

No. 479A09

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

LIBERTARIAN PARTY OF NORTH)
CAROLINA, et al.,)

Plaintiffs-Appellants,)

THE NORTH CAROLINA GREEN)
PARTY; et al.,)

Intervenors-Appellants)

v.)

STATE OF NORTH CAROLINA; ROY)
COOPER, Attorney General of North)
Carolina; et al.,)

Defendants-Appellees.)

From Wake County
05-CVS-13073
COA08-1413

**BRIEF OF AMICI CURIAE THE SOUTHERN COALITION FOR SOCIAL
JUSTICE, DEMOCRACY NORTH CAROLINA, FAIRVOTE ACTION,
THE LEAGUE OF WOMEN VOTERS—NORTH CAROLINA, COMMON
CAUSE NORTH CAROLINA, NORTH CAROLINIANS FOR FREE AND
PROPER ELECTIONS, THE JOHN LOCKE FOUNDATION, THE NORTH
CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP,
AND THE NORTH CAROLINA CENTER FOR VOTER EDUCATION.**

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I. Statement of Interest of *Amici Curiae*

Amici Curiae submit this proposed Brief in support of Plaintiffs-Appellants' (hereinafter "Plaintiffs") respective appeals from the decision of the North Carolina Court of Appeals upholding the trial court's determination that N.C.G.S. §§ 163-96(a)(1)-(2) and 163-97.1 do not violate Article I, Sections 1, 10, 12, 14, and 19, or Article VI, Sections 1 and 6, of the North Carolina Constitution. This proposed Brief is being filed today, simultaneous with the attached Motion for Leave to File Brief as *Amici Curiae*.

Amici, the Southern Coalition for Social Justice, Democracy North Carolina, FairVote Action, the League of Women Voters—North Carolina, Common Cause North Carolina, North Carolinians for Free and Proper Elections, the John Locke Foundation, the North Carolina State Conference of Branches of the NAACP, and the North Carolina Center for Voter Education all advocate for expansive political participation and civic engagement, and actively work with groups or individuals to promote these ultimate goals. *Amici* have a shared interest in ensuring that government remains responsive to the needs of its clients and/or members, and that their clients/members are free to actively participate in government. *Amici* are concerned that restrictive ballot access laws—especially those which unduly burden the voting rights of citizens of North Carolina—discourage political participation on a broad basis and reduce the accountability of elected officials.

II. Statement of the Case

Amici Curiae adopt by reference Plaintiffs' Statement of the Case. N.C. R. App. P. 28(f).

III. Statement of the Facts

Amici Curiae adopt by reference Plaintiffs' Statement of the Facts. N.C. R. App. P. 28(f).

IV. Argument

North Carolina state statutes governing the recognition of political parties and ballot access implicate fundamental voting, associational and expressive rights of its citizens. McLaughlin v. N.C. Bd. of Elections, 65 F.3d 1215, 1221 (4th Cir. 1995), cert. denied, 517 U.S. 1104, 134 L. Ed. 2d 472 (1996). As such, these laws must be subject to strict scrutiny. Treants Enters., Inc. v. Onslow Cty., 83 N.C. App. 345, 351, 350 S.E.2d 365, 369 (1986), disc. review denied, 319 N.C. 411, 354 S.E.2d 730, aff'd, 320 N.C. 776, 360 S.E.2d 783 (1987). In order to survive such exacting scrutiny, laws subject to this scrutiny must be “narrowly drawn to express only the legitimate interests at stake.” Id. That is, laws implicating fundamental rights must employ only the least restrictive means necessary in order to further the state’s interest. As the Fourth Circuit has noted, determining numerically the least restrictive means by which the state can ensure that parties show a “preliminary modicum of support” before gaining ballot access can be

difficult. McLaughlin, 65 F.3d at 1222 (internal quotation marks omitted). The United States Supreme Court, in reviewing ballot access laws, has to review the state's entire electoral scheme when deciding whether "the totality of the [state's] restrictive laws taken as a whole imposes a[n unconstitutional] burden on voting and associational rights," Williams v. Rhodes, 393 U.S. 23, 34 (1968).

Not only are North Carolina's ballot access laws clearly not the least restrictive means to advance the state's interest in requiring some preliminary modicum of support given the compelling benefits that minor parties with ballot access bring to the political system, but the broadly restrictive barriers imposed by N.C.G.S. §§ 163-96(a)(1)-(2) and 163-97.1 deprive North Carolina citizens of many invaluable benefits to the political process available when the process is amenable to active participation by minor parties. In fact, in her dissenting opinion, Judge Calabria noted that "the compelling interests of the people of North Carolina as explicitly delineated in the State Constitution are thwarted by the ballot access statutes." Libertarian Party of North Carolina, et al. v. State of North Carolina, — S.E.2d—, 2009 WL 3383035, 12 (N. C. App. 2009). *Amici* seek to highlight for the Court some of these compelling policy interests.

The results of the North Carolina ballot access scheme are clear—while not an absolute bar to ballot access, the crippling costs necessarily assumed by minor parties in North Carolina in simply trying to get on the ballot drain them of the

means to campaign, present innovative ideas, and offer to voters an alternative to the major party duopoly. Dmitri Evseev, A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections, 85 B.U. L. Rev. 1277, 1278 (2005); Richard Winger, The Supreme Court and the Burial of Ballot Access: a Critical Review of Jenness v. Fortson, 1 Election L.J. 235, 235 (2002). This statewide burden on voting and associational rights is the result of the state employing an overly and unnecessarily restrictive solution to its perceived but undocumented problem of preventing voter confusion because of an overly long ballot. When deciding whether the totality of North Carolina's ballot access scheme unconstitutionally burdens voting and associational rights, this Court should consider the detrimental policy impacts on voters across the state of North Carolina's unnecessarily restrictive ballot access scheme is allowed to stand.

A. Increased Political Participation and Competition Resulting from Easier Ballot Access Laws Can Increase Political Accountability

The promotion of political accountability is a compelling policy justification for minimizing the ability of major party incumbents to enact self-serving laws that restrict the ability of minor parties to meaningfully participate in the political process. As will be discussed below, restrictive ballot access laws have a demonstrable effect on political participation and competition. Where participation and competition are lacking, entrenched incumbents will have little

motivation to remain responsive to their constituents. Minor parties can increase political competition by offering voters another electoral choice.

First, inadequate electoral competition results in higher percentages of uncontested seats. Peverill Squire, Uncontested Seats in State Legislative Elections, 25 Legis. Stud. Q. 131, 142 (2000). Uncontested races are a problem for any democracy because voters have no choice or recourse if they are dissatisfied with their present representation. Uncontested races are even more common on the state legislative level than on the national level, and state legislatures in the South see a higher percentage of uncontested races than their counterparts in the North. Id. at 131. Specifically, in 2006 and 2004 election cycles, half of all North Carolina General Assembly members ran unopposed. Drew Elliot, Legislative Spending Trends Up, N.C. Data-Net (University of North Carolina at Chapel Hill Program on Public Life, Chapel Hill, N.C.), April 2007, at 1, available at http://southnow.org/Web_Version.

Restrictive ballot access schemes have been linked to stifled political competition. A political science study published in 1996 found that laws governing ballot access stunted competition in the U.S. House races during the 1980s. Stephen Ansolabehere & Alan Gerber, The Effects of Filing Fees and Petition Requirements on U.S. House Elections, 21 Legis. Stud. Q. 249, 260 (1996). The researchers found that “higher ballot access requirements significantly

increase the frequency of uncontested seats and decrease the frequency of retirements.” Id. at 249. For example, in states that have neither filing fees nor petition requirements, the expected frequency of uncontested U.S. House races is 6.9%, compared to a predicted 27.7% uncontested rate in states with \$2,000 filing fees and 2,000 signature petition requirement. Id. In short, despite the proffered justification offered by the state for the restrictive ballot access laws—the prevention of cluttering of the ballot—the reality is that voters face too few choices, not too many.

Secondly, uncontested elections interfere with the normal democratic process of elections by depriving voters not only of choices, but also of the chance to communicate with their elected officials. Id. An essential element of political accountability involves elected officials listening and being responsive to the needs of their constituents, and when elected officials go unchallenged in a race, the pressure to do this is less. The truth is that petition requirements and filing fees amount to entry costs that deter potential candidates and challengers. Id. at 250. Less stringent ballot access requirements could encourage more and better candidates to run for office, and reduce the number of uncontested races.

Furthermore, examination of campaign spending practices indicates that the presence of even the weakest challenger compels incumbents to engage in increased voter communication, and to spend more money doing so. Id. at 260.

For example, unchallenged incumbents in 1990 U.S. House campaigns spent 21% of their campaign expenditures (an average of \$244,557) on direct voter contact, while even weakly-challenged incumbents spent 38% of their funds (an average of \$342,400) on direct constituent communication. Id. at 263. This means that, in that particular study, an incumbent spent \$78,755 more on direct voter communication when faced with a challenger spending only between \$5,00 and \$25,000. Id. The presence of a minor party challenger in an otherwise uncontested race will increase the responsiveness and voter communication efforts of the incumbent—a clear benefit to North Carolina voters, regardless of affiliation.

Finally, there are some studies that indicate that, when discounting for other factors, the presence of a robust third-party candidate in a race can produce higher voter turnout. See Dean Lacy & Barry C. Burden, *The Vote-Stealing and Turnout Effects of Ross Perot in the 1992 Presidential Election*, 43 Am. J. Pol. Sci. 233(1999) (using an abstention model to show that Ross Perot increased turnout by nearly three percentage points in 1992); see also Dean Lacy & Quin Monson, *The Origins and Impact of Votes for Third-Party Candidates: A Case Study of the 1998 Minnesota Gubernatorial Election*, 55 Pol. Res. Q. 409 (2002) (demonstrating that Ventura’s candidacy added seven percentage points to the voter turnout rate). Ultimately, by stifling the growth and activity of minor parties, North Carolina’s ballot access regulations are denying its citizens the benefits of increased political

competition and participation—and the resulting increase in political accountability of their elected officials—that third parties can bring.

B. Minor Parties Bring New Ideas to the Table—New Ideas Which May Benefit the Public and Be Adopted by Major Parties

When minor parties are not stifled, they serve an important agenda-setting role in the American political landscape. Third or minor parties historically have made enormous contributions to the political process in this country by raising policy issues that the major parties have ignored. Major parties frequently seek to bring third party supporters to into the fold by adopting third party positions as their own—a process known as cooptation. Steven J. Rosenstone, Roy L. Behr & Edward H. Lazarus, Third Parties in America: Citizen Response to Major Party Failure 43 (2d ed. 1996). One preeminent historical scholar on third parties in America—Steven Rosenstone—noted that, “[t]hird parties usually lose the battle but, through cooptation, often win the war.” Id. at 44.

History is replete with examples of robust third-party introduction of new and innovative ideas into national political discourse through the process of cooptation. The Greenback Party formed in the 1870s largely to give voice to the crippling effect of railroad monopoly on farming. Id. at 63. The party was able to force the major political parties to pass important antimonopoly and labor legislation. Id. at 64-65. Formed in 1869, the Prohibition Party was the first party

to introduce women's suffrage and the direct election of senators—novel ideas at the time that were embraced at the major-party level through cooptation. Id. at 75-76. Finally, the People's Party, during its first national convention in 1892, became the first political party to propose the idea of a graduated income tax, a now fundamental aspect of the United States tax structure. Id. at 71. These are but a small sampling of the important and currently mainstream ideas introduced by vigorous nineteenth century third parties. Additionally, this process of cooptation is occurring in the national political arena to this day. For example, the members of the Tea Party movement are starting to seek recognition as a political party, and the Republican Party has become very interested in co-opting some of their ideas and momentum. See Tea Party to Field Candidate in Battle for Harry Reid's Senate Seat, Las Vegas Sun, Feb. 13, 2010, available at <http://www.lasvegassun.com/news/2010/feb/13/report-tea-party-field-candidate-battle-harry-reid/>; David Barstow, Tea Party Lights Fuse for Rebellion on Right, N.Y. Times, Feb. 15, 2010, available at <http://www.nytimes.com/2010/02/16/us/politics/16teaparty.html>.

However, a certain level of legitimacy is required for the ideas introduced by minor parties to become more than fringe concepts. Inability to gain ballot access can and has lead to “the general perception that third parties are temporary and makeshift, not deserving of equal consideration.” Steven J. Rosenstone, Roy L.

Behr & Edward H. Lazarus, Third Parties in America: Citizen Response to Major Party Failure 23-24 (2d ed. 1996). Beyond that, the limited resources of minor parties are typically drained just in overcoming ballot access hurdles, leaving them without the means to communicate with voters about the valuable new ideas they offer. Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 Stan. L. Rev. 643, 687 (1998). Minor parties have important ideas to introduce into North Carolina's political discourse, but major party attempts to delegitimize these minor parties by denying them access to ballots will diminish their ability to present these ideas for the benefit of the states electorate.

C. North Carolina's Ballot Access Scheme Interferes with its Citizens' Freedom of Association and Deprives Them of a Traditional American Means of Voicing Dissent

One of the truest and most traditional American values is the ability of its people to politically organize (or reorganize, in some cases) in order to voice their dissent. This value is encapsulated in the fundamental right of its citizens to free association. The ballot access statutory scheme currently in place in North Carolina restricts the state's citizens from freely associating to express political beliefs, and the increasing number of "unaffiliated" voters in North Carolina is a sign that that the traditional two-party domination promoted by the state's ballot access laws is not meeting the needs of voters.

The United States Supreme Court has recognized the right of candidates and voters to “associate for the advancement of political beliefs.” Am. Party of Tex. V. White, 415 U.S. 767, 771 (1974). Indeed, one of the rights held most dearly by citizens of this county is their right as Americans to form other institutions that represent their interests—to shed themselves of the yoke of stagnant political structures and to form new and more responsive vehicles for political action. The ability of minor political parties to form and to engage in campaigning, unhindered by major party political machinations, is key to associational rights of North Carolina’s citizens 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 v. Celebrezze, 460 U.S. 780, 787-88 (1983).

Throughout history, periods of third party strength have demonstrably corresponded with periods where major parties were not representing citizens’ political demands. Steven J. Rosenstone, Roy L. Behr & Edward H. Lazarus, Third Parties in America: Citizen Response to Major Party Failure 4 (2d ed. 1996). However, where barriers exist to prevent the formation of third parties, this major party failure can also be seen in mass migration affiliation with one of the two major parties. The phenomenon of voters separating themselves from political parties rather than switching affiliations from one party to another is known as

"dealignment." See David G. Lawrence, The Collapse of the Democratic Presidential Majority: Realignment, Dealignment, and Electoral Change from Franklin Roosevelt to Bill Clinton 21 (1996). Over the last several decades, the number of people who do not identify themselves as belonging to either of the recognized major political parties (that is, the number of dealigned voters) has been consistently rising. Gordon S. Black & Benjamin D. Black, The Politics of American Discontent: How a New Party Can Make Democracy Work Again 150 (1994). These are voters who are not satisfied situating themselves within an unnuanced two-party system.

Voter registration trends by party explicitly highlight the current failure of the two-party system to meet voter needs. The acceleration of dealignment from loyalties to existing major parties has been particularly noticeable in North Carolina. In North Carolina, unaffiliated voters—those who have chosen not to register with a recognized political party—now constitute over one-fifth of the entire North Carolina electorate. Justin Martin, Todd Brantley & Thad Beyle, 2008 North Carolina Election Primer, N.C. Data-Net (University of North Carolina at Chapel Hill Program on Public Life, Chapel Hill, N.C.), October 2008, at 2, available at <http://southnow.org/southnow-publications/nc-datanet/DataNet%2047.pdf>. Unaffiliated voters accounted for 18.5 percent of all registrants in late 2004, and that number rose to 22.1 percent in October of 2008.


Id. During that same time period, both Republican and Democratic affiliation percentages of the total electorate decreased. Id. This data is evidence of the dissatisfaction that North Carolina voters feel with the major two-party system. By effectively hamstringing the ability of minor parties to gain ballot access and still have the resources to engage in vigorous campaigning, North Carolina's current ballot access laws are restricting the ability of the state's citizens to associate with like-minded political associations.

V. Conclusion

For the above reasons, *Amici* urge the Court to hold that N.C.G.S. §§ 163-96(a)(1)-(2) and 163-97.1 violate Article I, Sections 1, 10, 12, 14, and 19, and Article VI, Sections 1 and 6, of the North Carolina Constitution, and that the Court of Appeals dissenting opinion be adopted by this Court.

Respectfully submitted this 26th day of February, 2010.

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CERTIFICATE OF COMPLIANCE

This Brief complies with North Carolina Rule of Appellate Procedure 28(j). The Brief was prepared in Microsoft Word, using Times New Roman 14-point font. According to the word count function, the word count, including footnotes and headings, but excluding cover, index, table of authorities, list of counsel, and certificates is less than 3,750 words.


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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of *Amici Curiae* has this day been served via United States Mail, postage prepaid, and properly addressed to:


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