No. 07-290

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

AMICUS CURIAE BRIEF OF THE LIBERTARIAN NATIONAL COMMITTEE, INC. IN SUPPORT OF RESPONDENT

BOB BARR
LAW OFFICES OF EDWIN MARGER, LLC
44 N. Main Street
Jasper, Georgia 30143
(770) 836-1776
*Attorney for Amicus Libertarian
National Committee, Inc.*

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TABLE OF CONTENTS

	Page
Interest of the Amicus	1
Summary of Argument	2
Argument	3
I. The Solicitor General Misinterprets the Standard it Proposes	3
II. The Standard Proposed Is and Should Be Restricted to the Unique Area of Regulation of Certain Electoral Activities	6
III. Even If the Proposed Standard Were Adopted, the Appropriate Result Would Be Affirmance, not Remand	7
Conclusion	8

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Celebreeze, 460 U.S. 780 (1983) 5

Burdick v. Takushi, 504 U.S. 428 (1992) 2, 3, 4, 6

California Democratic Party v. Jones, 530 U.S. 567 (2000) 4, 5, 7

Clingman v. Beaver, 544 U.S. 581 (2005) 3, 4

Eu v. San Francisco Democratic Comm., 489 U.S. 218 (1989) 4

Munroe v. Socialist Workers Party, 479 U.S. 189 (1986) 4

Rosario v. Rockefeller, 410 U.S. 752 (1973) 7

San Francisco County Democratic Cent. Comm. v. Eu, 826 F.2d 814 (9th Cir. 1987) 5

Storer v. Brown, 415 U.S. 724 (1974) 6

Tashjian v. Republican Party, 479 U.S. 208 (1986) 5, 7

Timmons v. Twin City Area New Party, 520 U.S. 351 (1997) 2, 3, 4

OTHER AUTHORITIES

U.S. Const., Art. I, §4 6

ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS 300 (1803) 8

INTEREST OF THE AMICUS[1]

Amicus Libertarian National Committee is the national organization of the third largest political party in the United States, founded in 1971 as an alternative to the two main political parties. Its interest in the present case is twofold.

First, Amicus is an established political party dedicated to a strict adherence to the Constitution and the protection of rights both natural and enumerated, including the right of an individual to keep and bear arms in the defense of life, liberty and property.

Second, as America's third largest political party, it has considerable experience with litigation involving parties gaining ballot access, which is the subject of the precedent invoked by the Solicitor General in proposing a standard of review.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus, its members, or its counsel made any such monetary contributions. This brief is filed with the written consent of the parties. Amicus complied with the conditions by providing seven days advance written notice to both parties.

SUMMARY OF ARGUMENT

Amicus the Solicitor General proposes a deferential standard of review, which it describes as a balancing test involving heightened scrutiny. It invokes for this proposition two prior decisions of this Court: *Burdick v. Takushi,* 504 U.S. 428, 434 (1992) and *Timmons v. Twin City Area New Party,* 520 U.S. 351, 358-359 (1997). Sol. Gen. Br. at 8, 24, 30-31.

It then asks for reversal, since the Circuit applied strict scrutiny, *id.* at 30-31, and goes so far as to suggest that to apply its standard would require individual fact-finding: the "right of the people" apparently would mean different things for different people, depending upon their size, strength and even whether they had two arms. *Id.* at 33 n.9.

Burdick and *Timmons* evolved in a unique corner of the First Amendment, an area in which Amicus has considerable experience – that of regulation of political party activities and ballot access. We will first discuss how the Solicitor General misinterprets the standard it proposes, then show the unusual features of that arena and why its standards should not be applicable to the Second Amendment. Finally, we will demonstrate that even if its standards *were* applicable, affirmance would be the proper response.

ARGUMENT

I. The Solicitor General Misinterprets the Standard it Proposes.

The Solicitor General treats the precedent it invokes as if it establishes that some manner of general balancing test was involved. In fact, the situation is considerably more complex. *Burdick*, *Timmons*, and their progeny are ballot access cases, and apply a unique, two-tiered approach to review. Under their teachings, only party-neutral regulations that have minor impact on First Amendment rights receive a lessened standard of review; regulations that significantly impact such rights receive strict scrutiny.

Burdick v. Takushi, 504 U.S. 428, 434 (1992), involved a First Amendment challenge to Hawaii's refusal to allow write-in votes; the challenger alleged that he desired to vote for a person who had not filed a nominating petition and thus was not on the ballot. The Court treated this as the converse of a ballot-access challenge, and concluded that Hawaii's system posed only minimal barriers to the entry of a potential candidate.

Discussing the standard of review, the *Burdick* majority indicated that ballot-access laws that impose "severe" burdens on constitutional rights require strict scrutiny, while "reasonable, nondiscriminatory" limitations can be justified by a State's "important regulatory interests." 504 U.S. at 434.

In *Clingman v. Beaver*, 544 U.S. 581 (2005), upholding a ban on parties inviting members of other

parties into their primaries, this Court drew a distinction between "minimal infringement" and "severe" burdens,[2] a paraphrase of the *Burdick* test. *Clingman* held that requiring voters to register with a party before voting in its primary was a minimal barrier to so voting. *Cf. Munroe v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) (requirement that candidate receive 1% of total primary votes to gain ballot access in general election upheld: State may respond to anticipated electoral problems so long as they "do[ ] not significantly impinge on constitutionally protected rights").

Timmons applied the same standard to a ban on "fusion" candidates (those running as candidates of two or more parties). A small political party was disabled from selecting a major party candidate as its joint standard-bearer, but it was still free to run anyone else on its ticket.

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[2] In some subsequent cases, however, this Court does not appear to have applied either test. *See Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 222 (1989) (Statute extensively regulating internal party activities: "If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the state shows that it advances a compelling state interest . . . "); *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (statute forcing a "blanket primary" upon parties, in which nonparty members could vote). As the burdens upon associational freedoms were quite apparent in those cases, the Court may have seen no necessity of beginning with the two-tier test.

The test is thus a unique, two-tiered one; the impact upon the right involved itself determines which level of review is employed. It is emphatically *not* a simple balancing test, and in fact justifies strict scrutiny if serious impairment of the right is involved. Thus this Court applied strict scrutiny in *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986) (party desired to allow independents to vote in its primary, which State law forbade), and in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (mandatory "blanket" primary).

Moreover, even the lesser test of the "important regulatory interests of the State" does not reflect a regulatory blank check. In *Anderson v. Celebreeze*, 460 U.S. 780, 788 n.9 (1983), for example, this Court defined these as "generally applicable and even-handed restrictions that protect the integrity and reliability of the electoral process itself." *See also San Francisco County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 831 (9th Cir. 1987) ("[A]ny state regulation of political parties beyond that necessary to further orderly elections must be viewed with great skepticism.").

The Solicitor General thus erroneously treats this Court's rulings, establishing a two-tiered standard of review in certain election law situations, as if they simply established the lower tier as the universal rule.

II. The Standard Proposed Is and Should Be Restricted to the Unique Area of Regulation of Certain Electoral Activities.

State-organized elections are unique, in that they involve First Amendment protected activities that can only be meaningfully exercised if subject to a variety of controls, many rather arbitrary in nature. *Burdick*, 504 U.S. at 435. We can think of no other First Amendment activity that can be exercised only upon rare occasions, with the State determining its "time, place, and manner." U.S. Const., Art. I, §4. As this Court has noted, "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 processes." *Storer v. Brown,* 415 U.S. 724, 730 (1974).

Moreover, the regulations often must be rather arbitrary. One cannot justify with reasons why an election is held on one day rather than another, at one place rather than elsewhere, why a political party should need to have 1% rather than 2% of total voter registrations to gain a place on the ballot, or why candidate petition deadlines were put at ninety rather than sixty days before an election. Choices have to be made, and one choice is as good as the other, so long as a fair and neutral result ensues.

The two-tiered test evolved within this unique legal environment. The test's double standard, and its "important regulatory interests of the State," branch are, to the best of our knowledge, to be found nowhere

else in this Court's teachings. The two-tier standard functions simply to avoid imposing a "compelling state interest" standard on fixing deadlines or picking a number, even though the deadline or number might have some minor First Amendment impact. *See Rosario v. Rockefeller*, 410 U.S. 752 (1973) (deadline for voter registration alleged to have restricted voting rights).

These principles are simply inapplicable here. The right of the American people to keep and bear arms is not a right that cannot be practically exercised absent considerable, and often arbitrary, regulation.

III. Even If the Proposed Standard Were Adopted, the Appropriate Result Would Be Affirmance, not Remand.

As we have noted, this Court has applied strict scrutiny under the two-tiered test when the statute at issue significantly affected the underlying rights. *Tashjian v. Republican Party*; *California Democratic Party v. Jones*.

We would suggest that a ban on all handguns, applicable to all persons, no matter how law-abiding, is by definition a significant impairment of "the right of the people to keep and bear arms." In *California Democratic Party v. Jones*, by way of comparison, this Court rejected the Circuit's finding that the burden of allowing cross-over primary voting was minor. The Circuit found that very few races would be affected,

but this Court responded that winning or losing a single major race might be sufficient to create or destroy a political party. If applied here by analogy, we would suggest the ordinance at issue clearly passes the threshold for strict scrutiny.

The D.C. Circuit applied strict scrutiny. The Solicitor General's proposed test would likewise require strict scrutiny. Were this test applied here, the result would be affirmance, with perhaps a note that strict scrutiny is not inevitable in contexts where a statute minimally burdens the underlying right.

CONCLUSION

The Solicitor General cites certain precedent of this Court without noting that they are applicable only to a narrow subset of First Amendment situations – those involving access to the ballot. This, in turn, involves the unique situation in which a First Amendment right can only be exercised, in a practical manner, with extensive government regulation. Even if those standards were applied here, strict scrutiny would be required, and the ruling below therefore affirmed.

To Americans of the Framing Period, the Second Amendment was no "second class right." On the contrary, St. George Tucker described it as "the true palladium of liberty." BLACKSTONE'S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND

LAWS 300 (1803). Its infringement here, by an ordinance outlawing possession of a large class of arms by citizens, no matter how law-abiding, clearly requires strict scrutiny.

The ruling of the District of Columbia Circuit should be affirmed.

Respectfully submitted,

BOB BARR
Attorney for the Amicus