012.

C. The district court correctly concluded the equities and public interest favor an injunction.

The district court was also correct to conclude that "[t]he balance of equities . . . tips in favor of the Party." 1-ER-0012. As the Secretary argued and the court explained, "[b]ecause the state opposes injunctive relief, examination of the balance of equities and the public interest merge in this case." *Id.* (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). The court determined this merged factor favored No Labels Arizona because "Arizona and its voters have minimal interest in candidates running for offices under the Party insignia that the Party does [not] intend to seek," whereas "[t]he Party has substantial First Amendment rights to structure itself, speak through

a standard bearer, and allocate its resources." 1-ER-0012. As just explained, the court's underlying factual findings regarding the State's minimal interests were correct. So were the court's legal conclusions about the Party's weighty First Amendment rights. The balance of equities thus tipped not only decisively, but lopsidedly, in No Labels Arizona's favor. Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (citation omitted); *accord Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate, and injunctions protecting First Amendment freedoms are always in the public interest.").

* * *

The district court correctly concluded that No Labels Arizona actually succeeded on the merits of its claim that forcing the Party to compete in elections against its wishes and objectives would infringe the Party's First and Fourteenth Amendment rights; that No Labels Arizona would suffer irreparable harm if the Secretary's actions were not enjoined; and that the equities and public interest favored an injunction to prevent the deprivation of the Party's constitutional rights. The district court did not abuse its discretion in entering a permanent injunction. Its decision should be affirmed.

D. Each of the Secretary's arguments to the contrary fails.

The Secretary fails to show that any of the district court's factual findings was clearly erroneous, that any of its legal conclusions was incorrect, or that the court somehow abused its discretion by permanently enjoining him.

1. *Alaskan Independence Party* does not govern this dispute.

On appeal, as in the district court, the Secretary leads with the argument that the Court's decision in *Alaskan Independence Party* "govern[s]" and "[c]ontrol[s]" this dispute. AOB14. The Secretary's argument fares no better here than it did below.

Alaskan Independence Party involved "an attack on" that state's "mandatory direct primary." 545 F.3d at 1177. Two political parties wanted their candidates' names to appear on Alaska's general-election ballot but sought "to exclude from the ballot those candidates the party finds objectionable," and to force the state to accept nominees who were not selected at the primary election. *Id.* at 1178. The parties argued "that Alaska's state-run primary violate[d] their associational rights either by compelling them to nominate their candidates by primary election instead of convention, or by failing to allow them to 'exclude'" philosophically incompatible candidates. *Id.* at 1177. This Court upheld Alaska's primary-election law. *Id.* at 1180.

The Secretary asserts, repeatedly, that "[r]egardless of the framing, No Labels' Complaint raises the same argument that the plaintiff parties in *AIP* did."

AOB15; *see also* AOB3 ("[R]egardless of how the argument is framed, [it] is an attack on Arizona's constitutional direct primary system."); AOB17 ("No matter how No Labels' argument is framed, it is an attack on the validity of Arizona's primary and ballot access statutes."); AOB35 (same); AOB45 (same). Repetition does not make an assertion true.

Unlike the parties in *Alaskan Independence Party*, No Labels Arizona did not challenge the validity of Arizona's direct primary or seek to nominate down-ballot candidates outside the primary. *See Alaskan Independence Party*, 545 F.3d at 1176. On the contrary, No Labels Arizona acknowledges that *if* it wanted candidates to appear on the general-election ballot with party insignia, it would have to abide by the State's requirement that candidates must be nominated through primary elections. *See Jones*, 530 U.S. at 572 ("We have considered it 'too plain for argument' . . . that a State may require parties to use the primary format for selecting their nominees[.]" (citation omitted)). But that is *not* what No Labels Arizona wants.

As the district court explained, *Alaskan Independence Party* "differs significantly from the present one," because "[t]here, the 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." 1-ER-0009. Here, in contrast, No Labels Arizona *does not intend to run candidates* for any of the offices for which Arizona requires a direct primary.

The Secretary calls these distinctions "a red herring" because No Labels Arizona's "party leadership" supposedly "is attempting to do indirectly what it could not do directly by blocking candidacies that it cannot unilaterally decide." AOB16. Not so. Unlike the parties in *Alaskan Independence Party*, 545 F.3d at 1177, No Labels Arizona does not seek to exclude any candidate based on a claimed ideological objection in order to install its preferred candidate without a primary election. In its complaint, No Labels Arizona made clear that it "is not seeking protection against unaffiliated voters or candidates who are ideologically incompatible." 3-ER-0452 ¶ 37. Rather, the Party "objects to the Secretary's acceptance of statements of interest . . . because it does not want to nominate *anyone* or participate in *any* election for these or other down-ballot races." *Id.* Put differently, unlike in *Alaskan Independence Party*, No Labels Arizona isn't trying to bypass primary elections for offices for which the Party had decided to compete; the Party is trying to avoid being *forced* to pursue offices it wants nothing to do with. The district court appropriately recognized this critical distinction. *See* 1-ER-0009.

Alaskan Independence Party is inapposite for still another reason that the Secretary ignores. Not only had the parties in that case already decided to participate in races for which Alaska required primary elections, but the parties' bylaws authorized them to nominate candidates for the races at issue. *Alaskan Independence Party*, 545 F.3d at 1176 n.1 ("AIP bylaws provide for nomination by convention

'[i]n any election for public office where the Alaskan Independence Party is authorized by law to nominate a candidate,'" while "ALP bylaws . . . 'consent to have Libertarian candidates for elective public office appear on a primary ballot.'"). Here, in contrast, No Labels Arizona's Constitution and Bylaws authorize the Party to compete only for the offices of President and Vice President, and forbid the Party from nominating candidates for other offices. 2-ER-0099 ¶ 7; 2-ER-0109 § 2(b).

2. No Labels Arizona has an associational right to determine the boundaries and structure of its association, including which offices it intends to seek.

As No Labels Arizona explained (Argument § I.A.1), the district court's conclusion that "the Party has First Amendment rights to define the boundaries and structure of its association, including what offices it intends to seek," 1-ER-0011, is well grounded in precedent. The Secretary nonetheless tries to defeat No Labels Arizona's constitutional claim by advancing an astonishingly cramped and ultimately meritless view of the Party's associational rights. The Secretary argues that "[n]o associational freedom is implicated when the association is not being forced to associate with nonmembers." AOB34 (capitalization altered). But the governing case law readily dispatches with that notion. As the district court recognized, 1-ER-0011–12, a party's "determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Tashjian*, 479 U.S. at 224. The Constitution also

protects a "political party's decisions about the identity of, and the process for electing, its leaders." *Eu*, 489 U.S. at 229. And a minor political party's associational freedoms are implicated when a state forces it to run candidates for offices the party does not want to pursue and, as a consequence, divert the party's scarce resources. *See Scholz*, 872 F.3d at 524.

The Secretary also argues that "[p]olitical parties' interests are minimal at best when it comes to controlling their own members." AOB34. But he cites no authority for that proposition, and it is irrelevant anyhow. Contrary to the Secretary's rhetoric, No Labels Arizona is not attempting "to control[] [its] own members," or to prevent "its own members from participating in its own candidate selection process," or to "disenfranchise its own members in selecting the party's nominees for state and local offices." AOB34–35 (emphases removed). Instead, as the district court correctly recognized, 1-ER-0011–12, No Labels Arizona sued the Secretary to vindicate the Party's associational right to decide whether to nominate candidates in down-ballot races in the first place.

The Secretary next contends a party's associational rights are more limited outside the context of a presidential election, citing *Cousins*, 419 U.S. at 490. AOB34–35. But while the interests of *States* are more circumscribed in presidential contests, *Cousins*, 419 U.S. at 490, it does not follow that *parties'* interests are more limited in contests for other offices.

Perhaps to bolster its argument that non-presidential races somehow trigger diminished constitutional rights, the Secretary says, "No Labels did not limit its argument to the presidential election, but specifically brought up other races, like the state mine inspector race." AOB18 (citing 1-ER-0063–65). The Secretary misses the point.

At trial, to illustrate that the offices a party decides to seek may be inextricable from its message and goals, No Labels Arizona "analog[ized]" to a "minor party that gets ballot recognition to focus on mine safety issues" and, accordingly, decides only to "nominate a candidate for Arizona State Mine Inspector." 2-ER-0056. It is "easy to see why forcing that party to nominate candidates for Superintendent of Public Instruction or representative for . . . Legislative District 17 . . . would interfere with its core mission to focus on mine safety[,] and to express that mission and pursue that mission solely through the election of a Mine Inspector." 2-ER-0057. The Secretary suggests—without explaining why—that there would be something wrong with such a party, or that it would not have a constitutionally protected right to determine its structure or purpose. But that just illustrates the problem with the Secretary's position in this case.

As the district court correctly recognized, the First and Fourteenth Amendments protect *every* party's right to "define the boundaries and structure of its association, including what offices it intends to seek." 1-ER-0011. And as the

Party explained at trial, "No Labels Arizona has structured itself in such a way as to pursue a unity ticket for President and Vice President and believes that forcing it to compete in any other race would divert it from that mission and cause it to have to allocate resources differently." 2-ER-0057; *see also* 2-ER-0064–65 (analogizing to "[a] utility regulation party that only wants to field candidates for the [Arizona] Corporation Commission," which would be diverted "from its fundamental purpose" by "forcing that party also to nominate a candidate for State Treasurer").

The point was not that No Labels Arizona wants to run candidates for State Mine Inspector. *See* AOB42. The point was that the offices the Party had decided to pursue—President and Vice President only—were inseparable from the Party's organizational purpose.

Finally, the Secretary contends that when a party's *leaders* make the decision about what offices to seek, "the political party's freedom of association is more circumscribed." AOB36. He cites no authority for that claim either. The Secretary derides No Labels Arizona's party leaders as "political party bosses," accuses them of "assert[ing] one thing in their new party recognition petitions" and then "reneg[ing] on that commitment," and claims they "never attempted to tell [party] members . . . that the party neither supported their candidacies nor intended to participate in the primary election." AOB36; *see also* AOB43 (making similar claims and suggesting, without a shred of evidence, that No Labels engaged in "an

outright act of intentional deception"). Even if *any* of the Secretary's assertions were true, *none* would vitiate No Labels Arizona's constitutional rights.

But all of the Secretary's claims are either false or misleading. The three Arizona citizens the Secretary calls "party bosses"—not once, but 10 times in his brief, AOB1, 12, 16, 21, 27, 29, 30, 35, 36, 44—are the Party's chair, vice chair, and secretary/treasurer. State law requires every party to have "a chairman, a secretary and a treasurer." A.R.S. § 16-826(A). The new-party petition form that No Labels used was a form the Secretary himself prescribed, using language borrowed from Arizona's new-party-recognition statute, A.R.S. § 16-801(A). *See* 2-ER-0018. No Labels Arizona made no "commitment" that it "reneged" on; petitioning for ballot access is not the same as a promise that a party will decide to compete for every office. AOB36. And what the Secretary cites for support regarding No Labels Arizona's supposed lack of communications, *id.*, is his own counsel's argument about what the Party chair's declaration did *not* say. *See* 2-ER-0093 ("Yes, they have sent letters to the Secretary, but Ms. Wachtel's declaration . . . does not state anywhere that they ever communicated with the candidates whose identities they knew or have attempted to communicate to the voters . . . .").

But again, none of this has anything to do with the existence or scope of No Labels Arizona's constitutional rights—except in one sense: The Constitution protects the Party from the Secretary's evident desire to micromanage the Party's

leadership structure and communications. *See Eu*, 489 U.S. at 233 ("[A] State cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure, any more than it can tell a party that its proposed communication to party members is unwise.").

3. The Secretary's acts substantially burden No Labels Arizona's associational rights.

The Secretary also resists the district court's factual finding that "the Secretary's acts in furtherance of placing Party candidates on the primary ballot" impose a "substantial burden" on the Party's associational rights. 1-ER-0012. But as No Labels Arizona showed (Argument § II.A.2), the district court's finding was correct, and the Secretary comes nowhere close to showing, as he must, that it was clearly erroneous. *See Feldman*, 843 F.3d at 392.

(a) The Secretary mischaracterizes the Party's asserted interests.

In an effort to minimize the burden his acts caused the Party, the Secretary mischaracterizes the interests No Labels Arizona asserted. The Secretary claims variously that "[t]he core of No Labels' asserted interest is to be a political party . . . completely free of Arizona's primary election laws and ballot access requirements," AOB17, and that "No Labels' asserted interest [is] in eliminating its members' ability to participate in building a party as voters and candidates," AOB29. But No Labels Arizona did not assert either of those claims. Instead, the Party sued to

vindicate its constitutional rights to decide, as an initial matter, whether to nominate down-ballot candidates at all. As the district court correctly found, the associational rights that No Labels Arizona asserted are the rights "to structure itself, choose a standard bearer who speaks for the Party, and decide where to devote resources," rights that the Secretary substantially burdened through his "acts leading to placement of candidates on the primary election ballot under the Party insignia for offices the Party does not intend to seek." 1-ER-0011–12.

(b) The Party does not challenge Arizona's ballot-access requirements or direct-primary law.

The Secretary also argues "[t]he district court . . . 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 that "[n]o court has ever held that complying with constitutional ballot access requirements and a direct primary law is a substantial burden on . . . an organization's freedom of association." AOB22, 31. The Secretary misses the point. As explained above (Argument § I.A.3), and contrary to the Secretary's own claims, No Labels Arizona does not challenge Arizona's ballot-access requirements or direct-primary law. The Party agrees that *if* it wanted to run candidates for offices for which a primary election were required, it would have to nominate those candidates at a primary. But the Party does *not* want to nominate such candidates *at all*. No Labels Arizona does not challenge state law;

it challenges the Secretary's unconstitutional attempt to force the Party to participate in elections in which the Party decided not to participate.

(c) The burden on the Party here is different from the burden on the parties in *Alaskan Independence Party*.

The Secretary next argues that this burden "is no different than the burden that the minor parties in [*Alaskan Independence Party*] asserted." AOB31–32. That is wrong, too. For all the reasons explained above (Argument § II.A.3), this case is materially different from *Alaskan Independence Party*, a case in which the parties *already had decided to nominate candidates*, but wanted to do so by convention rather than by direct primary. 545 F.3d at 1177. This case involves the Party's anterior right to decide whether to nominate candidates in the first place. And again, unlike in *Alaskan Independence Party*, No Labels Arizona does not object to particular candidates for philosophical reasons. Rather, as the district court recognized, the Party objects to "[t]he Secretary's acts leading to placement of candidates on the primary election ballot under the Party insignia for offices the Party does not intend to seek," 1-ER-0011.

(d) The district court correctly relied on the Seventh Circuit's decision in *Scholz*.

The Seventh Circuit's decision in *Scholz*, 872 F.3d at 524, leaves no doubt that these acts—forcing a minor party to compete in elections and devote resources against its wishes—burden the Party's associational rights.

The Secretary's argument that the district court "erred in relying" on *Scholz* is entirely unpersuasive. AOB19. The Secretary first objects that "*Scholz* is a Seventh Circuit case, and reliance on this nonbinding precedent from another circuit instead of on this Court's precedent was error." *Id.* But there is no error in relying on persuasive out-of-circuit authority, particularly when there is no in-circuit authority on point.

Next the Secretary admits "the requirement at issue in *Scholz* obviously imposed a severe burden on any political party" by requiring new parties to "'submit a full slate of candidates, one for each race in the relevant political subdivision.'" AOB19–20 (quoting *Scholz*, 872 F.3d at 521). The Secretary correctly points out that "Arizona has no such requirement." AOB20. But the Secretary construes Arizona to create a de facto full-slate requirement: by his lights, a party that chooses to compete in one race (here, the race for President and Vice President) may be forced to compete in every other statewide or federal race. This creates a similarly severe burden as in *Scholz*.

Finally, the Secretary argues "[t]he facts of *Scholz* are inapposite" for two apparent reasons. AOB20. First, the Secretary says *Scholz* "is not a forced-association case . . . but was instead decided as a pure ballot access case." AOB20. The Secretary does not attempt to explain why this matters—a party's constitutional rights do not ebb and flow based on how a case is described. And this case, like

Scholz, is about whether a party can be forced to compete for offices with which it does not want any involvement.

Second, the Secretary tries to distinguish *Scholz* on the grounds that the minor party there was forced to "devote to each candidate the funding and other resources necessary to operate a full-fledged campaign." AOB20 (quoting *Scholz*, 872 F.3d at 524). But that is no distinction at all. Here, the Secretary "[did] not contest" that "No Labels Arizona believes its participation in additional races would require it to allocate resources." 2-ER-0099 ¶ 8. As a result, the district court correctly found that forcing the Party to compete in additional races "infringes on the Party's associational rights to . . . decide where to devote its resources," and that the burden on the Party was "substantial." 1-ER-0012.

(e) The district court correctly found that the substantial burden on the Party outweighed the State's minimal interests.

The Secretary also takes aim at the district court's word choice, arguing the 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." AOB33. The Secretary argues that "[a]nything less than a severe burden . . . does not require the challenged regulation to satisfy strict scrutiny." *Id.* (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). But the district court did not subject the Secretary's acts to strict scrutiny. The court did not require the Secretary to show

that forcing No Labels Arizona to compete in elections against its wishes "was narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). *Burdick* itself describes the standard as a "flexible" one, under which heavier burdens trigger closer scrutiny. *Id.* And whether the burden on No Labels Arizona is called substantial or severe, the district court correctly found, as a factual matter, that it outweighed "the state's minimal interests." 1-ER-0012.

(f) The burden on the Party is neither "minimal" nor "nonexistent," as the Secretary claims.

Finally, the Secretary argues the burden he placed on No Labels Arizona's constitutional rights is actually "minimal" or even "nonexistent" for two other reasons. AOB33. First, the Secretary says, "No Labels had an alternative under Arizona law": No Labels Arizona could forgo party status and instead, have its candidates run as independent candidates under A.R.S. § 16-341, by filing a nomination petition for the offices of President and Vice President, and then describe their preference as "No Labels." AOB32–33. The Secretary continues to fundamentally misunderstand party associational rights. An unaffiliated candidate's statement of *his or her* political preference is not the equivalent of a party's nominating *its* choice, given that a candidate's party-preference designation does not "mean that the candidate is the party's chosen nominee or representative." *Wash. State Grange*, 552 U.S. at 454. The Secretary's proffered "alternative" is really no

alternative at all, because "[t]here is simply no substitute for a party's selecting its own candidates." *Jones*, 530 U.S. at 581.

Second, the Secretary claims "the burden on No Labels is now nonexistent because its aspirations of creating a 'unity ticket' have proven to be a mirage." AOB33. The Secretary's reliance on post-trial facts is improper, *see, e.g.*, *Krishner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988), but no matter. As the Secretary himself acknowledges, under state law, No Labels Arizona will have ballot access through at least the 2026 general election. AOB7. Citing even more facts outside the trial record, the Secretary suggests No Labels Arizona may have ballot access even beyond that. AOB7, 44. That does not mean, as the Secretary implies, AOB44, that No Labels Arizona is something other than a minor party. It does mean that, far from being "illusory," AOB34, No Labels Arizona has an ongoing interest in not being forced to participate in down-ballot elections over the Party's objection. Were the Secretary to force the Party to do so in 2026 or beyond, it would place the same substantial burden on the Party's associational rights. This includes the right to have limited goals and objectives, in contrast to the major national parties who have resources, and interest, in competing widely for multiple offices at federal, state, and local levels.

The district court correctly found that the Secretary's acts substantially burdened No Labels Arizona's associational rights. The Secretary has not even

begun to show that factual finding was clearly erroneous.

4. The State's interests are minimal here.

The Secretary also cannot show that the district court clearly erred in finding that "Arizona's interests are minimal in this context." 1-ER-0011.

(a) The voter and candidate interests that the Secretary asserts fall far short here.

The Secretary begins by asserting the interests of "voters and candidates" whose participation in a No Labels Arizona primary election the Party has purportedly "block[ed]" by exercising its associational right not to participate in down-ballot races. AOB14, 17. He says he "correctly identified as an important state interests the right of No Labels members . . . to participate in a primary election." AOB28. Yet he cites no case establishing that these are *state* interests at all; at most they are the interest of individual voters and candidates themselves. *Compare Anderson v. Celebrezze*, 460 U.S. 780, 793–96 (1983) (analyzing the burden on voters' and candidates' associational rights in contradistinction to asserted state interests).

Moreover, as explained above (Argument § II.A.3), even individual voters and candidates do not have the rights the Secretary tries to assert on their behalf. As the district court astutely put it, "the idea that registered members of the Party, as individual citizens, have the right to appear on a ballot as the Party's candidate . . . is unsupported in the case law." 1-ER-0011. Indeed, it is well established that

candidates do not have a constitutional right to have a "fair chance of prevailing in their parties' candidate-selection process," *Lopez Torres*, 552 U.S. at 203–05, much less to be the nominee of a particular party, *Massey*, 87 F.3d at 1234. And contrary to the Secretary's argument, an aspiring candidate is not "blocked" from running for office just because No Labels Arizona decided not to pursue that office. AOB14, 17. Instead, as the district court explained, "[t]o the extent an individual citizen has the right to appear on the ballot at all, the citizen can appear on the ballot without party affiliation (or in the primary of another political party) after meeting the state's requirements to do so." 1-ER-0011. The Secretary has no response.

The Secretary challenges the district court's "bald[] assert[ion]" that "Arizona voters do not have the right to select a nominee for an office the Party is not seeking," claiming that conclusion "finds no support in law." AOB26. On the contrary, the Eleventh Circuit has held that a voter does not have an "absolute right to vote" for a particular candidate as a member of a particular party. *Cleland*, 954 F.2d at 1531. Numerous courts, including this one, have held that voters do not have a right vote for particular candidates. *See, e.g.*, *Burdick v. Takushi*, 937 F.2d 415, 419 (9th Cir. 1991) ("Burdick does not have an unlimited right to vote for any particular candidate."); *Stiles v. Blunt*, 912 F.2d 260, 266 (8th Cir. 1990) (holding voters do not have an "absolute right to support a specific candidate" stemming from their "fundamental right[] of voting"); *Zielasko v. Ohio*, 873 F.2d 957, 961 (6th Cir. 1989)

("This is so because no one is guaranteed the right to vote for a specific individual."). To the extent a voter wanted to vote in a primary election, the voter could re-register with a different party or no party. *Cf. Jones*, 530 U.S. at 584 (a voter who "feels himself disenfranchised" by party rules "should simply join the party"). No voter was "disenfranchise[d]" by No Labels Arizona's decision not to pursue down-ballot offices, contrary to the Secretary's claim. *E.g.*, AOB13, 28.

Unable to identify actual state interests at play here, the Secretary resorts to wild speculation. He says that, "[u]nder 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." AOB28. Not so. No Labels Arizona agrees that a party that wanted to nominate candidates must do so in accordance with Arizona law, and thus could not place restrictions on its candidate eligibility that are repugnant to Arizona law.

The Secretary also says parties could decide not to compete in elections for anticompetitive reasons. AOB27. So what? The Secretary may think a party's internal decision-making is unwise, but he cannot "substitute [his] own judgment for that of the Party" even to save the party from itself. *Tashjian*, 479 U.S. at 224. Even the State's "interest in clearing the smoke-filled back rooms" comes into play only once a party has decided to nominate candidates in the first place. *See* AOB27 (citing *Alaskan Independence Party*, 545 F.3d at 1177–78).

More darkly, the Secretary suggests the district court's ruling would allow parties to sit out elections "for an improper purpose, such as the race or religious affiliation of candidates or potential voters." AOB26–27 (citing *Smith v. Allwright*, 321 U.S. 649, 657–60 (1944)). There is not even a *hint* of an "improper purpose" in this case, and the Secretary's citation of *Smith* is inapposite. *Smith* stands for the proposition that "when a State prescribes an election process that gives a special role to political parties . . . the parties' discriminatory action becomes state action under the Fifteenth Amendment." *Jones*, 530 U.S. at 573. Here, the Party has decided that it will not participate in any down-ballot elections whatsoever, and it made that decision irrespective of any potential down-ballot candidate's merits or demerits. That is far from the bogeyman of discrimination that the Secretary raises.

(b) The district court did not clearly err by finding that Secretary's asserted interest in limiting fraud and corruption is not implicated here.

The Secretary also asserts an interest in "limiting opportunities for fraud and corruption." AOB22. Here, too, the Secretary fails to show the district court clearly erred in finding his interest in this context was minimal.

For starters, the Secretary recites the district court's finding that, unlike *Alaskan Independence Party*, this case does not implicate a state 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." AOB18–19 (quoting 1-ER-

0011); *accord* 1-ER-0009 ("The state does not have an interest in eliminating corruption in a primary election (or in a party's selection of its primary candidates) where the party is not running any candidates."). But the Secretary does not even attempt to dispute this unassailable logic. For this reason alone, he cannot show clear error in the district court's factual finding.

The Secretary nonetheless claims "the district court's order *invites* fraud and corruption . . . because it is based on *post hoc* policies that No Labels' party bosses adopted." AOB29 (emphasis added); *see also* AOB41. But there was nothing "*post hoc*" about No Labels Arizona's decision not to participate in down-ballot races. As explained above (Argument § II.D.2), No Labels' new-party petitions sought recognition of No Labels Arizona as a new party; they did not make "representations" about which offices the new party would nominate candidates for. AOB41. The Secretary was informed that No Labels Arizona would not be nominating candidates for any offices other than President and Vice President *seven weeks* before the first statement of interest was filed. 2-ER-0100 ¶ 13. He was told that same message two more times before his September 2023 decision to deem any down-ballot candidate "who receives the highest number of votes in the Primary Election [to] be the political party nominee and appear on the General Election ballot." 2-ER-0135.

The Secretary also raises the specter that "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," which could result in "a stranglehold on candidate selection." AOB29. Yet nothing in state law restricts when or how a party may change its bylaws or who the party's leaders may be; if it did, that might unconstitutionally infringe the party's associational rights too. *See Eu*, 489 U.S. at 229–32 (invalidating California's "restrictions on the organization and composition of official governing bodies" and other related restrictions). The Secretary points to no state law that No Labels Arizona violated in adopting its bylaws. *See* AOB29–30. And for all the Secretary's speculation about how or when or where No Labels Arizona's decisions are made, *id.*, he does not show how overriding the Party's decision not to nominate down-ballot candidates would eliminate fraud or corruption.

(c) The district court did not clearly err by finding that the Secretary had a minimal interest in avoiding voter confusion here.

The Secretary also challenges the district court's finding that the Secretary had a minimal interest in "avoiding voter confusion." AOB22. Here, too, the Secretary cannot show the district court clearly erred.

At trial, "the Secretary . . . raised concerns that No Labels Arizona voters might expect to receive primary ballots and will be confused when they do not receive them, and that such confusion could lead to threats against election workers."

1-ER-0011. The problem, the district court explained, was that "the Secretary provided no evidentiary or legal support for these suggested interests." *Id.* And the Supreme Court has made clear that evidence, not "sheer speculation," is necessary to support claims of voter confusion. *Wash. State Grange*, 552 U.S. at 454. Absent such evidence, the district court correctly rejected the Secretary's assertions.

On appeal, the Secretary has abandoned his raw speculation about "threats against election workers," 1-ER-0011, but continues to assert an interest in "avoiding voter confusion," AOB22, 25. He argues "the district court's order . . . sows voter confusion," and suggests that No Labels' new-party petitions confused voters. AOB29–30, 43. Yet the Secretary has no more evidence of voter confusion now than before. He claims he does not need such evidence. AOB42 (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)). But while a "particularized showing of the existence of voter confusion" may not be needed "prior to the imposition of reasonable restrictions on ballot access," *Munro*, 479 U.S. at 194–95, something more than "sheer speculation" is needed to overcome party associational rights, *Wash. State Grange*, 552 U.S. at 454. Claiming voter confusion is "obviously very likely to" occur does not plug the Secretary's evidentiary hole. AOB30; *see also* AOB43 ("the facts substantiating voter confusion here are obvious"). That is particularly true when even the Secretary's speculation is based on facts outside the record. AOB30 & n.3 (citing a post-trial online news story for the proposition that

"No Labels voters who are on [Arizona's Active Early Voter List] will receive blank ballots," and this "is obviously very likely to confuse voters"); *cf.* AOB43 (citing 2-ER-0098–103 and pointing to the *absence* of correspondence "with any of the political party's candidates or voters").

(d) The Secretary's arguments regarding Arizona's ballot-access framework fall flat.

Finally, the Secretary argues the district court's order "completely upends" Arizona's "ballot access framework" and "inappropriately disturbs the careful balance of Arizona's ballot access laws." AOB39–41. The Secretary does not frame this as a state interest that justifies overriding No Labels Arizona's associational rights, and he did not assert such an interest at trial. Regardless, a State's interest in its own laws *as laws* cannot be a cognizable interest in this context, because a State could assert such an interest anytime state action is challenged. And here, No Labels Arizona does not challenge Arizona's ballot-access laws; as explained above, No Labels Arizona has never disputed that *if* the Party wanted to nominate candidates for offices for which a primary election is required, its candidates would have to be nominated at a primary election. But No Labels Arizona does not want to nominate candidates for such offices, and the Constitution protects the Party's choice.

(e) The Secretary may not substitute his judgment for the Party's.

One last point. Throughout his brief, the Secretary demeans No Labels

Arizona as "antidemocratic," *e.g.*, AOB2, 17, 21, 22, 28; calls the Party's organizational structure "dangerous," AOB17; accuses the Party of "stifl[ing] *all* debate within," AOB16; and says the Party "trample[s] the rights of its own members," AOB29. The Secretary is free to disapprove of or even dislike No Labels Arizona. As the district court took pains to remind him, however, "[s]imply because the state may disagree with the Party's choices in structuring or setting boundaries for itself does not entitle the state to constitutionally substitute its judgment for the Party's judgment." 1-ER-0012 (citing *Tashjian*, 479 U.S. at 224). If anything might stifle democracy, it is the principle advocated by the Secretary: that small new parties must structure themselves just like the established major parties, building organizations equipped to run candidates in all races up and down the ballot. No Labels Arizona chose differently, and the Constitution protects that decision.

* * *

The Secretary cannot show that the district court clearly erred in concluding that the interests he asserted are "minimal in this context." 1-ER-0012. "Weighing the state's minimal interests against the substantial burden on the Party," the district court correctly "conclude[d] that the Secretary's acts in furtherance of placing Party candidates on the primary ballot infringe[d] on the Party's First and Fourteenth Amendment rights." *Id.* That conclusion was correct and should be affirmed.

5. The district court correctly evaluated the other permanent-injunction factors.

The Secretary insists that, after finding No Labels Arizona succeeded on the merits, the district court "fail[ed] to meaningfully analyze the remaining [permanent-injunction] factors" and also got the analysis "wrong." AOB47, 49; *see also* AOB46. The Secretary is incorrect on both counts.

The primary basis for the Secretary's argument that the district court's "analysis of the irreparable harm and the balance of public interest factors" was "insufficient" is that it was too short. AOB48. In the span of three pages, the Secretary points out seven times that the district court's analysis of the remaining injunction factors was two or three sentences long. *See* AOB47–49. But the Secretary confuses length with quality of analysis.

The Secretary also complains that the district court's conclusion on the merits drove its conclusions on the remaining injunction factors. *See* AOB48 ("Because the district court relied on the exact same points" on the merits and the other factors, "it is not at all clear that the district court actually applied the *Winter* factors."). But the Secretary's criticism of the district court's analysis itself turns on the Secretary's view of the merits: The Secretary argues that the district court got the constitutional analysis wrong, so No Labels Arizona will not suffer irreparable harm, and the public interest and the balance of equities favor the Secretary. AOB49–51.

Anyhow, the Secretary shows no error. That is true both because the district

court was right on the merits (for all the reasons described above), and because in this case the other injunction factors were indivisible from the merits. As No Labels Arizona showed (Argument §§ II.B, II.C), the irreparable harm the Party would suffer absent an injunction resulted from the Secretary's violation of the Party's constitutional rights; and the same interests that the district court had to balance to resolve the constitutional question were necessarily at stake in the court's balance-of-equities/public-interest analysis. The Secretary does not cite a single case suggesting otherwise.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's permanent injunction against the Secretary, and its judgment in favor of No Labels Arizona on Count 2 of the complaint. No Labels Arizona intends to seek attorneys' fees and costs on appeal.

RESPECTFULLY SUBMITTED this 22nd day of July, 2024.

OSBORN MALEDON, P.A.

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