UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LIBERTARIAN PARTY OF NORTH DAKOTA, RICHARD AMES, THOMMY PASSA AND ANTHONY STEWART, Appellants, v. ALVIN A. JAEGER, Appellee.	)	No. 10-3212

APPELLANTS' PETITION FOR REHEARING EN BANC

Appellants Libertarian Party of North Dakota, Richard Ames, Thommy Passa and Anthony Stewart ("the Libertarians") seek en banc rehearing and reversal of the decision in this case, in which the Panel upheld the minimum vote requirement that North Dakota imposes on the winners of partisan primary elections pursuant to N.D.C.C. § 16.1-11-36 ("Section 16.1-11-36").

Dated: October 31, 2011

Respectfully submitted,

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FEDERAL RULES OF APPELLATE PROCEDURE RULE 35(B) STATEMENT

En banc review by this Court is warranted because, as set forth *infra* at Part II, the Panel's decision conflicts with the Supreme Court's decisions establishing that a state may not require, as a condition of accessing its ballot, a showing of support from as much as 15 percent of the actual voters in an election. *See Williams v. Rhodes*, 393 U.S. 23 (1968); *Storer v. Brown*, 415 U.S. 724 (1974).

ARGUMENT

I. The Panel Misstated North Dakota Law and Erroneously Concluded That Section 16.1-11-36 Is "Necessary" to Further a Compelling State Interest.

Rehearing is necessary in this case because the Panel committed a significant error by misstating the applicable law of North Dakota. Specifically, the Panel mischaracterized the "7,000 signature requirement" that a party must meet in order to qualify for North Dakota's primary election ballot as a "one-time occurrence." Slip Op. at 14. "Once a party is established using the 7,000 signatures," the Panel averred, "it will not have to regain those signatures in future years." Slip Op. at 14. That is incorrect.

To place its candidates on North Dakota's primary election ballot, a party must submit "a petition signed by at least seven thousand qualified electors" in each election cycle, unless the party was ballot-qualified in the preceding general election, and one of its candidates for statewide office received "at least five percent of the total vote cast for the office the candidate was seeking." N.D.C.C. § 16.1-11-30 ("Section 16.1-11-30"). Contrary to the Panel's assertion, therefore, complying with the 7,000 signature requirement once does not enable a party to avoid the requirement in future years. *See id.* Rather, a party may be required to submit a petition containing 7,000 signatures *even if it did so in the previous election* – as the Libertarians can

attest, having been required to submit such petitions not only in 2010, but also in 2008.

The Panel's incorrect reading of the statutory scheme governing this case is a substantial error that, standing alone, constitutes grounds for rehearing. But the Panel's misstatement of law is even more significant, because it serves as the lynchpin for the Panel's holding that the challenged provision, Section 16.1-11-36, is "necessary" to achieve North Dakota's asserted interests. Slip Op. at 12.

Based on its misreading of North Dakota's statutory scheme, the Panel reasoned that "the 1% or 300 vote requirement" imposed on primary election winners by Section 16.1-11-36 is "the only protection the state has from frivolous party candidates and ballot overcrowding in subsequent elections." Slip Op. at 14. That is not true. In fact, even if Section 16.1-11-36 were not in place, a party still could not place its candidates on North Dakota's primary election ballot unless: 1) one of its candidates for statewide office in the preceding general election received at least 5 percent of the vote cast for that office; or 2) the party submitted a petition with the signatures of 7,000 qualified electors. *See* N.D.C.C. § 16.1-11-30. Section 16.1-11-30 thus ensures that a party cannot place its candidates on North Dakota's ballot without first demonstrating "a significant modicum of support," *Jenness v. Fortson*, 403 U.S. 431, 442 (1972), either by virtue of its performance in the previous election cycle, or by submitting a 7,000-signature petition in the current election cycle. *See* N.D.C.C. § 16.1-11-30. Had the Panel properly recognized that a party must comply with the requirements imposed by Section 16.1-11-30 in each election cycle, it would not have concluded that Section 16.1-11-36 is also "necessary" to protect North Dakota's regulatory interests. Slip Op. at 12.

The Panel objects that the 7,000 signature requirement does not "show support for the

individual candidates, but rather for the party as a whole," Slip Op. at 14, but this, too, rests on a misreading of North Dakota law. As a threshold matter, the Panel's objection contradicts the plain language of the statute itself, which specifies that the 7,000 electors who signed the Libertarians' petition were "requesting the names of its candidates to be included" on North Dakota's 2010 primary election ballot. N.D.C.C. § 16.1-11-30 (emphasis added). Moreover, the only benefit the 7,000 signatures provided "the party as a whole" was to enable its candidates to access North Dakota's primary election ballot in 2010 – and *only* in 2010. *See id.* If the Libertarians wish to place their candidates on North Dakota's primary election ballot in 2012, they will be required to submit yet another 7,000-signature petition. *See id.* Consequently, the Panel's concern about "frivolous party candidates and ballot overcrowding in subsequent elections" is misplaced and unwarranted.

The rationale for the Panel's conclusion that Section 16.1-11-36 is "necessary" to protect North Dakota's interests in regulating ballot access thus unravels once it is understood that Section 16.1-11-30 already protects those interests by requiring a party to show "a significant modicum of support" in each election cycle, just to access the primary election ballot. *Jenness*, 403 U.S. at 442. North Dakota simply has no legitimate interest in imposing a subsequent and additional minimum vote requirement on the winners of a ballot-qualified party's primary election. Indeed, no other state in the nation imposes such a requirement, R17, and, except for the Panel, every court that has considered such a requirement struck it down. *See Libertarian Party v. Reed*, No. 04-CV-2019742 (Wash. Sup. Ct. Sept. 30, 2004) (unpublished order filed with Court by letter dated May 17, 2011) (enjoining enforcement of Washington's partisan primary minimum vote requirement); *In re Candidacy of Independence Party Candidates v. Kiffmeyer*,

688 N.W.2d 854 (Minn. 2004) (striking down Minnesota's partisan primary minimum vote requirement); *Maryland Green Party v. Bd. of Elections*, 832 A.2d 214 (2003) (striking down Maryland's requirement that party's candidates submit individual petitions in addition to 10,000-signature petition submitted by party).

Finally, the case on which the Panel principally relies to support its conclusion that Section 16.1-11-36 is "necessary" to eliminate "frivolous and unsupported candidates from the ballot" differs from the instant matter in several key aspects, the critical importance of which the Panel overlooked. Slip Op. at 15-18 (citing *Munro v. Socialist Workers Party*, 479 U.S 189 (1986)). First, in *Munro*, minor party candidates could access the primary election ballot by submitting only 100 signatures. *See Socialist Workers Party v. Munro*, 765 F.2d 1417 (9th Cir. 1985). Such "easy access," the Supreme Court found, produced a "long and complicated" primary election ballot, which justified Washington's imposition of a minimum vote requirement on the primary election winners. *Munro*, 479 U.S. at 196, 199. The requirement for minor party candidates to access North Dakota's primary election ballot, by contrast, is 7,000 signatures – a burden 700 times greater than Washington's. *See* N.D.C.C. § 16.1-11-30. This fact alone demonstrates that the state interests found sufficient to justify the minimum voter requirement upheld in *Munro* do not apply here, but because the Panel misread North Dakota law, it overlooked this crucial distinction.

Moreover, the minimum vote requirement upheld in *Munro* was much less restrictive than North Dakota's. The Washington statute in *Munro* permitted candidates to access the general election ballot if they received only 1 percent of the actual vote for their office in the primary election. *See Munro*, 479 U.S. at 190. By defining its minimum vote requirement as 1 percent of

the entire population, however, North Dakota actually requires candidates to show support from as much as 15 percent of the actual vote for their office in the primary election. *See* N.D.C.C. § 16.1-11-36; R12. The Panel acknowledged this fact, Slip Op. at 8-9, but completely failed to address the conclusion that necessarily follows: North Dakota's minimum vote requirement is 15 times more restrictive than the one upheld in *Munro*. Instead, the Panel cited *Munro* as support for "the use of primaries as a forum to determine whether a candidate has a modicum of support." Slip Op. at 18 (citing *Munro*, 479 U.S. at 197-98). The issue in this case, however, is not whether North Dakota may use primary elections to make such a determination, but whether the "modicum" of support that North Dakota requires is constitutionally permissible – and *Munro* does not support the Panel's conclusion that it is.

II. The Panel Relied on a Flawed Analysis to Uphold a Law That Unconstitutionally Burdens the Libertarians.

Review by this Court sitting en banc is also warranted because the Panel's decision conflicts with Supreme Court precedent, which establishes that states may not condition ballot access on a showing of support from as much as 15 percent of the actual voters in an election, as North Dakota does through Section 16.1-11-36. Indeed, if North Dakota enacted a statute that explicitly imposed such a requirement, there would be little doubt that the statute was unconstitutional. But because Section 16.1-11-36 takes a more circuitous path to reach exactly the same result, the Panel concluded that it "is reasonable under Supreme Court and Eighth Circuit precedent." Slip Op. at 13. This was error.

In the Supreme Court's very first ballot access case, it struck down an Ohio law that required minor parties to submit a petition with signatures equal in number to 15 percent of the actual voters in the preceding gubernatorial election. *See Williams v. Rhodes*, 393 U.S. 23 (1968).

The Court held Ohio's entire ballot access scheme unconstitutional on equal protection grounds, because it practically guaranteed a monopoly to the two major parties. *See id.* at 32, 34. Justice Harlan wrote separately in *Williams*, to emphasize that Ohio's 15 percent signature requirement also "violates the basic right of political association assured by the First Amendment." *Id.* at 41 (Harlan, J. concurring). "Even when regarded in isolation," Justice Harlan therefore concluded, Ohio's 15 percent requirement "must fall." *Id.* at 46 (Harlan, J. concurring).

The Supreme Court has since emphasized that there is no "litmus paper test" for determining the constitutionality of ballot access statutes, *Storer*, 415 U.S. 724, 730 (1974), but its decisions following *Williams* establish that there is a limit on the percentage of support that a state may require. In *Storer*, for example, a California statute required independent candidates to submit a petition signed by a number of voters equal to 5 percent of the actual vote in the preceding general election. *See id.* Primary voters were barred from signing the petition, however, and the Court therefore remanded for a determination of whether exclusion of these voters would require independent candidates to show support from "substantially more than 5% of the eligible pool," which "would be in excess, percentagewise, of anything the Court has approved." *Id.* Three dissenting Justices went further, concluding that remand was unnecessary because the available data demonstrated that the exclusion of primary voters resulted in a requirement that independent candidates submit signatures equal in number to 9.5 percent of the eligible pool, which left "no room for doubt that California's statutory requirements are unconstitutionally burdensome." *Id*. at 763-4 (Brennan, J. dissenting).

In this case, North Dakota requires that partisan primary winners receive a minimum number of votes equal to 1 percent of the entire population of their electoral district, not to

exceed 300 votes, in order to access its general election ballot. Slip Op. at 2-3 (citing N.D.C.C. §§ 16.1-11-36, 16.1-11-11(2)(c)(4)-(5)). The Panel acknowledged that this minimum vote requirement "is equivalent to the candidate receiving as high as 15% of actual votes cast in the primary." Slip Op. at 9. The Panel therefore should have held Section 16.1-11-36 unconstitutional under *Williams*, *Storer* and other Supreme Court cases establishing limits on the "modicum of support" states may require. *See*, *e.g.*, *Am. Party of Tex. v. White*, 415 U.S. 767, 783 (1974) (describing a requirement of 1 percent of the actual vote in the preceding gubernatorial election as "within the *outer boundaries* of support the State may require") (emphasis added).

Instead, the Panel erroneously concluded that "the percent of actual votes cast" is not "the correct consideration" in this case. Slip Op. at 9. "As was the case in *Storer*," the Panel reasoned, "the eligible pool should be the number of people who were *eligible* to vote for the candidates in the primary regardless of whether they cast a vote or not, not the number who *actually* voted." Slip Op. at 9. But this reasoning confuses the "modicum of support" that a state may require with the size of the "eligible pool" from which it can be satisfied. The Supreme Court's decisions do not prohibit North Dakota from defining the eligible pool as the entire population of an electoral district, and determining the modicum of support it requires as a percentage thereof. But however North Dakota defines the "eligible pool," it cannot require a "modicum of support" that exceeds the limits established by *Williams*, *Storer* and other Supreme Court cases.

The Panel's mistake, in other words, is to conclude that because North Dakota expanded the eligible pool to include the entire population in an electoral district, and not just the actual voters, the modicum of support required may exceed the limits established by Supreme Court

precedent. This error is made explicit in the Panel's discussion of *Williams*. The Panel purported to distinguish *Williams* on the ground that North Dakota's requirement is "fairly minimal" compared to the Ohio law struck down in that case – "compare 15% to 1%," the Panel reasoned. Slip Op. at 21. But the Panel is comparing apples and oranges. Requiring a showing of support from one percent of the entire population, as North Dakota does in this case, might be just as burdensome as requiring a showing of support from 15 percent of the actual voters in an election, as Ohio did in *Williams*. And in fact, as the Panel conceded, North Dakota's 1 percent requirement actually is "equivalent to" as much as "15% of actual votes" in the primary election. Slip Op. at 8-9. Requiring such a showing of support is unconstitutional, no matter how North Dakota defines the eligible pool. *See Williams*, 393 U.S. 23; *Storer*, 415 U.S. 724.

Contrary to the Panel's assertion, therefore, the Libertarians do not ask that the Court "ignore the plain language" of Section 16.1-11-36, nor that it "define the 'eligible pool' in a way unsupported by precedent." Slip Op. at 8-9. The Libertarians do not challenge North Dakota's definition of the eligible pool at all. Rather, the gravamen of the Libertarians' claim is that the modicum of support required by Section 16.1-11-36 exceeds the limits established by Supreme Court precedent. If North Dakota enacted a statute that expressly required a showing of support from "15 percent of the actual voters in the primary election," the statute could not withstand scrutiny under *Williams*, *Storer* and other Supreme Court cases. *See Williams*, 393 U.S. 23; *Storer*, 415 U.S. 724. But Section 16.1-11-36 *does* impose that requirement, by defining the necessary showing of support as a percentage of the entire population that is "equivalent to" 15 percent of the actual voters in the primary election. *See id.*; Slip Op. at 9. The statute is therefore unconstitutional.

Had the Panel properly applied *Williams*, *Storer* and other Supreme Court precedent, it would have recognized that the modicum of support required by Section 16.1-11-36 is unconstitutional. The Panel's failure to do so thus brings the Eighth Circuit into conflict with the Supreme Court. This Court should grant the Libertarians' Petition for Rehearing En Banc to resolve that conflict.

III. The Panel Improperly Resolved Questions of Fact Against the Libertarians and Overlooked Evidence in the Record.

Rehearing also should be granted because the Panel improperly resolved questions of fact against the Libertarians and overlooked evidence in the record that supports their claims. It is well settled that a complaint may not be dismissed under Rule 12(b)(6) "based on a judge's disbelief of a complaint's factual allegations." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citation omitted). Yet, the Panel affirmed dismissal in this case largely because it was "unpersuaded" by the Libertarians' allegation that Section 16.1-11-36 is the cause for the complete absence of minor party legislative candidates on North Dakota's ballot in the last three decades, since 1976. Slip Op. at 10, 21-22. This was error.

The Supreme Court has recognized that "past experience" is a "helpful, if not...unerring" indicator of a statute's constitutionality: "it will be one thing if...candidates qualify with some regularity and quite a different matter if they have not." *Storer*, 415 U.S. at 742. This Court relied on that rationale in striking down North Dakota's previous ballot access requirement because only one minor party had complied with it in the three decades prior to the Court's decision. *See McLain v. Meier*, 637 F.2d 1159, 1165 (8th Cir. 1980). In this case, by contrast, the Panel concluded that the Libertarians did not allege "facts indicating minor party candidates have appeared consistently on the primary election ballot," and therefore it could not find that "the

mere absence of minor party candidates from the general election ballot, without a causal connection, *necessarily establishes*" that Section 16.1-11-36 imposes an unconstitutional burden. Slip Op. at 21-22.

As a threshold matter, both the Supreme Court in *Storer* and this Court in *McLain* recognized that the historical failure of candidates to comply with a ballot access statute permits the inference that the statute is unconstitutionally burdensome. *See Storer*, 415 U.S. at 742; *McLain*, 637 F.2d at 1165. Because no minor party candidate has complied with the minimum vote requirement imposed by Section 16.1-11-36 since 1976, the Panel was required, at the pleading stage, to draw that inference in the Libertarians' favor. *See O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503 (8th Cir. 2009). Moreover, the Libertarians supported their claims with extensive evidence, which the Panel did not address and apparently overlooked. Specifically, the Declaration of Richard Winger cites numerous examples of minor party candidates in other states, who received very low, even single-digit primary election vote totals, yet went on to win a plurality or even a majority of votes in the general election. R19-R20. Such evidence supports the inference that North Dakota's minimum vote requirement, which no other state imposes, is the cause for the complete absence of minor party legislative candidates on North Dakota's ballot since 1976. R17.

Accordingly, the Court should grant rehearing because the Libertarians pleaded sufficient facts to support their claim that Section 16.1-11-36 imposes an unconstitutional burden, and because the Panel's resolution of this question of fact against the Libertarians conflicts with Supreme Court and Eighth Circuit precedent.

CONCLUSION

For the foregoing reasons, the Petition for Rehearing should be granted, so that the Court may resolve the conflict between the Panel's decision and Supreme Court and Eighth Circuit precedent.

Dated: October 31, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October 2011, I electronically filed the foregoing Appellants' Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished upon Douglas A. Bahr by the CM/ECF system.

/s/Oliver B. Hall

Oliver B. Hall