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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

ARIZONA LIBERTARIAN PARTY, ARIZONA GREEN PARTY, JAMES MARCH, KENT SOLBERG and STEVE LACKEY,	)	
Plaintiffs	)	No. 11-CV-856-CKJ
v.	)	
KEN BENNETT, SECRETARY OF STATE	)	PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
Defendant.	)	

Introduction

"[M]inor political parties are not the step-children of the American political process. Core First and Fourteenth Amendment principles protect their rights to organize and to compete for votes." *Patriot Party v. Allegheny County Dept. of Elections*, 95 F.3d 253, 261 (3rd Cir. 1996). Sometimes, as with the Republican Party in 1852-1860, they become major parties. They have historically played a

significant role outside the voting booth, as well. "Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185-86 (1979). Thus,

> For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties. The right derives from the First and Fourteenth Amendments and advances the constitutional interest of likeminded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences.

Norman v. Reed, 502 U.S. 279, 288 (1992). While Arizona has four and perhaps five parties with continuing ballot access,[1] Arizona's legislature is monopolized by its two largest parties, Republican and Democrat.[2] It is thus not surprising that, when acting on political matters, the legislature is apt to overlook the situation and needs of Arizona's smaller political parties. *See Arizona Libertarian Party, Inc. v. Bd. of Supervisors of Pima County*, 216 F. Supp. 2d 1007 (D. Ariz. 2002). *aff'd* 351 F.3d 1277 (9th Cir. 2003).

[1] "Continuing ballot access" signifies that a party has met requirements for voter registrations or electoral turnout such that it is no longer required to file petitions in order to be entitled to a place on the ballot. Its individual candidates must still meet petition requirements, but the party need not. Arizona's parties with continuing access are the Democratic, Republican, Libertarian, Green and Americans Elect. The last appears moribund, and will not run a presidential candidate in 2012.

[2] Every member of both House and Senate is one or the other. http://www.azleg.gov/MemberRoster.asp?Body=H&SortBy=1

The legislation here at issue suggests that the legislature did not merely ignore the situation of the smaller parties, but actively sought to undermine them. Arizona's voter registration forms traditionally had a blank where the registrant could write in his or her party affiliation; all parties had equal standing in this regard. To the best of our knowledge, no one was complaining that this was a burden or unfair in some way.

The amendment to A.R.S. §16-152 changed this, requiring arbitrarily that the voter registration form have two check boxes for the two major parties.[3] A.R.S. 16-152(A)(5). Anyone wishing any other registration (including "independent") must check "other" and fill in a blank – we might add, a tiny blank, 0.9" long, and able to contain at best one short word.[4] See Statement of Facts Deemed Undisputed, Attachment A. The suggestion to the voter is clear: you should register Democrat or Republican, anything else is a display of eccentricity or a waste of time. This, we contend, is clear and invidious discrimination in violation of the Equal Protection Clause.[5] The discriminatory impact is rendered all the

[3] "The two largest political parties that are entitled to continued representation on the ballot shall be listed on the form…. The form … shall include a blank line for other party preference options." A.R.S. §16-152(A)(5).

[4] The small size of the blank poses its own problems. It is far too short for "Libertarian," so a registrant for that party must abbreviate and risk the abbreviation being misunderstood.

[5] We would note that, in this particular portion of the legal arena, courts apply the same standards for equal protection analysis as they do for First/Fourteenth Amendment analysis. *See Norman v. Reed*, 502 U.S. 279, 288 n.8 (1992); *Patriot Party of Pa. v. Mitchell*, 826 F. Supp. 926, 934 n. 8 (E.D. Pa. 1993). *See also Patriot Party of Allegheny County v. Alleghency Co. Dept. of Elections*, 95 F.3d 253, 261 (3rd Cir. 1996) (noting that laws giving advantages to major

worse by the fact that a small party which loses registrations may also lose its continuing ballot status, a risk not shared by the two major parties.[6]

I

The Appropriate Standard of Review is Strict Scrutiny

As we note above, citizens have a fundamental right to create new political parties. *Norman v. Reed*, 502 U.S. 279, 288 (1992). *Williams v. Rhodes*, 393 U.S. 23 (1968) is here instructive. *Williams* dealt with Ohio election laws that permitted the two major parties to remain on the ballot so long as they polled 10% of the vote in the previous election – which they obviously would do with ease – but required new parties to obtain petitions signed by 15% of the electorate to obtain ballot access. The Supreme Court struck down the laws, and held that strict scrutiny was applicable:

> No extended discussion is required to establish that the Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence, and thus place substantially unequal burdens on both the right to vote and the right to associate. The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot, and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on

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parties burden the right of association, *i.e.*, 14th Amendment inequality implicates First Amendment prohibitions).

[6] Continuing ballot access is determined by A.R.S. §16-804. A party can qualify by receiving a certain percentage of votes cast for certain offices, or by maintaining voter registration levels of 2/3 of 1% of total registrations. The two major parties can easily meet that requirement; small parties cannot say the same.

> the ballot. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP v. Button,* 371 U.S. 415, 438 (1963).
>
> The State has here failed to show any "compelling interest" which justifies imposing such heavy burdens on the right to vote and to associate.
>
> The State asserts that the following interests are served by the restrictions it imposes. It claims that the State may validly promote a two-party system in order to encourage compromise and political stability. The fact is, however, that the Ohio system does not merely favor a "two-party system"; it favors two particular parties the Republicans and the Democrat -- and, in effect, tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.

393 U.S. at 31-32. *See also Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest."); *Patriot Party of Pa. v. Mitchell*, 826 F. Supp. 926, 941 (E.D. Pa. 1993) ("Ballot access laws that appear to arbitrarily discriminate against minor political parties have been subjected to strict scrutiny.").

The rationale for strict scrutiny here is simple: "because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be

ignored in legislative decisionmaking may warrant more careful judicial scrutiny." *Anderson v. Celebreeze*, 460 U.S. 780, 793 n. 16 (1983).

The Court has recognized that, in the electoral context, a form of intermediate scrutiny[7] may apply where the regulatory burden is not severe and the regulations consist of "'reasonable, *nondiscriminatory* restrictions.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (emphasis supplied). The "nondiscriminatory" requirement is crucial.

> Where the State imposes only reasonable and genuinely neutral restrictions on associational rights, there is no threat to the integrity of the electoral process and no apparent need for judicial intervention. As such restrictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barrier to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anti-competitive restrictions.

Clingman v. Beaver, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring). The legislation here at issue is patently discriminatory and anti-competitive. The two political parties that control the Legislature have handed themselves an advantage, when they already have the lead. "The State has shown no compelling state interest nor even a justifiable purpose for grant what, in effect, is a significant subsidy only

[7] Requiring that the State show "important regulatory interests" rather than a "compelling interest," and that the regulations reasonably serve that end. *Timmons*, 520 U.S. at 358. Another phrasing asks whether restrictive measures were "reasonably taken" in pursuit of "vital state objectives" that cannot be served equally well by "less burdensome" means. *American Party of Texas v. White*, 415 U.S. 767, 781 (1974).

to those parties who have the least need therefore." *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 995 (S.D.N.Y.) *aff'd* 400 U.S. 806 (1970).

II

The Statute at Issue Deprives Plaintiffs of Equal Protection of the Laws and of Their First Amendment Right to Association

In assessing a challenge of this type, the Court must

> first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). This is, in short, not rational basis review, where the State may rest upon speculated objectives to be served; instead the State must establish interests with "legitimacy and strength," and why it was "necessary" to burden Plaintiffs' rights (or, in this context, to discriminate against them). The government bears the burden of establishing that challenged legislation passes muster. *First National Bank v. Bellotti*, 435 U.S. 765, 786 (1978).

As noted above, strict scrutiny requires at the outset proof of a *compelling* governmental interest. Such an interest "must be genuine, not hypothesized or

invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

It is hard to see *any* legitimate interest, let alone a compelling one, in making it easier for persons to register in certain parties, and harder to register in others. The registration form shows more than sufficient space to add in the Green and Libertarian Parties.[8] It bears emphasis that *the statute commands the Secretary of State to list only the two largest parties, even if he could find room on the form to list the other parties with ballot access.*

The same may be said of its second requirement, that the statute serve that interest. Since we cannot see any legitimate interest, it is hard to specify how the statute serves that interest.

Finally, strict scrutiny requires that the measure taken be the least restrictive (or here, least discriminatory) means of achieving the desired end. If that end is making registration simpler or less prone to error, it is hard to see why the same was not done for the smaller established political parties.

The legislation at issue would likewise fail intermediate scrutiny. There is no "vital" or "important regulatory" interest in discriminating against the smaller parties with continuing ballot access, nor one that justifies this measure.

[8] If nothing else, moving the line beginning "Use black pen" above rather than below the "fold line" would add sufficient space. The State could also delete item 11, Alien Registration Number, since aliens are not allowed to vote, or item 20 (volunteering to work at a polling place) or 21 (email address).

> Perhaps a stricter standard of review should be used to judge the statute here, as it is discriminatory in the sense that it favors the two largest political parties [citation omitted]. The court need not resolve whether a stricter standard should be applied, however, because even under the standard applied in *Anderson*, the states' regulatory interests do not serve to justify the burdens it has imposed on the plaintiffs.
>
> The plaintiffs in this case seek equal access to voters, meaning that significant advantages may not be accorded to two major political parties and arbitrarily denied to others.

Libertarian Party v. Marion County Bd. of Voter Registration, 788 F. Supp. 1458, 1463 (S. D. Ind. 1991). *See also Fulani v. Krivanek*, 973 F.2d 1539, 1544 (11th Cir. 1992) (striking down electoral law that allowed a signature verification fee to be waived, but not for minor parties or their candidates).

Conclusion

A.R.S. §16-152, as amended, violates the 14th Amendment's guarantee of equal protection of the laws. It is *expressly* discriminatory, in favor of the two parties that control the Legislature, and against Arizona's Green and Libertarian Parties. It affects the fundamental right of Americans to form and advance new political parties when the dominant ones prove unsatisfactory. The statute cannot pass muster under either strict or intermediate scrutiny, and must be stricken.

Respectfully submitted this 29th day of June, 2012

s/ _____
David T. Hardy
Counsel for Plaintiffs

Certificate of Service

I hereby that on June 29, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

s/_____
David T. Hardy