UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LIBERTARIAN PARTY, et al.,	:	
	:	
Appellants,	:	
	:	
v.	:	Case No. 11-7029
	:	
DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, et al.,	:	
	:	
Appellees.	:	

APPELLANTS' PETITION FOR REHEARING EN BANC

Pursuant to Fed. R. App. P. 35, Appellants Libertarian Party, Bob Barr, J. Bradley Jansen, Rob Kampia and Stacie Rumenap (the "Libertarians") hereby petition the Court for rehearing en banc of the Panel's June 8, 2012 Judgment and Opinion ("Opinion" or "Slip Op."). The Panel held that the District of Columbia Board of Election and Ethics may refuse to report the result of the Libertarians' valid write-in votes in order to reduce the administrative burden of holding elections. No precedent is cited for this holding. Further, the Panel's holding directly contradicts Supreme Court precedent recognizing that states must treat all valid votes equally, including by reporting their result. Rehearing en banc is therefore needed, so that the full Court may address the following questions of exceptional importance: Does the Constitution permit states to treat a class of valid votes unequally, by failing to report their result, in order to save time and money? If so, which votes may be subject to such discrimination?

The Libertarians contend that the Constitution forbids states from discriminating on the basis the Board has adopted in this case, and that the Panel's conclusion to the contrary directly contradicts Supreme Court precedent. The Panel makes no attempt to resolve this conflict, but simply disregards such precedent. The Panel also misreads the single case on which it primarily relies, and fails to specify any neutral legal principle that could justify its holding. In sum, the Panel Opinion is unsupported by precedent or principle, and its holding was arbitrarily applied in this case. The Panel Opinion should be vacated.

ARGUMENT

I. The Panel Opinion Should Be Vacated Because It Directly Contradicts Supreme Court Precedent.

In its short Opinion affirming summary judgment for the Board, the Panel treats this case as if it were applying a well-settled rule of law to a familiar pattern of facts. That is not so. Instead, the Panel Opinion breaks new ground in its erosion and degradation of speech, voting and associational rights. Never before has a court held, as the Panel does, that a state may refuse to report the result of a valid vote in order to reduce the administrative burden of holding elections. On the contrary, the Supreme Court has expressly concluded not only that "every voter's vote is entitled to be counted once," but also that "it must be correctly counted and

reported." *Gray v. Sanders*, 372 U.S. 368, 380 (1963). The Panel's holding directly contradicts this conclusion.

The Panel acknowledges that the Libertarians rely on *Gray* to support the claim that their own votes must be correctly counted and reported, Slip Op. at 5, but then fails to address that case anywhere else in its Opinion. Instead, the Panel asserts that the Libertarians rely only on cases where strict scrutiny applied because states had "actually disenfranchised a segment of voters." Slip Op. at 9 (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986)). That is incorrect.

In *Gray*, the Supreme Court held a statutory scheme that weighted certain votes more heavily than others in violation of the Equal Protection Clause. *See Gray*, 372 U.S. at 376-81. Voting was not "literally prohibited" in *Gray*, as the Panel erroneously asserts. Slip Op. at 9-10. Rather, the plaintiffs in *Gray*, no less than the Libertarians, "were free to vote," "they voted," and their votes were "counted." Slip Op. at 6. Nonetheless, the unequal treatment of their votes thereafter was held unconstitutional. *See Gray*, 372 U.S. at 381. Here, too, the Libertarians challenge the unequal treatment of their votes after they were cast, based on the Board's refusal to report the results. The Panel therefore should have followed the Supreme Court's unequivocal command in *Gray*, that every voter's

vote "must be correctly counted and reported," by holding the Board's refusal to do so in this case unconstitutional. *Gray*, 372 U.S. at 380.

Had the Supreme Court itself entered the decision in this case, it would have been obliged to resolve the direct conflict between the Panel's holding and *Gray*, either by overruling *Gray* or by distinguishing it. The Panel cannot overrule *Gray*, however, and it made no attempt to distinguish that case. If this Court is to maintain fidelity to Supreme Court precedent, therefore, the Panel Opinion must be vacated.

II. The Panel Opinion Should Be Vacated Because The Panel Misreads the Single Case on Which Its Holding Primarily Relies.

A. *Burdick v. Takushi* Does Not Hold That States May Refuse to Report the Results of Valid Write-In Votes.

The Panel Opinion rests on its finding that the Board's refusal to report the result of the Libertarians' votes does not impose a "severe burden," but only makes it "inconvenient" for them to exercise their speech, voting and associational rights. Slip Op. at 6. Based on this finding, the Panel holds that the Board's "regulatory interests" are sufficient to justify its unequal treatment of the Libertarians' votes. Slip Op. at 9 (citing *Burdick v. Takushi*, 504 U.S 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). But the Panel misreads *Burdick*. That case does not hold that states may refuse to report the result of valid

write-in votes, or that states may treat such votes unequally in any way – much less that a state's regulatory interests can justify such discrimination.

In *Burdick*, the plaintiff challenged Hawaii's absolute ban on write-in voting, and claimed the state was required to count a "protest vote" for Donald Duck. *See Burdick*, 504 U.S at 438. In essence, the Supreme Court found, the plaintiff claimed an absolute right to vote and to associate for political purposes in any manner whatsoever, "and that any impediment to this asserted 'right' is unconstitutional." *Id.* at 438. Rejecting this claim, the Supreme Court upheld the ban. *Id.* at 433, 442. Because Hawaii allowed any candidate who submitted nomination petitions with as few as 25 signatures to access the primary election ballot, the Court found that the ban only affected "those who fail to identify the candidate of their choice until days before the primary." *Id.* at 436-37. The Court thus concluded that the ban imposed "a limited burden on voters' rights to make free choices and to associate politically through the vote," which was justified by the state's regulatory interests. *Id.* at 439-40.

Here, by contrast, the District of Columbia permits write-in voting, and Barr was a declared write-in candidate under District of Columbia law. Slip Op. at 2. Thus, the Libertarians are not claiming an "absolute" right to vote or to associate for political purposes. Rather, they seek to have the result of their votes, which

were properly cast for a declared candidate pursuant to District of Columbia law, reported on an equal basis with all other valid votes. *Cf. Brown v. Bd. of Education*, 347 U.S. 483, 493 (1954) (where the state has undertaken to provide an opportunity, "it is a right which must be made available to all on equal terms"). Unlike the plaintiff in *Burdick*, therefore, who claimed a right to cast a protest vote for a fictional character in a manner that violated state law, the Libertarians have a right to equal protection of their valid votes, which they cast for a declared candidate in a manner expressly authorized by District of Columbia law. *See Bush v. Gore*, 531 U.S. 98, 104 (2000) (equal protection applies not only to "the initial allocation of the franchise," but also to "the manner of its exercise").

The Panel thus errs by equating the Libertarians' claim with that asserted by the plaintiff in *Burdick*. Slip Op. at 7-8. The holding in *Burdick* was expressly predicated on the Court's finding that the plaintiff's vote was not valid, and that the plaintiff was improperly attempting to use the election "to provide a means of giving vent to short-range political goals, pique, or personal quarrels." *Burdick*, 504 U.S at 438 (citation and quotation marks omitted). That is not true of the Libertarians. Instead, they cast valid votes under District of Columbia law for a declared candidate who appeared on the ballot in 45 more states. Slip Op. at 2. Neither *Burdick*, nor any case applying *Burdick*, holds that states may refuse to

report the result of such valid votes, or that states may treat them unequally in any way.

B. The Panel Erred By Finding the Board's Administrative Interests Sufficient to Justify Its Unequal Treatment of the Libertarians' Votes.

The Panel concedes that the "administrative costs" asserted by the Board are insufficient, under *Anderson* and *Burdick*, to justify any regulation that imposes a severe burden on the Libertarians' speech, voting and associational rights. Slip Op. 9-10. Because the Panel falsely equates the Libertarians' claims with that of the plaintiff in *Burdick*, however, Slip Op. at 7-8, it mischaracterizes the burden imposed on the Libertarians in this case as a mere inconvenience. Slip Op. at 6. This is error.

By refusing to report the results of the Libertarians' valid votes, the Board denies them equal protection of the law. The Libertarians' injury, therefore, "is the denial of equal treatment resulting from the imposition of a barrier, not the ultimate ability to obtain benefits if that barrier is eliminated." *Conservative Party v. Walsh*, 818 F. Supp. 2d 670, 673 (S.D.N.Y. 2011) (citing *Rockefeller v. Powers*, 74 F.3d 1367, 1375-76 (2d Cir. 1995)). The Panel nonetheless discounts the Libertarians' injury precisely because it concludes they failed to prove they would gain a particular benefit – public funding – if their votes were reported on an equal basis

with all other votes. Slip Op. at 7. The Panel is wrong: the Libertarians are entitled to equal protection of their votes whether or not it would qualify them for public funding.

Further, although the Panel assures the Libertarians that their votes were "counted," Slip Op. at 6, it ignores the fact that the Board falsely reported to the Federal Election Commission that Barr received zero votes in the 2008 presidential election. Br. of Appellant at 12. The resultant injury is manifest: the Board erased the official record of support among District of Columbia voters for the Libertarians' agenda, and it did not report the result of the Libertarians' own votes. Such injury severely burdens the Libertarians' "constitutional right … to create and develop [a] new political part[y]." *Norman v. Reed*, 502 U.S. 279, 288 (1992). As the Court recognized in *Conservative Party*, a state's failure to credit a minor party with its votes burdens the party's ability "to fundraise, to influence elected officials on matters of public policy, and to recruit candidates and members," as well as the right of voters "to have their intended votes counted and reported fairly and accurately." *Conservative Party*, 818 F. Supp. 2d at 676-77 (finding such burdens to be "severe").

The Panel contends that it "cannot see how" the Board's refusal to report the result of the Libertarians' votes "can be considered a severe burden." Slip Op. at 7.

If that is so, it is because the Panel completely fails to address the Libertarians' equal protection claims, and similarly disregards their reliance on *Norman*. Instead, the Panel focuses on whether the Libertarians have a right "to use the ballot itself to send a particularized message, to [their] candidate and to the voters, about the nature of their support for the candidate." Slip Op. at 8 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). But the Panel's reliance on *Timmons* is misplaced. The Libertarians no more claim a right "to send a particularized message" through the ballot than do Democrats, Republicans, or any other group of voters who cast valid votes for a declared candidate. Just as it would severely burden Democrats and Republicans if the Board refused to report the result of their votes, so too does it severely burden the Libertarians.

III. The Panel Opinion Should Be Vacated Because the Panel Fails to Specify Any Neutral Legal Principle to Support Its Holding.

Given the Panel's conflict with *Dunn*, its misreading of *Burdick*, its disregard for *Norman*, and the complete absence of precedent for its holding, it is especially important that the Panel specify some neutral legal principle to support its holding. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARVARD L. REV. 1 (1959-60). On what basis does the Panel conclude that the Constitution permits the Board's unequal treatment of the Libertarians' votes in this case? The Panel offers only one answer: "where write-in

votes could have no possible effect on the outcome" of an election, the Board need not report their result. Slip Op. at 6. But this 'outcome-determinative' standard has never been recognized before, and it was arbitrarily applied in this case.

If voters were required to show that their votes might "have a determinative effect on the election" before they could invoke the protection of the Constitution, Slip Op. at 6, as the Panel demands of the Libertarians in this case, then many others could also be denied such protection. In the 2008 presidential election, Democrat Barack Obama received more than 90 percent of the votes cast in the District of Columbia. *See Libertarian Party v. D.C. Bd. of Elections and Ethics*, 768 F.Supp.2d 174, 176-77 (2011). Applying the Panel's reasoning, therefore, the Board could have refused to report the result of votes cast for the Republican nominee, because such votes likewise would have no determinative effect on the outcome of the election. Similarly, the Board could have refused to report the result of absentee ballots, including those cast by overseas military personnel, because they, too, would not be outcome-determinative. Yet only the Libertarians, among all the citizens who cast valid votes in the 2008 presidential election, have been denied equal treatment of their votes. Just as there is no precedent to support such discrimination, neither is there any principle that can justify it.

Where there is neither precedent nor principle to support the discrimination in this case, all that remains is prejudice. The Board did not report the result of the Libertarians' votes because, in its own words, it found such votes to be "inconsequential" and "of no moment." Br. of DCBOEE at 21, 23. The Constitution does not permit states to discriminate against voters on this basis. The Panel Opinion also should be vacated, therefore, because the Panel fails to specify any principle that could justify the Board's discrimination against the Libertarians in this case.

CONCLUSION

The Panel's holding – that states may reduce the administrative burden of holding elections by refusing to report the outcome of an entire class of valid votes – cannot be reconciled with Supreme Court precedent. Further, it is not grounded in any neutral legal principle. Instead, the Panel Opinion announces a new basis for discrimination in voting rights cases, which has never before been recognized, and which was arbitrarily applied in this case. Because the Panel Opinion relies on multiple errors and omissions, it should be vacated for the reasons set forth herein.

Dated: July 9, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 9, 2012 I caused the foregoing Petition for Rehearing En Banc to be served, by means of the Court's CM-ECF system, on the following:

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 10, 2012 Decided June 8, 2012

No. 11-7029

LIBERTARIAN PARTY, ET AL.,
APPELLANTS

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:09-cv-01676)

Oliver B. Hall argued the cause and filed the briefs for appellants.

Rudolph M.D. McGann argued the cause and filed the brief for appellee District of Columbia Board of Elections and Ethics. *Kenneth J. McGhie* entered an appearance.

James C. McKay Jr., Senior Assistant Attorney General, Office of the Attorney General for the District of Columbia, argued the cause for appellees Vincent C. Gray and Irvin B. Nathan. With him on the brief were *Irvin B. Nathan*, Attorney

General for the District of Columbia, *Todd S. Kim*, Solicitor General, and *Donna M. Murasky*, Deputy Solicitor General.

Before: TATEL, GARLAND, and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: The District of Columbia's Board of Elections and Ethics published the total number of write-in votes cast in the 2008 presidential election but, consistent with its regulations, never reported which individuals were penciled in by voters choosing the write-in option or how many votes any such individual accrued. The Libertarian Party, along with its 2008 presidential candidate Bob Barr, a write-in candidate, contends that the District's failure to report the number of votes cast for Barr violates the First and Fifth Amendments. The district court granted the Board's motion for summary judgment. For the reasons set forth in this opinion, we affirm.

I.

Bob Barr was listed on the ballots of forty-five states and qualified as a write-in candidate in one other. He also qualified as a write-in candidate in the District of Columbia. District voters could either vote for a ballot candidate, such as John McCain or Barack Obama, or they could opt to pencil in a vote for Bob Barr or one of the other write-in candidates. Of the 265,853 votes cast, 245,800 went to the future president, Barack Obama, and of the remaining 20,053 votes, a total of 1,138 were counted as votes for write-in candidates. The D.C. Board of Elections and Ethics tallied and reported all of these votes, including the 1,138 write-in votes, as required by its rules. *See* D.C. Mun. Regs. tit. 3, § 806.12. But because the "total number of write-in votes" was not "sufficient to elect a

write-in candidate," *id.* § 806.13, the Board, pursuant to section 806.13 of its rules, did not individually tally and report the total number of votes cast for Barr or any other write-in candidate. The Libertarian Party, Bob Barr, and several citizens who voted for Barr sued in the United States District Court for the District of Columbia, alleging that the Board's failure to do so violated their First Amendment speech and associational rights and their Fifth Amendment equal protection rights. Throughout this opinion, we shall refer to the plaintiffs as "the Party."

The district court granted summary judgment for the Board. After observing that whether speech and associational rights "extend to the manner in which votes are reported is a close question," the district court determined that it had no need to resolve the issue because "when an election law imposes only 'reasonable, nondiscriminatory restrictions' upon the constitutional rights of voters, 'the State's important regulatory interests are generally sufficient to justify the restrictions.' " *Libertarian Party v. D.C. Bd. of Elections & Ethics*, 768 F. Supp. 2d 174, 180, 181–82 (D.D.C. 2011) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). The district court concluded that "[t]he burden Section 806.13 puts on Plaintiffs' constitutional rights is accordingly very limited," and here, "the District's regulatory interests trump Plaintiffs' limited interest in having write-in votes tabulated and reported on a candidate-by-candidate basis." *Id.* at 187.

The Party now appeals, and our review is de novo. *See, e.g., Maydak v. United States*, 630 F.3d 166, 174 (D.C. Cir. 2010).

II.

The Supreme Court's decision in *Burdick v. Takushi*, 504 U.S. 428, provides the framework for our analysis. There, the Court explained that "[e]lection laws will invariably impose some burden upon individual voters," and that not all laws burdening the right to vote are subject to strict scrutiny. *Id.* at 433–34. Rather, as explained in *Anderson v. Celebrezze*, courts must "consider the character and magnitude of the asserted injury" to the plaintiff's constitutional right, as well as "the precise interests put forward by the State as justifications for the burden imposed by its rule." 460 U.S. 780, 789 (1983). When a voter's rights are "subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (internal quotation marks omitted). But when election laws impose only "reasonable, nondiscriminatory restrictions" upon the constitutional rights of voters, "the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (internal quotation marks omitted). The question, then, is whether the District's regulations impose "severe restrictions" on the Party's constitutional rights and are thus subject to strict scrutiny (as the Party argues), or whether they impose "reasonable, nondiscriminatory restrictions" and are thus permissible in light of the District's "important regulatory interests" (as the district court found).

Acknowledging that the Supreme Court in *Burdick* upheld Hawaii's outright ban on write-in voting, the Party argues that the Court only did so in the context of Hawaii's particular statutory scheme, which provides candidates with "easy access to the ballot." Appellants' Br. 11. By contrast, the Party points out that the District, unlike Hawaii, requires that candidates seeking to appear on the general election ballot submit a nomination petition signed by one percent of

all registered voters. D.C. Code § 1-1001.08(f). The Party does not challenge this requirement. Instead, it argues that in light of the burden the District imposes on candidates seeking access to the ballot, the Board's unwillingness to count and report the number of votes cast for each individual write-in candidate "severe[ly]" burdens the Party's constitutional rights. Appellants' Br. 14. It does so, the Party argues, by burdening " 'the right of qualified voters, regardless of their political persuasion, to cast their votes effectively,' " as well as the " 'right of individuals to associate for the advancement of political beliefs.' " *Id.* at 19 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). Elaborating, the Party explains:

> [A] voter who casts a valid write-in ballot for a declared candidate like Barr is entitled to know whether she has acted in concert with other like-minded voters or whether her vote is a lone statement in the political wilderness. The voting public is entitled to know how Barr fared at the polls. The Libertarian Party is entitled to know whether its stature has grown or been diminished by the votes cast for Barr. None of this vital information, laden with associative and communicative value, is available if the Board fails to count and report the Barr vote.

Id. at 19–20. Finally, the Party points to case law recognizing that each voter's vote "must be correctly counted and reported." *Gray v. Sanders*, 372 U.S. 368, 380 (1963).

The District's laws no doubt impose burdens on write-in candidates, but, like the district court, we have no basis for concluding that these burdens are "severe," or anything but "reasonable [and] nondiscriminatory." *Libertarian Party*, 768 F. Supp. 2d at 181 (internal quotation marks omitted). The Party nowhere disputes that its members were perfectly free to associate, to campaign freely and zealously, to mobilize

supporters, and to vote as they wished. Nor does it dispute that the Board accurately counted all votes, including the write-in votes, or that the Board reported the number of votes for the named candidates, as well as the number of votes cast for the write-in option in general. Yet it insists that the Board "effectively disenfranchises . . . registered District of Columbia voter[s] who cast a valid write-in vote for plaintiff Barr in the 2008 presidential election." Appellants' Br. 17. We fail to see how. They were free to vote. They voted. The number of write-in votes was counted. The Party knows it "received between 3 and 1,138 votes out of a total 265,853 votes cast—at most, less than 0.5 percent of the total vote." *Libertarian Party*, 768 F. Supp. 2d at 186. And, as the district court pointed out, "their votes would have been further tabulated on a candidate-by-candidate basis, pursuant to Section 806.13, if there had been a sufficient number of write-ins to have a determinative effect on the election." *Id.* at 185. In the context of an election, like this one, where write-in votes could have no possible effect on the outcome, the District's refusal to tally and report the precise number of voters who penciled in Bob Barr as their candidate of choice hardly amounts to disenfranchising those voters or, more precisely for our purposes, imposing a severe burden on their rights. Of course, the Party would benefit from knowing how many people voted for its candidate. And it seems reasonable to think that having such information may facilitate further and future speech and association. But that alone does not render the regulation a severe burden. It just makes the regulation inconvenient for candidates unable to obtain signatures from one percent of District voters in advance of the election.

Arguing otherwise, the Party contends that a precise count is necessary because under federal law, 26 U.S.C. § 9004, a minor party presidential candidate polling at least

five percent of the national vote can qualify for public funding in the next election. But as the district court pointed out, "[e]ven if all 1,138 write-in votes from the District of Columbia were allotted to Barr, his vote total would still be approximately 0.40%—nowhere near the 5% threshold required for public funding." *Libertarian Party*, 768 F. Supp. 2d at 187. Thus, any such harm is, at least in this case, purely hypothetical.

Indeed, the District's regime is no stricter and no more severe than the one in Hawaii upheld by the Supreme Court in *Burdick*. There, Hawaii banned write-in voting and required candidates to run in an open primary in order to appear on the general election ballot. *Burdick*, 504 U.S. at 435. A nonpartisan candidate could get on the primary ballot by filing paperwork containing, depending on the office sought, fifteen to twenty-five signatures, but could only advance to the general election by receiving either ten percent of the primary vote or the number of votes that would have allowed the nonpartisan candidate to be nominated had she run as a partisan candidate. *Id.* at 436. By contrast, a partisan candidate—including one outside the major parties—was required to file a party petition containing the signatures of one percent of the state's registered voters. *Id.* at 435. In holding that Hawaii's election scheme did not constitute a severe burden, the Court explained that it had "previously upheld party and candidate petition signature requirements that were as burdensome or more burdensome than Hawaii's one-percent requirement." *Id.* at 435 n.3. Given this, we cannot see how the District's regulations—which, unlike Hawaii's, allow voters to write in a candidate of choice, and which provide for the counting and reporting of the total number of write-ins, though not how many votes each individual write-in candidate received—can be considered a severe burden.

Although we certainly understand why the Party is interested in the ballot count for reasons other than figuring out who won the election, so too was the plaintiff in *Burdick* who sued because he wanted to register a protest vote for Donald Duck. *See id.* at 438. As the Supreme Court put it, "the function of the election process is to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals." *Id.* (citation and internal quotation marks omitted). Accordingly, "[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.* Likewise, in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the Supreme Court rejected a challenge to the constitutionality of Minnesota's law prohibiting candidates from appearing on the ballot as the candidate of more than one party. In doing so, the Court explained that it was "unpersuaded . . . by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression." *Id.* at 363.

Moreover, any burden imposed is to some extent mitigated by the District's Freedom of Information Act, which provides that "[a]ny person has a right to inspect . . . any public record of a public body," D.C. Code § 2-532(a), and expressly defines the term "public record" to include "vote data (including ballot-definition material, raw data, and ballot images)," *id.* § 2-502(18). Invoking this law, the Party, as the Board emphasized at oral argument, can obtain the ballots and count exactly how many were cast for Bob Barr. To be sure, like any other FOIA request, this would cost the Party some time and resources. Thus, what is really at

stake here is the allocation of cost—whether the Board has to manually count every write-in vote, even when the write-in votes could not possibly affect the election's outcome, or whether it is sufficient for the Board to count and report the total number of write-in votes, determine that they are irrelevant to the outcome, and leave interested parties free to rummage through the ballots and count specifically how many votes their write-in candidate received.

Because the Party has failed to show that the District's law places a severe burden on its rights, the District's " 'important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). Here, in elections where a write-in candidate could not possibly be declared the victor, the District seeks to avoid the needless cost of tabulating each write-in ballot by hand. As a declaration from the Board's Executive Director states, the write-in ballots would have to be sorted from the hundreds of thousands of ballots cast and manually counted, an undertaking that would require D.C. to hire and train employees for a task that would "require at least a few weeks to complete." Decl. of Rokey Suleman ¶¶ 5–6. The Party does not contest this declaration. Instead, it cites cases like *Dunn v. Blumstein*, where the Court explained that "states may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." 405 U.S. 330, 351 (1972) (internal quotation marks omitted). But in *Dunn* and the other cases cited by the Party, the Court was applying strict scrutiny because the states had actually disenfranchised a segment of voters. In *Dunn*, the Court invalidated a "durational residence requirement," 405 U.S. at 338, and in *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986), it struck down a law that had banned political parties from allowing independent voters to vote in their primary. In such instances—where voting is literally

prohibited—mere administrative costs are insufficient to survive strict scrutiny. In a case like this, however, where the challenged regulation imposes no severe burden, strict scrutiny has no place and the District's general regulatory interests are sufficient to uphold its law.

III.

We affirm the judgment of the district court.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LIBERTARIAN PARTY, et al.,	
Appellants,	
v.	**Case No. 11-7029**
DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, et al.,	
Appellees.	

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

The following information is provided by appellants pursuant to D.C. Circuit Rule 28(a)(1):

A. Parties and Amici

The parties who have appeared before the district court are plaintiffs-appellants Libertarian Party, Bob Barr, J. Bradley Jansen, Rob Kampia and Stacie Rumenap and defendants-appellees District of Columbia Board of Elections and Ethics, Vincent C. Gray, Mayor of the District of Columbia and Irvin B. Nathan, Acting Attorney General, District of Columbia, in their official capacities. There are no intervenors or amici curiae.

B. Rulings under review

The ruling at issue in this Court is the Order of the United States District

Court for the District of Columbia (Hon. Beryl A. Howell, U.S.D.J.) entered on March 8, 2011 granting summary judgment to the defendants-appellees and denying summary judgment to the plaintiffs-appellants for the reasons set forth in an accompanying memorandum opinion. The memorandum opinion is not yet reported. It is available at 2011 WL 782031 (D.D.C. 2011).

C. Related cases

This case was not previously before this Court or any other court. Undersigned counsel is not aware of any other related cases currently pending in this Court or in any other court.

Respectfully submitted,

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441 4th Street, NW, 6th Floor
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/s/ Oliver B. Hall

CERTIFICATE OF SERVICE

I certify that on May 9, 2011 I caused the foregoing to be served, by means of the Court's CM-ECF system, on the following:

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