No. 13-16254

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Arizona Libertarian Party, et al.,

Plaintiffs/Appellants

v.

Ken Bennett,
Secretary of State,

Defendant/Appellee

Appeal from the U.S. District Court, District of Arizona
No 11-CV-856-CKJ

Appellants' Opening Brief

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RULE 26.1 STATEMENT

Plaintiff/Appellant Arizona Libertarian Party is incorporated, and has no parent corporation and no corporation that owns 10% or more of its stock.

Plaintiff/Appellant Arizona Green Party is not incorporated.

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JURISDICTIONAL STATEMENT

Plaintiff/Appellants brought this action under the Equal Protection Clause of the Fourteenth Amendment. The District Court's jurisdiction was invoked pursuant to 28 U.S.C. §1331.

The District Court entered a final judgment in favor of Defendant on March 19, 2013, thereby disposing of all parties' claims. (Docket No. 25).

Plaintiff/Appellants filed a motion under Rule 59, which the District Court granted on May 21, 2013 (Docket No. 30), and entered an amended judgment on the following day (Docket No. 31).[1] Plaintiff/Appellants timely appealed on June 14, 2013. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291.

STATUTE AT ISSUE

Arizona Revised Statutes §16-152(A)(5) provides:

> A. The form used for the registration of electors shall contain:
>
> . . . . .
>
> 5. The registrant's party preference. The two largest political parties that are entitled to continued representation on the ballot shall be listed on the form in the order determined by calculating which party has the highest number of registered voters at the close of registration for the most recent general election for governor, then the second highest. The form shall allow the registrant to circle, check or otherwise mark the party preference and shall include a blank line for other party preference options.

[1] The District Court ordered that the amendment be *nunc pro tunc*. The clerk apparently took this literally, with the result that Docket No 31 has a date stamp of March 19, the date of the original judgment, although the docket shows it was entered on May 22, 2013.

ISSUE PRESENTED

Arizona election law divides political parties into parties with continuing ballot access, which are subject to certain regulations and have certain privileges, and those without. It has at present five parties with continuing Statewide ballot access.

The issue presented is whether its Legislature violated the Equal Protection Clause, when it required that voter registration forms set out the names of the two largest parties next to checkboxes, together with a checkbox marked “Other,” and a blank.

STATEMENT OF THE CASE

Plaintiff/Appellants brought this action challenging a 2011 amendment to A.R.S. 16-152(A)(5), which prescribes the content of voter registration forms. Both sides thereafter moved for summary judgment. The District Court granted Defendant/Appellee’s motion for summary judgment, and denied our motion, on March 19, 2013. (Docket No. 25). It later entered an amended judgment (Docket No. 31).

STATEMENT OF FACTS

1. Arizona electoral law recognizes political parties with continuing ballot access, based on (1) the percentage of registered voters who register in them or (2)

a certain percent of persons voting for their candidates. A.R.S. §16-804. The qualified candidates of these parties are listed on the ballot without the party having to submit petitions to establish ballot access.[2]

2. Arizona has five parties with continuing ballot access: Democrats, Republicans, Greens, Libertarians, and Americans Elect. The first two parties are much larger than the remaining three and, indeed, the two largest parties control every seat in the State Legislature, as well as every elective office in the executive branch, including that of the governor who signed the challenged act into law.

3. In 2011, the Legislature amended the statute that dictated the content of voter registration forms. The amendment provided that the form must feature the names of the two largest parties, with checkboxes next to them. The remaining parties were not listed, but given a checkbox for "Other" and a tiny blank[3] to write in a party name. *See* A.R.S. 16-152(A)(5). A sample registration form can be found at Appellants' Appendix p. 16 *ff.*

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[2] The individual candidates must submit appropriate petitions. A party lacking continued access to the ballot must submit petitions to have its candidates listed on the ballot, and then its candidates must submit their own petitions to be listed as its candidates.

[3] We have measured it at 0.9" long.

ARGUMENT

I. THE AMENDMENT TO A.R.S. 16-152(A)(5) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

STANDARD OF REVIEW.

The constitutionality of a state law is reviewed de novo. *Am. Academy of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1103 (9th Cir.2004).

We would note that, in this particular portion of the legal arena, courts apply the same or similar standards for equal protection analysis as they do for First/Fourteenth Amendment analysis. *See Norman v. Reed*, 502 U.S. 279, 288 n.8 (1992); *Patriot Party of Pa. v. Mitchell*, 826 F. Supp. 926, 934 n. 8 (E.D. Pa. 1993). *See also Patriot Party of Allegheny County v. Alleghency Co. Dept. of Elections*, 95 F.3d 253, 261 (3rd Cir. 1996) (noting that laws giving advantages to major parties burden the right of association, *i.e.*, 14th Amendment inequality is analogous to First Amendment restriction).

A. THE AMENDMENT CANNOT PASS STRICT SCRUTINY.

1. Strict Scrutiny is Appropriate Here.

"The most famous footnote in constitutional law" is footnote 4 in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). There, the Court applied the rational basis test to an economic regulation, but noted that

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth….
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation…..
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

These passages describes the situation presented here. A legislature entirely controlled by the two largest parties has dictated a registration form that advances the interests of those two parties and disadvantages the associational rights of the three smaller ones. But "minor political parties are not the step-children of the American political process. Core First and Fourteenth Amendment principles protect their rights to organize and to compete for votes." *Patriot Party v. Allegheny County Dept. of Elections*, 95 F.3d 253, 261 (3rd Cir. 1996).

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

Norman v. Reed, 502 U.S. 279, 288 (1992).

Williams v. Rhodes, 393 U.S. 23 (1968) is here instructive. *Williams* dealt with Ohio election laws that permitted the two major parties to remain on the ballot so long as they polled 10% of the vote in the previous election – which they obviously would do with ease – but required new parties seeking ballot access to obtain petitions signed by 15% of the electorate. The Supreme Court struck down the laws, and held that strict scrutiny was applicable:

> No extended discussion is required to establish that the Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence, and thus place substantially unequal burdens on both the right to vote and the right to associate. The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot, and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP v. Button,* 371 U.S. 415, 438 (1963).
>
> The State has here failed to show any "compelling interest" which justifies imposing such heavy burdens on the right to vote and to associate.
>
> The State asserts that the following interests are served by the restrictions it imposes. It claims that the State may validly promote a two-party system in order to encourage compromise and political stability. The fact is, however, that the Ohio system does not merely favor a "two-party system"; it favors two particular parties the Republicans and the Democrat -- and, in effect, tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the

> time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.

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

The measure here is quite discriminatory. A person registering to vote is essentially told that there are two real political parties, and some unnamed "other" ones.

The rationale for strict scrutiny here is simple: "because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny." *Anderson v. Celebreeze*, 460 U.S. 780, 793 n. 16 (1983).

The Court has recognized that, in the electoral context, a form of intermediate scrutiny[4] may apply where the regulatory burden is not severe and the

[4] Requiring that the State show "important regulatory interests" rather than a "compelling interest," and that the regulations reasonably serve that end. *Timmons v. Twin Cities New Party*, 520 U.S. 351, 358 (1997). Another phrasing asks whether restrictive measures were "reasonably taken" in pursuit of "vital state objectives" that cannot be served equally well by "less burdensome" means. *American Party of Texas v. White*, 415 U.S. 767, 781 (1974).

regulations consist of "'reasonable, *nondiscriminatory* restrictions.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (emphasis supplied). The "nondiscriminatory" requirement is crucial.

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

Clingman v. Beaver, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring). The legislation here at issue is patently discriminatory and anti-competitive. The two political parties that control the Legislature have handed themselves an advantage, when they already have the lead. "The State has shown no compelling state interest nor even a justifiable purpose for grant what, in effect, is a significant subsidy only to those parties who have the least need therefore." *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 995 (S.D.N.Y.) *aff'd* 400 U.S. 806 (1970).

The District Court concluded that strict scrutiny was not applicable, since the statute did not discriminate in favor of the Democratic and Republican parties *by name*:

> Plaintiffs argue that the rights [statutes] are patently discriminatory and anti-competitive because the two political parties that control the Arizona Legislature have provided themselves an advantage. However, the statute does not discriminate against any party – it provides that the two largest

> political parties that are entitled to continued representation on the ballot shall be listed on the form. The statute does not prevent any party, if it qualifies under the statute, to be listed on the form.

Appellants' Appendix at 12. Yet this is precisely the situation the Supreme Court faced in *Williams v Rhodes*, where the statute discriminated in favor of existing parties, of which there were the usual two, without naming them. The Court held that this required strict scrutiny. 393 U.S. at 31. It faced a similar situation in *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), where a quirk in State law placed a very heavy burden on new parties seeking local ballot access, without listing any political party by name. The Court again held that strict scrutiny was applicable. 440 U.S. at 184.

Courts are not required to be blind to everyday realities. A statute which gives advantages to the two largest parties is a statute which rewards the Democratic and Republican Parties, and every legislator voting for it knew that. *Cf. William v. Rhodes*, 393 U.S. at 32 ("The fact is, however, that the Ohio system does not merely favor a 'two party system'; it favors two particular parties -- the Republican and the Democrat ….").

2. The 2011 Amendment Fails Strict Scrutiny.

The States bears the burden of proving that a measure of this type serves a compelling State interest. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978);

Montana Chamber of Commerce v. Argenbright, 226 F. 3d 1049, 1057-58 (9th Cir. 2000).

The Amendment serves no compelling State interest. Indeed, it is hard to see how it serves *any* State interest. It is in the interests of the two major parties, which are private entities, but not in the interest of the State. How would giving a future voter the ready choice of five parties rather than two harm either the voter or the government?

B. THE AMENDMENT FAILS INTERMEDIATE REVIEW.

We note above that intermediate review is only applicable to genuinely non-discriminatory regulations, which this clearly is not. But even under intermediate review, the 2011 amendment would fail. Intermediate review requires that the State show "important regulatory interests" and that the regulations reasonably serve those. *Timmons*, 520 U.S. at 358. Another phrasing asks whether restrictive measures were "reasonably taken" in pursuit of "vital state objectives" that cannot be served equally well by "less burdensome" means. *American Party of Texas v. White*, 415 U.S. 767, 781 (1974).

It is a test that requires genuine proof, not speculation, with the burden of proof resting upon the government. "[S]nce the State bears the burden of justifying its restrictions, *see Zauderer, supra,* at 471 U. S. 647, it must affirmatively establish the reasonable fit we require." *State Univ. of N.Y. v. Fox*, 492 U.S. 469,

480 (1989). The "justification must be genuine, not hypothesized or invented post hoc in response to litigation." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996).

It is hard to see how "important regulatory interests" or "vital state objectives" are served by making it easy to join two recognized parties, and harder to join the other three.

There is an alternative approach to review. Courts have frequently employed a passage from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), which was a First Amendment rather than an Equal Protection Clause case. It suggests that in assessing a challenge of this type, a court should

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

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). *Anderson* was a substantive rather than an equal protection case, and "[i]t is not entirely clear, however, whether the Supreme Court would apply this test in an equal protection situation." *Fulani v. Krivanek,* 973 F.2d 1539, 1543 (11th Cir. 1992). (invalidating a law that required that candidate petition signatures be verified, at the candidate's cost, with a fee waiver provision that excluded small parties' candidates).

> "*The character and magnitude of the asserted injury* [or here, discrimination] *to the rights protected by the First and Fourteenth Amendments.*"

An equal protection setting calls for a modification of this element, to focus upon the discrimination rather than the injury. The magnitude of the discrimination here is substantial. Obtaining registrations is important to a small political party. It is a key to retaining continuing access to the ballot, A.R.S. §16-804, which eliminates the need to petition for the party's ballot access. In Arizona, a small party forced to petition for Statewide offices must produce over 22,600 signatures,[5] a considerable task.

The registration form here clearly discriminates in favor of the two major parties. The registrant is reminded of their names, and invited to choose between the two. To choose any other, the registrant must check "other" and then write in the party's name or an abbreviation of it (the blank for party name is approximately 0.9" long). The blank is too short to contain even "Libertarian," so the registrant must invent an abbreviation, and hope that the registrar understands that. The party and the voter moreover run the risk of the registrar's misreading the abbreviation – is that AGP or ALP?

The District Court noted: "The burden of writing a party name on a line is not great." Appellants' Appendix at 13. But the issue here is equal protection. If the Legislature thought the burden trivial, why did it change the law to exempt the

[5] A party must file petitions signed by 1 1/3% of the number of voters who voted for governor in the preceding election for that office, and signed by voters in at least five different counties. A.R.S. §16-801(A). Slightly over 1.7 million votes were cast in the 2010 governor's race.

two major parties from it? The registration form moreover sends a message to the future voter. There are two REAL political parties in this State. Registering for any other party is a show of eccentricity, which we must grudgingly tolerate, but do not encourage.

> *[T]he precise interests put forward by the State as justifications for the burden imposed by its rule.*

This aspect of this case is unusual, perhaps unique. The State has never been able to come up with an interest served by the form, other than the advancement of the two major parties at the cost of all other parties. The interests traditionally advanced – resource costs and minimizing voter confusion – are completely inapplicable here.

The only interest the District Court could find was the State's interest in maintaining a "healthy two party system." Appellants' Appendix at 13. In other words, ensuring that voters are not tempted to vote for any but the two major parties. In this context, this is, we submit, *exactly* the type of interest that is not permissible. It is discrimination for discrimination's sake. As *Anderson* itself notes, 460 U.S. at 793-94:

> A burden that falls unequally upon new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and – of particular importance – against those voters whose political preferences lie outside the existing political parties.. … In short, the primary values protected by the First Amendment – "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 170 (1964) – are served when election campaigns are not monopolized by the existing political parties.

[T]he extent to which those interests make it necessary to burden [here, discriminate against[the plaintiff's rights

Assuming *arguendo* that the State had a valid interest in making voters enlist only in the two major parties, it could have given all five parties check boxes on the registration form, and left the major parties to try to persuade voters to register in their parties. The District Court ruled that this suggestion was "an attempt to replace the Legislature's judgment." which might result in other parties seeking to be listed as well. Appellants' Appendix at 14-15. But Arizona law has drawn a clear and simple line. A group either has continuing ballot access or it does not. Continuing ballot access means, not only dispensing with party petitions, but also free access to voter lists, matched by requirements that the recognized party be managed by elected precinct committeemen and nominate its candidates by primary election rather than convention. A.R.S. §§ 16-301, 302, 511, 821-27.

CONCLUSION

The two major parties that entirely control the Arizona Legislature, as well as all elective executive offices, passed an amendment which discriminates against and disadvantages the three other parties with continuing ballot access. Not content to be dominant, the major parties sought to become the exclusive political powers, by extinguishing the smaller parties. This is precisely the form of lawmaking against which the Equal Protection Clause (here augmented by the First Amendment) was meant to guard. The District Court's ruling should be reversed.

Respectfully submitted this 23d day of September, 2013

s/ *David T. Hardy*
Counsel for Appellants

Related Cases

Counsel knows of no related cases pending in this Court.

Certificate of Compliance

I certify that

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)because it contains 3,702 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman font at 14 points.

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Certificate of Service

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