

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 007955

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WAKE COUNTY, C.S.C.

HOPE-A WOMEN'S CANCER CENTER,)
P.A., and RALEIGH ORTHOPAEDIC)
CLINIC, P.A.,)

Plaintiffs,)

vs.)

STATE OF NORTH CAROLINA,)
et al.,)

Defendants.)

and)

ASHEVILLE RADIOLOGY)
ASSOCIATES, P.A., et al.,)

Defendant-Intervenors)

BY _____

MOTION FOR LEAVE TO FILE
BRIEF AS *AMICI CURIAE*

NOW COME the undersigned counsel for the Alliance Defense Fund ("ADF"); the American Civil Liberties Union of North Carolina Legal Foundation ("ACLU-NCLF"); the Center for Responsible Lending ("CRL"); the Financial Protection Law Center ("FPLC"); the Natural Resources Defense Council, Inc. ("NRDC"); the North Carolina State Conference of Branches of the National Association for the Advancement of Colored People ("NC Conference"); the North Carolina Justice Center ("Justice Center"); the Rutherford Institute; the Southern Coalition for Social Justice ("SCSJ"); and the Southern Environmental Law Center ("SELC") (collectively, "*Amici*"), who respectfully move for an Order permitting counsel for these organizations to file an *amici curiae* brief in opposition to the Amended Motion to Disqualify, filed by defense counsel

in the above case on January 9, 2009. In support of this motion, undersigned counsel state as follows:

I. THE INTEREST OF THE *AMICI* IN THIS CASE

Amici are particularly interested in the Amended Motion to Disqualify filed in the case at bar. The State's assertion in that Motion regarding the appropriate interpretation of state statutory prohibition on corporations practicing law is directly contrary to years of practice in this state by attorneys on behalf of non-profit corporations engaged in public interest law and would implicate the First Amendment rights of all individuals in North Carolina to be represented in court by attorneys employed by a variety of non-profit corporations. *Amici* seek to bring to the Court's attention the fact that, for good reason, no other state considering similar prohibitions on the practice of law by corporations has ever concluded that attorneys employed by non-profit corporations engaged in public interest litigation are disqualified from appearing on behalf of third parties in court proceedings.

A. The Alliance Defense Fund

ALLIANCE DEFENSE FUND ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties and family values. ADF and its allied organizations represent hundreds of thousands of Americans who believe strongly in these topics, and who have a right to express those views through this nation's political process. ADF's allies include more than 1,200 lawyers and numerous public interest law firms, many of whom have been recently pressed into service to represent individuals and organizations being harassed for expressing their viewpoints in the political arena.

ADF has advocated for the rights of Americans to exercise their religious beliefs and to express those beliefs in the political arena. ADF has been directly or indirectly involved in at least 500 cases and legal matters, including cases before this Court such as *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); and *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000).

B. The American Civil Liberties Union of North Carolina Legal Foundation

The American Civil Liberties Union of North Carolina Legal Foundation (“ACLU-NCLF”) is a statewide, nonprofit, nonpartisan organization dedicated to defending the constitutional rights of North Carolina residents through educational programs, public statements, opinion letters to public officials, and litigation. The ACLU-NCLF is a 501(c)(3) non-profit corporation, incorporated in North Carolina in 1969. For nearly 40 years, the ACLU-NCLF has been a vigilant defender of the protections afforded by the First Amendment to the United States Constitution, both in federal and state courts in North Carolina. As a result, the ACLU-NCLF has developed special expertise in this area of law.

ACLU-NCLF does not charge its clients any fees. In addition, it has a board of directors that represents the public interest and approves litigation proposed by its attorneys, but the board does not influence the conduct of the litigation once approved or interfere in any way in the relationship between the attorneys and the clients they represent. The litigation promotes the broad public interest of protecting the constitutional rights and not the financial interests of the clients. Without ACLU-NCLF’s representation, its clients likely would not have the means to pursue the litigation, and the constitutional rights of all North Carolinians would suffer as a result.

In addition to litigation regarding other constitutional rights, current and recent ACLU-NCLF free speech and free association cases include the following:

- In Fall 2008, ACLU-NCLF Legal Director Katherine Parker successfully defended a street musician who received a criminal citation for panhandling in the City of Wilmington. The New Hanover County district court struck down Wilmington's panhandling statute as unconstitutional under the First Amendment, both on its face and as applied to the defendant. *State v. Barbeau*, No. 08 CR 12362 (New Hanover County Dist. Ct. Nov. 3, 2008).
- Through partnership between Legal Director Parker and ACLU-NCLF cooperating attorneys, the ACLU-NCLF is currently challenging the State of North Carolina's ballot access laws, alleging, *inter alia*, that the ballot access scheme in North Carolina is unconstitutional under the free speech clause of the North Carolina Constitution. This case, in which ACLU-NCLF represents the North Carolina Green Party, is currently on appeal to the North Carolina Court of Appeals. *Libertarian Party of North Carolina, et al. v. State of North Carolina, et al.*, No. COA08-1413.
- Through partnership between Legal Director Parker and ACLU-NCLF cooperating attorneys, the ACLU-NCLF, recently filed suit in the United States District Court for the Eastern District of North Carolina, challenging the State of North Carolina's laws that impose a year-round total prohibition on certain state campaign contributions by lobbyists. This lawsuit alleges that these laws violate the plaintiff's rights to free speech and association under the First Amendment. *Preston v. Leake, et al.*, No. 5:08-CV-397-FL (E.D.N.C.).
- Most recently, on January 5, 2009, through partnership between Legal Director Parker and ACLU-NCLF cooperating attorneys, the ACLU-NCLF filed a First Amendment lawsuit in the Superior Court of Wilkes County against Wilkes County Schools on behalf an organization seeking meaningful access to the Wilkes County high schools to offer factual information regarding career opportunities, including military careers, to interested students. *North Carolina Peace Action, Inc., et al. v. Wilkes County School District, et al.* (Wilkes County Sup. Ct.).

C. The Center for Responsible Lending

The Center for Responsible Lending ("CRL"), founded in 2002, is a non-profit 501(c)(3) corporation headquartered in Durham, with additional offices in Washington, D.C. and Oakland, California. CRL is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive lending practices pertaining to home mortgages and other consumer loans. CRL is an affiliate of Self-Help, the

Durham-based non-profit lender with branches across North Carolina that has provided since its founding in 1980 more than \$5 billion in financing to help over 50,000 low-wealth borrowers buy homes, build businesses, and strengthen community resources. Long before the abuses in subprime mortgage lending became widely apparent and depressed American economic growth, CRL sought to focus the public's and policymakers' attention on these problems. Since its founding, the organization's policy work has had a strong focus on lending practices in North Carolina, and these efforts have helped North Carolina to have some of the nation's strongest laws restricting abusive lending.

As one means of combating abusive lending practice, CRL employs a litigation team in its Washington office that appears in state and federal courts to represent individual borrowers who have been the victim of predatory lending. CRL's litigation team, which includes a North Carolina-licensed attorney, particularly looks to represent clients in states that are the focus of the organization's policy efforts, including North Carolina. The organization, therefore, believes it is essential to its mission that the litigators it employs can represent borrowers in North Carolina courts.

CRL also partners with and provides support to North Carolina non-profit organizations that represent the victims of predatory lending in North Carolina courts. Non-profit organizations serve as the only potential source of representation for most of the North Carolina borrowers harmed by predatory lending. CRL, therefore, also believes it is essential to its mission of protecting North Carolinians against predatory lending that non-profit organization can represent clients in North Carolina courts.

D. The Financial Protection Law Center

The Financial Protection Law Center (“FPLC”) is a North Carolina nonprofit public interest law firm devoted to advocacy against predatory lending. FPLC pursues its mission by defending lower income clients in foreclosure proceedings and in bringing individual and class action litigation on behalf of homeowners and consumers who are victims of predatory lending practices. FPLC routinely provides consumer law trainings and continuing legal education events throughout the country to educate lawyers, housing counselors and the public about predatory lending issues.

E. The Natural Resources Defense Council

The Natural Resources Defense Council, Inc. (“NRDC”) is a 501(c)(3) not-for-profit membership corporation founded in 1970 and organized under the laws of the State of New York. NRDC has 400,000 members nationwide, including over 9,200 who live in North Carolina. NRDC is dedicated to protecting public health and the environment. In furtherance of this mission, NRDC’s staff attorneys provide free legal representation to NRDC members and to other national, state, and local organizations in federal and state courts and in federal and state administrative proceedings, including cases in North Carolina. NRDC has been certified by the North Carolina Secretary of State to conduct affairs as a corporation in North Carolina. Attorneys on the staff of *amicus* SELC also represent NRDC’s members in North Carolina state environmental proceedings. Without such representation, NRDC’s members and clients would not be able to protect and advance their interests in North Carolina’s environmental quality.

F. The North Carolina State Conference of Branches of the National Association for the Advancement of Colored People

The North Carolina State Conference of Branches of the National Association for the Advancement of Colored People (“NC Conference”) is a non-partisan, non-profit

organization incorporated in North Carolina in 1957. The organization is composed of over 100 branches and 20,000 individual members throughout the state of North Carolina. The NC Conference has members who are citizens, residents and registered voters in each of the state's 100 counties. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias. In furtherance of this mission, the NC Conference uses legal advocacy in a variety of forums advocates to protect and advance the interests of the African-American community. The NC Conference and its members potentially will be impaired and impeded in the protection of their rights by the disposition of this motion.

As part of its mission to overcome historical discrimination against African-American voters in the state, and securing access to the ballot for its members, the NC Conference is also concerned with ensuring that the voting strength of minority voters is not unfairly diluted by election structures that, in the presence of continued racially polarized voting, prevent minority voters from electing representatives of choice. Local NC Conference branches have filed and defended numerous redistricting cases under Section 2 of the Voting Rights Act, 42 U.S.C. §1973 (2007), throughout the state to ensure that minority voters have an equal opportunity to participate in the election process for local governing bodies. In addition, NC NAACP branches have advocated against changes in election methods that would be retrogressive during the preclearance process under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c) (2007).

G. The North Carolina Justice Center

The North Carolina Justice Center (“Justice Center”) is a statewide, non-profit legal advocacy organization, incorporated in North Carolina on December 28, 1982, as the North Carolina Legal Services Resource Center, Inc. The corporation was not formed for pecuniary gain or financial profit. The overall mission of the Justice Center is to secure economic justice for disadvantaged persons and communities in North Carolina. To help accomplish this mission, the Justice Center conducts litigation on behalf of indigent individuals and groups in North Carolina in major civil actions, including those involving consumer and health issues, public benefit programs, and education. Current and recent cases which Justice Center attorneys have filed as counsel or co-counsel include:

- *Kucan et al. v. Advance America*, _N.C. App._, 660 S.E.2d 98 (2008) challenging the legality of payday lending in this state and seeking the return of illegal fees and interest paid by borrowers.
- *Sanders, et al. v. State Personnel Commission*, 183 N.C. App. 15, 644 S.E.2d 10, *disc. rev. denied*, 361 N.C. 696, 652 S.E.2d 653 (2007), challenging the State’s failure to provide benefits to “temporary” state workers who have been employed for more than 12 consecutive months.
- *Heatherly v. State of North Carolina*, _N.C. App. _ , 658 S.E.2d 11 (2008), challenging the constitutionality of the process in which the Lottery Act was enacted.
- *De Luna-Guerrero v. North Carolina Growers Association*, 370 F.Supp.2d 386 (E.D.N.C. 2005), a bilateral class action on behalf of more than 15,000 H2A farmworkers in North Carolina, successfully asserting their rights to receive travel and visa expenses.
- *Antrican v. NC DHHS (now styled McCree v. Odom)* (290 F.3d 178 (4th Cir. 2002), *cert. den’d*, 537 U.S. 973 (2002). Statewide class action lawsuit against North Carolina State Medicaid officials, alleging that the Medicaid program was not adequately addressing the dental needs of North Carolina’s poor children.

The Justice Center does not charge its clients any fees. In addition, it has a board of directors that represents the public interest. The board does not influence the conduct

of the litigation or interfere in any way in the relationship between the attorneys and the clients they represent. The litigation promotes the broad public interest of securing economic justice for disadvantaged persons and communities in North Carolina. Without the Justice Center's representation, its clients likely would not have the means to pursue the litigation, and the extent of fairness and economic justice afforded to disadvantaged persons and communities in North Carolina would suffer as a result.

H. The Rutherford Institute

The Rutherford Institute is an international civil liberties and human rights organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated. The Institute also strives to educate the public about constitutional and human rights issues. During its 26-year history, attorneys affiliated with the Institute have represented numerous parties in state and federal courts, as well as before the U.S. Supreme Court. The Rutherford Institute is a non-profit corporation created under the laws of the Commonwealth of Virginia and is recognized as a tax-exempt 501(c)(3) organization by the Internal Revenue Service. The Institute is regularly contacted by residents of North Carolina seeking pro bono legal assistance on issues involving individual rights, and has in the past, and desires in the future, to provide North Carolina residents with legal counsel and representation.

I. The Southern Coalition for Social Justice

The Southern Coalition for Social Justice ("SCSJ") is a non-profit organization incorporated in North Carolina on August 10, 2007 for charitable purposes. The Internal Revenue Service has determined that SCSJ is an exempt organization pursuant to Section

501(c)(3) of the Internal Revenue Code. The organization's by-laws provide that SCSJ's purpose is to provide relief for the poor, to eliminate prejudice and discrimination, and to defend human and civil rights secured by law through the provision of free and below cost legal services to indigent and underprivileged individuals and charitable organizations in the southern United States otherwise financially incapable of obtaining such legal assistance from existing legal services organizations and the private bar. SCSJ promotes justice by empowering minority and low-income communities to defend and advance their political, social and economic rights. We use the combined skills of lawyers, social scientists, community organizers and media experts to help underrepresented people develop strategies to achieve their visions for themselves and their communities, incorporating an international human rights perspective and linking their efforts to broader processes of political, legal, social and economic change in the South.

SCSJ promotes this mission in part by having lawyers duly qualified to practice law in North Carolina to provide legal representation for individuals and organizations in administrative proceedings, state trial and appellate level proceedings and in federal courts. The litigation promotes community-based goals and interests, including advancing voting rights and civic participation, ensuring fairness in the administration of the criminal justice system, human rights for all including undocumented immigrants, environmental justice, greater community access to media tools, and implementing remedies for heirs' property problems that increase the racial wealth gap. As a 501(c)(3) corporation, SCSJ complies with the rules governing public interest law firms, including IRS Rev. Proc. 92-59, 1992 C.B. 411 (July 20, 1992).

In addition, SCSJ has a board of directors that represents the public interest and reviews litigation undertaken by its attorneys, but the board does not decide which cases are filed, influence the conduct of the litigation or interfere in any way in the relationship between the attorneys and the clients they represent. The litigation promotes the broad public interest of community empowerment and the specific policy goals listed above and not solely the private financial interests of individual clients. SCSJ's attorneys represent clients and communities who otherwise would not have the advantage of legal advice and whose rights and interests would not have a voice in the legal system.

Illustrative cases undertaken by SCSJ's attorneys include:

- *Rivers v. Gilbert, et al.*, Pasquotank County Superior Court, No. 08-CVS-309. Petitioner Rivers is an African-American city councilman whose right to vote in his ward was challenged by a citizen who alleged that he no longer lived in the ward from which he was elected. At stake in this case was the ability of Mr. Rivers to represent the constituents who elected him. SCSJ's attorneys represented Mr. Rivers in administrative hearings before the Pasquotank County Board of Elections and in this appeal to Superior Court, all of which ultimately established that Mr. Rivers is legally domiciled in the ward from which he was elected and he is legally entitled to represent the voters who elected him.
- *Dean v. Leake*, U.S. District Court, Eastern District of North Carolina, No. 2:07-CV-5. This is an action challenging the redistricting plan for the North Carolina legislature on numerous grounds, including a claim that the plan constitutes a racial gerrymander. SCSJ's attorneys represent the North Carolina NAACP as Defendant-Intervenors in the case. The NAACP believes that the ability of its members to participate equally in the political process may be impaired by a ruling for the Plaintiffs in this matter and seeks to ensure that the voting strength of minority voters is not unfairly diluted by election structures that, in the presence of continued racially polarized voting, prevent minority voters from electing representatives of choice.
- *Freeman Beach, LLC v. Williams, et al.*, New Hanover County Superior Court, No. 08-SP-1038. At issue in this partition action are approximately 180 acres of undeveloped waterfront property at the northern end of Carolina Beach. The original owner of the land was a notable free black man during slavery times and a brilliant entrepreneur-agriculturist, Alexander Freeman. In the 20th century, Freeman Beach was well-known as the beach, across from Seabreeze, where African Americans could enjoy the ocean front. The City of Carolina Beach has converted 143 acres of the ocean-front beach to a park known as Freeman Park. The partition action is filed by a developer, who claims to own approximately 72% interest in the land. SCSJ's attorneys represent

Freeman family members who are looking for a way to preserve the unique cultural heritage and natural beauty of this rare strip of undeveloped beach front property.

J. The Southern Environmental Law Center

The Southern Environmental Law Center (“SELC”) has been the Southeast’s leading environmental public interest law firm for over 22 years. It is a 501(c)(3) non-profit corporation and was incorporated in North Carolina on November 8, 1985. It is supported by thousands of donors in the Southeast and elsewhere. SELC works to improve the quality of the environment in North Carolina, as well as Virginia, Tennessee, South Carolina, Georgia, and Alabama. SELC defends the region’s most sensitive natural resources, including its clean air, water, forests, and coasts, from abuses and ensures their protection for future generations. With offices across the Southeast and Washington, DC, SELC’s staff of 70 includes some of the nation’s top environmental law and policy experts. These dedicated attorneys provide free legal representation to dozens of state, local, and national organizations, bolstering their effectiveness and helping achieve their common goals of improved environmental protection.

SELC currently has twelve attorneys working in its office in Chapel Hill, North Carolina, and two attorneys in its Asheville, North Carolina office; in addition, two lawyers in its Charleston, South Carolina, office are also licensed to practice law in North Carolina and occasionally appear in the courts of this state. In the last three years alone, SELC has represented the following clients, among others, in North Carolina state and federal courts and before the North Carolina Office of Administrative Hearings and North Carolina Utilities Commission: American Academy of Pediatrics, American Rivers, American Nurses Association, American Public Health Association, Appalachian Voices, The Audubon Society, Carolinas Clean Air Coalition, Catawba Riverkeeper Foundation,

City of Rockingham, Clean Water North Carolina, Conservation Council of North Carolina, Covenant with North Carolina's Children, Defenders of Wildlife, Environmental Defense Fund, Environment North Carolina, Haw River Assembly, National Parks Conservation Association, Natural Resources Defense Council, Neuse River Foundation, Inc., New River Foundation, Inc., North Carolina Coastal Federation, North Carolina Conservation Network, North Carolina Sustainable Energy Association, Pamlico-Tar River Foundation, Physicians for Social Responsibility, River Link, Sierra Club, Southern Alliance for Clean Energy, and Western North Carolina Alliance.

Under federal law, SELC must exist as a 501(c)(3) corporation, and it complies with the rules governing public interest law firms, including IRS Rev. Proc. 92-59, 1992 C.B. 411 (July 20, 1992). Consistent with those rules, SELC does not charge its clients any fees. In addition, it has a board of directors that represents the public interest, and it has a legal committee of the board that reviews and approves all litigation proposed by attorneys to assure it is in the public interest. The board does not influence the conduct of the litigation once approved or interfere in any way in the relationship between the attorneys and the clients they represent. The litigation promotes the broad public interest of improving environmental quality and not the financial interests of the clients. Without SELC's representation, its clients, who are primarily non-profit entities themselves, likely would not have the means to pursue the litigation, and the quality of North Carolina's environment would suffer as a result.

Among SELC's most significant recent victories in promoting and protecting the quality of North Carolina's environment are:

- SELC successfully challenged three permits that would have allowed increased discharges of polluted stormwater into a tributary of the Rocky River near Charlotte, and set a precedent for stronger water protections around the state. *North Carolina Wildlife Federation v. NC DENR*,

Division of Water Quality, No. 05 EHR 2055/06 EHR 0164 (Envtl. Mgmt. Comm'n, filed Mar. 7, 2007) (Final Agency Decision).

- SELC successfully halted construction of a vacation home development that would have allowed the discharge of polluted stormwater into valuable shellfish waters. *North Carolina Coastal Federation v. NC DENR, Division of Water Quality*, No. 07 EHR 0777 (Envtl. Mgmt. Comm'n, filed July 10, 2008) (Final Agency Decision). SELC also helped convince the General Assembly to enact tougher controls for discharges of polluted stormwater into shellfish waters.
- SELC intervened and successfully enforced the state law prohibiting the use of permanent hardened structures to control beach erosion. *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217; 517 S.E.2d 406 (1999).
- SELC won a unanimous ruling against Duke Energy in the U.S. Supreme Court. The Court held that utilities cannot increase their emissions of old, coal-burning power plants without installing modern pollution controls. *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 127 S. Ct. 1423 (2007).
- SELC won a lawsuit to prevent the U.S. Navy from building a landing field for jet fighter training next to Pocoson Lakes National Wildlife Refuge. *National Audubon Society v. Department of the Navy*, 422 F.3d 174 (4th Cir. 2005).
- SELC won a ruling that requires power plants permitted under EPA's unlawful Clean Air Mercury Rule to implement the maximum achievable controls on toxic mercury and other hazardous air pollution all new and existing power plants to implement the maximum achievable controls on toxic mercury emissions. *Southern Alliance for Clean Energy v. Duke Energy Carolinas, LLC*, No. 1:08CV318 (W.D.N.C. Dec. 2, 2008) (order denying Duke's motion to dismiss and granting summary judgment in favor of plaintiffs).

II. REASONS WHY AN AMICUS BRIEF IS DESIRABLE AND WHY THE MATTERS ASSERTED ARE RELEVANT TO THE CASE

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people to peaceably assemble . . ." U.S. CONST. amend. I. Additionally, the North Carolina Constitution provides that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained . . ." N.C. CONST. Art.

I, § 14. The state Constitution also protects the people's "right to assemble together to consult for their common good . . ." N.C. CONST. Art. I, § 12. An *amici* brief in the instant case is desirable because the First Amendment rights to freedom of speech and of association of Plaintiffs' counsel, *Amici*, and, indeed, all non-profit corporations who litigate issues of important public concerns are implicated by Defendants' pending Amended Motion to Disqualify.

In the Amended Motion to Disqualify, Defendants seek to disqualify counsel for Plaintiffs simply because they are employees of a non-profit corporation. Am. Motion to Disqualify at ¶ 11. The Motion seeks to disqualify counsel from representing the Plaintiffs in this case by arguing that such attorneys are barred from practicing law by a statutory ban on corporations practicing law. *Id.* A court decision accepting the Defendants' unprecedented interpretation of this rule to apply to non-profit corporations would violate Plaintiffs' counsel's First Amendment rights, as well as the First Amendment rights of Plaintiffs themselves, *Amici Curiae*, and other similarly situated attorneys and non-profit corporations. *NAACP v. Button*, 371 U.S. 415, 416 (1963); *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217 (1967); *In re Primus*, 436 U.S. 412 (1978); *Frye v. Tenderloin Housing Clinic, Inc.*, 38 Cal. 4th 23, 129 P.3d 408, 40 Cal.Reptr.3d 221 (2006); *In re N.H. Disabilities Rights Center*, 541 A.2d 208, 213 (N.H. 1998) (Souter, J.); *In re Amendment to S.J.C. Rule 3:07* 495 N.E.2d 282, 286 (Mass. 1986).

III. AMICI PARTICIPATION IN TRIAL COURT PROCEEDINGS

Where no specific rule permits nor prohibits *amicus* participation in the trial court, a trial judge is well within his authority to permit such participation if it may be helpful to the court. *See e.g., Parsons v. State, Dept. of Social and Health Services*, 118

P.3d 930, 934 (Wash. App. 2005); *State ex rel. Com'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 758 (Tenn.App. 2001); *Cook v. South Carolina Dept. of Highways and Public Transp.*, 420 S.E.2d 847, 849-50 (S.C. 1992). Indeed, it has been held to be a “commendable practice, in interest of justice, for a court to utilize all available assistance by its own legal officers.” *Thompson v. Fayette County*, 302 S.W.2d 550, 552 (Ky. 1957) (pointing out that the “practice has been approved in other jurisdictions”).

Amici curiae are drawn from the ranks of persons who care about the legal principles that apply in the suit before the court, *Atlantic Mut. Ins. Co. v. Northwest Airlines, Inc.*, 24 F.3d 958, 961 (7th Cir.1994); *Russell v. Board of Plumbing Exam'rs*, 74 F. Supp.2d 349, 351 (S.D.N.Y. 1999), but who do not have the right to appear in the suit as a party. *Giammalvo v. Sunshine Mining Co.*, 644 A.2d 407, 410 (Del 1994). They need not be completely disinterested in the outcome of the case. *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 728 (D.Md.1996); *Concerned Area Residents for the Env't v. Southview Farm*, 834 F. Supp. 1410, 1413 (W.D.N.Y.1993).

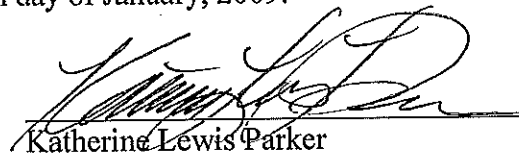
There is ample precedent for North Carolina superior courts to accept briefs of *amici curiae* in significant cases. *See, e.g., Bizzell v. Great Amer. Ins. Co.*, 248 N.C. 294, 297, 103 S.E.2d 348, 351 (1958) (noting that *amici* had participated at trial level after being invited by the courts and the parties); *Haugh v. County of Durham*, 7 CVS 6365 (Durham County); *Hoke County Bd. of Educ. v. State Bd. of Educ.*, 95 CVS 1158 (Wake County); *Friday Temp. Servs. v. Comm'r of Labor*, 96 CVS 1924 (Buncombe County); *See also United States v. Ward*, 618 F. Supp. 884, 914 (E.D.N.C. 1985) (federal district court allowing participation by *amicus curiae* despite lack of rule of civil procedure governing such briefs).

In the present case, *Amici* do care about the legal principles that apply in the suit before the Court, and are particularly well-situated to promote the ends of justice by helping illuminate the issues for the Court. Each of *Amici* is either formed for the specific purpose of defending and promoting the constitutional rights of citizens, or is vested in the ability of non-profit corporations to work for the public good through the use of litigation and other such means, or both.

IV. CONCLUSION

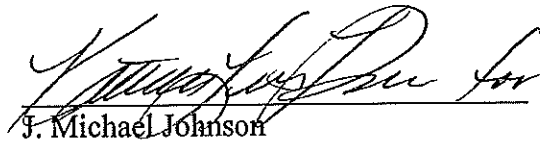
For the above reasons, the Alliance Defense Fund; the American Civil Liberties Union of North Carolina Legal Foundation; the Center for Responsible Lending; the Financial Protection Law Center; the North Carolina State Conference of Branches of the National Association for the Advancement of Colored People; the North Carolina Justice Center; the Rutherford Institute; the Southern Coalition for Social Justice; and the Southern Environmental Law Center, respectfully request that the Court grant them leave to file an *amici curiae* brief in this matter. The proposed brief is attached to this Motion as Exhibit "A." *Amici* also request five minutes of oral argument on this issue during the hearing scheduled on Friday, January 23, 2009.

Respectfully submitted this the 16th day of January, 2009.



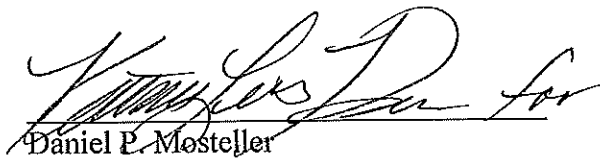
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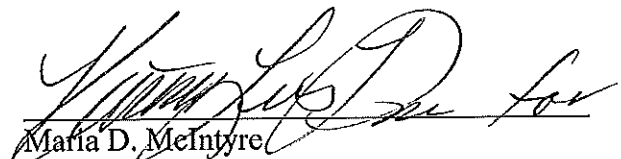
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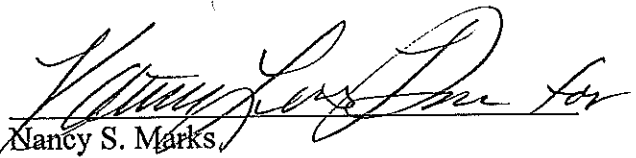
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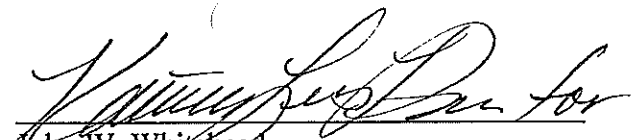
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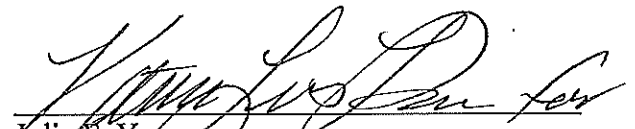
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A copy of the foregoing motion for leave to file a brief as *Amici Curiae* has this day been served via electronic and United States Mail, postage prepaid, and properly addressed to:

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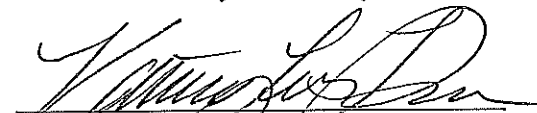
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This the 16th day of January, 2009.


Katherine Lewis Parker

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 007955

HOPE-A WOMEN'S CANCER CENTER,)
P.A., and RALEIGH ORTHOPAEDIC)
CLINIC, P.A.,)

Plaintiffs,)

vs.)

STATE OF NORTH CAROLINA,)
et al.,)
Defendants.)

and)

ASHEVILLE RADIOLOGY)
ASSOCIATES, P.A., et al.,)

Defendant-Intervenors)

BRIEF OF *AMICI CURIAE* OPPOSING
DEFENDANTS' AMENDED MOTION TO
DISQUALIFY

I. INTEREST OF *AMICI CURIAE*

Amici Curiae are representative of the many diverse non-profit corporations, including North Carolina corporations and others with a national presence and scope, whose staffs include attorneys who represent third parties in public interest litigation in North Carolina's state and federal courts. As more fully described in the accompanying Motion for Leave to File Brief as *Amici Curiae*, attorneys for each amicus party engage in legal representation, for charitable and public purposes, of individuals and organizations, both unincorporated and incorporated, in order to assert their clients' rights and interests and to use litigation appropriately to advance the social goals and broad public interests supported by each organization. The non-profit corporations participating in this diverse coalition have several things in common: 1) each has qualified for



and received tax-exempt status under section 501(c)(3) of the Internal Revenue Code; 2) each employs staff attorneys who conduct their legal representation of clients in a manner consistent with the public interest and their ethical responsibilities as members of the bar; 3) each pursues a mission based on the achievement of social goals for various classes of citizens on matters of a broad public interest; and 4) each is bound to abide by a strict set of rules regarding acceptance of any fees awarded for their litigation successes. Although some *Amici* may limit their representation to low-income persons or organizations consisting of mostly low-income persons, all *Amici* share an interest in safeguarding the First Amendment rights of organizations and individuals in North Carolina.

Amici have an interest in ensuring that certain of Plaintiffs' Counsel are not disqualified from participating in the case on the ground that they are employed by a non-profit corporation because such a ruling would be contrary to years of practice in this state, contrary to well-settled law from around the country, and would violate rights protected by the First Amendment of the United States Constitution.

II. STATEMENT OF CASE

This is an action for declaratory and injunctive relief and for monetary damages, on behalf of two professional corporations in the health care industry seeking to vindicate their substantive and procedural due process rights under the North Carolina Constitution. Complaint at pp. 15 – 16. They challenge the constitutionality of state laws that they allege operate to the public detriment by delegating decision-making regarding the development of new institutional health services to a body that operates without appropriate standards or procedural safeguards to prevent conflicts of interest or arbitrary decisions. Complaint at p. 14. Additionally, they assert that state laws, administrative regulations, and executive orders all operate to deny them access

to the courts for redress of grievances in violation of Article 1, § 18 of the North Carolina Constitution. Complaint at p. 16.

The State of North Carolina seeks to disqualify Robert F. Orr and Jason B. Kay from representing Plaintiffs on the ground that, as employees of the North Carolina Institute for Constitutional Law, they violate the state statutory prohibition on corporations engaging in the practice of law. *See* N.C. Gen. Stat. § 84-5. *Amici* do not take a position on the merits of the case at this time and are not at present seeking leave to participate on any issue other than this limited question of representation.

III. ARGUMENT

A. North Carolina Statutes Regulating the Practice of Law Should be Read Consistently with the U.S. Constitution, which Guarantees the Right of Individuals to Associate and Engage in Legal Advocacy in the Public Interest.

The practice of law has long been considered a legitimate subject of state regulation, and historically, most states have proscribed the corporate practice of law, through judicial decisions, state statutes or other regulations. *See, generally, Grace Giesel, Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151 (2000). At the same time, there are important constitutional limitations on the power of a state to limit or exclude certain organizations from the practice of law. These limitations protect organizations that represent their members in matters of common interest and to organizations for which litigation is a form of political expression and political association. *See, e.g., NAACP v. Button*, 371 U.S. 415, 416 (1963); *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217 (1967); *In re Primus*, 436 U.S. 412 (1978). In *NAACP v. Button*, the Supreme Court held that the First Amendment protects the associational and expressive rights of persons to join together to use litigation to seek redress of grievances, and that statutes that

would have prohibited the NAACP's attorneys and lay members from urging others to join them in litigation to challenge discriminatory practices were an impermissible infringement on those rights. *Id.*, at 428-431. The Court observed:

The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community ... makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.

Id., 371 U.S. at 431. Similarly, in *Primus*, which involved an attempt to regulate the activities of lawyers affiliated with the American Civil Liberties Union, the Court noted that "the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." *Primus*, 436 U.S. at 431. In both *Button* and *Primus*, the Court struck down rules that restricted the rights of attorneys acting on behalf of public interest organizations to offer legal services, including regulations regarding attorney advertising, solicitation and referrals.

Amici are non-profit organizations with diverse and sometimes opposing priorities, which seek to vindicate the rights of specific social groups, and wish to use litigation to advance those public interests. Whether advocating on behalf of those concerned about clean air and clean water, on behalf of those concerned about the use of racial profiling by law enforcement personnel, on behalf of those concerned about the provision of adequate affordable housing for working families, or on behalf of those concerned about the defense of religious freedom, each *amicus* party is a public interest organization for whom association for litigation is an effective form of political activity protected by the First Amendment. Collectively, they have been engaged in these activities in the state for over 40 years, have represented hundreds of thousands of clients in cases in state and federal court as well as in state administrative proceedings of all

kinds. There can be no doubt that this work has resulted in the establishment of many important legal precedents that benefit all North Carolinians.

The attorneys of the North Carolina Institute for Constitutional Law (the "Institute"), through this litigation, similarly seek to advance the views of those concerned about how the State is regulating opportunities for new health care facilities. *Amici* take no position on the merits of this case, but all agree and aver that the Institute's ability to offer legal services and to use this litigation to advance its ideas and beliefs is clearly protected by the First Amendment.

It is well-established that statutes are presumed to be constitutional and should be interpreted in such a way as to maintain their constitutionality. "A well recognized rule in this State is that, where a statute is susceptible to two interpretations – one constitutional and one unconstitutional – the Court should adopt the interpretation resulting in a finding of constitutionality." *In re Banks*, 295 N.C. 236, 239; 244 S.E.2d 386, 388 (1978) (citing *Smith v. Keator*, 285 N.C. 530, 206 S.E. 2d 203, (1974); *State v. Frinks*, 284 N.C. 472, 201 S.E. 2d 858 (1974); *Randleman v. Hinshaw*, 267 N.C. 136, 147 S.E. 2d 902 (1966)). Defendants' suggested interpretation of N.C. Gen. Stat. § 84-5 – to bar the Institute's attorneys from representing Plaintiffs in this case – would be an unconstitutional application of the statute. Instead, this Court should affirm that while the state is empowered to regulate the practice of law, traditional statutory rules for doing so must be interpreted in light of federally protected constitutional rights. The general rule against the corporate practice of law simply does not extend to non-profit public interest organizations that engage in litigation to achieve their particular social and political goals. This principle is an important and universal feature of our American justice system.

B. Every other state court to consider this issue has upheld the practice of public interest advocacy by lawyers employed by non-profit organizations.

Many states have enacted specific statutory provisions to expressly exclude all charitable non-profit organizations from their prohibitions on the practice of law by corporations. *See, e.g., Mich. Comp. Laws Ann. § 450.681* (West 1990); *705 Ill. Comp. Stat. Ann. § 220/5* (West 1999) (“nor shall [the prohibition] apply to associations organized for benevolent or charitable purposes. . . or to corporations organized not for pecuniary profit”); *La. Rev. Stat. Ann § 37:213* (West 1988) (prohibition not applicable to benevolent or charitable organizations); N.J. Rules of Court Rule 1:21-1(e) (prohibition does not apply to nonprofit organizations).

While other states legislatures have not passed a particular statute to affirm a safe harbor for non-profit organizations’ attorneys, the state courts in those jurisdictions have consistently allowed and protected the custom, and faithfully applied the logic of *Button* and *Primus*. *See, e.g., Frye v. Tenderloin Housing Clinic, Inc.*, 38 Cal. 4th 23, 129 P.3d 408, 40 Cal.Reptr.3d 221 (2006); *In re N.H. Disabilities Rights Center*, 541 A.2d 208, 213 (N.H. 1998) (Souter, J.); *In re Amendment to S.J.C. Rule 3:07* 495 N.E.2d 282, 286 (Mass. 1986); *In re Education Law Center*, 86 N.J. 124, 429 A.2d 1051 (1981). **In fact, there is no state court opinion decided since *Button* that allows attorneys employed by non-profit public interest organizations to be disqualified from representing plaintiffs in litigation.**

Reviewing the jurisprudence, the American Bar Association’s Standing Committee on Ethics and Professional Responsibility has concluded that the principle is no longer subject to dispute. ABA Comm. On Ethics and Prof. Responsibility, Formal Op. 93-374 (1993) (“[I]t is now well settled, as a matter of constitutional law, that non-profit organizations may employ staff attorneys to provide legal representation to appropriate categories of third persons.”)

All of these previous courts have understood that an opposite ruling would jeopardize quintessential First Amendment rights. For example, in *Frye*, the California Supreme Court rightly held that it could interpret its state regulations in such a way as to avoid the “grave First Amendment questions” that would be raised by applying them to non-profit advocacy organizations. *Frye*, 38 Cal. 4th at 42-43. Those grave questions were addressed in *In re Disabilities Rights Center*, when Justice Souter, writing at the time for the New Hampshire Supreme Court, struck the state statute at issue there as an impermissible infringement upon the constitutional associational rights of the Disabilities Rights Center. *In re Disabilities Rights Center*, 541 A.2d at 215-16. The same conclusion was reached by the New Jersey Supreme Court in *In re Education Law Center*, 429 A.2d 1051 (1981). There, the court – acting in its role as regulator of the legal profession rather than interpreting a state statute – declined to reach the constitutional issues and held: “[W]e reaffirm the policies on which the general prohibition of the practice of law by corporations is based. However, we believe that competing policy considerations call for an exemption of non-profit corporations operating for charitable and benevolent purposes ...” *In re Education Law Center*, 429 A.2d at 1059.

C. Non-Profit Public Interest Corporations Must Engage in Charitable Activities to Keep their Status as a Tax-Exempt Organization.

The important distinctions between for-profit corporations and non-profit corporations should be carefully considered in the Court’s determination of this motion. One such distinction is the fact that in order to maintain tax-exempt status as a charitable organization under section 501(c)(3) of the Internal Revenue Code, non-profit public interest advocacy organizations must abide by detailed regulations relating to the circumstances under which they can receive fees for their services. 26 U.S.C. §501(c)(3). While there are no specific regulatory limits on their client’s incomes, non-profit organizations are generally prohibited from being retained by private

clients for private disputes at rates that would be competitive in the general market for legal services. *See* I.R.S. Rev. Proc. 92-59. Thus, the regulations that determine which entities are entitled to non-profit status for tax purposes serve as a safeguard to ensure that the litigation brought by such advocacy organizations is brought only for public and charitable purposes.

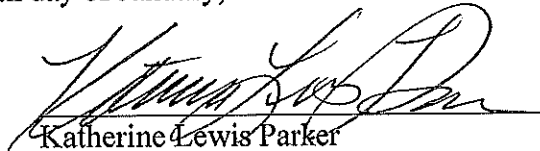
D. North Carolina's Statutory Exception for Indigent Clients is a means-based test – not an income-based test.

The State's motion must also fail because it is based on a false assumption. The State wrongly contends that the statutory exception to the ban on corporations engaging in the practice of law contained in N.C. Gen. Stat. § 84-5.1 - which exempts groups organized for the sole purpose of rendering indigent legal services – applies *only* to organizations employing an income-based criterion in client selection. However, the State fails to acknowledge that indigency can also be defined by a means-based test. Clients who do not have the financial means to pursue needed civil rights and related public interest litigation must fall within the scope of the statute's exception. Indeed, the IRS regulations governing non-profit public interest organizations recognize as charitable public interest law firms those that provide representation "for the resolution of issues of broad public importance where such representation is not ordinarily provided by private law firms because the cases are not economically feasible." I.R.S. Rev. Proc. 92-59, § 2.02. Thus, the proper focus is not on the client's income, but on whether it is economically feasible for the client to bring the litigation, remembering that these are cases which raise issues of general public importance and therefore have broader public benefit. The clients represented by *Amici* who may not be of "low-income" fall within this exception, as do the Plaintiffs in the case at bar.

IV. CONCLUSION

After over 40 years of public interest advocacy by lawyers employed by non-profit organizations in this state, no new statute, regulation, ethics opinion or other rationale exists to justify taking the extraordinary step of disqualifying certain of Plaintiffs' counsel in this case merely because they are employed by a non-profit organization. To do so would violate the First Amendment rights of Plaintiffs and their counsel, and would result in an unconstitutional application of an otherwise valid statute regulating the general practice of law by corporations. Following the logic of *NAACP v. Button*, and *In re Primus*, the observations of the ABA Standing Committee on Ethics and Professional Responsibility, and the conclusion of every other court to have considered this issue in modern times, this court should recognize that non-profit, charitable organizations employing lawyers to engage in public interest litigation, and the clients those lawyers represent, are engaging in activities protected by the First Amendment. Therefore, N.C. Gen. Stat. § 84.5 cannot be read to bar those activities. Defendants' motion to disqualify Mr. Orr and Mr. Kay from representing Plaintiffs in this case must be denied.

Respectfully submitted this the 16th day of January, 2009.



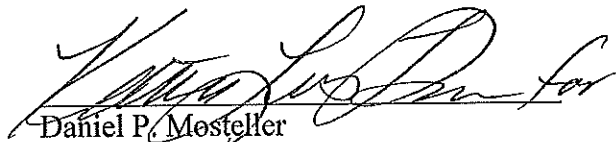
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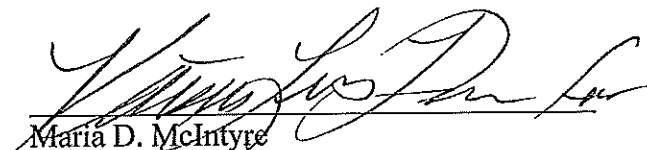
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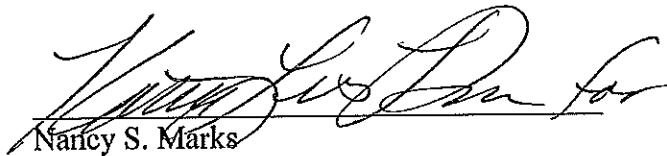
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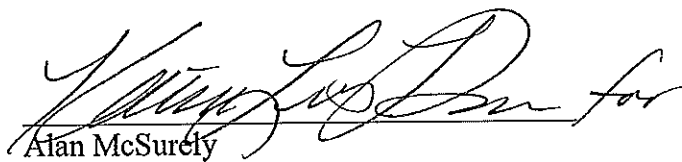
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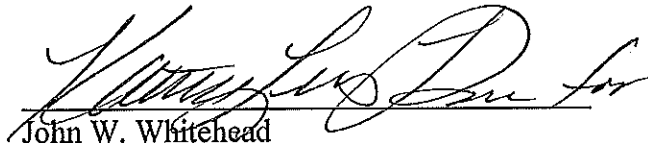
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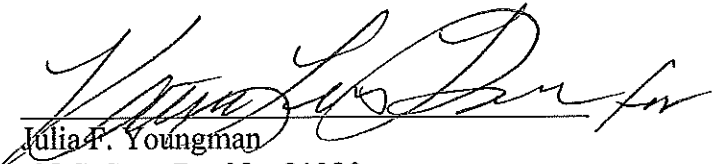
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