UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE LIBERTARIAN PARTY, *et al.* Plaintiffs, v. DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, *et al.*, Defendants.	Civil Action No. 09-1676-EMS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS' MOTION TO DISMISS

BACKGROUND[1]

Plaintiff Bob Barr ("Barr") was the Libertarian Party candidate for President of the United States during the November 4, 2008, General Election, as nominated by the Libertarian Party's national nominating convention. (Pls.' Compl., ¶ 14.) Although Barr was listed on ballots as the Libertarian Party presidential candidate in nearly all other jurisdictions, he ran as a qualified write-in candidate in the District of Columbia.[2] (Pls.' Compl., ¶ 19.) In the November presidential contest in the District, a total of 265,853

[1] The factual discussion in this section, other than matters of which the Court may take judicial notice, such as the outcome of the Presidential election, is based on the allegations in the Complaint.

[2] *See* D.C. Code § 1-1001.08(r).

votes were cast, with Barack Obama receiving over 92% of the popular vote.[3] Write-in votes comprised less than half of one percent of all votes cast in the presidential contest, totaling 1,138 votes.

After the November election, the Board reported the election results in the manner required by the D.C. Code of Municipal Regulations, tit. 3, § 808. *See* (Pls.' Compl., ¶¶ 18 -20.) With respect to the tabulation of write-in votes, § 808 specifically provides in relevant part:

> 808.15 The total number of write-in votes marked by voters shall be reported for each contest.
>
> 808.16 The total of votes cast for each write-in candidate shall be calculated only in contests where there is no candidate printed on the ballot in order to determine a winner, or where the total number of write-ins reported, under § 808.15, is sufficient to elect a write-in candidate.

Pursuant to § 808.16, the Board did not tally and report the total number of votes for each write-in candidate for the presidential contest because (1) there were candidates printed on the ballot in the presidential race, and (2) the total 1,138 write-in votes would not be sufficient to elect a write-in candidate. Because neither of the two circumstances specified in § 808.16 were present, the Board was not legally required to tabulate the 1,138 write-in votes for each write-in vote recipient in the presidential contest, and it therefore properly denied Plaintiffs' request to tally and report the number of votes cast for each write-in candidate in the November General Election. *See* (Pls.' Compl. ¶¶ 21-22.)

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[3] Candidate Barack Obama received 92.46% of the popular vote, or 245,800 total votes. General Election 2008 – Certified Results, D.C. Board of Election and Ethics, *available at* http://www.dcboee.org/election_info/election_results/ (Last updated Nov. 24, 2008).

Plaintiffs then brought this action against Defendant under 42 U.S.C. § 1983, claiming that the Board's actions are unconstitutional, and, to the extent that those actions are required by § 808.16, that the regulation itself is also unconstitutional. (Pls.' Compl. ¶¶ 26-27.)

STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) should only be granted where the complaint fails to contain "a short and plain statement of the claim showing that the pleader is entitled to relief, … in order to 'give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). "Detailed factual allegations" are not necessary to withstand a motion under the Rule, provided that the "grounds" of "entitle[ment] to relief" furnished by the plaintiff are not merely "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id.*; Fed. R. Civ. P. 12(b)(6). "[F]actual allegations [in the complaint] must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (internal citations omitted).

> In keeping with [*Twombly's*] principles, a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. Where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Ashcroft v. Iqbal, ____ U.S. ____, 129 S. Ct. 1937, 1950 (2009). Although a plaintiff enjoys the benefit of all inferences that plausibly can be drawn from well-pleaded

allegations of its complaint, bare conclusions of law, or sweeping and unwarranted averments of fact, will not be deemed admitted for purposes of a motion under Rule 12(b)(b). *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987). "Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss." *Butz v. Economou*, 438 U.S. 478, 507-508 (1978). *Accord Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). Under the foregoing standard, Plaintiffs have failed to state an actionable claim against Defendant, and this Court would be acting properly to dismiss Plaintiffs' complaint.

ARGUMENT

I. THE BOARD'S REFUSAL TO INDIVIDUALLY TALLY AND REPORT THE VOTES FOR EACH WRITE-IN CANDIDATE DOES NOT IMPAIR PLAINTIFFS' CONSTITUTIONAL RIGHTS.[4]

In considering whether a plaintiff has stated a claim for municipal liability under 42 U.S.C. § 1983, the district court must first determine whether the plaintiff establishes a predicate constitutional violation. *Person v. District of Columbia*, --- F. Supp. 2d ---, 2009 WL 2487324 *3 (D.D.C. 2009) (citing *Baker v. District of Columbia*, 326 F.3d 1302, 1306 (D.C. Cir. 2003)). Here, Plaintiffs have asserted that Defendants have violated their First and Fourteenth Amendment rights.[5] Based upon the undisputed facts,

[5] Plaintiffs have alleged an equal protection claim against the District, invoking the Fourteenth Amendment. (Pls.' Compl. ¶¶ 26-27, 29.) Although the Fourteenth Amendment applies to all of the individual states, it is well-established that it does not apply to the District of Columbia. *See Bolling v.*

Plaintiffs cannot establish a constitutional violation to impose liability under 42 U.S.C. § 1983 because (1) no First Amendment associational right was curtailed; and (2) no other fundamental right was curtailed to have invoked liability through the Equal Protection Clause. Therefore, the court should grant Defendants' motion to dismiss.

A. A WRITE-IN CANDIDATE WHO HAS NOT RECEIVED SUFFICIENT VOTES TO WIN HAS NO FIRST AMENDMENT ASSOCIATIONAL RIGHT IN THE TABULATION OF WRITE-IN VOTES

With regard to the right of association, the Constitution affords two distinct freedoms: freedom of "intimate association" (the choices to enter into and maintain certain intimate human relationships) and freedom of "expressive association" (association for the purposes of engaging in activities protected by the First Amendment such as speech, assembly, petition for the redress of grievances, and the exercise of religion). *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). "It is well settled that partisan political organizations enjoy freedom of expressive association protected by the First and Fourteenth Amendments."[6] *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) ("*Tashjian*"). A political party's expressive associational rights are infringed when governmental action directly impacts a political

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Sharpe, 347 U.S. 497, 499 (1954); *Person v. District of Columbia*, --- F. Supp. 2d ---, 2009 WL 2487324 *3 (D.D.C. 2009)(dismissing plaintiff's § 1983 claim based on violations of the Fourteenth Amendment); *Ennis v. Lott*, 589 F. Supp. 2d 33, 35 n.2 (D.D.C. 2008)(dismissing plaintiff's § 1983 claims premised on Fourteenth Amendment violations because "[t]he Fourteenth Amendment does not apply to the District of Columbia"); *Stoddard v. D.C. Pub. Defender Servs.*, 535 F. Supp. 2d 116, 117 n.3 (D.D.C. 2008)(noting that the plaintiff may not invoke the Fourteenth Amendment because "that amendment does not apply to the District of Columbia"). Instead, equal protection is applied to the District of Columbia through the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. at 499-500.

[6] *See supra* note 4.

party's "core functions," such as the selection process of its candidates; who may participate in the candidate selection process,; self-organization and party leadership; and political speech. *See Tashjian*, 479 U.S. at 215-16; *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).

Curiously, Plaintiffs have cited (in their Complaint) *Norman v. Reed*, 502 U.S. 279 (1992)("*Norman*"), as support for both their claim that they have an associational right and their claim that such right has been infringed upon. *Norman* is a ballot access case, however, and therefore inapposite. At issue in *Norman* was an Illinois statute requiring 25,000 nominating signatures for a new political party to field candidates for any district or political subdivision. *See* 502 U.S. at 282. As interpreted by the defendant electoral board, the statute at issue there "effectively increas[ed] the signature requirement applicable to elections for at least some offices in subdivisions with separate districts" because, if the signature requirement was not met for every district, the candidate would be disqualified from appearing on the ballot in all races within the subdivision. *Id.* at 293. Because the Illinois statute, as applied, "limit[ed] the access of new political parties to the ballot, [the Supreme Court] called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation." *Id.* at 288-89. Unlike the facts in *Norman*, Plaintiff Libertarian Party is an established political party, and Plaintiffs do not contend, nor can they, that 3 DCMR § 808.16 is a barrier to ballot access. Simply put, *Norman* does not establish a constitutional right to know how many write-in votes Plaintiff Barr received in the District of Columbia. The case has no application here.

In *Tashjian*, the Supreme Court reviewed a First Amendment associational rights challenge to a Connecticut statute that required voters in any political party primary to be registered members of that party. 479 U.S. at 210-11. The Republican Party of Connecticut, which had adopted a rule permitting independent voters to vote in Republican primaries, brought the action to challenge the statute, alleging that it deprived the Party of its First and Fourteenth Amendment rights to enter into political association with individuals of its own choosing. *Id.* In determining that the Connecticut statute curtailed associational rights, the Court reasoned:

> The statute here places limits upon the group of registered voters whom the Party may invite to participate in the 'basic function' of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.

Tashjian, 479 U.S. at 215-16 (citation omitted). Because (unlike in this case) the Connecticut statute curtailed an associational right at the functional core of a political party, the Court subjected the statute to strict scrutiny. *Id.* at 217.

Similarly in *Eu v. San Francisco County Democratic Central Committee*, the California Democratic Party brought a First Amendment challenge to the portions of California's Election Code that prohibited the governing bodies of political parties from endorsing candidates in party primaries, dictated political party organization and composition, and prescribed term limits and a rotational scheme between residents of northern and southern California for the office of the party chair. 489 U.S. at 216. In discussing why California's ban on primary endorsements limited political speech and associational rights, the Supreme Court stated:

> The ban prevents party governing bodies from stating whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought. This prohibition directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues… Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to identify the people who constitute the association, and to select a 'standard bearer who best represents the party's ideologies and preferences.

489 U.S. at 223 (internal citations and quotation marks omitted). The Court held that the primary endorsement ban infringed speech and associational rights and was thus subject to strict scrutiny. *Id.* at 225. Discussing next the several restrictions on party organization, composition, and the office of the party chair, the Court also applied strict scrutiny to these election code provisions, reasoning:

> These laws directly implicate the associational rights of political parties and their members…By requiring parties to establish official governing bodies at the county level, California prevents the political parties from governing themselves with the structure they think best. And by specifying who shall be the members of the parties' official governing bodies, California interferes with the parties' choice of leaders.

489 U.S. at 229-30 (internal citations and quotation marks omitted).

Finally, in *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981) ("*Democratic Party*"), the Supreme Court heard a challenge brought by the National Democratic Party alleging that being forced to accept Wisconsin's delegation to the national convention infringed upon the party's First Amendment associational rights. At the heart of the issue was Wisconsin's open primary system, which permitted anyone, even those without a public declaration of political affiliation, to cast a vote in the Democratic Primary. 450 U.S. at 116, n.14. Ultimately, the Court held that Wisconsin could not constitutionally compel the National Party to seat a delegation

chosen in a way that violated the Party's rules. *Id.* at 126. The Court reasoned that the freedom to associate "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only" because the freedom of association would "prove an empty guarantee if association could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *Id.* at 122 n.22.

In sharp contrast to the claims of the petitioners in *Tashjian*, *Eu*, and *Democratic Party*, Plaintiffs are not being deprived of *any* constitutionally protected associational rights. No basic functions of Plaintiff Libertarian Party or its members are at stake. Section 808.16 does not touch upon either the selection process of the Libertarian Party candidates, the Libertarian Party's ability to engage in political speech, or the Libertarian Party's ability to self-organize. Section 808.16 did not operate to interfere with Plaintiffs' process of selecting their presidential candidate, with dispensing of their political message and informing voters, or with their self-governance or strategic agenda. Further, § 808.16 does not affect Plaintiffs' ability to access the ballot, as was the issue in *Norman v. Reed*. Plaintiffs agree that Plaintiff Barr ran as a qualified write-in candidate for the Libertarian Party, and no facts suggest that § 808.16, or any other regulation, placed an additional burden on Plaintiff Barr in terms of ballot access. For all these reasons, the Board's adherence to § 808.16, by not tabulating and reporting the write-in votes for Mr. Barr did not implicate Plaintiffs' First Amendment associational rights.

B. THE BOARD'S COMPLIANCE WITH § 808.16 DOES NOT VIOLATE EQUAL PROTECTION AND, IF SUBJECT TO JUDICIAL REVIEW, IT SURVIVES RATIONAL BASIS SCRUTINY

The equal protection guarantee prohibits the government from engaging in arbitrary or invidious discrimination on the basis of prohibited classifications. *Avery v. Midland County*, 390 U.S. 474, 484 (1968). Typically, when laws classify on the basis of race, alienage, and national origin, or in ways that improperly infringe on the exercise of a fundamental constitutional right, a court will apply strict scrutiny. *McPherson v. U.S.*, 692 A.2d 1342, 1347 (D.C. 1997) (citing *Loving v. Virginia*, 388 U.S. 1 (1967)); *Bolling*, 347 U.S. 497, *supra*. If, however, a statutory classification does not implicate a fundamental right or create a suspect class, a statute should be upheld if it is rationally related to a legitimate government interest. *Tucker v. United States*, 704 A.2d 845, 847-48 (D.C. 1997).

Section 808.16 creates no prohibited classifications and does not implicate a fundamental right. If § 808.16 classifies at all, it distinguishes between write-in candidates and those already on the ballot. Write-in candidates are not a suspect class. *See, e.g., United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Furthermore, § 808.16 is politically neutral and makes no distinction between major or minor political parties. Assuming, *arguendo*, that § 808.16 drew such a classification, political parties are not suspect classes that warrant the application of strict scrutiny.[7]

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[7] *See Crawford v. Marion County*, 128 S. Ct. 1610, 1626 (2008) (Scalia, J., concur.) ("Insofar as our election-regulation cases rest upon the requirements of the *Fourteenth Amendment*…weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exception for vulnerable voters would effectively turn back decades of equal-protection jurisprudence. A voter complaining about

Similarly, no fundamental right – associational, voting, or otherwise – is at stake so as to trigger strict scrutiny under the Equal Protection Clause. A political party's expressive associational rights are infringed when governmental action directly impacts a political party's "core functions," such as the selection process of its candidates, who may participate in the candidate selection process, self-organization and party leadership, and political speech. *See Tashjian*, 479 U.S. at 215-16; *Democratic Party*, 450 U.S. 107; *Eu*, 489 U.S. 214. As discussed in sec. I.A., *supra*, § 808.16 does not curtail associational rights because the tallying of write-in votes is *not* a basic function of political party expression or self-organization. Further, § 808.16 does not curtail the fundamental right to vote because it has not selectively denied voters of the franchise, caused individual or group vote dilution, or denied access to the ballot. *See Dunn v. Blumstein*, 405 U.S. 330 (1972); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Bullock v. Carter*, 405 U.S. 134 (1972).

Because § 808.16 does not curtail a fundamental right or draw distinctions of suspect classes, it would be subject, at the very most,[8] to rational basis review. Under this lesser standard, a classification will not be set aside unless Plaintiffs make "a clear showing of arbitrariness and irrationality" and negate every conceivable basis which might support it. *Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450, 462 (1988); *FCC v.*

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such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. The *Fourteenth Amendment* does not regard neutral laws as invidious ones, even when their burdens purportedly fall disproportionately on a protected class. *A fortiori* it does not do so when, as here, the classes complaint of disparate impact are not even protected.") (internal citations omitted) (emphasis original).

[8] Defendant does not concede that the regulation or the Defendant's conduct in conformity therewith should be subject to *any* scrutiny by the Court since it is not clear what, if any, legally-protected interest Plaintiffs can *correctly* claim are infringed in this case.

Beach Communications, Inc., 508 U.S. 307, 315 (1993). As discussed in more detail in sec. II.B, *infra*, Defendants' interest in § 808.16 is the efficient and expedient reporting of election results, the minimization of election administration costs, and the promotion of faith in the certainty of election results. Requiring the Board to tabulate all write-in results would cause a significant delay in the reporting of election results, and because all write-in votes would need to be tabulated by hand, there would be a significant increase in election administration costs. Section 808.16 also helps provide quick and decisive election results that promote public confidence in the tabulation of votes. In the face of these legitimate governmental interests, § 808.16 is not arbitrary and irrational. Because Plaintiffs cannot demonstrate a predicate constitutional violation, their § 1983 claim, premised on an alleged equal protection violation, should be dismissed.

In summary, Plaintiffs have failed to allege a predicate constitutional violation of either the First Amendment or the Equal Protection Clause, and therefore, there is no constitutional violation present to impose liability against Defendant under § 1983.

II. ALTERNATIVELY, EVEN IF THE TABULATION OF WRITE-IN VOTES WERE A FUNDAMENTAL RIGHT, § 808.16 IS A REASONABLE ELECTION REGULATION THAT SURVIVES RATIONAL BASIS SCRUTINY

The First Amendment protects the rights of individuals "to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (quoting *William v. Rhodes*, 393 U.S. 23, 30-31 (1968)). Although voting is a paramount constitutional right, "it does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are

absolute." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("*Burdick*") (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986)).

Through express provisions in the Constitution, states (including, for this purpose, the District of Columbia) have retained the power to regulate their own elections, and complex election law schemes resulted in the attempt to promote orderly, fair, and honest elections. *Burdick*, 504 U.S. at 433. As a consequence, election laws "invariably impose some burden" on the rights of voters. *Id.* "Each provision of a code, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

Consequently, the Supreme Court has repeatedly denied subjecting *every* voting regulation to strict scrutiny. *See Burdick*, 504 U.S. at 433; *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *Anderson v. Celebrezze*, 460 U.S. at 788; *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802 (1969). Instead, the Court has established a framework for assessing whether a state's election laws unconstitutionally burden First and Fourteenth Amendment rights.[9] *Burdick*, 504 U.S. at 434. When a state's rule imposes *severe* burdens on speech or association, it must be narrowly tailored to serve a compelling interest. *Id.* If, however, the state election regulation is merely a "reasonable, nondiscriminatory restriction" upon the First and Fourteenth Amendment

[9] The Equal Protection Clause is applied to the District of Columbia through the Fifth Amendment. *See* n.4, *supra*.

rights of voters, a State's important regulatory interests are generally sufficient to justify the restriction. *Id*.

A. NOT INDIVIDUALLY TABULATING THE RESULTS FOR EACH WRITE-IN CANDIDATE IS NOT A "SEVERE" BURDEN ON FIRST AMENDMENT OR OTHER FUNDAMENTAL RIGHTS

Applying this analytical framework, the Supreme Court has applied strict scrutiny in several cases involving First Amendment and equal protection challenges to state election regulations. Most of these cases, however, were challenges to laws that directly regulate core political speech or access to the ballot. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 198 (1992) (Tennessee law prohibiting solicitation of voters and distribution of campaign literature within 100 feet of the entrance of a polling place); *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982) (Kentucky's regulation of candidate campaign promises); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (Massachusetts law prohibiting certain businesses from making expenditures for the purpose of affecting referendum votes); *Eu*, 489 U.S. at 222-223 (California's prohibition on primary endorsements by the official governing bodies of political parties); *Tashjian*, 479 U.S. at 217 (Connecticut's requirement that voters in any party primary be registered members of that party); *Norman*, 502 U.S. 279 (Illinois' regulation of the use of party names and its law establishing signature requirements for nominating petitions).

In contrast, there is no such severe burden on Plaintiffs here. The regulation at issue does not restrict core political party functions or ballot access. *See* sect. I.A and B, *supra*. Instead, § 808.16 is a reasonable, non-discriminatory regulation aimed at increasing the efficiency of election results reporting. Because the Board's regulation is

not such a "severe restriction" as to warrant the application of strict scrutiny, a less rigorous standard is applied.

B. SECTION 808.16 IS A REASONABLE, NON-DISCRIMINATORY RESTRICTION THAT MINIMALLY INTERFERES WITH CONSTITUTIONALLY PROTECTED INTERESTS AND SURVIVES RATIONAL BASIS REVIEW

Lesser burdens imposed by election regulations "trigger less exacting review, and a state's important regulatory interests are typically enough to justify reasonable restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("*Timmons*") (citing *Burdick*, 504 U.S. at 434). Reasonable, politically neutral regulations, even if they have the effect of channeling expressive activity at the polls, are repeatedly upheld. *Burdick*, 504 U.S. at 364 (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96) (1986)). A reasonable justification is all that is required; no empirical verification of the state's interests is required. *Timmons*, 520 U.S. at 364 (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96)(1986)). In this case, there are substantial, important interests justifying Defendant's actions and § 808.16 itself.

Even in cases challenging state election regulations that limit ballot access and other voting rights, the Supreme Court has upheld such regulations under rational basis scrutiny. *See Timmons*, 520 U.S. at 363; *Burdick*, 504 U.S. at 437. In *Timmons*, the Supreme Court upheld Minnesota's law which prevented a candidate from appearing on the ballot as the choice of more than one party, the so-called "fusion ban." 520 U.S. at 363. Although the Court determined that the law burdened a party's access to the ballot

and associational rights, the Court reasoned that the burden was not so severe as to draw strict scrutiny. *Id.* at 364. The Court said:

> In sum, Minnesota's laws do not restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like. The laws do not directly limit the party's access to the ballot. They are silent on parties' internal structure, governance, and policymaking. Instead, these provisions reduce the universe of potential candidates who may appear on the ballot as the party's nominee only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party. They also limit, slightly, the party's ability to send a message to the voters and to its preferred candidates. We conclude that the burdens Minnesota imposes on the party's First and Fourteenth Amendment associational rights - though not trivial - are not severe.

Id. at 363. Importantly, in *Burdick*, the U.S. Supreme Court upheld Hawaii's outright prohibition on write-in voting as a limited burden on voters' freedom of choice and association. 504 U.S. at 437. In that case, the petitioner alleged "a constitutional right to cast, and Hawaii required to count, a write-in 'protest vote,' even if for Donald Duck." *Id.* at 438. The Court, finding that nothing in the flat ban of write-in votes was a content-based restriction, and that Hawaii's election code offered adequate ballot access, reasoned that Hawaii's interest in preventing "party raiding" and unrestrained factionalism were sufficient to pass rational basis scrutiny. *Id.* at 439-440. Put another way, the Court found that the complete absence of a candidate write-in process was not severe enough of a restriction on First Amendment associational rights to draw strict scrutiny.[10]

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[10] Plaintiffs' complaint tracks *Dixon v. Maryland State Administrative Board of Election Laws*, 878 F.2d 776 (4th Cir. 1989), a case which applied strict scrutiny to a Maryland statute that required write-in candidates to pay filing fees in order for the candidate's results to be publicly reported, but which has been overruled. Shortly after *Dixon*, the Ninth Circuit addressed similar issues with regard to write-in voting in *Burdick*. *See* 937 F.2d 415 (9th Cir. 1991). The Ninth Circuit declined to follow the Fourth Circuit's earlier decision to apply strict scrutiny. The Supreme Court granted certiorari to resolve the disagreement between the circuits on which level of scrutiny to apply for challenges to state election regulations on write-in voting. As discussed, *supra*, the Court upheld Hawaii's flat-ban on write-in voting under rational basis

As previously mentioned in sec. I.B, *supra*, § 808.16 is a nondiscriminatory, politically-neutral election regulation. Section 808.16 draws no suspect classifications. The "classification" that it does draw is between write-in candidates and those appearing on the ballot, a perfectly permissible distinction. Furthermore, § 808.16 applies to all election races and all write-in candidates equally, regardless of party affiliation. Put another way, § 808.16 applies to Democrat, Independent, Libertarian, and Republican write-in candidates in exactly the same way.

Defendant Board has substantial and important regulatory interests in its compliance with § 808.16, interests which also justify the existence of the regulation. These include the efficient and expedient reporting of election results, reduction of election administration costs, and the promotion of faith in the certainty of election results. Section 808.16 allows the Board to efficiently and rapidly report accurate election results. Requiring the Board to tabulate all write-in results would cause a significant delay in the reporting of election results because all write-in votes need to be tabulated by hand. In other words, the determination of voter intent as to write-in votes would come down to substantial man-hours training workers in tabulation procedures, locating ballots with write-in votes, and tabulating and reporting all write-in votes in all

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scrutiny. *Burdick*, 504 U.S. at 439-40. In other words, the strict scrutiny analysis in *Dixon* has since been overruled by *Burdick*. Thus, if § 808.16 amounts to an election "restriction" on associational rights at all, it is not a severe restriction warranting the application of strict scrutiny according to the decision in *Burdick*. Nonetheless, if the Court were to apply strict scrutiny, Defendant submits that the interests set forth herein would allow its actions and § 808.16 to survive such review by this Honorable Court.

the contests across the City.[11] Ultimately, § 808.16 allows the Board to quickly provide an accurate report of the official election results.

The Board has an additional interest through § 808.16 in reducing the costs of election administration. Because tabulation of all write-in votes would need to be done by-hand, the increased personnel costs would be a substantial burden on the Board's limited resources. For example, in the November 4, 2008 General Election, in all races other than ANC, the total number of write-in votes cast in the District of Columbia was 57,431, all of which would need to be counted by hand, by workers who would need to be trained. The cumulative effect of requiring the tabulation of all write-in votes in all contests regardless of the percentage of votes received or likelihood of success would be a substantial increase in election administration costs.

Section 808.16 also promotes public confidence in the certainty of election results. As explained, the tabulation of all write-in votes across all contests in the City would significantly delay in the reporting of official election results. Such a delay would cast a cloud on the certainty of election results. In recent litigation where election results were in limbo and delayed because of uncertainty, public sentiment about the tabulation of votes was shaken. *See, e.g., Sheehan v. Franken (In re Contest of Gen. Election)*, 767 N.W.2d 453 (Minn. 2009); *Bush v. Gore*, 531 U.S. 98 (2000). Section 808.16 promotes certainty and confidence in election outcomes by insuring quick and decisive results based on the tabulation of votes relevant to the outcome of contests.

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[11] Defendant is prepared to submit a declaration concerning the substantial burdens that would be imposed by Plaintiffs' in the event the Court believes it is necessary for it to do so. In such instance, Defendant would request additional briefing as appropriate under Rule 56.

By limiting the instances where tabulation of the number of votes for each write-in nominee is necessary under § 808.16, the Board is able to efficiently and quickly report election results, reduce election administration costs, and promote faith in the certainty of election results without running afoul of any person's constitutional rights.[12]

Additionally, in *Best v. D.C. Board of Elections and Ethics*, 852 A.2d 915 (D.C. 2004), the D.C. Court of Appeals upheld the Board's regulatory interests behind § 808.16.[13] In *Best*, the petitioner challenged the Board's interpretation of § 808.16 and its refusal to count the write-in votes cast in the Statehood Green Party primary, arguing that "while no write-in nominee could have received a plurality of the votes, it [was] possible that a write-in nominee received enough votes to win a delegate." 852 A.2d at 916. The court, agreeing with the petitioner, reasoned that § 808.16 must be read to require the counting of write-in votes when the total write-in votes is "'sufficient to elect a write-in candidate' to be represented by a delegate" after a primary election. *Id.* at 921.

Although the court held that the Board's interpretation of § 808.16 was too narrow in the context of primary elections, the application of § 808.16 as a reasonable election regulation was left intact. In other words, pursuant to § 808.16, the Board is obligated to tabulate write-in votes only where "it is possible that the count would affect

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[12] The District of Columbia is not alone is its effort to create greater efficiency in the reporting of election results and the reduction of election administration costs. Virginia's election regulations similarly create a threshold for the tabulation of write-in votes. Va. Code Ann. § 24.2-674 (2008) provides in relevant part:

> If no person was elected by write-in votes and the total number of write-in votes for any office is less than (i) five percent of the total number of votes cast for that office and (ii) the total number of votes cast for the candidate receiving the most votes, the abstract shall contain only the total number of write-in votes and not the number of write-in votes for each person receiving write-in votes.

[13] In *Best*, the regulation at issue, 3 DCMR § 810.10, was renumbered to 3 DCMR § 808.16 by Final Rulemaking published at 51 D.C. Reg. 7428-7429 (July 30, 2004).

the outcome of the election." 852 A.2d 916. In *Best*, the tabulation of write-in votes affected the awarding of delegates for a national nominating convention. Here, however, the Board's refusal to count the 1,138 write-in votes cast in the Presidential race in the general election will have no such similar effect. Unlike the possibility of "multiple winners" of delegates in a primary election, there is no such possibility in the Presidential general election. Thus, the Board's refusal to tabulate the write-in results under the present facts is consistent with both the Board's prior interpretation of § 808.16 and with the D.C. Court of Appeals' holding in *Best*.

CONCLUSION

Plaintiffs do not have a fundamental right under the First Amendment to have the write-in votes for Mr. Barr separately tallied and reported. But even if that were not the case, § 808.16 is a reasonable, non-discriminatory election regulation. As such, assuming the regulation, and Defendant's actions in conformity therewith, are subject to any judicial scrutiny, Supreme Court precedent requires only that it survive rational basis review. Here, the District of Columbia's regulatory interests, the efficient reporting of election results and reduced election administration costs, and the other substantial and important interests discussed above, are sufficient to justify and uphold § 808.16 and Defendant's conduct under that lesser standard of review.

For all the foregoing reasons, Plaintiffs have failed to allege a predicate constitutional violation sufficient to impose liability upon Defendant under 42 U.S.C. § 1983. Defendant's motion to dismiss therefore should be granted. An appropriate proposed Order accompanies these papers.

Respectfully submitted,

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