ORAL ARGUMENT SCHEDULED FOR FEBRUARY 10, 2010

NO. 11-7029

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LIBERTARIAN PARTY, BOB BARR, J. BRADLEY JANSEN, ROB KAMPIA and STACIE RUMENAP

Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, VINCENT C. GRAY and IRVIN B. NATHAN

Defendants-Appellees.

On Appeal from the United States District Court
For the District of Columbia

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND REGULATIONS

D.C. Code § 1-1001.08(r) provides in relevant part:

(1) In any primary, general, or special election held in the District of Columbia to nominate or elect candidates to public office, a voter may cast a write-in vote for a candidate other than those who have qualified to appear on the ballot.

* * *

(3) To be eligible for election to public office, a write-in candidate shall be a duly registered elector and shall meet all of the other qualifications required for election to the office and shall declare his or her candidacy not later than 4:45 p.m. on the seventh day immediately following the date of the election in which he or she was a candidate on a form or forms prescribed by the Board [of Elections and Ethics].

D.C. Mun. Regs., tit. 3, § 806 provides in relevant part:

806.12 The total number of write-in votes marked by voters shall be reported for each contest.

806.13 The total number of votes cast for each write-in nominee 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-in votes reported, under § 808.12, is sufficient to elect a write-in candidate.

Appellants Libertarian Party, its 2008 candidate for President of the United States Bob Barr, and its candidates for presidential elector from the District of Columbia who were pledged to Barr, J. Bradley Jansen, Rob Kampia and Stacie Rumenap (collectively, "the Libertarians") submit this Reply Brief in response to the Brief of Appellees Vincent C. Gray and Irvin B. Nathan ("the Mayor") and to the Brief of Appellee District of Columbia Board of Elections and Ethics ("the Board"), which were submitted on December 14, 2011.

SUMMARY OF ARGUMENT

The District Court's decision in this case should be reversed because it applies an improperly deferential standard of review to uphold D.C. Mun. Regs., tit. 3, § 806.13 ("Section 806.13"). Section 806.13 severel burdens the Libertarians by undermining their right to cast their votes effectively, to form and develop a party to advance their political interests, and to participate in elections in the District of Columbia on an equal basis with other citizens. The District Court thus erred by accepting the Board's unsubstantiated assertions of costs-savings and administrative efficiency as justification for Section 806.13.

Reversal is especially needed in this case, because the District Court's decision relies on a new standard that cannot be reconciled with Supreme Court precedent. States may treat a class of valid votes unequally, the District Court concluded, by failing to report the identity of the candidate for whom they were

cast, provided such votes are determined not to effect the outcome of an election. Neither the District Court nor the Board and the Mayor have cited a single case as precedent for this new standard, and they cannot. On the contrary, the Supreme Court of the United States has repeatedly concluded that states must treat all valid votes on an equal basis with all other valid votes, and it has never recognized any exception to this rule. This Court should not permit this case to become the first.

ARGUMENT

I. THE DISTRICT COURT MISCONCEIVED THE BASIS FOR THE LIBERTARIANS' CLAIMS AND IMPROPERLY CONCLUDED THAT THE DISTRICT'S ADMINISTRATIVE INTERESTS "TRUMP" THEIR CONSTITUTIONAL RIGHTS.

A. The District Court Mischaracterized the Burden Imposed on the Libertarians' Rights Because It Misconceived the Basis For Their Claims.

The District Court arrived at its unprecedented conclusion in this case because it fundamentally misconceived the basis for the Libertarians' claims. According to the District Court, the "crux" of the Libertarians' claims "is that they were constitutionally entitled to know *precisely* how well Barr fared at the polls and that the Board's failure to provide this information constitutes a severe burden on their rights." A. 138.[1] The Mayor and the Board likewise contend that the Libertarians primarily assert a right to "information." Mayor Mem. at 16; Board Mem. at 17. That is incorrect. The basis for the Libertarians' claims, as set forth in

[1] Citations to the Appendix refer to the numbers generated by the Court's CM/ECF system.

the Amended Complaint, is that the Board's failure to tally and report the results of their votes severely burdens them by undermining their right to cast their votes effectively, to form and develop a party to advance their political interests, and to participate in elections in the District of Columbia on an equal basis with other citizens. A. 18. To construe these claims as primarily asserting a right to "information" is inconsistent with the plain language of the Amended Complaint, and it obscures the true nature and extent of the burden imposed on the Libertarians' rights.

In the District Court's view, the issue in this case boils down to whether the Libertarians' "speech and associational rights extend to the manner in which votes are reported." A. 126-27. To address this issue, the District Court focused exclusively on whether, "after an election occurs," the Constitution protects the "expressions of political preference that voters communicated by casting their ballots." A. 128. Finding this to be a "close question," the District Court assumed that the Libertarians do have a "constitutional interest" in having their votes reported, A. 128, but concluded its analysis by finding that the burdens imposed on that interest are only "slight" and "very limited." A. 136, 140.

The first problem with the District Court's analysis is that it conflicts with nearly 100 years of Supreme Court precedent recognizing that the right to vote necessarily includes the right to have the vote counted and reported on an equal

basis with other valid votes. *See Gray v. Sanders*, 372 U.S. 368, 380 (1963) (recognizing that "every voter's vote is entitled to be counted once," and that "it must be *correctly* counted *and reported*") (emphasis added); *United States v. Classic*, 313 U.S. 299, 315 (1941) (recognizing "the right of qualified voters within a state to cast their ballots and have them counted"); *United States v. Mosley*, 238 U.S. 383 (1915) (recognizing that "the right to have one's vote counted" is equal in stature to "the right to put a ballot in a box"). Contrary to the District Court's conclusion, the burden on the Libertarians' voting rights cannot properly be assessed by focusing on the extent of the impact on the "expressive function" of their votes, A. 128, without also recognizing that the right to vote is severely burdened when a vote is not correctly counted and reported.

Similarly, the District Court's exclusive focus on the burden imposed on the Libertarians' ability to communicate political preferences after an election disregards the burden imposed on their associational rights prior to and during the election. In particular, it fails to address the burden imposed on their "constitutional right … to create and develop [a] new political part[y]." *Norman v. Reed*, 502 U.S. 279, 288 (1992). The District Court reasoned that the Libertarian Party is "free to organize itself, to disseminate its views, to select, nominate, and field candidates – and to win elections," A. 137-38, but completely ignored the burden the Libertarians face in convincing voters to vote for their candidates when

the Board's official policy, pursuant to Section 806.13, guarantees that the result of those votes will not be reported unless the total number is sufficient to enable the Libertarians to win the election. Thus, while the Libertarians technically might be free "to win elections" in the District of Columbia, it does not follow, as the District Court found, that the Board's failure to report the result of their votes imposes no burden whatsoever on their right to create and develop a new party. A. 137-38. On the contrary, such unequal treatment impairs the party's basic function of "select[ing] candidates for public office to be offered to the voters at general elections," *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973), by diminishing the candidates' chances of building electoral support for the party.

The District Court's entire analysis in this case thus rests on the faulty premise that the Libertarians' constitutional rights can be treated in isolation from one another, and that the burden imposed by the Board's failure to report the result of the Libertarians' votes can be assessed solely by reference to its impact on the "expressive function" of those votes. A. 128. This premise is faulty first because the Supreme Court has repeatedly recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation," *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)), and that state laws restricting ballot access burden "different" but "overlapping" rights. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

Furthermore, even if the Libertarians' speech and associational rights could be disentangled from one another and considered in isolation, the District Court's analysis would still be flawed, because the Libertarians do not primarily – much less exclusively – base their claims on the "expressive function" of their votes, as the District Court assumed. A. 128, 138. Unlike the plaintiff in *Burdick*, for example, the Libertarians do not assert a right to express a fit of "pique" by casting a "protest" vote. *Burdick*, 504 U.S. at 438. Rather, the Libertarians assert a right to cast a valid write-in vote, pursuant to the laws of the District of Columbia, for a qualified candidate. A. 17.

In sum, by misconstruing the basis for the Libertarians' claims and disregarding the full panoply of rights implicated in this case, the District Court mischaracterized the burden imposed by the Board's failure to report the results of the Libertarians' votes. A. 18. The burden imposed by such laws must be measured based on its overall impact on a plaintiff's speech and associational rights, and not by confining the inquiry to one discreet aspect of a particular right in a particular factual context, as the District Court did in this case. Had the District Court properly considered the true nature and extent of the burden on the Libertarians' constitutional rights, it could not have upheld Section 806.13.

B. The District Court Erred By Concluding That the Board's Asserted Administrative Interests Justify Its Failure to Report the Results of the Libertarians' Votes.

The Mayor and the Board contend that the burden imposed on the Libertarians' rights in this case is justified by the District's interests in "cost-effective administration of elections," Mayor Mem. at 22, and "election efficiency." Board Mem. at 19. The Mayor further asserts that requiring the Board to report the results of the Libertarians' votes would involve "a significant increase in election administration costs," that it would necessitate "special training," which would "delay the reporting of election results," and that this would "erode public confidence in the District's electoral system." Mayor Mem. at 22. Finally, the Mayor claims that "these facts are not disputed." Mayor Mem. at 22.

As a threshold matter, the Mayor is incorrect that the foregoing assertions are "undisputed." On the contrary, such claims are unconvincing on their face, because Section 806.13 already requires the Board to count write-in votes. Neither the Board itself nor the Mayor has submitted evidence demonstrating that requiring the Board merely to report the result of those votes would entail a significantly greater expenditure of time or resources – much less that it would necessitate special training of employees who are already engaged in such work.

Further, when presented with similar assertions by states seeking to justify election laws on the ground that they reduce the "administrative burden" associated with conducting elections, the Supreme Court has expressly rejected them as legally insufficient. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208,

218 (1986). In *Tashjian*, for example, the state asserted that striking down its law limiting participation in partisan primary elections to party members would require:

> the purchase of additional voting machines, the training of additional poll workers, and potentially the printing of additional ballot materials specifically intended for independents voting in the Republican primary. In essence, appellant claims that the administration of the system contemplated by the Party rule would simply cost the State too much.

Id. Nonetheless, the Court reasoned:

> Even assuming the factual accuracy of these contentions, which have not been subjected to any scrutiny by the District Court, the possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing appellees' First Amendment rights.

Id.

The Supreme Court has similarly concluded that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Dunn v. Blumstein*, 405 U.S. 330, 351 (1972) (quoting *Carrington v. Rash*, 380 U.S. 89, 96 (1965)). These decisions indicate that the dubious assertions of 'cost-savings' and 'administrative efficiency' advanced by the Mayor and the Board are insufficient as a matter of law to justify the burdens imposed on the Libertarians' rights in this case. At the least, the District Court should have scrutinized such assertions closely before accepting them as justification for a law which, by its plain terms, dictates that a class of valid votes

need not be reported on an equal basis with all other valid votes. Instead, however, the District Court concluded that the District's asserted interests in "minimiz[ing] costs and administrative burdens" of holding elections "trump" the Libertarians' constitutional rights. A. 140 & n8. This was error.

II. The District Court's 'Outcome-Determinative' Standard Cannot Be Reconciled With the Supreme Court's Equal Protection Jurisprudence.

As the District Court acknowledged, "having granted citizens the right to cast write-in votes, the District of Columbia must confer the right in a manner consistent with the Constitution." A. 130 (citation omitted). This includes the Equal Protection Clause. *See Bush v. Gore*, 531 U.S. 98, 104 (2000) (explaining that equal protection applies not only to "the initial allocation of the franchise," but also to "the manner of its exercise"). Nonetheless, in this case the District Court concluded that the Board need not report the Libertarians' valid write-in votes on an equal basis with all other valid votes, provided they are "duly counted and determined to have no effect on the election's outcome." A. 139-140. Neither the District Court nor the Board and the Mayor have cited a single case as precedent for this new standard, and they cannot. On its face, the District Court's conclusion that a state may discriminate against a class of voters on the ground that their votes are not 'outcome-determinative' contradicts the principles recognized in *Gray*,

Mosley and *Classic*,[2] *supra* Part I.A, which the Supreme Court recently reiterated in *Bush*.

The District Court devoted almost no analysis to the Libertarians' equal protection claims, but rejected them on the ground that "write-in voters or candidates are not a suspect class entitled to heightened scrutiny." A. 136 (citing *AFL-CIO v. United States*, 195 F. Supp. 2d 4, 10-12 (D.D.C. 2002)). This was error. As the Supreme Court has clarified, the presence of a suspect class is not necessary to trigger heightened review of state laws imposing unequal burdens on associational and voting rights. *See Anderson v. Celebrezze*, 460 U.S. 780, 787 n.7, 789 (1983) (establishing balancing test for determining proper standard of review applicable in both equal protection and First Amendment cases). The District Court thus misread *Anderson* by relying on that case to dispose of the Libertarians' equal protection claims without addressing the burden imposed by the Board's unequal treatment of their votes. A. 129. The Mayor likewise failed to address the merits of the Libertarians' equal protection claims, Mayor. Mem. at 13 n.2, while the Board disregarded them altogether. Board Mem. at 6. *Anderson* does not obviate equal protection claims, however, but merely establishes that they are to be analyzed under the same test as First Amendment claims. *See Anderson*, 460 U.S. at 787 n.7, 789.

[2] *Mosley* and *Classic* were not equal protection cases, but the Supreme Court relied on them in *Gray*, which was. *See Gray*, 372 U.S. at 380-81.

Here, it is undisputed that the Libertarians and possibly others cast an indeterminate number of write-in votes for Barr, that those votes are valid under the laws of the District of Columbia, and that the only reason the number of such votes is unknown is that, pursuant to Section 806.13, the Board failed to report them on an equal basis with all other valid votes. A. 136. The District Court upheld such discrimination on the ground that the Libertarians' votes would not have "a determinative effect on the election." A. 136. The Constitution, however, does not permit states to treat a class of valid votes unequally, simply because they will not effect the outcome of an election. Section 806.13 therefore violates the Equal Protection Clause.

CONCLUSION

For the foregoing reasons and those stated in the Libertarians' principal brief, the Court should reverse the determination of the district court, deny defendants' motion to dismiss and grant the Libertarians' motion for summary judgment.

Respectfully submitted,

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Dated: January 4, 2012

CERTIFICATE OF SERVICE

I certify that on January 4, 2012 I caused the foregoing Reply Brief of Plaintiffs-Appellants to be served by means of the Court's CM-ECF system on the following:

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