RECORD NO. 10-2068

In The

United States Court Of Appeals

For The Fourth Circuit

BRYAN E. GREENE; JORDON M. GREENE; TODD MEISTER,

Plaintiffs – Appellants,

v.

GARY O. BARTLETT, Director NCBOE; LARRY LEAKE; CHARLES WINFREE; ROBERT CORDLE; ANITA S. EARLS; BILL W. PEASLEE,

Defendant – Appellees,

and

BRADLEY D. SMITH,

Intervenor - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA AT STATESVILLE

BRIEF OF APPELLANT

Robert M. Bastress, Jr.
ATTORNEY AT LAW
P.O. Box 1295
Morgantown, WV 26507
(304) 293-5308

Jason E. Huber
CHARLOTTE SCHOOL OF LAW
2145 Suttle Avenue
Charlotte, NC 28208
(704) 971-8381

Counsel for Appellants

*Gibson*Moore Appellate Services, LLC
421 East Franklin Street ♦ Suite 230 ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 10-2068 Caption: Bryan E. Greene, Et al. v. Gary O. Bartlett, Et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Todd Meister (name of party/amicus) who is appellant (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

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I certify that on October 1, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Jordon M. Greene (name of party/amicus) who is appellant (appellant/appellee/amicus), makes the following disclosure:

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s/ Jason Huber (signature)

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JURISDICTIONAL STATEMENT

On August 6, 2008, Appellants filed a complaint in the United States District Court for the Western District of North Carolina seeking declaratory and injunctive relief under 42 U.S.C. § 1983. They asserted that North Carolina General Statute Section 163-122(a)(2) violates their First and Fourteenth Amendments rights to participate in the electoral process. This is an appeal from the district court's final judgment and order entered on August 24, 2010, granting summary judgment to the Appellees on all of the Appellants' claims. The Appellants filed their Notice of Appeal on September 20, 2010. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and 2201. This Court has jurisdiction to hear and decide this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether requiring as a condition for ballot access that unaffiliated candidates for the United States House of Representatives submit petitions signed by at least four percent of the registered voters in the relevant congressional districts imposes an undue and unjustified burden on the First and Fourteenth Amendment rights of those candidates and on those voters who support their candidacies.

2. Whether North Carolina violates the Equal Protection Clause of the Fourteenth Amendment by requiring unaffiliated candidates for the United States

House of Representatives to submit as a condition of ballot access signatures from four percent of registered voters in their district while granting ballot access to unaffiliated candidates for the United States Senate if they submit voters' signatures equal in number to two percent of the last gubernatorial vote.

3. Whether North Carolina violates the Equal Protection Clause of the Fourteenth Amendment by requiring unaffiliated candidates for the United States House of Representatives to submit as a condition of ballot access signatures from four percent of registered voters in their district while granting ballot access to political party nominees for Congress whose party has filed petitions endorsed by voters equal in number to two percent of the last gubernatorial vote.

4. Whether plaintiffs have standing to challenge the impairment to their rights to meaningful, nondiscriminatory participation in the electoral process imposed by North Carolina General Statutes Section 163-122(a).

STATEMENT OF THE CASE

Appellants Bryan E. Greene, Jordon M. Greene, and Todd Meister filed their complaint in the district court on August 6, 2008, pursuant to 42 U.S.C. § 1983, asserting that North Carolina General Statutes Section 163-122(a)(2) violates the First and Fourteenth Amendment rights of unaffiliated congressional candidates and their supporters to meaningful and equal participation in the electoral process. The Appellants sought injunctive and declaratory relief. On October 17, 2008,

Appellees Gary Bartlett, Larry Leake, Genevieve Sims, Lorraine Shinn, Charles Winfree, and Robert Cordle filed an Answer and Affirmative Defenses alleging that Appellants failed to state a claim upon which relief can be granted, that Section 163-122(a)(2) does not violate the Constitution of the United States, and that the claims alleged were moot and not yet ripe, thus non-justiciable.[1] Appellees filed a Motion to Dismiss for Improper Venue or to Transfer Venue on August 25, 2008, which the district court denied.

On February 15, 2010, plaintiffs filed a motion for summary judgment and a supporting memorandum, to which defendants filed a responsive memorandum. On June 1, 2010, Appellant Bradley Smith filed a Motion to Intervene as a plaintiff, alleging the same claims as the original plaintiffs. By order dated June 2, 2010, District Judge Richard L. Voorhees recused himself, and the case was reassigned to the Honorable Graham C. Mullen, who on July 15, 2010, granted Smith's motion to intervene. At the August 12, 2010, summary judgment hearing, the parties agreed to treat Appellants' Motion for Summary Judgment and Appellees' response to that motion as cross-motions for summary judgment.

Finding that Section 163-122(a)(2) was constitutional, on August 24, 2010, the district court denied Appellants' Motion for Summary Judgment and granted

[1] Defendants Shinn and Sims do not appear before this Court as Appellees. This Court substituted Anita S. Earls and Bill W. Peaslee as Appellees by order dated 10/7/2010.

summary judgment in favor of the Appellees on all claims. Thereafter, the Appellants filed their timely Notice of Appeal on September 20, 2010.

STATEMENT OF THE FACTS

In 2008, Appellant Bryan Greene, like every other unaffiliated North Carolina candidate for United States House of Representatives before him, tried and failed to be placed on the State's general election ballot. J.A. 223. Appellants Jordon Greene and Todd Meister avidly supported his candidacy. J.A. 13 ¶ 9. North Carolina's historic exclusion of unaffiliated candidates culminated in 2010, when Appellant Bradley Smith, like Appellant Bryan Greene, tried and failed to be placed on the State's general election ballot. J.A. 224. His petition drive lasted eight months. J.A. 194 ¶ 15. North Carolina's record survived unscathed; no unaffiliated candidate for United States House of Representatives has ever appeared on the ballot in North Carolina. J.A. 36 ¶ 3.

Appellants Greene and Smith sought to represent North Carolina's Tenth and Fifth Congressional Districts respectively. J.A. 223-24. The Tenth District includes Avery, Caldwell, Burke, Mitchell, Catawba, Cleveland, Lincoln, and parts of Iredell, Rutherford, and Gaston Counties. N. C. Gen. Stat. § 163-201(a) (2010). North Carolina's Fifth Congressional District includes Alexander, Alleghany, Ashe, Davie, Stokes, Surry, Watauga, Wilkes, and Yadkin counties and parts of Forsyth, Iredell, and Rockingham counties. *Id*. To be placed on the North

Carolina general election ballot, an unaffiliated candidate running for the United States House of Representatives must file a nominating petition signed by four percent of the total number of registered voters in the candidate's district. N.C. Gen. Stat. § 163-122(a)(2) (2010). For Appellants Bryan Greene and Smith, this amounts to 16,547 and 18,123 valid signatures, respectively. J.A. 13 ¶ 13; *see also* J.A. 26 ¶ 13. In United States history, no candidate for the United States House of Representatives has overcome a petition signature requirement in excess of 12,919 signatures to be successfully placed on a state's general election ballot.[2] J.A. 36 ¶ 3.

Across the United States, the median number of required signatures for unaffiliated candidates to gain ballot access is 2,750. J.A. 37 ¶ 5. There were 435 districts in the United States as of the 2008 election. *Id*. Of those districts, 318 required less than 5,000 signatures for unaffiliated candidates for United States House to gain ballot access, 62 required from 5,000 to 9,999 signatures, and as few

[2] The district court, at page 11 of its memorandum order, refers to Wendell Fant's 2010 petition drive as an unaffiliated congressional candidate and his success in gathering 21,000 valid signatures. Mr. Fant's signature drive and submission were not part of the record in this case and were not the subject of any discovery. Mr. Fant withdrew as a candidate, and he did not appear on the general election ballot. According to media reports, his signature drive was supported by North Carolina Families First, the State Employees Association of North Carolina, and the Service Employees International Union; which provided extraordinary resources well beyond the reach of the typical unaffiliated candidate. Jim Morrill, "Fant Rules out 8th District Race." CharlotteObserver.com, June 25, 2010, http://www.charlotteobserver.com/2010/06/25/1524466/fant-rules-out-8th-district-race.html, last viewed at 2:48 PM on 11/15/2010.

as 55 required 10,000 or more signatures. No signature requirement was higher than the 20,131 signatures required in North Carolina's Fourth District. *Id*. In fact, Georgia and North Carolina are the only states with a percentage requirement above three percent of the number of registered voters. *Id*. ¶ 6; *see also* J.A. 102-03.

In addition to obtaining the required number of signed petitions, unaffiliated candidates must pay a filing fee equivalent to one percent of the annual salary of the office being sought. N.C. Gen. Stat. § 163-107 (2010). Congressional annual salaries in 2008 were $169,300 and are $174,000 in 2010. J.A. 106. Thus, an unaffiliated Congressional candidate was required to pay $1,693 and $1,740 in 2008 and 2010 respectively.

Appellants Greene and Smith understandably could not bear the four percent requirement's burden. Appellant Greene obtained 899 signatures, 607 of which were valid; Appellant Smith obtained around 7,500 valid signatures. J.A. 175-76 ¶ 1; *see also* J.A. 13-4 ¶ 14.[3] As a result they were denied ballot access, and Appellants Jordon Greene and Meister were denied the opportunity to support their chosen candidate. Appellants Bryan Greene and Bradley Smith intend to petition to qualify for ballot access as congressional candidates in North Carolina in the

[3] The Complaint, cited above, has been verified by Jordon Greene. J.A. 34.

future. J.A. 14 ¶ 22; *see also* J.A. 194 ¶ 18. Appellants Jordon Greene and Meister intend to support Appellant Greene's future candidacy. J.A. 14 ¶ 22.

Appellees include the Executive Director and members of the State Board of Elections. Appellees are responsible for general supervision of elections in North Carolina, including the preparation of ballots, and the enforcement of Section 163-122(a)(2). N.C. Gen. Stat. §§ 163-19-22 (2010).

SUMMARY OF THE ARGUMENT

42 U.S.C. § 1983 allows individuals to sue state actors or administrative bodies who, under color of state law, infringe upon the individual's constitutional rights. Laws that regulate ballot access implicate the rights to political expression and association protected by the First Amendment and incorporated in the Fourteenth Amendment's Due Process Clause. *Anderson v. Celebrezze*, 460 U.S. 780 (1983). When a law imposes a heavy burden on those rights, to be valid, the law must be narrowly drawn to advance a compelling state interest in order to survive constitutional analysis. *Burdick v. Takushi*, 504 U.S. 428 (1992). To be narrowly drawn, a ballot access regulation must be the least restrictive means available of protecting the state's interest in regulating its ballot. *McLaughlin v. North Carolina Bd. of Elec.*, 65 F.3d 1215 (4th Cir. 1995).

The judgment of the district court regarding the constitutionality of Section 163-122(a)(2) of the North Carolina General Statutes should be reversed. The

Section is unconstitutional under the First and Fourteenth Amendments to the United States Constitution because it creates an extreme and unnecessary barrier to ballot access for unaffiliated candidates for the House of Representatives in North Carolina. Section 163-122(a)(2) requires unaffiliated candidates for the United States House of Representatives in North Carolina to file petition signatures equal to or greater than four percent of the total number of registered voters in the candidates' respective districts in order for the candidate to be placed on the general election ballot. No independent candidate for the House has appeared on the State's general election ballot since it began using government printed ballots in 1901. J.A. 37 ¶ 4. Indeed, prior to 2010, no candidate in United States history had ever overcome a requirement as high as that imposed by section 163-122(a)(2). J.A. 36 ¶ 3. The principal measure of a regulation's burden on ballot access rights is the past experience of candidates in satisfying the burden. *Storer v. Brown*, 415 U.S. 724, 738, 742 (1974).

The statute is not the least restrictive means of protecting North Carolina's interest in ballot regulation. Forty-seven states impose lesser signature requirements for ballot access while managing their ballots well. J.A. 37 ¶ 5. Furthermore, North Carolina uses a two percent requirement for unaffiliated statewide candidates seeking ballot access. N.C. Gen. Stat. § 163-122(a)(1) (2010). If the two percent requirement is sufficient to protect ballot access for statewide

candidates who would be placed on every ballot throughout the state, a four percent requirement cannot be the least restrictive means of protecting ballot access concerning candidates who would be placed on the ballot in their respective districts.

Appellants, despite their efforts, were unable to meet the atypically severe requirements of Section 163-122(a)(2). Because a regulation of ballot access cannot constitutionally consist of a practical prohibition of ballot access for an entire class of candidates, Appellants were entitled to judgment as a matter of law that Section 163-122(a)(2) is unconstitutional.

Furthermore, that Section unjustifiably imposes a severe burden on Appellants' rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. North Carolina cannot justify its disparate treatment of candidates for Congress, requiring unaffiliated candidates for the House of Representatives to submit signatures from four percent of the number of registered voters while granting ballot access to unaffiliated candidates if they submit signatures from two percent of those voting in the last election. *See* N.C. Gen. Stat. § 163-122(a)(1)-(2). Nor can the State justify the disproportionately heavy burden imposed on unaffiliated candidates for the House compared to new or minor party candidates for the House. *See* N.C. Gen. Stat. §§ 163-96 and 163-98 (2010).

Finally, Appellants have standing. Because Section 163-122(a)(2) of the North Carolina General Statutes unconstitutionally burdens Appellants' rights to participate in North Carolina congressional elections as unaffiliated candidates and denies to them the equal protection of the law, judicial intervention invalidating Section 163-122(a)(2) will provide the necessary remedy to Appellants' injuries. Appellants have established injuries traceable to the defendants' enforcement of Section 163-122(a)(2) that will be remedied by a favorable decision. Thus, Appellants have standing to challenge the constitutionality of Section 163-122(a)(2). *Dixon v. Edwards*, 290 F.3d 699, 711 (4th Cir. 2002).

ARGUMENT

STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment *de novo* applying the same legal standard used by the district court. *See EEOC v. Fairbrook Med. Clinic, P.A.*, 609 F.3d 320, 327 (4th Cir. 2010).

DISCUSSION

I. The district court erred in granting summary judgment to the Appellees because Section 163-122(a)(2)'s four percent requirement imposes an unjustifiably severe burden on Petitioners' First and Fourteenth Amendment rights and because the burden imposed is not the least restrictive means of protecting North Carolina's interests in controlling ballot access.

Section 163-122(a)(2) of the North Carolina General Statutes provides that a qualified voter may appear on the general election ballot as an "unaffiliated candidate." An unaffiliated candidates runs on his or her own and not as a candidate of a "political party," as that term is defined by Section 163-96. To qualify for ballot status as an unaffiliated candidate for the House of Representatives, the candidate must submit to the State Board of Elections petitions signed by at least four percent of the district's registered voters. N.C. Gen. Stat. § 163-122(a)(2) (2010). That Section implicates Appellants' First and Fourteenth Amendment rights because it regulates access to the ballot, and thereby infringes on Appellants' rights to political expression and association. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 786-87 (1983)(holding that it "is beyond debate the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech")(quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

In *Anderson*, the Court established the analysis for determining the constitutionality of a state's ballot access regulations:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiffs seek to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strengths of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 480 U.S. at 789 (citations omitted). In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court clarified the *Anderson* test, stating "the rigorousness of our inquiry depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." 504 U.S. at 434. Where the regulation imposes a severe burden, it must be "narrowly drawn to advance a state interest of compelling importance." *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). In order for the severely burdensome regulation to be narrowly drawn, it must be the least restrictive means available of safeguarding the state's purported interest. *McLaughlin v. North Carolina Bd. of Elec.*, 65 F.3d 1215 (4th Cir. 1995); *Wood v. Meadows*, 207 F.3d 708, 716 (4th Cir. 2000)(stating that the court will apply the least restrictive means test in determining the constitutionality of a challenged regulation where the burden imposed by that regulation is severe). Because

Section 163-122(a)(2) cannot survive this constitutional analysis, the judgment of the district court should be reversed.

A. The district court correctly held that the burdens imposed by Section 163-122(a)(2)'s four percent requirement on unaffiliated candidates and their supporters' First and Fourteenth rights are "undoubtedly" severe.

The historical record confirms the district court's conclusion that Section 163-122(a)(2)'s restrictions are severe. J.A. 227. That the four percent signature requirement has been overcome only once in North Carolina history demonstrates the severity of the burden the statute imposes on the First and Fourteenth Amendment rights of Appellants. Whether a state's ballot access requirement is constitutional depends on an analysis of that statute's practical impact. *Storer v. Brown*, 415 U.S. 724 (1974). In *Storer*, the Court explained that the question is whether

> [i]n the context of [the state's] politics, could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always unerring, guide; it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not.

Id., 415 U.S. at 740. The Supreme Court has maintained this emphasis on the practical impact of restrictions to ballot access. *See Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 207 (2008)(Scalia J., concurring)(citing *Storer* for the

proposition that the severity of an election regulation's burden should be measured by its likely impact).

Following the Supreme Court's lead, this Court in *McLaughlin v. North Carolina Bd. of Elec.*, 65 F.3d 1215 (4th Cir. 1995), held that "the burden that North Carolina's ballot access restrictions impose on protected interests is undoubtedly severe." 65 F.3d at 1221. That conclusion rested on the fact that "as history reveals, those regulations make it extremely difficult for any 'third-party' to participate in electoral politics." *Id.* This historical analysis is applied throughout the circuits. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 587 (6th Cir. 2006)(citing *Anderson* and holding that "part of the focus is 'on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process'"); *see also Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006)(holding Illinois ballot access restrictions unconstitutional when measured "by the stifling effect they have had on independent legislative candidacies since their inception"); *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007)(upholding an Alabama ballot-access restriction in part because independent candidates had been successful in gaining access to the ballot a number of times in the past).

In the instant case, the historical record demonstrates that Section 163-122(a)(2) operates to exclude North Carolina's class of unaffiliated congressional

candidates and stifles their supporters' participation in the electoral process. With a single exception, no unaffiliated congressional candidate has been able to meet the requirements of Section 163-122(a)(2) in North Carolina's history. J.A. 37 ¶ 4. In fact, no such candidate has appeared on any ballot by satisfying a requirement as severe as that imposed by Section 163-122(a)(2) in United States history. J.A. 36 ¶ 3. The highest signature requirement ever met by an unaffiliated candidate running for the United States House of Representatives was 12,919. *Id*. In 2008, Appellant Bryan Greene would have needed 16,547 signatures to gain access to the ballot; Appellant Smith would have needed 18,123 signatures in 2010. J.A. 223-24. Appellants Bryan Greene and Smith would also have needed to furnish filing fees of $1,693 and $1,740, respectively. J.A. 223. The practical effect of these requirements is, and has been, to bar unaffiliated candidates from gaining access to the North Carolina general election ballot, thereby freezing the status quo in North Carolina and thus imposing, as the district court correctly found, a severe burden on the Appellants' First and Fourteenth Amendment rights. J.A. 227.

B. The district court erred in its failure to hold that Section 163-122(a)(2) is not the least restrictive means of protecting North Carolina's interest in controlling ballot access because means more conducive to the First and Fourteenth Amendment rights of North Carolinians are available and are currently in use.

Discussing North Carolina's regulation of third-party ballot access, this Court in *McLaughlin* stated that strict scrutiny applies when a challenged election

law imposes a severe burden on constitutional rights. 65 F.3d at 1221 (citing *Storer*, *supra*). Defining strict scrutiny in the context of challenged election laws, this Court looked to the Supreme Court's holding in *Burdick*, stating "[d]espite its explicit endorsement of the *Anderson* approach, the *Burdick* Court also reaffirmed a single modification . . . : 'the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *McLaughlin*, 65 F.3d at 1221 (citing *Burdick*, 504 U.S. at 434, which was quoting *Norman v. Reed*, 502 U.S. 279 (1992)). After determining that North Carolina's third-party ballot access restrictions constituted a severe burden on the rights of third-parties, this Court stated that the final question was whether those restrictions constituted the least restrictive means of furthering compelling state interests. *McLaughlin*, 65 F.3d at 1221. Given the atypical severity of section 163-122(a)(2)'s requirements, the fact that North Carolina imposes lesser requirements for statewide unaffiliated candidates seeking ballot access, and the fact that no unaffiliated candidate for the House of Representatives has ever appeared on a North Carolina ballot, section 163-122(a)(2) cannot survive the least restrictive means analysis.

1. *Section 163-122(a)(2) imposes a petition signature requirement that is so out of proportion with the requirements of nearly every other state that it cannot constitute the least restrictive means of safeguarding North Carolina's interest in regulating ballot access.*

A comparison with other states' requirements is typically made in determining the severity of the challenged law and is useful in analyzing the availability of less restrictive means. *See Swanson*, 490 F.3d 894 (11th Cir. 2007) (holding that Alabama's challenged election law was not severely burdensome in part because other lower percentage petition signature requirements had been upheld in the Eleventh Circuit and in other jurisdictions); *Rogers v. Corbett*, 468 F.3d 188, 194-195 (3d Cir. 2006)(upholding a two percent signature requirement in Pennsylvania and referring to the decisions of other courts passing on higher percentage requirements); *Lee*, *supra* (overturning a ballot access regulation and noting the severity of the state's ballot-access requirements when compared to those of virtually every other state).

The district court initially appeared to reject the notion that other states' ballot access requirements were relevant to a determination that North Carolina's requirements were not the least restrictive means of safeguarding its interests.

> With the latitude the Constitution gives the States to regulate their elections, a range among the petitioning requirements for independent candidates will invariably arise . . . and simply because the North Carolina Legislature has deemed it prudent that North Carolina require a greater showing of support for unaffiliated candidates than

> the majority of her sister states does not convince this Court that the 4% requirement is not narrowly drawn.

J.A. 231. Despite this statement, the district court went on to state that a comparison of Section 163-122(a)(2) with the Georgia law upheld in *Jenness v. Fortson*, 403 U.S. 431(1971), was of particular influence to the court's decision. *Id*. The district court cannot have it both ways. In *Jenness*, the Court was analyzing a separate state's election laws. Therefore, *Jenness* should either lack influence in determining whether section 163-122(a)(2) is the least restrictive means, or the challenged election law in *Jenness*, as well as the laws in the other forty-nine states, should provide a useful comparison in the least-restrictive analysis.

The opinion in *Jenness* did not undertake the careful sifting of individual and state interests and less restrictive alternatives required by the subsequent rulings in *Anderson*, *Storer*, and *Burdick*. As this Court noted in *McLaughlin*, the *Anderson* test has continued to evolve since its original pronouncement. 65 F.3d at 1220. *Jenness* did not provide any assessment of the impact of the Georgia requirement other than to say that it did not "operate to freeze the political status quo" in the state. 403 U.S. at 438. In this case, of course, North Carolina's law *has* frozen the political status quo. The State cannot escape "the inexorable zero"[4] that the four percent requirement has imposed for unaffiliated candidates for the

[4] *See Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977).

House of Representatives. As shown on the "Highest Signature Requirement" chart, North Carolina is one of only two states that has never had an independent candidate appear on its general election ballots. J.A. 102-03.

Furthermore, *Jenness* is distinguishable because the practical impact of the challenged Georgia election law was much less severe when the case was decided in 1971 than that imposed by Section 163-122(a)(2) in 2008 to 2012. In 1971, Georgia required its district-wide unaffiliated candidates to file a nominating petition containing signatures of five percent of the number of registered voters at the last general election for the office sought and to pay a filing fee amounting to five percent of the annual salary of the office sought in order to be placed on the ballot. *Jenness*, 403 U.S. at 432. In November, 1970, Georgia had 1,961,013 registered voters.[5] Assuming the total number of registered voters is roughly equally distributed among Georgia's thirteen congressional districts, the total number of registered voters per district would be around 150,847 voters. Therefore, to satisfy Georgia's requirement, an unaffiliated candidate would need only around 7,542 signatures. This substantial difference distinguishes *Jenness* from the instant case and demonstrates that the district court's reliance on *Jenness* in this regard was in error.

[5] Georgia Secretary of State, *Voter Registration Statistics*, http://sos.georgia.gov/acrobat/elections/voter_registration_history.pdf (last visited Nov. 15, 2010).

Although *Coffield v. Kemp*, 599 F.3d 1276 (11th Cir. 2010), upheld Georgia's five percent requirement for non-statewide elections, that court's per curiam decision relied solely on *Jenness*, and it did not subject the Georgia law to the extensive, careful analysis developed by the Supreme Court in and after *Anderson* and adopted by this Court. Therefore, it should not be given weight in determining Appellants' case.

Instead, this Court should reach the practical determination that the atypical severity of North Carolina's four percent requirement proves that it is not the least restrictive means of protecting North Carolina's interest in regulating ballot access. North Carolina's petition signature requirement for district-wide unaffiliated candidates is the second-highest in the country in terms of percentage.[6] In 2008, the percentage requirement for unaffiliated candidates in North Carolina's Fourth Congressional District would have forced such candidates to attain signatures in excess of 20,000. J.A. 37 ¶ 5. In 2008, this was the highest signature requirement in the United States. *Id.* There are 435 districts in the United States. *Id.* 318 of those districts require between zero and 5,000 signatures for district-wide unaffiliated candidate ballot access. *Id.* Only 55 districts require 10,000 or more

[6] It is second only to Georgia's five percent requirement. Illinois has a five percent requirement as well, but the requirement forces candidates to attain signatures totaling five percent of the number of votes cast in the last election, as opposed to North Carolina's percentage requirement which uses the total number of registered voters. J.A. 37-8 ¶ 6.

signatures. *Id.* The median requirement is 2,750. *Id.* Again, under section 163-122(a)(2) Appellants Bryan Greene and Smith would have needed 16,547 and 18,123, respectively.

In justifying these unusually severe requirements, Appellees point to the large number of public offices that elected in North Carolina, stating that more candidates would cause ballot clutter. Defs.' Resp. Pls.' Mot. Summ. J., 12-3. Georgia and Arizona elect more statewide officers than North Carolina. *See* Addendum 1, *Libertarian Party of North Carolina, et al., v. State of North Carolina, et al.*, 05 CVS 13073 (Wake County May 27, 2008); *aff'd* 2009 N.C. App. LEXIS 1681, appeal retained No. 479A09 (N.C. Jan. 28, 2010). As noted above, Georgia retains the five percent requirement passed on in *Jenness*. In 2010, Georgia had 5,795,536 registered voters;[7] North Carolina had 6,194,229.[8] This means that in many instances, North Carolina's four percent requirement forces candidates to garner more signatures than Georgia's five percent requirement. In 2008, an unaffiliated candidate in North Carolina's Fourth Congressional District would have needed the highest number of signatures nationwide. Arizona's requirement for unaffiliated district-wide candidates is three percent. Ariz. Rev. Stat. Ann. § 16-341(e) (2010). Given the existence of these effective, less

[7] Secretary of State, *Voter Registration Statistics*, http://sos.georgia.gov/elections/voter_registration/vrgraphs.htm (last visited Nov. 15, 2010).

[8] *North Carolina State Board of Elections*, http://www.sboe.state.nc.us/ (last visited Nov. 15, 2010).

burdensome requirements, Section 163-122(a)(2) cannot be the least restrictive means of regulating ballot access, and the judgment of the district court should be reversed.

2. *Section 163-122(a)(2) cannot be the least restrictive means of protecting North Carolina's interest in regulating ballot access when North Carolina's legislature employs less restrictive means to safeguard the same interests.*

In *McLaughlin*, this Court noted concern over the means of reaching a least restrictive *vel non* determination.

> This inquiry 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., 65 F.3d at 1222. The appellants in that case argued that the Court did not have to look behind the legislative veil because the North Carolina General Assembly's use of a lesser percentage requirement for ballot access versus ballot retention demonstrated that the ballot retention percentage requirement was not the least restrictive means of protecting the State's interest. This Court held that the appellants' analysis was invalid because it compared the State's action in protecting two independent interests: ballot access and ballot retention. *McLaughlin*, 65 F.3d at 1222-23 (noting that this Court had "previously upheld two-tier ballot access schemes that require a party to exhibit a greater showing of

support to remain on the ballot than that party needed to place a candidate in the first place").

The instant case is distinguishable; Appellants in this case point to North Carolina's use of a lesser percentage requirement designed to protect the same interests allegedly justifying the four percent district-wide requirement as proof that the four percent requirement is not the least restrictive means. While North Carolina requires district-wide unaffiliated candidates to attain signatures from a number representing four percent of the total number of registered voters in the district, statewide unaffiliated candidates may be placed on the ballot after they attain signatures from a number of voters representing just two percent of the vote cast in the last gubernatorial election. N.C. Gen. Stat. § 163-122(a)(1). At the heart of both statutes is a single state interest: regulating ballot access. The imposition of a heightened requirement on district-wide candidates as opposed to statewide candidates, therefore, cannot be justified by an assertion that the statutes protect varying interests.

Whether the statute is considered in light of its plain requirements or its practical effect, the two percent requirement for statewide candidates is less stringent than the four percent requirement for district-wide candidates. Petitioning for district-wide office is more difficult than petitioning for statewide office because many voters do not know which district they reside in. J.A. 36 ¶ 2. The

rate of invalid signatures, therefore, is much higher in district-wide candidates' petitions. *Id*. Appellees offer no valid reason why the showing of support at the district level must be two times that required at the state level among candidates' respective constituencies. Because it is more difficult to garner petition signatures at the district-wide level and it is more difficult to garner signatures totaling four-percent of voters compared to two percent of votes cast, Section 163-122(a)(2) represents a far more stringent requirement than that imposed on statewide candidates in Section 163-122(a)(1).

Appellees cannot justify the difference by pointing only to the geographical distinctions between district-wide and statewide unaffiliated candidates in North Carolina. That the distinction for geographical reasons may be valid for some purposes does not answer whether it is valid here. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). In concluding that a disparity between petition signature requirements for statewide versus local candidates was invalid, the Court stated

> The signature requirements for independent candidates . . . seeking offices in [the districts] are plainly not the least restrictive means of protecting [the State's] objectives. The [State] Legislature has determined that its interest in avoiding overloaded ballots in statewide elections is served by the [two percent] signature requirement. Yet [the State Board of Elections] has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for [its districts] . . . Historical accident, without more, cannot constitute a compelling state interest.

Id., 440 U.S. at 186-87. Similarly, North Carolina has adopted a two percent requirement for statewide unaffiliated candidates and a four percent requirement for the same type of candidate in its districts. N.C. Gen. Stat. § 163-122(a) (2010). Both requirements protect the state's interest in ballot-access. If anything, that interest is put more squarely at stake in the context of a statewide candidacy, since any candidate who attains ballot access for statewide office will be placed on every ballot throughout the state. A district-wide candidate will be placed on just one. Yet Appellees advance no reason why a more stringent requirement would be necessary for district-wide unaffiliated candidates. J.A. 61-2. Because Appellees cannot adequately explain the disparity, and since the General Assembly has used less restrictive means to protect the same interests it claims require the use of a heightened requirement in its districts, this Court need not infringe on legislative authority in finding that Section 163-122(a)(2) is not the least restrictive means of regulating ballot access.

3. *Section 166-123(a)(2) cannot be the least restrictive means of protecting North Carolina's interest in regulating ballot access because its requirements translate to a practical prohibition of ballot-access that freezes the status quo*.

The historic absence from North Carolina's general election ballot of unaffiliated candidates for the House of Representatives represents the tipping point; a law that has prevented virtually every unaffiliated district-wide candidate from getting on the ballot for over a century cannot be constitutional. As noted

above, the practical impact of a challenged election law has become the cornerstone of the constitutional analysis of that law, *see Storer*, *supra*, and "[t]he Constitution requires that access to the ballot be real, not 'merely theoretical.'" *Am. Party of Texas v. White*, 415 U.S. 767 (1974)(quoting *Jenness v. Fortson*, 403 U.S. 431 (1971)). An unaffiliated district-wide candidate's access to the ballot in North Carolina has never been anything more than theoretical, and, therefore, North Carolina's regulation of ballot access in this regard cannot be the least restrictive means and is unconstitutional under the First and Fourteenth Amendments.

II. The district court erred in granting summary judgment to the Appellees because North Carolina General Statutes Section 163-122(a) violates the Equal Protection Clause by irrationally imposing substantially heavier petition requirements on unaffiliated candidates for the House of Representatives than it imposes on unaffiliated candidates for the United States Senate and on affiliated candidates for the House.

A. Section 163-122(a) lacks a rational basis for requiring unaffiliated candidates for the United States House of Representatives to four percent of the total number of current registered voters in the district while allowing ballot access to unaffiliated candidates for the U.S. Senate upon submission of signatures from voters equal to two percent of the number who voted in the previous gubernatorial election.

Section 163-122(a)(1) sets forth ballot access requirements for unaffiliated candidates for the United States Senate. The Section provides that unaffiliated candidates for the Senate must submit petitions with valid voters' signatures that number two percent of the statewide vote in the most recent gubernatorial election. In contrast to Section (a)(1), Section 163-122(a)(2) requires an unaffiliated

candidate for United States House seat to submit petitions with valid voters' signatures that equal or exceed four percent of the number of registered voters in the district – well more than twice the percentage than is required of senatorial candidates. It is well more than twice because a significant number of registered voters do not vote in a given election and because North Carolina's population growth will mean the number of registered voters in a current year will be higher than in an election year two or four years earlier. Hence the number of people voting in a preceding election will always be considerably smaller than the number of currently registered voters.

To qualify for placement on the 2008 general election ballot, unaffiliated congressional candidates in North Carolina's Tenth Congressional District had to submit ballot access petitions with at least 16,457 valid signatures from within the Tenth District, while unaffiliated United States Senate candidates had to submit 85,379 valid signatures state-wide. These disparate requirements are inconsistent with the established principles of reasonableness and similarity in degree set forth in *Delaney*. The District Court failed to account for the discrimination inherent in the current statutory scheme evidenced by the disproportionate burden placed upon unaffiliated House candidates *relative* to the size of their respective signature pool as compared to the much larger state-wide pool available to unaffiliated Senate candidates. There is simply no basis for requiring well over twice the percentage

of signatures from candidates seeking a seat in the lower house of Congress than is required from candidates seeking a seat in the upper house of Congress.

In *Socialist Workers Party*, *supra*, the Supreme Court held that disparate requirements for state and district offices that significantly burden one type of candidate in favor of another, but otherwise bear no rational relationship to any state interest, are unconstitutional and void. In that case, the court unanimously held that Illinois's more stringent requirements to ballot access for elections in Chicago than in elections held statewide were unsupported by any reason, let alone the compelling state interest needed to sustain the significant incursion on fundamental individual rights. *See also id*. at 190-91 (Rehnquist, J., concurring in the judgment)(disparity between the state and local signature requirements bore no rational relationship to any state interest); *see also* J.A. 60, 69 (Winger's Affidavit, stating generally that he does not know any explanation for the four percent requirement for unaffiliated congressional candidates).

North Carolina General Statutes Section 163-122(a)(2) arbitrarily discriminates against unaffiliated House candidates because the disparate qualification requirements for Senate and House candidacies bear no rational relationship to any state interest and therefore violates the Equal Protection Clause.

B. Section 163-122(a)(2) violates the Equal Protection Clause because its arbitrarily places disproportionately more burdensome requirements on unaffiliated congressional candidates than it does on affiliated congressional candidates.

In *Delaney v. Bartlett*, 370 F. Supp. 2d 373, 377 (M.D.N.C. 2004), the district court's inquiry focused on "whether the State may permit unaffiliated candidates to conform to significantly greater requirements than new party candidates for a place on the general election ballot." Its answer was that "unaffiliated candidates' ballot access should be 'reasonable' and 'similar in degree' to party candidates' requirements." *Id*. at 378 (quoting *Wood v. Meadow*, 207 F.3d 708, 712 (4th Cir. 2000)). Declaring the previous version of Section 163-122(a) unconstitutionally burdensome on unaffiliated candidates, the court reasoned that "[i]f the State's goal is to ensure that a candidate has a modicum of support for his platform, the new party signature requirement is a less restrictive means of meeting that goal." *Delaney*, 370 F. Supp. 3d at 379.

While it is true that *Delaney* centered on United States Senate candidates, and the present dispute arises out of the disparate classification of candidates for the United States House of Representatives, the contextual bases of the two cases are fundamentally analogous; the State's disparate classification of unaffiliated candidates for the United States House of Representatives in favor of affiliated congressional candidates is indistinguishable from the discriminatory statutory scheme held unconstitutional in *Delaney*.

Presently, Section 163-122(a)(2) requires unaffiliated candidates for the United States House of Representatives seeking to qualify for appearance on the general election ballot to submit petitions with valid signatures equal in number to four percent of the number of registered voters in their respective districts, while newly-recognized party candidates (hereinafter, "affiliated candidates") for the same congressional office are required to submit petitions signed by only two percent of the number of voters who voted in the most recent gubernatorial election. N.C. Gen. Stat. § 163-96 (2010). If that affiliated candidate's party received at least two percent of the vote in the last gubernatorial election, the candidate is not required to file individual petitions, but may appear on the ballot at the behest of the candidate's party. N.C. Gen. Stat. § 163-98 (2010).

As of the June 27, 2008, filing deadline, unaffiliated candidates for United States House of Representatives from North Carolina's Tenth Congressional District were required to submit petitions with 16,457 valid signatures,[9] while affiliated candidates seeking the same office were required to obtain 85,379 valid signatures. While the raw numbers of signatures to qualify new party are higher than required for an unaffiliated House candidate, these figures nevertheless contravene the *Delaney* standards of "reasonableness" and "similarity in degree."

[9] In 2008, the highest number of signatures an unaffiliated candidate would have needed was 22,549 in North Carolina's Fourth District. J.A. 229.

First, an affiliated congressional candidate is able to "ride the coattails" of a petition previously submitted by party members pursuant to North Carolina General Statutes Sections 163-96 (setting forth the petition requirements for new party recognition) and 163-98 (entitling new parties to have the names of its candidates for national, State, congressional, and local offices printed on the official ballots), while this luxury is not available to unaffiliated candidates.

Second, affiliated congressional candidates may obtain signatures from essentially anywhere within the State of North Carolina, so long as the petition is signed by at least 200 registered voters from each of four congressional districts. While the net quantity of signatures needed for ballot placement is less for the unaffiliated candidates, the pool from which those signatures may be respectively obtained is much greater for affiliated candidates. Moreover, the 200 signature requirement from each of four congressional districts placed on affiliated candidates is hardly burdensome.

Third, three of the ten counties within North Carolina's Tenth District are not entirely within the District, which makes canvassing for signatures subject to disproportionate signature invalidation mostly because of voters' uncertainties

about which district they live. [10] J.A. 36 ¶ 2; *see also* J.A. 86-7. Voters are obviously more aware of their state of residency than of their congressional district of residency. J.A. 36 ¶ 2.

The district court, however, found that because North Carolina's election scheme only recognizes new political parties statewide, the application of substantially different petition signature requirements for affiliated and unaffiliated candidates for the same Congressional seats "does not create the discrimination of similarly situated persons or entities required for an equal protection analysis." J.A. 233. Distinguishing the present set of facts from those in *Delaney*, the court found Petitioners' "argument fails to recognize the substantive difference between recognition of new parties on a statewide basis and an unaffiliated candidate's qualification in a single district." J.A. 232. This conclusory ruling fails to recognize the important, overarching reality that makes *Greene* indistinguishable from *Delaney*; in each case, both the unaffiliated and affiliated candidates were similarly situated in that each were running for the same congressional positions (the United States House of Representatives in *Greene* and the United States Senate in *Delaney*). Furthermore, the State does recognize new party candidates on a district level – once a new party complies with the requirements set forth in

[10] North Carolina's Tenth Congressional District, in which the Greene appellants reside, is comprised of seven whole counties (Avery, Burke, Caldwell, Catawba, Cleveland, Lincoln and Mitchell) and parts of three others (Gaston, Iredell and Rutherfordton). N.C. Gen. Stat. § 163-201 (2010).

Sections 163-96 and 163-98, its congressional candidate has the right to be placed on the district-wide ballot for the United States House of Representatives, even if that party has no other candidate in any state-wide or other district-wide race.

In the State's Response to Petitioners' Motion for Summary Judgment, the State claimed that "[f]or [P]laintiffs to assert an equal protection claim consistent with *Delaney*, they must establish that they are treated differently from new parties seeking to be recognized within a district … government." Defs.' Resp. Pls.' Mot. Summ. J., 18. Appellants believe that the facts presented indicate just that.

The North Carolina General Assembly has taken two classes of similarly-situated sets of candidates and has enacted separate rules for them, and the practical implications for unaffiliated candidates are even more discriminatory than those evidenced in *Delaney*. That no unaffiliated congressional candidate has *ever* appeared on the general election ballot in North Carolina evidences that the State's hostility towards candidates from outside of the traditional two-party scheme has resulted in an unduly burdensome and unreasonably discriminatory election law scheme. It disproportionally responds to what are otherwise justifiable state interests to avoid voter confusion and ballot clutter.

As in *Delaney*, the State has severely discriminated against unaffiliated candidates without justification. Since ballot access requirements for unaffiliated Senate candidates must be reasonable and similar in degree to affiliated Senate

candidates' requirements under *Delaney*, it is logical that the same standards of reasonableness and similarity in degree apply to candidates for the United States House of Representatives.

III. Appellants have standing to challenge N.C. Gen Stat. §163-122(a)(2).

While the district court's order did not address Appellants' standing, the Appellees made a cursory and flawed argument in the lower court that no Article III case or controversy exists. To determine if a party has standing, the court looks to "whether the plaintiff is the proper party to bring the suit." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). In doing so, the courts must examine

> (1) whether that party has "suffered an injury in fact, i.e., 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical,'" (2) whether the injury is "fairly traceable to the actions of the Defendants, rather than the result of actions by some independent third party not before the court," and (3) whether it is "likely, as opposed to merely speculative, that her injuries will be redressed by a favorable decision."

Dixon v. Edwards, 290 F.3d 699, 711 (4th Cir. 2002)(quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

First, Appellants Greene and Smith have "suffered an injury in fact" as a result of the unconstitutional burden imposed by Section 163-122(a)(2). That Section regulates ballot access for unaffiliated House candidates. *See Anderson v. Celebrezze*, 460 U.S. 780, 786-87 (1983). ("The impact of candidate eligibility requirements on [petitioners] implicates basic constitutional rights," including the

rights to political association, expression and equal protection). Appellants Bryan Greene and Smith unsuccessfully attempted to qualify for ballot access in 2008 and 2010, respectively, but were unable to meet that Section's severe standards. J.A. 223-24. Appellants Greene and Smith intend to run again for Congress and attempt to overcome the unconstitutional obstacle that currently stands in their way. J.A. 14 ¶ 22; *see also* J.A. 194 ¶ 18.

Similarly, the four percent requirement unjustifiably restricts Appellants Jordon Greene and Meister's right to advocate, promote, and potentially vote for the candidate of their choosing. This right is at the heart of the Court's ballot access cases, *see e.g*., *Celebrezze*, 460 U.S. 780, campaign finance cases, *see* e.g., *Wisconsin Right to Life, Inc. v. Fed. Elec. Comm'n*, 546 U.S. 410 (2006); *Buckley v. Valeo*, 424 U.S. 1 (1976), cases protecting political parties' rights to promote candidates, *see* e.g. *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Colorado Republican Fed. Campaign Comm. v. Fed. Elec. Comm'n*, 518 U.S. 604 (1996), cases protecting the rights of candidates to promote themselves, *see* e.g. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), cases protecting editors' rights to endorse candidates, *see* e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); *Mills v. Alabama*, 384 U.S. 214 (1966), and cases protecting the right to criticize and oppose candidates, *see* e.g., *Beckley Newspapers v. Hanks*, 389 U.S. 81 (1967). Thus all Appellants have suffered the

requisite particularized injury and face recurring injuries so long as Section 163-122(a)(2) exists in its present form.

Second, Appellants' injury is directly traceable to the Appellees' actions. Traceability is satisfied where the defendants' acts "cause[d] or contribute[d] to the kinds of injuries alleged by the plaintiffs." *Natural Res. Def. Council v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992). Because Appellees oversee all elections and are responsible for the implementation of Section 163-122(a)(2), J.A. 50-51, Appellants' injury is traceable to Appellees' actions.

Finally, invalidation of Section 163-122(a)(2) will redress Appellants' injuries by eliminating the unconstitutionally restrictive four percent requirement. The Appellants do not have to prove that either potential candidate would have qualified, or will be able to qualify, under some yet-to-be-identified constitutional petitioning requirement. *See Ne. Fla. Chapter of Assoc'd Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993)(holding, in striking down a municipal government requirement giving preferential treatment to minority-owned firms, that it was irrelevant whether the complainants would have actually received city contracts but for the ordinance and finding that the injury in fact was the discrimination imposed by the invalid law and that the injury was redressable by the law's removal). In fact, the circuits have uniformly recognized standing for candidates to challenge burdensome ballot access laws – even if the candidates had

made no attempt to comply with the statute. *See* e.g. *Rainbow Coal. of Oklahoma v. Oklahoma State Elec. Bd.*, 844 F.2d 740 (10th Cir. 1988); *Stevenson v. State Bd. of Elec.*, 794 F.2d 1176 (7th Cir. 1986); *Goldman-Frankie v. Austin*, 727 F.2d 603 (6th Cir. 1984).

CONCLUSION

The district court erred in granting summary judgment to Appellees and denying the same to Appellants. Section 163-122(a)(2)'s requirements for ballot access for district-wide unaffiliated candidates are unconstitutional because they impose a severe burden on Appellants' First and Fourteenth Amendment rights to meaningful and fair participation in the electoral process and because the four percent requirement is not the least restrictive means of protecting North Carolina's interest in regulating ballot access. Furthermore, North Carolina's law irrationally discriminates against unaffiliated candidates for the United States House of Representatives compared to unaffiliated candidates for the United States Senate and to affiliated candidates for the House. Appellants have standing to bring suit because the enforcement of Section 163-122(a)(2) of the North Carolina General Statutes has prevented, and continues to prevent, them from having a meaningful and nondiscriminatory opportunity to participate in Congressional elections.

For these reasons, the judgment of the district court should be reversed; alternatively, this case should be remanded to the district court for further findings of fact concerning whether section 163-122(a)(2)'s requirements are the least restrictive means of regulating ballot access in North Carolina.

REQUEST FOR ORAL ARGUMENT

In light of the significant burdens placed upon unaffiliated congressional candidates created by Section 163-122(a)(2) of the North Carolina General Statutes and the importance of First and Fourteenth Amendment ballot access rights, Appellants respectfully request oral argument.

Respectfully submitted,

Dated: November 16, 2010

/s/ *Robert M. Bastress, Jr.*
Robert M. Bastress, Jr.
(WV Bar ID #263)
P.O. Box 1295
Morgantown, WV 26505
(304) 293-5308
robert.bastress@mail.wvu.edu

/s/ *Jason E. Huber*
Jason E. Huber
(NC Bar ID #40914)
2145 Suttle Avenue
Charlotte, NC 28208
(704) 971-8381
jhuber@charlottelaw.edu

Counsel for Appellants

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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/s/ *Robert M. Bastress, Jr.*
Robert M. Bastress, Jr.
(WV Bar ID #263)
P.O. Box 1295
Morgantown, WV 26505
(304) 293-5308
robert.bastress@mail.wvu.edu

/s/ *Jason E. Huber*
Jason E. Huber
(NC Bar ID #40914)
2145 Suttle Avenue
Charlotte, NC 28208
(704) 971-8381
jhuber@charlottelaw.edu

Counsel for Appellants

Dated: November 16, 2010

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 16, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Karen E. Long
NORTH CAROLINA
DEPARTMENT OF JUSTICE
706 Bolin Creek Drive
Carrboro, NC 27510

Susan K. Nichols
NORTH CAROLINA
DEPARTMENT OF JUSTICE
114 West Edenton Street
P.O. Box 629
Raleigh, NC 27602

Alexander M. Peters
NORTH CAROLINA
DEPARTMENT OF JUSTICE
1505 Mail Service Center
Raleigh, NC 27699

Counsel for Appellees

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Laura C. Bunton
Laura C. Bunton
GIBSON MOORE APPELLATE SERVICES, LLC
421 East Franklin Street, Suite 230
Richmond, VA 23219

Addendum 1

Libertarian Party of North Carolina, et al., v. State of North Carolina, et al., 05 CVS 13073 (Wake County, May 27, 2008); *aff'd* 2009 N.C. App. LEXIS 1681.

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

05 CVS 13073

LIBERTARIAN PARTY OF NORTH CAROLINA, SEAN HAUGH, as Executive Director of the party; PAMELA GUIGNARD and RUSTY SHERIDAN, as Libertarian candidates for Mayor of Charlotte, North Carolina; JUSTIN CARDONE and DAVID GABLE, as Libertarian candidates for Charlotte City Council; RICHARD NORMAN and THOMAS LEINBACH, as Libertarian candidates for Winston-Salem City Council; and JENNIFER SCHULZ as a registered voter,

Plaintiffs,

and

THE NORTH CAROLINA GREEN PARTY; ELENA EVERETT, as Chair and KAI SCHWANDES, as Co-Chair of the party; NICHOLAS TRIPLETT, as a prospective North Carolina Green Party candidate for public office; HART MATTHEWS and GERALD SURH, as members of the party and qualified voters,

Intervenors,

v.

ORDER

STATE OF NORTH CAROLINA; ROY COOPER, Attorney General of North Carolina; STATE BOARD OF ELECTIONS; and GARY O. BARTLETT, as Executive Director of the State Board;

Defendants.

THIS CAUSE came on to be heard as a non-jury trial before the undersigned Judge Presiding in the Wake County Civil Superior Court on 5 May 2008. Kenneth A. Soo and Adam Mitchell, of Tharrington Smith, L.L.P., Attorneys at Law, were present representing the

Plaintiffs; Robert M. Elliot, of Elliot Pishko Morgan, P.A., and Katherine Lewis Parker, of the American Civil Liberties Union of North Carolina, were present representing the Intervenors; Alexander McC. Peters and Karen E. Long, Special Deputy Attorneys General, were present representing the Defendants.

Based upon the Pretrial Order entered into by the Parties and signed by this Court, the trial briefs submitted by the Parties, and the testimony and arguments presented at trial,
and all exhibits presented to the Court, the Court makes the following findings of fact and conclusions of law and enters the following Order.

STIPULATION OF FACTS:

The parties hereto stipulate and agree with respect to the following undisputed facts:

1. Historically, states, including North Carolina, have imposed requirements on political parties to gain and retain recognition for their parties and their affiliated candidates.
2. To gain recognition in North Carolina, a political party has been required to submit a petition with the signatures of a number of registered voters supporting the recognition of that party; once a party has obtained recognition as a political party, its candidates have been listed on ballots throughout North Carolina.
3. From 1935 through 1981, the North Carolina signature requirement was 10,000 registered voters. North Carolina Code of 1935 § 5913.
4. In 1980, the Socialist Workers Party presented enough signatures to appear on the ballot. In total, six political parties appeared on the presidential ballot that year: the Democratic, Republican, Libertarian, Citizens, Independent and Socialist Workers parties.
5. In the next legislative session, the General Assembly changed the petition

requirement to 5,000 names but also provided that the affiliation of any voter who signed a petition would be automatically switched to the new party. 1981 Sess. Laws C. 219, §§ 2 and 3.

6. The provision that automatically switched the voter registration of an individual who signed a petition was struck down by a federal court in 1982. *North Carolina Socialist Workers Party v. North Carolina State Board of Elections*, 538 F. Supp. 864 (E.D.N.C. 1982).

7. In 1982, the only year in which 5,000 signatures were required for a new party, only four parties–the Democratic, Republican, Libertarian and Socialist Workers–appeared on the ballot. 1982 was not a presidential election year, nor a year in which governor or Counsel of State members were elected.

8. In 1983, the General Assembly increased the number of registered voter signatures required for recognition of a new political party from 5,000 to two percent of the number who voted in the last gubernatorial election. 1983 Sess. Laws C. 576, § 1. Parties who are seeking recognition as political parties in North Carolina may begin gathering these signatures as soon as the gubernatorial election is over.

9. For the 2008 election, a party must submit 69,734 signatures from registered voters in order to gain recognition as a political party pursuant to N.C.G.S. § 163-96. These signatures must be submitted to the State Board of Elections by the first day of June.

10. The population of North Carolina, the number of registered voters in

North Carolina, the number of voters who vote in North Carolina's gubernatorial elections and, consequently, the number of signatures required to gain recognition as a political party have steadily increased from 1996 to the present. In addition, since the beginning of this year, at least 110,000 new voters have registered in North Carolina. As of April 12, 2008, 5,733,762 persons were registered to vote in North Carolina. This being so, the number of signatures required for recognition as a political party – 69,734 – is 1.21% of the total registered voters in North Carolina as of April 12, 2008.

Year	Population	Registered Voters	Votes in Gubernatorial Election	2% Requirement
1984	6,164,501	3,270,933	2,226,727	44,535
1988	6,483,344	3,432,032	2,180,025	43,601
1992	6,895,428	3,817,380	2,595,184	51,904
1996	7,499,276	4,330,657	2,566,042	51,321
2000	8,079,242	5,122,123	2,933,958	58,679
2004	8,531,293	5,519,992	3,486,688	69,734
	Source: NC Demographer's Office	Source: SBE Website	Sources: SBE Website; UNC Program on Southern Life Website	

11. In order to retain recognition, a political party has historically been required to receive a threshold percentage of the votes cast statewide in the most recent gubernatorial or presidential election.

12. From 1935 to 1949, the ballot retention requirement was 3% of the

statewide vote. North Carolina Code of 1935 § 5913.

13. In 1948, the States Right Party polled 8.8% of the vote.

14. In the next legislative session, the General Assembly raised the ballot retention requirement to 10% of the statewide vote.

15. Only one party other than the Democratic or Republican Party, the American Party in 1968, has ever met the 10% requirement. The Democratic and Republican Parties are the only two political parties to maintain continuous recognition since the enactment of N.C.G.S. §§ 163-96 and -97.

16. Effective January 1, 2007, after the filing of this action on September 21, 2005, the General Assembly amended N.C.G.S. § 163-96 to lower the retention requirement to 2%. 2006 Sess. Laws C. 234, §§ 1 and 2.

17. Once a political party is officially recognized, under § 163-96 its candidate must receive at least 2% of the statewide vote for governor or president for the party to remain officially recognized and for its candidates to be listed on the ballot for any office anywhere in the state. Thus, even if candidates of the party receive more than two percent of the vote in a particular city or county, they cannot be listed on the ballot and their party identified in ballots in that community if the party did not receive two percent of the vote statewide.

18. The Libertarian Party of North Carolina has been in continuous existence since 1976. The party has bylaws and a party platform; has held an annual convention for each of 25 years; has active local organizations in more than a dozen counties; and maintains a website.

19. At the time the present action was filed on September 21, 2005, the Libertarian Party had over 13,000 registered voters in the state.

20. Between October 1993 and November 2004, the number of registered Libertarian voters in North Carolina increased from 1193 to 12,754.

Date	Total Number of Registered Voters	Number of Registered Libertarian Voters	Percentage of Total Voters Registered as Libertarian
Oct. 1993	3,483,606	1193	0.03
Apr. 1994	3,544,094	1245	0.04
Oct. 1995	3,871,907	1938	0.05
Apr. 1996	4,034,233	2014	0.05

Oct. 1997	4,398,999	3241	0.07
Apr. 1998	4,547,438	3644	0.08
Oct. 1999	4,838,503	5043	0.10
Oct. 2000	5,186,094	6909	0.10
Dec. 2001	4,946,452	7979	0.16
Apr. 2002	4,972,379	8262	0.17
Oct. 2003	5,001,522	9838	0.20
Nov. 2004	5,519,992	12,754	0.23

Source: State Board of Elections website (http://www.sboe.state.nc.us/content.aspx?id=41) and e-archive (ftp://www.app.sboe.state.nc.us/data/voterstats/)

21. In 2000, the Libertarian Party candidate for Governor received 42, 674 votes (1.5% of the total votes cast) and the Libertarian Party candidate for President received 13,891 (0.5% of the total votes case). The Party did not meet the 10% threshold to retain their access to the ballot. The Party immediately began a petition drive that was successfully completed in 2001. The Party was not de-certified and retained its ballot access through 2004.

22. In 2004, the Libertarian Party candidate for Governor received 52,513 votes (1.5% of the total votes cast) and the Libertarian Party candidate for President received 11,731 (0.5% of the total votes cast). The Libertarian Party candidate for Senate District 36 received over 18% of the total votes cast in that race, in which the only other candidate was the incumbent Republican. The Party did not meet the 10% threshold to retain their access to the ballot. The Party was de-certified by the State Board of

Elections on August 27, 2005.

23. When the Libertarian or any other party is de-certified, the registration of all of its voters is automatically switched to "unaffiliated" pursuant to N.C.G.S. § 163-97.1. The county boards of elections send each affected voter a letter informing them of the automatic change in affiliation and their right to declare a party affiliation as provided by law. This change in registration means that when the party is again recognized voters desiring to be officially affiliated with the party are required to re-register with the party.

24. The North Carolina Green Party organized as a statewide political party in 2000 and has been in continuous existence since that time. The Green Party has established bylaws, maintains a website, elects officers, has regular meetings, has adopted and published a party platform, and has members who support the objectives of the party. The North Carolina Green Party is affiliated with the Green Party of the United States, which has been in existence since the 1980's.

25. Green Party members have never met the state's petition requirements; have never gained recognition as a political party pursuant to NCGS § 163-96; and consequently, have never received the benefits of party recognition, including the right to run as candidates for public office under the Green Party label.

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

the following years: 1992 - Libertarian; 1996 - Libertarian, Natural Law, Reform; 1998 - Libertarian; 2000 - Libertarian, Reform; 2002 - Libertarian; 2004 - Libertarian.

27. All current members of the General Assembly are either Democrats or Republicans.

28. All members of the State Board of Elections are either Democrats or Republicans.

29. The percentage of voters who do not identify as Democrats or Republicans–unaffiliated voters–has increased from 2.5% in 1968 to more than 20% in 2008.

Year	Total # Voters	% Democrat	% Republican	% Unaffiliated
1968	2,077,538	75.5	21.6	2.5
1978	2,430,306	72.6	23.3	4.1
1988	3,432,042	65.5	29.6	4.9
1998	4,700,779	52.2	33.8	14.0
2008	5,604,420	44.8	34.3	20.9

30. Without recognition under § 163-96 as political parties, the Libertarian and Green Parties are not automatically entitled pursuant to N.C.G.S. § 163-99 to free access to public schools and other public buildings for party meetings as are the Democratic and Republican parties.

31. When they do qualify for the ballot, candidates ofthose parties that reflect at least five percent (5%) of statewide voter registration, as reflected in the most recent statistical report by the State Board of Elections, are listed in alphabetical order on the ballot first; they are then followed by candidates

from other parties in alphabetical order by party, and then by unaffiliated candidates. N.C.G.S. § 163-165.6(d).

32. North Carolina taxpayers may designate on their tax return that $3.00 of the tax shall be credited to the North Carolina Political Parties Financing Fund for the use of the political party designated by the taxpayer. N.C.G.S. § 105-159.1. Only parties that are formally recognized by the State under N.C.G.S. § 163-96 and 97 are eligible for participation in the program.

33. Upon being recognized for the first time, a recognized political party is required by statute to nominate its candidates by convention while established parties use party primaries. The state pays the cost of conducting party primaries but offers no financial assistance for party conventions.

34. Because their preferred political party is not recognized by the State, voters who support the Green and Libertarian Parties are unable to register in such a way as to signify their party preference. As a result, the State Board of Elections does not maintain and cannot provide to the Green and Libertarian parties lists of those voters who support the Green and Libertarian parties.

35. Campaign finance reports for the North Carolina Democratic Party – State show that O. William Faison, identified as "Attorney, Faison & Gillespie" in Durham contributed $10,000 on 11/18/05 and $10,000 on 11/23/05; that Michael A. Brade-Arajae, identified as "Investor, True Pilot, LLC" in

Chapel Hill contributed $10,000 on 5/24/07; that Mack Pearsall, identified as "President, PVC, Inc." in Asheville contributed $9,733.59 on 5/10/07; that State Senator Bob Atwater of Pittsboro contributed $5,000 on 1/12/07; that State Senator Charlie Dannelly of Charlotte contributed $5,000 on 1/12/07; and that State Senator David F. Weinstein of Lumberton contributed $5,000 on 1/12/07.

36. Campaign finance reports for the North Carolina Republican Party – State show that Robert Luddy, identified as "President, Captive Air" in Raleigh contributed $5,000 on 1/10/07, $7,500 on 10/27/06 and $3,000 on 10/30/06; that Fred Smith, identified as "Home Builder" of Clayton, contributed $5,000 on 1/25/07; and that Don Walston, identified as "President, Howard, Perry & Walston" of Raleigh, contributed $5,000 on 10/23/06.

37. In general, individuals may contribute a maximum of $4,000 per candidate per election. However, G.S. 163-278(13)(e) exempts any national, state, district, or county executive committee of a political party that is recognized under 163-96 from the $4000 contribution maximum. Because they are not recognized as political parties under NCGS 163-96, the Libertarian and Green Parties are not eligible to receive donations greater than $4000.

38. Persons desiring to get on the ballot in North Carolina can also 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, though in neither

circumstance will the candidate's political party appear with a party label. N.C.G.S. § 163-122 requires unaffiliated candidates for statewide office 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 that district or locality must be submitted . N.C.G.S. § 163-123 requires write-in candidates for statewide office to submit 500 signatures of registered voters.

39. Article III of the North Carolina Constitution requires that all ten members of the Council of State be elected statewide.

40. North Carolina's voting equipment must comply with the requirements of N.C.G.S. 163-165.7 and with the federal "Help America Vote Act" ("HAVA"), 42 U.S.C. § 15481 *et seq.*

FINDING OF FACTS:

41. From 1983, when the 2%t signature requirement for recognition as a new party was adopted, to the present, the General Assembly has made no attempt to increase the 2% signature requirement and has dropped the retention requirement from 10% to 2% of the votes cast for Governor.

42. Only two states – Georgia and Arizona – elect more statewide officers than North Carolina does.

43. Unlike some other states, where those seeking recognition as new political parties must obtain the required number of signatures in periods as short as two weeks or ninety days, North Carolina allows those seeking recognition as new parties to begin collecting signatures on the day of a gubernatorial election. This effectively gives potential new parties approximately three and one-half years to collect the necessary signatures.

44. According to the testimony of Barbara Howe and Sean Haugh, as well as plaintiffs and intervenor's Exhibit 13, five people collected more than 85,000 signatures for the Libertarian Party this election cycle.

45. North Carolina holds its election for U.S. President, ten statewide executive officers, State House members, State Senate members, U.S. Congress in the same general election. If those years also have a statewide race for U.S. Senate, there will be fifteen offices up for partisan election on every ballot in North Carolina. Additionally, there may be non-partisan statewide elections for the North Carolina Supreme Court and the North Carolina Court of Appeals, as well as partisan and non-partisan elections for local offices, including judicial offices.

46. In 1996 North Carolina had long lines and voter dissatisfaction during the General Election. That election had an unusually long ballot; five parties were recognized in North Carolina that year.

47. Nearly eighty percent (80%) of North Carolina counties use optical scan voting machines.

48. There is a limit to the physical size of ballots that can be used on optical scan machines.

49. Longer ballots for optical scan machines have to be two sided and may have to be placed on more than one sheet. As testified to both by the Deputy Director of the North Carolina State Board of Election and by plaintiffs and intervenor's expert, Richard Winger, double-sided optical scan ballots and more than one sheet for a ballot are not desirable for the efficient administration of elections.

50. The longer the ballot, the greater the opportunity for errors and problems in the administration of elections.

51. The State must plan for the possibility for extremely long ballots, not merely for the probability of extremely long ballots.

52. Defendants North Carolina State Board of Elections and its Executive Director bear the legal responsibility and obligation of executing and administering on behalf of the State

of North Carolina the statutes challenged by plaintiffs and intervenors. There has been no evidence presented that defendant Roy Cooper, as Attorney General of the State of North Carolina, bears any responsibility for the administration or execution of these statutes other than in his capacity as counsel to the North Carolina State Board of Elections.

Based on the foregoing Stipulation of Facts and Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Plaintiffs and intervenors have failed to offer any evidence showing how defendant Roy Cooper, as Attorney General of the State of North Carolina, is a proper defendant to this action. Accordingly, he should be dismissed as a defendant.

2. "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). "[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991). "If 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." *Id.* at 338, 410 S.E.2d at 891.

3. Plaintiffs and intervenors have not demonstrated that N.C. GEN. STAT. §§ 163-96 or -97.1, or any other challenged statute, violate the North Carolina Constitution beyond a reasonable doubt.

4. "Strict scrutiny, this Court's highest tier of review, applies 'when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.' Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest." *Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002) (internal citations omitted).

5. Plaintiffs and intervenors have not alleged and have not shown that they are members of a suspect class.

6. The right to vote on equal terms is a fundamental right. *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002). The statutes challenged by plaintiffs and intervenors, however, do not infringe upon their right to vote on equal terms. Rather, plaintiffs and intervenors in essence posit that voters have a right to have the party of their choice appear on the ballot.

7. There is not a fundamental right to have the party of a voter's choice appear on the ballot. Accordingly, strict scrutiny does not apply to plaintiffs and intervenors challenges.

8. 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)).

9. "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." *McLaughlin*, 65 F.3d at 1222.

10. The provisions challenged by plaintiffs and interevenors cannot be considered in isolation, but "must be assessed as a complex whole," in the context of North Carolina's complete scheme regarding the conduct of elections. *McLaughlin*, 65 F.3d at 1223.

11. In North Carolina, this "complex whole" includes the following:

    a. The North Carolina Constitution requires that 10 Council of State offices be elected every four years;

b. The elections for Council of State occur in the same years as the election of the President and Vice-President of the United States;

c. If there is also a race for United States Senate in a presidential election year, there will be fifteen offices up for partisan election on every ballot in North Carolina, including members of the United States House of Representatives and the North Carolina Senate and North Carolina House of Representatives;

d. There may also be non-partisan statewide elections for the North Carolina Supreme Court and the North Carolina Court of Appeals, as well as partisan and non-partisan elections for local offices, including judicial offices;

e. Ballots and voting systems in North Carolina must comply with federal and state laws, which limit the options available to counties in choosing voting systems;

f. The majority of North Carolina counties use optical scan voting systems, in which longer ballots increase the possibility of errors or problems in the administration of elections; and

g. The more parties there are that are recognized by the State and that place candidates on the ballot, the greater chance there is for ballots that are so long as to be unwieldy and to risk voter confusion and frustration of the electoral process.

12. 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).

13. While 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. 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).

14. Both the Freedom of Speech clause (Article 1, § 14) and the Equal Protection clause

(Article I, § 19) of the North Carolina Constitution, are only 37 years old, having first been adopted with the ratification of the 1971 Constitution. They are modeled on the cognate provisions of the federal Constitution.

15. The 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.

16. Plaintiffs and intervenors have failed to overcome the presumption that the statutes they challenge are constitutional.

17. Neither the 2% retention requirement contained in N.C. GEN. STAT. § 163-96(a)(1) nor the 2% signature requirement contained in N.C. GEN. STAT. § 163-96(a)(2) violate Article I, §§ 1, 10, 12, 14 and 19, or Article VI, §§ 1 or 6, of the North Carolina Constitution.

18. The provisions of N.C. GEN. STAT. § 163-97.1 do not violate Article I, §§ 1, 10, 12, 14 and 19, or Article VI, §§ 1 or 6, of the North Carolina Constitution.

Therefore, it is hereby adjudged, ordered and decreed:

1. That defendant Roy Cooper should be dismissed as a party to this action; and

2. That judgment should be and hereby is entered in favor of defendants.

This the 27th day of May, 2008.

Robert H. Hobgood

The Honorable Robert H. Hobgood
Superior Court Judge Presiding