

SUPREME COURT OF NORTH CAROLINA

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

Plaintiffs/Appellants,)

and)

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

Intervenors/Appellants,)

v.)

STATE OF NORTH CAROLINA, *et al.*)

Defendants/Appellees.)

From Wake County

NEW BRIEF OF DEFENDANTS-APPELLEES

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From Wake County

NEW BRIEF OF DEFENDANTS-APPELLEES

QUESTIONS PRESENTED

- I. DID THE MAJORITY OF THE COURT OF APPEALS PROPERLY DETERMINE THAT APPELLANTS HAD ABANDONED THEIR CLAIMS THAT THE CHALLENGED STATUTES VIOLATE ARTICLE I, SECTIONS 1 AND 10, AND ARTICLE VI, SECTIONS 1 AND 6, OF THE NORTH CAROLINA CONSTITUTION?

- II. DID THE MAJORITY OF THE COURT OF APPEALS PROPERLY DETERMINE THAT THE CHALLENGED STATUTES DO NOT VIOLATE ARTICLE I, SECTIONS 12, 14 OR 19, OF THE NORTH CAROLINA CONSTITUTION?

- III. DID THE MAJORITY OF THE COURT OF APPEALS PROPERLY APPLY THE WELL-ESTABLISHED RULE THAT STATUTES ARE PRESUMED CONSTITUTIONAL AND THAT APPELLANTS BEAR THE BURDEN OF ESTABLISHING THAT A STATUTE IS NOT CONSTITUTIONAL?
- IV. DID THE MAJORITY OF THE COURT OF APPEALS PROPERLY DETERMINE THAT THE STATE HAS A COMPELLING INTEREST TO JUSTIFY THE CHALLENGED STATUTES AND THAT THE CHALLENGED STATUTES ARE NARROWLY DRAWN TO ACHIEVE THE STATE'S COMPELLING INTERESTS?

STATEMENT OF THE CASE

Plaintiffs Libertarian Party of North Carolina, *et al.* (“Libertarians”) filed their complaint on 21 September 2005, seeking a declaratory judgment that ballot access laws in North Carolina are unconstitutional under the State Constitution and an injunction requiring that they remain a recognized political party in North Carolina. (R pp. 4-23) The Libertarians amended their complaint on 13 October 2005. (R pp. 24-44) Defendants filed a timely Motion to Dismiss the Complaint on 12 December 2005.

The North Carolina Green Party, *et al.* (“Greens”) filed a Motion to Intervene on 7 April 2006. (R pp. 51-62) They also moved to file a Complaint (R pp. 65-73); both motions were allowed by a Consent Order of 27 April 2006. (R pp. 63-64) On 5 May 2006, the trial court denied defendants’ Motion to Dismiss made pursuant to N.C. R. Civ. P. 12(b)(6). (R pp. 74-75) After discovery, the trial court denied all parties’ Motions for Summary Judgment. (R pp. 187-88)

The Libertarians and the Greens, with the consent of defendants, jointly filed a Second Amended Complaint on 26 February 2007. (R pp. 122-147) Defendants answered the Second Amended Complaint on 28 March 2007. (R pp. 148-183)

The matter came on for trial at the 5 May 2008, Civil Session of Wake County Superior Court, the Honorable Robert H. Hobgood presiding. Because the bench trial occurred during the week of the primary election in North Carolina, State witnesses Gary Bartlett, Executive Director of the State Board of Elections (“State Board”), and Johnnie McLean, Deputy Director of the State Board, were not available to testify. The parties agreed that Bartlett’s and McLean’s depositions could be offered in place of their live testimony. (R pp. 207-08, ¶ 15)

By Order entered 27 May 2008, the trial court dismissed the Attorney General as a party and entered judgment in favor of defendants. (R pp. 210-226) The Libertarians and Greens gave written notice of appeal on 10 June 2008. (R pp. 27-229) The Record on Appeal was timely filed on 13 November 2008, and docketed on 2 December 2008. (R p. 2) Oral argument was heard in the Court of Appeals on 20 April 2009.

On 20 October 2009, the Court of Appeals issued its opinion in this case. The majority, in a decision written by Chief Judge John C. Martin and joined by Judge Sanford L. Steelman, Jr., affirmed the decision of the trial court. Judge Ann Marie Calabria dissented in part. *Libertarian Party of N.C. v. State*, No. COA08-1413 (N.C. Ct. App. Oct. 20, 2009). Appellants gave notice of appeal on 23 November 2009 on the basis of the dissent and on the basis that this case presented a substantial

constitutional question. This Court retained the appeal by order of 28 January 2010. *Libertarian Party of N.C. v. State*, 363 N.C. 805, ___ S.E.2d ___ (2010).

STATEMENT OF THE FACTS

States, including North Carolina, have historically imposed requirements on political parties to gain and retain recognition. (R p. 190) To gain recognition in North Carolina, a political party is required to submit a petition with the signatures of registered voters supporting the recognition of that party. Once a political party has obtained recognition, its candidates may be listed on ballots for all partisan races in North Carolina. (*Id.*) Currently, the requirement to gain recognition for a political party is a petition signed by registered and qualified voters in North Carolina equal in number to two percent (2%) of the total number of voters who voted in the most recent general election for Governor. N.C.G.S. § 163-96 (a)(2). (R pp. 191-92) Groups seeking recognition as political parties may begin to gather these signatures as soon as the gubernatorial election is over. (R p. 191) For the 2008 general election, the two percent (2%) requirement meant that a party had to submit 69,734 signatures of registered voters by June 2008 in order to gain recognition as a political party. (R pp. 191-92) Because the population of North Carolina, as well as its number of registered voters, grew between the 2004 and 2008 general elections, the 69,734 signatures required to establish recognition as a political party in 2008 represented 1.21% of the total registered voters as of 12 April 2008. (R p. 192)

Compared to other states, North Carolina is liberal in aspects of its petitioning process. Libertarian Sean Haugh testified that while parties have only 90 days in

Illinois to gather signatures, they have nearly four years in North Carolina. (T p. 153)
Haugh also testified that some states like California have larger signature requirements than North Carolina. (T p. 168)

In 2006, the General Assembly reduced the requirement to retain recognition as a political party from 10% of the vote in the gubernatorial or presidential election to 2% in 2006, effective 1 January 2007. Now, once a political party is officially recognized, its candidate must receive at least two percent (2%) of the statewide vote in the gubernatorial or presidential election for the party to remain officially recognized and its candidates to be listed on future ballots. N.C.G.S. § 163-96(a)(1).

The following parties, in addition to the Democratic and Republican Parties, have qualified to place candidates on the North Carolina ballot in recent years:

- 1992 – Libertarian
- 1996 – Libertarian, Natural Law, Reform
- 1998 – Libertarian
- 2000 – Libertarian, Reform
- 2002 – Libertarian
- 2004 – Libertarian
- 2008 – Libertarian

(R p. 196; *see also* 2008 sample ballot for Wake County at <http://www.sboe.state-nc.us/Sampleballots/2008General/8GWAKE18.pdf>). In addition, the Libertarian Party's candidate for Governor, Michael Munger, received 2.85% of the vote in the 2008 general election.¹ As a result, the Libertarian Party is a recognized political

¹ *See* <http://results.enr.clarityelections.com/NC/7937/14537/en/summary.html>.

party in North Carolina at least through the 2012 general election. N.C.G.S. § 163-96(a)(1).

There are other ways to gain ballot access in North Carolina as an alternative to running as the candidate of a political party. Persons may qualify as unaffiliated candidates pursuant to N.C.G.S. § 163-122 and as write-in candidates pursuant to N.C.G.S. § 163-123. (R p. 199) Unaffiliated candidates for statewide office are required to submit signatures of registered voters equal to two percent of the voters who voted in the most recent gubernatorial election; for district or local offices, signatures equal to four percent of the registered voters in the district or locality must be submitted. (R pp. 199-200; N.C.G.S. § 163-122). Write-in candidates for statewide office are required to submit 500 signatures of registered voters. (R p. 200; N.C.G.S. § 163-123). Neither unaffiliated candidates nor write-in candidates have a party label appearing with their name on the ballot. (R p. 199)

The Libertarians have achieved recognition as a political party through the petition process in North Carolina every presidential election year since 1976, except in 1988. (Plaintiffs-Intervenors' Exhibit 35, p.2, paragraph 6) The Greens have never qualified as a recognized political party in North Carolina. (R p. 196)

Both the Libertarian and Green parties have small memberships in North Carolina. At the time the first complaint was filed in this lawsuit, there were just over 13,000 registered Libertarians in North Carolina. (R p. 194) The Green Party has even fewer members. Witness Elena Everett testified at trial that the Greens had 61 members who had paid dues to the state party for 2007. Both Libertarians and Greens

have elected candidates to nonpartisan races in North Carolina for town councils and soil and water conservation districts. (T pp. 145, 207)

Libertarian and Green witnesses testified concerning what they contended are the difficulties of conducting petition drives for party certification in North Carolina. They claim that petition drives are a drain on finances and manpower. However, Haugh conceded on cross-examination that while the Libertarians fulfilled their petition gathering requirement for 58,679 signatures in thirteen months after the 2000 general election, it was a “change in philosophy” at the national level that partly caused it to take three-and-a-half years to gather the signatures needed for certification for the 2008 general election. (T pp. 157-58) The trial court found as a fact that just five paid signature gatherers collected 85,000 signatures in the election cycle. (R p. 222) Green witness John Hart Matthews testified that in 2006 the Greens decided not to focus on collecting signatures for party recognition, but to focus on this lawsuit and lobbying the General Assembly to change ballot access laws. (T pp. 204-05)

State witnesses testified that the State’s interest in regulating ballot access is in the orderly and fair administration of elections. The length of the ballot is a crucial factor in the successful administration of elections. (Supp. R pp. 216-17; Bartlett Dep., pp. 21-22) In presidential election years, North Carolina has an exceptionally long ballot in both the primary and the general election, irrespective of the number of parties fielding candidates. Under Article III of the North Carolina Constitution, the ten members of the Council of State are elected. (R p. 200) Only three other states have ten or more elected executive offices. (Supp. R p. 403; Bartlett Aff.,

Exhibit 1) In addition, the offices of President, United States Senate, and justices and judges of the appellate courts appear on the ballot statewide, as do any constitutional amendments or statewide bond referenda. (Supp. R pp. 307-08; McLean Dep., pp. 49-50) Every ballot also has legislative, congressional, trial court and county offices. (*Id.*) Each political party adds to the number of candidates on these exceptionally long ballots. Bartlett also testified that the lengthy ballot in 1996, where there were five political parties participating, contributed to long lines at the polling places and great voter dissatisfaction. (Supp. R pp. 217-19, 254; Bartlett Dep., pp. 22-24, 59)

The State presented evidence that the long ballot in North Carolina taxes the voting equipment used here and presents other administrative challenges. (Supp. R pp. 269, 276-77, 307-09; McLean Dep., pp. 11, 18-19, 49-51) Optical scan machines with paper ballots are used in nearly 80% of North Carolina's counties. (Supp. R p. 212; Bartlett Dep., p. 17) Long ballots tax the optical scan voting equipment (Supp. R pp. 309; McLean Dep., p. 51), because they require printing on both sides. Two-sided ballots are troublesome for voters, and increase the opportunities for errors. (*Id.*) Richard Winger, an expert witness for the Libertarians and the Greens, agreed that double-sided optical scan ballots and more than one sheet for a ballot are not desirable for the efficient administration of elections. (T p. 316) Winger also conceded that the State must plan for the possibility of extremely long ballots. (T p. 309)

Further pertinent facts will be noted in the argument below.

ARGUMENT

The central contention of the Libertarians and Greens is that North Carolina's ballot access laws for new political parties implicate their fundamental rights to associate, to advance their political beliefs and to cast their votes effectively. The focus of the argument of the Libertarians and Greens is that this Court should apply a strict scrutiny test to the challenged statutes. But they avoid addressing the trial court's actual findings and conclusions, including the trial court's explicit conclusion that the challenged statutes pass strict scrutiny. (R p. 224, ¶ 8) Instead, they invite this Court to view the evidence anew and the law in isolation from established precedent. As observed by the trial court (R p. 224, ¶ 6), the right that the Libertarians and Greens advance is not their right to vote, but is in reality a right to have a party of their choice recognized by the State, regardless of whether that party has demonstrated a modicum of support among the State's voters. But as the trial court correctly concluded in the order affirmed below, "there is not a fundamental right to have the party of a voter's choice appear on the ballot." (R p. 224, ¶ 7)

At the outset, the State notes that the Libertarian Party's candidate for Governor received 2.85% of the vote in the 2008 general election.² As a result, the Libertarian Party is a recognized political party in North Carolina at least through the 2012 general election. N.C.G.S. § 163-96(a)(1). This raises the question of whether the Libertarians' appeal is moot, as any decision of this Court cannot have a practical effect on the Libertarians' status as a recognized political party. *See Roberts v.*

² See <http://results.enr.clarityelections.com/NC/7937/14537/en/summary.html>.

Madison County Realtors Ass'n, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996).

Nevertheless, the State will proceed as though the Libertarians' appeal is not moot.

I. STANDARD OF REVIEW

It is well-established in North Carolina that findings of fact by the trial court supported by competent evidence are binding on the appellate courts, while conclusions of law are reviewable *de novo*. *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994). If supported by competent evidence, the trial court's findings of fact have the force of a jury verdict and are conclusive on appeal "even though the evidence might sustain findings to the contrary." *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). With regard to the conclusions of law, a statute "will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)).

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT APPELLANTS ABANDONED CERTAIN OF THEIR CONSTITUTIONAL CLAIMS AND THAT THE TRIAL COURT PROPERLY REJECTED THEIR REMAINING CLAIMS.

The Libertarians and Greens alleged five claims for relief grounded in the North Carolina Constitution. (R pp. 122-45) These are novel claims, never accepted by North Carolina's courts with respect to the specific provisions they challenge, and rejected by federal courts in similar challenges under the United States Constitution. The trial court and the Court of Appeals properly rejected them as well.

A. APPELLANTS HAVE NOT SHOWN THAT THEIR “FUNDAMENTAL RIGHTS” UNDER EITHER THE NORTH CAROLINA CONSTITUTION OR THE UNITED STATES CONSTITUTION ARE VIOLATED BY THE CHALLENGED STATUTE.

Although the Libertarians and Greens alleged violations of several provisions of the North Carolina Constitution, in their arguments to this Court they avoid any substantial examination of these constitutional provisions. The constitutional provisions invoked by appellants, however, warrant more than a cursory reference if those provisions are to be the basis for invalidating duly-enacted statutes of the North Carolina General Assembly. An appropriate examination of the constitutional provisions invoked by the Libertarians and Greens shows that their fundamental rights have not been violated.

1. Appellants’ Rights to Freedom of Expression and Association Are Not Violated by the Challenged Statutes.

In their first claim for relief in their Second Amended Complaint (R pp. 122-141), the Libertarians and Greens assert that their rights to freedom of expression and freedom of association, as guaranteed by Article I, §§ 1, 12, 14 and 19, of the North Carolina Constitution are violated by North Carolina’s statutory scheme of political party recognition. The Libertarians and Greens continue to argue these assertions to this Court. (Appellants’ New Br. at 18-19)

Initially, it must be noted that the majority below found that the Libertarians and Greens had abandoned any claim based on Article I, § 1, by failing to advance any argument or cite any authority in support of that claim.³ *Libertarian Party of*

³ While Judge Calabria refers in her dissent to Article I, § 1 (slip op. 23), she did not dissent from that part of the majority’s decision finding that the Libertarians

N.C. v. State, No. COA08-1413 (N.C. Ct. App. Oct. 20, 2009). Indeed, the Libertarians and Greens make no argument and cite no authority concerning Article I, § 1, in their New Brief either. (Appellants’ New Br. at 18) Thus, this question is not properly before this Court. N.C. R. App. Pro. 28(b)(6); *State v. Colson*, 274 N.C. 295, 310, 163 S.E.2d 376, 386 (1968) (an issue not raised and passed upon in the Court of Appeals is not properly before this Court), *cert. denied*, 393 U.S. 1087, 21 L. Ed. 2d 780 (1969).

Even if this issue had been properly preserved, the Libertarians and Greens’ argument would fail. Article I, § 1, entitled “The equality and rights of persons,” provides:

We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

This section was added in the 1868 Constitution and echoes in substantial part the words of the Declaration of Independence. JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION: WITH HISTORY AND COMMENTARY* 38-39 (1993) (hereinafter ORTH, N.C. STATE CONSTITUTION). The “life, liberty and pursuit of happiness” language has not been the subject of much litigation, *id.*, and the list of enumerated rights is exemplary, not exhaustive, *id.* at 39. Thus the substantive rights that the Libertarians and Greens allege are unduly burdened by ballot access laws are contained in other sections of the State Constitution and this section has little if any bearing on their claims.

and Greens had abandoned any claim under that provision.

Other constitutional provisions that the Libertarians and Greens reference in their complaint include §§ 12 and 14 of Article I. Article I, § 12, entitled “Right of assembly and petition,” provides:

The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.

Article I, § 14, entitled “Freedom of speech and press,” provides:

Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

North Carolina’s Freedom of Speech Clause is only 35 years old, having been adopted as part of North Carolina’s third Constitution – the 1971 Constitution. “It is curious, but true, that North Carolina’s first two constitutions contained no specific provision protecting freedom of speech; the present safeguard was inserted only in 1971.” ORTH, N.C. STATE CONSTITUTION, 51.

Because these constitutional provisions are clearly modeled after cognate provisions of the United States Constitution, a review of how federal courts have decided the sort of challenge raised by the Libertarians and Greens is appropriate. “Although decisions of the Supreme Court of the United States construing federal constitutional provisions are not binding on our courts in interpreting cognate provisions in the North Carolina Constitution, they are, nonetheless, *highly persuasive.*” *Stam v. State*, 47 N.C. App. 209, 213-14, 267 S.E.2d 335, 339-40 (1980) (emphasis added), *aff’d in part and rev’d on other grounds in part*, 302 N.C.

357, 275 S.E.2d 439 (1981). Such a review supports the conclusion of the trial court and the majority of the Court of Appeals that § 12, guaranteeing the right to assembly, and § 14, modeled after the First Amendment’s guarantee of free speech, does not prevent North Carolina from enacting and enforcing reasonable ballot access laws for minority parties.

The Fourth Circuit Court of Appeals in 1995 considered a challenge to North Carolina’s ballot access statutes brought by the Libertarians and others. *McLaughlin v. N. C. Bd. of Elections*, 65 F.3d 1215 (4th Cir. 1995), *cert. denied*, 517 U.S. 1104, 134 L. Ed. 2d 472 (1996). It upheld the two aspects of N.C.G.S. § 163-96 now challenged in this case. Notably, the *McLaughlin* court did not find that the Libertarians’ claims implicated any “fundamental rights”; indeed, that term appears nowhere in the opinion.

Rather, the court, relying on the decisions of the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 75 L. Ed. 2d 547 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 119 L. Ed. 2d 245 (1992), held that

election laws are usually, but not always, subject to ad hoc balancing. When facing any constitutional challenge to a state’s election laws, a court must first determine whether protected rights are severely burdened. If so, strict scrutiny applies. If not, the court must balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state’s interests in ensuring that “order, rather than chaos, is to accompany the democratic processes.” *Storer v. Brown*, 415 U.S. 724, 730, 39 L. Ed. 2d 714, 94 S. Ct. 1274 (1974). “The results of this evaluation will not be automatic; . . . there is ‘no substitute for the hard judgments that must be made.’” *Anderson* 460 U.S. at 789-90 (quoting *Storer*, 415 U.S. at 730).

McLaughlin, 65 F.3d at 1221. The court also described how, in *Jenness v. Fortson*, 403 U.S. 431, 442, 29 L. Ed. 2d 554, 563 (1971), the United States Supreme Court upheld Georgia laws that distinguished between “political parties” and “political bodies” in ways similar to the different treatment that North Carolina accords established and “new” political parties. *McLaughlin*, 65 F.3d at 1222. The court noted that similar two-tiered schemes had been uniformly upheld. Nevertheless, the court understood that it should assess North Carolina’s ballot access restrictions as a “complex whole” rather than in isolation from other aspects of the electoral framework. *Id.* at 1223. After making that assessment, the court concluded that “the provisions at issue pass constitutional muster.” *Id.* at 1225.

It is instructive to examine *Jenness*, the case relied on by the Fourth Circuit in *McLaughlin*. In *Jenness*, the United States Supreme Court upheld Georgia’s requirement that an independent candidate collect signatures of qualified voters equal in amount to 5% of voters eligible to vote in the most recent election for the office in question, and that those signatures be collected during a 180-day period. 403 U.S. at 438, 91, 29 L. Ed. 2d at 560-62. The Court stated:

Anyone who wishes, and who is otherwise eligible, may be an independent candidate for any office in Georgia. Any political organization, however new or however small, is free to endorse any otherwise eligible person as its candidate for whatever elective public office it chooses. So far as the Georgia election laws are concerned, independent candidates and members of small or newly formed political organizations are wholly free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish. They may confine themselves to an appeal for write-in votes. Or they may seek, over a six months’ period, the signatures of 5% of the eligible electorate for the office in question. If they choose the latter course, the way is open. For Georgia imposes no

suffocating restrictions whatever upon the free circulation of nominating petitions. A voter may sign a petition even though he has signed others, and a voter who has signed the petition of a nonparty candidate is free thereafter to participate in a party primary. The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand, is a person who was not even registered at the time of the previous election. No signature on a nominating petition need be notarized.

...

In a word, Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life.

403 U.S. at 438-40, 29 L. Ed. 2d at 560-61 (footnotes omitted).

By contrast to Georgia's statutory framework for independent candidates, North Carolina's requirements for new political parties require only signatures equal in amount to 2% of the number of people who voted in the most recent presidential or gubernatorial election, and it gives potential new parties essentially three and one-half years to gather signatures. *See* N.C. GEN. STAT. § 163-122(a)(2); *see also* T p. 42. As in *Jenness*, a voter may sign a petition for a new party even though he has signed others, is free to participate in the primary of a different party (if otherwise eligible to do so) even though he has signed a petition, and need not declare that he will vote for candidates of the new party in the election. No signatures need be notarized and a person who has previously voted in a party primary is eligible to sign a petition. North Carolina has no restrictions on the free circulation of petitions. Thus, North Carolina's ballot access statutes when viewed as a "complex whole" are at least as generous as those upheld in *Jenness*. Recently, the United States Supreme

Court favorably cited the *Jenness* opinion in upholding New York's requirements for candidate access to primary ballots. *N. Y. State Bd. of Elections v. Lopez Torres*, 522 U.S. 196, ___, ___, 169 L. Ed. 2d 665, 673, 675 (2008).

Federal courts have upheld more onerous ballot access requirements than North Carolina's. *See, e.g., Arutunoff v. Okla. State Election Bd.*, 687 F.2d 1375 (10th Cir. 1982) (5% access, 10% retention), *cert. denied*, 461 U.S. 913, 77 L. Ed. 2d 282 (1983); *Patriot Party v. Mitchell*, 826 F. Supp. 926, 937 (E.D. Pa.), *aff'd*, 9 F.3d 1540 (3^d Cir. 1993) (2% access, 15% retention). *See also Swanson v. Worley*, 490 F.3d 894, 910 (11th Cir. 2007) (upholding for independent presidential candidates signature requirement of 3% of voters who voted in the last presidential election, and specifically finding that the testimony of Richard Winger as to the requirements of other states was "irrelevant . . . because a court is 'no more free to impose the legislative judgments of other states on a sister state than it is free to substitute its own judgment for that of the state legislature.'" (quoting *Libertarian Party of Fla. v. Fla.*, 710 F.2d 790, 794 (11th Cir. 1983))).

As the highly persuasive federal analyses in these cases make clear, two-tiered ballot access laws, even those more restrictive than North Carolina's, do not impermissibly burden the rights to free speech and assembly given the State's compelling interests in promoting governmental stability, integrity of elections and the orderly conduct of elections. The trial court properly drew on the principles laid out in this line of federal cases and rejected the arguments of the Libertarian and

Green parties. Likewise, the majority below, while it found that fundamental rights were implicated, properly found that no rights were impermissibly burdened.⁴

2. Appellants' Rights to Free Elections Are Not Violated by the Challenged Statutes.

The Libertarians and Greens also allege that the challenged statutory scheme violates Article I, § 10, of the North Carolina Constitution. Again, the Court of Appeals found that the Libertarians and Greens had abandoned this challenge.⁵ (Slip op. at 10-11) Thus, this claim is not properly before this Court. *Colson*, 274 N.C. at 310, 163 S.E.2d at 386. Moreover, as with the Libertarians and Greens' other claims, this claim is without merit.

Article I, § 10, which is entitled "Free elections," provides simply, "All elections shall be free." The Libertarians and Greens allege that this section "establishes a constitutional right of citizens to organize political parties, campaign freely and have their candidates listed on the ballot without unreasonable and unnecessary restriction." (R p. 142; Sec. Am. Compl., ¶ 81) They cite two cases that refer to this section of the Constitution. In the first case, *Obie v. N. C. State Bd. of Elections*, 762 F. Supp. 119 (E.D.N.C. 1991), the United States District Court for the Eastern District of North Carolina considered North Carolina's requirement that

⁴ Interestingly, the majority below relied on *McLaughlin* in finding that the challenged statutes implicate fundamental rights, although as noted *supra*, *McLaughlin* makes no mention of and contains no discussion of fundamental rights. The majority below does not specifically discuss whether the rights protected by Article I of the North Carolina Constitution can be claimed by political parties or whether they are individual rights.

⁵ As with the Libertarians and Greens' claims under Article I, § 1, while Judge Calabria referred to Article I, § 10 (slip op. at 23), she did not dissent from the portion of the majority decision's finding that this claim had been abandoned.

unaffiliated candidates for county office collect signatures of qualified voters of the county equal in number to 10% of the registered voters in the county. The court held this was an unconstitutional ballot access restriction in violation of the First and Fourteenth Amendments to the Constitution of the United States, and Article I, §§ 10 and 19, of the Constitution of North Carolina. In so holding, the court relied on *Greaves v. State Bd. of Elections*, 508 F. Supp. 78 (E.D.N.C. 1980).

Both *Obie* and *Greaves* involved petition requirements for unaffiliated candidates that were far in excess of the petition requirements for new parties (10% for unaffiliated candidates versus 2% for new party petitioners). In *Obie* and *Greaves* it was not the ballot access requirement *per se* that violated § 10. Indeed, *Greaves* contains no reference to or discussion of § 10 or the right to free elections, while *Obie*, which expressly adopts the reasoning of *Greaves*, simply refers to § 10 without any analysis of that provision or how it was violated. Rather, it was the unequal protection for unaffiliated candidates compared to new parties that caused the challenged statutes to run afoul of constitutional protections. A similar result was reached by the United States District Court for the Middle District of North Carolina in *DeLaney v. Bartlett*, 370 F. Supp. 2d 373, 377-78 (M.D.N.C. 2004). While the Honorable Frank Bullock held that more restrictive requirements for unaffiliated candidates than for new parties could not be justified,⁶ he also noted, “[e]lection data

⁶ The decision in *DeLaney* must be taken into account in weighing the requirements of N.C.G.S. § 163-96(a). Under *DeLaney*, the State cannot impose a higher ballot access requirement on unaffiliated candidates than it does on new parties. If the State lowers the requirement for recognition of a new party, it must also lower the ballot access requirement for an unaffiliated candidate. Thus, in considering whether a lower requirement for new party recognition might still protect the compelling interests put forward by the State, including ballot overcrowding, the

demonstrates that minor party candidates obtain a place on the North Carolina general election ballot with some regularity.” *Id.* at 377.

In the second case cited by appellants that mentions § 10, *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964), this Court struck a party registration loyalty oath. The challenged law required a voter switching from one party registration to another to swear or affirm that he would support the nominees of the party for which he was registering. The Court, citing § 10, held that such a regulation was void because it “violate[d] the principle of freedom of conscience. It denies a free ballot – one that is cast according to the dictates of the voter’s judgment.” *Id.* at 143, 134 S.E.2d at 170.

In his treatise on the history of the North Carolina Constitution, Professor Orth states: “The meaning [of § 10] is plain: free from interference or intimidation.” ORTH, N.C. STATE CONSTITUTION, 47. Article I, § 10 guarantees a right to vote without restraint of conscience or intimidation. It does not grant minority parties ballot access free of legitimate regulation by the State. Just as the voters themselves are subject to legitimate registration requirements and qualifications, so too are parties subject to legitimate regulation. If this Court believes that, contrary to the decision below, the Libertarians and Greens have not abandoned this claim and considers it on the merits, the arguments put forth by the Libertarians and Greens should be rejected.

degree to which a lower ballot access requirement for unaffiliated candidates might also contribute to ballot overcrowding must be borne in mind.

3. Plaintiffs and Intervenors’ Rights to Equal Protection Are Not Violated by the Challenged Statutes.

The Libertarians and Greens also contend that the challenged statutory scheme deprives them of equal protection of the laws as guaranteed by Article I, § 19. That section, entitled “Law of the land; equal protection of the laws,” provides:

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

The Equal Protection Clause of the North Carolina Constitution, like the Freedom of Speech Clause, is only 35 years old. While our Supreme Court has stated that the concept of equal protection, “made explicit in the Fourteenth Amendment to the Constitution of the United States,” was inherent in our Constitution prior to being expressly added, *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971), the Equal Protection Clause of Article I, § 19, was not expressly incorporated into the Constitution until the revision of 1971. Thus, there is nothing in the history of § 19 suggesting that the rights secured by that section are more expansive than those provided by the United States Constitution. Indeed, the fact that § 19 essentially is based on its federal cognate suggests the opposite.

All political parties must comply with the laws of ballot access and political party recognition. Like the law in *American Party of Texas v. White*, 415 U.S. 767, 39 L. Ed. 2d 744 (1974), North Carolina’s ballot access and political party recognition scheme “afford[] minority political parties a real and essentially equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments

nor the Equal Protection Clause of the Fourteenth Amendment requires any more.” *American Party*, 415 U.S. at 787-88, 39 L. Ed. 2d at 763-64. The Equal Protection Clause of § 19, derived from the Equal Protection Clause of the Fourteenth Amendment, requires no more. This being so, the Libertarians and Greens’ equal protection rights are not violated by their lack of political party recognition.

4. Plaintiffs and Intervenors’ Right to Vote and to Run for Office Are Not Violated by the Challenged Statutes.

The Libertarians and Greens’ fourth and fifth claims for relief allege that the challenged statutes violate their right to vote in all elections and to run for office as guaranteed by Article VI, §§ 1 and 6, of the North Carolina Constitution. Again, the Court of Appeals found that the Libertarians and Greens had abandoned these claims (slip op. at 10-11); they are not currently before this Court. Notably, the Libertarians and Greens make no argument and cite no authority to support these claims before this Court; they simply cite these constitutional provisions as a basis for their challenges to the ballot access statute. (Appellants’ New Br. at 18) *Colson*, 274 N.C. at 310, 163 S.E.2d at 386. Even if this claim were properly before this Court, it would be clear that the claim is meritless.

Article VI, § 1, entitled “Who may vote,” provides:

Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided.

It simply states which persons are eligible and entitled to vote in North Carolina. Likewise, Article VI, § 6, simply provides that no one but a qualified voter shall be eligible for election.⁷ ORTH, N.C. STATE CONSTITUTION, 136.

These straightforward provisions are not requirements that individuals be allowed to vote for any party or any candidate they wish, whether or not that candidate or party meets North Carolina's valid qualifications for ballot access. Otherwise, North Carolina would be constitutionally unable to deny recognition to *any* political party or to deny ballot access to *anyone* who desired to run for office. The State must be allowed, in order to require a showing of a "significant modicum of support" by a potential political party or candidate, *see Jenness*, 403 U.S. at 442, 29 L. Ed. 2d at 562, to establish *some* ballot access and political party recognition requirements.

These fourth and fifth claims are predicated upon the false premise that it is the General Assembly that has kept the Libertarian and Green parties from being recognized as political parties. The General Assembly has merely stated objective requirements – requirements that the Libertarians and others have met in the past. Past failure to demonstrate sufficient support in the electorate to maintain ballot access (in the case of the Libertarian Party) or to even gain ballot access (in the case

⁷ Article VI, § 6, entitled "Eligibility to elective office," provides: "Every qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office." The clear language in this provision that "every qualified voter who is 21 years of age" is eligible for office unless disqualified stands in contrast the claim of amicus The North Carolina Institute for Constitutional Law that "every North Carolina *citizen*" is eligible for election to office. (Amicus NCICL's Br. at 14, emphasis added). Many citizens of North Carolina are not yet 21 years of age, and other citizens, though eligible to vote, have not registered to vote and thus are not qualified voters.

of the Green Party) that keeps them from recognition. The fault is not in the challenged statutes. If this Court concludes that the Court of Appeals incorrectly determined that the challenges based on Article VI, §§ 1 and 6, were abandoned, it should find those challenges without merit for the foregoing reasons.

B. THE EVIDENCE AT TRIAL DID NOT SUPPORT APPELLANTS' CLAIMS.

The Libertarians and Greens argue that they “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.” (Appellants’ New Br. at 19) As the trial court determined after hearing the evidence, however, the evidence did not establish any such burden. The Libertarians and Greens’ argument fails because they focus only on certain segments of their evidence while ignoring the import of their evidence as a whole, all while mischaracterizing the evidence and arguments offered by the State.

The trial court’s findings of fact are conclusive on appeal if supported by competent evidence. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). Yet the Libertarians and Greens spend little time in their brief to this Court attempting to demonstrate how the trial court’s findings of fact are not supported by the evidence. Instead, they seek to have this Court view the evidence differently from the trial court. The Libertarians and Greens focus on evidence of what they described as a “crippling price” of collecting the requisite number of signatures. (Appellants’ New Br. at 10) The trial court found, however, that their evidence showed that just “five people collected more than 85,000 signatures for the

Libertarian Party” during the 2004-08 election cycle. (R pp. 221-22 ¶¶ 43 and 44)
The evidence of the Greens showed that they chose to make little effort even to attempt to comply with North Carolina’s requirements. (T pp. 204-05)⁸

The Libertarians and Greens spend a great deal of time arguing that the State failed to show that North Carolina’s ballot access laws are necessary to avoid ballot clutter and voter confusion. This argument ignores two salient points. First, the argument ignores that, while the State did offer avoiding ballot *overcrowding* and voter confusion as two reasons for the ballot access laws, these were not the only reasons put forward by the State. Second, and perhaps more important, the argument ignores the fact that ballot clutter or voter confusion *per se* did not form the basis of the trial court’s Findings of Fact or Conclusions of Law. In essence, the Libertarians and Greens have set up a straw man of ballot clutter and voter confusion, attempting to draw this Court’s attention to whether there was sufficient evidence of these factors rather than focusing the Court’s attention on the evidence that actually underpinned the trial court’s Findings of Fact.

⁸ This disparity between a party that has repeatedly achieved ballot access and one that has expended little if any effort to even try to comply with North Carolina’s law highlights the problems inherent in the Libertarians and Greens’ attempts to portray the Green Party and the Libertarian Party as similarly situated. They are not similarly situated. The only standard that can accurately be applied to both parties is that they both meet a political scientist’s definition of political party because they both are organized groups of at least fifty people with political goals. (T pp. 105, 327 and 343) Under that standard, North Carolina could not enforce *any* ballot access restrictions, and any group of at least fifty people organized for the purpose of attempting to field candidates for office would have to be recognized *statewide* as a political party. If the proper line should lie somewhere between the Green Party and the Libertarian Party, the Libertarians and Greens offer this Court – and the General Assembly – no assistance in identifying where that line should be.

The trial court focused on North Carolina's compelling state interest in the orderly and fair administration of elections; and in particular, how the length of the ballot is a crucial factor in the successful administration of elections. As found by the trial court, in presidential election years, North Carolina has an exceptionally long ballot in both the primary and the general election, irrespective of the number of parties fielding candidates. Under Article III of the North Carolina Constitution, the ten members of the Council of State are elected. (R p. 200) Only three other states have ten or more elected executive offices: Arizona elects 11 statewide offices, Georgia elects 11 and North Dakota elects 10. (R p. 221; Finding of Fact ¶ 21. Supp. R p. 403; Bartlett Aff., Exhibit 1) In North Carolina, these ten Council of State elections are held during the same general election as the elections for President and Vice-President of the United States. (R p. 222, Finding of Fact ¶ 45) In addition, elections for United States Senate, and justices and judges of the appellate courts appear on the ballot statewide as do any constitutional amendments or statewide bond referenda, and every general election ballot will also have legislative, congressional, trial court and county offices. (*Id.*) Each political party adds to the number of candidates on these exceptionally long ballots. Johnnie McLean, Deputy Director for Administration of the State Board, explained the difficulties presented by long ballots – taxing the optical scan voting equipment used in almost 80 North Carolina counties, printing on both sides of the ballot which may confuse voters, and increasing the opportunities for errors at the precinct, county, and State levels. (Supp. R p. 309; McLean Dep. at 51) Even the expert retained by the Libertarians and Greens, Richard Winger, who testified that he did not consider having fewer than eight parties on a

ballot to constitute a “cluttered ballot,” conceded that having seven parties recognized in North Carolina could result in 105 candidates on every ballot just for partisan statewide, congressional and legislative offices, and that the State had to be prepared for all recognized parties to nominate candidates for every office.⁹ (T pp. 306, line 9 - 309, line 12) When asked about the use of optical scan equipment, which the vast majority of North Carolina’s counties use, Winger testified that:

Well, with an optical scan, obviously there’s limitations because if there’s too many offices on the ballot, they won’t all fit on one card. You have to turn it over. That’s always bad because some voters will forget to turn it over, and then it may spill over into a second card.

....

Now, there’s no absolute limit there because you can just keep on printing more and more cards, but obviously the more cards there are, the more cumbersome it is.

(T p. 316) This evidence supports the trial court’s findings of fact that North Carolina elects a large number of statewide offices and must “plan for the possibility of extremely long ballots, not merely for the probability of extremely long ballots.” (R pp. 221-22, Findings of Fact ¶¶ 42, 47-51) In other words, the State must assume that as many new parties as possible will qualify for ballot access, and that each new party will nominate candidates for every office for which there is a partisan election. This is the evidence that the Libertarians and Greens simply ignore in their brief to this Court. The Libertarians and Greens have totally failed to show how the trial court’s findings of fact are not supported by the evidence. Since the court’s findings

⁹ Dr. Winger’s estimate of 105 candidates does not include statewide or local judicial races, other local offices, constitutional amendments or other referenda that typically appear further down the ballot.

are supported by the evidence, they cannot be disturbed on appeal. The Court of Appeals properly affirmed the decision of the trial court.

III. THE COURT OF APPEALS PROPERLY APPLIED THE WELL-ESTABLISHED RULE THAT STATUTES ARE PRESUMED CONSTITUTIONAL AND THAT APPELLANTS BEAR THE BURDEN OF ESTABLISHING THAT A STATUTE IS NOT CONSTITUTIONAL.

The Libertarians and Greens, along with *amicus* The North Carolina Institute for Constitutional Law, argue that the trial court erred by applying the well-established rule that enactments of the General Assembly are presumed to be constitutional. They contend that this rule is inapplicable where the challenged statute burdens a fundamental right. This argument simply is not a correct statement of North Carolina law; it must, therefore, fail.

Citing mainly federal law, the Libertarians and Greens argue that laws that burden fundamental rights are not entitled to a presumption of constitutionality. The law of North Carolina holds otherwise. The North Carolina Supreme Court has often said that “[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.” *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)). This is so because the acts of the legislature are effectively the acts of the people.

All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.

State ex rel. Martin v. Preston, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989). See also *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (The legislative power rests “with the people and is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people’s elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution.*” (emphasis in original) (citations omitted)). Moreover, “[i]f there is any doubt as to the Legislature’s power to act in any given case, the doubt should be resolved in favor of the Legislature’s action.” *Baker v. Martin*, 330 N.C. at 338, 410 S.E.2d at 891.

In *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002), a case which explicitly involved the fundamental right to vote on equal terms and in which the strict scrutiny standard was applied, the Supreme Court nevertheless acknowledged that, while it is the duty of the judiciary, where appropriate, to declare statutes unconstitutional, “there is a strong presumption that acts of the General Assembly are constitutional.” *Stephenson*, 355 N.C. at 362, 562 S.E.2d at 384. See also *Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 413 S.E.2d 541 (1992) (involving a challenge to the “resign to run” law on the grounds that it adds a qualification for office not found in Article VI, § 6, of the North Carolina Constitution).

The Libertarians and Greens’ reliance on *Treants Enterprises, Inc. v. Onslow County*, 83 N.C. App. 345, 350 S.E.2d 365 (1986), *aff’d*, 320 N.C. 776, 360 S.E.2d 783 (1987), highlights the flaw in their argument. *Treants* does not stand for the proposition, as the Libertarians and Greens suggest, that statutes burdening fundamental rights are not entitled to a presumption of constitutionality. Such an

interpretation of a decision of the Court of Appeals cannot be squared with the decision of this Court in *Stephenson* and *Moore* – especially given that *Stephenson* and *Moore* involve exactly the same rights claimed by the Libertarians and Greens. Rather, *Treants* speaks to the showing necessary to *rebut* the presumption of constitutionality. In other words, the more a statute burdens fundamental rights, the more the presumption must give way and a showing of significant state interest must be made. This is, in essence, the strict scrutiny standard. *See McLaughlin*, 65 F.3d 1215, 1221 (1995), *cert. denied*, 517 U.S. 1104, 134 L. Ed. 2d 472 (1996).

The trial court and the majority below properly concluded that the challenged statutes must be presumed constitutional. The trial court and Court of Appeals also properly determined that the Libertarians and Greens had failed to rebut this presumption. The argument that the presumption is inapplicable must be rejected.

IV. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE CHALLENGED STATUTE IS NARROWLY DRAWN TO PROTECT THE STATE’S COMPELLING INTERESTS.

The Libertarians and Greens next argue that the trial court and the Court of Appeals erred by determining that the State has a compelling interest in maintaining the ballot access restrictions reflected in the challenged statutes and that the restrictions are narrowly drawn to protect that interest. Relying on what can only be described as “judicial hearsay” and repeating the flaws of their previous arguments, the Libertarians and Greens again divorce their argument from the actual holding of the trial court and the majority of the Court of Appeals.

The Libertarians and Greens cite as apparent authority a statement that they claim United States Supreme Court Justice Antonin Scalia attributed to a note he said Justice Harry Blackmun wrote during the Court's deliberation in *Munro v. Socialist Workers Party*, 479 U.S. 189, 93 L. Ed. 2d 499 (1986). According to appellants, Justice Scalia described this note as saying simply, "The cluttered ballot argument is phony." (Appellants' Br. at 32) The only source provided for this "judicial hearsay" is an article written by the Libertarians and Greens' expert, Richard Winger.

Of course, in *Munro*, a majority of the Supreme Court, including Justices Blackmun and Scalia, upheld the challenged statute and reaffirmed the principle previously stated "with unmistakable clarity that States have an 'undoubted right to require candidates to make a preliminary showing of *substantial* support in order to qualify for a place on the ballot.'" *Id.* at 194, 93 L. Ed. 2d at 505 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-789, n.9, 75 L. Ed. 2d 547, 557 n.9 (1983)) (emphasis added). The Court continued by holding: "We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Munro*, 479 U.S. at 194-95, 93 L. Ed. 2d at 505. The Court then stated:

To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the

electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Id. at 195-96, 93 L. Ed. 2d at 506. By this holding, the United States Supreme Court explicitly rejected the same argument that the Libertarians and Greens now make concerning the sufficiency of the State's evidence.

The trial court did not conclude that North Carolina had a compelling state interest in "reducing ballot clutter and preventing voter confusion" *per se*. (See Appellants' Br. at 30) Rather, the trial court – echoing numerous court decisions, including *Jeness*, *Anderson*, *Munro* and *McLaughlin* – concluded that North Carolina's compelling state interest lies

in requiring some preliminary modicum of support before printing the name of a political organization's candidate on the ballot – the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.” *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1221-22 (4th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996) (quoting *Jeness v. Fortson*, 403 U.S. 431 (1971)).

(R p. 224, Conclusion of Law ¶ 8) As shown in Argument II.B, *supra*, even the expert retained by the Libertarians and Greens conceded that problems could arise with many parties gaining ballot access, given the number of offices on the ballot for statewide election in North Carolina. The facts found by the trial court are supported by the evidence; the Libertarians and Greens have failed to establish otherwise. Those findings of fact, in turn, support the trial court's conclusions of law that North Carolina has a compelling interest in requiring a modicum of support before granting State recognition and ballot access to political parties. The Court of Appeals properly

affirmed the trial court's order and the Libertarians and Greens' arguments must be rejected.

Likewise, the Libertarians and Greens argue that the State failed to show that the challenged statutes are the least restrictive means of achieving the compelling state interest of requiring new parties to demonstrate a modicum of support. As the trial court and the Court of Appeals found, this argument is already foreclosed by case law. (R p. 226, ¶ 15)

In *McLaughlin v. North Carolina Board of Elections*, 65 F.3d 1215, the Fourth Circuit observed that the question of whether a state has employed the least restrictive means of demonstrating a modicum of support

brings us into hazardous terrain. While all states condition ballot access on a showing of some "preliminary modicum of support," it is beyond judicial competence to identify, as an objective and abstract matter, the precise numbers and percentages that would constitute the least restrictive means to advance the state's avowed and compelling interests.

Id. at 1222. The Fourth Circuit went on to note that the United States Supreme Court had upheld laws more restrictive than North Carolina's, and that the United States Supreme Court has held that "a reviewing court must determine whether 'the totality of the [state's] restrictive laws taken as a whole imposes a[n unconstitutional] burden on voting and associational rights.'" *Id.* at 1223 (quoting *Williams v. Rhodes*, 393 U.S. 23, 21 L. Ed. 2d 24 (1968)). After engaging in a review of the "complex whole" of North Carolina's complete scheme of statutes concerning the conduct of elections, *see McLaughlin*, 65 F.3d at 1223, the Fourth Circuit found the statutes to pass constitutional muster.

Here, the trial court also examined the “complex whole” of North Carolina’s elections statutes. (R pp. 224-25, Conclusions of Law ¶¶ 10-11) The conclusions the court made are supported by findings of fact that are in turn supported by the evidence. After this examination, the trial court concluded that “[t]he North Carolina Constitution does not require a different result in this case than was reached in *McLaughlin*, *Jenness*, or other federal cases considering challenges similar to the ones brought in this action.” (R p. 226, Conclusion of Law ¶ 15) While the trial court may not have addressed the “least restrictive means” test explicitly, the court’s conclusions of law clearly encompass it. The majority of the Court of Appeals explicitly found strict scrutiny to apply and determined that the strict scrutiny standard was met.

As an additional fallacy in appellants’ argument, they compare North Carolina’s current requirement with its earlier requirement of 10,000 signatures. The Libertarians and Greens seem to suggest that because 10,000 was once adequate to demonstrate a modicum of support for new parties, it is still adequate today. As a corollary, the Libertarians and Greens argue that the current requirement, fixed as a percentage of voters, is significantly higher than 10,000. What the Libertarians and Greens fail to acknowledge is that North Carolina has grown dramatically since the time when the requirement was 10,000 signatures. (*See Supp. R pp. 133-34*) As a result of this growth, the number of people who could wish to have new parties recognized has increased, as has the pool of registered voters who can sign petitions. The test for showing a modicum of support is designed to keep pace with growth.

The argument put forward by the Libertarians and Greens would have the State ignore these significant population changes.

The dissent in the Court of Appeals, on the other hand, suffers from a different fallacy. The dissent misunderstands the meaning of the challenged statute and the compelling interest advanced by the State (and found by the trial court); as a result, the dissent's analysis of whether the challenged statute is narrowly tailored to meet that compelling interest is flawed. The dissent describes the State's compelling interest this way: "[T]he State has a compelling interest in avoiding ballot confusion by requiring some preliminary modicum of support *before printing the name of a political party's candidate on the ballot.*" (Slip op. at 28) The dissent later continues:

The State, in asserting its compelling interest in avoiding confusion, deception, and even frustration of the democratic process in the general election, fails to provide any basis, rational or otherwise, for why ballot access pursuant to the 4% local requirement for unaffiliated candidates pursuant to N.C. Gen. Stat. § 163-122 or the 500 vote write-in candidate provision of N.C. Gen. Stat. § 163-123 does not cause these ballot problems. The State instead asserts that allowing these same candidates *the ability to identify their party on the ballot* somehow has the potential to cause substantial problems.

(Slip op. at 29-30) In other words, the dissent seems to be under the impression that N.C.G.S. § 163-96(a)(2) has to do with whether a candidate can identify the party to which he or she belongs and nothing more. To the contrary, N.C.G.S. § 163-96(a)(2) addresses how a party may be recognized and entitled to nominate candidates for *all* partisan elections that may be on any ballot in North Carolina. It is not about a candidate identifying his or her own party at all; it is about a party nominating a slate

of candidates for all offices.¹⁰ The fact that a party can nominate candidates for all partisan elections goes directly to the potential problems, recognized by the Libertarians and Greens' own expert, posed if too many recognized parties result in an over-long and unwieldy ballot. The issue presented by this case has to do with whether a potential new party should be recognized by the State and should be allowed to nominate candidates for all partisan elections; it has nothing to do with whether any one given candidate should be able to identify the party to which he or she belongs.

The trial court properly determined that the challenged statutes are constitutional and the Court of Appeals properly affirmed that determination. The majority below also appropriately recognized that in arguing that the challenged statute is not narrowly tailored, the Libertarians and Greens are really asking the judiciary to substitute its judgment for that of the people's representatives in the General Assembly. *Amici* The Southern Coalition for Social Justice, et al., essentially make the same argument – that the courts should decide policy. This is not, of course, the role of the courts. As the majority noted:

The legislative department is the judge, within reasonable limits, of what the public welfare requires, and the wisdom of its enactments is not the concern of the courts.” *State v. Warren*, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960). “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.” *Id.*

(Slip op. at 19) For all these reasons, appellants' argument should be rejected.

¹⁰ Recognition as a political party, of course, incurs other benefits, including having the State or counties conduct the party's primary election and receiving public funding from tax designations. N.C.G.S. § 105-159.1, §§ 163-105, -278.41.

CONCLUSION

For the foregoing reasons, defendants respectfully submit that plaintiffs and intervenors received a fair trial, free of prejudicial error, and pray that the judgment below be affirmed.

Respectfully submitted, this the 5th day of April, 2010.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **NEW BRIEF OF DEFENDANTS-APPELLEES** in the above titled action upon all other parties to this cause by:

- Hand delivering a copy hereof to each said party or to the attorney thereof;
- Transmitting a copy hereof to each said party via facsimile transmittal; or
- Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

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