

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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THE LIBERTARIAN PARTY, BOB BARR, J. BRADLEY  
JANSEN, ROB KAMPFA AND STACIE RUMENAP,

*Petitioners,*

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS, et al.,

*Respondents.*

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*On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit*

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

The District of Columbia permits voters to cast write-in votes for candidates other than those who qualify to appear on the ballot. D.C. Code § 1-1001.08(r)(1). Qualified persons are also permitted to run for public office as declared write-in candidates, provided they timely submit the prescribed forms. *Id.* § 1-1001.08(r)(3). The District of Columbia does not tally and report the number of votes each declared write-in candidate receives, however, unless the total number of write-in votes cast is sufficient to elect a write-in candidate. D.C. MUN. REGS. tit. 3 § 806.13. Instead, the District of Columbia only reports the total number of write-in votes, without identifying the candidate for whom they were cast. Petitioners are the Libertarian Party, Bob Barr, the Libertarian nominee for President of the United States in 2008, who ran as a declared write-in candidate in the District of Columbia, and his presidential electors for the District of Columbia, J. Bradley Jansen, Rob Kampia, and Stacie Rumenap (“the Libertarians”). The questions presented are:

1. Whether the District of Columbia Board of Elections violated the Libertarians’ speech, petition and associational rights guaranteed by the First Amendment, and their right to equal protection and due process of law guaranteed by the Fifth Amendment, by refusing to report the result of the valid write-in votes properly cast by Petitioners Jansen, Kampia and Rumenap pursuant to District of Columbia law, and by falsely reporting that Petitioner Barr received zero votes in the 2008 presidential election.

2. Whether D.C. MUN. REGS. tit. 3 § 806.13, as applied, violated the Libertarians' rights guaranteed by the First and Fifth Amendments.

## **PARTIES TO THE PROCEEDING**

The Petitioners are the Libertarian Party, Bob Barr, J. Bradley Jansen, Rob Kampia and Stacie Rumenap.

The Respondents are the District of Columbia Board of Elections, Adrian Fenty and Peter J. Nickles (“the Board”).

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The opinion of the Court of Appeals is reported at 982 F.3d 72 (D.C. Cir. 2012). App. 1. The District Court's opinion is reported at 768 F. Supp. 2d 174 (D.D.C. 2011). App. 14.

## **STATEMENT OF JURISDICTION**

The Court of Appeals entered its judgment on June 8, 2012 and denied rehearing on August 9, 2012. App. 1, 46-47. On October 26, 2012, Chief Justice Roberts extended the Libertarians' time for filing a petition for certiorari until and including January 4, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides, in relevant part:

No person shall be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

No State shall deny to any person within its jurisdiction the equal protection of the laws.

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.

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.

### **STATEMENT OF THE CASE**

No principle is more fundamentally important to the republican form of government established by the United States Constitution than voter equality. Every voter's vote must be treated equally. This Court has reaffirmed that principle countless times, in a multitude of factual contexts, and has never once recognized an exception. This case presents the question whether such an exception nonetheless exists, and if so, whether a state may treat a class of votes unequally not based on a necessity to further a compelling interest, but merely to further its regulatory interest in reducing the time and expense of conducting elections.

#### **A. District of Columbia Law Governing Write-In Votes**

Under the law of the District of Columbia, voters are expressly permitted to cast write-in votes for candidates other than those who appear on the ballot. D.C. Code § 1-1001.08(r)(1). District of Columbia law also permits qualified persons to run for public office as write-in candidates, provided they timely file forms prescribed by the Board. *Id.* § 1-1001.08(r)(3). The Board does not report the result of a voter's valid write-in vote, however, nor the number of votes a declared write-in candidate received, unless the total number of write-in votes cast is sufficient to elect a declared write-in candidate. D.C. Mun. Regs., tit. 3, § 806.13.

Instead, in its official certification of the elections results, the Board only reports the total number of write-in votes cast for all candidates, without reporting the number of votes received by each declared write-in candidate. *Id.* § 806.12.

### **B. The Proceedings Below**

Petitioner Libertarian Party is the third-largest political party in the United States. Bob Barr is a former Congressman from Georgia and the 2008 Libertarian nominee for President of the United States. App. 3. In the 2008 general election, Barr qualified to appear on the ballot in 45 states, and ran as a declared write-in candidate in the District of Columbia. App. 3. J. Bradley Jansen, Rob Kampia and Stacie Rumenap are District of Columbia residents and 2008 candidates for presidential elector who were pledged to Barr. App. 15. Jansen, Kampia and Rumenap also cast valid write-in votes for Barr in the 2008 presidential election, as authorized by District of Columbia law. App. 15. Nevertheless, pursuant to D.C. Mun. Regs., tit. 3, § 806.13, the Board did not report the result of the votes cast by Jansen, Kampia and Rumenap, and falsely reported that Barr received zero votes. App. 15.

Following several unsuccessful attempts to obtain Barr's 2008 vote total from the Board, the Libertarians commenced this action in Superior Court for the District of Columbia pursuant to 42 U.S.C. § 1983. In September 2009, the Board removed the case to the District Court for the District of Columbia. App. 17. The Libertarians claimed the Board violated their First Amendment speech and associational rights, and their rights to equal protection and due process of law

guaranteed by the Fifth and Fourteenth Amendments,<sup>1</sup> by failing to report the result of the valid write-in votes properly cast by Jansen, Kampia and Rumenap under District of Columbia law, and by falsely reporting that Barr received zero votes as a declared write-in candidate. App. 17. The Libertarians requested a judgment declaring D.C. Mun. Regs., tit. 3, § 806.13 unconstitutional as applied. App. 18. They further requested an order directing the Board to report the number of votes Barr received as a declared write-in candidate in the 2008 presidential election, and an injunction requiring the Board to tally and report the number of votes received by declared write-in candidates in future elections. App. 18.

The District Court properly acknowledged that this Court's decision in *Burdick v. Takushi*, 504 U.S. 428 (1992), which upheld Hawaii's outright ban on write-in voting, does not settle this case because, "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." App. 28. Nevertheless, the District Court granted summary judgment to the Board. App. 44-45. Applying the balancing test this Court set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), which *Burdick* also applied, the District Court based its analysis on a finding that the burden on the Libertarians' rights arose exclusively from their lack of "information"

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<sup>1</sup> This Court has held that the Fourteenth Amendment's equal protection clause applies to the District of Columbia through the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954). For convenience, the Libertarians refer hereinafter to their Fourteenth Amendment rights.

relating to their votes. App. 37. The “crux” of the Libertarians’ claims, the District Court reasoned, “is that they were constitutionally entitled to know *precisely* how well Barr fared at the polls.” App. 37. The District Court concluded, however, that “there is no constitutional mandate that [the Libertarians] be provided with this information at the public’s expense, provided that their votes have been duly counted and determined to have no effect on the election’s outcome.” App. 39. The District Court thus found the burden on the Libertarians’ rights to be “very limited,” and held it justified by the District of Columbia’s “regulatory interests” – i.e., reducing the time and expense of conducting elections, and promoting faith in the certainty of the results. App. 40-43. The District Court did not address the Libertarians’ equal protection claims, except to reject them summarily, on the ground that write-in voters and candidates “are not a suspect class entitled to heightened scrutiny.” App. 35 (citations omitted).

The Court of Appeals affirmed, substantially relying on the District Court’s analysis. App. 1-13. Like the District Court, the Court of Appeals applied the *Anderson-Burdick* balancing test, and premised its analysis on a finding that the burden on the Libertarians’ rights arose exclusively from their lack of “information” regarding the total number of votes Barr received in the 2008 presidential election. App. 7. The Libertarians “were free to vote,” the Court of Appeals reasoned, “they voted,” and “the number of write-in votes was counted.” App. 7. Thus, the Court of Appeals concluded, “in the context of an election . . . where write-in votes could have no possible effect on the outcome,” the Board’s failure to report the result of the



write-in votes cast by Jansen, Kampia and Rumenap, and its false report that Barr received zero votes as a declared write-in candidate, did not impose a “severe burden” on the Libertarians’ First Amendment rights, but merely made it “inconvenient” for them to exercise such rights. App. 7. The Court of Appeals therefore affirmed the District Court’s holding that the District of Columbia’s “regulatory interests” justify the Board’s failure to report the result of the Libertarians’ write-in votes. App. 10. Nowhere in its analysis, however, did the Court of Appeals address the Libertarians’ equal protection claims.

The Libertarians filed a petition for rehearing en banc, citing the exceptional importance of the questions raised in this case, as well as the direct conflict between the Court of Appeals’ opinion and this Court’s voting rights jurisprudence. The Court of Appeals entered an order directing the Board to respond to the Libertarians’ petition, App. 48, but thereafter denied the petition without opinion. App. 46.

## **REASONS FOR GRANTING CERTIORARI**

### **I. The Court Should Address the Important First Amendment Question Raised in This Case and Resolve the Court of Appeals’ Conflict With Long-Settled Precedent Protecting the Right to Vote.**

This case calls into question the heretofore inviolate principle that every voter’s vote must be treated equally. That principle is inherent in the republican form of government established by the Constitution, *see Baker v. Carr*, 369 U.S. 186, 242 (1962) (Douglas, J.

concurring), it is enshrined in the First Amendment’s guarantee of the freedom of political association, *see Williams v. Rhodes*, 393 U.S. 23, 30 (1968), and it is further protected by the Fourteenth Amendment’s guarantee of equal protection of the laws. *See* U.S. Const. amend. XIV, § 1. Consequently, no principle is more firmly established in this Court’s jurisprudence than voter equality. Time and again, the Court has reaffirmed that states must treat every voter’s vote equally, and it has never once recognized an exception to that command. *See Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (“It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted”) (citing *United States v. Mosley*, 238 U.S. 383 (1915) and *Ex Parte Yarbrough*, 110 U.S. 651 (1884)); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (same).

The expansive protection accorded the right to vote necessarily entails 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) (emphasis added). This follows from the Court’s consistent recognition that the right to vote can no more be “undermined” than it can be “denied outright”. *Wesberry*, 376 U.S. at 17 (citing *United States v. Classic*, 313 U.S. 299 (1941); *United States v. Saylor*, 322 U.S. 385 (1944)). The Court’s long-settled precedent thus leaves precious little room for any exception to the principle of voter equality. Indeed, since this Court reaffirmed that principle in cases such as *Reynolds*, *Wesberry* and *Gray*, no lower court has seen fit to recognize any such exception – until now.

In this case, the Court of Appeals held that the Constitution permits the District of Columbia to treat the Libertarians' valid write-in votes unequally, by failing to report the candidate for whom they were cast, provided the Board counts and reports the total number of write-in votes and finds they "could have no possible effect on the outcome" of the election. App. 7. Further, the Court of Appeals concluded, to justify such unequal treatment the Board need not show it is necessary to further a compelling state interest, but rather may show it merely furthers the District of Columbia's general "regulatory interests" in reducing the time and expense of holding elections. App. 9. As set forth *infra* at Part II, this conclusion rests on a misreading of the Court's decision in *Burdick* and is wrong on the merits. The Court's intervention is especially warranted, however, because the Court of Appeals' decision is not only wrong, but also radically departs from this Court's long-settled precedent protecting the right to vote.

As Justice Kennedy observed in *Burdick*, "until the late 1800's, all ballots cast in this country were write-in ballots." *Burdick*, 504 U.S. at 446 (Kennedy, J. dissenting). Further, when states began to print official ballots, they did so only as a means to protect voters from harassment, and not to limit voter choice in any way. *See id.*; *see also Burson v. Freeman*, 504 U.S. 191, 200-05 (1992) (describing rampant attempts at "bribery" and "intimidation" of voters in colonial era). On the contrary, one widely recognized disadvantage of the new state-regulated ballot system "was that it could operate to constrict voter choice." *Burdick*, 504 U.S. at 446 (Kennedy, J. dissenting). The great majority of states therefore continue to permit write-in

voting, and to count and report such votes on an equal basis with all other valid votes. And while *Burdick* upheld Hawaii's ban on write-in voting under a permissive statutory scheme that otherwise protected voter choice, *Burdick*, 504 U.S. at 434, this case presents an entirely distinct question. Specifically, does the Constitution permit states that allow write-in voting to treat such votes unequally, by declining to report their results?

The Court of Appeals' conclusion that the District of Columbia may practice such discrimination has no precedent. Further, it directly conflicts with this Court's conclusion that every voter's vote "must be correctly counted and reported," *Gray*, 372 U.S. at 380, and it cannot be reconciled with this Court's precedent protecting the right of every citizen to cast a vote on an equal basis with every other voter. As such, the Court of Appeals' decision represents a substantial threat to the voting rights of millions of Americans who intend to cast write-in votes in future elections. The Court should not allow such a decision to stand.

## **II. The Court Should Clarify That *Burdick* Does Not Authorize States to Treat Valid Votes Unequally.**

In its short opinion affirming summary judgment for the Board, the Court of Appeals treated this case as if it were applying a well-settled rule of law to a familiar pattern of facts. That is not so. By holding that a state may refuse to report the result of a valid vote in order to reduce the administrative burden of conducting elections, the Court of Appeals broke new ground in the erosion of core rights protected by the

First and Fourteenth Amendments. Certiorari is also warranted, therefore, because the Court of Appeals' decision misreads the single case on which it primarily relies, and is wrong on the merits.

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

The Court of Appeals' decision 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. App 7. Based on this finding, the Court of Appeals held that the District of Columbia's "regulatory interests" are sufficient to justify the Board's unequal treatment of the Libertarians' votes. App. 10 (citing *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788)). But the Court of Appeals 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 mere 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 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 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. App. 3. 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 Court of Appeals thus erred by equating the Libertarians’ claim with that asserted by the plaintiff in *Burdick*. App. 8-9. 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 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. App. 3. 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. *Burdick* Does Not Hold That a State's Administrative Interests Are Sufficient to Justify Its Unequal Treatment of Valid Votes.**

The Court of Appeals conceded 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. App. 10-11. Because the Court of Appeals falsely equated the Libertarians' claims with that of the plaintiff in *Burdick*, however, App. 8-9, it mischaracterized the burden imposed on the Libertarians in this case as a mere inconvenience. App. 7. This was error.

By refusing to report the results of the Libertarians' valid votes, the Board denied them equal protection of the law. The Libertarians' injury, therefore, "is the denial of equal treatment resulting from the imposition

of the barrier, not the ultimate inability to obtain the benefit.” *Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The Court of Appeals nonetheless discounted the Libertarians’ injury precisely because it concluded 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. App. 8. But the Libertarians are entitled to equal protection of their votes whether or not it would qualify them for public funding. *See Gray*, 372 U.S. at 379 (“all who participate in [an] election are to have an equal vote”).

Further, although the Court of Appeals assured the Libertarians that their votes were “counted,” App. 7, it ignored the fact that the Board falsely reported to the Federal Election Commission that Barr received zero votes in the 2008 presidential election. The resultant injury is manifest: the Board erased the official record of support among District of Columbia voters for the Libertarians’ platform, and it did not report the result of the Libertarians’ own votes. Such injury not only violates the Libertarians’ voting rights, but also severely burdens the Libertarians’ “constitutional right to create and develop [a] new political part[y],” which “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) (citations omitted).

The Court of Appeals contended that it “cannot see how” the Board’s refusal to report the result of the Libertarians’ votes “can be considered a severe



burden,” App. 8, but that is only because it completely failed to address the Libertarians’ equal protection claims, and similarly disregarded their reliance on *Norman*. Instead, the Court of Appeals focused 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.” App. 9 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)). But the Court of Appeals’ 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.

The Court should therefore grant certiorari to clarify that the balancing test set forth in *Anderson*, as applied in *Burdick*, does not permit states to treat valid votes unequally, much less does it authorize states to practice such discrimination merely to reduce the administrative cost of holding elections. This Court has never permitted Republicans and Democrats to suffer such a burden. See, e.g., *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 218 (1986) (“the cost of administering the election system is not a sufficient basis here for infringing appellees’ First Amendment rights”). The Libertarians are equally entitled to such protection.

**III. The Court Should Intervene Because the Court of Appeals' Decision Announces a New Standard for Discriminating in Voting Rights Cases, Which Cannot Be Applied on a Neutral Basis in Future Cases.**

Certiorari is also warranted because the Court of Appeals' decision announces a new standard for discrimination in voting rights cases, which cannot be applied on a neutral basis in future cases. "Where write-in votes could have no possible effect on the outcome" of an election, the Court of Appeals reasoned, the Board need not report their result. App. 7. 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, App. 7, as the Court of Appeals demanded of the Libertarians in this case, then many others also could 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*, 768 F. Supp. 2d at 176-77. Applying the Court of Appeals' 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 these non-outcome-determinative-voters, were 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.

The Board all but conceded this point in the proceedings before the Court of Appeals. The Board did not report the result of the Libertarians' votes because, in its own words, the Board found such votes to be "inconsequential" and "of no moment." Br. of Appellee 21, 23, *Libertarian Party v. D.C. Bd. of Elections*, No. 11-7029 (filed Dec. 14, 2011). The Constitution does not permit states to discriminate against voters on this basis. See *Burdick*, 504 U.S. at 447 (Kennedy, J. dissenting) ("The fact that write-in candidates are longshots more often than not makes no difference; the right to vote for one's preferred candidate exists regardless of the likelihood that the candidate will be successful"). This Court therefore should intervene, because the Court of Appeals based its decision on an arbitrary standard that cannot be applied neutrally in future voting rights cases.

#### **IV. The Court Should Resolve the Conflict Between the D.C. Circuit Decision in This Case and the Fourth and Eighth Circuits, Which Recognize That Valid Write-In Votes Are Entitled to Constitutional Protection.**

Finally, the Court should grant certiorari because the Court of Appeals' decision in this case directly conflicts with decisions of the Fourth Circuit and Eighth Circuits. See *Dixon v. Md. State Bd. of Election Laws*, 878 F.2d 776 (4th Cir. 1989); *McLain v. Meier*,

851 F.2d 1045 (8th Cir. 1988). In *Dixon*, the Fourth Circuit recognized that the state's failure to report write-in votes "discriminates . . . against those voters whose political preferences lie outside the existing political parties." *Dixon*, 878 F.2d at 782 (quoting *Anderson*, 460 U.S. at 794). The Fourth Circuit thus found the injury sustained by the voters in *Dixon* to be "of great magnitude." *Id.* This finding directly contradicts the Court of Appeals' conclusion that the very same injury merely constitutes an "inconvenience" to the Libertarians in this case. App. 7. Likewise, the Fourth Circuit's holding, which struck down the state's restrictions preventing the reporting of write-in votes, conflicts with the Court of Appeals' holding here, which upheld such restrictions. *See Dixon*, 878 F.2d at 786.

The Eighth Circuit's decision in *Mclain* is also in conflict with the Court of Appeals' decision in this case. In *Mclain*, the Eighth Circuit expressly concluded that the state's refusal to count valid write-in votes was unlawful. *See Mclain*, 851 F.2d 1045. The state has "an obligation to count all votes properly cast," the Eighth Circuit reasoned. *Id.* *Mclain* thus contradicts the Court of Appeals' conclusion in this case that such obligation only arises upon a showing that votes may be outcome-determinative. App. 7-10.

Accordingly, the Court should grant certiorari to resolve the conflict between the Court of Appeals' decision in this case and the Fourth Circuit's decision in *Dixon* and the Eighth Circuit's decision in *Mclain*.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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## **APPENDIX**

## **APPENDIX**

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**APPENDIX A**

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**United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 11-7029**

**[Argued February 10, 2012  
Decided June 8, 2012  
Filed June 8, 2012]**

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LIBERTARIAN PARTY, ET AL.,	)
APPELLANTS	)
	)
v.	)
	)
DISTRICT OF COLUMBIA BOARD OF	)
ELECTIONS AND ETHICS, ET AL.,	)
APPELLEES	)

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

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*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



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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

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‘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

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(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

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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

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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

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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

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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.*

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**United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 11-7029**

**September Term, 2011**

**[Filed June 8, 2012]**

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)

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

**J U D G M E N T**

This cause came on to be heard on the record on  
appeal from the United States District Court for the  
District of Columbia and was argued by counsel. On  
consideration thereof, it is

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**ORDERED** and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

**Per Curiam**

**FOR THE COURT:**

Mark J. Langer, Clerk

BY:

/s/

Jennifer M. Clark

Deputy Clerk

Date: June 8, 2012

Opinion for the court filed by Circuit Judge Tatel.

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**APPENDIX B**

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**Civil Action No. 09-1676 (BAH)**

**[Filed March 8, 2011]**

THE LIBERTARIAN PARTY, <i>et al.</i> ,	)
	)
Plaintiffs,	)
	)
v.	)
	)
DISTRICT OF COLUMBIA	)
BOARD OF ELECTIONS AND	)
ETHICS, <i>et al.</i> ,	)
	)
Defendants.	)
	)

**MEMORANDUM OPINION**

This case arises out of the November 4, 2008 election for President of the United States. The central issue is whether a District of Columbia election regulation governing the reporting of write-in votes unreasonably infringes upon Plaintiffs' First Amendment speech and associational rights, as well as their rights to due process and equal protection under the law. Pursuant to a D.C. election regulation,

Defendant District of Columbia Board of Elections and Ethics (the “Board”) is only required to tally and report the *total* number of write-in votes cast in an election (not the total for each write-in candidate), unless the number of write-in votes could potentially have a determinative effect on the election’s outcome. Plaintiffs – who are the Libertarian Party, its candidate for President of the United States in 2008 (Bob Barr), and its three candidates for presidential elector from the District of Columbia in 2008 – argue that the Constitution requires the District of Columbia to tally and report the number of write-in votes for each candidate, regardless of the potential effect on the election’s outcome. Plaintiffs argue that the number of votes for each write-in candidate must be reported as part of the official election results, which are usually certified and released by the Board within 10 to 15 days after the election. For the reasons explained below, the Court finds that neither the Board’s actions nor the District of Columbia regulation itself impermissibly burdened Plaintiffs’ constitutional rights.

### **I. Factual and Procedural Background**

The facts of the case are undisputed. Plaintiff Barr was the Libertarian Party candidate for President in 2008. Pl. Stmt. of Mat. Facts ¶ 1. Barr ran as a qualified write-in candidate in the District of Columbia. *Id.* ¶ 8. Plaintiffs J. Bradley Jansen, Rob Kampia, and Stacie Rumenap were D.C. voters who were also Libertarian Party candidates for presidential elector for the District of Columbia in 2008 pledged to Barr. *Id.* ¶¶ 8-10. The Defendants are the Board, the Mayor, and

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Attorney General of the District of Columbia in their official capacities.<sup>1</sup>

With respect to the tallying and reporting of write-in votes, the District of Columbia Municipal Regulations, Title 3, provides, in relevant part:<sup>2</sup>

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 § 806.12, is sufficient to elect a write-in candidate.

D.C. MUN. REGS. tit. 3, § 806 (2010).

Following the vote in the November 2008 presidential election, the total number of write-in votes in the District of Columbia was not sufficient to elect a write-in candidate. Indeed, there were only 1,138

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<sup>1</sup> The Mayor and Attorney General have joined in the submissions of the Board in this action. ECF No. 21.

<sup>2</sup> This section of the D.C. Municipal Regulations was amended on November 26, 2010. Previously, the pertinent sections appeared at §§ 808.15 and 808.16. The recent amendments made no material changes to the regulations at issue before the Court. The Court will use the current section numbering and text.

write-in votes out of a total 265,853 votes cast. Declaration of Errol Arthur, Chairman of the D.C. Board of Elections and Ethics, dated Jan. 6, 2010, hereinafter “Arthur Decl.” ¶ 9; Federal Election Commission 2008 Presidential General Election Results.<sup>3</sup> Barack Obama received 245,800 votes. Arthur Decl. ¶ 9. Pursuant to § 806, the Board did not tally and report the total number of votes for Plaintiff Barr because neither of the circumstances that would trigger a tally for each write-in candidate under § 806.13 were present. As a result, Plaintiffs argue, they are unable to determine the precise level of support for Barr and the Libertarian Party, in violation of their constitutional rights.

Plaintiffs first brought this action in Superior Court for the District of Columbia. On September 2, 2009, Defendants removed to this Court pursuant to 28 U.S.C. § 1441(b) and 1446. On November 9, 2009, Plaintiffs filed an amended complaint (“Compl.”).

Plaintiffs bring this action under 42 U.S.C. § 1983, alleging that their First Amendment speech and associational rights, as well as their rights to due process and equal protection under the law, were violated by the Board’s actions, and, to the extent that the Board’s actions were required by § 806.13, that the

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<sup>3</sup> The Court may take judicial notice of facts which are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 375 n.29 (D.C. Cir. 1983) (quoting Fed. R. Evid. 201(b) (2)).



regulation itself is unconstitutional.<sup>4</sup> Plaintiffs seek a declaration that the Board's refusal to tally and report the number of write-in votes for each candidate is unconstitutional and that § 806.13 is unconstitutional as applied. They also seek an order directing the Board to tally the number of votes cast for Plaintiff Barr in 2008 and enjoining the Board from refusing to tally and report such write-in votes in the future. In addition, they seek attorney's fees and costs pursuant to 42 U.S.C. § 1988.

Defendants respond that the tabulation of write-in votes for each candidate is not a constitutionally protected right, and that, insofar as the right is protected, the reasons behind the regulation justify its application. The parties dispute the appropriate level of review to be applied to Plaintiffs' claims.<sup>5</sup>

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<sup>4</sup> Plaintiffs' complaint asserts claims under the First, Fifth, and Fourteenth Amendments. The Fourteenth Amendment does not apply to the District of Columbia. *See Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954); *Roum v. Fenty*, 697 F. Supp. 2d 39, 45 (D.D.C. 2010). Instead, the Fourteenth Amendment's protections are applied to the District of Columbia through the Fifth Amendment. *See Bolling*, 347 U.S. at 499-500; *American Towers, Inc. v. Williams*, 146 F. Supp. 2d 27, 30 n.2 (D.D.C. 2001). The Court will therefore treat Plaintiffs' Fourteenth Amendment claims as Fifth Amendment claims.

<sup>5</sup> On July 8, 2010, the Court requested the views of the United States Department of Justice and the United States Attorney's Office for the District of Columbia on the constitutionality of the manner in which write-in votes are tabulated in the District of Columbia. In a report filed with the Court on July 30, 2010, the Department of Justice and United States Attorney's Office declined to take a position regarding this litigation.

On November 23, 2009, the Board moved to dismiss Plaintiffs' amended complaint pursuant to Rule 12(b)(6). On December 14, 2009, in response, Plaintiffs moved for summary judgment and opposed the Board's motion to dismiss.

On February 2, 2010, the Court notified the parties that it intended to treat Defendants' motion to dismiss as a motion for summary judgment pursuant to Rule 12(d). *See* Fed R. Civ. P. 12(d); *see also Kim v. United States*, No. 09-5227, 2011 WL 192496, at \*6 (D.C. Cir. Jan. 21, 2011); *Wiley v. Glassman*, 511 F.3d 151, 160 (D.C. Cir. 2007). The Court provided the parties with a reasonable opportunity to present any additional material pertinent to that motion.

Both parties submitted supplemental briefing and material on February 11 and 12, 2011.

Oral argument on the cross motions for summary judgment was held on March 4, 2011. The parties' cross motions for summary judgment are now before the Court.

## **II. Discussion**

### **A. Mootness**

As a threshold question, the Court must determine whether it still has jurisdiction to decide this case now that the 2008 election is long since over. Under Article III of the United States Constitution, this Court "may only adjudicate actual, ongoing controversies." *District of Columbia v. Doe*, 611 F.3d 888, 894 (D.C. Cir. 2010) (quoting *Honig v. Doe*, 484 U.S. 305, 317 (1988)). The

mootness doctrine prohibits the court from deciding a case if “events have so transpired that the decision will neither presently affect the parties’ rights nor have a more-than-speculative chance of affecting them in the future.” *Id.* (quoting *Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) (en banc)).

There is an exception to the mootness doctrine, however, for an action that is “capable of repetition, yet evading review.” *Id.* This exception applies where: “(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *Id.* (quotation omitted). The first prong of this doctrine is clearly satisfied here. Legal challenges to election procedures often take longer to resolve than the election cycle itself. *See Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (collecting cases). The second prong is also satisfied because it is likely that the Libertarian Party and its candidates and voters will participate in future elections in the District of Columbia. While the District of Columbia has amended the regulations at issue, the amendments made no material changes to the relevant provisions. This case therefore satisfies the “capable of repetition, yet evading review” exception and is not moot. *See id.*

## **B. Interpretation of District of Columbia Law**

Before proceeding to the constitutional questions, the Court will briefly address a question of District of Columbia law raised in Plaintiffs’ briefs. In their summary judgment motion papers, Plaintiffs contend

that the Board's application of § 806.13, as well as the provision itself, is inconsistent with controlling local law as set forth in *Kamins v. Bd. of Elections for D.C.*, 324 A.2d 187 (D.C. 1974). See Pl. Summ. J. Mem. at 15-17. Plaintiffs' complaint asserts no causes of action premised on District of Columbia law; consequently, it is unclear what claims or remedies pertain to Plaintiffs' local law arguments. In any event, Plaintiffs' D.C. law arguments are unfounded.

At the time of the *Kamins* ruling, D.C. law was silent as to write-in voting. The Board then took the position that it was not permitted to count write-in votes in the U.S. presidential election. 324 A.2d at 190. The *Kamins* court disagreed, instructing "that there is nothing in the statute regulating elections in the District of Columbia which precludes the counting of write-in votes in a presidential election where such votes are cast for candidates for whom, as here, a valid slate of electors has been filed." *Id.* at 193. On remand, an order in a hand-written docket entry directed the Board to count the write-in ballots at issue and to promulgate a regulation to facilitate write-in voting. Declaration of Richard Winger dated Dec. 14, 2009, hereinafter "Winger Decl.," Attachment C. Plaintiffs argue that "[w]hile the Board may be in literal compliance with *Kamins*, its refusal to tally and report the write-in votes cast for Barr robs the decision of meaning." Pl. Summ. J. Mem. at 16.

The D.C. Court of Appeals has more recently interpreted the meaning of the District's current write-in voting regulations, which are at issue here. In *Best v. D.C. Bd. of Elections and Ethics*, 852 A.2d 915 (D.C. 2004), a voter sought review of the Board's

decision not to count write-in votes in the Statehood Green Party (“Green Party”) primary election. The Green Party’s primary election plan called for the election of delegates based on a proportional representation formula. *Id.* at 917. Under the formula, any candidate who received 16.6 percent of the vote would win at least one delegate. *Id.* After the election, the total number of write-in votes was less than the plurality of votes received by the primary’s winner. *Id.* However, write-in ballots accounted for 32 percent of the vote. *Id.* Because only 16.6 percent was necessary to win a delegate, a write-in candidate could have earned a delegate under the primary’s rules. Regardless, the Board concluded that it did not need to tabulate the write-in votes by recipient because a write-in candidate could not have won the overall primary. *Id.* at 918. The Board relied on the language of § 806.13, which requires tabulation by write-in recipient only “where the total number of write-in votes reported . . . is sufficient to elect a write-in candidate.” *Id.* at 919-20. The D.C. Court of Appeals disagreed. The court held that in the context of an election to award delegates on a proportional basis, § 806.13 had to be read to require individual tabulation of write-in votes “so long as the total number of write-in votes is ‘sufficient to elect a write-in candidate’ *to be represented by a delegate.*” *Id.* at 921 (emphasis in original). “The purpose of the election is determinative.” *Id.* Thus, as explained in *Best*, § 806.13 requires the tallying of write-in votes by recipient where the write-in votes could have a determinative effect on the outcome of the election.

Significantly, the D.C. Court of Appeals in *Best* did not hold that § 806.13 required write-in votes to be

tallied by candidate in all situations, as Plaintiffs would have it. In addition, the opinion in *Best* specifically cited the D.C. Court of Appeals' earlier ruling in *Kamins*. *Id.* at 919. If the D.C. Court of Appeals viewed § 806.13 as inconsistent with *Kamins*, it presumably would have said so. Further, Plaintiffs themselves have conceded that "the Board may be in literal compliance with *Kamins*." Pl. Summ. J. Mem. at 16. Indeed, the record before the Court indicates that the Board's actions comport fully with D.C. law as set forth by the D.C. Court of Appeals.

### **C. Constitutional Claims**

The Court now turns to the merits of Plaintiffs' constitutional challenge.

#### **1. Do Plaintiffs Have a Constitutionally Protected Interest?**

The first question the Court must address is whether Plaintiffs have any constitutionally protected interest at stake in this case. The Board argues that Plaintiffs do not have any protected interest because, according to the Board, there is no constitutional "right to tabulation of all write-in votes for each recipient." Def. Reply Mem. at 2.

The Supreme Court has recognized that restrictions on the right to vote may burden "basic constitutional rights" protected by the First and Fourteenth (or Fifth) Amendments. *Anderson v. Celebrezze*, 460 U.S. 780, 786-87, 787 n.7 (1983); *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-15 (1986). For example, the Court has explained that ballot access

restrictions burden “two different, although overlapping, kinds of rights—the right 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. Both of these rights, of course, rank among our most precious freedoms.” *Anderson*, 460 U.S. at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)). These associational rights are analyzed together—with little distinction drawn between ballot access cases and voting rights cases, or between the rights of candidates and the rights of voters. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

The Court has held that these basic rights protect, for example, voters’ and parties’ interests in ballot access, *see Anderson*, 460 U.S. 780, 787; *Norman v. Reed*, 502 U.S. 279, 288 (1992); the ability of political parties to select their candidates, *see Tashjian*, 479 U.S. 208, 214-15; and the ability of political parties to organize themselves and determine their own internal governance, *see Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224, 229-30 (1989). In analyzing these rights, the First Amendment and Fourteenth or Fifth Amendment components are assessed jointly, without resort to a separate Equal Protection Clause analysis. *See Anderson*, 460 U.S. at 787 n.7; *Norman*, 502 U.S. at 288 n.8.

Whether Plaintiffs’ speech and associational rights extend to the manner in which votes are reported is a close question. Citizens in a democracy express their political preferences through voting, which “is of the most fundamental significance under our constitutional structure.” *See Illinois State Bd. of Elections v.*

*Socialist Workers Party*, 440 U.S. 173, 184 (1979). Consequently, after an election occurs, the First Amendment provides some level of protection to the important expressions of political preference that voters communicated by casting their ballots. For example, it would be a violation of voters' First Amendment rights for a law to preclude entirely the tabulation and reporting of the outcome of a lawfully conducted vote. *See Turner v. D.C. Bd. of Elections and Ethics*, 77 F. Supp. 2d 25, 31 (D.D.C. 1999) ("Because voters in properly conducted elections intend to send a particularized message which is received by those who act on the results of the elections, voting results can be categorized as protected symbolic speech under" the First Amendment.).

On the other hand, the Supreme Court has previously declined to adopt a "party's contention that it ha[d] 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" because "[b]allots serve primarily to elect candidates, not as forums for political expression." *Timmons v. Twin City Area New Party*, 520 U.S. 351, 362 (1997); *see also Burdick*, 504 U.S. at 438 ("Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.") This Court does not need to decide the precise scope of Plaintiffs' speech and associational rights, however. Even assuming *arguendo* that these rights extend to the manner in which votes are reported, which the Court will do here, the Board has advanced an adequate justification for § 806.13 that outweighs any burdens



the regulation places on Plaintiffs' rights. See *Timmons*, 521 U.S. at 369-70.

## **2. What Level of Scrutiny Applies?**

Having assumed that Plaintiffs have a constitutional interest in the manner in which their votes are reported, the Court must determine the appropriate standard to apply in reviewing the constitutionality of the Board's actions and the regulation itself. Plaintiffs contend that the Court should apply strict scrutiny, while Defendants argue that rational basis review is appropriate.

There is no question that "voting is of the most fundamental significance under our constitutional structure." *Burdick*, 504 U.S. at 433 (quoting *Socialist Workers Party*, 440 U.S. at 184). "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." *Id.* Because "[e]lection laws will invariably impose some burden upon individual voters," not all laws that impose burdens on the right to vote are unconstitutional or subject to strict scrutiny. *Id.* at 433-34. The Supreme Court has held that 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, pique, or personal quarrel[s].'" *Id.* at 438 (quoting *Storer*, 415 U.S. at 735). Accordingly, "[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.* Therefore, the First Amendment interest in voting, including any interest in the reporting and tabulation

of votes, is not unlimited and must not undermine the ability to operate elections effectively.

The Supreme Court set forth the framework for determining the appropriate level of scrutiny for reviewing a voting regulation in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992).<sup>6</sup> Under the framework outlined in *Anderson* and *Burdick*, the analysis is twofold. First, the court must “consider the character and magnitude of the asserted injury” to the plaintiff’s constitutional rights. *Anderson*, 460 U.S. at 789. Second, the court must “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Id.* If the plaintiff’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 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.” *Id.* (citing *Anderson*, 460 U.S. at 788) (internal quotation marks omitted).

In *Burdick*, the Supreme Court applied this framework to uphold a Hawaii election law that banned write-in voting entirely. *Id.* at 441-42. *Burdick*

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<sup>6</sup> As noted above, the analysis set forth in *Anderson* and *Burdick* applies jointly to the First and Fourteenth or Fifth Amendment rights embodied in the right to vote, so there is no need for a separate equal protection analysis. See *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 787 n.7; *Norman*, 502 U.S. at 288 n.8.

does not settle this case outright, though, because, 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. *Cf. Turner*, 77 F. Supp. 2d at 30 (citing *Grant v. Meyer*, 828 F.2d 1446, 1456 (10th Cir. 1987)).

**a. The Character and Magnitude of the Burden**

The first step in the *Anderson-Burdick* analysis is to assess whether the law imposes a “severe” restriction on Plaintiffs’ constitutional rights. Plaintiffs argue that the burden is severe for three main reasons. First, Plaintiffs assert that the severity of the burden imposed by Section 806.13 must be assessed within the overall context of the District of Columbia’s total ballot access scheme, which Plaintiffs contend is quite restrictive. Pl. Reply to Def. Supp. Mem. at 2. Second, they assert that “by authorizing the Board not to certify and report write-in votes, [Section 806.13] effectively disenfranchises Plaintiffs Jansen, Kampia, and Rumenap.” Pl. Summ. J. Mem. at 9. Plaintiffs argue that every voter’s vote is entitled to be counted and reported and that any legislation restricting that right is subject to strict scrutiny. *Id.* at 9-10. Third, Plaintiffs argue that the regulation severely burdens Plaintiffs Barr and the Libertarian Party by infringing on the party’s associational rights, including their constitutional right to create and develop a new political party. Pl. Reply Mem. at 5; *see also* Compl. ¶¶ 26-27. Plaintiffs argue that “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 . . . [and that] [t]he Libertarian Party is entitled to know whether its stature has grown or been diminished by the votes cast for Barr.” Pl. Summ J. Mem. at 10. The court will address these arguments in turn.

Plaintiffs argue that the burden imposed by Section 806.13 must be assessed within the context of the District of Columbia’s overall ballot access scheme, which Plaintiffs argue is highly burdensome. Pl. Reply to Def. Supp. Mem. at 2. As part of this argument, Plaintiffs note that while the Supreme Court in *Burdick* upheld Hawaii’s outright ban on write-in voting, it did so only in the context of Hawaii’s statutory scheme providing for otherwise easy access to the ballot. *Id.* (citing *Burdick*, 504 U.S. at 434-37). By contrast, Plaintiffs characterize D.C.’s ballot access scheme as “more burdensome” than that of 43 other states. *Id.*

The Court is not persuaded that the District of Columbia’s ballot access scheme is unusually burdensome. To obtain a position on the general election ballot, the District requires minor party presidential candidates to submit a nomination petition signed by 1 percent of all registered voters, which would have required approximately 3,900 signatures in 2008. D.C. CODE § 1-1001.08(f) (2001); Winger Decl., Attachment B. According to Plaintiffs’ own submissions, other jurisdictions, including California and Georgia, have the same requirement. Winger Decl., Attachment B. In addition, under the Hawaii ballot access scheme in *Burdick*, which the Supreme Court deemed sufficiently accessible to justify an outright ban on write-in voting, candidates had to run in an open

primary before they could get a position on the general election ballot. 504 U.S. at 435. While the requirements to get on the primary ballot were liberal – non-partisan candidates could enter the primary simply by filing nominating papers containing 15 to 25 signatures – advancing to the general election was more difficult. *Id.* at 436. To advance to the general election, a nonpartisan candidate had to receive 10 percent of the primary vote or the number of votes that was sufficient to nominate a partisan candidate, whichever number was lower. *Id.* In the ten years preceding the lawsuit in *Burdick*, fewer than a third of nonpartisan candidates in Hawaii advanced from the primary to the general election ballot. *See id.* As for partisan candidates outside the major parties, Hawaii required a party petition to be filed containing the signatures of 1% of the state’s registered voters – a requirement that is substantially similar to D.C.’s requirement here. *Id.* at 435. Regarding that requirement, the *Burdick* court observed, “We have previously upheld party and candidate petition signature requirements that were as burdensome or more burdensome than Hawaii’s one-percent requirement.” *Id.* at n.3 (citing cases). Thus, the Court concludes that the District of Columbia’s overall ballot access scheme is not especially burdensome or severe. In addition, the Court notes that the regulation at issue in this case does not actually restrict access to the ballot at all, but only concerns the manner in which validly cast votes are reported to the public.

The Court now turns to Plaintiffs’ argument that “by authorizing the Board not to certify and report write-in votes, Section 806.13 effectively disenfranchises Plaintiffs Jansen, Kampia, and

Rumenap.” Pl. Summ. J. Mem. at 9-10. As a factual matter, Plaintiffs overstate the effect of Section 806.13 by claiming that Jansen, Kampia, and Rumenap’s write-in votes were not certified or reported. As the Board explains, “the 1,138 write-in votes for president were counted, announced, and certified following the November 4, 2008 general election.” Def. Reply Mem. at 4; Arthur Decl. ¶¶ 6, 9, 11. The Court finds this explanation to be factually accurate. Plaintiffs do not allege that the write-in votes cast by Jansen, Kampia, and Rumenap were not counted among those votes. In certifying and reporting the 2008 presidential election results, the Board complied with the requirements of the D.C. election laws. Arthur Decl. ¶ 11. Plaintiffs Jansen, Kampia, and Rumenap were not disenfranchised or denied access to the ballot, nor is there any credible claim that the Board failed to certify or report their votes as part of the write-in total. Rather, relying principally on dicta in the United States District Court’s ruling in *Turner v. District of Columbia Board of Elections & Ethics*, Jansen, Kampia, and Rumenap claim they were “effectively” disenfranchised because of the manner or format in which their votes were counted, certified, and reported – i.e., because the Board refused to tally how many write-in votes Barr received specifically.

In *Turner*, the Court considered a constitutional challenge to the Barr Amendment, a rider to a D.C. appropriations bill that precluded the use of funds to conduct a ballot initiative that would legalize medical

use of marijuana.<sup>7</sup> 77 F. Supp. 2d at 27. Congress enacted the Barr Amendment after the Board had already certified a ballot referendum on the legal status of medical marijuana in the District of Columbia, and after the Board had already printed the referendum initiative on its ballots, but before voting had occurred. *Id.* After the vote occurred, the Board interpreted the Barr Amendment as prohibiting it from certifying and releasing the referendum's results. *Id.* Although ultimately the Court in *Turner* avoided any constitutional questions, the Court concluded that *if* the Barr Amendment had precluded the counting, announcing, and certifying of the referendum's results, the statute would have been subject to strict scrutiny and it would have violated plaintiffs' First Amendment rights. *Id.* at 34-35.

*Turner* is inapposite to the present case for several reasons. First, § 806.13 does not preclude the counting, announcing, and certifying of election results, as the Barr Amendment might have if the Court had not avoided the constitutional issue. Indeed, the 1,138 write-in votes for president *were* counted, announced, and certified following the November 4, 2008 general election, although they were not tallied by candidate. Arthur Decl. ¶¶ 6, 9, 11. The Barr Amendment, on the other hand, would have imposed a far more significant burden on voters' rights than any burden alleged here if it had precluded the release and certification of the results of a referendum. That would have directly

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<sup>7</sup> The Barr Amendment was so named because it was sponsored by Plaintiff Barr when he was a legislator in the House of Representatives.

interfered with the key “function of the election process” which is “to winnow out . . . all but the chosen candidates,” or in the case of a referendum, to identify the public’s chosen option. *Burdick*, 504 U.S. at 438.

Further, *Turner*’s dictum that “voting results can be categorized as protected symbolic speech,” 77 F. Supp. 2d at 31, is not wholly on point here because the *Turner* court was referring primarily to the public communication of an election’s decisive outcome. As the Court explained, “[t]hrough election voting, the public affects public governance by determining who holds office or which referenda properly before the voters will or will not become law.” *Id.* Here, it is undisputed that (1) all write-in votes were counted and certified as part of the write-in vote total; (2) the write-in votes had no effect on determining who holds office; and (3) if the write-in votes would have had an effect on the election’s outcome, they would have been tabulated by candidate as required by Section 806. While *Turner* identifies an election’s results as “core political speech,” *id.* at 32, *Turner* does not address the constitutional interests, if any, that are implicated by the precise format in which those election results are communicated to the public.

Nor is there any indication that *Turner* intended to depart from the Supreme Court’s well-settled precedents upholding “reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls.” *Burdick*, 504 U.S. at 438. Indeed, the Barr Amendment was far from “politically neutral.” If the Barr Amendment had prohibited the release of the medical marijuana referendum results, that would have amounted to a



content-based restriction on speech concerning the merits of drug legalization. *Turner*, 77 F. Supp. 2d at 32-33. As the *Turner* court explained, the Barr Amendment would have been subject to strict scrutiny for that reason. *Id.* By contrast, *Turner* explicitly recognized that a lesser standard applies to “facially neutral election laws propounded in the name of efficiency.” *Id.* at 33 n.4. Section 806.13 is exactly that – a facially neutral election law propounded in the name of efficiency. It does not present any content-based restriction on the speech embodied in write-in votes.

Finally, Congress enacted the Barr Amendment after the D.C. medical marijuana ballot initiative had already been certified and after the ballots had already been printed. That represented an unusual mode of interference with an election that was, in some sense, already underway. Here, there was no change to any electoral procedures during the course of the election process. Thus, the issue of casting a lawful vote “only to be told that that vote will not be counted or released” is not similarly presented in this case. *Id.* at 33. For all of these reasons, *Turner* does not suggest that strict scrutiny is the appropriate standard of review in this case.

In addition to *Turner*, Plaintiffs rely on *Gray v. Sanders*, 372 U.S. 368 (1963) and *Dunn v. Blumstein*, 405 U.S. 330 (1972) to argue that strict scrutiny applies here. These cases are also unavailing. In *Gray*, the Court stated that “Every voter’s vote is entitled to be counted once. It must be correctly counted and reported.” 372 U.S. at 380. *Gray* does not further Plaintiffs’ argument because (1) Jansen, Kampia, and

Rumenap's votes were counted and reported correctly as part of the write-in total; and (2) *Gray* is otherwise inapposite because it concerned vote dilution under Georgia's county unit system, an issue with little relevance here.

Plaintiffs cite *Dunn v. Blumstein*, 405 U.S. 330 (1973) to make an equal protection argument. They assert that strict scrutiny should apply because "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." Pl. Summ. J. Mem. at 12 (quoting *Dunn*, 405 U.S. at 351). This equal protection argument is without merit. Write-in voters or candidates are not a suspect class entitled to heightened scrutiny. See *AFL-CIO v. United States*, 195 F. Supp. 2d 4, 10-12 (D.D.C. 2002) (explaining equal protection analysis and identifying suspect classifications, such as race and national origin); cf. *Burdick*, 504 U.S. 428 (upholding state's ban on write-in voting).

Plaintiffs Jansen, Kampia, and Rumenap had full access to the polls; their votes were cast; their votes were duly counted as write-in votes, as required by Section 806.12; and 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. Accordingly, any burden placed by Section 806.13 on Jansen, Kampia, and Rumenap's right to vote is slight.

Consideration of the burden on the associational interests of Plaintiffs Barr and the Libertarian Party leads to the same conclusion. Plaintiffs claim that

Section 806.13 infringed the associational rights of Barr and the Libertarian Party, including their constitutional right to create and develop a new political party. Plaintiffs assert that “the Board’s failure to certify and report valid write-in votes cast for Plaintiff Barr impaired [the] ‘basic function’ of Plaintiff Libertarian Party” to “select candidates for public office to be offered to the voters at general elections.” Pl. Reply Mem. at 5 (citing *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)). Plaintiffs further claim that the “Libertarian Party is entitled to know whether its stature has grown or been diminished by the votes cast for Barr,” and that Section 806.13 deprived them of “this vital information, laden with associative and communicative value.” Pl. Summ. J. Mem. at 10-11.

First, for the purpose of constitutional analysis, the rights of Barr and the Libertarian Party in connection with the election itself are not substantially different from the rights of the voters. *See Burdick*, 504 U.S. at 438 (“the rights of voters and the rights of candidates do not lend themselves to neat separation.”) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). Therefore, the analysis above regarding the voting rights of Plaintiffs Jansen, Kampia, and Rumenap is equally applicable to Plaintiffs Barr and the Libertarian Party.

Second, while it is true that courts will apply strict scrutiny to laws that directly impact the “basic function” of selecting a party’s candidates or laws that severely burden the constitutional right of citizens to create and develop new political parties, *see, e.g., Tashjian*, 479 U.S. at 215-17, *Norman*, 502 U.S. at 288-289, Section 806.13 did not affect any basic functions of the Libertarian Party. No facts suggest

that Section 806.13 placed any burden on Barr or the Libertarian Party in terms of ballot access. Plaintiffs admit that Plaintiff Barr was nominated as the Libertarian Party candidate and ran as a qualified write-in candidate in the 2008 election. Pl. Stmt. of Mat. Facts ¶¶ 6, 8. Plaintiffs also admit that Jansen, Kampia, and Rumenap were selected and qualified as Libertarian Party candidates for presidential elector from the District of Columbia pledged to Barr, and that write-in votes were cast for Barr in the November 2008 election. *Id.* ¶¶ 6-10. The Libertarian Party was and remains free to organize itself, to disseminate its views, to select, nominate, and field candidates – and to win elections – in the District of Columbia. Thus, the claim that Section 806.13 impaired the party’s basic functions or its ability to select candidates is without merit.

The crux of Plaintiffs’ complaint 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. The Board’s reporting of the write-in vote total did, however, provide Plaintiffs with information about how well Barr fared: Specifically, Plaintiffs know that he 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. Plaintiffs also know substantial information about how Barr and the Libertarian Party fared nationally, considering that they note that Barr “polled more popular votes nationwide than any Libertarian presidential candidate since Ed Clark in 1980.” Pl. Supp. Mem. at 2. Plaintiffs assert that it is important for them to know their exact vote total because minor party voters “cast their votes hoping to increase a candidate’s vote total,” even though they

“almost never expect those candidates to win.” Winger Decl. ¶ 5. According to Plaintiffs, a typical minor party voter seeks to “gain satisfaction knowing that he or she has helped to boost the candidate’s total.” *Id.* That may be so, but the Supreme Court has specifically held that the primary function of elections is to elect candidates. *See Burdick*, 504 U.S. at 438. Accordingly, the Supreme Court has “repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls.” *Id.*

Plaintiffs’ supplemental brief in support of their motion for summary judgment raises an additional argument for why Plaintiffs need a precise vote count. Plaintiffs contend that a precise count is crucial because under 26 U.S.C. §§ 9003 and 9004, a minor party presidential candidate who polls at least 5 percent of the national vote qualifies for public funding in the next general election. Pl. Supp. Mem. at 1-2. Yet, Plaintiffs note, the official results of the 2008 election published by the Federal Election Commission (“FEC”) did not credit Barr with receiving any votes in the District of Columbia. *Id.* On the facts of this case, however, Plaintiffs cannot demonstrate that the Board’s actions pursuant to § 806.13 caused them any conceivable harm related to the availability of public campaign funding. According to the FEC results, Barr received 523,686 votes out of 131,257,328 nationally, or 0.40%. Even 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. In *Buckley v. Valeo*, the Supreme Court rejected the argument that the public funding threshold percentage requirements themselves infringed the constitutional rights of minor

parties. 424 U.S. 1, 97 (1976). In so holding, the Court noted that “we of course do not rule out the possibility of concluding in some future case, upon an appropriate factual demonstration, that the public financing system invidiously discriminates against nonmajor parties.” *Id.* at n.131. Similarly, the Court here does not rule out the possibility of a case in which § 806.13, as applied, could implicate constitutional harms, either on its own or in conjunction with the public financing statute. The Court, however, must rule based on the actual facts of the case. *See Fund For Animals v. Williams*, 311 F. Supp. 2d 1, 5 (D.D.C. 2004) (“[T]he Supreme Court has held that Article III’s case-or-controversy requirement prohibits courts from issuing advisory opinions or decisions based on hypothetical facts or abstract issues.”) (citing *Flast v. Cohen*, 392 U.S. 83, 96 (1968)). In this case, the application of § 806.13 had no bearing on Plaintiffs’ ability to obtain public campaign funding.

While Plaintiffs naturally would like to know their exact vote total, there is no constitutional mandate that they be provided with this information at the public’s expense, provided that their votes have been duly counted and determined to have no effect on the election’s outcome.<sup>8</sup> The burden Section 806.13 puts on Plaintiffs’ constitutional rights is accordingly very limited.

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<sup>8</sup> While on the facts of this case the Constitution does not compel the reporting of each candidate’s write-in total, the District of Columbia obviously could decide to amend its election regulations to provide for the reporting of each candidate’s write-in results in a manner that would minimize costs and administrative burdens by, for example, providing a mechanism for a write-in candidate to pay for the tallying of the write-in votes.

**b. Government Interests**

The Court turns next to the second step in the *Anderson-Burdick* analysis – the interests asserted by the District of Columbia to justify the burden imposed by § 806.13. Since the Court has already concluded that the regulation’s burden is slight, the District does not need to establish a compelling interest to justify the rule. Under the *Anderson-Burdick* analysis, when an election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the constitutional rights of voters, “the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Burdick*, 504 U.S. at 434 (citing *Anderson*, 460 U.S. at 788) (internal quotation marks omitted). Here, the District’s regulatory interests trump Plaintiffs’ limited interest in having write-in votes tabulated and reported on a candidate-by-candidate basis

In its submissions, the Board has identified reasonable interests that adequately justify § 806.13, including the (1) efficient and expedient reporting of election results, (2) reduction of election administration costs, and (3) the promotion of faith in the certainty of election results. Def. Mem. in Opp. to Pl. Summ. J. Mot. at 16. The District clearly has a legitimate interest “in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials.” *Timmons*, 520 U.S. at 364. No “elaborate, empirical verification of the weightiness of the State’s asserted justifications” is required. *Id.*

The Board currently uses a voting system in which paper ballots are processed through a ballot tabulator.<sup>9</sup> Declaration of Rokey Suleman, Executive Director of the D.C. Board of Elections and Ethics, dated Jan. 6, 2010 ¶ 5. The tabulator can read that a voter selected a write-in candidate for a particular race, but the Board must manually review the ballot in order to determine *which* write-in candidate the voter selected. *Id.* If the Board were required to tabulate the write-in votes cast in a single, district-wide election, it would need to collect the write-in votes from the 143 precincts of the District of Columbia and then tally them by hand. *Id.* ¶ 6. In order to accomplish the tallying, the Board would need to hire and train temporary employees to conduct that work, which, according to the Board's Executive Director, would take "at least a few weeks to complete." *Id.* While such an extensive delay may not be necessary given the relatively small number of write-in votes, even if the increased reporting time only took a few additional days, the Board still has articulated a legitimate interest in the efficient reporting of election results.<sup>10</sup> The Court finds

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<sup>9</sup> At oral argument, counsel for the Board presented several details about the conduct of elections in the District of Columbia that were not reflected on the factual record, despite the fact that this case has been pending in this Court for almost two years and despite the fact that the Court's order of February 2, 2011 explicitly directed the parties to "present any additional material that is pertinent" by February 12, 2011. Accordingly, the Court does not base its ruling on any factual representations that were presented at oral argument and that are not also reflected in the prior factual record.

<sup>10</sup> The delay refers to the reporting of the certified results which ordinarily occurs 10 to 15 days after the election, not the reporting



that requiring the Board to tabulate non-determinative write-in votes by hand would likely increase the expense of administering an election, cause delay in reporting the certified election results, or both. Accordingly, the Board has advanced reasonable interests in efficiency and cost-effective election administration that justify § 806.13. The Board also has a reasonable, legitimate interest in promoting public confidence in the electoral system and its results by ensuring efficient and cost-effective election administration.<sup>11</sup>

### III. Conclusion

“[W]hen a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and [Fifth] Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Burdick*, 504 U.S. at 434. Here, the Board has identified sufficient

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of unofficial results which occurs on election night. Plaintiffs indicated at oral argument that their claim is not concerned with the reporting of the unofficial results on election night.

<sup>11</sup> While it is true that states and, as relevant here, the District, have “a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State’s boundaries,” *Anderson*, 460 U.S. at 795, the District’s interests here are still sufficiently important to justify the regulation in light of the slight nature of any burden to Plaintiffs’ rights and by virtue of the fact that § 803.16 has no effect on access to voting itself, but rather concerns only the manner in which votes are publicly reported.

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regulatory interests to justify § 806.13 and any slight burden it may place on Plaintiffs' constitutional rights.

Plaintiffs' remaining arguments are without merit.

Accordingly, summary judgment is GRANTED for Defendants and DENIED for Plaintiffs.

Date: March 8, 2011

/s/ *Beryl A. Howell*  
BERYL A. HOWELL  
United States District Judge

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**Civil Action No. 09-1676 (BAH)**

**[Filed March 8, 2011]**

THE LIBERTARIAN PARTY, <i>et al.</i> ,	)
	)
Plaintiffs,	)
	)
v.	)
	)
DISTRICT OF COLUMBIA	)
BOARD OF ELECTIONS AND	)
ETHICS, <i>et al.</i> ,	)
	)
Defendants.	)

**ORDER**

Upon consideration of [10] the Plaintiffs' Motion for Summary Judgment and [7] the Defendants' Motion to Dismiss, which the Court has treated as a motion for summary judgment pursuant to Fed. R. Civ. P. 12(d) and Fed. R. Civ. P. 56, the related legal memoranda in support and in opposition and the accompanying declarations, and the entire record herein, it is hereby

**ORDERED** that, for the reasons set forth in the accompanying Memorandum Opinion, summary judgment is GRANTED to Defendants District of Columbia Board of Elections and Ethics, Vincent C. Gray, Mayor of the District of Columbia, and Irvin B.

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Nathan, Acting Attorney General, District of Columbia, in their official capacities, and summary judgment is DENIED to Plaintiffs Libertarian Party, Bob Barr, J. Bradley Jansen, Rob Kampia, and Stacie Rumenap.

Date: March 8, 2011

/s/ *Beryl A. Howell*  
BERYL A. HOWELL  
United States District Judge

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**APPENDIX C**

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**United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 11-7029  
September Term 2011  
1:09-cv-01676-BAH**

**[Filed August 9, 2012]**

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Libertarian Party, et al.,	)
	)
Appellants	)
	)
v.	)
	)
District of Columbia Board of	)
Elections and Ethics, et al.,	)
	)
Appellees	)

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**BEFORE:** Sentelle, Chief Judge, and Henderson,  
Rogers, Tatel, Garland, Brown,  
Griffith, and Kavanaugh, Circuit  
Judges

**ORDER**

Upon consideration of appellants' petition for rehearing en banc, the responses thereto, and the

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absence of a request by any member of the court for a  
vote, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**

Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail

Deputy Clerk

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**APPENDIX D**

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**United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 11-7029  
September Term 2011  
1:09-cv-01676-BAH**

**[Filed July 19, 2012]**

Libertarian Party, et al.,	)
	)
Appellants	)
	)
v.	)
	)
District of Columbia Board of	)
Elections and Ethics, et al.,	)
	)
Appellees	)
	)

**ORDER**

Upon consideration of the petition for rehearing en banc, it is

**ORDERED**, on the court's own motion, that within 15 days of the date of this order, appellees file a response to the petition for rehearing en banc, not to

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exceed 15 pages. Absent further order of the court, the court will not accept a reply to the response.

**FOR THE COURT:**

Mark J. Langer, Clerk

BY: /s/

Jennifer M. Clark

Deputy Clerk