IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
CIVIL DOCKET NO. 5:08-CV-00088RLV-CH

BRYAN E. GREENE, JORDAN M. GREENE, TODD MEISTER,	)	
Plaintiffs,	)	**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
v.	)	
GARY O. BARTLETT, et al.,	)	(Fed. R. Civ. P. 56; LCvR 7.1(E))
Defendants.	)	

NATURE OF THE CASE

Plaintiffs have brought this action under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343, by which they seek to have the North Carolina statute for ballot qualification of unaffiliated candidates for district offices, N.C. GEN. STAT. § 163-122 (a)(2), declared to be in violation of the First and Fourteenth Amendments of the United States Constitution. The statute requires a candidate who wishes his or her name to appear on the ballot as an unaffiliated candidate for a district office to qualify by obtaining petitions signed by 4% of the registered voters in the district.

STATEMENT OF THE FACTS

The material facts in this action are not contested. Plaintiffs are citizens and residents of Caldwell County, North Carolina, which lies in the State's Tenth Congressional District. (Compl. ¶ 2[1]; Answer ¶ 2) Plaintiff Bryan Greene sought unsuccessfully to run as an unaffiliated candidate

[1] Citations are to the "Corrected Image of Complaint" filed on August 15, 2008. Although not denominated an Amended Complaint, the paragraphs are in fact revised from the initial

for United States Representative from the Tenth Congressional District in the 2008 general election. (Compl. ¶ 8; Answer ¶ 8) Plaintiffs Jordan Greene and Todd Meister allege that they desired to support Bryan Greene's candidacy and vote for him in the 2008 general election. (Compl. ¶ 9). In order to qualify as an unaffiliated candidate, Bryan Greene was required to submit signatures from 4% of the registered voters in the Tenth Congressional District as of January 1, 2008. N.C. GEN. STAT. § 163-122 (a)(2). As of January 1, 2008, North Carolina's Tenth Congressional District had 411,425 registered voters; thus, N.C. GEN. STAT. § 163-122(a)(2) required that Bryan Greene gather and submit the signatures of at least 16,457 registered voters in the Tenth Congressional District to qualify as an unaffiliated candidate as United States Representative from that district. (Compl. ¶13; Answer ¶ 13) These signatures had to be submitted by June 27, 2008. (Compl. ¶ 11; Answer ¶ 11)

Plaintiffs gathered and submitted 805 signatures to the State Board of Elections ("State Board"), of which 552 were certified as valid. (Compl. ¶ 14; Answer ¶ 14) These certified signatures fell far short of the 16,457 required to qualify as an unaffiliated candidate for United States Representative from the Tenth Congressional District. (Compl. ¶ 13; Answer ¶ 13) Thus, Bryan Greene was not certified by the State Board as an unaffiliated candidate for the Tenth Congressional District in the 2008 general election.

Plaintiffs made the general allegation in their Complaint that "Plaintiff Bryan Greene intends to run as an independent candidate for Congress in North Carolina in future elections, and the remaining plaintiffs intend to support his candidacy if he does run." (Compl. ¶ 22) Defendants denied this allegation. (Answer, ¶ 22) The Complaint was verified by Jordan Greene, not Bryan Greene (Case Docket No. 32-2, Affidavit of Jordan Greene), and plaintiffs have come forward with

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complaint filed, beginning with paragraph 8.

no evidence concerning any specific plans that Bryan Greene may have to run as an unaffiliated candidate for Congress. There is nothing in the record, for example, indicating whether he is currently attempting to qualify as an unaffiliated candidate for the 2010 general election.

The Executive Director and the members of the State Board are sued in their official capacities.

QUESTIONS PRESENTED

I. DO PLAINTIFFS LACK STANDING TO PROSECUTE THIS ACTION?

II. DOES THE CHALLENGED REQUIREMENT UNDULY BURDEN PLAINTIFFS' FIRST AMENDMENT RIGHTS?

III. IS THE CHALLENGED REQUIREMENT INVALID BECAUSE IT REQUIRES A HIGHER PERCENTAGE OF SIGNATURES THAN IS REQUIRED FOR THOSE SEEKING TO RUN AS UNAFFILIATED CANDIDATES FOR STATEWIDE OFFICE?

IV. DOES THE CHALLENGED REQUIREMENT VIOLATE PLAINTIFFS' EQUAL PROTECTION RIGHTS DUE TO THE DIFFERENCES IN THE REQUIREMENTS FOR UNAFFILIATED CANDIDATES AND NEW PARTIES?

ARGUMENT

"Summary judgment is appropriate only if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *King v. Rumsfeld*, 328 F.3d 145 (4th Cir. 2003). Any evidence is viewed in the light most favorable to the non-moving party. *Id*

Plaintiffs' challenges to N.C. GEN. STAT. § 163-122(a)(2) must be considered under the framework set forth by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983). *Anderson* requires that courts considering a challenge to a State election law weigh

> "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick v. Takushi, 504 U.S. 428, 434, 112 S. Ct. 2059, 2063, 119 L. Ed. 2d 245, 253 (1992) (quoting *Anderson*, 460 U.S. at 789, 103 S. Ct. at 1570, 75 L. Ed. 2d. at 558).

The *Anderson* test rejects summary categorization of State election laws as subject to either strict scrutiny or the rational-basis test. *Anderson* requires instead a balancing that ranges from strict scrutiny to a rational-basis analysis. Restrictions on access to the ballot may burden the fundamental rights of individuals to associate for the advancement of political beliefs, but the restrictions will be upheld if they meet the appropriate test. *See Burdick*, 504 U.S. at 432-35, 112 S. Ct. at 2062-64, 119 L. Ed. 2d. at 252-54. Under *Anderson*, a regulation must be narrowly drawn to advance a State's interest only when it subjects voters' rights to severe burdens; if the challenged law imposes only reasonable, nondiscriminatory restrictions upon voters' rights, the State's important regulatory interests are generally sufficient to justify the restrictions. *Id.*

A court will not look solely to the allegedly offensive regulation; rather, the court will determine whether the entire regulatory scheme presents an unconstitutional burden. The Fourth Circuit, in upholding North Carolina's two-tiered ballot access requirements for political parties, stated:

> The Supreme Court has emphasized that ballot access restrictions must be assessed as a complex whole. Because it is rare indeed that a rule which requires a party to demonstrate a particular percentage of support in order to secure or retain ballot access would be unconstitutional *per se,* 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."

McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1223 (4th Cir. 1995) (quoting *Williams v. Rhodes*, 393 U.S. 23, 34, 89 S. Ct. 5, 12, 21 L. Ed. 2d 24, 33 (1968)), *cert. denied*, 517 U.S. 1104, 116 S. Ct. 1320, 134 L. Ed. 2d 472 (1996). In *McLaughlin*, the Libertarian Party of North Carolina challenged provisions of North Carolina that required a group seeking recognition as a political party to obtain petition signatures equal to 2% of the voters who voted in the most recent presidential or gubernatorial election but required the party to poll 10% in the next election to retain recognition. The statute automatically changed to "unaffiliated" the registration of voters registered with a political party that failed to maintain recognition. The Fourth Circuit found in *McLaughlin* that "the provisions at issue pass constitutional muster," under *American Party of Texas v. White,* 415 U.S. 767, 94 S. Ct. 1296, 39 L. Ed. 2d 744 (1974).[2] *McLaughlin*, 65 F.3d at 1225. The Fourth Circuit has also noted, in reviewing a challenge to Virginia's requirements for independent (unaffiliated) candidates for national offices,

> a court must not apply a "litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made." *Storer v. Brown*, 415 U.S. 724, 730, 39 L. Ed. 2d 714, 94 S. Ct. 1274 (1974) (cited in *Anderson*, 460 U.S. at 789).
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> The variations and complexities of the election laws of the several states complicate such judgments.

Wood v. Meadows, 207 F.3d 708, 710 (4th Cir. 2000).

A plaintiff challenging an election scheme has the initial burden of showing that the ballot access requirements seriously restrict political opportunity. *American Party of Texas*, 415 U.S. at 781, 94 S. Ct. at 1306, 39 L. Ed. 2d at 760. To prevail, the challenger must demonstrate that a

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[2] The plaintiffs in McLaughlin also challenged a $0.05 per signature petition fee, which the court declared unconstitutional. No such fee is applicable or challenged in this case.

"reasonably diligent" candidate could not gain a place on the ballot under the statutory framework. *See Storer v. Brown*, 415 U.S. 724, 742, 94 S. Ct. 1274, 1285, 39 L. Ed. 2d 714, 730 (1974). Any lesser standard would impermissibly tie the hands of States seeking to assure that elections are operated equitably and efficiently.

Federal courts in North Carolina have recognized that "the interest of a state in preserving the integrity of the electoral process and regulating the number of candidates to avoid voter confusion is compelling." *New Alliance Party v. North Carolina State Bd. of Elections*, 697 F. Supp. 904, 907 (E.D.N.C. 1988) (citing *American Party of Texas*). *See also Nader 2000 Primary Committee, Inc., v. Bartlett*, No. 5:00-CV-348-BR3 (E.D.N.C., August 9, 2000) (attached as Attachment A). Plaintiffs have the particularly difficult burden of showing that the North Carolina scheme *as a whole* is unconstitutionally burdensome when the signature requirement for new political party ballot access has already withstood the scrutiny of the Fourth Circuit.

Rule 56 of the Federal Rules of Civil Procedure "does not provide for situations in which . . . the court desires to enter summary judgment *sua sponte*, or in which the nonmoving party, rather than the movant, is entitled to summary judgment, but no cross-motion has been made." 10A Charles Alan Wright *et al.*, Federal Practice & Procedure § 2720 (3d ed. 1998). Nevertheless, a district court clearly has the inherent authority to enter summary judgment *sua sponte* consistent with the principles of Rule 56. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265, 276 (1986). *See also United States Dev. Corp. v. Peoples Fed. Sav. & Loan Ass'n*, 873 F.2d 731, 735 (4th Cir. 1989); *Amzura v. Ratcher*, 18 Fed. Appx. 95, 103 (4th Cir. 2001). Thus, a district court may, when considering a motion for summary judgment, grant summary judgment to the nonmoving party, so long as the party against whom judgment was entered was given

sufficient notice. *Celotex Corp*, 477 U.S. at 326, 106 S. Ct. at 2554, 91 L. Ed. 2d at 276. Where, as here, all parties agree that there are no genuine issues of material fact and that the case presents purely legal questions, and where plaintiffs will have an opportunity to file a reply brief, summary judgment can properly be entered in favor of defendants. *See Amzura*, 18 Fed. Appx. at 103, 104 n.8. Therefore, defendants respectfully request that the Court enter summary judgment in their favor.

I. PLAINTIFFS LACK STANDING TO PROSECUTE THIS ACTION.

A. The Requirements of Standing.

It is well-established that plaintiffs must affirmatively establish that they have standing in order to seek a judgment from a federal court.

> Article III of the Constitution limits the jurisdiction of federal courts to cases or controversies. Doctrines like standing, mootness, and ripeness are simply subsets of Article III's command that the courts resolve disputes, rather than emit random advice. The courts should be especially mindful of this limited role when they are asked to award prospective equitable relief instead of damages for a concrete past harm, and a plaintiff's past injury does not necessarily confer standing upon him to enjoin the possibility of future injuries.

Bryant v. Cheney, 924 F.2d 525, 529 (4th Cir. 1991).

> Standing concerns "whether the plaintiff is the proper party to bring the suit . . . ." *Raines v. Byrd*, 521 U.S. 811, 818, 138 L. Ed. 2d 849, 117 S. Ct. 2312 (1997). The "central purpose of the standing requirement [is] to ensure that the parties before the court have a concrete interest in the outcome of the proceedings such that they can be expected to frame the issues properly." *Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir. 1994). In determining whether a party has standing to bring a claim, courts 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) (citations omitted).

ProEnglish v. Bush, 70 Fed. Appx. 84, 87-88 (4th Cir. 2003). The burden of establishing compliance with these standing requirements rests upon the party asserting the claim. *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 320 (4th Cir. 2002).

> Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presume that general allegations embrace those specific facts that are necessary to support the claim." In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts, which for purposes of the summary judgment motion will be taken to be true."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136-37, 119 L. Ed. 2d 351, 364-65 (1992) (citations omitted).

B. Plaintiffs Lack Standing Because They Made Little, If Any, Effort to Comply with the Provisions of the Statute They Challenge.

The record indicates that plaintiffs made minimal, if any, effort to comply with the requirements of N.C. GEN. STAT. § 163-122(a)(2). Bryan Greene's petition to qualify as an unaffiliated candidate that was ultimately submitted to the State Board in 2008 contained only 805 signatures – far below the number required by N.C. GEN. STAT. § 163-122(a)(1). This is a tiny number of signatures, given the number of people that can readily be found at events in the Tenth District which includes municipalities like Mooresville, Hickory, Morganton and Lenoir.

Further, only 552 of these signatures – just over 3% of the signatures required by statute and barely .00134% of the total registered voters in the Tenth Congressional District – proved to be valid. Plaintiffs cannot establish, then, that Bryan Greene's failure to gain ballot access as an unaffiliated candidate resulted from the number of signatures required rather than from his own lack of effort to

comply with North Carolina's statutory requirements. For this reason, any real injury suffered by plaintiffs was not "fairly traceable to the actions of" defendants, *ProEnglish*, 70 Fed. Appx. 84, 88, but rather was the result of plaintiffs' own decisions and inaction. Accordingly, plaintiffs fail to satisfy the requirement for standing, and summary judgment should be granted in favor of defendants.

C. Plaintiffs Have Failed to Demonstrate Any Ongoing or Future Harm.

Similarly, the record is devoid of any but the most general suggestion that Bryan Greene might again seek to run as an unaffiliated candidate for Congress or for any other office. Nowhere do any plaintiffs offer evidence showing that he is planning to run in 2010 or that he is making concrete plans to run in the future. Thus, plaintiffs have failed to show how it is more than speculative that any injury they have suffered will be redressed by a favorable decision. *ProEnglish*, 70 Fed. Appx. 84, 88.

Plaintiffs assert in their brief to this Court that they have a "fundamental right[] . . . to promote Bryan Greene's candidacy." This assertion is, of course, absurd. There is no general fundamental right to promote the candidacy of a specific person. If there were such a general fundamental right, then all persons would have the right to see whomsoever they wished listed as a candidate on any ballot. The fundamental right to organize effectively for political purposes, *see Williams v. Rhodes*, 393 U.S. 23, 39, 89 S. Ct. 5, 15, 21 L. Ed. 2d 24, 36 (1968), does not include a right to promote a specific person's candidacy. Even if it did, however, plaintiffs have failed to offer any evidence by which this Court could find that Bryan Greene will, in fact, offer himself as a candidate. Absent such evidence, plaintiffs merely seek an advisory opinion, as nothing this Court does could redress any injury plaintiffs may have suffered.

For these reasons, plaintiffs have failed to establish standing and summary judgment should be entered for defendants.

II. THE CHALLENGED REQUIREMENT DOES NOT UNDULY BURDEN PLAINTIFFS' FIRST AMENDMENT RIGHTS.

Plaintiffs argue that the 4% requirement contained in N.C. GEN. STAT. § 163-122(a)(2) impermissibly infringes upon their First Amendment rights because it sets too high a bar for unaffiliated candidates (and those who wish to support them). In pressing this argument, plaintiffs ignore controlling precedent, ignore the State's compelling interests at stake and attempt to force the evidence to support propositions it cannot support. Plaintiffs' argument, which has been rejected by the Supreme Court, must fail.

In *Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 29 L. Ed. 2d 554 (1971), the Supreme Court upheld Georgia's requirement that an independent candidate collect signatures of qualified voters equal in amount to *5%* of voters eligible to vote in the most recent election for the office in question, and that those signatures be collected during a 180-day period. 403 U.S. at 438, 91 S. Ct. at 1974, 29 L. Ed. 2d at 560-62. The Court stated:

> Anyone who wishes, and who is otherwise eligible, may be an independent candidate for any office in Georgia. Any political organization, however new or however small, is free to endorse any otherwise eligible person as its candidate for whatever elective public office it chooses. So far as the Georgia election laws are concerned, independent candidates and members of small or newly formed political organizations are wholly free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish. They may confine themselves to an appeal for write-in votes. Or they may seek, over a six months' period, the signatures of 5% of the eligible electorate for the office in question. If they choose the latter course, the way is open. For Georgia imposes no suffocating restrictions whatever upon the free circulation of nominating petitions. A voter may sign a petition even though he has signed others, and a voter who has signed the petition of a nonparty candidate is free thereafter to participate in a party primary.

> The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand, is a person who was not even registered at the time of the previous election. No signature on a nominating petition need be notarized.
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> . . .
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> In a word, Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life.

403 U.S. at 438-40, 91 S. Ct. at 1974-75, 29 L. Ed. 2d at 560-61 (footnotes omitted). *See also Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002) (holding that Georgia's 5% requirement does not violate the qualification clause: U.S. CONST., art. I, § 2, cl. 2), *cert. denied*, 538 U.S. 908, 123 S. Ct. 1500, 155 L. Ed. 2d 229 (2003).

By contrast to Georgia's statutory framework, North Carolina requires only signatures equal in amount to 4% of registered voters in the district as of January 1, and it gives potential candidates essentially one and one-half years to gather signatures . *See* N.C. GEN. STAT. § 163-122(a)(2). As in *Jenness*, a voter may sign a petition even though he has signed others, is free to participate in the primary even though he has signed a petition, and need not declare that he will vote for the candidate in the election. No signatures need be notarized and a person who has previously voted in a party primary is eligible to sign a petition. North Carolina has no restrictions on the free circulation of petitions. Undoubtedly, if Georgia's scheme does not violate the First and Fourteenth Amendments, then neither does North Carolina's less restrictive scheme.

Plaintiffs attempt to blunt the significance of the Supreme Court's ruling in *Jenness* by suggesting that the Court "did not undertake the careful sifting of individual and State interests and less restrictive alternatives required by subsequent rulings." (Case Docket No. 32-1, Pls'

Memorandum in Support of Motion for Summary Judgment, p. 10) Plaintiffs' argument sidesteps the Supreme Court's continued reliance on *Jenness*. As recently as 2008, the Supreme Court cited *Jenness* as authority for the principle that "States may require persons to demonstrate 'a significant modicum of support' before allowing them access to the general-election ballot, lest it become unmanageable." *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 204, 128 S. Ct. 791, 798, 169 L. Ed. 2d 665, 673 (2008).

Plaintiffs also devalue the State's compelling interest in this case. Plaintiffs acknowledge that the State "has a legitimate interest in limiting access to the ballot to prevent ballot clutter and avoid voter confusion and to insist that candidates . . . enjoy a modicum of support." (Case Docket No. 32-1, Pls' Memorandum in Support of Motion for Summary Judgment, p. 8) Indeed, 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. 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. Only three other States have ten or more elected executive offices. (*See Libertarian Party of North Carolina, et al., v. State of North Carolina, et al.*, 05 CVS 13073 (Wake County May 27, 2008)[3], *aff'd* 2009 N.C. App. LEXIS 1681 (2009), appeal retained No. 479A09 (N.C. Jan. 28, 2010.) 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. Every ballot will also have

[3] A copy of this order is attached as Attachment B.

congressional, legislative, trial court and county offices. Each political party adds to the number of candidates on these exceptionally long ballots.

Plaintiffs would dismiss the challenges presented by North Carolina's exceptionally long ballot as allowing the tail to wag the dog. The Fourth Circuit counsels otherwise, noting that election restrictions cannot be examined in isolation from other aspects of a State's election framework but must be considered as a part of a "complex whole." *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1223 (4th Cir. 1995) (quoting *Williams v. Rhodes*, 393 U.S. 23, 34, 89 S. Ct. 5, 12, 21 L. Ed. 2d 24, 33 (1968)), *cert. denied*, 517 U.S. 1104, 116 S. Ct. 1320, 134 L. Ed. 2d 472 (1996). The "complex whole" in North Carolina includes the reality that our Constitution requires that we elect our Council of State, and that this requirement results in a longer ballot than the vast majority of other States. This is why plaintiffs' attempts at simple comparisons at what might work in other States fail – other States have a different "complex whole" from North Carolina.

Plaintiffs also point to the fact that no unaffiliated candidates have run for Congress from North Carolina as demonstrating that the bar is set too high. In fact, this one piece of evidence establishes nothing other than that no unaffiliated candidates have run for Congress from North Carolina. Plaintiffs present no evidence demonstrating why this is so. Is it because few if any have tried and have put forward no more effort than did plaintiffs in this case? There is nothing in the record that answers this question. Other candidates for district, county and local offices have met the 4% petition requirement and qualified for the ballot. Under N.C. GEN. STAT. § 163-122(3), unaffiliated candidates for county offices and single county legislative districts may gain ballot access also by submitting petitions signed by 4% of the registered voters of the county. Records are not necessarily maintained by the counties as far back as 1992 on activities of unaffiliated

candidates. Nevertheless, defendants were able to identify over 80 candidates for the North Carolina House, sheriff, clerk of court, school board, register of deeds and county commissioner who successfully qualified through the petition process since 1992 for these offices. (Defendants' Response to Plaintiffs' First Set of Interrogatories and Defendants' Supplement Response to Plaintiffs' First Set of Interrogatories, attached as Attachments C and D.[4]) As a percentage, these candidates had to meet the same standard as would Mr. Greene to qualify as an unaffiliated candidate.

For these reasons, plaintiffs' motion for summary judgment should be denied and summary judgment should be entered for defendants.

III. THE CHALLENGED REQUIREMENT IS NOT INVALID BECAUSE IT REQUIRES A HIGHER PERCENTAGE OF SIGNATURES THAN IS REQUIRED FOR THOSE SEEKING TO RUN AS UNAFFILIATED CANDIDATES FOR STATEWIDE OFFICE.

Plaintiffs also argue that their rights under the Fourteenth Amendment are violated by the fact that N.C. GEN. STAT. § 163-122(a)(2) requires those wishing to run as unaffiliated candidates in a district race obtain signatures equal to 4% of the registered voters in that district, while under N.C. GEN. STAT. § 163-122(a)(1), those wishing to run as unaffiliated candidates in a *Statewide* race are required to obtain signatures equal to 2% of those who voted in the most recent gubernatorial election. Plaintiffs, relying exclusively on *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979), contend that this difference between

[4] It has come to defendants' attention that these responses to plaintiffs' interrogatories were not verified. A verification for both Defendants' Response to Plaintiffs' First Set of Interrogatories and Defendants' Supplement Response to Plaintiffs' First Set of Interrogatories is attached as Attachment E.

requirements for district and Statewide candidates causes a violation of their equal protection rights.[5] In making this contention, plaintiffs misapprehend the holding in *Illinois State Board of Elections*.

In *Illinois State Board of Elections*, the Court considered a scheme where Illinois had one requirement for qualifying as an independent (unaffiliated) candidate for Statewide office and a different requirement for qualifying as an independent candidate for local office. For Statewide office or for a new political party, an independent candidate was required to present the signatures of 25,000 qualified voters, while for local office, an independent candidate required to present the signatures of qualified voters equal to 5% of those who voted in the most recent election in that political subdivision. 440 U.S. at 175-76, 99 S. Ct. 985-86; 59 L. Ed. 2d 235-36. In the city of Chicago and in Cook County, these different requirements meant that those seeking to run as an independent candidate for local office were required to obtain *more than* 25,000 signatures of qualified voters. In other words, it was not simply that the percentage was higher, but rather that the raw number of signatures necessary to qualify was higher in Chicago and in Cook County than it was Statewide. In fact, almost 60,000 signatures – more than twice the number required for Statewide office – were needed to qualify as an unaffiliated candidate in a Chicago municipal election. *Id.* at 182, 99 S. Ct. 989; 59 L. Ed. 2d 239. Thus, it was not simply that the State imposed different requirements that caused the Supreme Court to find a violation of equal protection rights; it was the anomaly that Illinois had determined that 25,000 signatures were sufficient to protect the State's interests in Statewide elections, but effectively required more than twice that number in some municipal and county elections that led to the Court's decision.

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[5] In 2008, of course, plaintiffs presented only 552 valid signatures. (Compl. ¶ 14; Answer ¶ 14) This number does not even approach the 2% threshold that plaintiffs appear to advocate.

No similar anomaly exists here. As plaintiffs themselves acknowledged, pursuant to N.C. GEN. STAT. § 163-122(a)(1) the number of valid signatures currently necessary to qualify as an unaffiliated candidate for Statewide office in North Carolina is 85,379. (Case Docket No. 32-1, Pls' Memorandum in Support of Motion for Summary Judgment, p. 12) Meanwhile, plaintiff Greene would have to present 17,541 valid signatures to qualify as an unaffiliated candidate for United States Representative for the Tenth Congressional District, and no person seeking to be an unaffiliated candidate for United States Representative in North Carolina will have to present more than 22,549 signatures (North Carolina's Fourth Congressional District). (*Id*.) Those seeking to run as unaffiliated candidates in a district election, then, are subject to a much smaller signature requirement than is necessary for Statewide office; there is no chance of a larger requirement as was the case in *Illinois State Board of Elections*. Plaintiffs' reliance on that case is misplaced.

Plaintiffs themselves acknowledge that conducting petition drives on a Statewide basis requires more resources and effort, which explains the difference in the percentage of signatures required for Statewide office and district or local office. (Case Docket No. 32-1, Pls' Memorandum in Support of Motion for Summary Judgment, p. 12) Plaintiffs attempt to explain this fact away, however, by suggesting that many people do not know what congressional district they live in, thus making it harder for canvassers to collect signatures. This suggestion cannot hold up to scrutiny. Of North Carolina's 100 counties, almost three-quarters (72) are contained wholly within a single congressional district.[6] N.C. GEN. STAT. § 163-201. In the majority of cases, if a voter knows what county he resides in, there is no question as to which congressional district he resides in. In most

[6] The Tenth Congressional District, in which plaintiffs live, is comprised of seven whole counties (Avery, Burke, Caldwell, Catawba, Cleveland, Lincoln and Mitchell) and parts of three other counties (Gaston, Iredell and Rutherford). N.C. GEN. STAT. § 163-201.

other cases, it will still be relatively easy to determine which congressional district a voter lives in. There is no reason, then, to think that a petition drive in a single congressional district is more difficult or even equal in difficulty to a Statewide drive. This is especially so given that pursuant to N.C. GEN. STAT. § 163-122(a)(1), petitions for Statewide office "must be signed by at least 200 registered voters from each of four congressional districts in North Carolina." If obtaining signatures on a congressional district basis is indeed made more difficult by voters' lack of knowledge as to the district they live in, that difficulty is magnified, not ameliorated, in Statewide petition drives.

Plaintiffs have failed to show any violation of their equal protection rights. Summary judgment should therefore be entered for defendants.

IV. THE CHALLENGED REQUIREMENT DOES NOT VIOLATE PLAINTIFFS' EQUAL PROTECTION RIGHTS DUE TO THE DIFFERENCES IN THE REQUIREMENTS FOR UNAFFILIATED CANDIDATES AND NEW PARTIES.

Finally, plaintiffs argue that their equal protection rights under the Fourteenth Amendment are violated because N.C. GEN. STAT. § 163-122(a)(1) places a higher burden on them than is placed on new parties desiring recognition in North Carolina. Relying primarily on *Delaney v. Bartlett*, 370 F. Supp. 2d 373 (M.D.N.C. 2004), plaintiffs contend that the 4% requirement of N.C. GEN. STAT. § 163-122(a)(1) cannot be sustained because the percentage is higher than that required by N.C. GEN. STAT. § 163-96 for new parties.[7] Plaintiffs' argument totally ignores the substantive difference between recognition of new parties on a Statewide basis and qualification as an unaffiliated candidate in a single district.

[7] Again, plaintiffs in this case came nowhere near obtaining signatures equal to the lower (2%) requirement they now seem to advocate when collecting signatures.

It is true that in *Delaney*, the court held that the State could not hold unaffiliated candidates for Statewide office to higher signature requirement than it held new parties. 370 F. Supp. 2d at 378-79. The plaintiff in *Delaney* had sought to be an unaffiliated candidate for United States Senate, a Statewide office. Thus, in *Delaney* the court was comparing two Statewide criteria – one for an unaffiliated candidate and one for new parties. The court in essence held that if 2% served the State's interest for one situation (new parties), it necessarily would serve the State's interest for the other situation (unaffiliated candidates).

Here, however, plaintiffs are attempting to take that Statewide criterion and compare it to a district qualification. For plaintiffs 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 or local government. North Carolina's electoral scheme does not provide for recognition of political parties on anything other than a Statewide basis; a party cannot be recognized only within a district. Thus, the comparison plaintiffs attempt to draw will not lie.

Moreover, as shown in Argument III, *supra*, the requirements for a new political party (2% of those who voted in the most recent gubernatorial election) is always going to be substantially greater in actual signatures required than the actual signatures required for qualification as an unaffiliated candidate for district or local office. Plaintiffs cannot plausibly argue that they are subjected to a higher requirement when they need to present only fewer than one-fifth the number of signatures that a new party must present. There simply is no discrimination of similarly situated persons or entities presented in this case.

Plaintiffs have failed to show any violation of their equal protection rights. Summary judgment should therefore be entered for defendants.

CONCLUSION

For the foregoing reasons, summary judgment should be entered for defendants.

Defendants request oral argument on plaintiffs' motion.

Respectfully submitted, this the 18TH day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2010, I electronically filed the foregoing **DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system, and I hereby certify that I have mailed and e-mailed the document to the following non- CM/ECF participants:

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