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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Arizona Libertarian Party, et al.,

No. CV-16-01019-PHX-DGC

10 Plaintiffs,

ORDER

11 v.

12 Michele Reagan,

13 Defendant.
14

15 Plaintiffs Arizona Libertarian Party (“AZLP”) and Michael Kielsky, the party’s
16 chairman and a candidate for public office, challenge the constitutionality of A.R.S.
17 §§ 16-321 and 16-322 as amended in 2015 by H.B. 2608. Doc. 42. Plaintiffs have filed a
18 motion for summary judgment. Doc. 63. Defendant Michele Reagan, the Arizona
19 Secretary of State (“the Secretary”), has filed a cross-motion for summary judgment.
20 Doc. 69. The motions are fully briefed (Docs. 63, 69, 71, 73), and the Court heard oral
21 argument on June 28, 2017. For the reasons that follow, the Court will deny Plaintiffs’
22 motion and grant the Secretary’s motion.

23 **I. Background.**

24 Arizona law provides that a party qualifies for continued representation on the
25 general ballot if its registered members compromise at least two-thirds of one percent of
26 total registered voters. A.R.S. § 16-804. A party that does not meet this requirement
27 may qualify to appear on the ballot by filing a petition signed by a number of qualified
28 voters equal to or greater than one and one-third percent of the total votes cast for

1 governor in the immediately preceding general election. A.R.S. § 16-801(A). It is
2 undisputed that AZLP qualifies for continued representation on the general election
3 ballot. Doc. 64 at 2, ¶ 4; Doc. 70 at 2, ¶ 4.¹

4 When a candidate from a continued-representation party wishes to have her name
5 appear on the general election ballot, she must follow one of two paths. The candidate
6 may, on a specified date before her party's primary election, file a nomination petition
7 that includes a specified number of signatures from voters in the relevant jurisdiction.
8 *See* A.R.S. §§ 16-322(A), 16-314(A). The candidate must then win the primary by
9 receiving more votes than any other candidate from her party. A.R.S. § 16-645(A).
10 Alternatively, she may qualify for the general election as a write-in candidate. A.R.S.
11 § 16-312(A). This path also requires the filing of a nomination petition before the
12 primary election, but the petition need not be supported by voter signatures. Instead, the
13 candidate must win the primary election and receive a number of write-in votes
14 "equivalent to at least the same number of signatures required by § 16-322 for
15 nominating petitions for the same office." A.R.S. § 16-645(E).

16 H.B. 2608 became effective on July 3, 2015. Doc. 12 at 3. Among other changes,
17 it altered the pool of persons from which candidates affiliated with a political party can
18 collect signatures for nomination petitions. Under the old system, a candidate could
19 collect signatures only from people who were qualified to vote in the candidate's primary
20 election. *See* 2015 Ariz. Sess. Laws Ch. 293, §§ 2-3 (H.B. 2608). Thus, if a candidate's
21 party chose to hold an open primary, the candidate could collect signatures from
22 registered party members, registered independents, and unaffiliated voters. If a
23 candidate's party opted for a closed primary, the candidate could collect signatures only
24 from registered members of her party.

25 H.B. 2608 redefined the pool of eligible signers – referred to in the bill as
26 "qualified signers" – to include (1) registered members of the candidate's party,

27 ¹ Parties may also qualify for continued representation if its members cast 5% of
28 the total votes for governor or presidential electors in the last general election.
A.R.S. § 16-804(A). AZLP does not qualify using this method.

1 (2) registered members of a political party that is not entitled to continued representation
2 on the ballot under A.R.S. § 16-804, and (3) voters who are registered as independent or
3 having no party preference. A.R.S. § 16-321(F). This redefined pool applies whether a
4 candidate's party holds an open or a closed primary.

5 This pool of "qualified signers" is larger than the pool available before H.B. 2608
6 for candidates whose parties hold closed primaries. Although H.B. 2608 lowered the
7 prescribed percentage of the pool from which candidates must obtain signatures, it
8 actually increased the number of signatures closed-primary candidates must obtain by
9 increasing the pool of signers against which the percentage is measured. *See* 2015 Ariz.
10 Sess. Laws Ch. 293, § 3 (H.B. 2608).

11 The increase is significant for AZLP candidates. For example, an AZLP candidate
12 competing in legislative district 11 in 2012 needed to collect 25 signatures to access the
13 primary ballot, or 25 write-in votes to access the general election ballot. Doc. 1 at 36,
14 ¶ 2. In 2016, the new law required an AZLP candidate in district 11 to obtain 220
15 signatures or write-in votes, a number which represents 26.12% of registered AZLP
16 members in the district. *Id.* at 38, ¶ 9. AZLP candidates seeking other Arizona offices
17 face similar increases in both raw numbers and percentages of registered AZLP members.
18 *Id.* at 36-37, ¶ 3; 38, ¶ 10 (congressional district 1 increased from 60 to 636 signatures or
19 write-in votes, or 25.75% of AZLP members in the district); *id.* at 40, ¶¶ 2-3 (Arizona
20 Corporation Commission increased from 130 to 3,023 signatures or write-in votes, or
21 11.9% of AZLP members state-wide); *id.* at 50, ¶¶ 10-11 (Maricopa County Attorney
22 increased from 88 to 1,881 signatures or write-in votes, or 11.18% of AZLP members in
23 Maricopa County).

24 Plaintiffs filed a motion for a preliminary injunction, asking the Court to enjoin
25 application of A.R.S. §§ 16-321 and 16-322 to write-in candidates in the 2016 election.
26 They asked the Court to order the Secretary to place write-in candidates on the general
27 election ballot if they win the AZLP primary and receive the number of write-in votes
28 required before the passage of H.B. 2608. Doc. 18 at 5. The Court denied the motion,

1 finding that Plaintiffs had not demonstrated a likelihood of success on the merits.
 2 Doc. 34. The Court considered only the constitutionality of the write-in method for
 3 achieving ballot access, and did not consider the petition signatures method. On this
 4 summary judgment motion, the Court considers Arizona's procedures for candidate ballot
 5 access as a whole.

6 **II. Legal Standard.**

7 A party seeking summary judgment "bears the initial responsibility of informing
 8 the district court of the basis for its motion, and identifying those portions of [the record]
 9 which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*
 10 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the
 11 evidence, viewed in the light most favorable to the nonmoving party, shows "that there is
 12 no genuine dispute as to any material fact and the movant is entitled to judgment as a
 13 matter of law." Fed. R. Civ. P. 56(a). Summary judgment is also appropriate against a
 14 party who "fails to make a showing sufficient to establish the existence of an element
 15 essential to that party's case, and on which that party will bear the burden of proof at
 16 trial." *Celotex*, 477 U.S. at 322.

17 **III. Motion to Strike.**

18 The Secretary filed a motion to strike certain portions of Plaintiffs' motion for
 19 summary judgment and related statement of facts, contending that Plaintiffs failed to
 20 disclose witnesses whose declarations were submitted with the motion. Additionally, the
 21 Secretary argues that Plaintiffs rely on impermissible hearsay.²

22 **A. Undisclosed Declarants.**

23 Federal Rule of Civil Procedure 26 requires parties to disclose "the name and, if
 24 known, the address and telephone number of each individual likely to have discoverable
 25 information – along with the subjects of that information – that the disclosing party may
 26 use to support its claims or defenses, unless the use would be solely for impeachment[.]"

27
 28 ² The Court denied the motion to strike and ordered the Secretary to address the
 permissibility of Plaintiffs' evidence in her summary judgment briefing. Doc. 68. The
 Secretary renewed the motion in her cross-motion for summary judgment. Doc. 69 at 24.

1 Fed. R. Civ. P. 26(a)(1)(A)(i). If a party makes an inadequate disclosure, it must
2 supplement or correct the disclosure in a timely manner. Fed. R. Civ. P. 26(e)(1)(A). If a
3 party fails to provide information required by Rule 26(a) or (e), “the party is not allowed
4 to use that information or witness to supply evidence on a motion, at a hearing, or at a
5 trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P.
6 37(c)(1).

7 Plaintiffs’ motion for summary judgment relies on declarations from six persons
8 that the Secretary contends were never disclosed under Rule 26(a). Doc. 66 at 9; Doc. 71
9 at 4. Plaintiffs do not contend that they disclosed these individuals under Rule 26(a), but
10 argue that they were disclosed by alternative means. Doc. 71 at 4. First, Plaintiffs argue
11 that the Secretary identified in her own initial disclosures the following persons as likely
12 to have discoverable information: “Any individual that gathered signatures to run as a
13 Libertarian candidate in the 2016 election cycle,” and “Any individual running as a write-
14 in candidate in the Libertarian Party in the 2016 election cycle.” *Id.* The six declarants
15 fall within these descriptions. On March 2, 2017, Plaintiffs responded to the Secretary’s
16 Interrogatory No. 1 by stating that they would provide a list of candidates who had
17 advised AZLP of their intention to run. *Id.* Plaintiffs provided this list on March 9,
18 including contact information for the candidates. *Id.* On March 17, 2017, the deadline
19 for completion of fact discovery, the Secretary asked Plaintiffs whether they had
20 produced the list of candidates, and Plaintiffs confirmed that they had and resent a direct
21 link to the list.³ *Id.* While Plaintiffs contend that this course of events shows that the
22 Secretary knew of the individuals who submitted declarations in support of Plaintiffs’
23 motion for summary judgment, it is insufficient to satisfy Rule 26(a) disclosure
24 requirements for several reasons.

25 Rule 26(a) requires a party to identify “each individual” it “may use to support its
26 claims or defenses.” Fed. R. Civ. P. 26(a)(1)(A)(i); *see also Ollier v. Sweetwater Union*

27
28 ³ The deadline for completing fact discovery was extended to March 17, 2017 in
an order dated January 13, 2017. Doc. 56 at 2. All depositions were required to
commence at least five working days before the deadline. *Id.*

1 *High Sch. Dist.*, 768 F.3d 843, 863 (9th Cir. 2014); *Robert Kubicek Architects & Assocs.,*
2 *Inc. v. Bosley*, No. CV-11-01945-PHX-JAT, 2013 WL 998222, at *1 (D. Ariz. Mar. 13,
3 2013). The disclosure must include the name of the individual, the individual's address
4 and phone number, and the subject of the information in the individual's possession.
5 Fed. R. Civ. P. 26(a)(1)(A)(i). The obvious purpose of the rule is to enable the opposing
6 party to prepare to deal with the individual's evidence in the case. *See Ollier*, 768 F.3d at
7 862-63 ("After disclosures of witnesses are made, a party can conduct discovery of what
8 those witnesses would say on relevant issues, which in turn informs the party's judgment
9 about which witnesses it may want to call at trial, either to controvert testimony or to put
10 it in context.").

11 Plaintiffs argue that because the Secretary identified a broad class of individuals as
12 having relevant information (those who attempted to run for office as AZLP candidates in
13 2016), and requested that Plaintiffs identify those individuals, Rule 26(a) was satisfied.
14 But the purpose of Rule 26(a)'s initial disclosure requirement is not merely to apprise the
15 opposing party of the existence of individuals with relevant information, it is to tell the
16 opposing party which individuals the disclosing party "may use to support its claims or
17 defenses." Fed. R. Civ. P. 26(a)(1)(A)(i). The fact that a party has identified individuals
18 as having relevant information does nothing to inform that party of whether the opposing
19 party may use the individuals as witnesses in the case.

20 The list Plaintiffs provided included the names of 27 people, their phone numbers
21 and email addresses. Doc. 67-1 at 23-26. Plaintiffs did not disclose the nature of any
22 relevant information these individuals might have, or whether Plaintiffs were considering
23 using them as witnesses in this case. The Secretary received the list, apparently with
24 other discovery documents, less than two weeks before the discovery deadline and with
25 only a few days to schedule depositions.

26 Because the Secretary was not told that Plaintiffs may use the six declarants to
27 support their claims, and the declarants were not identified until it was too late to depose
28 them, the Court concludes that Plaintiffs failed to satisfy their initial or supplementary

1 disclosure obligations under Rule 26(a) and (e). *See L-3 Commc'ns Corp. v. Jaxon Eng'g*
 2 *& Maint., Inc.*, 125 F. Supp. 3d 1155, 1169 (D. Colo. 2015) (“a party’s collateral
 3 disclosure of information . . . must [be] in such a form and of such specificity as to be the
 4 functional equivalent of a supplemental discovery response; merely pointing to places in
 5 the discovery where the information was mentioned in passing is not sufficient”); *see*
 6 *also Wallace v. U.S.A.A. Life Gen. Agency, Inc.*, 862 F. Supp. 2d 1062, 1067 (D. Nev.
 7 2012) (finding a party’s identification of an individual in response to the opposing party’s
 8 interrogatories insufficient to satisfy the disclosure requirements of Rule 26(a) because,
 9 among other reasons, the party did not identify the individual as someone with
 10 information that the party may use in establishing its case).

11 Plaintiffs also argue that the Secretary misstates the duty imposed by Rule 26(a)
 12 when she contends that Plaintiffs were required to identify which “candidates the
 13 Plaintiffs intended to call as witnesses.” Doc. 71 at 6 (quoting Doc. 66 at 7). As Plaintiff
 14 notes, a party must identify trial witnesses only thirty days before trial unless otherwise
 15 ordered by the court. Fed. R. Civ. P. 26(a)(3)(B). But this is an additional disclosure
 16 requirement. It does not affect the party’s separate obligation to identify in its initial
 17 disclosures all individuals with relevant information whom the party “may use to support
 18 its claims or defenses.” Fed. R. Civ. P. 26(a)(1)(A)(i). As the commentary to the Federal
 19 Rules makes clear, “[u]se’ includes any use at a pretrial conference, to support a motion,
 20 or at trial.” Steven S. Gensler, *Federal Rules of Civil Procedure, Rules and Commentary*
 21 *Rule 26* (Feb. 2017).

22 To avoid preclusion, Plaintiffs have the burden of showing that their failure to
 23 disclose the six declarants was substantially justified or harmless. Fed. R. Civ. P.
 24 37(c)(1); *R & R Sails, Inc. v. Ins. Co. of Pennsylvania*, 673 F.3d 1240, 1246 (9th Cir.
 25 2012). Plaintiffs provide no explanation for their failure to include the declarants in their
 26 initial or supplemental Rule 26(a) disclosures, and therefore have not shown that it was
 27 substantially justified. Because Plaintiffs’ failure to disclose the six declarants impeded
 28 the ability of the Secretary to depose those declarants and obtain additional evidence to

1 counter their declarations, the Court concludes that it was not harmless. *See Ollier*, 768
 2 F.3d at 863. The Court accordingly will grant the Secretary's motion to strike.⁴

3 **B. Hearsay.**

4 The Secretary also asks the Court to strike evidence provided by Plaintiff Kielsky
 5 regarding the efforts of another individual to obtain ballot access, contending that this
 6 evidence is inadmissible hearsay. Doc. 66 at 10. Plaintiffs' motion for summary
 7 judgment cites to Kielsky's third declaration for the proposition that "only one candidate
 8 qualified to appear on AZLP's primary ballot in 2016, and he did so only by working on
 9 his petition drive full-time for approximately 70 days." Doc. 63 at 12 (citing Doc. 18 at
 10 22, Third Kielsky Dec., ¶ 6). These statements were made with respect to candidate
 11 Gregory Kelly. *Id.* The Secretary contends that the only way Kielsky could know that
 12 Kelly worked full-time for a specific number of days is if he was told this information, as
 13 it is impossible for him to have this information through personal observation of the
 14 candidate. Doc. 66 at 10.

15 Plaintiffs do not argue that Kielsky's statement is offered for something other than
 16 the truth of the matter asserted, or that Kielsky acquired this information from first-hand
 17 observation. Plaintiffs assert that he obtained this information through contemporaneous
 18 reports "submitted directly to Plaintiff Kielsky in his capacity as Chair of AZLP, which
 19 have been submitted into the record." *Id.* They argue that Kielsky "is competent to
 20 testify to all matters relating to" his position as Chair of AZLP. Doc. 71 at 7 n.2.

23 ⁴ Rule 37(c)(1) sanctions are generally mandatory if a party violates its duty to
 24 disclose or supplement. The Ninth Circuit has held, however, that when application of
 25 Rule 37(c)(1) sanctions will "amount[] to dismissal of a claim, the district court [i]s
 26 required to consider whether the claimed noncompliance involved willfulness, fault, or
 27 bad faith." *R & R Sails*, 673 F.3d at 1247. The Court's exclusion of the six declarations
 28 does not amount to dismissal of Plaintiffs' claim. As the Court explains below, the grant
 of the Secretary's motion for summary judgment is not based on the absence of these
 witnesses, and their presence would not result in a different outcome.

Competency is not the question. The Secretary's objection is based on hearsay, and Plaintiffs provide no basis for finding that Kielsky's statements regarding Mr. Kelly's signature-collection efforts are not hearsay or fall within a hearsay exception. Plaintiffs assert that the record upon which Kielsky relied has been placed in the record, and cite to the Second Declaration of Michael Kielsky (*id.*), but the second declaration merely attaches an email from Mr. Kelly stating that he has devoted 45 days (not 70 days) to "getting on the ballot" (Doc. 10 at 26). Nothing about the email suggests a solution to the hearsay problem. It clearly is an out-of-court statement offered for the truth of the matter asserted, and Plaintiffs identify no rule that would permit its admission at trial or in support of their summary judgment motion.⁵

The Secretary also asks the Court to strike a statement first contained in Plaintiffs' reply brief. Doc. 73 at 6. Plaintiffs quote a letter from a supporter sent to Kielsky, stating that the supporter "couldn't interest any independents (other than family) to sign" his nomination petitions. Doc. 71 at 18 (quoting Doc. 10 at 28). This too is hearsay, and Plaintiffs have identified no basis on which it is admissible.

IV. Constitutional Analysis.

Plaintiffs argue that A.R.S. §§ 16-321 and 16-322 violate the First and Fourteenth Amendments. Doc. 42. Specifically, Plaintiffs contend that the provisions place an impermissible burden on them under the Supreme Court's ballot access jurisprudence and in violation of their rights to freedom of speech, petition, assembly, and association for political purposes. Doc. 42 at 21-22, ¶ 59 (Count I); Doc. 63 at 4. Plaintiffs also argue that the provisions violate their rights to freedom of association and equal protection of the laws. Doc. 42 at 22-25 (Counts II and IV); Doc. 63 at 4, 13-16.⁶

⁵ The email from Mr. Kelly is address to AZLP (Doc. 10 at 26), but Plaintiffs provide no evidence or argument that the email would be admissible as a business record of AZLP under Rule 803(6).

⁶ In Count III, Plaintiffs allege a separate violation of their right to form a political party under the First and Fourteenth Amendments. Doc. 42 at 22-23. While they present a separate argument section concerning this right in their briefing (Doc. 71 at 19-20), they do not identify a separate test to be applied in determining if this right has been violated.

1 “States have a major role to play in structuring and monitoring the election
2 process,” but this power is not without limits. *California Democratic Party v. Jones*, 530
3 U.S. 567, 572 (2000). “Restrictions upon the access of political parties to the ballot
4 impinge upon the rights of individuals to associate for political purposes, as well as the
5 rights of qualified voters to cast their votes effectively, and may not survive scrutiny
6 under the First and Fourteenth Amendments.” *Munro v. Socialist Workers Party*, 479
7 U.S. 189, 193 (1986). “A court considering a challenge to a state election law must
8 weigh the character and magnitude of the asserted injury to the rights protected by the
9 First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise
10 interests put forward by the State as justifications for the burden imposed by its rule,
11 taking into consideration the extent to which those interests make it necessary to burden
12 the plaintiff’s rights.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quotation marks
13 and citation omitted); *accord. Nader v. Brewer*, 531 F.3d 1028, 1034 (9th Cir. 2008).

14 Thus, the validity of a state election law is determined by applying a “balancing
15 and means-ends fit analysis.” *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019,
16 1024 (9th Cir. 2016). If the First and Fourteenth Amendment rights “are subjected to
17 ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of
18 compelling importance.’ But when a state election law provision imposes only
19 ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment
20 rights of voters, ‘the State’s important regulatory interests are generally sufficient to
21 justify’ the restrictions.” *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S.
22 279, 289 (1992)). There is no litmus-paper test for separating valid and invalid election
23 restrictions. Courts must make hard judgments based on the facts and circumstances of
24 each case. *Storer v. Brown*, 415 U.S. 724, 730 (1974). In this case, the Court must
25 balance Arizona’s interest in ensuring a modicum of support for general election

26
27 Courts have identified the First and Fourteenth Amendment rights of voters and
28 candidates implicated by ballot access restrictions, and tend to analyze them together
using one test. *See Anderson v. Celebrezze*, 460 U.S. 780, 786 & n.7 (1983). As a result,
the Court will consider Count III together with Count I, applying the test outlined below.

1 candidates against the burden imposed on Plaintiffs' First and Fourteenth Amendment
2 rights by A.R.S. §§ 16-321 and 16-322.

3 **A. The Burden on Plaintiffs.**

4 **1. Relevant Supreme Court Cases.**

5 The Supreme Court has on several occasions addressed the constitutionality of
6 state limitations on the ability of candidates to appear on the ballot. In *Williams v.*
7 *Rhodes*, 393 U.S. 23 (1968), the Supreme Court addressed a series of election laws in
8 Ohio that required members of new political parties who wished to appear on the
9 presidential ballot to submit petitions signed by 15% of the number of voters in the last
10 gubernatorial election and to satisfy other procedural hurdles. *Id.* at 24-25. The Supreme
11 Court found that Ohio's "restrictive provisions [made] it virtually impossible for any
12 party to qualify on the ballot except the Republican and Democratic Parties" (*id.* at 25),
13 and held that the Ohio laws violated the Equal Protection Clause of the Fourteenth
14 Amendment (*id.* at 34).

15 In *Jenness v. Fortson*, 403 U.S. 431 (1971), the Supreme Court addressed a
16 Georgia law that permitted a candidate who failed to enter or win his party's primary
17 election to have his name placed on the general election ballot if he obtained signatures
18 from 5% of the voters eligible to vote in the last general election. *Id.* at 432. The Court
19 found that the 5% requirement, although higher than most states, was "balanced by the
20 fact that Georgia [had] imposed no arbitrary restrictions whatever upon the eligibility of
21 any registered voter to sign as many nominating petitions as he wishes." *Id.* at 442. The
22 Court upheld the 5% requirement. *Id.*

23 In *Storer*, the Supreme Court examined a California law that required independent
24 candidates who wished to appear on the general election ballot to obtain signatures of
25 between 5% and 6% of the entire vote cast in the preceding general election in the area
26 where the candidate sought office. 415 U.S. at 726-27. The candidate's petition could
27 not, however, be signed by voters who had voted in the preceding primary election (*id.* at
28 739), and all signatures had to be obtained during a 24-day period following the primary

1 (*id.* at 727). Because the pool of qualified signers was reduced by excluding primary
2 election voters – a reduction which would have the effect of requiring a candidate to
3 obtain signatures from more than 5% or 6% of the available signers – the Supreme Court
4 remanded the case to determine the precise extent of the burden. *Id.* at 740, 746.

5 In *American Party of Texas v. White*, 415 U.S. 767 (1974), the Supreme Court
6 considered a series of Texas laws that provided four methods for placing candidates on
7 the general election ballot. *Id.* at 772. Of particular relevance here, minor political
8 parties were allowed to nominate candidates through party conventions. *Id.* at 777. But
9 to have these nominees appear on the general ballot, the parties were required to
10 demonstrate support in the form of convention participants numbering at least 1% of the
11 total votes cast for governor at the last general election. *Id.* If the required number of
12 individuals did not participate in the nominating convention, the party could secure its
13 candidate’s position on the general ballot by circulating petitions for signature. *Id.* The
14 party was required to obtain signatures from persons equaling 1% of the total votes in the
15 last gubernatorial election, but a voter who had already participated in any other party’s
16 primary election or nominating process was ineligible to participate in a second
17 nominating convention or sign a petition. *Id.* at 778. Additionally each signer had to
18 give a notarized oath that she had not participated in any other party’s nominating or
19 qualification proceeding. *Id.* The Court upheld this scheme, finding, as a whole, that it
20 “afford[ed] minority political parties a real and essentially equal opportunity for ballot
21 qualification.” *Id.* at 788.

22 In *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the Supreme Court
23 addressed the validity of a Washington law which required that a minority-party
24 candidate for an office receive at least 1% of all votes cast for that office in the State’s
25 blanket primary election before she would be included on the general election ballot. *Id.*
26 at 190. Because Washington used a blanket primary, registered voters could vote for any
27 candidate regardless of the candidate’s party affiliation. *Id.* at 192. The Court noted that
28 “States may condition access to the general election ballot by a minor-party or

1 independent candidate upon a showing of a modicum of support among the potential
 2 voters for the office.” *Id.* at 194. Emphasizing that there is no “litmus-paper test” for
 3 deciding when a ballot restriction violates First and Fourteenth Amendment rights, the
 4 Court held that the Washington requirement was valid. *Id.* at 195, 199.⁷

5 **2. The Burden Imposed by the Arizona Statutes.**

6 Plaintiffs contend that no federal court has upheld a statute requiring support from
 7 more than 5% of eligible voters, and that A.R.S. §§ 16-321 and 16-322 require AZLP
 8 candidates to secure support from up to 30% of eligible voters in AZLP’s closed primary.
 9 Doc. 71 at 7. In making this argument, Plaintiffs compare the number of signatures or
 10 write-in votes required by the statutes to the number of voters eligible to vote in AZLP’s
 11 closed primary. Doc. 63 at 5. Using this denominator, Plaintiffs assert that they are
 12 required to collect signatures or write-in votes of between 11% and 30% of eligible voters
 13 for the primary.

14 The Court’s previous order questioned whether this was the correct math –
 15 whether the required number of petition signatures or write-in votes should be divided by
 16 the number of voters who can participate in the AZLP closed primary or by the number
 17 of qualified signers under the statute. Doc. 34 at 8-10. The two approaches produce very
 18 different results. Dividing by the number of qualified signers results in the percentages

19
 20 ⁷ The Ninth Circuit considered the constitutionality of ballot access restrictions in
 21 *Lightfoot v. Eu*, 964 F.2d 865, 869 (9th Cir. 1992), *as amended* (July 6, 1992). *Lightfoot*
 22 considered a challenge to a California law which provided that write-in candidates could
 23 qualify for the general election ballot by receiving votes in the primary “equal in number
 24 to 1 percent of all votes cast for the office at the last preceding general election.” *Id.* at
 25 866. As here, AZLP had chosen to hold a closed primary. *Id.* at 870. The Ninth Circuit
 26 upheld the requirement, finding it “not significant that it was impossible for any
 27 Libertarian write-in candidate to meet the 1% threshold in the 1988 primary.” *Id.* at 870.
 28 It noted that “the small number of voters eligible to vote in the Libertarian primary is not
 an impediment created by the State of California[,]” and that the party could choose to
 open its primary to non-party members or increase its membership to reduce its burden.
Id. As the Court noted in its previous order, *Lightfoot* is not controlling because the
 Ninth Circuit based its ruling at least in part on the fact that California law included an
 alternative path that provided “easy access to the primary ballot” – a minor party
 candidate could simply gather 40 to 65 signatures. *Id.* at 870-72. While Arizona law
 provides an alternate route of signature gathering to appear on the primary ballot,
 Arizona’s signature requirements are significantly higher than those imposed by the
 California law. Thus, the Court must still consider the Arizona scheme as a whole to
 determine whether it provides reasonable access to the ballot.

1 identified in the statutes – between 0.25% and 0.50% for most offices. Doc. 70 at 1, ¶ 2;
2 Doc. 72-2 at 1, ¶ 2. This is well within the 5% limit upheld by the Supreme Court.
3 Dividing by the number of AZLP registered voters allowed to participate in the closed
4 primary produces the much larger percentages emphasized by Plaintiffs – up to 30% for
5 some offices. Doc. 34 at 10.

6 Plaintiffs advance several arguments in support of their math. The Court will
7 address these arguments in the next section of this order, but first will look at the actual
8 numbers involved in this case.

9 Plaintiffs agreed during oral argument that Arizona could, consistent with *Jenness*
10 and other Supreme Court cases, require candidates to obtain signatures from 5% of the
11 voters eligible to vote in the last general election, provided it did not erect other obstacles
12 to their participation. *See Jenness*, 403 U.S. at 442. During the 2016 general election,
13 there were 3,588,466 registered voters in Arizona. *See* Arizona Secretary of State, Voter
14 Registration & Historical Election Data, [https://www.azsos.gov/elections/voter-](https://www.azsos.gov/elections/voter-registration-historical-election-data)
15 [registration-historical-election-data](https://www.azsos.gov/elections/voter-registration-historical-election-data) (last visited July 3, 2017). Thus, Arizona lawfully
16 could require an AZLP candidate to obtain 179,423 signatures – 5% of the total number
17 of registered voters – to appear on the general election ballot for a statewide office.

18 Instead, Arizona has adopted a two-step process. First, AZLP has qualified as a
19 party entitled to continuing representation on the general election ballot by having a
20 membership equal to at least two-thirds of one percent of all registered voters in the State
21 (at least 23,684 members in 2016). A.R.S. § 16-804(B). Second, as members of such a
22 qualified party, AZLP candidates for general state offices must obtain petition signatures
23 or write-in votes equal to 0.25% of qualified signers under the statute, which in 2016
24 amounted to 3,034. Doc. 42-2 at 3.

25 The contrast between what is constitutionally permissible (179,423 petition
26 signatures) and what Arizona requires (party membership of less than one percent of
27 registered voters and petition signatures or write-in votes totaling 3,034) is striking.
28 Looking only at these numbers, and recognizing that Plaintiffs make other arguments that

1 must be addressed below, it is difficult to conclude that Arizona's requirement is
2 unconstitutionally burdensome. Statements in various Supreme Court cases seem to
3 confirm this initial impression. In *Storer*, the Court observed:

4 Standing alone, gathering 325,000 signatures in 24 days would not appear
5 to be an impossible burden. Signatures at the rate of 13,542 per day would
6 be required, but 1,000 canvassers could perform the task if each gathered
7 14 signers a day. On its face, the statute would not appear to require an
8 impractical undertaking for one who desires to be a candidate for President.

9 415 U.S. at 740. In *American Party*, the Supreme Court noted that collecting 22,000
10 signatures in 55 days “does not appear to be either impossible or impractical, and we are
11 unwilling to assume that the requirement imposes a substantially greater hardship on
12 minority party access to the ballot.” 415 U.S. at 783, 786.

13 Comparison to other Arizona parties and candidates is also informative.
14 Independent candidates may appear on the Arizona general election ballot only if they
15 obtain signatures from 3% of voters registered to vote in the relevant jurisdiction and who
16 are not affiliated with a party qualified for representation on the next general election
17 ballot. A.R.S. § 16-341 (E), (F). In 2016, this required 37,077 signatures to appear on
18 the general election ballot for statewide office, more than ten times the number required
19 from AZLP candidates. *See* Arizona Secretary of State, Voter Registration & Historical
20 Election Data, <https://www.azsos.gov/elections/voter-registration-historical-election-data>
21 (last visited July 3, 2017) (reporting 1,235,911 registered voters in Arizona in 2016 who
22 were not members of the Democratic, Green, AZLP, or Republican parties).

23 Candidates from the major parties also have higher burdens than AZLP
24 candidates. Republican candidates for statewide office must secure 5,801 petition
25 signatures or write-in votes to make the general ballot, and Democratic candidates must
26 secure 5,352. Doc. 42-2 at 3; Doc. 70 at 3, ¶ 10. The requirement for Green Party
27 candidates is lower – 806 signatures or write-in votes – but the Green Party faces a hurdle
28 AZLP does not. *Id.* Because the Green Party does not have enough members to qualify
 for continuing representation on the general ballot, the Green Party must secure at least

1 25,000 petition signatures every four years, a requirement not imposed on AZLP,
 2 Republicans, or Democrats. A.R.S. § 16-803; Doc. 42-4 at 2, ¶ 3; Doc. 70 at 7, ¶ 38.

3 Thus, when actual numbers are considered, the ballot-qualification requirements
 4 for AZLP candidates are well below constitutionally permissible requirements and lower
 5 than those imposed on other candidates in Arizona.

6 **3. Plaintiffs' Arguments.**

7 As noted, Plaintiffs argue that the Arizona laws are unconstitutional because they
 8 require signatures or write-in votes from more than 5% of voters when the percentage is
 9 calculated on the basis of persons permitted to vote in their closed primary. Plaintiffs
 10 make several arguments in support of this math. The Court does not find them
 11 persuasive.⁸

12 **a. Ballot Qualification of AZLP.**

13 Plaintiffs argue that Arizona has already determined that AZLP has the requisite
 14 modicum of support to qualify for continued representation on the ballot, and that no
 15 additional requirements are needed to further the State's interest. Doc. 63 at 5. As
 16 Plaintiffs acknowledge, however, support for a party is distinct from support for a
 17 candidate. *Id.* at 5-6. Cases recognize that states have a legitimate interest in ensuring
 18 that *candidates* – not just parties – have a significant modicum of support before their
 19 names appear on general ballots. *See Anderson*, 460 U.S. at 788 n.9 (“The State has the
 20 undoubted right to require *candidates* to make a preliminary showing of substantial
 21

22 ⁸ Plaintiffs make some separate arguments with respect to Arizona's write-in
 23 requirements for ballot access. To the extent Plaintiffs argue that write-in requirements
 24 are too stringent because they can be satisfied only through votes in the limited primary
 25 election, the Court notes that states are not required to provide a write-in method for
 26 qualifying for a general election ballot. *Burdick*, 504 U.S. at 441 (“when a State's ballot
 27 access laws pass constitutional muster as imposing only reasonable burdens on First and
 28 Fourteenth Amendment rights . . . a prohibition on write-in voting will be presumptively
 valid.”). If a state's ballot-qualification scheme can pass constitutional muster by
 providing no write-in method for qualifying, it certainly can pass constitutional muster by
 providing a restricted write-in method, so long as its other ballot-access methods are
 reasonable. Because the Court finds Arizona's signature method reasonable, it need not
 address Plaintiffs' separate write-in arguments.

1 support in order to qualify for a place on the ballot, because it is both wasteful and
2 confusing to encumber the ballot with the names of frivolous *candidates*.”) (emphasis
3 added); *Am. Party*, 415 U.S. at 789 (“requiring *independent candidates* to evidence a
4 ‘significant modicum of support’ is not unconstitutional”) (quoting *Jenness*, 403 U.S. at
5 442) (emphasis added, footnote omitted). Indeed, state restrictions upheld by the
6 Supreme Court focus on individual candidates, requiring them to obtain a specified
7 number of petition signatures to appear on a general ballot. *See, e.g., Storer*, 415 U.S. at
8 727.

9 No stretch of the imagination is needed to conclude that a candidate could run for
10 office without significant support, despite the existence of general support for her party.
11 If a candidate was not required to show any threshold of support through votes or petition
12 signatures, she could win her primary and reach the general ballot with no significant
13 modicum of support at all. This is especially true where, as here, “Libertarian candidates
14 typically run unopposed in the AZLP primary[.]” Doc. 71 at 15. An unopposed
15 candidate could win a spot on the general election ballot with only one vote in such a
16 primary.

17 Plaintiffs appear to concede that the State has an independent interest in requiring
18 an individual candidate to show that she enjoys sufficient support to be included on the
19 ballot. Plaintiffs argue, however, that primary elections are inherently unsuitable for
20 measuring voter support for minor party candidates. Doc. 63 at 7. They emphasize that
21 AZLP candidates generally receive large numbers of votes in general elections but few
22 votes in primary elections, and thus primary vote totals do not show whether they enjoy
23 support “among the general electorate.” *Id.*

24 But Plaintiffs are not limited to showing support by obtaining votes in the primary
25 election. AZLP candidates may obtain the designated number of signatures from
26 qualified signers before the primary, win the primary with fewer votes, and still be placed
27 on the general election ballot. If Plaintiffs are concerned that the true level of their
28 support is more accurately reflected by results in the general election, rather than results

1 in their smaller closed primary, then A.R.S. §§ 16-321 and 16-322 take a step in that
 2 direction by permitting AZLP to obtain signatures not only from registered AZLP voters,
 3 but also from registered independents and unaffiliated voters – a pool totaling more than
 4 one million voters in Arizona. Doc. 70 at 3, ¶ 16; Doc. 72-2 at 4, ¶ 16.

5 What is more, nothing in the Arizona statutes suggests that the State views a
 6 party's qualification for ballot access as sufficient for individual candidate qualification.
 7 To the contrary, parties who meet the requirements for representation on the ballot
 8 qualify, under the language of the statute, only to have a "column" on the general election
 9 ballot. A.R.S. § 16-801(A). They do not qualify to have candidates on the ballot. *Id.*
 10 Candidates must meet the additional support requirements through petition signatures or
 11 write-in votes. A.R.S. §§ 16-321, 16-322. This structure shows that Arizona does not
 12 view a party's qualification as tantamount to candidate qualification.

13 **b. Supreme Court References to "Eligible Voters."**

14 Plaintiffs argue that "[e]very Supreme Court and lower federal court decision
 15 analyzing the constitutionality of ballot access laws cited by the parties in the
 16 proceedings thus far measures the modicum of support that such a law requires as a
 17 percentage of eligible voters." Doc. 63 at 6. True, but this does not mean that the phrase
 18 "eligible voters" can be lifted from the cases and applied to the AZLP closed primary.
 19 None of the Supreme Court cases addressed a closed primary; each addressed
 20 qualification requirements for general election ballots. *See Williams*, 393 U.S. 23;
 21 *Jenness*, 403 U.S. 431; *Storer*, 415 U.S. 724; *Am. Party*, 415 U.S. 767; *Munro*, 479 U.S.
 22 189.

23 This distinction is significant. The Supreme Court has held that states may require
 24 candidates to show support from up to 5% of the general electorate. *See, e.g., Jenness*,
 25 403 U.S. 431. Arizona requires a showing of support from between 0.25 and 0.50% of
 26 qualified signers – a group smaller than the general electorate – and therefore requires an
 27 even lower percentage of the general electorate. This is best illustrated with actual
 28 numbers. In 2016, Arizona had 3,588,466 registered voters. Arizona Secretary of State,

1 Voter Registration & Historical Election Data, [https://www.azsos.gov/elections/voter-](https://www.azsos.gov/elections/voter-registration-historical-election-data)
2 registration-historical-election-data (last visited July 3, 2017). For AZLP candidates for
3 statewide office, there were 1,188,771 qualified signers. Doc. 69 at 7; Doc. 70 at 3, ¶¶
4 16, 17; Doc. 72-2 at 4, ¶¶ 16, 17. 0.50% of these qualified signers – which totals 5,944
5 voters – would be 0.16% of the total registered voters. 0.25% would be 2,972 voters,
6 equal to 0.08% of total registered voters. Thus, Arizona effectively requires AZLP
7 candidates to obtain signatures from less than 0.20% of registered voters, well below the
8 5% upheld by the Supreme Court.

9 While the Supreme Court has upheld state laws requiring candidates to obtain
10 signatures from up to 5% of the general electorate, additional state law restrictions on
11 who may sign candidate petitions may increase the burden on candidates and thus affect
12 the constitutionality of the state laws in question. In *Storer*, the Supreme Court
13 considered a law that limited those eligible to sign a nomination petition for an
14 independent candidate to registered voters who had not participated in the primary
15 election. 415 U.S. at 739. The Court noted that this limitation could substantially reduce
16 the pool of eligible signers and thus increase the candidate’s burden to obtain signatures
17 to an amount exceeding 5% of eligible signers. *Id.* at 739. Noting that this “would be in
18 excess, percentagewise, of anything the Court ha[d] approved to date,” the Court
19 remanded the case to determine the precise extent of the burden. *Id.* at 739, 746. A
20 similar problem does not exist here. Arizona has limited those who may sign a nominee
21 petition to “qualified signers,” but this is a substantial pool that included 1,188,771
22 potential signers in 2016. Doc. 69 at 7; Doc. 70 at 3, ¶¶ 16, 17; Doc. 72-2 at 4, ¶¶ 16, 17.
23 Arizona requires that AZLP candidates obtain signatures from 0.50% or less of this pool.

24 **c. Other Responses to Plaintiffs’ Math.**

25 Plaintiffs’ use of closed-primary voters as the denominator in its percentage
26 calculations is flawed for several additional reasons, some of which are related to the
27 discussion above.

1 First, in *Munro*, the Supreme Court noted that “it is now clear that States may
2 condition access to the general election ballot by a minor-party or independent candidate
3 upon a showing of a modicum of support among *the potential voters for the office*.”
4 479 U.S. at 193 (emphasis added). The potential voters for the office are those who will
5 vote in the general election. Measuring support for a candidate only within his own
6 party, as Plaintiffs do by focusing on their closed primary, does not show the support a
7 candidate enjoys among voters for her office in the general election. Plaintiffs identify
8 no case where the required modicum of support was measured in such a way.

9 Second, although Arizona requires parties to hold primaries, and specifies the
10 number of petition signatures required to appear on the primary ballot, it requires this as
11 part of a process for appearing on the general election ballot – the ultimate object of the
12 Arizona legislation. As noted above, a person who obtains the required number of
13 signatures for the AZLP primary can qualify for the general election ballot even if she
14 receives fewer votes in the primary than the number of petition signatures she obtained.
15 She simply must win the primary, even with only a single vote. Thus, the modicum of
16 support is shown by the petition signatures (or in the number of write-in votes if the
17 candidate chooses that path). The Supreme Court has recognized that states may use
18 primaries as the method for establishing a sufficient modicum of support to appear on a
19 general election ballot. *Munro*, 479 U.S. at 196 (“The primary election . . . functions to
20 winnow out and finally reject all but the chosen candidates. We think that the State can
21 properly reserve the general election ballot for major struggles . . . by conditioning access
22 to that ballot on a showing of a modicum of voter support.”) (quotation marks and
23 citations omitted); *id.* at 197-98 (“To be sure, candidates must demonstrate, through their
24 ability to secure votes at the primary election, that they enjoy a modicum of community
25 support in order to advance to the general election. But requiring candidates to
26 demonstrate such support is precisely what we have held States are permitted to do.”).
27 Because the ultimate effect of the Arizona legislation is to determine who appears on the
28 general election ballot, the Arizona percentage requirements should be compared to the

1 general electorate, consistent with the Supreme Court cases discussed above. As shown
2 above, the percentage of general election voters from whom AZLP candidates must
3 obtain signatures is well below 5%.

4 Third, if the percentage of closed-primary voters is relevant at all, AZLP
5 candidates are not helpless to affect it. While some candidates may have been required to
6 obtain signatures or primary votes from 30% of registered AZLP voters this year, they
7 could reduce this percentage in subsequent years by attracting more voters to AZLP. The
8 facts suggest that increasing AZLP membership is feasible. As the Secretary notes,
9 membership increased from 24,394 in 2016 to 31,886 by April 1, 2017. Doc. 70 at 3, 6
10 ¶¶ 17, 34; Doc. 72-2 at 4, 6-7 ¶¶ 17, 34. A party may not use its low membership to
11 reduce the support it must show for presence on the general ballot. States are not
12 required to grant an advantage to less popular candidates to ensure they appear on the
13 general election ballot. *See Munro*, 479 U.S. at 198. States only need ensure that the
14 requirements of support for the office are reasonable and do not freeze the political status
15 quo, but offer a real opportunity for minority and independent candidates to qualify for
16 the ballot. *Am. Party*, 415 U.S. at 787.

17 In summary, the Court concludes that the Arizona legislation should be analyzed
18 by looking to the percentage of qualified signers or the general electorate, not by focusing
19 solely on the number of voters in AZLP's closed primary. When so tested, Arizona's
20 requirement falls well below the 5% requirement upheld in Supreme Court cases.

21 **4. 2016 Election Results.**

22 There is no dispute that the Arizona statutes increased the number of signatures
23 AZLP candidates must obtain. For the 2016 election, AZLP candidates for state
24 legislative positions were required to obtain signatures or write-in votes from between
25 144 and 273 qualified signers, depending on the size of their district. Doc. 70 at 2, ¶ 4;
26 Doc. 72-2 at 2, ¶ 4. Prior to H.B. 2608, these candidates had signature requirements as
27 low as 7 signatures. Similarly, an AZLP candidate for Congress was required to obtain
28 between 529 and 785 signatures or write-in votes in 2016, but previously needed only

1 between 24 and 43 signatures to qualify for the ballot. Doc. 70 at 2, ¶¶ 7, 8; Doc. 72-2 at
2 2, ¶¶ 7, 8. Candidates for statewide office, such as governor, need signatures from 0.25%
3 of qualified signers. Doc. 70 at 3, ¶ 10; Doc. 72-2 at 3, ¶ 10. In 2016, this amounted to
4 3,034 signatures for AZLP candidates. Doc. 70 at 3, ¶ 10; Doc. 72-2 at 3, ¶ 10. Prior to
5 H.B. 2608, an AZLP gubernatorial candidate was required to submit 133 valid signatures.
6 Doc. 70 at 3, ¶ 11; Doc. 72-2 at 3, ¶ 11.

7 It is undisputed that only one AZLP candidate qualified for the primary ballot in
8 2016 under the new signature requirements. Doc. 64 at 3, ¶ 11; Doc. 70 at 12, ¶ 11.
9 Plaintiffs state that none appeared on the general election ballot. In contrast, 35 AZLP
10 candidates appeared on the general election ballot in 2004, 19 in 2008, and 18 in 2012.
11 Doc. 64 at 3, ¶ 10; Doc. 70 at 11, ¶ 10.

12 The Supreme Court has addressed the evidentiary value of comparing the number
13 of minority party candidates appearing on the ballot before and after enactment of a
14 challenged ballot access law. While such comparison is relevant, it is not controlling. As
15 the Supreme Court explained in *Munro*:

16 Much is made of the fact that prior to 1977, virtually every minor-party
17 candidate who sought general election ballot position so qualified, while
18 since 1977 only 1 out of 12 minor-party candidates has appeared on that
19 ballot. Such historical facts are relevant, but they prove very little in this
20 case, other than the fact that § 29.18.110 does not provide an insuperable
21 barrier to minor-party ballot access. It is hardly a surprise that minor
22 parties appeared on the general election ballot before § 29.18.110 was
23 revised; for, until then, there were virtually no restrictions on access.
24 Under our cases, however, Washington was not required to afford such
25 automatic access and would have been entitled to insist on a more
substantial showing of voter support. Comparing the actual experience
before and after 1977 tells us nothing about how minor parties would have
fared in those earlier years had Washington conditioned ballot access to the
maximum extent permitted by the Constitution.

26 479 U.S. at 196-97.

27 The Court finds the present case very similar to *Munro*, where Washington passed
28 a law which required candidates to receive at least 1% of all votes cast for the candidates'

1 office in the state's open primary election before the candidate's name would be placed
2 on the general election ballot. The Ninth Circuit found the law invalid primarily because
3 of its practical effect on minor party candidates. The Court of Appeals noted that "[p]rior
4 to 1977, candidates of minor parties qualified for the general election ballot in contests
5 for statewide office with regularity," but "[t]he 1977 amendment . . . worked a striking
6 change." *Socialist Workers Party v. Sec'y of State of Wash.*, 765 F.2d 1417, 1419 (9th
7 Cir. 1985). "According to the affidavit of Washington's Supervisor of Elections, since
8 1977 minor parties have not been successful at qualifying candidates for the state general
9 election ballot for statewide offices. Although one or more minor parties nominated
10 candidates in each of the four statewide elections held between 1978 and 1983, none
11 qualified for the general election ballot." *Id.* (quotation marks omitted). Given these
12 results, the Ninth Circuit found that Washington's ballot access law seriously impinged
13 on the plaintiffs' protected rights and that Washington had "failed to present an interest
14 substantial enough to warrant the restraint imposed on those rights." *Id.* at 1422.

15 The Supreme Court reversed, even in the face of the election results on which the
16 Ninth Circuit relied. 479 U.S. at 196-97. The Supreme Court noted that its previous
17 cases "establish with unmistakable clarity that States have an 'undoubted right to require
18 candidates to make a preliminary showing of substantial support in order to qualify for a
19 place on the ballot[.]'" *Id.* at 194 (quoting *Anderson*, 460 U.S. at 788-89). Because the
20 Washington law imposed lower requirements than the laws upheld in *Jenness* and
21 *American Party*, the Supreme Court found it constitutional. *Id.* at 199.

22 Plaintiffs in this case make essentially the same argument as the plaintiffs in
23 *Munro*. They cite statistics showing that it is now more difficult for their candidates to
24 qualify for the primary and general election ballots. But the Supreme Court in *Munro*,
25 *American Party*, and *Jenness* upheld state ballot qualification laws that were more
26 burdensome than Arizona's. The laws in these cases required candidates to demonstrate
27 support of between 1% and 5% of all registered voters, where Arizona requires only
28 between 0.25% and 0.50% of the smaller pool of qualified signers – and, as shown above,

1 an even smaller percentage of registered voters. In light of these Supreme Court cases
2 and the discussion of actual election results in *Munro*, the Court cannot conclude that
3 Plaintiffs have shown an unconstitutional burden.

4 **5. Impact of the Scheme as a Whole.**

5 Courts must review a state's ballot-access scheme as a whole. *Storer*, 415 U.S. at
6 730. The Court accordingly will consider other restrictions in the Arizona law.

7 Only two restrictions are apparent: AZLP candidates are limited to collecting
8 signatures from qualified signers, and an individual who signs a nominating petition may
9 not sign any other nominating petition. A.R.S. § 16-321(A), (E). These are not
10 significant restrictions. Candidates may obtain signatures physically or electronically,
11 A.R.S. §§ 16-321, 16-316-318, and, unlike many states, Arizona imposes no time limit on
12 signature gathering as long as the nomination petitions are filed between 120 and 90 days
13 before the primary election, A.R.S. 16-314. Other than complaining about the number of
14 signatures required, Plaintiffs do not argue that Arizona has unduly restricted the
15 signature gathering process.

16 Plaintiffs do contend that they cannot, in practice, obtain signatures from non-
17 party members. They argue that because "[n]on-members are not permitted to vote in
18 AZLP's primary, [] independent and unaffiliated voters have no incentive to support a
19 candidate seeking to run in such an election." Doc. 63 at 7. As a result, they argue, they
20 are not able to obtain signatures from non-party members in practice. But this assertion
21 is hard to square with Plaintiffs assertion that they regularly receive significant support in
22 the general election. Doc. 63 at 7. If a registered independent or unaffiliated voter
23 supports an AZLP candidate in the general election, she has every incentive to sign the
24 candidate's nominating petition. Plaintiffs cite declarations to support their assertion that
25 the closed nature of AZLP's primary election deters independent and unaffiliated voters
26 from signing their petitions. But the cited declarations actually show that it is a
27 difference in philosophy between the voters and AZLP, or a reluctance by the candidates
28 to seek support from these voters, that keeps AZLP candidates from obtaining the

1 signatures of independent voters. *See, e.g.*, Doc. 42-4 at 3, ¶ 7 (declaration from Kim
2 Allen asserting that she does not like to seek support from independent voters and they do
3 not generally want to sign her petition because they are not part of the party and “may not
4 share [their] political philosophy and goals”).

5 The parties dedicate significant briefing to the question of whether AZLP
6 candidates exercised reasonable diligence when trying to secure placement on the 2016
7 ballot. They reach contrary answers, relying on declarations and expert opinions
8 concerning the quality of the efforts made by AZLP candidates and what could
9 reasonably be expected of them. Facts relating to the ability of candidates to obtain ballot
10 access in practice may inform the Court’s inquiry into the reasonableness of the burden
11 imposed on Plaintiffs. *See Munro*, 479 U.S. at 196-98; *Nader*, 531 F.3d at 1035. But
12 where the Court has determined that the quantity of signatures required for ballot access
13 falls well within the 5% requirement generally upheld by the Supreme Court, and
14 Plaintiffs have not identified any additional restrictions that would increase the burden
15 imposed on them, the Court need not engage in a detailed and extensive factual
16 consideration of the hours and techniques employed by each AZLP candidate to obtain
17 signatures or write-in votes. While the Supreme Court has directed lower courts to
18 consider whether a reasonably diligent candidate could be expected to satisfy the
19 signature requirements and gain a place on the ballot, *Storer*, 415 U.S. at 742, evidence
20 that some candidates struggled to satisfy those requirements is not, as *Munro* shows,
21 sufficient to show that the scheme imposed an unconstitutional burden. As the Supreme
22 Court has made clear, states are not required to provide candidates with essentially
23 “automatic access” to the ballot. *Munro*, 479 U.S. at 197.

24 Plaintiffs additionally argue that AZLP candidates must seek signatures from
25 independent and unaffiliated voters, a requirement that violates their right to freedom of
26 association. Plaintiffs rely on *California Democratic Party v. Jones*, a case in which the
27 Supreme Court considered a California law mandating the use of a blanket open primary
28 to select each party’s nominee. 530 U.S. at 570, 581-82. The Court noted that “a

1 corollary of the right to associate is the right not to associate,” and “[i]n no area is the
2 political association’s right to exclude more important than in the process of selecting its
3 nominee.” *Id.* at 574, 575. Forcing a party to involve non-members in its nominee
4 selection process will inevitably change the party’s message. *Id.* at 581-82. As a result, a
5 law requiring parties to open their nominee selection process to non-party members
6 imposes a heavy burden and is “unconstitutional unless it is narrowly tailored to serve a
7 compelling state interest.” *Id.* at 582.

8 The Ninth Circuit similarly considered the validity of an Arizona provision
9 allowing voters who were unaffiliated, registered as independents, or registered as
10 members of parties that are not on the primary ballot to vote in the primary of their
11 choice. *Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1280 (9th Cir. 2003).
12 Relying on *Jones*, the Ninth Circuit emphasized that forced association with non-
13 members in the nominee selection process raised a risk of “influenc[ing] the choice of the
14 nominee at the primary and [] caus[ing] partisan candidates to change their message to
15 appeal to a more centrist voter base.” *Id.* at 1282. The Ninth Circuit noted that “forcing
16 the Libertarians to open their primary to nonmembers for the selection of party
17 candidates raises serious constitutional concerns,” but ultimately determined that
18 resolution of these concerns was a factual issue and remanded to the district court for
19 further consideration. *Id.* On remand, the district court found the provision
20 unconstitutional because it imposed a severe burden on AZLP that was not justified by a
21 compelling interest. *Arizona Libertarian Party v. Brewer*, No. 02-144-TUC-RCC (D.
22 Az. Sept. 27, 2007) (unpublished order).

23 *Jones* and *Bayless* are distinguishable from this case. The law in *Jones* directly
24 mandated the use of an open primary. Similarly, the law in *Bayless* mandated that
25 nonmembers be allowed to vote in AZLP’s primary. Here, Arizona law requires only
26 that AZLP candidates obtain a certain number of signatures before they may appear on
27 the primary ballot. They are not required by the law to seek those signatures from non-
28 AZLP voters. True, a candidate who cannot establish a modicum of support from the

1 ranks of her own party may feel the need to turn to nonmembers to supplement her
2 support, but the law does not require her to do so. This is a significant distinction from
3 the legally-mandated participation of other parties at issue in *Jones* and *Bayless*.

4 Because Plaintiffs are required, at most, to obtain signatures from 30% of
5 registered AZLP voters in any relevant jurisdiction, they can obtain sufficient signatures
6 without looking outside their party. If the candidates or the party find this too daunting a
7 task, they can work to increase their party membership. The Supreme Court has made
8 clear that Arizona is not required to decrease its ballot access requirements for the benefit
9 of less popular parties or candidates. *Munro*, 479 U.S. at 198 (“States are not burdened
10 with a constitutional imperative to reduce voter apathy or to ‘handicap’ an unpopular
11 candidate to increase the likelihood that the candidate will gain access to the general
12 election ballot.”).

13 There is another significant distinction between this case and the laws at issue in
14 *Jones* and *Bayless*. Those laws permitted nonmembers of a party to participate directly in
15 selection of the party’s candidates. In this case, although a candidate may feel the need to
16 seek signatures from qualified signers who are not members of her party, those signers
17 will not have the right to vote in the AZLP closed primary. Thus, AZLP will be free to
18 select its nominee without involvement of nonmembers.

19 Finally, the Court notes that Plaintiffs’ arguments could lead to absurd results.
20 Suppose a minority political party has only five members. If Plaintiffs’ associational
21 argument is correct, Arizona could not require the party’s candidates, as a practical
22 matter, to obtain petition signatures from anyone other than party members. And because
23 the party would be entitled to hold a closed primary under *Jones* and *Bayless*, the party
24 could place candidates on the general election ballot with support from five or fewer
25 voters. Such a result would be plainly inconsistent with Arizona’s “undoubted right to
26 require candidates to make a preliminary showing of substantial support in order to
27 qualify for a place on the ballot[.]” *Anderson*, 460 U.S. at 788-89.

1 The Court concludes that Arizona’s signature requirements, considered as a whole,
2 do not impose a severe burden on Plaintiffs’ right to freedom of association.

3 **B. Constitutional Balancing.**

4 In light of the discussion above, the Court concludes that the burden imposed on
5 Plaintiffs by A.R.S. §§ 16-321 and 16-322 is reasonable. This is true when the actual
6 numbers are considered, and whether the percentage requirement is calculated on the
7 basis of qualified signers or the general electorate. In both instances, Arizona imposes a
8 burden on Plaintiffs well below the 5% requirement upheld by the Supreme Court. The
9 fact that Plaintiffs placed fewer candidates on the ballot in 2016 is relevant, but not
10 determinative. The total number of signatures required for AZLP candidates is lower
11 than the numbers required for independent candidates and candidates from the two major
12 parties, and a lighter burden than imposed on Green Party candidates when the Green
13 Party’s four-year petition requirement is considered. The Court cannot conclude that
14 Plaintiffs have shown that the signature requirements pose an insurmountable obstacle to
15 ballot access. Comparing the higher burdens placed on the other parties and independent
16 candidates, the Court also concludes that the Arizona requirements are not discriminatory
17 against Plaintiffs.⁹

18 “[W]hen a state election law provision imposes only ‘reasonable,
19 nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of
20 voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the
21 restrictions.” *Burdick*, 504 U.S. at 434 (quoting *Norman*, 502 U.S. at 289). The Court
22 finds Arizona’s interests sufficient here. As the Supreme Court has held, “[t]here is
23

24 ⁹ It is well-accepted that states may impose different restrictions on parties’ access
25 to the ballot depending on their size and history. *See Jenness*, 403 U.S. at 441-42 (“The
26 fact is that there are obvious differences in kind between the needs and potentials of a
27 political party with historically established broad support, on the one hand, and a new or
28 small political organization on the other. Georgia has not been guilty of invidious
discrimination in recognizing these differences and providing different routes to the
printed ballot.”); *id.* at 440-41 (“We cannot see how Georgia has violated the Equal
Protection Clause of the Fourteenth Amendment by making available these two
alternative paths [to the ballot], neither of which can be assumed to be inherently more
burdensome than the other.”).

1 surely an important state interest in requiring some preliminary showing of a significant
 2 modicum of support before printing the name of a political organization's candidate on
 3 the ballot – the interest, if no other, in avoiding confusion, deception, and even frustration
 4 of the democratic process at the general election.” *Jenness*, 403 U.S. at 442; *see also*
 5 *Munro*, 479 U.S. at 193; *Am. Party*, 415 U.S. at 782; *Lightfoot*, 964 F.2d at 871.

6 Plaintiffs argue that the State has failed to show that it has a genuine interest in
 7 requiring a modicum of support before appearance on the general election ballot – that
 8 Arizona has not shown that it has experienced voter confusion or fraud. Doc. 71 at 15.
 9 But the Supreme Court has “never required a State to make a particularized showing of
 10 the existence of voter confusion, ballot overcrowding, or the presence of frivolous
 11 candidacies prior to the imposition of reasonable restrictions on ballot access.” *Munro*,
 12 479 U.S. at 194. As the Supreme Court explained:

13 To require States to prove actual voter confusion, ballot overcrowding, or
 14 the presence of frivolous candidacies as a predicate to the imposition of
 15 reasonable ballot access restrictions would invariably lead to endless court
 16 battles over the sufficiency of the “evidence” marshaled by a State to prove
 17 the predicate. Such a requirement would necessitate that a State's political
 18 system sustain some level of damage before the legislature could take
 19 corrective action. Legislatures, we think, should be permitted to respond to
 potential deficiencies in the electoral process with foresight rather than
 reactively, provided that the response is reasonable and does not
 significantly impinge on constitutionally protected rights.

20 *Id.* at 195-96.

21 Balancing Arizona's legitimate interest in requiring a significant modicum of
 22 support before appearance on the general election ballot against the reasonable and
 23 nondiscriminatory burdens imposed by A.R.S. §§ 16-321 and 16-322, the Court
 24 concludes that the statutes are constitutional.¹⁰

25
 26
 27 ¹⁰ The Court notes that it would reach this conclusion even if the evidence
 28 excluded at the beginning of this order were considered. Comparable evidence was not
 sufficient to defeat the state restrictions in *Munro*, and the Court concludes that it would
 not be sufficient here. *See* 479 U.S. at 196-97.

1 **C. Freedom of Association and Equal Protection.**

2 Plaintiffs claim in Counts II and IV that the Arizona statutes violate their rights to
3 freedom of association and equal protection. Doc. 42 at 22-25; Doc. 63 at 4, 13-16.
4 Plaintiffs' freedom of association arguments are dealt with above. The Arizona statutes
5 do not legally require Plaintiffs to associate with voters outside of their party or to
6 include such voters in their primary elections, as did the laws at issue in *Jones* and
7 *Bayless*.

8 Plaintiffs have also failed to show an equal protection violation. For reasons
9 discussed above, the Court finds the Arizona laws to be nondiscriminatory. And even if
10 H.B. 2608 could be viewed as having a greater impact on AZLP than other Arizona
11 political parties, it would violate equal protection only if Plaintiffs showed that it was
12 enacted with a discriminatory intent. *Washington v. Davis*, 426 U.S. 229 (1976)
13 (disparate impact resulting from a facially neutral law, without more, is not sufficient to
14 establish a violation of the Equal Protection Clause). Plaintiffs do not attempt to make
15 this showing.

16 **IT IS ORDERED** that Plaintiffs' motion for summary judgment (Doc. 63) is
17 **denied** and the Secretary's cross-motion for summary judgment (Doc. 69) is **granted**.
18 The Clerk of Court shall enter judgment in accordance with this order and terminate this
19 matter.

20 Dated this 7th day of July, 2017.

21
22
23 

24 _____
25 David G. Campbell
26 United States District Judge
27
28