

No. 479A09

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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LIBERTARIAN PARTY OF NORTH)

CAROLINA, et al., )

Appellants, )

and )

THE NORTH CAROLINA GREEN )

PARTY, et al., )

Intervenors, )

v. )

STATE OF NORTH CAROLINA, )

et al. )

Appellees. )

\_\_\_\_\_)

From Wake County  
No. 05 CVS 13073

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AMICUS CURIAE BRIEF  
(North Carolina Institute for Constitutional Law)  
(Filed 8 March 2010)

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\*\*\*\*\*

BRIEF OF *AMICUS CURIAE*

\*\*\*\*\*

Pursuant to Rule 28(f) of the North Carolina Rules of Appellate Procedure,  
the North Carolina Institute for Constitutional Law hereby files its brief as *amicus*  
*curiae*.

## I. STATEMENT OF THE CASE

*Amicus Curiae* adopts by reference the Statement of the Case of Plaintiffs.

N.C. R. App. P. 28(f).

## II. STATEMENT OF THE FACTS

*Amicus Curiae* adopts by reference the Statement of the Facts of Plaintiffs.

N.C. R. App. P. 28(f).

## III. ARGUMENT

The Court of Appeals unanimously held that the fundamental rights of the plaintiffs were burdened and that strict scrutiny was the appropriate standard of judicial review. See *Libertarian Party of North Carolina, et al., v. State, et al.*, \_\_\_ S.E.2d \_\_\_, 2009 WL 3383035 (N.C. App. 2009). A majority of the lower court, however, held that the challenged statutes did not violate the North Carolina Constitution. Id. The dissent noted two primary errors of the majority opinion. First, the dissent disagreed with the majority's imposition of a presumption of constitutionality in favor of the State. Id. Second, the dissent found several examples of evidence which did not support the majority's holding that the statutes were the "least restrictive means" by which the State could have accomplished its objective. Id.

*Amicus Curiae* contends that the lower court erred in three aspects of its majority opinion, each of which imposes a significant impact on the constitutional jurisprudence of North Carolina and broadly weakens the fundamental constitutional rights of North Carolinians. The lower court erred when it: (1) applied a constitutional presumption in favor of the State while undertaking a strict scrutiny analysis; (2) held that the State's action was narrowly tailored to advance its interest; and (3) failed to construe the state constitutional provisions which protect and direct the electoral process in North Carolina.

**A. The presumption employed in a strict scrutiny analysis is against the State and in favor of the citizen.**

The lower court stated that the enactment challenged in this case burdened fundamental rights and that it “must be strictly scrutinized.” *Id.* It then concluded that the “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.’” *Id.* (quoting Guilford Cty. Bd. of Educ. v. Guilford Cty. Bd. of Elections, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993)). By invoking strict scrutiny and applying a presumption of constitutionality in favor of the State, the lower court erred.

Our state courts have traditionally employed two tiers of constitutional analysis: rational basis review and strict scrutiny review.<sup>1</sup> See Blankenship v. Bartlett, 363 N.C. 518, 526-28, 681 S.E.2d 759, 765-66 (2009).

When a governmental act classifies persons in terms of their ability to exercise a fundamental right, e.g., Kramer v. Union Free School District No. 15, 395 U.S. 621, 23 L. Ed. 2d 583, 89 S. Ct. 1886 (1969); Shapiro v. Thompson, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), or when a governmental classification distinguishes between persons in terms of any right, upon some “suspect” basis, e.g.; Bolling v. Sharpe, 347 U.S. 497, 98 L. Ed. 884, 74 S. Ct. 693 (1954), the upper tier of equal protection analysis is employed. Calling for “strict scrutiny”, this standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest. E.g., Memorial Hospital v. Maricopa County, 415 U.S. 250, 39 L. Ed. 2d 306, 94 S. Ct. 1076 (1974).

When an equal protection claim does not involve a “suspect class” or a fundamental right, the lower tier of equal protection analysis is employed. E.g., Vance v. Bradley, 440 U.S. 93, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979). This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate

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<sup>1</sup> This Court has previously utilized “rational basis” review, “intermediate scrutiny,” and “strict scrutiny.” See generally, Blankenship, 363 N.C. at 526-28, 681 S.E.2d at 765-66. These three tiers of review and the accompanying presumptions they carry may be generally understood as follows. “Under rational basis review, it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost. Stated differently, under the prevailing rational-basis test, the challenged law is presumed to be constitutional, and all a court need do is ask whether a sound justification of a law may be imagined. Intermediate scrutiny, like strict scrutiny, reverses the presumption. The government bears the burden of justifying its restrictions, and it must affirmatively establish the reasonable fit that the test requires. In other words, the public benefits of the restrictions must be established by evidence, and not just asserted; lawyers’ talk is insufficient.” United States v. Skoien, 587 F.3d 803, 814 (7th Cir. 2009) (internal citations and quotations omitted). See also, N. Fla. Women’s Health & Counseling Servs. v. State, 866 So. 2d 612, 625-626 n. 14-16 (Fla. 2003) (“Under ‘ordinary’ scrutiny, which applies to most legislation, a court must review the legislation to ensure that it bears a reasonable relationship to a legitimate State interest. The legislation is presumptively constitutional. . . . Under ‘mid-level’ scrutiny . . . a court must review the legislation to ensure that it is substantially related to an important government interest. The legislation is presumptively unconstitutional. Under ‘strict’ scrutiny, which applies inter alia to certain classifications and fundamental rights, a court must review the legislation to ensure that it furthers a compelling State interest through the least intrusive means. The legislation is presumptively unconstitutional.”).

governmental interest. E.g., *New Orleans v. Dukes*, 427 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976); *Hagans v. Lavine*, 415 U.S. 528, 39 L. Ed. 2d 577, 94 S. Ct. 1372 (1974).

*Texfi Industries, Inc. v. Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980).

The lower tier of analysis, rational basis, permits the government merely to demonstrate some rational relationship to a conceivable government objective and grants to the State a presumption in favor of constitutionality. *Id.* Strict scrutiny, on the other hand, is “this Court's highest tier of review. . . . Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest.” *Stephenson v. Bartlett*, 355 N.C. 354, 377-378, 562 S.E.2d 377, 393 (2002); see also *Northampton Cty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746, 392 S.E.2d 352, 355 (1990), *Texfi Indus., Inc.*, 301 N.C. at 11, 269 S.E.2d at 149.

Therefore, the constitutional question raised by the lower court in this case is whether legislative deference is appropriate in the context of strict scrutiny, as it is in rational-basis review. It is not.

Courts have consistently and clearly stated not only that a presumption of constitutionality is inappropriate in strict scrutiny analysis, but the counter-presumption – a presumption of unconstitutionality – is the rule of constitutional jurisprudence. “A strong presumption against constitutionality,” noted the United

States Supreme Court, is “often thought to accompany the words ‘strict scrutiny.’” Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring). Indeed, the United States Supreme Court has stated the rule even more starkly in reasoning that strict scrutiny imposes a “heavy burden of justification” on the State. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973). “[S]trict scrutiny means that the State's system is not entitled to the usual presumption of validity.” Id. Succinctly put, “[i]t is well settled that, quite apart from the guarantee of equal protection, if a law ‘impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.’” Harris v. McRae, 448 U.S. 297, 312 (1980) (quoting City of Mobile v. Bolden, 446 U.S. 55, 76 (1980) (plurality opinion); see also Vieth v. Jubelirer, 541 U.S. 267, 294-95 (2004) (“As is well known, strict scrutiny readily, and almost always, results in invalidation”).

In agreement with this well-formed constitutional doctrine, this Court has previously recognized that, when the Court engages a strict scrutiny analysis, the burden lies with the State to establish the constitutionality of its act, not with the plaintiff to establish its unconstitutionality: “a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest.” Stephenson, 355 N.C. at 377-378, 562

S.E.2d at 393 (emphasis added). Yet, the lower court stated in the act of imposing strict scrutiny that “[t]his [c]ourt presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality. . . . In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground.” Libertarian Party of N.C., \_\_\_ S.E.2d \_\_\_, 2009 WL 3383035. It was precisely this presumption that the lower court used as the primary basis upon which it refused to overturn the challenged statutes: “[b]ecause 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 . . . .” Id. (internal quotations omitted). The oft-repeated position of a long line of constitutional jurisprudence under both the state and federal constitutions, however, indicates that the only instance in which a presumption of constitutionality is properly afforded to the State is in rational-basis review. The lower court erred not only in applying a presumption of constitutionality to the State’s enactment, but in failing to apply a presumption against constitutionality.

**B. The means selected by the State to accomplish its interest are not “narrowly tailored” to accomplish only that objective.**

In addition to imposing a presumption of constitutionality, the lower court also erred in its application of strict scrutiny. Specifically, the lower court applied the narrowly tailored prong of its analysis in marked deviation from prior holdings of this Court and other courts.

The lower court unanimously held that the challenged enactment ““must be narrowly drawn to express only the legitimate interests at stake.”” Id. (quoting Treants Enters., Inc. v. Onslow Cty., 83 N.C. App. 345, 351, 350 S.E.2d 365, 369 (1986)). But in applying that test to the statutes before it, a majority of the court held, in somewhat circuitous language, that “we cannot agree with appellants’ assertion that . . . the State’s current 2% threshold is not narrowly tailored to meet the State’s compelling interest . . . .” Id. In arriving at this conclusion, the lower court substantially misapprehended and misapplied the narrowly tailored prong of the strict scrutiny analysis.

This Court has previously held that the application of strict scrutiny requires the State to demonstrate affirmatively that the challenged statute is “narrowly tailored” to advance a compelling state interest. Stephenson, 355 N.C. at 377-378, 562 S.E.2d at 393. Our Court of Appeals has agreed: to survive strict scrutiny, acts

of the legislature must be “narrowly drawn” to achieve “only the legitimate interests at stake.” Treants, 83 N.C. App. at 351, 350 S.E.2d at 369 (emphasis added).

The United States Supreme Court has similarly held that a statute which burdens fundamental constitutional rights must be “structured with precision” and be “tailored narrowly” to achieve its ends. San Antonio Indep. Sch. Dist., 411 U.S. at 16-17 (internal quotations omitted). “And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose “less drastic means.” Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (internal quotations omitted). A governmental “purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.” Shelton v. Tucker, 364 U.S. 479, 488 (1960). Thus, if a reviewing court finds a less restrictive means of accomplishing the objective, the statute cannot be upheld.

While the lower court purported to require the State to demonstrate that the burden it placed on fundamental constitutional rights was drawn precisely to accomplish only that objective, the court itself noted that a less restrictive means of

advancing the same state interest has, in fact, been employed by the State. “We recognize that the General Assembly’s former requirement that a group of voters collect the signatures of 10,000 registered voters is a considerably lower threshold than the State’s current 2% petition requirement.” Id. In the very next sentence of the majority opinion, the court held that the 2% requirement was as narrowly tailored as it could have been. Id. The lower court did not provide an explanation for how the State’s interest could both (1) be accomplished at a “considerably lower threshold” and (2) be the “least drastic means” available to accomplish its objective. Id. Rather, in attempting to resolve this tension, the lower court appeared to focus on the deference it believed it owed the Legislature, not the strict scrutiny it owed the plaintiffs.

As we recognized above, “[t]he 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. 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,” see Guilford Cty. Bd. of Educ., 110 N.C. App. at 511, 430 S.E.2d at 684, 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.

The lower court erred when it misunderstood and misapplied the narrowly tailored prong of the strict scrutiny analysis. The lower court, quite simply, failed to require that the challenged statutes in fact be the least restrictive means of assuring a preliminary modicum of public support before a third political party may be afforded the status of the primary two political parties. To reason, as the lower court did, that although the State has used and could not have used a less restrictive means of burdening a citizen's fundamental constitutional rights creates concerning constitutional precedent and weakens the standard of strict scrutiny itself.

**C. The Constitution of North Carolina provides additional rights to citizens and restrictions upon the State in the election process generally and the ability to run for political office specifically.**

The plaintiffs alleged at trial that the state statutes governing the recognition of political parties, including N.C. Gen. Stat. §§ 163-96(a)(1)-(2) and 163-97.1, violate the North Carolina Constitution under Article I, sections 1, 10, 12, 14, and 19, and Article VI, sections 1 and 6. These constitutional provisions restrict the regulation of candidates, parties, and the electoral process generally in ways that are distinct from and additional to the United States Constitution. The Court of Appeals, however, declined to address plaintiffs' claims under Article I, sections 1

and 10 or under Article VI, sections 1 and 6, and instead relied only on those provisions of the North Carolina Constitution which it deemed to run parallel with the federal constitution. See Libertarian Party of N.C., \_\_\_ S.E.2d \_\_\_, 2009 WL 3383035.

The lower court majority relied on two sources of authority in analyzing whether the statutes were narrowly tailored: (1) McLaughlin, a federal case which addressed a challenge solely under the federal constitution, and (2) citations in McLaughlin itself to decisions of federal courts construing the law of other states (e.g. Texas and Georgia) under the federal constitution. Id. In so doing, the lower court erred in failing to squarely address plaintiffs' claims that their rights had been violated under the North Carolina Constitution.

The lower court relied heavily on McLaughlin v. N.C. Bd. of Elections, 65 F.3d 1215 (1995). McLaughlin, however, construed only the meaning and application of the First and Fourteenth Amendments to the United States Constitution to North Carolina's then-existing election laws. Id. at 1218 (reviewing whether "the North Carolina election laws unconstitutionally deprive [the plaintiffs] of rights guaranteed by the First and Fourteenth Amendments" of the federal constitution). No provisions of the North Carolina constitution were analyzed, interpreted, or applied in McLaughlin or in any of the cases on which

McLaughlin relied. Thus, the lower court neglected not only to interpret relevant provisions of the North Carolina Constitution, but it neglected to interpret the North Carolina Constitution as a discrete body of law, which is best interpreted in the context of other provisions of the North Carolina Constitution. “The best way to interpret the meaning of a word or sentence in the [North Carolina] Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected.” State v. Emery, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944).

When construing provisions of the North Carolina Constitution that have federal counterparts, “the only significant issue for this Court . . . will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision.” State v. Jackson, 348 N.C. 644, 648, 503 S.E.2d 101,103 (1998). Furthermore, even when the provisions of the federal constitution are precisely parallel, “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.” The lower court correctly noted that “[the Court of Appeals] cannot construe the provisions of the North Carolina Constitution to accord the citizens of

North Carolina any lesser rights than those which they are guaranteed by the parallel federal provisions in the federal Constitution.” State v. Carter, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988). “Only this Court may authoritatively construe the Constitution and laws of North Carolina with finality.” Lea Co. v. N.C. Bd. of Transp., 308 N.C. 603, 610, 304 S.E.2d 164, 170 (1983).

The Constitution enacted by the people of North Carolina is a unique body of law which grants separable and additional constitutional rights to North Carolina citizens and imposes distinct and nuanced requirements on how the State may and may not regulate the electoral process. The North Carolina Constitution, in addition to providing rights of free association, free speech, and equal protection, also requires that (1) “[a]ll elections shall be free,” (2) all constitutionally eligible North Carolina citizens “shall be entitled to vote at any election by the people of the State,” and (3) every North Carolina citizen “shall be eligible for election by the people to office,” except when disqualified by the North Carolina Constitution. N.C. Const. art. I, § 10 and art. VI, §§ 1 and 6. Such provisions are entirely absent in the United States Constitution.

Whatever their ultimate meaning as construed by this Court, the import of these Constitutional provisions is clear: North Carolina grants broader and supplemental rights to voters and candidates in North Carolina and places different

limitations on the actions of state government than does the United States Constitution. The lower court, however, construed the North Carolina Constitution to provide no different rights than the federal constitution and reached its conclusion based on the decisions of courts in other jurisdictions construing the rights provided under other constitutions.

“All political power is vested in and derived from the poeple, all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.” N.C. Const. art. I, § 2. The lower court erred in failing to construe the Constitution of North Carolina as the distinct and supreme legal document by which the people of North Carolina granted power to its State government. See, e.g. N.C. Const. article I, §§ 2 and 10, and article VI, §§ 1 and 6. We respectfully request that this Court make the “frequent recurrence to fundamental principles,” which our Constitution holds to be “absolutely necessary to preserve the blessings of liberty,” and interpret the meaning and application of the Constitution of North Carolina to the citizens of North Carolina. See N.C. Const. art. I, § 35.

### CONCLUSION

For the reasons stated above, the North Carolina Institute for Constitutional Law requests that this Court reverse the Court of Appeals, apply strict scrutiny to

the challenged statutes, and hold that the challenged statutes violate the Constitution of North Carolina.

Respectfully submitted this 8th day of March, 2010.

NORTH CAROLINA INSTITUTE FOR  
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**CERTIFICATE OF COMPLIANCE**

This brief has been prepared using:

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Exclusive of the Index, Table of Authorities, Certificate of Compliance, and the Certificate of Service, this brief contains fewer than 3,750 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 8th day of March, 2010.

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**CERTIFICATE OF SERVICE**

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

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