No. 19-757

# In The
# Supreme Court of the United States

Arizona Libertarian Party and Michael Kielsky,

Petitioners,

v.

Katie Hobbs, Arizona Secretary of State,

Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


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May 7, 2020

## QUESTIONS PRESENTED[1]

1. Did the court of appeals correctly determine that Arizona's ballot access requirements—which are measured by "qualified signers" rather than the much more limited pool of primary-eligible party members—satisfy this Court's precedent requiring candidates to demonstrate a "significant modicum of support" for ballot access?

2. Did the court of appeals correctly determine that A.R.S. § 16-321(F), which uses the same "qualified signers" metric for ballot access for all political parties entitled to continuous representation on the primary and general election ballots, comport with the Equal Protection Clause?

[1] Respondents agree to Petitioners' List of Directly Related Proceedings, Opinions Below, Jurisdiction, and Relevant Constitutional Provisions. To avoid redundancy, the Respondent has not included those provisions; to the extent those provisions are required, she hereby incorporates them with this reference.

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## INTRODUCTION

The Petition presents split-less, fact-bound issues of limited importance to anyone but Petitioners. In addition, the asserted burdens are self-inflicted, not imposed by the State, and entirely within the control of Petitioner Arizona Libertarian Party ("ALP"). The decision below is plainly correct, as the district court and all three panel judges unanimously recognized. And Petitioners notably failed to obtain even a single judge calling for a vote when they sought rehearing *en banc*. For all of these reasons, the issues presented here do not meet the demanding standards of this Court's Rule 10.

The Petitioners ask this Court to determine whether the primary ballot access requirements for ALP candidates violate Petitioners' constitutional rights. They do not. The State is charged with ensuring properly-administered, fair elections. To meet that high bar, candidates, voters, and election administrators must all work together to ensure that "the excellences of republican government may be retained and its imperfections lessened or avoided." ALEXANDER HAMILTON, THE FEDERALIST PAPERS, #9. In order to vote, a voter must follow certain rules, such as registering to vote, and casting his or her ballot before polls close on Election Day. Election officials must ensure candidate petitions include the required number of valid signatures prior to authorizing access to the ballot. And this Court has made plain that candidates must obtain a "significant modicum of support" from the people they hope to ultimately represent to obtain access to the ballot. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

Petitioners argue that Arizona's statute requiring all candidates to obtain signatures from between 0.25% to 1% of all qualified signers is an unconstitutional bar to ballot access for ALP candidates in Arizona. Arizona's ballot access requirements are substantially below—sometimes by more than a full order of magnitude—the requirement that 5% of all registered voters or all votes cast for statewide office that this Court has repeatedly upheld as constitutional for decades. *See, e.g. id.* at 440. But Petitioners seek to rewrite this Court's "significant modicum of support"- standard with a *far* lower burden that they merely demonstrate support from 0.25% to 1% of ALP members rather than qualified voters—effectively cutting the required demonstration of support by orders of magnitude by ignoring a huge swath of Arizona voters. No court has ever endorsed that proposition, and there is accordingly no split of authority as to it.

Petitioners understandably would prefer to return to a time when their ability to achieve ballot access was extremely easy, when Arizona law measured the modicum of support from the party's membership, rather than registered partisans and unaffiliated voters (even though unaffiliated voters were free to sign petitions for candidates from all parties). But that ballot access framework was enormously in excess of what the Constitution demands, and the State had no obligation to continue it.

Before the amendment to A.R.S. § 16-321(F), ALP candidates for Congress were able to obtain ballot access with as few as twenty-four signatures, and statewide candidates could qualify for the ballot with as few as 133 signatures.

(App. 64-65). With the change to the law, Petitioners must now gather approximately 3,000 signatures from 1.2 million voters. At the same time Petitioners argue that they have a constitutional right to ballot access upon a showing of miniscule support, the ALP still desires to maintain the benefits of party status, such as exemptions from campaign finance limits that apply to other political actors, A.R.S. § 16-915, the benefit of tax-payer funded primaries, A.R.S. § 16-503, tax-payer funded mail-in voting, A.R.S. § 16-542(C), and an exemption from the requirement to requalify as a political party every four years, A.R.S. § 16-801(A), among other benefits.

ALP has elected to prohibit independents from voting in their primaries, which they are allowed to do. *Calif. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000). And Petitioners have not challenged the law allowing them to collect signatures from unaffiliated voters. In other words, they want to continue to have the ability to gather signatures from over one million voters, but submit only 133 signatures to qualify a statewide candidate who could, ultimately, represent 7.28 million people. The State's refusal to permit such an arrangement and instead require the "significant modicum of support" that this Court has repeatedly affirmed is not a "severe burden" on Petitioners' rights.

In the end, Petitioners are attempting to use their internal political party choices to manipulate Arizona law to obtain preferential ballot access with truly *miniscule* support, seeking the approval of this Court to rule that the Constitution requires a state to allow a candidate ballot access for statewide office with as little

as 133 signatures or less than 0.002% of the population. No court has ever accepted an argument like Petitioners' and Petitioners can, at any moment, alleviate their own burden by expanding the pool of Arizona voters their candidates seek signatures from. Petitioners do not require this Court's intervention to alleviate their injuries; they need simply stop inflicting harm upon themselves.

Even charitably read, Petitioners' argument amounts at best to contending that the Ninth Circuit's decision was a "misapplication of a properly stated rule of law," S. Ct. R. 10—*i.e.*, the *Anderson*/*Burdick* framework and this Court's "significant modicum of support" standard. Those fact-bound assertions do not warrant this Court's review. *Id.*

## STATEMENT OF THE CASE

### I. Factual Background

Arizona law has a very low signature threshold and a variety of ways for members of any party to obtain access to the ballot. Candidates of all established parties, like the ALP, must obtain signatures from between 0.25% to 2% of all "qualified signers," depending on the office sought. (App. at 5). A qualified signer is a voter who is registered with the candidate's party, a voter who is registered with no party, or a voter registered with a new party as defined by Arizona law. A.R.S. § 16-321(F). In Arizona, as of January 1, 2019, there were 1,290,553 qualified signers eligible to sign petitions for ALP candidates. (App. 25) (calculated by adding the number of green, libertarian, and "other" voters). The Petitioners challenge a law requiring ALP candidates for statewide office to collect 3,034 signatures from a pool of approximately 1.3 million potential signers. (App. 65).

Arizona law allows unaffiliated voters to sign nomination petitions for partisan candidates because they are eligible to vote in those elections if the parties allow it. A.R.S. § 16-467. Under the prior version of A.R.S. § 16-321, a candidate could collect signatures from the candidate's own party, new parties, and unaffiliated voters, but the number of signatures required to qualify for the ballot was based solely on the number of voters registered in the candidate's political party. 2015 Ariz. Sess. Laws Ch. 293 §§ 2-3 (H.B. 2608). In other words, prior to 2016 all political parties had a very broad pool of signers to collect from, but the modicum of support necessary for ballot access was limited by the size of the party. H.B. 2608 aligned the method of measuring the modicum of support for a particular candidate with the pool of qualified signers eligible to sign a candidate's nomination petition.

The road to the general election ballot necessarily travels through the primary election first. All candidates who obtain the requisite number of signatures are granted access to the primary ballot. A.R.S. § 16-311(H). The candidate in the primary who obtains the most votes wins the nomination and is automatically placed on the general election ballot. A.R.S. § 16-645(A). While the Democratic and Republican parties allow Arizona's unaffiliated voters to vote in their primaries, the ALP does not. (App. 7). So, while Petitioners have nearly 1.3 million people who are eligible to sign their candidate's petitions, a maximum of approximately 32,000 people are eligible to vote in the ALP's primary. (App. 25).

Other than the qualified signer requirement, Arizona law puts no impediments before candidates seeking ballot access; rather, Arizona has been a leader in

ensuring candidates have new, more efficient ways to collect signatures. (App. 14-15). Unlike many states, Arizona does not limit when candidates can start collecting signatures. (*Id.*) Additionally, Arizona has allowed candidates to submit nomination petition signatures online through the "E-Qual Portal" for years. A.R.S. §§ 16-316 through -318. While candidates often need to collect many additional signatures to survive a challenge to their nomination petitions and avoid being disqualified from the ballot, E-Qual signatures are automatically validated. (App. 15). Thus, when using E-Qual, candidates do not need to collect a large buffer because a qualified signer will only see candidates they are eligible to sign a petition for. The link for the E-Qual system can be easily shared via email and social media.[2]

Not only is there no time limit on how long candidates may collect signatures, but petitions need only be submitted to the filing officer far enough in advance of the election to ensure that all statutory duties required of elections officials can be met. Candidates must file ninety days in advance of the primary election when running as a candidate for a party primary. A.R.S. § 16-311(A). Ninety days is required to ensure that there is time to process the petitions, verify the candidates' eligibility for the ballot, and print ballots in time to send to overseas military and civilian voters and Arizona's very large early voter population. Overseas ballots must be sent at least forty-five days prior to the election, 52 U.S.C. § 20302(a)(8)(A),

[2] The link for E-Qual is available at https://apps.azsos.gov/equal/.

and Arizona allows for early voting up to twenty-seven days prior to the election, A.R.S. § 16-542(C).

## II. Procedural Background

Petitioners attempted to obtain a preliminary injunction twice before the district court in this case. The first motion for a preliminary injunction was filed approximately two weeks before signatures were due in 2016. The second preliminary injunction motion came later that summer to contest another ballot access requirement, but Petitioners have since dropped that claim. (App. 38-39). Both of Petitioners' requests for injunctive relief were denied. (App. 39). After discovery, the parties filed cross-motions for summary judgment, and the Secretary prevailed on all counts. (App.77). Indeed, at oral argument on the cross-motions for summary judgment, the Petitioners agreed that, under *Jenness*, 403 U.S. at 442, Arizona "could require an AZLP candidate to obtain 179,423 signatures . . . to appear on the general election ballot for statewide office." (App. 54).

This case was appealed to the Ninth Circuit on the very limited basis that the law requiring ALP candidates to collect signatures from 0.25% to 2% of qualified signers, rather than libertarians alone, was an unconstitutional bar to ALP candidates' access to the primary ballot. (App. 8). In a unanimous opinion, the Ninth Circuit applied the *Anderson/Burdick* test and analysis from other ballot access cases, and ultimately upheld the district court's order in favor of the Secretary on all counts. (App. 23). The Ninth Circuit determined that the proper way to measure a candidate's support was to determine what "voters [are] *eligible*

*under state law*" to offer their signatures to a candidate, noting that out of all of this Court's precedents, "[t]here was no adjustment to account for the significant portion of this pool comprised of registered members of other parties, many of whom, . . . were unlikely to help nominate a competing candidate[.]" (App. 12). And when Petitioners sought *en banc* review, "no judge requested a vote" on the matter and it was denied. (App. 80). None of the judges to review this case have found any merit to Petitioners' claims.

## REASONS TO DENY THE WRIT

### I. The Ninth Circuit's Decision Did Not Create a Circuit Split.

Petitioners over-promise and under-deliver on their asserted circuit split. Specifically, their first argument asserts that "The Court of Appeals' Decision Conflicts With the Settled Law of Other Circuits" (plural). (Pet. at 21). But that entire section then cites a grand total of *one* decision from another circuit, only in a string cite. And the single court of appeals case was only discussed by Petitioners in a parenthetical not even amounting to a full sentence. Even accepting all of Petitioners' characterizations at face value, there is no developed circuit split here and certainly no split with the multiple circuits as Petitioners pledge.

The entirety of Plaintiffs' alleged circuit split is found at page 23, where they cite *Lee v. Keith*, 463 F.3d 763 (7th Cir 2006), in a string cite with the unexceptional parenthetical characterizing *Lee* as "striking down Illinois law requiring showing of support equal to 10 percent of last vote" as unconstitutional. But Arizona law does no such thing; requiring between 0.25% to 2% of qualified signers for ALP candidates is the equivalent of requiring a candidate to obtain

between 0.00016% to 0.0013% of the votes cast in the last gubernatorial election—*i.e.*, far less than the 10% requirement at issue in *Lee*.

Indeed, *Lee* is an unexceptional application of this Court's 5% standard from *Jenness*, invalidating an Illinois law that required an independent candidate to collect signatures from voters in his or her district "equal to at least 10% of the number of votes cast in that district during the last general election." *Lee*, 463 F.3d at 764. In addition to requiring twice the number of signatures recognized in *Jenness* as being the outer bounds of what a state could require, Illinois also required independent candidates to file their petitions by the same deadline as partisan candidates, despite the fact that unlike partisan candidates, independent candidates did not stand for primary election. *Id.* (requiring candidates submit their petition signatures "92 days before the primary, which is 323 days before the general."). What is more, all signatures had to be collected within ninety days, and all signers had to forego any right to vote in the primary, regardless of whether they supported a single independent candidate or a slate of independent candidates. *Id.* at 765.

The Ninth Circuit did not depart from *Lee* as to any of these holdings, nor does Arizona law share any of the offensive features of the Illinois law at issue there. Indeed, if Arizona's ballot access requirements were actually equivalent to Illinois law struck down by *Lee*, then ALP statewide candidates would have needed to submit 240,991 signatures on December 16, 2019. Arizona requires nothing of the sort.

The alleged "split" is thus on an issue *Lee* never reached: whether a political party's self-inflicted limitation on the size of the pool that they are willing to pursue signatures from is an unconstitutional "severe burden" under *Anderson*/*Burdick*. *Lee* simply has nothing to say on that subject—and Petitioners' bare parenthetical plainly fails to demonstrate an actual split.

Petitioners also string cite a number of district court decisions ranging from twenty-nine to fifty years old. (Pet. at 23-24). Such decisions are obviously not decisions of "court of appeals" or a "state court of last resort." S. Ct. R. 10(a). But even if they were, they too are unexceptional applications of this Court's 5% of voters for the office standard from *Jenness* and its progeny. None of them addresses the issue presented here: whether Petitioners can artificially limit the size of the pool of voters from which to gather signatures and then demand the 5% standard be measured only from Petitioner's preferred pool of voters, rather than all voters. No court has ever accepted such an argument, and it remains patently split-less.

Petitioners' second argument holds even less merit, not even attempting to cite a single decision of another court of appeals. (Pet. at 28-30). The court of appeals amply explained why *Jones* was not controlling here. (App. 17-18.). No other court has ever held otherwise, nor did *Jones* specifically address the issues presented here. Petitioners thus—at most—have alleged a misapplication of *Jones*, which does not warrant review. Sup. Ct. R. 10. And if a single lower court has read *Jones*

in a different manner than the court of appeals and district court here in the *nineteen years* since it was decided, Petitioners fail to raise it.

Moreover, not a single judge to review this case has seen any merit in Petitioners' claims at any stage of the litigation. Petitioners attempted three times at the district court to enjoin the law—temporarily or permanently—and lost each time. They failed on appeal, with a unanimous Ninth Circuit panel noting "Arizona has *easily* met its burden." (App. 16) (emphasis added). And Petitioners' request for a rehearing *en banc* failed to garner even a single judge calling for a vote. There is no split as to issues raised by Petitioners, and the judges have unanimously held that Arizona's ballot access framework does not violate Petitioners' constitutional rights.

## II. Petitioners' Self-Inflicted Harms Are Not of National Importance.

Petitioners have put themselves in a unique box—a position that Petitioners fail to demonstrate is shared by any other political party in any other state. As both courts to rule on this case have noted, the fact that ALP candidates must collect a higher percentage of signatures from party members is "a consequence of the Libertarian Party's modest size, not a fatal flaw of the statutory scheme." (App. 19). The district court put it more bluntly: "The Supreme Court has made clear that Arizona is not required to decrease its ballot access requirements for the benefit of less popular parties or candidates." (App. 72). Petitioners can remedy this problem by attracting more members, opening their primary, or utilizing the tools Arizona has provided to collect signatures more effectively. (*See* App. 63) (noting that "[t]he

facts suggest that increasing AZLP membership is feasible" and that membership grew substantially between 2016 and 2017).

For decades, this Court has recognized that the state has an interest in avoiding voter confusion and ballot clutter, and to accomplish those ends may "require candidates to make a preliminary showing of substantial support" to qualify for ballot access. *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983). If candidates are unable to obtain signatures because voters do not support their political positions, that is an admission that the candidate cannot "make a preliminary showing of substantial support in order to qualify for a place on the ballot." *Id.* at 788 n.9. That is an issue for the candidate to fix, not the State.

The lower courts' fact-bound application of this Court's settled precedent to Petitioners' unique circumstances does not warrant this Court's review. Petitioners' bind is self-inflicted and self-remediable.

Petitioners argue that Arizona's law sets signature requirements too high because it either requires them to receive signatures from 11 to 30% of ALP voters in a given jurisdiction, or forces them to reach out to unaffiliated voters. But evidence considered by the courts below demonstrated that it was a "reluctance by the candidates to seek support from [unaffiliated] voters" and differences in political philosophy preventing ALP candidates from securing signatures from unaffiliated voters, not Arizona law. (App. 69). As the Ninth Circuit explained, the ALP's "choice to exclude all non-members from its primary and its preference to obtain signatures only from party members do[es] not change the calculus." (App. 13).

It is also telling that despite Petitioners' freedom of association claim, Petitioners have not challenged the law that allows them to collect signatures from unaffiliated voters. Rather, Petitioners want to have their cake and eat it too, by artificially restricting who is included in the pool used to calculate how many signatures are required to get on the ballot, while keeping the broad definition of qualified signers provided by Arizona law. Candidates who choose not to obtain signatures from unaffiliated voters suffer a self-inflicted harm, not a burden imposed by the state.

The fact that ALP candidates may not obtain ballot access in Arizona because they either choose to exclude qualified signers or because those candidates do not have support from unaffiliated voters is hardly an issue of national importance—particularly where that purported problem does not appear to be shared by political parties anywhere else. Indeed, the position Petitioners are urging would allow a political party to manipulate its internal processes to artificially limit the "significant modicum of support" they need to demonstrate to achieve ballot access. *Jenness*, 403 U.S. at 442. Such a rule would increase ballot clutter and voter confusion, while burdening election administration. And it would almost certainly endanger important and valid ballot access guidelines in other states, especially given Arizona's rather lenient ballot access requirements and forward-thinking options candidates are able to use to collect signatures.

Because Petitioners' problems are both self-inflicted and apparently unique, the Petition does not present issues of national importance. The issues are purely

local and limited: the alleged burdens at issue are not widely shared by others (or perhaps anyone) and they can be remedied by the Petitioners at any time. This Court's intervention is not warranted.

## III. The Ninth Circuit's Decision Was Correct.

Ballot access regulations are analyzed by reviewing the entire ballot access framework, determining how onerous the burden on the plaintiff is, and deciding whether the State's interest in specific ballot access rules are sufficiently important to justify the coinciding burden on the plaintiffs' rights. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986). The more onerous the burden on ballot access, the more important the State's interest must be. *Anderson,* 460 U.S. at 789. Absent other restrictions, this Court has repeatedly upheld signature thresholds at or below 5% of all registered voters, or all persons who voted in the proceeding election, within a circumscribed period of time. *See, e.g. American Party of Texas v. White*, 415 U.S. 767, 785 (1974) (upholding ballot access laws requiring candidates to collect 22,000 signatures in just fifty-five days).

The Ninth Circuit's analysis was correct. Petitioners use the term "eligible voters" as though it is a talisman, but Petitioners must divorce the term from all context to support their argument. As the Ninth Circuit correctly explained, the key question is whether the state requires "an unfairly large percentage of those voters eligible under state law to offer their signatures." (App. 12). This Court's precedent, from *Jenness* on, consistently measured the modicum of support for a candidate from a pool "comprised of registered members of other parties, many of

whom, it can be reasonably presumed, were unlikely to help nominate a competing candidate or party." (*Id.*). A "'significant, measurable quantum of community support' does not impose a severe burden." (*Id.*) (citing *American Party of Texas*, 415 U.S. at 782). As the lower courts noted, there is no question that Arizona's signature requirements would be constitutional if the ALP chose to hold an open primary. "A political party cannot manipulate its internal preferences and processes to transform a constitutional statute into an unconstitutional one." (App. 13).

The district court noted that Petitioners had not identified any case that required the court to measure a candidate's modicum of support based on the limited membership of the party. Rather, this Court has approved ballot access rules that require candidates to make "a showing of a modicum of support *among the potential voters for the office*." (App. 62) (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986)). The district court explained that under *Jenness*, Arizona could require ALP candidates to obtain 179,423 signatures without violating the constitution. (App. 54). "The contrast between what is constitutionally permissible (179,423 petition signatures) and what Arizona requires (party membership of less than one percent of registered voters and petition signatures . . . totaling 3,034) is striking." (*Id.* at 54-55).

The Ninth Circuit compared the minimal burden of collecting approximately 3,000 signatures from a state with more than 3.7 million voters (App. 25) with the important interests advanced by the Secretary. "[A] State has an interest, if not a

duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock v. Carter*, 405 U.S. 134, 145 (1972). That is exactly what Arizona has done. The Secretary asserted an interest in "preventing voter confusion, ballot overcrowding, and frivolous candidacies[.]" (App. 15). These interests have been repeatedly recognized as valid and important State interests, more than sufficient to justify the minimal burden imposed by Arizona's ballot access framework. *Bullock*, 405 U.S. at 145 ("[T]he State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting[.]").

It is also important to note that Petitioners have taken great pains to paint the Arizona primary election as a stand-alone event. They must do so to maintain Petitioners' needlessly narrow view of "qualified signers." Indeed, Petitioners' brief is replete with allegations that this case "dramatically departs from settled law" by "requiring a candidate seeking ballot access to demonstrate support from voters who are not eligible to vote for the candidate." (Pet. at 25). Petitioners are simply wrong in their interpretation of the law. The primary election is not a stand-alone event. *Smith v. Allwright*, 321 U.S. 649, 660 (1944) (recognizing that state law may fuse "the primary and general elections into a single instrumentality for choice of officers"). The candidate from a ballot-qualified party who wins his or her party's primary is guaranteed ballot access to Arizona's general election ballot, even if that candidate receives only one vote in his or her primary election. A.R.S. § 16-645(A)

("[T]he person having the largest number of votes . . . for the nomination for an office in the political party of which the person was set forth on the ballot as a candidate for the nomination, is declared the nominee of the party for that office . . . which shall entitle the person to have the person's name placed on the official ballot at the ensuing election as the nominee of the party for the office."). Recognizing that the primary and general election are part of a single cycle, the Ninth Circuit correctly determined that Arizona could require an ALP candidate to demonstrate "significant community support" rather than a fractional percentage of a very small number of voters. (App. 16).

Thus, Petitioners' own test: "[t]he dispositive question is how much support a candidate must show from eligible voters" (Pet. at 26), cannot be limited to primary voters. Rather, because the primary is an integral part of the broader general election context, "eligible voters" includes both ALP members, the only ones who may vote in ALP's primary elections, and other registered voters, who are eligible to vote in Arizona's general election. Arizona is well within its rights to measure the "significant modicum of support" from both voters eligible to vote in the primary and the general elections because they are inextricably linked. The lower courts that ruled on this case correctly applied the law in determining that Arizona's ballot access framework was constitutional, and this Court should deny review for that reason.

## CONCLUSION

Petitioners' request for review by this Court should be denied. There is no circuit split because the courts below have faithfully applied the rule consistently

repeated by this Court since the 1970s and correctly concluded that Arizona's law is constitutional. Indeed, Petitioners' supposed circuit split consists of a single stray citation with a terse parenthetical, which fails to demonstrate any actual conflict. Moreover, any burden faced by Petitioners is a result of their own actions, not a burden imposed by the State. While Petitioners may dispute these findings and disagree with the ultimate conclusions of the lower courts, that does not make this case appropriate for this Court to review. For these reasons, the Petition for Writ of Certiorari should be denied.

May 7, 2020

Respectfully Submitted,

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