

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Arizona Green Party; Craig Thorsen; and)
Kent Solberg,

Plaintiffs,

vs.

Ken Bennett, in his official capacity as)
Secretary of State of Arizona,

Defendant.

No. CV 09-2412-PHX-SRB

ORDER

At issue is Plaintiffs' Motion for Preliminary Injunction ("Pls.' Mot.") (Doc. 3).

I. BACKGROUND

A. The Parties

Plaintiffs in this case include a political party, the Arizona Green Party, and two individuals, Craig Thorsen and Kent Solberg. (Compl. ¶ 1.) The Arizona Green Party "seeks official ballot access recognition such that it may participate in the next election cycle (2010 cycle) with its own official party ballot at the primary election and its own column on the official ballot for the general election." (*Id.* ¶ 5.) Mr. Thorsen is a supporter of the Arizona Green Party who resides in California. (*Id.* ¶ 6; Pls.' Mot., Ex. 3, Decl. of Craig Thorsen ("Thorsen Decl.") ¶¶ 3-4.) Mr. Thorsen states in his Declaration that he "would have circulated petitions seeking signatures on behalf of the Arizona Green Party in their

1 campaign to obtain official ballot recognition” if not for Arizona’s current prohibition of that
 2 activity. (Thorsen Decl. ¶ 3.) Mr. Solberg is an Arizona resident and a supporter of the
 3 Arizona Green Party. (Compl. ¶ 7; Pls.’ Mot., Ex. 4, Decl. of Kent Solberg (“Solberg Decl.”)
 4 ¶ 4.) Defendant Ken Bennett is the Secretary of State of Arizona, in which capacity he
 5 oversees Arizona’s statewide election process. (Compl. ¶ 8.)¹

6 **B. Statutes at Issue**

7 To form a new political party in Arizona, supporters must file petitions with the
 8 Secretary of State containing a number of signatures equal to not fewer than one and one-
 9 third percent of the total votes cast for governor at the last preceding general election at
 10 which a governor was elected. A.R.S. § 16-801. A party may be “grandfathered in” for the
 11 next election if: (1) at the last preceding general election, the party cast at least five percent
 12 of the total votes for governor, presidential electors, county attorney, or mayor; *or* (2) if the
 13 party has registered electors equal to at least two-thirds of one percent of the total registered
 14 voters in the state as of November 1 of the year immediately preceding the year of the
 15 general election. *Id.* § 16-804(A)-(B). The Arizona Green Party is currently in the midst of
 16 a signature-gathering campaign to obtain new party status on the ballot for the 2010 general
 17 election, because it did not receive enough votes in the 2008 general election and does not
 18 have enough registered electors to qualify automatically. (Pls.’ Mot., Ex. 1, Decl. of Angel
 19 Torres ¶¶ 4-6.)

21 ¹ Defendant is authorized by statute to receive petitions filed by new parties and
 22 confirm that they bear the certification of the county recorder of each county that the
 23 signatures have been verified to be valid. *See* Ariz. Rev. Stat. (“A.R.S.”) § 16-801. In his
 24 Response to Plaintiffs’ Motion, Defendant argues that he is not the proper party to sue
 25 because the actions Plaintiffs challenge are performed by county recorders, not the Secretary
 26 of State. (Def.’s Resp. to Pls.’ Mot. (“Def.’s Resp.”) at 9 n.3.) However, the Arizona
 27 Supreme Court has held that, in a lawsuit arising out of a challenge to a statewide election
 28 or election process, the Secretary of State is the proper party for suit. *Van Arsdell v.*
Shumway, 798 P.2d 1298, 1302 (Ariz. 1990); *see also* *Ariz. Libertarian Party, Inc. v.*
Bayless, 351 F.3d 1277, 1280-81 (D. Ariz. 2003) (observing that Arizona Secretary of State
 “has authority over primary elections” and promulgates relevant rules, meaning that any
 injury plaintiffs suffered was traceable to Secretary of State, rather than county officials).

Petitions for new party recognition must be certified by the appropriate county recorder, to ensure that the signatures are of “qualified electors of the county.” A.R.S. § 16-801(1). The petitions must also “[b]e verified by the affidavit of ten qualified electors of the state.” *Id.* § 16-801(2). Finally, the petitions must “[b]e in substantially the form prescribed by [A.R.S.] § 16-315.” *Id.* § 16-801(3). Section 16-315 sets forth a number of requirements for petitions and circulators of petitions, including the following:

Instructions for Circulators

1. All petitions shall be signed by circulator.
2. Circulator must be qualified to register to vote in this state.²
3. Circulator’s name shall be typed or printed under such person’s signature.
4. Circulator’s actual residence address or, if no street address, a description of residence location shall be included on the petition.

Id. § 16-315(B). Petitions must be submitted to county recorders no later than 180 days before the primary election. *Id.* § 16-803(B). County recorders have 30 days to verify and count the signatures, after which petitioners must file the verified petitions with the Secretary of State at least 140 days before the primary election. *Id.* § 16-803(A), (C). For the purposes of Plaintiffs’ Motion, the relevant dates are as follows:

Feb. 25, 2010	Last day to submit new party recognition petitions to county recorders for verification and counting
Mar. 29, 2010	Last day for county recorders to verify and count new party signatures
Apr. 6, 2010	Last day to file verified petition signatures with the Secretary of State
Aug. 24, 2010	Primary election
Nov. 2, 2010	General election

(*See* Def.’s Resp. at 3-4.)

In 2007, the Arizona State Legislature moved the primary election date from eight weeks before the general election to nine weeks before the general election. (*Id.* at 4-5.) The Legislature moved the primary date back another week, to ten weeks before the general election, in 2009, via S.B. 1074, 49th Leg., 1st Sess. (Ariz. 2009). (*Id.* at 5; *see also* Decl. of

² To be eligible to register to vote in Arizona, a person must be an Arizona resident, among other qualifications. *Id.* § 16-101.

1 Amy Bjelland in Supp. of Def.'s Resp. ("Bjelland Decl."), Ex. A.) Senate Bill 1074 was
2 signed into law by the governor on July 13, 2009. (Bjelland Decl., Ex. A at 21.) The bill did
3 not contain an emergency clause, meaning that it was to become valid on September 30,
4 2009. (Def.'s Resp. at 5 (citing Ariz. Const. art. IV, pt. 1, § 1(3)).) Arizona is a state covered
5 by the Voting Rights Act, and it is therefore required to obtain preclearance from the
6 Department of Justice before implementing any changes to state law affecting voting. (*Id.*)
7 The Department of Justice precleared S.B. 1074 on October 6, 2009. (Bjelland Decl., Ex. B.)

8 **C. Plaintiffs' Claims**

9 Plaintiffs challenge two aspects of Arizona's procedure for recognizing new political
10 parties: (1) the prohibition of residents of other states circulating petitions and (2) the change
11 in the deadline for handing in signed petitions to county recorders (on account of the change
12 in the primary election date). (Pls.' Mot. at 3-5.) Plaintiffs claim that the residency restriction
13 "unduly and unconstitutionally hampers the Arizona Green Party's efforts, and the efforts
14 of their supporters, to place the Arizona Green Party on the ballot in Arizona, a result that
15 impacts every voter in the state." (*Id.* at 3.) Further, Plaintiffs argue that "all of the Plaintiffs
16 are being denied their full constitutional rights of free speech and political association by the
17 prohibition of non-resident signature-gatherers." (*Id.*) Plaintiffs assert that the Arizona Green
18 Party has supporters who reside both in and outside of Arizona, but if an out-of-state resident
19 circulates petitions for new party recognition, he or she could face either criminal prosecution
20 or the invalidation of petition signatures. (*Id.* at 6.) In addition, Plaintiffs argue that
21 individuals' right to freely associate with like-minded people and work towards the
22 advancement of a particular political cause is impinged by this restriction. (*Id.*) Plaintiffs also
23 contend that not being able to utilize willing out-of-state petition circulators impedes their
24 ability to gather the required number of signatures in time. (*Id.*)

25 Mr. Thorsen, a California resident and supporter of the Arizona Green Party, wishes
26 to circulate petitions for new party recognition, but he has stated in his declaration that he
27 will not do so because of the "risk of criminal penalty." (*Id.*; Thorsen Decl. ¶ 3.) Mr. Thorsen
28 argues that this violates his rights of expressive association and free speech, as well as his

1 right to cast an effective vote, because the viability of the Green Party in California “is
 2 necessarily enhanced by the Green Party’s presence in Arizona.” (Pls.’ Mot. at 7.) Mr.
 3 Solberg, an Arizona resident, “meets all the requirements to be a registered voter and is a
 4 likely candidate for the Arizona Green Party.” (*Id.*; Solberg Decl. ¶ 4.) Mr. Solberg argues
 5 that his right to associate with other supporters, including Mr. Thorsen, is adversely impacted
 6 by the residency restriction, as is his right to free speech. (Pls.’ Mot. at 7.) Mr. Solberg also
 7 contends that his ability to run for office is hindered by this policy. (*Id.*)

8 Plaintiffs’ second claim is that moving the deadline for turning in completed petitions
 9 to the county recorders, thereby reducing the amount of time new political parties have to
 10 gather signatures, without any corresponding reduction in the required number of signatures,
 11 “constitutes a severe burden on new political parties.” (*Id.*) For the reasons discussed below,
 12 the Court need not address this claim in detail at this time.

13 **D. Injunctive Relief Sought**

14 Plaintiffs ask the Court to: (1) declare that the Arizona statutory scheme described
 15 above with respect to non-resident petition circulators violates the First and Fourteenth
 16 Amendments to the United States Constitution; (2) preliminarily enjoin Defendant from
 17 enforcing this statutory scheme against the Plaintiffs, such relief including but not limited to
 18 enjoining the Defendant from rejecting a petition for new party recognition submitted after
 19 February 25, 2010, but before March 11, 2010; (3) preliminarily enjoin Defendant from
 20 enforcing the new deadline for submitting signed petitions to county recorders for
 21 verification and counting, such relief including but not limited to enjoining Defendant from
 22 rejecting a petition for new party recognition submitted after February 25, 2010, but before
 23 March 11, 2010; and (4) grant any further relief the Court should deem necessary, including
 24 an award of reasonable attorneys’ fees and costs. (Pls.’ Mot. at 1-2.)

25 **II. LEGAL STANDARDS AND ANALYSIS**

26 **A. Preliminary Injunction**

27 Until recently, in the Ninth Circuit, a plaintiff was entitled to a preliminary injunction
 28 upon demonstrating either “(1) a likelihood of success on the merits and the possibility of

1 irreparable injury, or (2) the existence of serious questions going to the merits and the
 2 balance of hardships tipping in [the movant's] favor." *MAI Sys. Corp. v. Peak Computer,*
 3 *Inc.*, 991 F.2d 511, 516 (9th Cir. 1993) (quoting *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th
 4 Cir. 1990)). However, the Supreme Court held in November 2008 that the Ninth Circuit's
 5 "'possibility' standard is too lenient." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct.
 6 365, 375 (2008). The Supreme Court continued, "Our frequently reiterated standard requires
 7 plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the
 8 absence of an injunction." *Id.* Therefore, as rearticulated in *Winter*, the standard for a
 9 preliminary injunction in this case is as follows: "A plaintiff seeking a preliminary injunction
 10 must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable
 11 harm in the absence of preliminary relief, that the balance of equities tips in his favor, and
 12 that an injunction is in the public interest." *Id.* at 374.

13 **B. Residency Requirement**

14 For the reasons discussed below, the Court grants Plaintiffs' Motion with respect to
 15 their claim related to the residency requirement for petition circulators.

16 **1. Likelihood of Success on the Merits**

17 Plaintiffs argue that requiring petition circulators to be eligible to register to vote in
 18 Arizona (in essence, requiring that they be Arizona residents) violates their rights under the
 19 First and Fourteenth Amendments, namely their rights to free speech and free association.
 20 (Pls.' Mot. at 3.) The Ninth Circuit Court of Appeals examined an analogous situation in
 21 *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008). In *Nader*, the court struck down a
 22 requirement that petition circulators attempting to get an independent candidate for president
 23 on the ballot be "qualified to register to vote in [Arizona]." 531 F.3d at 1035-38 (alteration
 24 in original). Construing the requirement as essentially amounting to a residency requirement,
 25 the *Nader* court held that strict scrutiny applies to this type of claim and that Arizona had not
 26 met its burden to prove that the regulation was narrowly tailored to the compelling state
 27 interest in preventing election fraud. *Id.* at 1037-38.

1 In response to *Nader*, Plaintiffs assert, the Arizona State Legislature amended the
2 relevant state statute to state that, for the purposes of nominating an independent candidate
3 for president, “a nomination petition for the office of presidential elector may be circulated
4 by a person who is not a resident of this state but who is otherwise eligible to register to vote
5 in this state.” A.R.S. § 16-341(G). However, Plaintiffs argue, neither § 16-341 nor any other
6 provision address the issue of who may circulate petitions for a new political party that
7 wishes to appear on the ballot in Arizona, despite the fact that the holding of *Nader* was not
8 limited to independent presidential candidates. (Pls.’ Mot. at 8-9.)

9 Defendant argues that this claim is untenable because Plaintiffs lack standing. (Def.’s
10 Resp. at 6-8.) Citing cases from the Ninth Circuit Court of Appeals and the Supreme Court,
11 Defendant contends that Plaintiffs have not demonstrated that they suffer an actual or
12 imminent injury-in-fact to a protected interest. (*Id.* at 7 (quoting *Lujan v. Defenders of*
13 *Wildlife*, 504 U.S. 555, 560-61 (1992); *San Diego County Gun Rights Comm. v. Reno*, 98
14 F.3d 1121, 1126 (9th Cir. 1996).) Defendant essentially argues that Plaintiffs have not
15 demonstrated a real threat of either criminal prosecution or invalidation of signatures as a
16 result of a non-resident circulating petitions for a new party. (*Id.* at 6-9.) Defendant states that
17 nothing in the provisions cited by Plaintiffs requires circulators of petitions for new parties
18 to swear falsely to an affidavit in violation of A.R.S. § 16-184(A). (Def.’s Resp. at 7.)

19 Defendant also points out that the statutory language from A.R.S. § 16-315 outlining
20 instructions for petition circulators pertains to petitions for candidates, *not* new party
21 petitions. (Def.’s Resp. at 7.) Likewise, Defendant contends that the laws requiring the
22 invalidation of signatures gathered by non-residents do not apply to new party petitions. By
23 way of comparison, Defendant cites A.R.S. §§ 19-112(A), (D) and 121.01(A)(1)(d), which
24 state that petitions filed by non-residents in support of initiatives or referenda will be
25 invalidated. (*Id.* at 8.) Defendant submitted two supplemental authorities in support of his
26 argument that new party petitions are treated differently by the Secretary of State and the
27 county recorders: (1) the Arizona Supreme Court’s decision in *Jenkins v. Hale*, 190 P.3d 175
28 (Ariz. 2008), in which the court held that the absence of a residential address (in lieu of a

1 post office box) did not automatically invalidate a signature on a candidate nominating
2 petition, but rather required the proponent to demonstrate that the signer is a registered voter;
3 and (2) a recent opinion of the Arizona Attorney General stating that the analysis in *Jenkins*
4 led to the conclusion that signatures without addresses on new party petitions should be
5 counted if the county recorder can validate the signatures. (*See* Def.'s Notice of Supp. Auth.
6 in Supp. of Def.'s Resp. ("Def.'s Notice"), Exs. 1-2.)

7 Despite these arguments, though, counsel for Defendant conceded at the hearing on
8 Plaintiffs' Motion that "tension" exists between the requirements of the statute and the
9 petition form generated by the Secretary of State for new party recognition. (Prelim. Inj. Hr'g
10 Tr. 77:10-11, Jan. 11, 2009 ("Hr'g Tr.")). The form, which Plaintiffs submitted to the Court,
11 requires a petition circulator to sign below a statement reading, "I _____ hereby verify that
12 I am qualified to register to vote in the county of _____, state of Arizona" (Notice re
13 Filing of Circulation Petition & Decl. of Daniel J. Treuden, Ex. 1 at 2.) At the hearing,
14 Plaintiffs' attorney argued that they have standing because, if Mr. Thorsen were to circulate
15 a petition for the Green Party using the form propagated by the Secretary of State, he would
16 be faced with either falsely signing the form or modifying it and risking the invalidation of
17 the signatures by the pertinent county recorder. (Hr'g Tr. 77:21-79:5.)

18 The Court finds that the Plaintiffs have established that they have standing to bring
19 these claims. The petition form creates just the Catch-22 Plaintiffs describe. In order for
20 someone who is not a resident of Arizona to circulate a petition for new party recognition,
21 he or she must choose between falsely signing the petition form or modifying it and risking
22 invalidation of the signatures. Mr. Thorsen currently faces this dilemma, and the other
23 Plaintiffs are also affected by it, as described above.

24 The Court further concludes that Plaintiffs are likely to succeed on the merits.
25 Applying strict scrutiny, as outlined in *Nader*, the Court finds that requiring petition
26 circulators for new parties to be qualified to vote in Arizona is not narrowly tailored to a
27
28

1 compelling state interest.³ There are other means of accomplishing the state’s presumptive
 2 goal of preventing election fraud without preventing non-resident petition circulators from
 3 working on behalf of new political parties. For example, in the context of independent
 4 presidential candidates, Arizona has implemented a different system to avoid just this
 5 problem. Moreover, the state has neither argued nor demonstrated that any past election fraud
 6 issues were connected to out-of-state petition circulators for new parties seeking to be on the
 7 ballot. Plaintiffs have satisfied this element of the preliminary injunction test.

8 **2. Irreparable Harm**

9 In the free speech and association context, the Supreme Court has held that “[t]he loss
 10 of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes
 11 irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373-74 (citing *N.Y. Times Co. v. United*
 12 *States*, 403 U.S. 713 (1971)); accord *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08
 13 (9th Cir. 2009). “The harm is particularly irreparable where, as here, a plaintiff seeks to
 14 engage in political speech, as ‘timing is of the essence in politics’ and ‘[a] delay of even a
 15 day or two may be intolerable’” *Klein*, 584 F.3d at 1208 (quoting *Long Beach Area*
 16 *Peace Network v. City of Long Beach*, 522 F.3d 1010, 1020 (9th Cir. 2008)) (alteration in
 17 original). The Court has concluded that Plaintiffs have demonstrated a likelihood of success
 18 on the merits of their claims related to the residency requirement for petition circulators.
 19 Given that the Supreme Court has held that restrictions on petition circulators impact political
 20 expression, the restriction at issue here clearly presents a likelihood of irreparable injury to
 21 Plaintiffs and others. *See, e.g., Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 194-95
 22 (1999) (observing that restrictions on petition circulators in the initiative context limit the
 23 number of voices in the political discussion, reduce the size of the audience a proponent or
 24 candidate can reach, and reduce the chance that proponents will be able to gather enough
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26
 27 ³ Defendant focused his arguments on the question of standing and did not specifically
 28 explain what state interest animates the restriction on petition circulators who are not Arizona
 residents.

1 signatures). Plaintiffs have satisfied this element of the test outlined in *Winter* for the
2 issuance of a preliminary injunction.

3 **3. Balance of Equities and Public Interest**

4 The Court will consider the final two factors together. The Ninth Circuit Court of
5 Appeals has “consistently recognized the ‘significant public interest’ in upholding free
6 speech principles, as the ‘ongoing enforcement of the potentially unconstitutional regulations
7 . . . would infringe not only the free expression interests of [plaintiffs], but also the interests
8 of other people’ subjected to the same restrictions.” *Klein*, 584 F.3d at 1208 (quoting
9 *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 964 (9th Cir. 2002)) (alteration in original).
10 Here, the residency requirement impacts not only Plaintiffs but also any other out-of-state
11 supporter of a new political party wishing to appear on the ballot in Arizona. The
12 requirement also affects Arizona voters, who have an interest in being exposed to and
13 selecting among a complete list of political parties. Finally, the measure impacts members
14 of the Green Party outside Arizona who want their party to have a national presence and
15 consider Arizona to be an important state. The public interest favors Plaintiffs in this matter.

16 Turning to the question of equities, Plaintiffs argue that the balance tips in their favor.
17 Plaintiffs’ counsel argued at the hearing that the risk of invalidation of petition signatures or
18 even criminal prosecution far outweigh any inconvenience that the state might face as a result
19 of an injunction. (Hr’g Tr. 67:22-68:10; 78:8-16.) Plaintiffs also pointed out that the state
20 worked around the question of residency restrictions in the context of independent
21 presidential candidates, so presumably a similar system could be put in place for new party
22 petitions. (Pls.’ Mot. at 18-19.) Defendant rejoins that the state has a significant interest in
23 orderly election procedures and changing the deadlines would present administrative
24 difficulties. (Def.’s Resp. at 16.) While the Court recognizes that this is a legitimate concern,
25 Defendant’s interest is outweighed by the threat of impingement on Plaintiffs’ First
26 Amendment rights and those of other members of the public. For one thing, Plaintiff points
27 out that although the statutory deadline for submission of petitions changed by seven days
28 in the last election cycle, the Secretary of State did not adjust the filing deadline accordingly

1 and simply used the old deadline. (Pls.' Reply at 9.) This demonstrates that, in the last cycle
2 at any rate, it was not burdensome for Defendant to utilize a later deadline.

3 For these reasons, the Court finds that the balance of equities and the public interest
4 weigh in favor of injunctive relief for Plaintiffs.

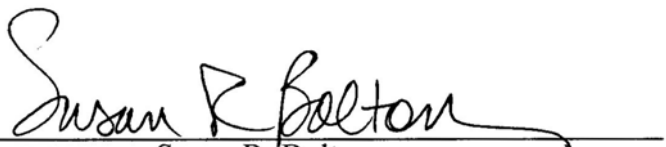
5 **III. CONCLUSION**

6 Plaintiffs seek the same remedy for their claim related to the change in deadline for
7 submission of petition forms to county recorders, namely a two-week extension in the
8 deadline for submitting verified petitions. (*See* Hr'g Tr. 54:10-13; 59:18-60:1; Pls.' Mot. at
9 2.) As the Court grants Plaintiffs' Motion with respect to the restrictions on petition
10 circulators, it need not consider the arguments related to the change in deadline at this
11 juncture. Furthermore, as the parties do not make an argument that other deadlines need to
12 be altered, the other dates outlined in the chart at page 3, *supra*, remain unchanged.⁴

13 **IT IS ORDERED** granting Plaintiffs' Motion for Preliminary Injunction (Doc. 3).

14 **IT IS FURTHER ORDERED** enjoining Defendant Ken Bennett, in his official
15 capacity as Secretary of State of Arizona, from enforcing any restriction on non-resident
16 circulators of petitions in support of new political parties, as codified at A.R.S. §§ 16-315,
17 16-801, to the extent those provisions conflict with the terms of this Order. Defendant is not
18 to reject on the basis of timeliness any petition for new party recognition filed after February
19 25, 2010, but before March 11, 2010.

20 DATED this 15th day of January, 2010.

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23 

24 Susan R. Bolton
United States District Judge

25
26
27 ⁴ For example, Defendant has not claimed that the county recorders would be unable
28 to review and verify signatures on petitions for new party recognition by the established
deadline of March 29, 2010.