No. _____

In the
Supreme Court of the United States

ARIZONA LIBERTARIAN PARTY AND MICHAEL KIELSKY,
Petitioners,

v.

KATIE HOBBS, ARIZONA SECRETARY OF STATE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Oliver B. Hall
Counsel of Record
Center for Competitive Democracy
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294
oliverhall@competitivedemocracy.org

Counsel for Petitioners

December 9, 2019

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

This Court has long held that states may require a "showing of a significant modicum of support" as a prerequisite to granting a candidate or political party access to the ballot. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). In *Jenness*, this Court upheld the constitutionality of a statute requiring a showing of support equal to 5 percent of the voters eligible to vote for the candidate seeking ballot access, but it has never upheld a statute requiring a showing of support greater than that. The questions presented are:

1. May a state require that a candidate seeking to run in the primary election of a ballot-qualified party demonstrate support from as much as 30 percent of the voters eligible to vote in the primary election?

2. May a state require that a candidate seeking to run in the primary election of a ballot-qualified party demonstrate support from independent or unaffiliated voters, who are not eligible to vote in the primary election?

LIST OF DIRECTLY RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Arizona Libertarian Party and Michael Kielsky respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1) is published at 925 F. 3d 1085. The court of appeals' order denying Petitioners' Petition for Rehearing (Pet. App. 80) is not published. The district court's opinion is published at 189 F. Supp. 3d 920.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2019. Pet. App. 1. A timely petition for rehearing or rehearing en banc was denied on July 11, 2019. Pet. App. 80. On October 2, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including December 8, 2019 (a Sunday), *see* 19A367, such that the petition is timely filed on December 9, 2019. *See* Sup. Ct. R. 30.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The First Amendment of the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment of the United States Constitution provides in pertinent part: "No State shall … deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

This Court has long recognized the "virtue of political activity" by minor political parties, "who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted." *Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957). And it has warned that "the absence of such voices would be a symptom of grave illness in our society." *Id.* Yet, this Court has not accepted a petition for a writ of certiorari filed by a minor political party in 28 years. *See Norman v. Reed*, 502 U.S. 279 (1991). Meanwhile, partisan state Legislatures have stepped into the breach, devising ever more intricate methods of excluding these vital voices from the electoral process under the guise of the state's power to regulate the "Times, Places and Manner of holding Elections." U.S. Const. art. I, § 4. This is one such case.

By means of a statutory scheme that requires Petitioner Arizona Libertarian Party ("AZLP") to select its nominees in primary elections, while making it practically impossible for Libertarian candidates to qualify for the primary election ballot, the State of Arizona has nullified this minor party's participation in the political process and silenced the voters it represents with a swipe of the Governor's pen. Arizona has relegated AZLP to a state of electoral purgatory: the party is ballot-qualified under Arizona law, but it

cannot place its candidates on the ballot. In the rare cases where states have overstepped their regulatory powers by making it impossible for Republican or Democratic party candidates to appear on the ballot, or by disadvantaging them, this Court has not hesitated to intervene. *See*, *e.g.*, *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) (relying on Qualifications Clause to strike down state constitutional provision imposing term limit on congressional candidates); *Cook v. Gralike*, 531 U.S. 510 (2001) (striking down state constitutional provision establishing pejorative ballot labels for congressional candidates who declined to endorse term limits on ground that it exceeds state's power under the Elections Clause). As this Court explained, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Cook*, 531 U.S. at 523 (quoting *U.S. Term Limits*, 514 U.S. at 833-34).

In contrast with the unequivocal holdings in *U.S. Term Limits* and *Cook*, this Court has concluded that "no litmus-paper test" exists for analyzing the constitutionality of state ballot access laws, *Storer v. Brown*, 415 U.S. 724, 730 (1974), and that "a more flexible standard applies." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). It has thus adopted an analytic framework that requires courts to balance the burdens that ballot access restrictions impose upon a plaintiff's First and Fourteenth Amendment rights against the interests the state asserts to justify them. *See Burdick*, 504 U.S. at 434; *Anderson v. Celebrezze*, 460 U.S. 780,

789 (1983). Under this analysis, restrictions that impose "severe" burdens are subject to strict scrutiny, whereas lesser burdens are subject to less exacting review. *See Burdick*, 504 U.S. at 434.

Courts of appeals have struggled to apply this "*Anderson-Burdick*" analysis with consistency. *See*, *e.g.*, *Republican Party of Ark. v. Faulkner County, Ark.*, 49 F. 3d 1289, 1296 (8th Cir. 1995) ("The Supreme Court has not spoken with unmistakable clarity on the proper standard of review for challenges to provisions of election codes"); *Hatten v. Rains*, 854 F.2d 687, 693 (5th Cir. 1988) ("The Supreme Court has never stated the level of scrutiny applicable to ballot access restrictions with crystal clarity"). As the Seventh Circuit observed, the lower courts' difficulty is exacerbated by the fact that the *Anderson-Burdick* analysis "can only take us so far," because "there is no 'litmus test for measuring the severity of a burden that a state law imposes,' either." *Stone v. Board of Election Com'rs for City of Chicago*, 750 F.3d 678, 681 (7th Cir. 2014) (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008)). In the absence of such standards, one noted scholar has opined that this Court's ballot access jurisprudence, "as a pronouncement of doctrine … is positively Delphic." Tribe, *American Constitutional Law* § 1320 (2d Ed.1988). Notwithstanding such uncertainty, lower courts have generally adhered to a critical limitation gleaned from this Court's decisions: in regulating access to the ballot, states may not require that a candidate or party demonstrate support from more than 5 percent of the voters eligible to vote for the candidate or party. *See*, *e.g.*, *Dart v. Brown*, 717 F.2d

1491, 1506 (5th Cir. 1983) ("requirements as high as five percent are not unconstitutional *per se*, but requirements substantially in excess of five percent probably are") (quoting L. Tribe, *American Constitutional Law*, 784 (1978)).

In this case, the Ninth Circuit has plunged the lower courts into deeper confusion by upholding a statutory scheme that requires candidates who seek to run in AZLP's primary to demonstrate support from as much as 30 percent of the eligible voters. Compounding the confusion, the Ninth Circuit expressly concluded that such a requirement only imposes "a minimal burden" on Petitioners' First and Fourteenth Amendment rights. But the legislation at issue disfavors a class of candidates – those who seek the nomination of the AZLP – and targets them with surgical precision, eliding them from Arizona's ballot as effectively as the impermissible qualification this Court struck down in *U.S. Term Limits*. Only review by this Court can provide the guidance needed for the lower courts to subject such laws to the proper level of scrutiny, and to protect the most precious constitutional rights of the voters, candidates and parties who must labor under them in the absence of this Court's intervention.

STATEMENT OF THE CASE

1. The State of Arizona requires that political parties select their nominees by primary election. *See* A.R.S. § 16-302. In 2015, Arizona amended the statutory provisions that establish the requirements it imposes on candidates who seek to run in the primary election of a political party that is qualified to place its

nominees on the general election ballot. *See* A.R.S. §§ 16-321, 16-322. Prior to their amendment, §§ 16-321 and 16-322 enabled candidates to appear on the primary ballot by submitting nomination petitions with a number of signatures defined as a percentage of their party's registered voters in the relevant jurisdiction. As amended, however, the provisions define the signature requirements as a percentage of all "qualified signers" in the relevant jurisdiction – a pool that includes more than one million independent and unaffiliated voters, even though such voters are ineligible to vote in the primary election of any party that holds a closed primary. Pet. App. 37, 59.

Petitioner AZLP has 32,056 members. Pet. App. 4 & n.1. By virtue of the size of its membership, AZLP is ballot-qualified: it is entitled to "continued representation as a political party" on Arizona's general election ballot. A.R.S. § 16-804(B); Pet. App. 4. AZLP also elects to hold a closed primary, as it is permitted to do under Arizona law and the decisions of this Court. Pet. App. 7; *see California Democratic Party v. Jones*, 530 U.S. 567 (2000). As applied to AZLP – though not to the Republican Party or the Democratic Party, which are the only other ballot-qualified parties in Arizona – the amendments to §§ 16-321 and 16-322 drastically increased the number of signatures required of a candidate seeking to run in its primary election, in most cases by a factor of 20 to 30. The requirements for candidates seeking to run in the Republican or Democratic primaries, by contrast,

increased only slightly for most offices, and in many cases they decreased.[1]

The signature requirements that §§ 16-321 and 16-322 now impose on Libertarian candidates are greater, by several orders of magnitude, than the highest such requirement this Court has ever upheld. To comply with them in 2016, Libertarian candidates needed to obtain signatures amounting to as much as 30 percent of the eligible voters (*i.e.*, registered Libertarians) in the jurisdiction. For several offices, the signature requirement amounted to more than 20 percent of the eligible voters, and in no case was it equal to less than 11 percent of the eligible voters. Yet this Court has never upheld a signature requirement greater than 5 percent of eligible voters. *See Storer*, 415 U.S. at 739.

Although candidates seeking access to AZLP's primary ballot are permitted to obtain signatures from independent and unaffiliated voters in their jurisdictions, in addition to registered Libertarians, *see* A.R.S. § 16-321, those voters are not eligible to vote in AZLP's primary election. Candidates seeking to run in AZLP's primary election thus face a choice between two unconstitutional alternatives: either they obtain signatures exclusively from registered Libertarians, in which case they must comply with unconstitutionally burdensome signature requirements, or they obtain

---

[1] The amendments to §§ 16-321 and 16-322 had a negligible as applied to the Republican and Democratic parties, because the amendments increased the size of the pool of voters who could sign a candidate's nomination petitions, but decreased the percentage of that larger pool whose signatures a candidate is required to obtain.

signatures from nonmembers – a form of compelled association that not only violates Petitioners' rights under *Jones*, but also lacks any rational basis. Arizona has no legitimate interest in requiring that Libertarian candidates demonstrate support from independent voters who are not eligible to vote for them, and who have no reason or incentive to support the candidates' effort to obtain AZLP's nomination.

The Hobson's choice that Arizona imposes on Petitioners under §§ 16-321 and 16-322 has had predictable results. In election cycles preceding the 2015 amendments to those provisions, AZLP routinely placed dozens of candidates for county, state and federal office on Arizona's general election ballot – as would be expected of a party that is ballot-qualified under Arizona law. *See* A.R.S. § 16-804(B); *see also* Arizona Secretary of State, Historical Election Information, available at https://www.azsos.gov/elections/voter-registration-historical-election-data/historical-election-information. In the first election cycle thereafter, however, that record of historical success came to an immediate and near-complete halt. In 2016, only one candidate was able to comply with the increased signature requirements that now apply under §§ 16-321 and 16-322. In 2018, no Libertarian candidates were able to comply those requirements. *See* State of Arizona, *2018 Election Information*, available at https://azsos.gov/2018-election-information. Further, despite the diligent efforts of many others who sought AZLP's nomination by running in the primary election as write-in candidates, not one was permitted to appear on the general election ballot in 2016 or 2018, even though each of them won their primary races,

because they were required to receive a number of write-in votes equal to the number of signatures they would have been required to obtain on a nomination petition. *See* Arizona Secretary of State, Historical Election Information, available at https://www.azsos.gov/elections/voter-registration-historical-election-data/historical-election-information; *see also* A.R.S. § 16-645(E).

Only one other political party is formally organized under Arizona law – the Arizona Green Party ("AZGP"). Because AZGP is not ballot-qualified under § 16-804(B), it must submit a petition to qualify as a new party pursuant to A.R.S. § 16-801. Once it does so, AZGP also must select its nominees by primary election, but it need not comply with the signature requirements that § 16-322 imposes on the Libertarians. *See* A.R.S. § 16-801. Instead, § 16-322 imposes a separate, and much lower, signature requirement for parties that are not ballot-qualfied. *See* A.R.S. § 16-322(C). As a result of this lower signature requirement, AZGP's nominees were permitted to appear on the general election ballot in 2016, while AZLP's nominees for the same offices were excluded from the general election ballot, despite outpolling the AZGP candidates by wide margins. *See* State of Arizona, *2016 Election Information*, available at https://apps.azsos.gov/election/2016/Info/ElectionInformation.htm. And in 2018, AZGP's candidates once again appeared on Arizona's general election ballot, while AZLP's candidates were excluded.

2. Petitioners commenced this action on April 12, 2016, by filing their four-count complaint asserting

violations of their First and Fourteenth Amendment rights. Petitioners alleged, *inter alia*, that §§ 16-321 and 16-322 violate the Libertarians' freedoms of speech, petition, assembly and association by imposing impermissibly burdensome signature requirements on them, and, by compelling them to associate with nonmembers for purposes of selecting their own partisan nominees. Petitioners also alleged that §§ 16-321 and 16-322 violate their right to equal protection of the law, by imposing severe and unequal burdens that fall on Libertarian candidates alone. Petitioners supported these claims with the declarations of eight Libertarian candidates and AZLP's Chair, each of whom attested to the specific burdens the challenged provisions imposed on them as candidates seeking access to AZLP's primary ballot, including their difficulty in obtaining support from independent voters who are ineligible to vote for them, as well as a declaration from AZGP's Chair.

As the 2016 election cycle approached, the Libertarians filed two motions for preliminary relief, the first on behalf of candidates who were seeking to appear on AZLP's primary election ballot, and the second on behalf of candidates who were seeking to run in AZLP's primary election as write-in candidates. Petitioners supported these motions with additional declarations from Petitioner Kielsky, AZLP's Chair, who attested to the crippling burdens the increased signature requirements were imposing on Libertarian candidates, and to the fact that AZLP had recruited no fewer than 15 candidates to run in its primary election, but none of them had come close to complying with the requirements, and that consequently, at least a dozen

had committed to run as write-ins. The district court denied both motions. In doing so, it failed to address the complete lack of evidence that Arizona had any legitimate interest in adopting the new requirements imposed by §§ 16-321 and 16-322, nor did it identify any state interest that is served by applying the requirements to write-in candidates.

As a result, no Libertarian candidate appeared on AZLP's 2016 primary election ballot, and all 14 candidates who ran in AZLP's primary election as write-ins were excluded from the general election ballot because they failed to receive enough votes to satisfy the minimum vote requirement imposed by § 16-645(E). By contrast, AZGP ran 10 write-in candidates in its 2016 primary, and all 10 appeared on Arizona's general election ballot, because they did not need to comply with the minimum vote requirement imposed by § 16-645(E), but only needed to obtain a "plurality" of votes in their respective races. *See* A.R.S. § 16-645(D). AZGP's write-in candidates were included on the general election ballot, while AZLP's write-in candidates for the very same offices were excluded, even though in each case the Libertarian candidates received far more votes.

Following the 2016 general election, the parties filed cross-motions for summary judgment. Petitioners submitted seven more declarations in support of their motion – a fourth declaration from Petitioner Kielsky, as well as six more declarations from write-in candidates who ran in AZLP's 2016 primary, won their races, but were excluded from the general election ballot. These declarations provided detailed evidence

of the diligent efforts that Libertarian candidates made to comply with the increased requirements imposed by §§ 16-321 and 16-322. Although Respondents had identified, in their own initial disclosures, all write-in candidates who ran in AZLP's 2016 primary election as persons who may have discoverable information, and Petitioners timely provided Respondents with the name and contact information for each of these witnesses, the district court granted Respondents' motion to strike their evidence on the ground that they were not formally disclosed under Fed. R. Civ. P. 26(a). Pet. App. 41. In a footnote, the district court acknowledged that it was required to make a finding of "willfulness, fault or bad faith" before excluding such evidence, if that sanction would "amount to dismissal of a claim" – a finding the district court did not and manifestly could not make[2] – but, the district court reasoned, "the Court's exclusion of the six declarations does not amount to dismissal of [Petitioners'] claim[s]," because inclusion of the evidence "would not result in a different outcome." Pet. App. 45 n.4. The district court thus began its analysis of the parties' motions for summary judgment by excluding virtually all the evidence Petitioners submitted in support of theirs – and most important, the evidence bearing upon the severity of the burden imposed by §§ 16-321 and 16-322.

---

[2] On the contrary, Petitioners demonstrated good faith by consenting to extend the deadline for taking discovery for the sole purpose of accommodating Respondents' failure to notice depositions prior to that deadline.

3. Turning to the merits, the district court began its analysis with a fundamental mischaracterization of the basis for Petitioners' claims. According to the district court, this case does not present a challenge to the requirements that Arizona imposes on candidates seeking access to AZLP's *primary* election ballot, but rather to the "two-step process" that such candidates must follow to appear on Arizona's *general* election ballot. Pet. App. 54. The district court thus concluded that Petitioners did not use "the correct math" to support their claims. Pet. App. 53. Although §§ 16-321 and 16-322 establish the requirements for appearing on Arizona's primary election ballot, the district court determined that the burden they impose should be measured not as a percentage of eligible voters in that election, but as a percentage of "qualified signers" as those provisions define the term. Pet. App. 64. Despite conceding that every Supreme Court and lower federal court case analyzing the constitutionality of ballot access laws measures the burden that such laws impose "as a percentage of eligible voters," the district court insisted that such a standard was inapposite here, because this case arises from a closed primary. Pet. App. 60. This factual difference, in the district court's view, made the percentage of eligible voters required by §§ 16-321 and 16-322 immaterial to its analysis of their constitutionality.

Having excluded Petitioners' evidence and jettisoned the standard that every other federal court has followed in reviewing the constitutionality of ballot access laws, the district court had little trouble upholding §§ 16-321 and 16-322 as "reasonable and nondiscriminatory" regulations. Pet. App. 76. The

burden the provisions impose on Petitioners is "reasonable," the district court found, "whether the percentage requirement is calculated on the basis of qualified signers or the general electorate." Pet. App. 73. "In both instances," the district court reasoned, the burden imposed "is well below the 5% requirement upheld by the Supreme Court." Pet. App. 73-74. The district court reached this conclusion notwithstanding its express acknowledgment that, when the burden is calculated using the standard applicable in every other ballot access case – eligible voters – the percentage required is as high as 30 percent. Pet. App. 72. Further, because the district court found the signature requirements established by §§ 16-321 and 16-322 to be facially permissible, it found no need to address Petitioners' evidence relating to the severity of the burdens they impose. Pet. App. 70. The district court thus upheld the requirements without any analysis of whether a "reasonably diligent" candidate could "be expected to satisfy" them. *See Storer*, 415 U.S. at 742.

The district court also found §§ 16-321 and 16-322 to be "nondiscriminatory" for "reasons discussed above," but it failed to specify those reasons. Pet. App. 76. Whatever they might be, the district court did not address the arguments and evidence that Petitioners advanced in support of their equal protection claims. Instead, the district court acknowledged that §§ 16-321 and 16-322 "could be viewed as having a greater impact on AZLP than on other Arizona political parties," but nonetheless concluded that Petitioners' equal protection claims fail because they did not allege that the amendments were "enacted with a discriminatory intent." Pet. App. 77. To support this conclusion, the

district court cited not to *Anderson* or *Burdick*, which do not require an allegation of discriminatory intent, but to a Title VII case alleging racial discrimination. Pet. App. 77 (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

The district court also rejected Petitioners' claim that §§ 16-321 and 16-322 violate their freedom of association under *Jones*. Unlike *Jones*, the District Court observed, this case does not involve "the legally-mandated participation of other parties" in AZLP's primary election. Pet. App. 72. Libertarian candidates are thus able to obtain all the signatures required by §§ 16-321 and 16-322 "without looking outside their party." Pet. App. 72. The district court conceded that this would require candidates to obtain support from as much as "30% of the registered AZLP voters in any relevant jurisdiction," but reasoned that if Petitioners found this "too daunting a task, they can work to increase their party membership." Pet. App. 72.

4. The Ninth Circuit affirmed the district court's decision. It began its analysis by summarily rejecting Petitioners' appeal from the district court's exclusion of their evidence. That issue is "moot," the court of appeals concluded, "because summary judgment for [Respondents] is warranted even if we consider the excluded evidence." Pet. App. 8 n.7. But like the district court, the court of appeals gave no indication that it had in fact considered that evidence, except to characterize it as "limited" and only sufficient to show Petitioners' "modest efforts" to comply with §§ 16-321 and 16-322. Pet. App. 15. The court of appeals thus concluded as a matter of law that §§ 16-321 and 16-322

impose "a minimal burden" on Petitioners' First and Fourteenth Amendment rights, without addressing Petitioners' evidence to the contrary. Pet. App. 15.

The Ninth Circuit did not adopt the district court's reasoning that Petitioners' challenge to §§ 16-321 and 16-322 was tantamount to a challenge to the "two-step process" for accessing Arizona's general election ballot, such that the burden imposed by the signature requirements the provisions establish need not be measured as a percentage of voters eligible to vote in AZLP's primary election. Neither, however, did the court of appeals accept Petitioners' argument that the burden imposed by §§ 16-321 and 16-322 must be measured as a percentage of that pool of eligible voters. Instead, the court of appeals concluded that the burden must be measured as a "percentage of those voters *eligible under state law* to offer their signatures." Pet. App. 12 (emphasis original). Thus, the court of appeals expressly concluded that it was proper to measure the burden that Arizona's primary election ballot access requirements impose as a percentage of the voters eligible to vote in AZLP's primary election, combined with the more than one million independent and unaffiliated Arizona voters who are not eligible to vote in AZLP's primary election. Because the signature requirements established by §§ 16-321 and 16-322 do not amount to more than 5 percent of that "pool of eligible signers," the court of appeals found that Petitioners had "failed" to demonstrate that the provisions impose a "severe burden" on their First and Fourteenth Amendment rights. Pet. App. 13.

Applying the "less exacting" scrutiny applicable to laws that impose "minimal" burdens, the court of appeals readily accepted Arizona's asserted interests in "preventing voter confusion, ballot overcrowding and frivolous candidacies" as sufficient justification for the requirements imposed by §§ 16-321 and 16-322. Pet. App. 15-16. The court of appeals thus declined to address Petitioners' uncontested evidence demonstrating that, far from overcrowded, AZLP's primary election ballot almost invariably features candidates running uncontested for AZLP's nomination. *See generally*, State of Arizona, *Historical Election Information*, available at https://azsos.gov/elections/voter-registration-historical-election-data. Nor did the court of appeals address the complete lack of evidence to support Respondents' assertion that §§ 16-321 and 16-322 were reasonably tailored to prevent "voter confusion" or "frivolous" candidacies. Perhaps most important, the court of appeals disregarded Petitioners' argument that Arizona has no rational basis for requiring that candidates seeking to run in AZLP's primary election demonstrate support from independent and unaffiliated voters who are not eligible to vote for them, and who have no reason or incentive to support their effort to obtain AZLP's nomination.

The court of appeals also rejected Petitioners' claim that §§ 16-321 and 16-322 violate their freedom of association under *Jones*. This claim, the court of appeals reasoned, turns on the answer to two questions: first, whether Arizona's statutory scheme "forces" Petitioners to associate with nonmembers; and second, "whether such forced association creates a risk

that nonparty members will skew either primary results or candidates' positions." Pet. App. 17 (citation and quotation marks omitted). The court of appeals answered both questions in the negative.

As to the first question, the court of appeals found no forced association because Libertarian candidates are not required by statute or otherwise compelled to solicit signatures from nonmembers, and because they "can qualify for the primary ballot with signatures from 11% to 30% of party members in their jurisdictions, and no evidence suggests it is impossible to do so as a practical matter." Pet. App. 18. Here, the court of appeals disregarded a fact it had previously acknowledged, that statutes requiring a demonstration of support from "substantially" more than 5 percent of eligible voters impose "a severe burden triggering heightened scrutiny." Pet. App. 10 (citing *Williams v. Rhodes*, 393 U.S. 23, 24-25 (1968) (invalidating 15 percent requirement)). As to the second question, the court of appeals summarily rejected the "speculative conclusion" that the necessity of obtaining nonmembers' signatures would "skew" AZLP's primary election results or Libertarian candidates' positions, Pet. App. 18, but once again, the court of appeals failed to address Petitioners' uncontested evidence (which was not excluded) that Libertarian candidates had in fact experienced great difficulty obtaining signatures from nonmembers, and that such difficulty incentivized them "to curry favor with persons whose views are more 'centrist' than those of the party base." *Jones*, 530 U.S. at 581.

The court of appeals thus found that §§ 16-321 and 16-322 only impose a "modest" burden on Petitioners' associational rights, and it applied "less exacting scrutiny" to hold that Arizona's asserted interests are sufficient to justify them. Pet. App. 18.

Finally, the court of appeals rejected Petitioners' claim that §§ 16-321 and 16-322 violate their right to equal protection. First, the court of appeals found that a Libertarian candidate seeking to run in the primary election "actually faces a *lower* burden than his Democratic and Republican counterparts." Pet. App. 19 (emphasis original). "A statewide Libertarian candidate needs to submit approximately 3,200 signatures, compared to 6,000 and 6,400 signatures for the Democratic and Republican competitors, respectively," the court of appeals reasoned. Pet. App. 19. That the Libertarian requirement translated to approximately 10 percent of the voters eligible to vote in AZLP's primary election, whereas the Democratic and Republican requirements amounted to approximately 0.5 percent of the voters eligible to vote in their primary elections "lacks constitutional significance," the court of appeals concluded. Pet. App. 19; Pet. App. 1 n.1 (citing partisan registration figures). The court of appeals did not address the fact that the amendments to §§ 16-321 and 16-322 had unequally impacted Petitioners, in that they increased the signature requirements for Libertarian candidates by approximately 20 to 30 times, while leaving the requirements for Democrats and Republicans essentially unchanged.

The court of appeals also found no equal protection violation arising from the drastic disparity between the requirements that Arizona imposes on Petitioners and those it imposes upon "new" parties like AZGP. In particular, the signature requirements for a candidate seeking to appear on the primary election ballot of a new party are a tiny fraction of those that apply to Libertarian candidates. *See* A.R.S. § 16-322(C). Further, a new party's write-in candidates are exempted from the minimum-vote requirement that applies to Libertarian write-in candidates under § 16-645(E). Instead, a new party's write-in candidates may appear on Arizona's general election ballot provided that they receive a mere "plurality" of votes in AZGP's primary. As a result, in 2016, no Libertarian write-in candidate was permitted to appear on Arizona's general election ballot, whereas all Green write-in candidates did, even though in each case the Libertarian candidate received many more votes than the Green candidate. Pet. App. 22 & n.16. The court of appeals declined to address this inequity, or Petitioners' claim that it lacked justification in any legitimate state interest, on the ground that Petitioners "disclaim[ed] any challenge to Arizona's general election ballot access requirements." Pet. App. 22 n.16. Petitioners, however, did not "disclaim" their challenge to the minimum vote requirement imposed by § 16-645(E), but pressed it vigorously on appeal, and expressly argued that §§ 16-321 and 16-322 are "most clearly unconstitutional as applied to write-in candidates." Reply Br. of Petitioners, Dckt. No. 31, at 20.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Conflicts With the Settled Law of Other Circuits and Injects Intolerable Confusion Into a Question of Exceptional Importance.

For nearly as long as this Court has adjudicated constitutional challenges to state ballot access laws, lower courts have recognized an upper limit on the "modicum of support" that a state may require of candidates and political parties seeking access to its ballot. *See Jenness*, 403 U.S. at 442. That limit is rooted in this Court's observation that the "somewhat higher" signature requirement upheld in *Jenness* – 5 percent of the voters eligible to vote for the candidate seeking access to the ballot – was permissible because it was "balanced" by the fact that the state did not impose many other restrictions. *See id.* (citing *Williams v. Rhodes*, 393 U.S. 23, 47 n.10 (Harlan, J., concurring)). As Justice Harlan's concurrence in *Williams* makes explicit, the 5 percent requirement upheld in *Jenness* was in fact higher than at least 46 other state requirements. *See Williams*, 393 U.S. at 47 n.10 (Harlan, J.).

In *Storer*, this Court implicitly affirmed the conclusion that *Jenness* represents the upper limit on the modicum of support that a state ballot access law may require. *See Storer*, 415 U.S. 724. *Storer* involved a challenge to California's requirement that independent candidates obtain signatures equal in number to 5 percent of the total vote in the last general election. *See id.* A majority of this Court found that this percentage was not unconstitutional on its face,

but remanded for a determination of whether the requirement was impermissibly burdensome given that partisan primary voters were ineligible to sign the candidates' petitions. *See id.* Exclusion of those voters might make California's signature requirement "substantially more than 5% of the eligible pool," the majority reasoned, which "would be in excess, percentagewise, of anything the Court has approved." *Id.*

Three Justices dissented in *Storer* on the ground that remand was unnecessary, because the record demonstrated that the exclusion of primary voters resulted in a requirement that independent candidates demonstrate support from 9.5 percent of the eligible voters. *See id.* at 764 (Brennan, J. dissenting). Thus, Justice Brennan wrote, the available evidence left "no room for doubt that California's statutory requirements are unconstitutionally burdensome." *Id.* at 763. Despite dividing on the need for remand, however, both the majority and dissent in *Storer* reaffirmed what *Jenness* had established: states may not require that candidates seeking ballot access show support from substantially more than 5 percent of the eligible voters in an election. *See id.* at 739, 763-64; *Jenness*, 403 U.S. at 442.

Even prior to *Storer* and *Jenness*, this Court had made clear that the First and Fourteenth Amendments limit the showing of support that states may require of candidates seeking ballot access. *See Williams*, 393 U.S. 23 (striking down Ohio statute requiring signatures equal in number to 15 percent of the vote in the preceding gubernatorial election). In *Williams*, the

Court held Ohio's entire ballot access scheme unconstitutional on equal protection grounds, because in its totality, it practically guaranteed a monopoly to the two major parties. *See id.* at 32, 34. Justice Harlan wrote separately, however, to emphasize that Ohio's 15 percent signature requirement also "violates the basic right of political association assured by the First Amendment." *Id.* at 41 (Harlan, J. concurring). "Even when regarded in isolation," Justice Harlan therefore concluded, Ohio's 15 percent requirement "must fall." *Id.* at 46.

Lower courts have consistently applied *Williams*, *Jenness*, *Storer* and the other decisions of this Court to invalidate ballot access laws that require a showing of support from more than 5 percent of the eligible voters in an election. *See*, *e.g.*, *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006) (striking down Illinois law requiring showing of support equal to 10 percent of last vote); *Obie v. North Carolina State Bd. of Elections*, 762 F. Supp. 119 (E.D.N.C. 1991) (striking down North Carolina law requiring showing of support equal to 10 percent of registered voters); *Greaves v. State Bd. of Elections of North Carolina*, 508 F. Supp. 78 (E.D.N.C. 1980) (striking down North Carolina law requiring showing of support equal to 10 percent of last gubernatorial vote); *Lendall v. Jernigan*, 424 F. Supp. 951 (E.D. Ark. 1977) (striking down Arkansas law requiring showing of support equal to 10 percent of last gubernatorial vote); *American Party of Arkansas v. Jernigan*, 424 F. Supp. 943 (E.D. Ark. 1977) (striking down Arkansas law requiring showing of support equal to 7 percent of last gubernatorial vote); *Lendall v. Bryant*, 387 F. Supp. 397 (E.D. Ark. 1974) (striking down Arkansas

law requiring showing of support equal to 15 percent of last gubernatorial vote); *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262 (S.D. Oh. 1970) (striking down Ohio law requiring showing of support equal to 7 percent of last gubernatorial vote); *see also Consumer Party v. Davis*, 633 F. Supp. 877, 891-92 (E.D. Pa. 1986) (holding Pennsylvania's primary election statutory scheme "unconstitutional as applied to the Consumer Party and its members because it makes it effectively impossible for the Party to place candidates on the general election ballot). To be sure, these courts acknowledge this Court's admonition that "no litmus-paper test" can distinguish valid ballot access requirements from those that are unconstitutionally burdensome. *Storer*, 415 U.S. at 730. At the same time, they recognize what the court of appeals failed to recognize here: where this Court has never upheld a ballot access statute that requires a showing of support greater than 5 percent of the eligible voters, it is not the province of lower courts to make new law by upholding a statute that requires a showing of support as high as 30 percent of the eligible voters – a figure so high as to be presumptively unconstitutional under this Court's prior decisions. *See Williams*, 393 U.S. at 46 (Harlan, J., concurring); *Storer*, 415 U.S. at 739, 763-64; *cf. American Party of Texas v. White*, 415 U.S. 767, 783 (1974) (finding that a statute requiring "1% of the vote for governor at the last general election … falls within the outer boundaries of support the State may require before according political parties ballot position").

The Ninth Circuit's decision in this case injects significant confusion into the important question of

what limit exists on the modicum of support a state may require of candidates and political parties seeking access to its ballot. Not only did the court of appeals dramatically depart from the settled law in other circuits, by upholding a statute that requires a showing of support from as much as 30 percent of the voters eligible to vote in AZLP's primary election, but also, the court of appeals expressly rejected the "eligible voter" standard by which this Court and every other federal court have measured the burden imposed by such statutes. The court of appeals concluded that the burden imposed by §§ 16-321 and 16-322 should be measured as a percentage of "qualified signers" as that term is statutorily defined – meaning not only the 32,056 voters eligible to vote in AZLP's primary election, but also the more than 1 million independent and unaffiliated voters who are not eligible to vote in that election. Pet. App. 12-13.

The court of appeals compounded the confusion its adoption of this novel standard creates by characterizing it as consistent with this Court's decisions in *Williams*, *Jenness*, *Storer*, *American Party of Texas* and the Ninth Circuit's own prior decisions. Pet. App. 12. It is not. Neither this Court nor the Ninth Circuit itself has ever held that a state may require a candidate seeking ballot access to demonstrate support from voters who are not eligible to vote for the candidate – much less that the burden imposed by such a statute should be measured as a percentage of those ineligible voters. Yet, the court of appeals found, "in each of these cases" the dispositive question was "whether the required signatures constitute[s] an unfairly large percentage of those

voters *eligible under state law* to offer their signatures." Pet. App. 12 (emphasis original). That is incorrect.

The court of appeals' formulation obscures the critical difference between Arizona's statutory scheme and those of every other state in the cases it cites. Arizona stands alone in requiring that candidates demonstrate support from voters who are not eligible to vote for them. *See Jenness*, 415 U.S. at 433 (defining the modicum of support required of an independent candidate as a percentage of voters eligible to vote for the candidate); *Storer*, 415 U.S. 726-27 (same); *American Party of Texas*, 415 U.S. at 777 (defining the modicum of support required of a political party as a percentage of voters eligible to vote for the party).[3] Thus it is immaterial, under this Court's precedent, that Arizona defines the modicum of support required by §§ 16-321 and 16-322 as a percentage of voters who are not eligible to vote in the election the provisions regulate. The dispositive question is how much support a candidate must show *from eligible voters* as a prerequisite to appearing on the ballot.

---

[3] The court of appeals further confused the issues raised here by failing to acknowledge the distinction between these cases, which arose from challenges to general election ballot access requirements, and the instant case, which arises from a challenge to primary election ballot access requirements. Because *Jenness*, *Storer* and *American Party of Texas* involved general election ballot access requirements, the "voters *eligible under state law* to offer their signatures" were coextensive with the voters eligible vote in the election. Pet. App. 12. Here, by contrast, Arizona has defined the "voters *eligible under state law* to offer their signatures" to include more than 1 million independent and unaffiliated voters, who are not eligible to vote in AZLP's primary election. Pet. App. 12.

The importance of this question to the proper adjudication of constitutional challenges to ballot access laws is paramount. As the Seventh Circuit has observed, when courts apply the *Anderson-Burdick* analysis to such laws, "much of the action takes place at the first stage" of the inquiry – the court's determination as to the severity of the burden imposed – because that determines the level of scrutiny that applies. *See Stone*, 750 F.3d at 681. It is critical, therefore, that this Court provide the lower courts with sufficient guidance to measure that burden. The Ninth Circuit's adoption of an improper standard in this case, and its erroneous insistence that this Court applies the same improper standard, demonstrates the urgent need for this Court's intervention.

Although the Ninth Circuit's opinion appears to be in conflict with the controlling precedent of every other circuit, this Court should not postpone resolution of that conflict to allow it to develop further. *See Cook*, 531 U.S. at 518 n.10 (granting certiorari despite the absence of a circuit split due to the importance of the question presented). Arizona's statutory scheme provides a template for other states to evade the constitutional limitations established by this Court's precedent, just as Arizona has thus far done, merely by redefining the method by which they define the "modicum of support" they require of candidates and parties seeking access to their ballots. If this Court does not answer the questions presented, they will be free to do so, putting the most precious constitutional rights of their citizens at peril.

II. The Court of Appeals' Decision Conflicts With This Court's Decision in *Jones*.

Because the signature requirements imposed by Sections 16-321 and 16-322 are all but insurmountable when measured as a percentage of Libertarians alone, candidates seeking to run in AZLP's primary ballot have no real choice but to obtain signatures from both Libertarians and independent and unaffiliated voters. But this does not lessen the burden that Arizona's statutory scheme imposes on Petitioners. It just exposes them to another burden – opening their candidate selection process to nonmembers – that is equally severe. *See Jones*, 530 U.S. at 581-82 ("We can think of no heavier burden on a political party's associational freedom" than forcing it "to adulterate [its] candidate-selection process … by opening it up to persons wholly unaffiliated with the party").

As this Court explained:

> a corollary of the right to associate is the right not to associate. Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being. … In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the

> general electorate in winning it over to the party's views.

Jones, 530 U.S. at 574-75 (citations and quotation marks omitted). These concerns are implicated here because candidates cannot realistically appear on the AZLP primary ballot unless they obtain support from voters who do not belong to the AZLP. Arizona's primary system thus "encourages candidates … to curry favor with persons whose views are more 'centrist' than those of the party base." *Id.* at 580.

The court of appeals attempted to distinguish *Jones* on the ground that, unlike the statutory scheme held unconstitutional in that case, §§ 16-321 and 16-322 permit parties like AZLP "to exclude non-members from voting in their primaries." Pet. App. 17. Thus, in the court of appeals' view, this case does not involve a "state-imposed restriction on [Petitioners'] freedom of association." Pet. App. 17 (citing *Jones*, 530 U.S. at 584). "Libertarian candidates can qualify for the primary ballot with signatures from 11% to 30% of party members in their jurisdiction," the court of appeals reasoned, "and no evidence suggests it is impossible to do so as a practical matter." Pet. App. 18.

The fatal flaw in the court of appeals' reasoning is that it fails to grapple with the fact that Libertarian candidates can avoid the compelled association imposed on them by §§ 16-321 and 16-322 only if they assume the burden of complying with unconstitutional signature requirements, while they can avoid the burden of complying with the unconstitutional signature requirements only if they obtain the support of nonmembers. This is not merely a "difficult"

scenario, as the court of appeals describes it, but a choice between two unconstitutional alternatives. Pet. App. 18. Thus, the court of appeals' exhortation that "we expect 'hard work and sacrifice by dedicated volunteers'" misses the point. Pet. App. 18 (quoting *American Party of Texas*, 415 U.S. at 787). This Court did not suggest in *American Party of Texas* – or in any other case – that minor political parties are expected to work hard enough to overcome unconstitutional ballot access requirements.

The court of appeals' reasoning thus fails to resolve the clear conflict between this case and *Jones*. The false choice between two unconstitutional alternatives that §§ 16-321 and 16-322 impose upon Petitioners involves compelled association, in violation of *Jones*, as surely as if it were statutorily mandated. This Court should grant certiorari to resolve that conflict.

III. This Case Is the Right Vehicle for Answering the Questions Presented.

This case is an ideal vehicle for resolving the questions presented. Both questions were squarely raised in the proceedings below, and the essential facts necessary to decide them are undisputed.

There is no dispute between the parties that, as applied in 2016, §§ 16-321 and 16-322 required that candidates seeking to appear on AZLP's primary election ballot were required to obtain signatures equal in number to between 11 and 30 percent of the voters eligible to vote for them. Pet. App. 10. Nor is there any dispute that the only way a Libertarian candidate could avoid such burdensome requirements was to

solicit support from independent or unaffiliated voters, who are not eligible to vote in AZLP's primary election. Pet. App. 10. Thus, the Ninth Circuit addressed its decision directly to the questions presented by this petition: (1) whether Arizona may require that a candidate seeking to run in the primary election of a ballot-qualified party demonstrate support from as much as 30 percent of the voters eligible to vote in the primary election?; and (2) whether Arizona may require that such a candidate demonstrate support from independent or unaffiliated voters, who are not eligible to vote in the primary election? With respect to each question, the court of appeals squarely held in the affirmative. Consequently, the important issues raised in this case are ripe for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Oliver B. Hall
Counsel of Record
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294
oliverhall@competitivedemocracy.org

Counsel for Petitioners