

SUPREME COURT OF NORTH CAROLINA

LIBERTARIAN PARTY OF NORTH)
 CAROLINA, et al.,)
)
 Appellants,)
)
 and)
)
 THE NORTH CAROLINA GREEN)
 PARTY, et al.,)
)
 Intervenors,)
)
 v.)
)
 STATE OF NORTH CAROLINA,)
 et al.)
)
 Appellees.)
 _____)

From Wake County
No. 05 CVS 13073

**MOTION OF THE NORTH CAROLINA INSTITUTE FOR CONSTITUTIONAL LAW
FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE***

Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, the North Carolina Institute for Constitutional Law hereby seeks leave to file a brief as *amicus curiae*.

STATEMENT OF THE INSTITUTE’S INTEREST

The North Carolina Institute for Constitutional Law (the “Institute”) is a 501(c)(3) corporation established to conduct research and to educate and advise the general public, policy makers, and the Bar on the rights of citizens under the constitutions of the State of North

Carolina and the United States of America. A part of the Institute's mission is to ensure the State's compliance with the North Carolina Constitution, and it has litigated such issues over the last five years.

The Institute has a direct interest in the Court's ruling on questions concerning the level of legislative deference appropriate to statutes which burden fundamental constitutional rights under the North Carolina Constitution. It further has an interest in the integrity of the Constitution of North Carolina, which has been directly affected by the Court of Appeals decision in this case, which held that the statutes challenged in this litigation have survived strict judicial scrutiny. The ruling below is based largely on the authority of other jurisdictions construing constitutional provisions other than those memorialized in the Constitution of North Carolina.

BACKGROUND

This appeal was filed by the plaintiffs, seeking review of the trial court's ruling on a declaratory judgment action in which the plaintiffs alleged that the state statutes governing the recognition of political parties, including N.C. Gen. Stat. §§ 163-96(a)(1)-(2) and 163-97.1, violate the North Carolina Constitution under Article I, Sections 1, 10, 12, 14, and 19, and Article VI, Sections 1 and 6. The trial court ruled that plaintiff's claims did not surmount the presumption that North Carolina's ballot access scheme is constitutional. A divided Court of Appeals affirmed, holding that statutes were constitutional under Article I, Sections 12, 14, and 19 of the North Carolina Constitution, which address the rights to free association, free speech, and equal protection of the laws.

Notably, the Court of Appeals panel unanimously held that the statutes infringed on fundamental constitutional rights and, therefore, the statutes must survive strict judicial scrutiny. A majority of the panel, however, took the curious position that the legislature had met this heretofore high constitutional burden, holding that the infringing statutes were narrowly tailored to achieve only the alleged compelling state interest. In so doing, the Court of Appeals erroneously ventured upon rarely trod constitutional soil.

QUESTIONS OF LAW TO BE ADDRESSED

The Institute seeks leave to file a brief addressing the following questions of law:

- I. Whether the lower court erred in applying a presumption of constitutionality to acts of the legislature which were not subject to a rational basis standard of review?
- II. Whether the lower court erred in holding that the challenged statutes were narrowly tailored to advance only the alleged compelling state interest?
- III. Whether the lower court erred in concluding that the protections afforded North Carolina citizens under the North Carolina Constitution are not greater than the protections provided under the constitutions of other jurisdictions, including the United States of America?

THE INSTITUTE'S POSITION ON THE QUESTIONS TO BE ADDRESSED

Rule 28(i) of the North Carolina Rules of Appellate Procedure requires that “[t]he motion shall state . . . the questions of law to be addressed in the *amicus curiae* brief and the applicant’s position on those questions.” N.C. R. App. P. 28(i). The Institute’s position on the questions of law to be addressed is articulated below.

The Court of Appeals acknowledged in its decision that the challenged statutes burdened the fundamental rights of plaintiffs and that strict scrutiny applied. See *Libertarian Party of North Carolina, et al., v. State, et al.*, --- S.E.2d ---, 2009 WL 3383035 (N.C. App. 2009). It further noted, consistent with myriad constitutional decisions, that “[the Court of Appeals] cannot construe the provisions of the North Carolina Constitution to accord the citizens of North Carolina any lesser rights than those which they are guaranteed by the parallel federal provisions in the federal Constitution.” Id. Yet, the court held that the State had permissibly burdened these fundamental rights, reasoning largely if not exclusively on decisions of federal courts construing the meaning of other constitutions and statutes of other states. This ruling gives rise to the following three errors of law.

First, the lower court erred by holding that any measure of legislative deference is appropriate when an action of the government has burdened a fundamental constitutional right. The lower court stated that although the statutes burdened fundamental rights under the North Carolina Constitution: “[t]his Court presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality. . . . In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground.” Id.

The position of the Institute is that the application of legislative deference outside the context of a rational basis review is incorrect and dangerous as a matter of constitutional law. Legislative deference is appropriate only when a rational basis review is conducted by the court. The Constitution of North Carolina is a grant of power to the government and an inherent

limitation on that power. The lower court's deference to acts of the legislature which burden fundamental constitutional rights tears at the very fabric of the constitutional rule of law.

Second, the lower court stated that the State's burdens on fundamental constitutional rights rose to the standard of strict scrutiny. "[W]e cannot agree with appellants' assertion that ... the State's current 2% threshold is not narrowly tailored to meet the State's compelling interest to ensure that, before a group is recognized by the State's election laws, a political party must have some preliminary showing of a significant modicum of support among the current voting population of North Carolina." Id. Without explanation, the lower court also noted that a less restrictive means of advancing the same state interest has, in fact, recently been employed. "We recognize that the General Assembly's former requirement that a group of voters collect the signatures of 10,000 registered voters is a considerably lower threshold than the State's current 2% petition requirement." Id. Thus, the lower court simultaneously asserted that a more narrowly tailored means of burdening a citizen's constitutional rights has been used by the State and that a more narrowly tailored means of burdening a citizen's constitutional rights could not have been used.

The position of the Institute on this issue is that the lower court erred as a matter of law when it misunderstood and misapplied the standard of strict scrutiny. To reason, as the lower court did, that the State both has used and could not have used a more narrowly tailored means of burdening a citizen's constitutional rights creates alarming constitutional precedent. It weakens the standard of strict scrutiny itself.

Finally, the lower court failed to construe the North Carolina Constitution as a unique body of law which grants additional constitutional rights to North Carolina citizens. The lower

court acknowledged that the North Carolina Constitution provides rights which may supplement those of the United States Constitution. The lower court failed, however, to recognize that the North Carolina Constitution does in fact provide supplemental rights in comparison to the United States Constitution in the election context. The North Carolina Constitution, in addition to providing rights of free association, free speech, and equal protection, also requires that (1) “[a]ll elections shall be free,” (2) all constitutionally eligible North Carolina citizens “shall be entitled to vote at any election by the people of the State,” and (3) every North Carolina citizen “shall be eligible for election by the people to office,” except when constitutionally disqualified. N.C. Const. art. I, section 10 and art. VI, sections 1 and 6. The import of these Constitutional provisions is clear: North Carolina grants broader and supplemental rights to voters and candidates in North Carolina and places different limitations on the actions of state government than does the United States Constitution. The lower court, however, construed the North Carolina Constitution to provide no different rights than the United States Constitution and reached its conclusion based on the decisions of courts of *other* jurisdictions construing the rights provided under *other* constitutions.

The position of the Institute is that the lower court erred in failing to account for the legal fact that the North Carolina Constitution provides different and additional limitations on the electoral process in North Carolina. See, e.g. N.C. Const. article I, section 10, and article VI, sections 1 and 6. The North Carolina Constitution provides to North Carolina voters and candidates a unique and separate set of rights in the election context, and it places different and supplemental restrictions on actions of the State when it seeks to regulate the activities of voters and candidates.

CONCLUSION

For the reasons stated above, the North Carolina Institute for Constitutional Law moves for leave to participate in this appeal as *amicus curiae* and to submit a brief on the issues addressed above at the time briefs are due from the Appellants.

This 18th day of December, 2009.

Electronically Submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Motion for Participation As *Amicus Curiae* was served this day on the persons indicated below by depositing a copy under the exclusive care and custody of the United States Postal Service in a first-class postage-prepaid envelope properly addressed as follows:

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This 18th day of December, 2009.

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