

NORTH CAROLINA COURT OF APPEALS

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

BRIEF OF DEFENDANTS-APPELLEES

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QUESTIONS PRESENTED

- I. DID THE TRIAL COURT ERR IN DETERMINING THAT APPELLANTS DO NOT HAVE A FUNDAMENTAL RIGHT TO HAVE THE PARTY OF THEIR CHOICE APPEAR ON THE BALLOT IN NORTH CAROLINA?

- II. DID THE TRIAL COURT ERR BY APPLYING THE WELL-ESTABLISHED RULE THAT STATUTES ARE PRESUMED CONSTITUTIONAL AND THAT PLAINTIFFS BEAR THE BURDEN OF ESTABLISHING THAT A STATUTE IS NOT CONSTITUTIONAL?

- III. DID THE TRIAL COURT ERR BY CONCLUDING THAT STRICT SCRUTINY DOES NOT APPLY TO APPELLANTS' CHALLENGES?
- IV. DID THE TRIAL COURT ERR BY FINDING THAT THE STATE HAS A COMPELLING INTEREST TO JUSTIFY THE CHALLENGED STATUTES?
- V. DID THE TRIAL COURT ERR BY UPHOLDING THE CHALLENGED STATUTES AS APPROPRIATE MEANS FOR ACHIEVING THE STATE'S COMPELLING INTEREST?

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 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)

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 establish 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

(R p. 196)

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 the time of 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 this 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 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, not merely for the probability of them. (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 Libertarians and Greens make this argument in an effort to have this Court apply a strict scrutiny test to the challenged statutes. In so doing, 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, "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, Michael Minger, received 2.85% of the vote in the 2008 general election.¹ 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

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

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. 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

“A trial court’s findings of fact in a bench trial have the force of a jury verdict and are conclusive on appeal if there is evidence to support them. Whether those findings of fact support the trial court’s conclusions of law is reviewable *de novo*.” *Hall v. Hall*, ___ N.C. App. ___, ___, 655 S.E.2d 901, 904 (2008) (internal citations omitted). If supported by competent evidence, the trial court’s findings of fact 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 TRIAL COURT PROPERLY DETERMINED THAT APPELLANTS DO NOT HAVE A FUNDAMENTAL RIGHT TO HAVE THE PARTY OF THEIR CHOICE APPEAR ON THE BALLOT IN NORTH CAROLINA.

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 properly rejected them as well.

A. THE RIGHTS ADVANCED BY APPELLANTS ARE NOT "FUNDAMENTAL RIGHTS" UNDER EITHER THE NORTH CAROLINA CONSTITUTION OR THE UNITED STATES CONSTITUTION.

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. 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.

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), *aff'd in part and rev'd on other grounds in part*, 302 N.C. 357, 275 S.E.2d 439 (1981) (emphasis added). Such a review supports the trial court's conclusion 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. North Carolina 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

plaintiffs' 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." *Id.* at 1223. After making that assessment, the court concluded that "the provisions at issue pass constitutional muster." *Id.* at 1225. Recently, the United States Supreme Court favorably cited the *Jenness* opinion in upholding New

York's requirements for candidate access to primary ballots. *New York State Bd. of Elections v. Lopez Torres*, ___ U.S. ___, 169 L. Ed. 2d 665, 673, 675 (2008).

Federal courts have upheld even more onerous ballot access requirements than North Carolina's. *See, e.g., Arutunoff v. Oklahoma 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 (3rd 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 interest 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.

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. That provision, 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. North Carolina 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 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 third party candidates (10% for unaffiliated candidates versus 2% for third 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 third party candidates 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,² he also noted, “[e]lection data demonstrates that minor party candidates obtain a place on the North Carolina general election ballot with some regularity.” *Id.*

In the second case cited by appellants that mentions § 10, *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964), our Supreme 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.

² 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 degree to which a lower ballot access requirement for unaffiliated candidates might also contribute to ballot overcrowding must be borne in mind.

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.

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

In their next claim for relief, the Libertarians and Greens allege 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 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, § 19 does not provide a basis for arguing that the rights secured by the North Carolina Constitution are more expansive than those provided by the United States Constitution.

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. 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.

Thus 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.³ 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. It is 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 of the Green Party) that keeps them from recognition. The fault is not in the challenged statutes.

³ 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."

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

The Libertarians and Greens argue that the evidence at trial established that their “fundamental rights are severely and needlessly burdened by North Carolina’s ballot access laws.” (Appellants’ Br. at 22) As the trial court determined, however, the evidence did not establish this. The Libertarians and Greens’ argument fails both because they minimize the import of their own evidence and mischaracterize the evidence and arguments offered by the State.

The trial court’s findings of fact are conclusive on appeal if supported by competent evidence. *Hall v. Hall*, ___ N.C. App. at ___, 655 S.E.2d at 904. 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 evidence of the Libertarians and Greens focused on what they described as a “crippling obstacle” of collecting the requisite number of signatures. (Appellants’ Br. at 23) As the trial court found, however, 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 relatively little effort to attempt to comply with North Carolina’s requirements. (T pp. 204-05)

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 the trial court made no findings of fact regarding ballot clutter or voter confusion *per se*. 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 formed the basis for the trial court's Findings of Fact.

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 statewide, congressional and legislative offices, and that the State had to be prepared for all recognized parties to nominate candidates for every office. (T pp. 309-09) 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) 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 are supported by the evidence, they cannot be disturbed on appeal.

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

The Libertarians and Greens 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. at 334, 410 S.E.2d at 889 (quoting *Gardner v. Reidsville*, 269 N.C. at 595, 153 S.E.2d at 150). 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.

The Libertarians and Greens’ reliance on *Treants Enterprises, Inc. v. Onslow County*, 83 N.C. App. 345, 350 S.E.2d 365 (1986), 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 cannot be squared with the decision of the Supreme Court in *Stephenson*. 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 at 1221.

The trial court properly concluded that the challenged statutes must be presumed constitutional. The trial court 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 TRIAL COURT PROPERLY CONCLUDED THAT STRICT SCRUTINY DOES NOT APPLY TO APPELLANTS' CHALLENGES.

The Libertarians and Greens further argue that the trial court erred by not applying a strict scrutiny standard. Relying exclusively on federal law, the Libertarians and Greens assert that their fundamental rights have been burdened and that the court should have applied the strict scrutiny standard in assessing their claims. This argument ignores the fact that the trial court *did* in fact apply the strict scrutiny standard.

The trial court did indeed conclude that “[t]here is not a fundamental right to have the party of a voter’s choice appear on the ballot” and that therefore “strict scrutiny does not apply” to the Libertarians and Greens’ challenges. (R p. 224; Conclusion of Law ¶ 7) The trial court went on, however, to conclude as follows:

*Even if strict scrutiny did apply to plaintiffs and intervenors’ challenges, the State has a compelling interest in requiring a preliminary modicum of support before recognizing a political party and placing its candidates on the ballot. “There is a recognized and ‘important state interest 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 *Jenness v. Fortson*, 403 U.S. 431 (1971)). *Cf. Stephenson v. Bartlett*, 355 N.C. at 376, 562 S.E.2d at 393 (noting with regard to multi-member districts “that ballots containing multi-member districts ‘tend to become unwieldy, confusing, and too lengthy to allow thoughtful consideration.’”; quoting *Chapman v. Meier*, 420 U.S. 1, 15 (1975)).

(R p. 224; Conclusion of Law ¶ 8 (emphasis added)) The trial court further concluded:

The provisions of N.C. GEN. STAT. § 163-96 challenged by plaintiffs and intervenors have been found by the United States Court of Appeals for the Fourth Circuit to meet the strict scrutiny test in a challenge under the United States Constitution. *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1221-22 (4th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996).

(R p. 225; Conclusion of Law ¶ 12) The trial court then determined that, “[w]hile federal Supreme Court and Fourth Circuit precedents are not binding on State courts considering similar constitutional questions, they are entitled to great weight, *Stam v. State*, 47 N.C. App. 213-14, 267 S.E.2d 339-40 (1980), *aff’d in part and rev’d on other grounds in part*, 302 N.C. 357, 275 S.E.2d 439 (1981).” He recognized that “[b]oth the Freedom of Speech clause (Article I, § 14) and the Equal Protection clause (Article I, § 19) of the North Carolina Constitution, are only 37 years old” and “are modeled on the cognate provisions of the federal Constitution.” (R pp. 225-26; Conclusions of Law ¶¶ 13 and 14) Finally, 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)

Thus, while the trial court held that it was not required to apply a strict scrutiny standard, its conclusions of law clearly reflect the trial court's determination that the challenged statutes do withstand strict scrutiny. Because the trial court did, in fact, determine that the challenged statutes withstand strict scrutiny, the Libertarians and Greens' argument that the trial court erred by failing to apply strict scrutiny must be rejected.

V. THE TRIAL COURT PROPERLY FOUND THAT THE STATE HAS A COMPELLING INTEREST TO JUSTIFY THE CHALLENGED STATUTES.

The Libertarians and Greens next argue that the trial court erred by determining that the State has a compelling interest in maintaining the ballot access restrictions reflected in the challenged statutes. 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.

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) No source is provided for this "judicial hearsay."

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* at 194-95, 93 L. Ed. 2d at 505-06.

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 up 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 Libertarians and Greens' arguments, then, must be rejected.

VI. THE TRIAL COURT PROPERLY UPHELD THE CHALLENGED STATUTES AS APPROPRIATE MEANS FOR ACHIEVING THE STATE'S COMPELLING INTEREST.

Finally, 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 noted, this argument is already foreclosed by case law. (R p. 226, ¶ 15)

In *McLaughlin v. North Carolina Bd. 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.

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 trial court properly determined that the challenged statutes are constitutional. Appellants' argument should be rejected.

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 23rd day of February, 2009.

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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)(A)2.

The undersigned hereby certifies that the foregoing brief complies with Rule 28(j)(2)(A)2 of the Rules of Appellate Procedure in that, according to the word processing program used to produce this brief (WordPerfect 12), the document does not exceed 8,750 words, exclusive of cover, index, table of authorities, certificate of compliance, certificate of service, and appendices.

This 23rd day of February, 2009.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **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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