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.

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

REPLY TO BRIEF IN OPPOSITION TO 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

INTRODUCTION

Petitioners Arizona Libertarian Party ("AZLP") and Michael Kielsky respectfully submit this Reply to the Brief in Opposition to Petition for Certiorari ("Opposition" or "Opp.") filed by Respondent Arizona Secretary of State Katie Hobbs ("the Secretary").

ARGUMENT

A respondent who declines to address the issues presented in a constitutional challenge to a statutory scheme implicitly concedes that there is no defense.

Such is the case here. The Secretary does not even acknowledge the central issue that Petitioners raise in this case – whether Arizona may require that candidates seeking access to the AZLP's primary election ballot demonstrate support from voters who are not eligible to vote in that election – until the final paragraph of her Opposition. (Opp. at 17.) That paragraph is notably devoid of legal authority, and for good reason: to defend Arizona's statutory scheme on the merits is to defy the entire body of this Court's ballot access jurisprudence.

Time and again this Court has reaffirmed that states have a legitimate interest in limiting access to the ballot to candidates who can demonstrate a "modicum of support" from voters who are eligible to vote for them. Contrary to the Secretary's assertion, however, this Court has never held that states may require that candidates seeking access to a party's primary election ballot demonstrate support "from both voters eligible to vote in the primary" and from general election voters who are ineligible to vote in the primary. (Opp. at 17.) Such an irrational requirement cannot withstand scrutiny even under the most deferential standard of review available

under the *Anderson-Burdick* analytic framework. Arizona does not have a legitimate interest in requiring that candidates demonstrate support from voters who are not eligible to vote for them, nor can the Secretary articulate a rational basis for that requirement. Hence the Secretary's attempt to bury this fundamental issue in the final paragraph of her Opposition, and her failure to cite a single decision of this Court or any other that supports her position. There is none.

The remainder of the Secretary's Opposition amounts to an exercise in evasion and obfuscation. It proceeds from the false premise that Petitioners present a challenge to Arizona's requirements for accessing the general election ballot, not their own primary election ballot. (Opp. at 5 ("The road to the general election ballot necessarily travels through the primary election first.").) That simply is not so. AZLP is a ballot-qualified political party in Arizona: it is entitled to place its nominees on the general election ballot by virtue of the size of its membership. *See* A.R.S. § 16-804(B) (providing that a party "is entitled to continued representation as a political party on the official ballot for state, county, city or town officers if … such party has registered electors in the party equal to at least two-thirds of one percent of the total registered electors in such jurisdiction").[1] The Secretary studiously omits mention of this fact, but it is critical to a proper understanding of the issues raised in this case. Petitioners do not challenge § 16-804(B), which authorizes them to place their nominees on Arizona's general election ballot; rather, they challenge §§ 16-321 and

[1] All statutory citations hereinafter are to the Arizona Revised Statutes unless otherwise indicated.

16-322, which impose signature requirements so high that it is practically impossible for candidates to qualify for AZLP's primary election ballot.

It is uncontested that as applied, §§ 16-321 and 16-322 require that candidates who seek access to AZLP's primary election ballot demonstrate support from as much as 30 percent of the voters eligible to vote in that election. (Pet. App. 72.) Such a requirement is unconstitutional. *See Storer v. Brown*, 415 U.S. 724, 739 (1974) (observing that a requirement "substantially more than 5% of the eligible pool … would be in excess, percentagewise, of anything the Court has approved…"); *see also 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)). According to the Secretary, however, §§ 16-321 and 16-322 are not unconstitutional because the modicum of support that they require is "miniscule" when measured as a percentage of Arizona's "1.2 million" independent or unaffiliated voters, who are not eligible to vote in AZLP's primary election. (Opp. at 3.) But this assertion merely confirms that the Secretary, like the Court of Appeals below, is relying on an improper legal standard. The modicum of support that a statute requires of candidates is properly measured as a percentage of the voters eligible to vote for the candidates, as this Court has recognized in every case in which it has addressed the issue, and not, as the Secretary erroneously implies, as a percentage of "the people [the candidates] hope to ultimately represent…" (Opp. at 1.)

Candidates who are unable to comply with §§ 16-321 and 16-322 by seeking signatures from the voters who are eligible to vote for them in AZLP's primary (*i.e.*,

registered Libertarians) have just one alternative: they must seek signatures from independent and unaffiliated voters who are not eligible to vote for them. As Petitioners have explained, such an "alternative" merely replaces one unconstitutional burden – the excessive signature requirements imposed by §§ 16-321 and 16-322 – with another: a form of compelled association that not only violates Petitioners' associational rights, *see California Democratic Party v. Jones*, 530 U.S. 567 (2000), but also lacks any rational basis. It bears repeating that the Secretary cannot articulate any legitimate state interest in requiring that a candidate, as a prerequisite to appearing on AZLP's primary election ballot, demonstrate support from voters who are not eligible to vote for that candidate.

The Secretary's assertion that Petitioners "are attempting to use their internal political party choices to manipulate Arizona law to obtain preferential ballot access" does not comport with reality. (Opp. at 3, 13.) AZLP maintained a closed primary long before Arizona amended §§ 16-321 and 16-322 in 2015, and it successfully defended its right to do so in federal court. *See Arizona Libertarian Party v. Bayless*, 351 F.3d 1277 (9th Cir. 2003) (remanding for factual determination as to whether statute compelling AZLP to allow independent voters to vote in its primary was unconstitutional under *Jones*); *Arizona Libertarian Party v. Brewer*, No. 02-144-TUC-RCC (D. Az. Sept. 27, 2007) (unpublished order) (permanently enjoining the Secretary from enforcing that statute). Despite this background, and contrary to this Court's unequivocal conclusion that a state may not "forc[e] political parties to associate with those who do not share their beliefs," especially "at the critical juncture at which party members traditionally find their collective voice and select their

spokesman," *Jones*, 530 U.S. at 586, the Secretary insists that Petitioners' injuries are "self-inflicted". (Opp. at 10-11.) Here, once again, the Secretary betrays the extent to which her position conflicts with this Court's precedent. *Jones* makes clear that a state may not compel a political party to associate with non-members, particularly with respect to the procedures by which it selects its nominees for public office. Yet the Secretary's Opposition confirms that is precisely what Arizona seeks to do here. (*E.g.*, Opp. at 15 ("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.").)

Finally, the Court of Appeals' application of an improper legal standard and its failure to follow this Court's holding in *Jones* places it in conflict with its sister Circuit Courts of Appeal that maintain fidelity with this Court's precedents. The Court of Appeals' decision therefore injects intolerable confusion into this area of the law, with consequences for voters, candidates and political parties nationwide. It should not be allowed to stand.

CONCLUSION

For the foregoing reasons, and those stated in Petitioners' Petition for Certiorari, the Petition should be granted.

Dated: June 9, 2020

Respectfully submitted,

/s/Oliver B. Hall

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