No. 15-____

In The

Supreme Court of the United States

ARIZONA LIBERTARIAN PARTY, ARIZONA GREEN PARTY, JAMES MARCH, KENT SOLBERG and STEVE LACKEY,

Petitioners,

v.

MICHELE REAGAN, Secretary of State,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has previously established a "sliding scale" standard of review for electoral regulations, under which "severe" impairments or inequalities are assessed under strict scrutiny, while lesser ones that involve "reasonable, nondiscriminatory restrictions," are reviewed under a more deferential standard.

The questions presented are:

1. Whether an overtly discriminatory electoral regulation is to be assessed using the deferential standard of review; and

2. Whether that standard of review is rational basis.

PARTIES TO THE PROCEEDING

Petitioners Arizona Libertarian Party, Arizona Green Party, James March, Kent Solberg, and Steve Lackey were plaintiffs-appellants below.

Respondent Michele Reagan was appellee below, having been substituted for defendant Ken Bennett pursuant to Federal Rule of Appellate Procedure 43(b)(2).

CORPORATE DISCLOSURE STATEMENT

Petitioner Arizona Libertarian Party is incorporated, and has no parent corporation nor does any corporation own 10% or more of its stock. Petitioner Arizona Green Party is not incorporated.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

STATUTES

DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 784 F.3d 611 and is reprinted in the Appendix (App.) at 1. The decision of the United States District Court for the District of Arizona is unreported and reprinted at App. 30.

JURISDICTION

The amended judgment of the court of appeals was entered on August 7, 2015. The court denied *en banc* review by the same order. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

> 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.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Ninth Circuit, which affirmed the District Court's grant of summary judgment to Respondent.

In Arizona, political parties can gain ballot access for their qualified candidates by two means. A "new party" can gain access for two Federal electoral cycles by obtaining a sufficient number of signatures on petitions. A party with "continuing ballot access" can retain ballot access based on a sufficient number of

voter registrations or on sufficient success at designated elections. Petitioners Arizona Libertarian Party and Arizona Green Party both hold ballot access, the former by virtue of its number of voter registrations, the second by petition.

In 2011, the Arizona Legislature enacted a statute which provided that voter registration forms would bear the names of the two largest political parties in the State with check boxes next to their names. For all other parties, the forms would carry a third check box, labeled "other," next to a tiny blank.

Petitioners brought action in the District Court for the District of Arizona, challenging this enactment as a violation of the First and Fourteenth Amendments. The District Court granted the Respondent's motion for summary judgment. The Ninth Circuit affirmed the District Court, holding that the burden of writing in a party was trifling rather than "severe," and that the statute's discriminatory nature was no barrier to rational basis review. On appeal, the State had suggested an interest supporting the statute, that of avoiding the cost of reprinting registration forms when smaller parties gained or lost ballot access. The Circuit found that this proposed interest, although undocumented and unquantified in the record, was sufficient to meet rational basis.

Petitioners moved for rehearing *en banc*, suggesting that the panel ruling conflicted with other rulings of the Circuit. That motion was denied but the panel amended its ruling to conclude, in the alternative,

that the District Court's ruling would have been sustained under a balancing test.

REASONS FOR GRANTING THE PETITION

I. Background to the Petition.

In the field of election law, courts face a paradox: a core First Amendment right, whose practical exercise requires governmental regulation of its time, place and manner. *Storer v. Brown*, 415 U.S. 724, 730 (1974). It is a First Amendment right which, to be functional, must be exercised by the citizen only once every few years, on dates and at places set by the government, using a government-issued form.

Dealing with that paradox brings us to another: the regulators must be the very ones who, as elected officials, have a vested interest in gaming the electoral system to advantage themselves and disadvantage their rivals. In a system dominated by two parties, the disadvantages were most likely to be imposed upon "third parties," which are apt to be seen as competitors for votes and resources. Yet, this Court has recognized that such parties are important components of our electoral system. "Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office." *Illinois Bd. of Elections*

v. Socialist Workers Party, 440 U.S. 173, 185-86 (1979).

This Court dealt with these paradoxes over the second half of the twentieth century, and evolved certain standards, which we here describe as the *Burdick*/*Timmons* test. Since the recognition of that test, lower courts have divided over and gradually wandered from its teachings. We submit that it is appropriate that the Court now re-enter the field to adjust and correct their course.

A. Background to the *Burdick*/*Timmons* Test.

Before turning to the test at issue, we should note three foundational cases:

First, *Williams v. Rhodes*, 393 U.S. 23 (1968), dealt with a statute that made it considerably easier for the large political parties to retain ballot access, and more difficult for a small ("new") party to do so. Citing this "decided advantage," the Court applied strict scrutiny and struck down the law:

> 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." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

393 U.S. at 31.

Second, *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), assessed a statute that required a minor party candidate seeking nomination for a local office to produce more petition signatures than were required for a candidate for statewide office.

This Court found that "[r]estrictions on ballot access burden two distinct and fundamental rights," the freedom to associate the right to vote. 440 U.S. at 184. It accordingly applied strict scrutiny: "When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest." *Id.*

Third, *Anderson v. Celebreeze*, 460 U.S. 780 (1983), struck down as discriminatory an early deadline for submission of nominating petitions, which effectively burdened independent candidates more greatly than it did those of major parties. "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. It discriminates against those candidates

and – of particular importance – against those voters whose political preferences lie outside the existing political parties." 460 U.S. at 793-94. This Court noted, however, that *nondiscriminatory* measures could be subject to reduced scrutiny. The Court noted the State's regulatory interest in ensuring that elections were honest and orderly.

> To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.

460 U.S. at 788. The Court then added, in footnote 9, a description of the "generally applicable and even-handed restrictions" that had been upheld in previous cases.

Williams, Anderson, and *Socialist Workers Party* thus established that some election-related regulations, particularly those that discriminate against third parties, were subject to strict scrutiny, while others that impose "reasonable, nondiscriminatory restrictions" were subject to a manner of deferential review.

B. The *Burdick/Timmons Test.*

Burdick v. Takushi, 504 U.S. 428 (1992), undertook to formulate these and other decisions into a general test, involving a "flexible standard." 504 U.S. at 434.

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*, at 789; *Tashjian*, *supra*, at 213-214.
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman* v. *Reed*, 502 U.S. 279, 289 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to

> justify" the restrictions. *Anderson*, 460 U.S., at 788; see also *id.*, at 788-789, n.9.

504 U.S. at 434. Justice Kennedy dissented, noting *inter alia* that the State had demonstrated no regulatory interest served by the statute. 504 U.S. at 448.

Timmons v. Twin Cities New Party, 520 U.S. 351 (1997) repeated this formulation, with one change. *Burdick* had posed a dichotomy between "severe" burdens and "reasonable, nondiscriminatory ones," leaving the ground between those extremes in doubt.[1] *Timmons* described the test as being between "severe burdens" and "lesser" ones, thus allowing the latter to take over the middle ground for deferential review.

> Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "'important regulatory interests'" will usually be enough to justify "'reasonable, nondiscriminatory restrictions.'" *Burdick*, *supra*, at 434 (quoting *Anderson*, *supra*, at 788); *Norman*, *supra*, at 288-289 (requiring "corresponding interest sufficiently weighty to justify the limitation").

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[1] And also leaving unclear how the two extremes, severe vs. reasonable, were to be understood, since they are not extremes on the same scale. A measure may be unreasonable without being severe, or severe without being unreasonable. This ambiguity was not resolved by *Timmons*.

520 U.S. at 538-39. The last sentence may have been meant to address the *Burdick* dissent: even under the more deferential standard, the State must establish a valid interest sufficient to overcome the burden imposed, or to justify the statute's discriminatory effects.[2]

II. The Ninth Circuit's Ruling Is in Conflict With the Rulings of Another Circuit, and With the Rulings of This Court, in that it Accords Deferential Review to a Voter Registration Statute Which on its Face Discriminates Against Smaller Political Parties With the Same Ballot Access.

This Court's formulations of the more deferential test have universally included "nondiscriminatory" to describe electoral restrictions that qualify for such deference. *See Anderson*, 460 U.S. at 788 ("a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory

[2] This Court has counseled that an Equal Protection challenge is to be assessed in a way similar to a First Amendment one. *Norman v. Reed*, 502 U.S. 279, 288 n.8 (1992). This would seem to focus upon the degree of discrimination rather than that of burden *per se*. If a hypothetical city had thirty polling places, and decided to reduce them to five, this would burden voting, but not raise a First Amendment issue. If the city were instead to retain all thirty polling places to receive votes from one party, and require those for another party to be collected only at five, the discrimination would raise serious Equal Protection issues.

restrictions.'") & 460 U.S. at 788 n.9 ("generally applicable and evenhanded restrictions"); *Timmons*, 520 U.S. at 358; *Burdick*, 504 U.S. at 434. The "non-discriminatory" or "evenhanded" requirement is crucial to qualifying for judicial deference.

> 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). *See also Anderson*, 460 U.S. at 793 ("[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.").

Fortunately, many electoral regulations fall into the nondiscriminatory category. The Third Circuit encountered an exception in *Reform Party of Allegheny County v. Allegheny County Dep't of Elections*, 174 F.3d 305 (3d Cir. 1999) (*en banc*). There the challenged

statute barred small parties, but not large ones, from nominating "fusion" candidates. The Third Circuit noted that while *Timmons* had "held that the burdens imposed by fusion bans on parties and voters were not severe, the Court still maintained a requirement that the restrictions be reasonable and nondiscriminatory." 174 F.3d at 313. It accordingly imposed intermediate scrutiny, 174 F.3d at 314, and invalidated the statute. *Cf. Green Party of New York State v. New York State Bd. of Elections*, 389 F.3d 411 (2d Cir. 2004) (treating discrimination as a "severe" restriction and applying strict scrutiny).

That treatment contrasts sharply with the Ninth Circuit's treatment of the statute under review. That statute does not impose a facially-neutral requirement that has disproportionate effects. Instead, it overtly and expressly bestows a voter registration benefit upon the two major parties with continuing ballot access and denies it to the smaller ones with the same. By thus giving a registration advantage to the two parties which already have the most registrations, it ensures that they will retain that status in perpetuity. *Compare Jeness v. Fortson*, 403 U.S. 431, 438 (1971) ("Georgia's election laws, unlike Ohio's, do not operate to freeze the political *status quo.*"); *Clements v. Fashing*, 457 U.S. 957, 965 (1982) ("[T]he State may not act to maintain the '*status quo*' by making it virtually impossible for any but the two major parties to achieve ballot positions for their candidates.").

In sustaining the Arizona law, the Ninth Circuit emphasized the minor "burden" which it imposed on

Petitioners, and relegated its overt discrimination to a footnote. App. 14, n.8. There the Ninth Circuit treated this Court's repeated references to nondiscriminatory laws as "express[ing] a generalized concern about laws that favor major parties over minor parties" and noted that this Court had only applied strict scrutiny to discriminatory laws that also imposed severe burdens. *Id.* The Ninth Circuit then (as we shall see) employed rational basis review and upheld the discrimination, notwithstanding the State's failure to document any measurable interest that justified its discrimination.

We submit that the Third Circuit correctly followed the teachings of *Anderson*, *Timmons*, and *Burdick*, and the Ninth Circuit did not. A legislature entirely controlled by the two major parties cannot be presumed to be fair to their rivals. It was not unreasonable for this Court to condition deferential review upon the legislature's avoidance of overt discrimination. The Ninth Circuit's treatment of that condition as a mere "generalized concern" is an abandonment of the judiciary's role in our constitutional system.

III. The Ninth Circuit's Ruling Decides an Important Federal Question in a Way that Conflicts With the Relevant Decisions of This Court, by Applying a Rational Basis Test to Any Electoral Restriction/ Discrimination that Imposes Less Than a Severe Burden.

The starting point here is *Timmons'* note that "Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" 520 U.S. at 358.

Placed in context, it is apparent that this Court had more in mind than rational basis. *Prior* to reaching the standard of review issue, *Anderson* taught, and *Timmons* repeated, that a court must first consider the First Amendment impairment, and "[i]t then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." 460 U.S. at 789; 520 U.S. at 378. In doing so, a 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." 460 U.S. at 789; 520 U.S. at 358. That this was not the language of rational basis was reinforced in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), where this Court noted that an evaluation of state interests "is not to be made in the abstract," but rather, whether, "*in the circumstances of this case*" the

state's interests are important or "compelling" or even "legitimate." 520 U.S. at 584 (Emphasis original).

Notwithstanding this context, and the fact that fundamental rights to expression and association are at issue, the lower courts have universally applied interpreted *Anderson* and *Timmons* to mandate rational basis for less-than-severe electoral restrictions. *See, e.g.*, *Rockerfeller v. Powers*, 74 F.3d 1367 (2d Cir. 1996); *Werme v. Merrill*, 84 F.3d 479, 485 (1st Cir. 1996); *Coalition for Sensible and Humane Solutions v. Wamser*, 771 F.2d 395, 399 (8th Cir. 1985).

It might be expected that application of rational basis to First Amendment guarantees would be foreclosed by this Court's recent instruction in *Heller v. District of Columbia*, 554 U.S. 570 (2008):

> But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. [Citations]. In those cases, "rational basis" is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.

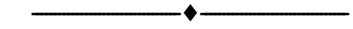
554 U.S. at 629, n.27. This did not inhibit the Ninth Circuit from applying rational basis to First Amendment rights. App. at 18-22.[3] Indeed, the application of rational basis was at the heart of the outcome. The State had asserted an interest in that, if all parties with ballot access were listed on the registration forms, it would have to reprint the forms whenever such a party gained or lost ballot access; the two major parties were unlikely to lose ballot access. The State first argued this interest on appeal, with the result that there was nothing in the record documenting its significance. How often are the forms reprinted in any event, and what is the cost? If a party lost ballot access, what would be the harm of exhausting the old forms before printing new ones? How often

[3] The panel amended its ruling in response to a motion for reconsideration, adding a paragraph that admitted that its use of rational basis was in tension with *Burdick*, but concluding that balancing of interests (apparently simple balancing without reference to the *Burdick*/*Timmons* mediation) would yield the same result, that Petitioners had shown no "burden," and that even if the State bore the burden of justification, the small degree of "burden" would enable it to meet it. App. at 18-19 & n.12. The amended opinion also characterized the State's justification as not hypothetical or manufactured, since it was raised (and we might add, invented) *on appeal*. *Id.*

All these arguments suffer from a common failing; they employ rational basis without using the term. Under any form of heightened scrutiny, the State bears the burden of justification, *State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989), and this "justification must be genuine, not hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Here, the justification was first asserted on appeal, and was supported by no evidence in the record below.

have parties newly gained ballot access? There was nothing in the record to establish any of this. Petitioners had pointed out that the Arizona Libertarian Party had had ballot access for twenty years and the Arizona Green Party had requalified via petition, ensuring it would be on the ballot for at least another two two-year cycles.

The Arizona legislation essentially mandated a voter registration form which specifically listed two of the parties that held continuing ballot access, and relegated the others to a "write-in" position. This Court has repeatedly held, in the election context, that allowing a write-in candidacy is no fair substitute for ballot listing, and characterized relegating a candidate to write-in status as a heavy burden that justifies strict scrutiny. *See Lubin v. Panish*, 415 U.S. 709, 719, n.5 (1974) ("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."); *Anderson v. Celebreeze*, 460 U.S. 780, 799, n.26 (1983); *American Party of Texas v. White*, 415 U.S. 767, 795 & n.3 (1974); *cf. U.S. Term Limits v. Thornton*, 514 U.S. 779, 830 & n.44, 45 (1995). We suggest that what is true of a ballot is also true of a party registration form. Expressly listing select parties, and relegating others to hope of a write-in, is invidious discrimination, and a heavy burden. It cannot be tested by rational basis nor justified by unquantified speculation.



CONCLUSION

The decision of the Ninth Circuit applies rational basis to an electoral restriction that overtly discriminates against smaller political parties. This approach puts the Ninth Circuit in conflict with the rulings of the Third Circuit and with the precedent of this Court. The Court should grant the petition.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA LIBERTARIAN PARTY; ARIZONA GREEN PARTY; JAMES MARCH; KENT SOLBERG; STEVE LACKEY, *Plaintiffs-Appellants*, v. MICHELE REAGAN, Secretary of State, *Defendant-Appellee*.	No. 13-16254 DC No. 4:11 cv-0856 CKJ ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona,
Cindy K. Jorgenson, District Judge, Presiding

Argued and Submitted
January 29, 2015 – University of Arizona,
James E. Rogers College of Law, Tucson, Arizona

Filed April 24, 2015
Amended Aug. 7, 2015.

Before: A. Wallace Tashima, M. Margaret McKeown, and Marsha S. Berzon, Circuit Judges.

Order;
Opinion by Judge Tashima;
Concurrence By Judge McKeown.

COUNSEL

David T. Hardy, Tucson, Arizona, for Plaintiffs-Appellants.

Thomas C. Horne, Attorney General of Arizona, Robert L. Ellman, Deputy Attorney General (argued), Michele L. Forney and Todd M. Allison, Assistant Attorneys General, Phoenix, Arizona, for Defendant-Appellant.

ORDER

The opinion filed April 24, 2015, and reported at 784 F.3d 611, is amended by adding at the end of the carryover paragraph from page 16, slip op. at 17, 784 F.3d at 621, left-hand column, end of carryover paragraph from page 620, a new footnote 12, as follows:

> [12]We apply *Munro* because it is binding on us and addresses situations, like this one, in which the burden, if it exists at all, is vanishingly small. We note, however, that *Munro's* statements that we may consider hypothetical rationales for a state's election law, and that the plaintiff alleging a *de minimis* burden must demonstrate the *lack* of a rationale basis, are in tension with some of our other cases and Supreme Court precedent. *See, e.g., Burdick*, 504 U.S. at 434; *Dudum*, 640 F.3d at 1106, 1113-14. We need not resolve that tension, however, because even under the balancing of interests and burdens analysis,

> we would nonetheless reject this challenge. First, as noted above, Plaintiffs failed to adduce evidence of *any* burden at all; absent *any* burden, there is no reason to call on the State to justify its practice. At most, Plaintiffs established a burden on those wishing to register with a third party, limited to writing a word rather than checking a box – assuredly not an infringement of constitutional dimension. Second, the State's rationale, which we below hold justifies this law, is not hypothetical or manufactured by the court, having been specifically articulated in its brief on appeal. Third, even if the State bears the ultimate burden of persuasion with regard to the justification of this law, we are persuaded, given the very slight burden involved, that it survives constitutional scrutiny.

The footnotes following new footnote 12 are accordingly renumbered.

The amended opinion and the amended concurrence are filed concurrently with this order.

With the above amendments, Judges McKeown and Berzon vote to deny the petition for rehearing en banc and Judge Tashima so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for rehearing en banc is denied. No further petitions for rehearing/rehearing en banc will be entertained.

OPINION

TASHIMA, Circuit Judge:

In 2011, the Arizona Legislature enacted a law requiring the voter registration form distributed by the Arizona Secretary of State to list the two largest parties (as measured by number of registered voters) on the form, as well as provide a blank line for "other party preferences." The Arizona Green Party, Arizona Libertarian Party, and three of their members (together, "Plaintiffs") brought this action, alleging that the new voter registration form violated their First and Fourteenth Amendment rights. The district court concluded that the amended voter registration form survived constitutional scrutiny and granted the State's motion for summary judgment. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I.

A Section 16-152(A)(5) and the Registration Form

In 2011, the Arizona Legislature amended the statute that dictates the content of the voter registration form provided by the State (the "Registration Form"). *See* 2011 Ariz. Legis. Serv. Ch. 339 § 1 (West) (codified at Ariz. Rev. Stat. § 16-152(A)). The amended statute provides, in relevant part:

> A. The form used for 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.

Ariz. Rev. Stat. § 16-152(A)(5). Prior to the 2011 amendment, Arizona law required only that voter registration forms include a blank space for "[t]he registrant's party preference." *See* Ariz. Rev. Stat. § 16-152(A)(5) (2010). As of January 1, 2011, the two parties with the highest number of registered voters in Arizona were the Republican Party, with approximately 35.8 percent, and the Democratic Party, with approximately 31.6 percent. The next largest party was the Libertarian Party, with approximately 0.78 percent of registered voters.[1]

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[1] Although the exact percentage of voters registered with each party has fluctuated slightly since January 1, 2011, the Republican and Democratic Parties have remained the two parties with the highest number of registered voters.

In response to the amendment, the Arizona Secretary of State revised box 14 on the Registration Form. In its current form, box 14 appears as follows:

The blank line under the "Other" checkbox is approximately 0.9 inch long. The Registration Form also provides the following instructions regarding box 14:

> Fill in your political party preference in box 14. If you leave this box blank as a first time registrant in your county, your party preference will be "Party Not Designated." If you leave this box blank and you are already registered in the county, your current party preference will be retained. Please write full name of party preference in box.

B. Arizona's Voter Registration Scheme

Under Arizona law, qualified electors[2] may register to vote in one of three ways:

1. They may obtain, fill out, and mail in the Registration Form, which can be downloaded from the Secretary of State's website or picked up from either the Secretary of State's office or any local county recorder's office, *see* Ariz. Rev. Stat. § 16-151;

2. They may submit an online voter registration application using the "EZ Voter Registration" process, available at the Arizona Department of Transportation's service website, *see* Ariz. Rev. Stat. § 16-112(B)(4); *see also* Ariz. Dep't of Transp. Motor Vehicle Div., Service Arizona, http://www.servicearizona.com (last visited Jan. 7, 2015);[3] or,

3. They may register in person at Arizona Motor Vehicle Division offices by filling out a section provided on the form for a

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[2] Arizona law sets forth certain criteria that make a resident of the state a "qualified elector." *See* Ariz. Rev. Stat. §§ 16-101, 16-121.

[3] We may take judicial notice of "official information posted on a governmental website, the accuracy of which [is] undisputed." *Dudum v. Arntz*, 640 F.3d 1098, 1101 n.6 (9th Cir. 2011) (citing *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010)).

> driver's license or renewal for individuals who want to register to vote.

Section 16-152(A)(5) applies *only* to the first of these three options – that is, only the Secretary of State is required to provide checkboxes for the two largest parties on the Registration Form. *See* Ariz. Rev. Stat. § 16-152(E) (providing that the content regulations set forth in § 16-152(A) "do[ ] not apply to registrations received from the department of transportation"). Like the Secretary of State's form before the amendment to § 16-152(A)(5), the second and third options allow a registrant to indicate party preference by entering any party's name, including a major party.[4]

C. Arizona's Ballot Access Laws

Under Arizona law, there are two ways for a party to get its preferred candidate on the ballot.[5]

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[4] In addition, "[t]he National Voter Registration Act requires States to 'accept and use' a uniform federal form to register voters in federal elections." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2251 (2013). The federal form, like the second and third Arizona options described above, permits a voter to indicate a political party of choice, but does not include checkboxes for the two largest political parties. *See* U.S. Election Assistance Commission, National Mail Voter Registration Form, http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_6-25-14_ENG.pdf (last visited Mar. 20, 2015).

[5] Arizona law also permits individuals who are not members of political parties to qualify for the ballot if they comply with certain criteria. *See* Ariz. Rev. Stat. § 16-341.

First, a "new political party" becomes "eligible for recognition" upon filing a petition with the Secretary of State signed by a number of qualified electors equal to one and one-third (1⅓) percent "of the total votes cast for governor at the last preceding general election at which a governor was elected." Ariz. Rev. Stat. § 16-801(A). Recognition entitles a new political party to be "represented by an official party ballot at the primary election and accorded a ballot column at the succeeding general election" through at least "the next two regularly scheduled general elections for federal office immediately following recognition of the political party." Ariz. Rev. Stat. § 16-801(B).

After these first two federal election cycles, a party may continue to be represented by an official party ballot during a primary election and accorded a ballot column in the succeeding general election (that is, the party is entitled to "continuing ballot access") in one of two ways. First, a party is entitled to continuing ballot access if its candidate receives "not less than five per cent of the total votes cast for governor or presidential electors" at the "last preceding general election" for certain specified offices. Ariz. Rev. Stat. § 16-804(A). Second, a party is entitled to continuing ballot access if, on certain dates prescribed by statute, the party "has registered electors in the party equal to at least two-thirds of one per cent of the total registered electors in such jurisdiction." Ariz. Rev. Stat. § 16-804(B). A party that loses continuing ballot access may get it back the same way a new party would gain access to the ballot: it must submit another

petition signed by a number of qualified electors equal to one and one-third (1) percent of the total votes cast for governor at the last preceding general election at which a governor was elected. *See* Ariz. Rev. Stat. § 16-801(B).

When Plaintiffs filed their complaint, five parties had continuing ballot access: Republican, Democratic, Green, Libertarian, and Americans Elect. During the pendency of this appeal, the Arizona Green Party lost its continuing ballot access.[6]

D. Procedural History

Plaintiffs' complaint, filed against defendant Ken Bennett, as Arizona Secretary of State, alleges that § 16-152(A)(5) violated their First and Fourteenth Amendment rights. Plaintiffs sought an order from the district court enjoining the State from issuing voter registration forms that failed to "treat equally the four parties with Statewide continuing ballot access." On the parties' cross-motions for summary judgment, the district court denied Plaintiffs' motion and granted the State's motion. Plaintiffs timely appeal.

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[6] At oral argument counsel for appellants informed the court that the Green Party has again qualified for continuing ballot access by submitting a petition with a sufficient number of signatures.

II.

This Court reviews the constitutionality of a statute *de novo. See Chamness v. Bowen*, 722 F.3d 1110, 1116 (9th Cir. 2013).

III.

A. The Framework for Resolving Constitutional Challenges to State Election Laws

"Restrictions on voting can burden equal protection rights as well as 'interwoven strands of liberty' protected by the First and Fourteenth Amendments – namely, 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.'" *Dudum*, 640 F.3d at 1105-06 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (some internal quotation marks omitted)).[7] As the Supreme Court has recognized, these rights are generally guaranteed by ensuring that political parties, including those that are new to the political scene, are given the opportunity to place their candidate on the ballot. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("The freedom to associate as a political party

[7] Although Plaintiffs assert both First and Fourteenth Amendment claims, "[t]he Supreme Court has addressed such claims collectively using a single analytic framework." *Dudum*, 640 F.3d at 1106 n.15. Plaintiffs agree that this "single analytic framework" applies here.

. . . has diminished practical value if the party can be kept off the ballot."). Indeed, because "an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens," *Anderson*, 460 U.S. at 788, "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." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

"At the same time," however, "'States retain the power to regulate their own elections.'" *Dudum*, 640 F.3d at 1106 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Id.* at 1103 (quoting *Burdick*, 504 U.S at 433). The Constitution itself "provides that States may prescribe 'the Times, Places and Manner of holding Elections for Senators and Representatives.'" *Burdick*, 504 U.S. at 433 (quoting U.S. Const. art. I, § 4, cl. 1 (brackets omitted)). And, "[t]o achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes." *Anderson*, 460 U.S. at 788. Moreover, *every* law regulating elections, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Id.*

Thus, in order to "resolve the tension between a [party's] First Amendment rights and the state's interest in preserving the fairness and integrity of the voting process," the "Supreme Court developed a balancing test." *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002). "In considering a constitutional challenge to an election law, we must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Nader v. Cronin*, 620 F.3d 1214, 1217 (9th Cir. 2010) (per curiam) (internal quotation marks omitted).

Accordingly, "the severity of the burden the election law imposes on the plaintiff's rights dictates the level of scrutiny applied by the court." *Id.* (quoting *Nader v. Brewer*, 531 F.3d 1028, 1034 (9th Cir. 2008) (internal quotation marks omitted)); *see also Burdick*, 504 U.S. at 434 ("[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."). "An election regulation that imposes a severe burden is subject to strict scrutiny and will be upheld only if it is narrowly tailored to serve a compelling state interest." *Cronin*, 620 F.3d at 1217 (quoting *Brewer*, 531 F.3d at 1035 (internal quotation marks and brackets omitted)). By contrast, "[a] state may justify election regulations imposing a lesser burden by demonstrating the state has 'important

regulatory interests.'" *Id.* (quoting *Brewer*, 531 F.3d at 1035).

B. Section 16-152(A) Imposes a *De Minimis* Burden on Plaintiffs' Constitutional Rights

In cases "previously examining differing treatments of minor and major political parties," we have held that, "in determining the nature and magnitude of the burden that the state's election procedures impose on the minor party, we must examine the entire scheme regulating ballot access." *Cronin*, 620 F.3d at 1217 (quoting *Libertarian Party of Wash. v. Munro*, 31 F.3d 759, 761-62 (9th Cir. 1994) (internal quotation marks and brackets omitted)).[8] The relevant

[8] Plaintiffs urge us to forgo a severity-of-the-burden analysis, arguing that, because § 16-152(A)(5) differentiates between major and minor parties on its face, strict scrutiny automatically applies. Plaintiffs' proposed bright-line rule is at odds with both Supreme Court precedent and our own. Although the Supreme Court has expressed a generalized concern about laws that favor major parties over minor parties, *see, e.g.*, *Anderson*, 460 U.S. at 793 n. 16; *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring in part and concurring in the judgment), it has only applied strict scrutiny to a state election law after determining that the law imposed a severe burden on a party's constitutional rights. *See, e.g.*, *Williams*, 393 U.S. at 25 n.1, 31. Moreover, we have repeatedly refused to apply strict scrutiny to election laws that differentiate between major and minor parties, so long as the law at issue did not "severely burden" a minor party's constitutional rights. *See, e.g.*, *Cronin*, 620 F.3d at 1217-18; *Munro*, 31 F.3d at 763. Accordingly, we reject Plaintiffs' contention that strict scrutiny automatically

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inquiry "is whether 'reasonably diligent' minor party candidates can normally gain a place on the ballot, or if instead they only rarely will succeed." *Munro*, 31 F.3d at 762 (quoting *Storer v. Brown*, 415 U.S. 724, 742 (1974)); *see also Anderson*, 460 U.S. at 787-88 (noting that the relevant inquiry in determining the constitutionality of election regulations is the ability of voters' preferred candidates to get on the ballot). Moreover, the party challenging the law bears "the initial burden of showing that [the state's] ballot access requirements seriously restrict the availability of political opportunity." *Munro*, 31 F.3d at 762.

Plaintiffs have failed to make any such showing. Section 16-152(A)(5) does not directly inhibit the ability of any party to gain access to the ballot, nor does it articulate different criteria for major and minor parties who seek to get their candidates on the ballot. All new political parties (and parties that have lost continuing ballot access) are required to comply with the same criteria to get their candidate on the ballot. *See* Ariz. Rev. Stat. § 16-801. Moreover, all political parties, major and minor alike, are entitled to continuing ballot access if: (1) their candidates garner at least five percent of the "total votes cast for governor or presidential electors" at the "last preceding general election" for certain specified offices; or, (2) they have "registered electors . . . equal to at least two-thirds of one per cent of the total registered

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applies to all state election laws that facially distinguish between major and minor parties.

electors" in the relevant jurisdiction by a specified date. Ariz. Rev. Stat. § 16-804.

Acknowledging that § 16-152(A)(5) does not directly burden their ability to get their preferred candidate on the ballot, Plaintiffs instead assert that the statute indirectly "restrict[s] the availability of political opportunity," *Munro*, 31 F.3d at 762, by encouraging voters to register with the two major parties over all others. This encouragement, Plaintiffs contend, affects their ability to get their preferred candidate on the ballot, because continuing ballot access is linked (at least partially) to the number of voters who are registered with the party.

Plaintiffs have failed, however, to adduce any evidence that § 16-152(A)(5) actually encourages individuals to register for major parties instead of minor ones. As an initial matter, Plaintiffs have failed to show how many new voters actually use the Registration Form to register, as opposed to using one of the other three alternative means, which do not require use of the Registration Form. Without some assessment of how many voters actually use the Registration Form, we cannot even begin to gauge the impact it may have had on party registration rolls.

Moreover, even if we were to assume that a significant number of voters used the Registration Form, Plaintiffs failed to adduce *any* evidence – statistical, anecdotal, or otherwise – that the Registration Form has, in fact, encouraged voters to register for the major parties over minor ones. Plaintiffs

suggest that the Registration Form discourages voters from registering with minor parties by sending "a message to the future voter" that there are only "two [*real*] political parties in this State," and that "[r]egistering for any other party is a show of eccentricity" that must be "grudgingly tolerate[d]." However, Plaintiffs failed to introduce even an iota of evidence in support of this assertion. The alleged psychological effects that the Registration Form has on registering voters is sheer speculation.[9] Plaintiffs' other contention – that voters have been unable to register with the party of their choosing because the blank line below the word "Other" in box 14 is "too short to contain even the word 'Libertarian'" – is similarly unsupported by any evidence in the record.

In sum, by failing to adduce evidence that the Registration Form actually discourages or prevents

[9] Both sides make much of a chart compiled by the State that details the number of qualified electors registered with the Republican, Democratic, Green, and Libertarian Parties, as well as an undefined "Other" category, at various points between January 1, 2011, and March 1, 2012. These raw data do not, by themselves, allow us to draw reliable conclusions as to whether the Registration Form actually dissuaded new voters from registering with minor parties. Party registration may ebb and flow for myriad reasons, including overall changes in the number of eligible voters, in voter mobilization activity, or in disaffection with the electoral process. Although a study isolating the effects that the Registration Form has had on party registration might allow a fact-finder reasonably to infer that the Registration Form has discouraged voters from registering with minor parties, Plaintiffs have presented no such evidence here.

voters from registering with minor parties, Plaintiffs have failed to meet their "initial burden of showing that [Arizona's] ballot access requirements seriously restrict the availability of political opportunity." *Munro*, 31 F.3d at 762. At most, § 16-152(A)(5) imposes a *de minimis* burden on Plaintiffs' First and Fourteenth Amendment rights.

C. Section 16-152(A)(5) is Rationally Related to a Legitimate State Interest

Where, as here, a state election law imposes only a *de minimis* burden on a party's First and Fourteenth Amendment rights, the State "need demonstrate only that [the statute at issue] is rationally related to a legitimate state interest." *Cronin*, 620 F.3d at 1218 (quoting *Munro*, 31 F.3d at 763 (internal quotation marks omitted)).[10] In evaluating the constitutionality of such statutes, we may "look to any conceivable interest promoted by the challenged procedures, whether or not the state cited that interest in its briefs or in the district court." *Munro*, 31

[10] Alternatively, we have stated that, in cases in which an election law imposes a *de minimis* burden on constitutional rights, the challenged procedures "survive review as long as they further a state's *important regulatory interests*." *Wash. State Republican Party v. Wash. State Grange*, 676 F.3d 784, 793-94 (9th Cir. 2012) (internal quotation marks omitted) (emphasis added). In this context, we have used the terms "legitimate" interests and "important regulatory" interests interchangeably. *See Cronin*, 620 F.3d at 1217, 1218; *Dudum*, 640 F.3d at 1114, 1116.

F.3d at 763; *see also Dudum*, 640 F.3d at 1116 n.28 (noting that, in sustaining an election law that did not impose a severe burden on constitutional rights, the Supreme Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), "expressly relied on a state interest admittedly not advanced in its briefs, but mentioned during oral argument"). Furthermore, we need not determine whether the interests served by § 16-152(A)(5) can be better served by other means: as we recently concluded, "when a challenged rule imposes only limited burdens on the right to vote, there is no requirement that the rule is the only or the best way to further the proffered interests." *Dudum*, 640 F.3d at 1114.[11] Finally, where, as here, the regulation at issue imposes only a slight burden on a party's constitutional rights, that party "bear[s] the burden of demonstrating that the regulations [it] attack[s] have no legitimate rational basis." *Munro*, 31 F.3d at 763.[12]

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[11] Although we have noted that there may be "instances where a burden is not severe enough to warrant strict scrutiny review but is serious enough to require an assessment of whether alternative methods would advance the proffered governmental interests," *Dudum*, 640 F.3d at 1114 n.27, for the reasons set forth above, it is clear that § 16-152(A)(5) does not impose a serious enough burden on Plaintiffs' constitutional rights to mandate this kind of comparative analysis.

[12] We apply *Munro* because it is binding on us and addresses situations, like this one, in which the burden, if it exists at all, is vanishingly small. We note, however, that *Munro*'s statements that we may consider hypothetical rationales for a state's election law, and that the plaintiff alleging a *de minimis*

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Plaintiffs have failed to meet their burden. Section 16-152(A)(5) is rationally related to Arizona's legitimate interest in ensuring that election official correctly register voters as members of parties of their choosing. By providing checkboxes for the two largest political parties, the Registration Form reduces the potential that an election official will incorrectly register a voter who wishes to affiliate with one of the state's two most prominent parties. Because the overwhelming majority of Arizona voters are registered with one of the two major parties, the checkbox method ensures that most voters will be able to participate in the primary election of their choosing. *See* Ariz. Rev. Stat. § 16-467 (providing that, in primary elections, voters who are registered as a member of a political party shall be given "one ballot only

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burden must demonstrate the *lack* of a rational basis, are in tension with some of our other cases and Supreme Court precedent. *See, e.g.*, *Burdick*, 504 U.S. at 434; *Dudum*, 640 F.3d at 1106, 1113-14. We need not resolve that tension, however, because even under the balancing of interests and burdens analysis, we would nonetheless reject this challenge. First, as noted above, Plaintiffs failed to adduce evidence of *any* burden at all; absent *any* burden, there is no reason to call on the State to justify its practice. At most, Plaintiffs established a burden on those wishing to register with a third party, limited to writing a word rather than checking a box – assuredly not an infringement of constitutional dimension. Second, the State's rationale, which we below hold justifies this law, is not hypothetical or manufactured by the court, having been specifically articulated in its brief on appeal. Third, even if the State bears the ultimate burden of persuasion with regard to the justification of this law, we are persuaded, given the very slight burden involved, that it survives constitutional scrutiny.

of the party with which the voter is affiliated"). Ensuring that voters are able to participate in their preferred party's primary election is, at the very least, a legitimate state interest. *See Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) ("Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections. A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process.").

Although election officials also have an interest in correctly registering applicants who wish to associate with smaller political parties, there are, as the State notes, countervailing concerns about providing checkboxes for smaller political parties that are not present with the two largest parties. For example, smaller political parties lose their status as recognized political parties under Arizona law much more frequently than the major parties do. If Arizona was required to provide checkboxes for all political parties entitled to continuing ballot access, as Plaintiffs suggest, the State would be required to change, and reprint, the Registration Form each time a party lost, or gained, continuing ballot access.[13] Thus, § 16-152(A)(5) helps to ensure that election officials will

[13] Indeed, just during the pendency of this appeal, the State would have had to alter and replace such a Registration Form when the Green Party lost its continuing ballot access, and change it again when the Green Party regained access.

easily be able to determine the preferred party for most of Arizona's voters in a manner that the State has deemed to be cost efficient and less prone to clerical error. This cost-benefit analysis is the kind of judgment that the Legislature was entitled to make. *See Munro*, 31 F.3d at 764 ("[B]ecause the current scheme poses only a minuscule burden for minor party candidacies, the Constitution does not require [the state] to adopt a system that is the most efficient possible; it need only adopt a system that is rationally related to achieving its goals."); *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008) (upholding Oregon's system for verifying that individuals who signed a referendum because it reduced the state's administrative burden); *Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003) (concluding that a state has a legitimate interest in saving money).[14]

IV.

In sum, we conclude that Plaintiffs have failed to meet their burden of demonstrating that § 16-152(A)(5) is not rationally related to a legitimate

[14] The State also argues that § 16-152(A)(5) serves its interest of "maintaining the stability of Arizona's political system through a healthy two-party system." In light of our conclusion that § 16-152(A)(5) is rationally related to the State's legitimate interest in efficiently and accurately determining most voters' registration preference, we do not address this assertion.

state interest. Accordingly, the judgment of the district court is

AFFIRMED.

Judge McKEOWN, Circuit Judge, concurring:

I concur in the panel's judgment: Arizona's voter registration form passes constitutional muster. I write separately because I believe the rational basis review and burden-shifting standards articulated in *Libertarian Party of Washington v. Munro*, 31 F.3d 759 (9th Cir. 1994), and applied by the panel in this case, are inconsistent with the Supreme Court's approach to analyzing voting rights challenges.

The majority opinion discusses at length how political parties in Arizona gain access to the ballot and states that "[t]he relevant inquiry 'is whether "reasonably diligent" minor party candidates can normally gain a place on the ballot. . . .'" Maj. Op. at 14-15 (quoting *Munro*, 31 F.3d at 762). But this is not a ballot access case. This case focuses instead on the state's voter registration process, specifically the form that lists only the two major political parties and simply leaves a blank for a prospective voter to identify any other party. This is, of course, a change from the prior voter registration form that identified no specific parties and simply provided a write-in line for party preference. The essence of the minority parties' claim is that they are burdened because the revised form advantages the major parties. By not being

listed, the minority parties claim they are unable to compete for voter registrations on an equal footing.[1]

The starting point for analyzing an election law challenge is the Supreme Court's opinion in *Burdick v. Takushi*, 504 U.S. 428 (1992). The Court succinctly stated the applicable standard: "A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 434 (internal quotation marks and citations omitted).

In *Munro*, we summarized *Burdick* as follows: "If the burden is severe, the challenged procedures will pass muster only if they are narrowly tailored to achieve a compelling state interest. If the burden is slight, the procedures will survive review as long as

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[1] In *Anderson v. Celebrezze*, the Supreme Court explicitly recognized that state "schemes . . . govern[ing] the registration and qualification of voters" can burden "the individual's right to vote and his right to associate with others for political ends." 460 U.S. 780, 788 (1983). For example, it would surely be unconstitutional for a state to sponsor voter registration drives at Republican Party events, while refusing to do so at comparable Democratic gatherings. The tacit encouragement alleged by the minority parties here is of the same character, but of a different magnitude.

they have a rational basis." 31 F.3d at 761 (citing, but not quoting, *Burdick*, 504 U.S. at 434). According to *Munro*, in the event plaintiffs can only demonstrate a "slight" or "*de minimis* " impairment of their rights, they then bear "the burden of demonstrating that the regulations they attack have no legitimate rational basis." *Id.* at 763. The panel recognizes that the standard articulated in *Munro* is in tension with Supreme Court precedent, but applies it nonetheless. Maj. Op. at 18-19 & n.12.

Neither rational basis review nor the burden-shifting framework articulated in *Munro* is found in *Burdick*, nor in any other Supreme Court voting rights decision since. The Supreme Court has consistently employed language that rejects traditional rational basis review. In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), for example, the Court wrote that there is no "litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Id.* at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

This understanding of the Supreme Court's approach to analyzing voting rights cases is faithfully reflected in our recent decision in *Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011). There, we concluded that San Francisco's instant runoff voting system imposed an "extremely limited burden[ ]" on the

plaintiffs. *Id.* at 1117. We nonetheless evaluated whether the government's purported interests were "substantial enough to justify" that minimal burden. *Id.* at 1114-17. This language can be read as a variation on the "sufficiently weighty" requirement. Other cases have likewise eschewed resort to traditional rational basis analysis when evaluating the constitutionality of laws that impose "nonsevere burdens" on voting rights. *See, e.g.*, *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008) (upholding regulation imposing a "minimal burden on plaintiffs' rights" with respect to signature verification in the referendum process); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1017 (9th Cir. 2002) (weighing the government's "important regulatory interest in predictable and administrable election rules" against challenge to regulation on how candidates are identified on the ballot). Indeed, neither party in this case argued that rational basis review was the appropriate standard for analyzing the minority parties' claims.

Munro, like the majority opinion, suffers another deficiency – it places the burden on the plaintiffs vis-a-vis the state's purported interests. In a situation where there is only a slight burden on a party's constitutional rights, *Munro* instructs that that party "bear[s] the burden of demonstrating that the regulations [it] attack[s] have no legitimate rational basis." 31 F.3d at 763. This turns *Burdick's* balancing standard on its head and relieves the state of its burden of putting forward "interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191

(quoting *Norman*, 502 U.S. at 288-89). It is no accident that in introducing the balancing standard, the Court counseled lower courts that they "must weigh the character and magnitude" of plaintiffs' asserted injury "against the precise interests put forward by the State." *Burdick*, 504 U.S. at 434 (internal quotation marks omitted).

It may well be that the semantic distinction between the balancing test and the rational basis standard articulated in *Munro* makes little difference in many cases. *See* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. Pa. L. Rev. 313, 330 (2007) ("For now, suffice it to say that the Supreme Court typically applies something like rational basis review in [voting rights cases where the burden is nonsevere], but that the rationality standard may not be quite so lax as the one applied to ordinary economic and social legislation."). However, it is difficult to believe that the Supreme Court's articulation of the balancing standard represents anything other than a deliberate choice to eschew traditional rational basis review. The balancing standard instructs courts to be vigilant in their review of rules and regulations that disadvantage minority viewpoints. *See Anderson*, 460 U.S. at 793 (1983) ("[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status."). The balancing principle also recognizes that

voting laws that at first glance appear to be inconsequential may unfairly distort election outcomes. *See, e.g.*, *Gould v. Grubb*, 536 P.2d 1337, 1346 (Cal. 1975) (holding that it is unconstitutional for a ballot to list candidates in alphabetical order because it "reserves advantageous ballot positions for candidates whose names begin with letters occurring early in the alphabet").

Any effort to apply the balancing standard to this case is hamstrung by a lack of evidence. It is remarkable that both parties rely principally on generalizations, i.e. a claimed burden, or platitudes, i.e. efficiency, rather than evidence. Other than the registration form itself and statistics that show an ambiguous decline in voter registrations across all political parties, the minority parties have not presented any evidence that demonstrates the burden on their rights.[15] Likewise, the state has not even attempted to document the administrative benefits of its voter registration form. Without any evidence

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[15] The majority states not only that the burden imposed by the voter registration form is "*de minimis,*" but also that it is "assuredly not an infringement of constitutional dimension." Maj. Op. at 19 n.12. I disagree. In the ballot context, the Supreme Court has specifically recognized the burden imposed by requiring voters to write a word rather than to check a box. *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974). ("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 be more accurate to state that any burden is slight, not that it lacks a "constitutional dimension."

regarding the practical consequences of the voter registration form, we find ourselves in the position of Lady Justice: blindfolded and stuck holding empty scales.

In light of the poorly developed record in this case, I conclude that the voter registration form passes constitutional muster. The form is constitutional, however, not because the minority parties have "failed to meet their burden" of demonstrating it "ha[s] no legitimate rational basis," Maj. Op. at 19. Rather, the voter registration form is constitutional because, even on the thin record we have before us, the state's asserted interests in reducing printing costs and easing administrative efficiency are "sufficiently weighty to justify" the speculative burden on the plaintiffs' rights. *See Crawford*, 553 U.S. at 191.

I recognize that *Munro* has never been officially overruled or abrogated. However, in my view, to the extent *Munro* prescribes a different standard than what the Supreme Court articulated in *Burdick* and reiterated in *Crawford*, we should fix it.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ARIZONA LIBERTARIAN PARTY, et al., Plaintiffs, vs. KEN BENNETT, Secretary of State, Defendant.	No. CIV 11-856-TUC-CKJ **ORDER** (Filed Mar. 19, 2013)

Pending before the Court are the Motion for Summary Judgment (Doc. 15) by Secretary of State Ken Bennet ("the Secretary" or "Defendant") and the Motion for Summary Judgment (Doc. 17) filed by Plaintiffs Arizona Libertarian Party Incorporated, Arizona Green Party, James March, Kent Solbert, Steve Lackey ("Plaintiffs"). Responses and replies have been filed. The parties presented oral argument to the Court on December 3, 2012.

Factual Background

In 2011, the Arizona Legislature amended the statute regarding the form used for the registration of electors. At the time of the amendment, the statute stated the form "shall contain . . . [t]he registrant's party preference." A.R.S. § 16-152(A)(5) (2004). The amended statute now provides that the form 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.

A.R.S. § 16-152(A)(5). The form currently available from the county recorders and the Secretary of State's Office includes check boxes to indicate a registrant's party preference as "Republican," "Democratic," or "Other," with a blank line on which the person can fill in their choice. Defendant's Statement of Facts, ("DSOF"), ¶ 1. Plaintiffs' Motion for Summary Judgment states that the blank line on which a person can fill in the "Other" choice is .9" long.[1] Motion for Summary Judgment, p. 3. The form utilized by the Motor Vehicle Division includes a blank box where a registrant can fill in any party to indicate their party preference. DSOF, ¶ 2.

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[1] This statement was made in the Motion for Summary Judgment rather than in Plaintiffs' Statement of Facts. Defendant's response indicates that he does not object to Plaintiffs' Statement of Facts, but does assert that the form provided by Plaintiffs is not the only voter registration form that is used.

On December 29, 2011, Plaintiffs, members of the Arizona Libertarian Party and the Arizona Green Party, filed a Complaint against the Secretary alleging that the issuance of voter registration forms listing only two of Arizona's four political parties with statewide continuing ballot access abridges the other two parties' First and Fourteenth Amendment rights to advocate and associate in a political context in violation of 42 U.S.C. § 1983 and deprives the other two parties of equal protection of the laws, guaranteed by the Fourteenth Amendment.

The parties have submitted Motions for Summary Judgment (Docs. 15 and 17). Responses and replies have been filed.

In his Motion for Summary, the Secretary has provided the numbers of recent party registrants:

PARTY	DATE	REGISTRANTS
Libertarian	January 1, 2011	24,880
	April 1, 2011	24,951
	July 1, 2011	24,854
	October 1, 2011	23,913
	January 1, 2012	22,912
	March 1, 2012	22,530
Green	January 1, 2011	5,040
	April 1, 2011	5,105
	July 1, 2011	5,174
	October 1, 2011	5,061
	January 1, 2012	4,996
	March 1, 2012	4,929

Democratic	January 1, 2011	1,008,689
	April 1, 2011	1,007,124
	July 1, 2011	999,232
	October 1, 2011	974,892
	January 1, 2012	957,786
	March 1, 2012	952,907
Republican	January 1, 2011	1,142,605
	April 1, 2011	1,142,045
	July 1, 2011	1,138,802
	October 1, 2011	1,124,173
	January 1, 2012	1,118,938
	March 1, 2012	1,134,094
Other	January 1, 2011	1,010,725
	April 1, 2011	1,030,500
	July 1, 2011	1,043,649
	October 1, 2011	1,037,450
	January 1, 2012	1,033,584
	March 1, 2012	1,037,007
Total Registered Voters	January 1, 2011	3,191,939
	April 1, 2011	3,209,725
	July 1, 2011	3,211,711
	October 1, 2011	3,165,558
	January 1, 2012	3,138,327
	March 1, 2012	3,151,615

DSOF, pp. 4-5. Plaintiffs' response points out that these records show that, over the 15 month period tracked, Democratic registrations declined 5%,

Republican registrations fell by under 1%, but Libertarian registrations fell by nearly 10%. Additionally, the Green Party's registration declined by approximately 2%.

Summary Judgment Legal Standard

Summary judgment may be granted if the movant shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. The moving party has the initial responsibility of informing the court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Once the moving party has met the initial burden, the opposing party must "go beyond the pleadings" and "set forth specific facts showing that there is a genuine [material] issue for trial." *Id.*, 477 U.S. at 248, 106 S.Ct. at 2510, internal quotes omitted. The nonmoving party must demonstrate a dispute "over facts that might affect the outcome of the suit under the governing law' to preclude entry of summary judgment. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Further, the disputed facts must be material. *Celotex*

Corp., 477 U.S. at 322-23. In opposing summary judgment, a plaintiff is not entitled to rely on the allegations of his complaint, Fed.R.Civ.P. 56(e), or upon conclusory allegations in affidavits. *Cusson-Cobb v. O'Lessker*, 953 F.2d 1079, 1081 (7th Cir.1992). Further, "a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. Walter Kiddle & Co.*, 690 F.2d 1235, 1238 (9th Cir.1982).

The parties do not appear to present any factual disputes, but argue the legal significance of those facts.

Standing Doctrine

The parties dispute whether Plaintiffs have standing to bring their claims. The issue of standing is a threshold determination of "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Steel Co. v. Citizens For A Better Env't*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Indeed, Article III of the U.S. Constitution limits "the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Valley Forge Christian Coll. v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464,

472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982), *quoting Flast v. Cohen*, 392 U.S. 83, 97, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)).

"Standing doctrine involves 'both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Fleck & Assocs., Inc. v. Phoenix*, 471 F.3d 1100, 1103 (9th Cir.2006) *quoting Kowalski v. Tesmer*, 543 U.S. 125, 128-29, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004). The Supreme Court has set forth that "[t]he 'irreducible constitutional minimum of standing' contains three requirements." *Steel Co. v. Citizens For A Better Env't.*, 523 U.S. 83, 102-03, 118 S.Ct. 1003, 140 L.Ed .2d 210 (1998), *quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The party seeking standing must show that it has "(1) suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir.2008); *Valley Forge*, 454 U.S. at 472.

Prudential limitations, however, "restrict the grounds a plaintiff may put forward in seeking to vindicate his personal stake." *Fleck*, 471 F.3d at 1104, *citing Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Indeed, "a litigant must normally assert his own legal interests rather than those of third parties." *Id., quoting Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804, 105 S.Ct. 2965, 86

L.Ed.2d 628 (1985). "Within the context of the First Amendment, the Court has enunciated other concerns that justify a lessening of prudential limitations on standing," *Munson*, 467 U.S. 953, 956, 104 S.Ct. 2349, 90 L.Ed.2d 943 (1986) but "[i]t is the burden of the complainant to allege facts demonstrating the appropriateness of invoking judicial resolution of the dispute, *Renne v. Geary*, 501 U.S. 312, 317, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991).

The Secretary argues that Plaintiffs have failed to carry their burden of demonstrating a real or immediate threat of injury. The Secretary asserts that Plaintiffs are speculating in asserting that possible Libertarian or Green registrants may assume that those parties must not be real political parties or do not have ballot access, and there would, therefore, be no purpose in registering in them. The Secretary asserts that there have been fluctuations in all party membership numbers over the past fourteen months (January 2011 to March 2012), but there is no evidence of a causal connection between the new registration forms and the minimal fluctuations in the Libertarian and Green Party numbers. Rather, the Secretary points out there are many possible reasons for the fluctuation, including people moving in and out of the state, changing party affiliation, dying, imprisonment, and allowing registrations to go inactive.

Plaintiffs argue that they have been harmed in fact because they are unfairly put to the extra effort of writing their parties' names on the registration

form and that, because such a tiny space is afforded for filling in an "Other" party, a clerk may mistake what has been written down. Further, Plaintiffs argue that keeping continued ballot access is vital to the parties' survival and a sufficient number of voter registrations is one way of keeping such access. A.R.S. § 16-804(A). Although Plaintiffs acknowledge that registration fluctuations are natural, they point out that the Libertarian decrease is greater than the Democrat or Republican decrease.

A review of the registrations indicates that non-Libertarian or Green registrations (i.e., the "Others") increased by about 2.6%, indicating that the "Other" blank line permits "Other" parties to increase registrations. However, Plaintiffs are placed in a position that extra effort is required to register in an "Other" party and such registrations run the risk of being misread. Plaintiffs have shown that they have suffered an actual concrete injury in fact. Further, although other factors may be at play, the injury is fairly traceable to the modified registration form. Lastly, the injury is likely to be redressed by a favorable court decision. Plaintiffs have standing to bring their claims.

Ripeness Doctrine

The parties dispute whether Plaintiffs' claims are ripe for review. The ripeness doctrine serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract

disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). The doctrine is aimed at cases that do not yet have a concrete impact on the parties. *See Thomas v. Union Carbide Agricultural Prod. Co.*, 473 U.S. 568, 580, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985).

The Supreme Court has stated that to meet the ripeness standard, plaintiffs must show either a specific present objective harm or the threat of specific future harm. *Laird v. Tatum*, 408 U.S. 1, 14, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998), *internal citations omitted.*The Ninth Circuit has stated that, "[b]ecause ripeness is peculiarly a question of timing, we look at the facts as they exist today in evaluating whether the controversy before us is sufficiently concrete to warrant our intervention." *Assiniboine and Sioux Tribes v. Bd. of Oil and Gas*, 792 F.2d 782, 788 (9th Cir.1986), *quotations omitted*; *see also Alcoa, Inc. v. Bonneville Power Administration*, 698 F.3d 774, 793 (9th Cir.2012). The burden of establishing ripeness rests on the party asserting the claim. *Colwell v. Department of Health and Human Services*, 558 F.3d 1112 (9th Cir.2009).

The ripeness doctrine requires the Court "to first consider the fitness of the issues for judicial review, followed by the hardship to the parties of withholding court consideration." *Oklevueha Native American Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 837 (9th Cir.2012). The Ninth Circuit has recognized:

> Courts have regularly declined on prudential grounds to review challenges to recently promulgated laws or regulations in favor of awaiting an actual application of the new rule. *See, e.g.*, *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967) ("We believe that judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here."); *Nat'l Park Hospitality Ass'n*, 538 U.S. 803, 812, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003) ("[J]udicial resolution of the question presented here should await a concrete dispute about a particular concession contract."); *Colwell*, 558 F.3d at 1128 ("If and when the parties are able to provide examples of the manner in which the HHS has used the Policy Guidance . . . we will be in a better position to determine whether the 2003 Policy Guidance functions as a substantive rule or as a general statement of policy.").

Oklevueha Native Am. Church, 676 F.3d 829, 837-38 (9th Cir.2012). "Hardship serves as a counterbalance to any interest the judiciary has in delaying

consideration of a case." *Id.* at 838; *see also Colwell*, 558 F.3d at 1129 ("[T]his hardship is insufficient to overcome the uncertainty of the legal issue presented in the case in its current posture."). Indeed, the Ninth Circuit has state that the "mere potential for future injury does not overcome the interest of the judiciary in delaying review." *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1326 (9th Cir.1992), *internal quotation marks omitted.*

In determining whether an issue is fit for judicial review, the central focus is on "whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." 13A Wright, Miller & Cooper, Federal Practice & Procedure, § 3532 at 112. Consideration of whether the issue is purely legal and whether the challenged government action is final is appropriate. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-52, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

Additionally, to prevent expressly proscriptive laws from "chilling" First Amendment rights, courts have adopted relaxed standards for standing and ripeness. *See, e.g.*, *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1129 (9th Cir.1996) (noting that the "chilling effect" on First Amendment speech is an adequate injury for standing purposes when the plaintiff presents an overbreadth facial challenge to a statute); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499-1500 (10th Cir.1995) ("in the context of a First Amendment facial challenge, reasonable predictability of enforcement or

threats of enforcement, without more, have sometimes been enough to ripen a claim"), *quotation omitted.*

In determining whether Plaintiffs' claims are ripe, therefore, the Court considers the fitness of the controversy for judicial review, whether withholding review will be a hardship to Plaintiffs and the chilling effect the challenged law may have on First Amendment liberties.

Plaintiffs' case involves an uncertain future in that registrations may not occur as speculated by Plaintiffs; however, it is certain that persons choosing to register for an "Other" party will have to make an extra effort to do so. Further, the issue is purely legal and the Secretary's action is final. Additionally, withholding review will be a hardship to Plaintiffs as extra effort will be required to register as an "Other" party. Because additional efforts may be needed to maintain or increase the "Other" party registrations, a chilling effect on Plaintiffs' First Amendment liberties may result. Indeed, "while it is true that 'the mere existence of a statute . . . is ordinarily not enough to sustain a judicial challenge, even by one who reasonably believes that the law applies to him and will be enforced against him according to its terms,' *National Student Ass'n v. Hershey*, 412 F.2d 1103, 1110 (D.C.Cir.1969), in the context of a First Amendment facial challenge, '[r]easonable predictability of enforcement or threats of enforcement, without more, have sometimes been enough to ripen a claim,' [*Martin Tractor Co. v. Federal Election*

Comm'n, 627 F.2d 375, 380 (D.C.Cir.), *cert. denied,* 449 U.S. 954, 101 S.Ct. 360, 66 L.Ed.2d 218 (1980)]. *See also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99, 99 S.Ct. 2301, 2308-09, 60 L.Ed.2d 895 (1979)." *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499-1500 (10th Cir.1995). The statute at issue having already resulted in the modification of a registration form, there is more than reasonable predictability regarding the statute's effect. Plaintiffs' claims are ripe.

Standard of Review

The parties disagree what standard of review is to be used. Plaintiffs assert that strict scrutiny is applicable. Plaintiffs point out that, in ballot cases, the Supreme Court has considered whether states have shown any compelling interest which justifies imposing heavy burdens on the right to vote and to associate. *Williams v. Rhodes*, 393 U.S. 23 (1968) (In determining whether unequal burdens placed on minority groups by the State, the Court has consistently held that the State must have a compelling state interest to justify limiting First Amendment freedoms.); *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."); *Anderson v. Celebrezze*, 460 U.S. 780, 793 n. 16, 103 S.Ct. 1564 (1983) ("[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.").

The Secretary asserts, however, a "state statute or policy must cause more than a minimal infringement of First Amendment rights before a state is called upon to provide a 'compelling interest' justification." *Nader v. Schaffer*, 417 F.Supp. 837, 848-49 (D.Conn.1976), aff'd 429 U.S. 989 (1976); *see also United States Civil Serv. Comm. v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973) ("neither the right to associate nor the right to participate in political activities is absolute"). Indeed, the Secretary points out that the Supreme Court has recognized that States may enact reasonably regulations of parties, elections, and ballots to reduce election – and campaign-related disorder. *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); *see also Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.")

The Ninth Circuit has recognized that the Supreme Court "has typically applied [a] 'more flexible' standard to election laws because '[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections.'" *Caruso v. Yamhill County*, 422 F.3d 848, 855 (9th Cir.2005), *quoting Burdick*, 504 U.S. at 433; *accord Clingman*, 544 U.S. 581, 593, 125 S.Ct.

2029, 2038, 161 L.Ed.2d 920 (2005) (explaining that subjecting every electoral regulation to strict scrutiny would "hamper the ability of States to run efficient and equitable elections"). Although the Ninth Circuit recognized that the Supreme Court has subjected several other election law case to strict scrutiny, those cases "involved regulations of – or, more precisely, limitations on – 'pure speech.'" *Caruso*, 422 F.3d at 855. The Ninth Circuit recognized that cases involving regulations of the "voting process" are "generally subject to a balancing standard, under which a reviewing court weighs the 'character and magnitude' of the burden imposed against the interests advanced to justify that burden. *Id.*

The Ninth Circuit stated:

> Under [the balancing] standard, "the rigorousness of [a reviewing court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059. "[W]hen those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992. But when those rights are subjected only to "'reasonable, nondiscriminatory'" restrictions, "'the State's important regulatory interests are generally sufficient.'" *Id.* (quoting *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564).

Caruso, 422 F.3d at 859; *see also Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir.2011) (Ninth Circuit applies a "flexible standard" when considering constitutional challenges to election regulations.); *Doe v. Reed*, 586 F.3d 671, 678 n. 11 (9th Cir.2009). An application of the balancing standard is appropriate.

Application of the Balancing Standard

The parties do not appear to assert that a separate analysis is appropriate for each of the claims. Indeed, the Ninth Circuit has recognized that separate analyses may not be appropriate. *Dudum*, 640 F.3d at 1106 n. 15 ("The Supreme Court has addressed such claims collectively using a single analytic framework. *See Anderson*, 460 U.S. at 787 n. 7, 103 S.Ct. 1564 ("[W]e base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment.").

Plaintiffs argue that the rights 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. Moreover, the challenged statute does not subject the rights to severe restrictions. Rather, the statute does not limit the access of, or inhibit the development of, other or new parties. *See Norman v. Reed*, 502 U.S. 279, 288-89, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992). Indeed, when faced with a challenge that a registration form which included only organizations that qualified as a Party and an unaffiliated option, the Second Circuit Court of Appeals affirmed a district court's preliminary injunction directing New York's voter registration form be revised to include an option labeled "Other," followed by a blank line. *Green Party of New York State v. New York State Board of Elections*, 389 F.3d 411 (2nd Cir.2004). In other words, when faced with a constitutional challenge to the voter registration form, the New York courts determined an appropriate remedy was to direct a form comparable to the one provided for by A.R.S. § 16-152. However, *Green Party* is distinguishable because it includes all political organizations that have qualified as a Party on its registration form. It is only those political organizations that do not qualify as a Party for which the use of the "Other" is provided. Plaintiffs in this case, however, are not an unaffiliated option, but are political parties.

Nonetheless, the statute does not discriminate against any specific party. In such circumstances, "the State's important regulatory interests are generally sufficient" to withstand a challenge. *Caruso*, 422 F.3d at 859. The Secretary argues that Arizona has a strong interest in the stability of its political system,"

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 226 (1989), and that the Constitution permits a State's Legislature to decide that political stability is best served through a healthy two-party system. *Timmons*, 520 U.S. at 367. Further, the Secretary points out that neither the Supreme Court nor the Ninth Circuit have recognized a party's right to be listed on a registration form or for no specific parties to be listed.

The State has an interest in enacting reasonable regulations of parties, elections, and ballots. Indeed the government must play an active role in structuring elections. *Caruso*, 422 F.3d at 855. Additionally, the clerical simplification presumably assists in the State's efforts to reasonably regulate election processes. These interests must be balanced against the character and magnitude of the burden resulting from the "Other" option. *Caruso*, 422 F.3d at 855. The burden of writing a party name on a line is not great. As pointed out by counsel for the Secretary during oral argument, prior to the amended statute, all registrants had this burden. Additionally, the burden of writing a name on a line does not unnecessarily burden parties that are not the two largest political parties that are entitled to continued representation on the ballot to organize. *See e.g. Iowa Socialist Party v. Nelson*, 909 F.2d 1175 (8th Cir.1990) (Iowa's refusal to permit registrants to designate a minor party on the voter registration form did not unnecessarily burden the opportunity of the citizen or the party to organize or promote minority interests, Iowa had

broad latitude in controlling frivolous party registration of tiny fractional interests, and Iowa's interest in preserving order in its democratic process weighed in favor of upholding registration procedures). Although Plaintiffs have submitted a declaration of Richard Winger which asserts that no state has adopted a registration system like that of Arizona, Plaintiffs' Response, Doc. 19, Attachment, *Nelson* demonstrates that a less-open registration form is permissible. Indeed, as pointed out by the Secretary in his reply, Connecticut and Florida currently use voter registration forms that list the Democratic and Republican parties along with a blank for indicating affiliation with some other party. *See* Reply, Doc. 21.

Further, Arizona's modified registration procedure does not present a situation where the parties that are not the two largest political parties that are entitled to continued representation on the ballot cannot identify a specific "other" party. *See e.g. Baer v. Meyer*, 728 F.2d 471 (10th Cir.1984). Indeed, unlike in *Baer*, where voter registrants could designate their affiliation with one of the political parties (Democratic and Republican) or persons not interested in those two parties were required to register as "unaffiliated." 728 F.2d at 475, the blank line in Arizona's registration form allows for a specific designation. In other words, that parties in Arizona that are not the two largest political parties that are entitled to continued representation on the ballot are not placed in a situation where they can not determine from the mass of unaffiliated persons who were actually

supporters of their organizations. *See Baer*, 728 F.2d at 475.

Although counsel for Plaintiffs argued during the hearing that the State could simply use four check boxes, this appears merely to be an attempt to replace the Legislature's judgment to list the top two consistent parties with Plaintiff's judgment to list the top four consistent parties. Indeed, it seems such a solution would result in other parties then arguing the list should contain five, six, or even more options. The State's interests in regulating the election processes outweigh the reasonable nondiscriminatory burden that results from the modified registration form.

Accordingly, IT IS ORDERED:

1. Defendant's Motion for Summary Judgment (Doc. 15) is GRANTED.
2. Plaintiffs' Motion for Summary Judgment (Doc. 17) is DENIED.
3. Summary Judgment is awarded in favor of Defendant and against Plaintiffs.
4. The Clerk of Court shall enter judgment and shall then close its file in this matter.

DATED *nunc pro tunc* the 19th day of March, 2013.

/s/ Cindy K. Jorgenson
Cindy K. Jorgenson
United States District Judge