

SUPREME COURT OF NORTH CAROLINA

LIBERTARIAN PARTY OF NORTH)
 CAROLINA, et al.,)
)
 Plaintiffs/Appellants)
 and)
)
 THE NORTH CAROLINA)
 GREEN PARTY,)
 et al.,)
)
 Intervenor/Appellants,)
)
 vs.)
)
 STATE OF NORTH CAROLINA, et al.,)
)
 Defendants/Appellees.)

FROM WAKE COUNTY
No. 05 CVS 13073

APPELLANTS' NEW BRIEF

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 WAKE COUNTY, NC

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APPELLANTS' NEW BRIEF

QUESTIONS PRESENTED

1. Whether North Carolina's ballot access statutes violate the political parties' rights under Article I, §§ 1, 12, 14, and 19 of the Constitution of North Carolina?

2. Whether the State of North Carolina in this case demonstrated that its ballot access statutes are the least restrictive means of advancing a compelling government interest?
3. Whether a statute that burdens a fundamental right must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground?

STATEMENT OF THE CASE

The Libertarian Party filed this action on September 21, 2005, seeking a declaration that provisions of Chapter 163 of the North Carolina General Statutes bar or impede access to the ballot by third parties in violation of the North Carolina Constitution; and seeking an injunction to retain its status as a recognized political party in North Carolina. (R. p. 4) On April 27, 2006, the North Carolina Green Party intervened pursuant to Rule 24, *N.C. Rules Civ. Proc.* (R. p. 63) On May 5, 2006, the trial court denied defendants' motion to dismiss pursuant to Rule 12(b)(6). (R. p. 74)

The appellants filed their amended complaint on February 26, 2007. (R. p. 122) Defendants filed their answer on March 28, 2006. (R. p. 148)

On February 6, 2008, following discovery, the trial court denied all parties' motions for summary judgment. (R. p. 187)

The trial court conducted a non-jury trial of this action on May 5-7, 2008. On May 27, 2008, the court entered judgment in favor of defendants. (R. p. 210)

Appellants filed their notice of appeal of the trial court's judgment on June 10, 2008. (R. p. 227). On October 20, 2009, the North Carolina Court of Appeals ruled 2-1 to affirm the trial court's decision. Judge Calabria dissented, reasoning that North Carolina ballot access statutes violate the Constitution of North Carolina. (2009 WL 3383035, at *9)

Appellants filed their notice of appeal to this Court on November 23, 2009.

STATEMENT OF GROUND FOR APPELLATE REVIEW

Appeal of the Court of Appeals decision is based on the dissent in the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-30(2) and N.C. Rule of Appellate Procedure 14(b). Appellants, in their notice of appeal, also petitioned the Court to consider the appeal as one presenting a substantial constitutional question pursuant to N.C. Gen. Stat. § 7A-30(1) and the Court retained the notice of appeal by order dated January 28, 2010.

STATEMENT OF THE FACTS

The evidence presented at trial establishes the following:

I. The North Carolina Ballot Access Laws

Historically, North Carolina has imposed requirements on political parties to gain and retain recognition for their parties and their affiliated candidates. To

gain recognition, a political party has been required to submit a petition with the signatures of a number of registered voters supporting the recognition of that party. Once a party has obtained recognition as a political party, its candidates may be listed on state and local ballots throughout North Carolina. (R. pp. 190, 211)

From 1929 through 1981 the North Carolina signature requirement was only 10,000 names. When the Socialist Workers Party obtained enough signatures to appear on the ballot in 1980, the General Assembly changed the petition requirement to 5,000 names but also provided that the affiliation of any voter who signed a petition would be switched automatically to the new party, a provision that was struck down by a federal court in 1982. (R. p. 190-91, 211-12; T. vol. II, page 259, lines 7-19) *See North Carolina Socialist Workers Party v. North Carolina State Board of Elections*, 538 F.Supp. 864 (E.D.N.C. 1982). In 1982, the only year in which 5,000 signatures were required for a new party, only four parties appeared on the ballot, two fewer than the six parties that appeared in 1980, when the requirement was 10,000 signatures. (R. pp. 191, 212; T. vol. II, p. 317, lines 2-7)

In 1983, the legislature enacted the present requirement that a party obtain signatures of 2% of the voters who voted in the previous gubernatorial election. (R. pp. 191, 212) (T. vol. II, p. 259, lines 22-25) (App. 1-6) In 1984, that number was 44,535 signatures, nearly *a nine-fold increase* in the number of signatures

previously required. With North Carolina's growing population, the 2% rule meant that, approaching the 2008 election, third parties were required to obtain 69,734 signatures. (R. pp. 191-92, 212) In the entire history of the United States, there are only five instances in which a new political party has been able to collect that many signatures. (T. vol. II, p. 276, lines 4-15)

To retain recognition in North Carolina, a political party is required to receive a threshold percentage of the votes in the current gubernatorial/presidential election. From 1929 to 1949 the ballot retention requirement was 3% of the vote, but it was raised to 10% in 1949. (R. pp. 192-93, 213-14) (T. vol. II, p. 260, lines 3-16) In 2007, following the filing of the present lawsuit, the legislature amended N.C. Gen Stat. § 163-96 to lower the retention requirement to 2%. (R. pp. 192, 214) (App. 1-6)

II. The Libertarians and NCGP Are Legitimate Political Parties Entitled to Recognition under State Law.

Expert testimony at trial established that the Libertarians and NCGP are legitimate political parties. According to accepted definitions, a political party is a group of individuals who associate to advance common political beliefs by running and supporting their candidates for public office. (T. vol. I, p. 105, lines 2-17; vol. II, p. 327, lines 5-23; p. 336, line 18 through p. 337, line 24) The Libertarian Party and the North Carolina Green Party are legitimate political parties under that

definition. (T. vol. II, p. 290, line 19 through p. 291, line 5; vol. II, p. 327, lines 5-23; p. 336, line 18 through p. 337, line 24)

The Libertarian Party: The Libertarian Party of North Carolina has been in continuous existence in North Carolina since 1976. (R. pp. 193-94, 215; T. vol. I, p. 35, lines 21-23; p. 135, lines 19-21) The party has bylaws and a party platform; has held an annual convention for each of 25 years; has active local organizations in more than a dozen counties; maintains a web site; and has all the other attributes normally expected of a political party. When the present action was filed, the Libertarian Party had more than 13,000 registered voters in the state. (R. pp. 193-94, 215; T. vol. I, p. 48, line 17, through p. 50, line 13) The Libertarian Party of North Carolina is affiliated with the national Libertarian Party, which was founded in 1971 and is active in all 50 states.

Libertarian member Barbara Howe explained why she joined the Libertarian Party in 1976:

I found the Libertarian Party in 1976. It spoke to me as a political home. It shared all the beliefs I believed in, and the Republicans and Democrats didn't offer me that, so I joined the Libertarian Party....Socially speaking, I have ... some agreements with the Democrats. Fiscally speaking, I have some agreements with the Republicans. But ... they just don't fit me. I'm anti-death penalty. I'm pro-life. I'm anti-drug war. I'm all sorts of things that don't fit into either of those two categories.

(T. vol. I, p. 35, line 15 through p. 36, line 3) *See also* testimony of Sean Haugh (T. vol. I, p. 146, lines 1-15); testimony of Dr. Michael C. Munger (T. vol. I, p. 106, line 23 through p. 107, line 21)

Despite the State's stringent requirements, the Libertarian Party has, at considerable cost, been able to place candidates on the ballot, at the national, state and local levels. In 2000, the Libertarian Party candidate for Governor received 42,674 votes (1.5%), and the Libertarian Party candidate for President received 13,891 votes (0.5%). In 2004, the Libertarian Party candidate for Governor received 52,513 votes (1.5%) and the Libertarian Party candidate for President received 11,731 votes (0.5%). (R. pp. 194-95; 216) (T. vol. I, p. 36, lines 16-20)¹ Additionally, Libertarian Party members have served as non-partisan elected members of three different city councils, five different soil and water conservation district boards and as a county surveyor. (T. vol. I, p. 145, lines 2-25)

The North Carolina Green Party: The North Carolina Green Party organized as a statewide political party in 2000. It has established bylaws, maintains a website, elects officers, has regular meetings, has adopted and published a party platform, and has members who pay dues and support the

¹ In addition, by judicial notice, the Court can recognize that the Libertarian Party succeeded, following trial, in obtaining recognition as a political party for the 2008 election, and generated sufficient votes to retain recognition for the time being. Nevertheless, as foreshadowed at trial, the onerous financial burden sustained by the party in obtaining access to the 2008 ballot severely impaired their ability to advance the beliefs around which they have politically associated. *See, e.g.*, testimony of Dr. Michael C. Munger, Libertarian Candidate for Governor in 2008. (T. vol. I, p. 114, line 16 through p. 117, line 15)

objectives of the party. The party is affiliated with the Green Party of the United States, which has existed since the 1980s and is affiliated with the international Green Party and its organizations in numerous countries. (R. pp. 196, 217) (T. vol. I, p. 63, line 19 through p. 65, line 18; T. vol. II, p. 179, line 9 through p. 182, line 6; p. 220, line 11 through p. 222, line 5)

The Green Party of the United States has held conventions and national meetings in each year since 2000, and North Carolina Green Party delegates attended the conventions of the Green Party of the United States in at least six of the last eight years. The North Carolina Green Party has local affiliates throughout the state. Green Party members have participated in public events, fairs, festivals and forums, publicizing their party and its mission. (T. vol. I, p. 68, line 7 through p. 70, line 15; p. 71, line 3 through p. 72, line 11; T. vol. II, p. 179, lines 21-24; p. 185, line 6 through p. 186, line 25)

NCGP member Elena Everett explained why she became a member of the party:

My political perspective doesn't match that of the Republican or Democratic parties, the platform and ... my belief system. You know, those aren't my homes, so I'm a member of the Green Party.... [T]he Green Party, nationally and internationally, believes in the ideas of decentralization, grass-roots democracy, community-based economics.... So all of these ideas of ecology and environmental protection, I feel the Green Party's platform is best in line with my own political perspective.

(T. vol. I, p. 62, line 12 through p. 63, line 2) *See also* testimony of Hart Matthews (T. vol. II, p. 177, lines 14 - 20); testimony of Gray Newman (T. vol. II, p. 212, line 13 through p. 213, line 12)

Despite spending thousands of volunteer hours collecting signatures for recognition as a new political party, Green Party members have been unsuccessful in meeting the state's stringent petition requirements. Consequently, Green Party members have been denied the opportunity to run as candidates under the Green Party label. (R. pp. 196, 217; T. vol. I, p. 73, line 14 through p. 76, line 17; T. vol. II, p. 190, line 7 through p. 191, line 4; p. 225, line 21 through p. 226, line 6)

III. North Carolina's Ballot Access Laws Place the Libertarian Party and NCGP at a Distinct Disadvantage to the Democratic and Republican Parties.

North Carolina's party recognition requirements have forced the Libertarians and NCGP to exhaust their financial resources and have denied them equal access to North Carolina's electoral process. Even when they have met some success, they have been placed at a distinct disadvantage to the major political parties who, because of their dominance, do not experience the same financial burden. (R. pp. 196-99, 218-20) (T. vol. I, p. 134, line 6 through p. 135, line 17)

The Libertarian Party: Before the 2008 election, the Libertarian Party had met the petition requirements for recognition in six elections since 1976. (R. pp. 196, 217-18; T. vol. I, p. 126, lines 9-13) Their limited success has come with a

crippling price. Sean Haugh, previously the executive director of the Libertarian Party, and Barbara Howe, current State Chair, testified at trial that the petition process exhausts the party's manpower and financial resources, a problem that will only grow (T. vol. I, p. 42 line 7 through p. 44, line 16; p. 50, line 20 through p. 51, line 8; p. 138, lines 10-25; p. 150, line 22 through p. 151, line 15) Given the time and effort required, the Libertarians could only gather approximately 10,000-12,000 signatures through volunteer efforts. (T. vol. I, p. 42, lines 9 - 13)

The only practical way to meet the 2% requirement is to hire people to gather signatures. (T. vol. I, p. 41, line 20 through p. 42, line 8) The cost of completing the petition drive for the election year 2008 was almost \$130,000. (T. vol, I, p. 43, line 18 through p. 44, line 2) The state party raised \$78,000 of this amount and the national party contributed \$51,000. (T. vol, I, p. 43, lines 18-24; p. 140, lines 10-18)

The petition drive expenditures every four years deplete most of the party's funds and have left the party with little money to assist candidates, significantly impairing the party's ability to compete for votes. (T. vol. I, p. 47, line 23 through p. 48, line 16; p. 162, line 24 through p. 163, line 6; p. 165, lines 7-20) The 2008 Libertarian gubernatorial nominee, Dr. Michael Munger, testified that he spent several years raising money to pay the signature gatherers and by the spring of 2008, was left with approximately \$3,000 (and any other funds that he was able to

raise in the few months left in the 2008 campaign) to wage his campaign against the candidates of the major parties. (T. vol. I, p. 114, line 16 through p. 117, line 15) Dr. Munger's opinion, based on his professional expertise and his personal experience, was that the 2% requirement "makes it effectively impossible for any kind of grass-roots level political party to compete effectively," given the number of registered voters in North Carolina. (T. vol. I, p. 114, line 16 through p. 117, line 15)

The North Carolina Green Party: The experience of the North Carolina Green Party, like that of the Libertarians, shows that volunteers alone cannot satisfy the petition requirement. Hart Matthews, a member and former director/organizer of the NCGP, and Elena Everett, former co-chair, testified at trial that NCGP members have spent thousands of volunteer hours collecting signatures for petitions for ballot access. For example, the North Carolina Green Party collected at least 14,000 verified signatures for the 2004 election cycle, which represented many hours of effort. (T. vol, I, p. 73, line 14 through p. 76, line 17; T. vol. II, p. 190, lines 11-19; p. 201, line 18 through p. 203, line 5; p. 207, line 20 through p. 209, line 3) While these numbers demonstrate the organized and sustained efforts of a legitimate party organization, their results fell far below the high threshold of the 2% rule. (T. vol. I, p. 77, lines 13-16; T. vol. II, p. 207, line 20 through p. 209, line 3)

Green Party member Elena Everett described the impact of the party's inability, due to a lack of money, to obtain access to the North Carolina ballot:

We don't have a voice. If you don't have ballot access and you don't have a way to register as a Green party member, people don't know that we exist. So it's impossible to grow as a party. We spend a lot of time ... letting people know they we're out there and that we... do exist.

(T. vol. I, p. 79, line 23 through p. 80, line 3)

Other Disparities: In addition to the denial of ballot access, the Libertarian Party and the NCGP have experienced other significant forms of discrimination as a result of the state's failure to recognize them as political parties. (App. 1-6)

Elections in North Carolina are supervised by the State Board of Elections, whose five members must be appointed by the governor from "a list of nominees submitted to him [or her] by the State party chairman of each of the two political parties having the highest number of registered affiliates as reflected by the latest registration statistics published by the State Board of Elections" – *i.e.*, from members of the Republican and Democratic parties. N.C. Gen. Stat. § 163-19. (R. pp. 196, 218) The State Board in turn appoints the 100 county boards of election, which then has the practical effect of ensuring that only nominations submitted by the Republican and Democratic parties will be considered. N.C. Gen. Stat. § 163-30. (Tr. vol. I, p. 150, lines 8-19) Members of the Libertarian Party and Green Party, thus, are disqualified from membership on the boards that set and run the

election machinery, even if those parties gain ballot status. (Tr. vol, I, p. 150, lines 8-19) The county and state elections boards hear and determine all election protests and challenges to voters' and candidates' qualifications. N.C. Gen. Stat. §§ 163-22 & -33. (App. 1-6)

Other features of our election laws which discriminate against third parties include:

- The requirement that party recognition be based on statewide results, N.C. Gen. Stat. § 163-96. This requirement poses an enormous burden on a party attempting to gain name recognition through local elections. *See e.g., testimony of Gray Newman* (Tr. vol. II, p. 227, lines 13-20) (in which Mr. Newman and the trial judge discuss this onerous burden on local candidates);
- The unfavorable placement on the ballot of candidates from parties other than the two major parties, N.C. Gen. Stat. § 163-165.6;
- The prohibition against a political party allowing registered voters of other parties to vote in its primary, N.C. Gen. Stat. §§ 163-59, -119;
- The involuntary change of registration of voters affiliated with a political party when the party is decertified, N.C. Gen. Stat. § 163-97.1;³
- The denial of political parties other than the Democratic and Republican parties to have the same use of public buildings as the two major parties, N.C. Gen. Stat. § 163-99;
- The denial of placement on the presidential ballot of nationally recognized candidates of parties other than the Democratic and Republican parties, N.C. Gen. Stat. § 163-98;

³ This requirement, in itself, has been found unconstitutional under the First Amendment. See *Green Party of New York State v. New York State Bd of Elections*, 389 F.3d 411 (2d Cir. 2004).

- The exclusion of parties other than the Democratic and Republican parties from public funding, N.C. Gen. Stat. §§ 105-159.1, 163-278.41; and
- The exemption of the two major parties from a \$4,000 limit on contributions of their executive committees, N.C. Gen. Stat. § 163-278.13.

(R. pp. 197-200, 218-20; Tr. vol, I, p. 109, line 18 through p. 111, line 1; p. 148, lines 1-24); Tr. vol. II, p. 194, lines 11-20; p. 195, lines 2-20; p. 227, lines 13-20) (App. 1-6)

IV. Uncontroverted Expert Testimony Demonstrated that North Carolina's Ballot Access Statutes Are Unduly Burdensome to Minor Parties

The State failed to meet its burden to present evidence to support a compelling interest, or even rational basis, for its restrictive ballot access laws. To the contrary, plaintiffs/interveners' evidence demonstrated that North Carolina's ballot access laws unreasonably burden minor political parties.

Richard Winger, the foremost national expert on ballot access, testified that North Carolina's ballot access requirements are the second most restrictive in the country. (T. vol. II, p. 263, line 6 through p. 264, line 19) (App. 7-8) North Carolina's petition requirement, for example, is five times higher than the median percentage requirement in the United States for a new political party, (T. vol. II, p. 264, lines 20-23) (App. 7-8); and is much higher than those of other Southern states. (T. vol. II, p. 265, line 17 through p. 268, line 16; p. 270, line 21 through 276, line 3) (App. 7-8)

Mr. Winger testified that the 2% ballot access threshold is “a terrible burden. In effect, it’s a gigantic filing fee of... \$125,000 because that’s what the Libertarians have spent this year, but sometimes it’s worse.” (T. vol. II, page 280, line 22 through 281, line 5) Mr. Winger testified that North Carolina’s burden is excessive – to that point only four times in history of the United States has a new or previously unqualified political party met a petition requirement as high as North Carolina’s 2008 requirement of 69,734 signatures. (T. vol. II, p. 276, lines 4-15)

Mr. Winger elaborated that the 10,000 signature requirement North Carolina that imposed from 1929 to 1983 was more than enough to avoid ballot clutter. “[I]n most of those years there were no minor parties,” and in the other years there were a limited number of minor parties. (T. vol. II, p. 284, line 16 through p. 285, line 18)

None of the states with ballot access laws more lenient than North Carolina has faced an excessive number of political parties or problems managing elections. Mr. Winger concluded, based on his extensive state-by-state research throughout the United States, that a requirement of 5,000 signatures for recognition of a third

party would avoid a “crowded ballot” and eliminate joke or vanity candidates.⁴ (T. vol. II, p. 285, line 19 through p. 287, line 1)

ARGUMENT

I. STANDARD OF REVIEW

It is well settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated. *Piedmont Triad Regional Water Authority v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). Under *de novo* review, the reviewing court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal. *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

II. NORTH CAROLINA’S BALLOT ACCESS STATUTES BURDEN FUNDAMENTAL RIGHTS UNDER THE STATE CONSTITUTION.

Assignments of Error Nos. 5, 6, 7, 13, 14, 15, 17, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 38, 39, 43
(R pp. 223, 224, 226; T. vol. I, pp. 35-36, 62-63, 79-80; vol. II, p. 352; Ex. 26, p. 10-12, 13-14, 32-34, 39-41, 58-59; Ex. 27, pp. 11-16, 18-19, 32-33, 42-43, 46, 52-53, 59-60)

Substantial restrictions on ballot access burden two distinct and fundamental rights: “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

⁴ Mr. Winger based his opinion on Justice Harlan’s observation in the United States Supreme Court decision in *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1964), that as many as eight parties should not be considered a “crowded ballot” that might cause voter confusion. (T. vol. II, p. 286, lines 4-9)

votes effectively.” *Greaves v. State Board of Elections*, 508 F. Supp. 78, 80 (M.D.N.C. 1980), quoting *Illinois State Board of Elections v. Illinois Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 990 (1979).

The Court of Appeals panel in this case found that the ballot access in question implicate fundamental rights under the state constitution. As the Court of Appeals majority stated, “[W]e conclude that the challenged statute, which has been held to implicate fundamental rights protected by parallel provisions in the federal Constitution, also implicates the fundamental associational and expressive rights protected by Article I, Sections 13 and 14 of our Constitution, as well as by the ‘law of the land’ clause of Article I, Section 19.” *Libertarian Party of North Carolina et. al. v. State of North Carolina et. al.*, --- S.E.2d ---, 2009 WL 3383035 (N.C. App. 2009) (internal citations omitted).

Judge Calabria emphatically agreed on this point in her dissent, noting: “Appellants’ claims also implicate the right to vote, which our Supreme Court has called ‘one of the most cherished rights in our system of government, enshrined in both our Federal and State Constitutions.’ These provisions lead to the undeniable conclusion that the rights infringed by the ballot access statutes are fundamental under the State Constitution.” *Libertarian Party of North Carolina et. al. v. State of North Carolina et. al.*, --- S.E.2d ---, 2009 WL 3383035 (N.C. App. 2009) (Calabria, J., dissenting).

Appellants bring their claims under Article I, Sections 1, 12, 14 and 19 of the North Carolina Constitution, which protect freedom of expression and association, and due process. Article I, Section 1 provides that “all persons are created equal” and have the “inalienable rights of life, liberty and pursuit of happiness”; Section 12 protects the right of association (“The people have a right to assemble together”); Section 14 protects freedom of speech (which also carries with it a right of association); and Section 19 includes the state constitution’s equal protection and due process clauses. Appellants also bring claims under Article I, Section 10, which provides that “All elections shall be free”; under Article VI, Section 1, which establishes the right of all voters to vote for candidates of their choice at all elections; and under Article VI, Section 6, which establishes the right of every citizen to run for office.

The rights of individuals under the state constitution to associate for the advancement of political beliefs and to cast their votes effectively have been recognized as fundamental by federal courts interpreting North Carolina law. North Carolina’s federal courts have relied on those rights to strike down burdensome restrictions on ballot access. *See e.g. Obie v. North Carolina State Bd. of Elections*, 762 F. Supp. 119, 121 (E.D.N.C. 1991) (“[T]he Court officially declares that the 10% numerical signature requirement for an unaffiliated candidate county commissioner . . . is in violation of . . . Article I, Sections 10 and 19 of the

Constitution of the State of North Carolina.”). Section 10 also has been used to strike down the requirement that a voter swear to support a party’s candidates as a condition of registering to vote with the party. *Clark v. Meyland*, 261 N.C. 140, 143, 134 S.E.2d 168, 170 (1964).

In this case, appellants presented uncontroverted testimony that the state’s stringent ballot access restrictions burden their fundamental rights to associate for the advancement of their political beliefs and to cast their votes effectively. Barbara Howe, state chair of the Libertarian Party, testified that the Libertarian Party “spoke to her as a political home” and that she did not “fit in” with either of the two established parties. (T. vol. I, p. 35, line 15 through p. 36, line 3) Likewise, Elena Everett, a member of the NCGP, explained that her political perspective did not fit in with either the Democratic or Republican parties and that the Green Party offers her a political “home.” (T. vol. I, p. 62, line 12 through p. 63, line 2) Ms. Everett further testified that without access to the ballot, “[w]e don’t have a voice...If you don’t have ballot access and you don’t have a way to register as a Green party member, people don’t know that we exist.” (T. vol. I, p. 79, line 23 through p. 80, line 3)

Appellants urge the Court to affirm the reasoning of the Court of Appeals panel in this case and hold that North Carolina’s ballot access statutes burden fundamental rights under the Constitution of North Carolina.

III. STATES REMAIN FREE TO INTERPRET THEIR OWN CONSTITUTIONS IN ANY WAY THEY SEE FIT, INCLUDING CONSTRUCTIONS WHICH GRANT A CITIZEN RIGHTS WHERE NONE EXIST UNDER THE FEDERAL CONSTITUTION.

The Fourth Circuit Court of Appeals in *McLaughlin v. State Board of Elections*, 65 F.3d. 1215 (4th Cir. 1995) held that while ballot access restrictions implicate fundamental constitutional rights, North Carolina's restrictions did not violate the Constitution of the United States. *McLaughlin*, however, does not compel a similar result under the Constitution of North Carolina, which provides broader speech, free association and voting rights than the federal constitution.

As articulated by Judge Calabria in her dissent:

States remain free to interpret their own constitutions in any way they see fit, including constructions which grant a citizen rights where none exist under the Federal Constitution. *See Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985). Even where provisions of the State Constitution and Federal Constitution are identical, "we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision." *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988) (citations omitted). In construing the State Constitution, this Court is not bound by the decisions of federal courts, including the United States Supreme Court. *State ex rel. Martin v. Preston*, 325 N.C. 438, 449-50, 385 S.E.2d 473, 479 (1989) (citations omitted).

Libertarian Party, 2009 WL 3383035 (N.C. App. 2009) (Calabria, J., dissenting).

McLaughlin's holding does not apply here for two main reasons. First, North Carolina's constitution "is more detailed and specific than the federal

Constitution in the protection of the rights of its citizens.” *Corum v. Univ. of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). Second, the instant case was decided after trial, providing both parties a full opportunity to develop a factual record. As can be seen in the district court’s decision, *McLaughlin* was decided at summary judgment, primarily based on analysis of the laws in question without the significant factual evidence of the burden imposed on third parties by the restrictions at issue.⁵ See *McLaughlin v. State Board of Elections*, 850 F. Supp. 373 (M.D.N.C. 1994). Here, appellants presented undisputed evidence of the less drastic means successfully utilized previously by this state and currently by other states which accomplish the same ends without precluding participation in the electoral process by third parties.

Judge Calabria further noted that, “Although the *McLaughlin* Court felt it could not overturn North Carolina’s ballot access statutes without a more explicit holding from the United States Supreme Court, this Court is under no such constraint when analyzing the ballot access statutes under the State Constitution.” *Id.*

It is well settled that state courts “remain free to interpret their own constitutions in any way they see fit, including constructions which grant a citizen

⁵ In addition, the 2% rule applicable to the 1992 election, at issue in *McLaughlin*, required 43,601 signatures (Tr. Exh. 16); as noted, the number of signatures had grown to 69,734 by the 2008 election. By judicial notice, the Court can recognize that the number of signatures required in 2012 will be 86,215. (N.C. State Board of Elections Website)

rights where none exist under the federal Constitution.” *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103-04 (1998). The North Carolina constitution in particular has a rich history that predates the federal constitution, and state courts often give a more expansive reading to the same rights. *See* Exum, James G., Jr., “Rediscovering State Constitutions,” 70 N.C. L. Rev. 1741 (Sept. 1992); Martin, Harry C., “The State as a ‘Font of Individual Liberties’: North Carolina Accepts the Challenge,” 70 N.C. L. Rev. 1749 (Sept. 1992). As stated by former Justice William Brennan of the United States Supreme Court:

It is simply that decisions of the [United States Supreme] Court are not, and should not be dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them.

Brennan, William J., Jr., “State Constitutions and the Protection of Individual Rights,” 90 Harv. L. Rev. 489, 502 (1977).

Other state supreme courts have relied on the unique provisions of their own state constitutions to strike down ballot access restrictions. In striking down Alaska’s ballot access scheme as unconstitutional under its state constitution, the Alaska Supreme Court noted:

Our previous decisions have found the free speech guarantee of Article I, Section 5 to be at least as broad as that of the First Amendment of the United States Constitution. The equal protection provision of Article I, section 1 has in some instances been interpreted more broadly than its federal counterpart. Since there are no Alaskan

cases on ballot access much of our analysis deals with cases applying the federal standard. However, we are not necessarily limited by those precedents in interpreting Alaska's constitution.

Vogler v. Miller, 651 P.2d 1, 3 (AK. 1982). The Court went on to hold that ballot access restrictions implicated fundamental rights under the state constitution and that the State did not meet its burden of showing that its scheme represented the least restrictive means of achieving a compelling state interest.

Similarly, in *Maryland Green Party v. Maryland Board of Elections*, 832 A.2d 214 (Md. 2003), the Court of Appeals of Maryland struck down a certain provisions of the state election code that imposed burdensome requirements on minor political parties. The Court stated that, "Our holdings in this case, that certain provisions in the Maryland Election Code and practices by the Board [of Elections] are invalid, shall be based entirely upon Article I of the Maryland Constitution and Articles 7 and 24 of the Maryland Declaration of Rights." *Id.* at 221. The Court noted that the "federal and state guarantees of equal protection are obviously independent and capable of divergent application," *Id.* at 232, and rejected the Board's argument that the state's ballot access scheme should be upheld because a similar scheme had been upheld by the United States Supreme Court. *Id.* at 231-232.

IV. BECAUSE NORTH CAROLINA'S BALLOT ACCESS STATUTES IMPLICATE FUNDAMENTAL RIGHTS UNDER THE STATE CONSTITUTION, THEY CAN BE UPHELD ONLY IF THEY ARE NARROWLY TAILORED TO ADVANCE A COMPELLING GOVERNMENTAL INTEREST.

Assignments of Error Nos. 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 24, 32, 33, 34, 35, 36, 37, 40, 41, 42, 43
(R pp. 222, 223, 224, 225, 226, T. vol. I pp. 41-48, 50-51, 53-54, 73, 80, 89, 91, 100, 102-105, 109-13, 118, 130, 134, 141-44, 146, 148, 151, 155, 158-66; T., vol. II, pp. 181, 183-85, 190-92, 195, 208, 212-13, 216-20, 225-27, 230-31, 253, 257, 260-64, 268-70; 284-85; S. pp. 110-11, 139-94; 208, 210, 227, 245, 276-77, 304)

The Court, unlike the trial court in this case, should apply strict scrutiny to determine whether North Carolina's ballot access statutes violate the State Constitution. The Court of Appeals majority held that "[A] law which burdens certain explicit or implied fundamental rights must be strictly scrutinized. It may be justified only by a compelling state interest, and must be narrowly drawn to express only the legitimate interests at stake." *Libertarian Party of North Carolina et. al. v. State of North Carolina et. al.*, --- S.E.2d ---, 2009 WL 3383035 (N.C. App. 2009) at page 14 citing to *Treants Enterprises, Inc. v. Onslow County*, 83 N.C.App. 345, 351, 350 S.E.2d 365, 369 (N.C. App. 1986). Similarly, Judge Calabria noted that "the ballot access statutes are subject to strict scrutiny review under the State Constitution." *Libertarian Party of North Carolina et. al. v. State of North Carolina et. al.*, --- S.E.2d ---, 2009 WL 3383035 (N.C. App. 2009) at page 24. Appellants respectfully urge this Court to apply strict scrutiny to the questioned statutes.

1. THE STATE FAILED TO MEET ITS BURDEN OF ARTICULATING WITH PARTICULARITY THE COMPELLING STATE INTERESTS PROTECTED BY THE BALLOT ACCESS STATUTES.

Assignments of Error Nos. 1, 2, 3, 5, 8, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 24, 32, 33, 34, 35, 36, 37, 40, 42, 43 (R pp. 222, 223, 224, 225, 226, T. vol. I pp. 41-48, 50-51, 53-54, 73, 80, 89, 91, 100, 102-105, 109-13, 118, 130, 134, 141-44, 146, 148, 151, 155, 158-66; T., vol. II, pp. 181, 183-85, 190-92, 195, 208, 212-13, 216-20, 225-27, 230-31, 253, 257, 260-64, 268-70; 284-85; S. pp. 110-11, 139-94; 208, 210, 227, 245, 276-77, 304)

As the United States Supreme Court noted in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564 (1983), when the plaintiff shows that its associational and speech rights are severely burdened, the court “then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Anderson*, 460 U.S. at 789. It is not enough simply to assert a valid interest; rather, the Court is bound to look behind mere assertions to determine whether there is actual evidence that the proffered interest is actually valid. *See Williams v. Rhodes*, 393 U.S. at 33 (noting that an asserted compelling interest must be more than one that is simply “theoretically imaginable” (internal quotations and citations omitted)). In *Anderson*, for example, the Court reviewed and evaluated each of the interests put forward by Ohio for its early petition requirement – voter education, equal treatment for partisan and independent candidates, and political stability – and found them all lacking.

In this case, the State produced *no* evidence to show that the current ballot access laws are necessary, relying instead on their conclusory and unsupported defense that they are necessary to prevent “ballot clutter” and “voter confusion.” The State contends that in the absence of restrictions on the recognition of political parties, voters would be inundated with multiple candidates from multiple parties, confusing voters and making it difficult for them to determine their choice. The State presented *no* factual evidence to support its contentions. The state produced *no* research or studies; demonstrated *no* proliferation of parties when the access requirements were more reasonable; presented *no* history of problems in elections when third parties were included; had *no* witnesses, expert or lay, attest to any trend of increasing numbers of third parties in states with more reasonable requirements, or any consequential problems in voter perceptions. In short, the State made no effort to justify the above restrictions with facts or evidence. To the contrary, the State’s witnesses admitted that the State has never studied the issues of ballot clutter and voter confusion. (T. vol. II, p. 352, lines 18-22; Ex. 26, p. 32, line 2 through p. 34, line 23; Ex. 27, page 12, line 17 through page 13, line 2)

Gary Bartlett, the state elections director, and Johnnie McLean, the deputy director, acknowledged that North Carolina’s greatest problems in recent years resulted from the splitting of precincts in drawing legislative, judicial and other electoral districts, thereby requiring election officials to offer multiple ballot styles

in a single precinct. (T. vol. II, Ex. 26, p. 10, line 13 through p. 12, line 16; Ex. 27, p. 11, lines 1-6) During their depositions in this case, portions of which were introduced at trial, both referred to problems when five parties qualified candidates in 1996, but the difficulties were not in voter confusion; rather, the difficulties arose as a result of election administrative issues of insufficient space on voting equipment, a problem compounded by the need for multiple ballot styles in split precincts. (T. vol. II, Ex. 26, p. 13, line 7 through p. 14, line 1; Ex. 27, p. 18, line 16 through p. 19, line 12; p. 52, line 3 through 53, line 19). The State's witnesses, however, testified that newer voting equipment already has or soon will solve the problem. (T. vol. II, Ex. 26, p. 13, line 16 through p. 14, line 1; Ex. 27, p. 42, line 5 through p. 43, line 7)

The only effect on voters McLean can recall is longer lines to vote, not voter confusion. (T. vol. II, Ex. 27, p. 18, line 16 through p. 19, line 12; p. 46, lines 10-18) The problem of long lines occurs whenever there is a large turnout, and it is a problem caused by too few voting machines, precincts that are too large, and too few precinct workers. In sum, not only has the State failed to establish that any problems with the 1996 election (a) resulted from voter confusion or ballot clutter; and (b) arose from additional parties being listed on the ballot, the State's witnesses established that there were, in fact, other reasons for any problems that occurred.

Further, appellants' evidence demonstrated that many key North Carolina elections often are uncontested by one of the two major political parties. In 2006, for example, 64 out of 120 seats, or 53% of the seats in the state House were unopposed and 22 of 50 seats in the state Senate (44%) were unopposed. (R. Ex. 23; Tr. p. 103, lines 3-25) In 2008, 57 out of 120 seats, or 47% of the state House seats unopposed and 20 of fifty seats, or 40% of the seats in the state Senate were unopposed. (R. Ex. 24; Tr. p. 104, line 12 through p. 105, line 1) In many cases, the presence of a third party on the ballot merely ensures a basic level of democratic competition.

In sum, the evidence presented at trial demonstrated what Justice Scalia rightly declared, according to notes Justice Harry Blackmun kept during court deliberation in the case of *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986): "The cluttered ballot argument is phony." Richard Winger, *How Many Parties Ought To Be on the Ballot?: An Analysis of Nader v. Keith*, 5 Election L.J. 170-200 (2006).

2. THERE IS UNDISPUTED EVIDENCE IN THE RECORD THAT NORTH CAROLINA'S BALLOT ACCESS RESTRICTIONS ARE NOT THE LEAST RESTRICTIVE MEANS TO ACHIEVE A COMPELLING GOVERNMENTAL INTEREST

Assignments of Error Nos. 1, 2, 3, 5, 9, 14, 15, 18, 19, 20, 24, 32, 33, 34, 35, 36, 37, 41, 42, 43

(R pp. 222, 223, 224, 225, 226, T. vol. I pp. 41-48, 50-51, 53-54, 73, 80, 89, 91, 100, 102-105, 109-13, 118, 130, 134, 141-44, 146, 148, 151, 155, 158-66; T., vol. II, pp. 181, 183-85, 190-92, 195, 208, 212-13, 216-20, 225-27, 230-31, 253, 257, 260-64, 268-70; 284-85; S. pp. 110-11, 139-94; 208, 210, 227, 245, 276-77, 304)

Under strict scrutiny, the State also must establish that the restrictions in place constitute the “least drastic means available” to achieve compelling state interests. *Greaves v. State Bd. of Elections of North Carolina*, 508 F. Supp. 78, 80-81 (E.D.N.C. 1980) (citing *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185, 99 S.Ct. 983 (1979)).

It is undisputed that North Carolina had no substantial problems with its ballots during the half-century, from 1929 to 1981, when it required only 10,000 signatures for ballot access. In 1982, when North Carolina required only 5,000 signatures for ballot access, only four parties qualified for the ballot. Clearly, the requirement for 2008 (which is projected to grow even larger) far exceeds the least restrictive means of avoiding ballot clutter and confusion.

Gary Bartlett, the State’s election director, testified that cutting the petition requirement in half would serve the State’s purpose.⁶ Mr. Bartlett’s testimony concedes that North Carolina’s ballot access laws are not the least restrictive means to the state’s claimed interests. (T. vol. II, Ex. 26, p. 32, lines 2-15)

⁶ Mr. Bartlett emphasized that he was expressing a personal opinion, not an official agency position. (T. Ex. 26, p. 32, lines 6-7)

North Carolina's burdensome ballot access requirements have excluded the Green Party from the ballot and required the Libertarian Party to spend all its resources to maintain a foothold on the ballot. It was undisputed at trial that the Green Party and the Libertarian Party are legitimate political parties. North Carolina's restrictions, like those in *Anderson*, have the effect of stifling the speech and association rights of its struggling third parties. North Carolina's history shows that it can control ballot access with a 10,000-signature requirement. The current requirement, at last count nearly seven times as great, is excessive and overly restrictive.

Furthermore, North Carolina's ballot access requirements prevent a local third party candidate, even one with significant support in the electorate, from running under his or her party label if the state party has not met the burdensome requirements for ballot access. *See e.g., testimony of Gray Newman* (Tr. vol. II, p. 227, lines 13-20) (in which Mr. Newman and the trial judge discuss this onerous burden on local candidates).

As stated by the dissent in the Court of Appeal, the complex whole of North Carolina's ballot access scheme cannot survive strict scrutiny. Judge Calabria explained:

An analysis of the 'complex whole' under the State Constitution must include consideration of the unique voting rights contained in the State Constitution, the inability of political parties lacking the resources to run a statewide campaign to gain ballot access, and the ability of

unaffiliated and write-in candidates to run for local office with far less than the 2% statewide requirement for political parties. An analysis that includes these items as part of the 'complex whole' of ballot access statutes are too restrictive to survive strict scrutiny under the State Constitution.

Libertarian Party of North Carolina et. al. v. State of North Carolina et. al., --- S.E.2d ---, 2009 WL 3383035 (N.C. App. 2009) at page 31 (Calabria, J., dissenting).

V. THE COURT OF APPEALS MAJORITY ERRED WHEN IT APPLIED THE GENERAL PRESUMPTION OF CONSTITUTIONALITY EVEN AFTER FINDING THAT STRICT SCRUTINY APPLIED TO THIS CHALLENGE.

Assignments of Error Nos. 4, 5, 14, 15, 43
(R pp. 223, 226; T. vol. 1, pp. 41-48, 50-51, 53-54, 73, 80, 89, 91, 100, 109-13, 118, 130, 134, 141-44, 146, 148, 151, 155, 158-66; T. vol. 2, pp. 181, 183-85, 190-92, 195, 208, 212-13, 216-20, 225-27, 230-31)

While the Court of Appeals majority purported to apply strict scrutiny to the challenged provisions, it ultimately based its holding on the general presumption that statutes enacted by the General Assembly are constitutional. It was error to apply that presumption to statutes that implicate fundamental rights under the state constitution.

After acknowledging the that North Carolina's ballot access laws burden the associational rights of members of small parties as well as the informational interests of all voters, the Court of Appeals majority then stated:

As to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts—it is a political question.

Because we conclude that a legislative enactment ‘must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground, we hold that the trial court did not err when it concluded that N.C.G.S. § 163-96(a)(2) was not violative of Article I, Sections 12 or 14, or of the “law of the land” clause of Section 19 of the North Carolina Constitution.

Libertarian Party of North Carolina et. al. v. State of North Carolina et. al., --- S.E.2d ---, 2009 WL 3383035 (N.C. App. 2009) at page 19-20 (internal citations omitted).

Because this case implicates fundamental rights under the Constitution of North Carolina, it was error for the Court of Appeals majority to rely on the general presumption of constitutionality afforded enactments of the General Assembly. The State bears the burden of demonstrating that the challenged statutes represent the least restrictive means to achieve a compelling state interest. As explained above, the State failed to meet this burden.

CONCLUSION

The only purpose served by North Carolina’s ballot restrictions is to unfairly prevent small and new political parties from taking part in elections. The ballot access laws have prevented the Green Party from participating in elections and have required the Libertarian Party to exhaust its financial and manpower resources on petition drives. The 2% ballot signature requirement is, in effect, a \$130,000 filing fee which prevents candidates other than Republicans and

Democrats from representing their parties on the ballot. Voters are denied an opportunity to support the parties of their choice.

It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues. This does not mean every voter can be assured that a candidate to his liking will be on the ballot, but the process of qualifying candidates for a place on the ballot may not be measured solely in dollars.

Lubin v. Panish, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320 (1974).

The undisputed evidence in this case shows that the state could impose a far less restrictive ballot access requirement and still guarantee orderly elections. The state has thus failed to show that its ballot access laws, which burden fundamental rights of free association and expression, are the least restrictive means of accomplishing its interests. Appellants respectfully ask this Court to reverse the decision of the trial court and find that North Carolina's ballot access laws violate the state's constitution.

Respectfully submitted, this 1st day of March, 2010.

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CERTIFICATE OF COMPLIANCE

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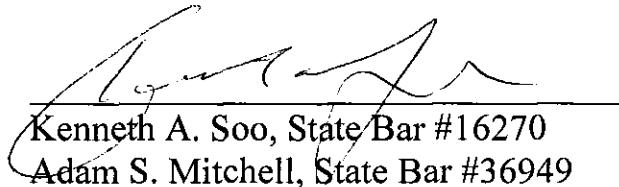
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EXCLUSIVE of the Index, Table of Authorities, Certificate of Compliance, and the Certificate of Service, this Brief contains fewer than 8,750 words, in compliance with N.C. App.R. 28(j)(2)(A)2.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the Brief and/or a copy of the word or line print-out.

Respectfully submitted, this 1st day of March, 2010.



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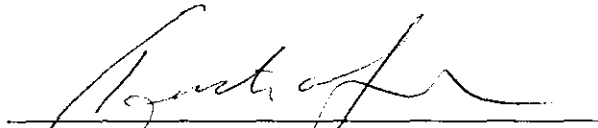
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the Appellees herein by depositing a copy thereof in a postpaid wrapper in a post office or official depository, certified mail, receipt requested, under the exclusive care and custody of the United States Post Office Department properly addressed to the attorney for Appellees as follows:

Alec Peters
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Special Deputy Attorneys General
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This 1st day of March, 2010.


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