

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' Reply Brief

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Table of Contents

STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	
I. THE AMENDMENT TO A.R.S. 16-152(A)(5) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.....	2
A. THE AMENDMENT CANNOT PASS STRICT SCRUTINY.	2
1. Strict Scrutiny is Appropriate Here.....	3
2. The 2011 Amendment Fails Strict Scrutiny.....	4
B. THE AMENDMENT FAILS INTERMEDIATE REVIEW.....	4
1. Intermediate Review is Inapplicable; it is Only Applicable Where the Restriction at Issue is Neutral and Nondiscriminatory.	4
2. The Interest Advanced by the State is Insufficient, and Indeed Demonstrates the Unconstitutionality of the Law at Issue Here.	6
CONCLUSION.....	11
Certificate of Compliance	12
Certificate of Service.....	12

Index of Authorities Cited

Cases

<i>American Party of Texas v. White</i> , 415 U.S. 767 (1974)	6
<i>Anderson v. Celebreeze</i> , 460 U.S. 780 (1983)	3
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992)	4
<i>Illinois Bd. of Elections v. Socialist Workers Party</i> , 440 U.S. 173 (1979)	4
<i>Norman v. Reed</i> , 502 U.S. 279 (1992)	6
<i>Patriot Party of Pa. v. Mitchell</i> , 826 F. Supp. 926 (E.D. Pa. 1993)	4
<i>State Univ. of N.Y. v. Fox</i> , 492 U.S. 469 (1989)	6
<i>Timmons v. Twin Cities New Party</i> , 520 U.S. 351 (1997)	4, 6
<i>United States v. Carolene Products</i> , 304 U.S. 144 (1938)	3
<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	6
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	2,7

Statutes

A.R.S. §16-646(A)	9
A.R.S. §16-803(A)	8

STATEMENT OF FACTS

The dispute here centers upon a statute and voter registration form that disadvantages the smaller recognized political parties, giving a clear advantage to the two largest parties, who entirely control the legislature which enacted it. Voter registration levels are critical to a smaller party's obtaining continuing ballot access.

As the State notes, last month Appellant Arizona Green Party lost continuing ballot access due to an insufficient number of voters who registered in it. It must now secure over 23,000 petition signatures if it is to place its candidates before the voters.

We noted that the blank on the registration form for writing in the name of an "other" political party was 0.9 inches long.¹ The State's Statement of Facts lists the instructions on the back of the registration form. Answering Brief at 6. Among these is "Please write full name of party preference in box." Given the size of the blank, it is impossible to register in the Arizona Green Party or the Arizona Libertarian Party without violating the instructions.

Finally, the State refers to Appellants as "minority parties." In fact, *all* political parties in Arizona are minority parties. The State has 3.2 million voters, so to be a majority party would require 1.6 million registrations. Of registered voters,

¹ Measured with a micrometer.

1.1 million are Republicans, 964,000 are Democrats, and nearly 1.1 million are independents or members of smaller parties.² No party in Arizona is a “majority party,” or is close to such.

SUMMARY OF ARGUMENT

The State paints itself into a corner, then paints the corner, too. As a justification for the statute at issue, it argues that the Legislature judged that long-term stability of continuing ballot access status is desirable, to prevent changes in the voter registration form, and that only the Democratic and Republican Parties meet this test. Answering Brief at 26-29. But as the Supreme Court has counseled:

[T]he 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.

Williams v. Rhodes, 393 U.S. 23, 32 (1968).

ARGUMENT

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

We noted 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. We must also recognize that applying these

² <http://www.azsos.gov/releases/2013/pressrelease30.htm>.

standards in an equal protection setting requires us to proceed by analogy. Here, it is not so much a question of burdening a choice as it is a question of slanting that choice, of advertising, so to speak, one set of political parties while hiding others who are legally their equals. And the State does not advance in justification “important regulatory interests,” but rather a financial one, that of the possible cost of printing new registration forms.

A. THE AMENDMENT CANNOT PASS STRICT SCRUTINY.

1. Strict Scrutiny is Appropriate Here.

The State questions our reference to footnote four of *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). Answering Brief at 9 & n.5. But the Supreme Court has itself drawn the parallel:

[B]ecause 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. *Id.* at 1136 , n. 87; see generally *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)....

Anderson v. Celebreeze, 460 U.S. 780, 793 n.16 (1983). The State does not otherwise respond to our argument that strict scrutiny is appropriate where the two major parties entirely control the legislature (and the executive), and enact laws giving political advantages to themselves, at the cost of all smaller parties. In such a setting, strict scrutiny has been applied. *See Williams v. Rhodes*, 393 U.S. 23

(1968) *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *Patriot Party of Pa. v. Mitchell*, 826 F. Supp. 926, 941 (E.D. Pa. 1993).

2. The 2011 Amendment Fails Strict Scrutiny.

The State does not deny that the 2011 amendment would fail strict scrutiny. As we will see below, it fails intermediate review as well.

B. THE AMENDMENT FAILS INTERMEDIATE REVIEW.

The State places its reliance upon intermediate review.

1. Intermediate Review is Inapplicable; it is Only Applicable Where the Restriction at Issue is Neutral and Nondiscriminatory.

As we pointed out in our Opening Brief, intermediate review is only applicable to 'reasonable, nondiscriminatory restrictions.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

The State does not attempt to argue that the statute at issue is “nondiscriminatory.” The statute clearly favors the two major parties and disfavors the other parties with continuing ballot access. The State does contest our statement that the registering voter is essentially told there are two real parties in Arizona, and some unnamed “other” ones. Answering Brief at 19.

We live in an age of advertising and name recognition. The registration form essentially advertises the two major parties to the future voter, at the moment of

registration, while leaving the other parties – having continued ballot access, and thus their legal equals – unadvertised.

The State invokes *Libertarian Party of New Hampshire v. Gardner*, 638 F.3d 6 (1st Cir. 2011), a case entirely different from the one before this Court. There, the State law differentiated between “parties” and other political organizations, based on their vote count. The plaintiff there had not qualified as a “party,” and so was not the legal equal of those parties that had. The issue was whether the Libertarian Party, which was not a “party,” could prevent candidates who had petitioned their way onto the ballot without its approval, from having its name put underneath that of the candidate. In short, the case has no similarity to the one at bar except that it concerned an election-related form.

The State also contests our argument that the form for writing in an “other” party is made impossibly small – not that this is directly relevant, but simply as evidence of a purpose to disadvantage and discriminate against the other parties with continuing ballot access. Answering Brief at 22-23. The State protests that we cite no authority for this proposition.

As noted above, the instructions for the registration form require that the full name of the other “other” party be written in. The blank is either 1” long (the State’s measurement) or 0.9” (ours). “Arizona Libertarian Party” has 23 characters

(25 counting spaces). The designer of the form had, perhaps, a taste for practical jokes.

2. The Interest Advanced by the State is Insufficient, and Indeed Demonstrates the Unconstitutionality of the Law at Issue Here.

As we noted, intermediate scrutiny requires genuine proof, not speculation, of impact upon a valid governmental interest, with the burden of proof resting upon the government. “[S]ince 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). In this context, the interests advanced must be “important,” *Timmons v. Twin Cities New Party*, 520 U.S. 351, 358 (1997), or “vital.” *American Party of Texas v. White*, 415 U.S. 767, 781 (1974).

The State initially advances its interest in maintaining a two-party system. Answering Brief at 25. That may be an interest, but Arizona has no valid (let alone vital) interest in guaranteeing that the Democratic and Republican Parties will forever remain those two. After all, “For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties....” *Norman v. Reed*, 502 U.S. 279, 288 (1992).

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.

Williams v. Rhodes, 393 U.S. 23, 31-32 (1968). The 2011 amendment, in effect, gives free advertising to the Democratic and Republican Parties, which least need it, while denying it to their statutory equals, the other parties which hold continuing ballot access.

The State next argues that that voter registration forms might have to be changed from time to time if the "other" parties were listed; the Democratic and Republican Parties have alone showed sufficient stability over the years, in terms of holding continuing ballot access, to merit listing. Answering Brief at 26-29, 35.

First, this is an open admission that the purpose and effect of the 2011 amendments is to give advantage to those two specific parties.

Second, as noted above, under intermediate review the State must provide sound evidence to support its claimed interests; speculation is not sufficient. The State presented no affidavits or other evidence in the District Court to document any such interest's significance. *Inter alia*,

- How often are the registration forms reprinted?
- A new party seeking ballot access must submit its petitions six months, 180 days, before the next primary election, A.R.S. §16-803(A); why is that not sufficient time to use up the existing registration forms?
- If a party loses continuing ballot status, that determination is made a year before the next election (*vide* the Green Party's recent loss of that status). Again, why is this not sufficient warning?³
- The Arizona Libertarian Party has qualified for continuing ballot access since 1995; why would not eighteen years of stability suffice for this purpose?

But, finally, the State here makes a serious, indeed fatal, error. It argues that in Arizona there have been a considerable and varying number of "third parties" with continuing ballot access within recent years:

Minor political parties who have qualified at one point or another in the last thirty-eight years for continued ballot access include the Socialist Labor Party, the Arizona Independence Party, the Socialist Worker's Party, the American Party, the American Independent Party, the Restoration Party, the United American Party, the Citizens Party, the Communist Party, the Workers World Party, the New Alliance Party, the Populist Party, the

³ There can be no State interest opposed to using up registration forms bearing a checkbox for the party which has lost ballot status. Persons are still entitled to register in that party. Having the checkbox actually reduces the resources devoted to registering voters, since the forms can be scanned rather than requiring clerks to hand-enter each registration in the party.

Natural Law Party, the Reform Party, the Maverick Democrat Party, and the U.S. Taxpayers Party.

Answering Brief at 26. For this proposition the States cites to its Supplemental Excerpts of Record [hereinafter “SER”], which reflect the election canvasses for those years.

The problem is that the canvasses do not reflect only parties with continuing ballot access. Rather, they reflect *every* candidate and party which received *any* votes *at all* in the elections. This includes parties that petitioned, and even write-ins.

By statute, the official canvass must report, *inter alia*, “The number of votes by precincts and county received by each candidate.” A.R.S. §16-646(A)(4). This includes write-in candidates and their parties. Parties with continuing ballot access and parties listed on the canvass are utterly different things.

In the 2012 Presidential election, the canvass reports votes for the Republican, Democratic, Libertarian and Green candidates. It also reports write-in votes (denominated by “[write-in]” after the Presidential candidate’s name) for the Constitution and Justice Parties’ candidates.⁴

⁴ The 2012 canvass is not in the SER, since the latter was filed before the election. It can be found online at the Secretary of State’s website:
<http://www.azsos.gov/election/2012/General/Canvass2012GE.pdf>

In the 2008 Presidential election, the canvass reports votes for the Republican, Democratic, Libertarian and Green candidates.⁵ SER at 53-55.

In the 2004 Presidential election, the canvass reports votes for the Democratic, Republican, and Libertarian candidates. SER at 50-51.

Going back to the 2000 Presidential election, the canvass reports votes for the Democratic, Republic, Green and Libertarian candidates, plus votes for the Reform and Natural Law Parties. SER at 46-48.

The 1996 canvass reports the same, plus write-ins for the Maverick Democratic Party (which drew 11 votes)⁶ and the US Taxpayers' Party (which got 147). SER at 46-48.

Thus, to the extent we can judge from the canvasses:

- The addition and the removal of the Green Party are the only changes in over a dozen years to the list of recognized parties.
- Going back to 1996 – seventeen years – the only other change was in the 2000 election cycle, when two parties temporarily appeared.
- In short, changes to the list of parties with continuing ballot access are quite infrequent events, occurring once in 8-10 years.

⁵ Most canvasses also report write-in votes for candidates with no party affiliation; we omit mention of these.

⁶ The State thus mistakes a write-in candidate who could not draw a dozen votes, running for a party likely existing only in his imagination, with a party with continuing ballot access.

In short, under intermediate scrutiny the State bore the burden of proving that listing only the Democratic and Republican Parties was necessary to a valid and vital State interest. The interest it advances – that once in a great while, with plenty of advance notice, it would have to change its registration forms (as it had to do after the 2011 amendment was enacted), at unknown effort – is nowhere near sufficient to justify the unequal treatment of legal equals, in an arena shielded by the First Amendment.

CONCLUSION

The State has admitted that the effect of the 2011 amendment is to benefit two named political parties – which number among their members the entire of the legislature which passed it, and the governor who signed it into law. Whatever may be the interest in having a two party system, there is no valid interest in having a system where two named parties are continued in power by advantages they least need.

The challenged legislation is by no means neutral or nondiscriminatory, so strict scrutiny must be applied. Even under intermediate scrutiny, the legislation fails for lack of a showing that the law serves a proven, “vital,” State interest.

The judgment of the District Court, granting the State’s motion for summary judgment and denying ours, should be reversed.

Respectfully submitted this 20th day of December, 2013

s/ David T. Hardy
Counsel for Appellants

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 2,605 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.

s/ David T. Hardy
Counsel for Appellants

Certificate of Service

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 20, 2013. I certify that all participants in the case are registered CM/ECF users and the service will be accomplished by the appellate CM/ECF system.

s/ David T. Hardy
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