

No. 13-16254 [Dist Ct. No. 11-CV-857-CKJ] Panel Decision:
April 24, 2015. Before: TASHIMA, MCKEOWN and BERZON,
Circuit Judges.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Arizona Libertarian Party and Arizona Green Party,
Plaintiffs - Appellant,

VS.

Ken Bennett,
Defendant - Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

**APPELLANTS' PETITION FOR
REHEARING EN BANC**

David T. Hardy
8987 E. Tanque Verde, No. 265
Tucson, AZ 85749
520-749-0241
email: dthardy@mindspring.com

Counsel for Plaintiff – Appellants

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FRAP Rule 35 Statement

This appeal concerns a challenge to an election-related restriction. The applicable standard of review varies with the degree to which the restrictions burden First Amendment rights. “Severe” burdens qualify for strict scrutiny, whereas for lesser ones “A State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1966).

This panel decision found that the restrictions (or more precisely, the discrimination) under review was not “severe,” and then applied rational basis review to affirm the ruling below.

This Circuit has also employed this bifurcated “severe vs. lesser” standard of review in the Second Amendment context. There, however, panel rulings have applied intermediate scrutiny to lesser infringements. *See Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015); *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013).

The standard of review was critical to the outcome here since (1) this is an appeal from a grant of summary judgment, and (2) the regulatory interest advanced (the potential cost of changing voter registration forms) was not established in the record. Under any standard but rational basis, the

State would have borne (or here, failed to bear) the burden of proof, and summary judgment in its favor would be reversed.

En banc consideration is necessary to maintain the uniformity of this Court's decisions as to whether, under bifurcated review, intermediate scrutiny or rational basis governs "lesser" burdens on constitution rights.

The panel decision also appears to conflict with decisions of the Supreme Court in two aspects: (1) whether the "lesser" standard is applicable to *discriminatory* burdens, when several Supreme Court decisions have cited it only for nondiscriminatory ones, *see, e.g., Timmons*, 520 U.S. at 358, and (2) whether the availability of what is essentially a "write in" option is a sufficient alternative to listing on a ballot (or, as here, a voter registration form). *See Lubin v. Panish*, 415 U.S. 709, 719 n. 5 (1974); *US Term Limits v. Thornton*, 514 U.S. 779, 828 (1995).

Statement of the Case

The District Court entered an amended judgment on May 22, 2013, and Appellants timely appealed on June 14, 2013. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291. The panel entered judgment affirming the District Court on April 24, 2015.

Statement of Facts

Arizona election law divides political organizations into two classes: political parties with continuing ballot access, which have certain rights and duties,¹ and all other political organizations. Arizona has five parties with continuing ballot access: the Republican, Libertarian, Democratic, Green and Americans Elect Parties.

The Arizona legislature is composed entirely of members of two of those parties, the Republicans and Democrats. In 2011, it enacted legislation which changed the voter registration form to clearly advantage those parties *vis-à-vis* the other parties with continuing ballot access. This amended Ariz. Rev. Stat §16-152(A)(5) to require the Secretary of State to issue forms with check-boxes for registering in the two largest parties. All other parties are consigned to a check box labeled “Other,” with a blank next to the word.

The requirement imposed is inflexible. Appellant Arizona Libertarian Party, for instance, cannot appeal to the Secretary, demonstrate that it has had continuing ballot access for twenty years and is unlikely to lose that in

¹ The principal right is to have the party’s candidates listed on the ballot without the party having to file its petition; the principal duty is to choose the party’s candidates and party officers via State-run primary elections.

² That Arizona voters are unsatisfied with the two largest parties is evidenced by the fact that “independent” (or in the words of the statute, “no

the future, and be listed. Arizona Green Party cannot demonstrate that, having qualified by petition, it will now be on ballot for at least 3-4 years. Ariz. Rev. Stat. §16-801(C). A party either is one of the two largest parties, or it is not. Its stability is irrelevant.

This clearly disadvantages all parties other than the Republicans and the Democrats. Further, the number of a party's registered voters is a determinant of whether a party receives continuing ballot access, which has a direct effect on its viability. The amendment thus impedes and jeopardizes the development of any challengers to the dominance of the two largest parties.² This was illustrated here, when during this appeal Appellant the Arizona Green Party lost continuing ballot access, and had to petition to regain its right to ballot access.

The panel ruling here followed the Supreme Court's precedent, and assessed whether this election-related discrimination was "severe" or "less than severe." Finding it less than severe, it applied rational basis review and found that the State had articulated (albeit not proven) a rational basis for it.

² That Arizona voters are unsatisfied with the two largest parties is evidenced by the fact that "independent" (or in the words of the statute, "no party preference") registrants form the second largest "party" bloc in the State, a group larger than the Democratic, and nearly as large as the Republican, registrants.

The questions posed are whether, consistent with the principles of equal protection, the two major parties may so selectively advantage themselves, and whether such so discriminatory a measure need only pass rational basis review.

Argument

I

The Panel Decision Here Is Inconsistent With the Rulings of Other Panels and of the Supreme Court.

A. The Application of Rational Basis Review to “Less than Severe” Constitutional Discrimination Is Inconsistent With Rulings of Other Panels and of the Supreme Court.

1. Consistency With Other Panel Decisions.

After finding that the burden (or discrimination) involved here was less than “severe,” the panel applied rational basis review to it. This was central to the outcome – affirmance of a summary judgment – since the State’s asserted interests on appeal (the cost of printing new voter registration forms should a party gain or lose ballot access)³ were not documented in the record. Under intermediate scrutiny such interests must be proven, while rational basis requires no such proof.

This Circuit has adopted the “severe vs. less than severe” distinction in one other context – that of the Second Amendment and the right to arms. In *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) and in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), the burdens were found to

³ *Cf. Tashjian v Republican Party*, 479 U.S. 208, 218 (1986). (“While the State is of course entitled to take administrative and financial considerations into account in choosing whether or not to have a primary system at all, it can no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party.”)

be less than severe, and intermediate scrutiny – rather than rational basis – was applied. It is hard to see why the First Amendment would be governed by a lesser standard of review than is the Second Amendment. As we shall see below, the use of rational basis in this context runs counter to the rulings of the Supreme Court.

2. Consistency With Rulings of the Supreme Court.

We will not describe this problem at length, because Judge McKeown’s concurrence documents it in detail.

As discussed below, the Supreme Court has adopted a standard here which requires strict scrutiny for “severe” restrictions on electoral freedom,⁴ and something less, resembling intermediate scrutiny, for “lesser” ones.⁵

Over the past two decades, this Circuit’s precedent in this aspect of election law has gradually drifted away from that of the Supreme Court. The central factor in the drift has been the application of rational basis review to all but “severe” restrictions of election-related rights. *See Washington v.*

Munro, 31 F.3d 759 (9th Cir. 1994). As a consequence, challengers of those

⁴ And, by inference, for electoral discriminations challenged under the Equal Protection Clause rather than the First Amendment and the Due Process Clause.

⁵ The rationale for this approach to freedom of expression and association is that election-related rights are at the core of the First Amendment, but also are meaningless unless State regulated. They are the only First Amendment rights that may only be exercised on a fixed day, at a fixed place, on government-issued paperwork.

restrictions bear the burden of proof, and the restrictions can be justified by speculation, notwithstanding First Amendment liberties being at stake.

The panel employed the test laid out by *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). While those rulings are less than crystal-clear, they certainly suggest that non-severe restrictions or impediments must pass a test stricter than rational basis. *Anderson* required initial application of a balancing test, under which a court must “evaluate the precise interests put forward by the State,” then “determine the legitimacy and strength of each of those interests,” and finally “consider the extent to which those interests make it *necessary* to burden the plaintiff's rights.” 460 U.S. at 789 (emphasis supplied). “Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.” Likewise *Timmons*, which counsels that for non-severe burdens a court must determine whether there is a “corresponding interest sufficiently weighty to justify the limitation.” 520 U.S. at 358-59. This is not the language of rational basis.

B. Treating “Write In” Capabilities as a Viable, Only Slightly Burdensome, Alternative Is Inconsistent with the Precedent of the Supreme Court.

Under the amended statute, the Republican and Democratic Parties get express listing and a check box; the Greens and Libertarians are relegated to writing in.

It is true that a write-in requirement imposes a minor burden on a *voter*. The Supreme Court has, however, consistently held that it imposes a serious burden on a *candidate*; by extension, it imposes such a burden on a political party. In *Lubin v. Panish*, 415 U.S. 709 (1974), an equal protection case, the Court noted:

It is suggested that a write-in procedure, under § 18600 *et seq.*, without a filing fee would be an adequate alternative to California's present filing fee requirement [for candidates]. The realities of the electoral process, however, strongly suggest that "access" via write-in votes falls far short of access in terms of having the name of the candidate on the ballot. It would allow an affluent candidate to put his name before the voters on the ballot by paying a filing fee while the indigent, relegated to the write-in provision, would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot. That disparity would itself give rise to constitutional questions and, although we need not decide the issue, the intimation that a write-in provision without the filing fee required by § 18600 *et seq.* would constitute "an acceptable alternative" appears dubious, at best.

415 U.S. at 719 n.5. *US Term Limits v. Thornton*, 514 U.S. 779 (1995)

involved a Qualifications clause challenge to State-imposed term limits. The limits prevented a term-limited candidate from being listed on the ballot. 415

U.S. at 828. The State argued that that term-limited candidates could still run as write-ins, but the Court cited *Lubin* in responding:

But even if petitioners are correct that incumbents may occasionally win reelection as write-in candidates, there is no denying that the ballot restrictions will make it significantly more difficult for the barred candidate to win the election. In our view, an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand.

Thus also *Anderson v. Celebrezze*, 460 U.S. 780 (1983), which brushed aside the State's argument to this effect with "It is true, of course, that Ohio permits "write-in" votes for independents. We have previously noted that this opportunity is not an adequate substitute for having the candidate's name appear on the printed ballot." 460 U.S. at 799 n. 26.

C. The Panel Decision Is Inconsistent With the Supreme Court's Application of the "Severe vs. Less than Severe" Standard, in that the Supreme Court has Limited that Standard to Nondiscriminatory Measures.

The legislation at issue is clearly discriminatory. The two political parties that control the legislature have voted themselves an advantage in seeking voter registrations.

Under the Supreme Court's teachings, a lesser level of 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) (emphasis supplied). *Cf. Anderson*, 460 U.S. at 789

(“Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.”). As *Anderson* notes, “A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment.” 460 U. S. at 794-95. Justice O’Connor has explained the reason for the requirement of nondiscrimination:

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 State has shown no compelling state interest nor even a justifiable purpose for granting 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 panel ruling disposes of this issue in a footnote. Slip Op. at 13, n.8. The footnote treats the Supreme Court’s concerns as “generalized,”

since the Supreme Court has never applied strict scrutiny in that context.

While the Court has not used that specific term, in *Williams v. Rhodes*, 393

U.S. 23 (1968), it imposed strict scrutiny's requirements:

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. ...

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."

393 U.S. at 31. This Circuit has in the past refused to "blandly shrug off [Supreme Court *dicta*] because they were not a holding," *United States v.*

Montero-Camargo, 208 F.3d 1122, n. 17 (9th Cir. 2000). *See also Coeur*

D'Alene Tribe of Idaho v. Hammond, 384 F.3d 674, 683 (9th Cir. 2004).

Here, the Supreme Court has repeatedly employed the term in question in describing what test is to be employed, and the rationale for the restriction has been explained by a concurrence.

Conclusion

Several aspects of the panel ruling are in conflict with rulings of other panels of this Circuit, and with rulings of the Supreme Court. We request that this case be considered *en banc* to resolve those conflicts.

Respectfully submitted this 8th day of May, 2015

s/_____
David T. Hardy
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. Rule 35 and/or the alternative Circuit Rule 40-1(a). It contains 2,599 words as counted in Word and is set in Times New Roman 14 point font.

NOTICE OF RELATED CASES

Appellants know of no pending cases that are related to this action.

CERTIFICATE OF SERVICE

On May 8, 2015, I served the foregoing APPELLANTS' PETITION FOR REHEARING EN BANC by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

s/David T. Hardy
David T. Hardy
Counsel for Appellants