UNITED STATES COURT OF APPEALS

for the

EIGHTH CIRCUIT

Case No. 10-3212

THE LIBERTARIAN PARTY OF NORTH DAKOTA, RICHARD AMES, THOMMY PASSA and ANTHONY STEWART,

Appellants,

- v. -

ALVIN A. JAEGER,

Appellee.

ON APPEAL FROM THE ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION, AT NO. 3:10-CV-00064-RRE-KKK

BRIEF AND ADDENDUM (APPENDIX VOLUME I OF II (R1 – R14))
ON BEHALF OF APPELLANTS

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
Attorneys for Appellant
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294 (ph)
(202) 248-9345 (fx)
oliverhall@competitivedemocracy.org

SUMMARY OF CASE AND ORAL ARGUMENT STATEMENT

The Libertarian Party of North Dakota and its candidates for state legislature filed this case pursuant to 42 U.S.C. § 1983, to challenge the constitutionality of N.D.C.C. § 16.1-11-36. The challenged statute prohibits the winners of partisan primary elections from accessing North Dakota's general election ballot unless they receive a certain minimum number of votes in the primary election. The Libertarians allege that this minimum vote requirement impermissibly burdens their First Amendment rights, and that it burdens minor political parties unequally, in violation of the Fourteenth Amendment.

The District Court dismissed the case pursuant to Rule 12(b)(6). The Libertarians appeal on the ground that the District Court failed to identify and address the unconstitutional burden that the challenged statute imposes, and failed to address its disparate impact upon minor political parties.

Oral argument should be permitted in this case to provide the Libertarians with an opportunity to demonstrate that the District Court disregarded key points of law and facts in the record establishing that the challenged statute is unconstitutional. Twenty minutes will be sufficient time for the Libertarians to present their argument.

TABLE OF CONTENTS

Appendix Volume 1

TABLE OF AUTHORITIES

Statutes and Rules

STATEMENT OF JURISDICTION

Plaintiff-Appellants, the Libertarian Party of North Dakota ("LPND"), Richard Ames, Thommy Passa and Anthony Stewart (collectively, "the Candidates," and, together with LPND, "the Libertarians") filed this action for declaratory and injunctive relief in the United States District Court for the District of North Dakota under 42 U.S.C. § 1983 against Defendant-Appellee Alvin A. Jaeger ("Secretary Jaeger"), in his official capacity as Secretary of State of North Dakota. Jurisdiction in the District Court was based on federal question. 28 U.S.C. § 1331.

The District Court entered a final Order and Opinion dismissing this action on September 3, 2010 ("Opinion"). R1. The Libertarians timely filed a Notice of Appeal on October 4, 2010. R16. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Whether the District Court erred by denying the Libertarians' Motion for Preliminary Injunction and Granting Secretary Jaeger's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), without allowing oral argument, based on its conclusion that the minimum vote requirement imposed by N.D.C.C. § 16.1-11-36 ("Section 16.1-11-36") does not violate the Libertarians' rights under the First and Fourteenth Amendments, as follows:

I. Whether the District Court erred by failing to identify and address the unconstitutional burden that Section 16.1-11-36 imposes on the Libertarians' First Amendment rights.

Most apposite cases: *Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431(1971); *Williams v. Rhodes*, 393 U.S. 23 (1968); *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980).

II. Whether the District Court erred by failing to address the disparate impact that Section 16.1-11-36 imposes on minor political parties, in violation of the Libertarians' Fourteenth Amendment right to equal protection.

Most apposite cases: *Jenness*, 403 U.S. 431; *Storer*, 415 U.S. 724; *MacBride v. Exon*, 558 F.2d 443, 449 (8th Cir. 1977).

STATEMENT OF THE CASE

On July 20, 2010, Plaintiff-Appellant Libertarians commenced this civil action under 42 U.S.C. § 1983 against Defendant-Appellee Secretary Jaeger, in his official capacity only. R15. The Libertarians stated claims for declaratory and injunctive relief from Section 16.1-11-36. R23-R25. Specifically, the Libertarians sought a declaratory judgment holding Section 16.1-11-36 unconstitutional as applied to the Candidates, and an injunction directing Secretary Jaeger to certify the Candidates for inclusion on North Dakota's 2010 general election ballot, because they were the undisputed winners of a ballot-qualified political party's primary election. R26.

On July 29, 2010, the Libertarians filed a Motion for Preliminary Injunction, requesting that the District Court direct Secretary Jaeger to certify the Candidates

for inclusion on North Dakota's 2010 general election ballot. R15. On August 3, 2010, the Libertarians filed a Motion for Oral Argument and Motion to Expedite. R15. Secretary Jaeger filed an Opposition to the Libertarians' Motion for Preliminary Injunction and a Motion to Dismiss pursuant to Fed. Rule Civ. P. 12(b)(6) on August 19, 2010. R15. The Libertarians filed a Reply to Secretary Jaeger's Opposition to their Motion for Preliminary Injunction on August 30, 2010, and an Opposition to Secretary Jaeger's Motion to Dismiss on September 2, 2010. R15.

On September 3, 2010, less than 24 hours after the Libertarians filed their Opposition to Secretary Jaeger's Motion to Dismiss, the District Court entered its Order and Opinion not only denying the Libertarians' Motion for Preliminary Injunction, but also granting Secretary Jaeger's Motion to Dismiss and. R1-14. That Order and Opinion is the subject of this appeal.

STATEMENT OF FACTS

The Libertarian Party of North Dakota is a ballot-qualified political party in North Dakota. R20-R21; Complaint ("Comp.") ¶ 13. LPND became ballot-qualified by submitting nomination petitions with at least 7,000 valid signatures of qualified electors prior to the deadline of April 9, 2010, as required by state law. R20-R21; Comp. ¶ 13. LPND was therefore entitled, under state law, to a

designated column listing its candidates on North Dakota's June 8, 2010 primary election ballot. R21; Comp. ¶¶ 14-15.

Richard Ames, Thommy Passa and Anthony Stewart were LPND candidates for the state legislature, who timely filed the documents necessary to qualify for placement on the primary election ballot. R21; Comp. ¶ 16. Candidate Ames is the undisputed winner of LPND's primary election for North Dakota State Senate, 25th district. R21; Comp. ¶¶ 17-18. Candidate Passa is the undisputed winner of LPND's primary election for North Dakota State House of Representatives, 43rd district. R21; Comp. ¶¶ 17-18. Candidate Stewart is the undisputed winner of LPND's primary election for North Dakota State House of Representatives, 17th district. R21; Comp. ¶¶ 17-18. Each Candidate thus became LPND's duly selected nominees for their respective offices. R21; Comp. ¶ 18.

On or about June 25, 2010, Secretary Jaeger sent Candidate Ames a Notice of Nomination, stating that "you were nominated in the primary election that was held on June 8, 2010," and that "your name will now be placed on the ballot for the General Election to be held on November 2, 2010." R21; Comp. ¶ 19. Candidates Passa and Stewart did not receive such Notices of Nomination. R21; Comp. ¶ 19.

On or about June 29, 2010, Candidate Ames contacted Secretary Jaeger's office by telephone, to confirm whether the Candidates would be listed on North Dakota's November 2, 2010 general election ballot. R22; Comp. ¶ 20. Candidate

Ames was informed that Secretary Jaeger's office had sent the Notice of Nomination to him in error. R22; Comp. ¶ 20. Candidate Ames was further informed that none of the Candidates would be included on the November 2, 2010 General Election ballot – even though they are the undisputed winners of the ballot-qualified LPND's primary election for their respective offices – because Secretary Jaeger found that they did not comply Section 16.1-11-36. R22; Comp. ¶ 20.

Section 16.1-11-36 provides that candidates who win their partisan primary races may not access North Dakota's general election ballot unless they also receive a certain minimum number of votes in the primary election. R14, R22. The minimum number of votes required is equal to the number of signatures required on a petition to place a candidate for that office on the primary ballot. R14, R22; Comp. ¶ 21. For state legislative candidates, such a petition must contain the signatures of at least 1 percent of the total resident population of the legislative district, as determined by the most recent federal decennial census, but not more than 300 signatures. N.D.C.C. § 16.1-11-11 ("Section 16.1-11-11"); R14, R22; Comp. ¶ 22.

Under Section 16.1-11-36 and Section 16.1-11-11, Candidate Ames was required to receive 142 votes in the primary election in order to be deemed nominated by LPND as its candidate for the North Dakota State Senate, 25th

district. R22; Comp. ¶ 23. In total, only 933 voters from all parties voted in the primary election for that office. R22-R23; Comp. ¶ 24. Section 16.1-11-36 therefore required Candidate Ames to receive 15.21 percent of the total votes cast in the primary election in order to access North Dakota's general election ballot. R23; Comp. ¶ 24.

Under Section 16.1-11-36 and Section 16.1-11-11, Candidate Passa was required to receive 132 votes in the primary election in order to be deemed nominated by LPND as its candidate for the North Dakota State House of Representatives, 43rd district. R23; Comp. ¶ 23. In total, only 1654 voters from all parties voted in the primary election for that office. R23; Comp. ¶ 25. Section 16.1-11-36 therefore required Candidate Passa to receive 7.98 percent of the total votes cast in the primary election in order to access North Dakota's general election ballot. R23; Comp. ¶ 25.

Under Section 16.1-11-36 and Section 16.1-11-11, Candidate Stewart was required to receive 130 votes in the primary election in order to be deemed nominated by LPND as its candidate for the North Dakota State House of Representatives, 17th district. R23; Comp. ¶ 23. In total, only 2960 voters from all parties voted in the primary election for that office. R23; Comp. ¶ 26. Section 16.1-11-36 therefore required Candidate Stewart to receive 4.39 percent of the total

votes cast in the primary election in order to access North Dakota's general election ballot. R23; Comp. ¶ 26.

As the undisputed winners of LPND's 2010 primary election for their respective offices, the Candidates qualified in all respects for inclusion on North Dakota's 2010 general election ballot. R23; Comp. ¶ 28. Each Candidate would have been included on that ballot, but for Defendant Jaeger's determination that they did not meet the minimum vote requirement imposed by Section 16.1-11-36. R23; Comp. ¶ 28.

North Dakota is the only state in the nation that prohibits the undisputed winners of a partisan primary election from appearing on the general election ballot unless they receive a certain minimum number of votes. R28. Not coincidentally, North Dakota is also the only state in the nation that has not allowed a minor party candidate for state legislature to appear on the general election ballot in the last ten years. R28. In fact, no minor party candidate for state legislature has appeared on North Dakota's general election ballot since 1976. R28.

SUMMARY OF ARGUMENT

In this case, the District Court upheld Section 16.1-11-36, despite the fact that the statute imposes burdens on the Libertarians' First Amendment rights which plainly exceed the constitutional limitations established by the Supreme Court's ballot access jurisprudence. The District Court simply failed to identify those

burdens, or to address their character and magnitude, as it was required to do before passing on the statute's constitutionality. This was clear error, and the District Court should be reversed on that basis alone.

The District Court also should be reversed because it erroneously concluded that Section 16.1-11-36 does not violate the Libertarians' right to equal protection, without addressing the disparate impact that Section 16.1-11-36 imposes on minor political parties. The District Court's decision thus conflicts with Supreme Court precedent holding that ballot access statutes may violate the Equal Protection Clause because, by imposing the same requirements on all parties, the statutes unequally burden new or minor parties. The District Court further erred by disregarding facts in the record demonstrating that Section 16.1-11-36 does in fact violate the Equal Protection Clause, by operating to freeze the political status quo.

STANDARD OF REVIEW

This Court reviews a district court's dismissal for failure to state a claim de novo. *See Norwood v. Dickey,* 409 F.3d 901, 903 (8th Cir. 2005) (citing *Springdale Educ. Ass'n v. Springdale Sch. Dis.*, 133 F.3d 649 (8th Cir.1998)). The allegations in the complaint must be accepted as true and must be construed in the light most favorable to the plaintiff. *See id.* (citing *Kottschade v. City of Rochester*, 319 F.3d 1038, 1040 (8th Cir.2003)).

ARGUMENT

I. THE DISTRICT COURT ERRED BY FAILING TO IDENTIFY AND ADDRESS THE UNCONSTITUTIONAL BURDEN THAT SECTION 16.1-11-36 IMPOSES ON THE LIBERTARIANS' FIRST AMENDMENT RIGHTS.

It is well-settled that states may require that candidates demonstrate "a significant modicum of support" before printing their names on the ballot. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). The burdens that states may impose are limited, however, by candidates' and voters' First and Fourteenth Amendment rights. *See id.* at 440. Therefore, to determine the constitutionality of a state's ballot access requirement, a reviewing court "*must first consider the character and magnitude of the asserted injury* to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (emphasis added). The court next must identify and evaluate the legitimacy and strength of the state interests asserted to justify its requirement, and consider the extent to which those interests make it necessary to burden the plaintiff's rights. *See id.* Only then can the court determine whether the requirement is constitutional. *See id.*

In this case, the District Court erred by holding Section 16.1-11-36 constitutional without even identifying the burden that the statute imposes, much less addressing whether that burden is necessary and justified by legitimate state interests, as it was required to do. *See id*.

A. The Minimum Vote Requirement Imposed By Section 16.1-11-36 Exceeds the Constitutional Limits Established By the Supreme Court's Ballot Access Jurisprudence.

The District Court erroneously concluded that Section 16.1-11-36 is constitutional on the ground that states may require that candidates show a "modicum" of support prior to their placement on the ballot. R2, R8-R10, R13. That is not at issue. Rather, the issue in this case is whether the modicum of support that Section 16.1-11-36 actually requires – more than 15 percent of the eligible pool for some candidates – is constitutional.

The District Court did not even reach this issue, because it considered only the number of votes required by Section 16.1-11-36, without identifying the size of the eligible pool of voters. R3, R9-R10. The "character and magnitude" of the burden that Section 16.1-11-36 imposes, however, is determined by *the percentage of support from the eligible pool of voters* that the statute requires. *Anderson*, 460 U.S. at 789; *see Storer v. Brown*, 415 U.S. 724, 739 (1974). Not once in its Opinion did the District Court identify or address that percentage. This was error.

Although there is no "litmus paper test" for determining the constitutionality of ballot access statutes, the Supreme Court has nevertheless recognized limits on the percentage of support that a state may require. *Storer*, 415 U.S. at 730. In fact, the Court has never upheld a statute that required a showing of support from more than 5 percent of the eligible pool. *See id.* at 739 (citing *Jenness*, 403 U.S. 431).

In *Jenness*, the Supreme Court upheld Georgia's requirement that minor party and independent candidates submit nomination petitions with signatures equal in number to 5 percent of the eligible voters in the last election. *See Jenness*, 403 U.S. at 432. The Court made clear, however, that this "somewhat higher" percentage was permissible because it was "balanced" by the fact that Georgia's law did not impose many other restrictions, and allowed any registered voter to sign the petitions. *Id*. at 438, 442. *Jenness* thus established that states may not require candidates to show support from substantially more than 5 percent of the eligible pool of voters in order to access the ballot. *See id.* at 442.

The Supreme Court recognized and reaffirmed that limit in *Storer*. *See Storer*, 415 U.S. at 739. *Storer* involved a challenge to California's requirement that independent candidates obtain signatures equal in number to 5 percent of the entire vote in the last general election. *See id.* The Court acknowledged that this percentage did not appear to be unconstitutional on its face, but nevertheless remanded for a determination of whether the requirement was impermissibly burdensome, given that partisan primary voters were ineligible to sign the candidates' petitions. *See id.* Exclusion of those voters might make California's signature requirement "substantially more than 5% of the eligible pool," the Court reasoned, which "would be in excess, percentagewise, of anything the Court has approved." *Id.*

Three Justices dissented in *Storer* on the ground that remand was unnecessary, because the record demonstrated that the exclusion of primary voters resulted in a requirement that independent candidates demonstrate support from 9.5 percent of the eligible pool. *See id*. at 764 (Brennan, J. dissenting). Thus, Justice Brennan wrote, the available data left "no room for doubt that California's statutory requirements are unconstitutionally burdensome." *Id*. at 763. Despite dividing on the need for remand, however, both the majority and dissent reaffirmed in *Storer* what the Court had previously established in *Jenness*: states may not require that candidates show support from substantially more than 5 percent of the eligible pool of voters in order to access the ballot. *See id*. at 739, 763-64; *Jenness*, 403 U.S. at 442.

Even prior to *Storer* and *Jenness*, the Supreme Court had made clear that the First and Fourteenth Amendments limit the showing of support that states may require of candidates seeking ballot access. *See Williams v. Rhodes*, 393 U.S. 23 (1968) (striking down Ohio statute requiring signatures equal in number to 15 percent of the vote in the preceding gubernatorial election). In *Williams*, the Court held Ohio's entire ballot access scheme unconstitutional on equal protection grounds, because in its totality, it practically guaranteed a monopoly to the two major parties. *See id.* at 32, 34. Justice Harlan wrote separately, however, to emphasize that Ohio's 15 percent signature requirement also "violates the basic

right of political association assured by the First Amendment." *Id.* at 41 (Harlan, J. concurring). Both Justice Harlan and the majority observed that 42 states imposed relatively lenient signature requirements of 1 percent or less of the eligible pool of voters, whereas only four states imposed a requirement of 3.1 to 5 percent, while Ohio's draconian 15 percent requirement was in a class by itself. *See id.* at 33 n.9, 47 n.10. "Even when regarded in isolation," Justice Harlan therefore concluded, Ohio's 15 percent requirement "must fall." *Id.* at 46 (Harlan, J. concurring).

The Supreme Court's ballot access jurisprudence thus makes clear that North Dakota's minimum vote requirement impermissibly burdens the Libertarians' First Amendment rights. In order to access the general election ballot, Section 16.1-11-36 required Candidate Ames to show support from more than 15 percent of the voters in his primary election, while Candidate Passa needed to show almost 8 percent support, and the average state legislative candidate needed to show almost 6 percent support. R22-R23. These burdens plainly exceed the constitutional limitations established by the Court's decisions. *See Storer*, 415 U.S. at 739; *Jenness*, 403 U.S. at 442; *Williams*, 393 U.S. at 46 (Harlan, J. concurring); *see also McLain v. Meier*, 637 F.2d 1159, 1163 (8th Cir. 1980) (striking down North Dakota's prior requirement that new parties show support from 3.3 percent of the electorate).

Following *Storer*, *Jenness* and *Williams*, the federal courts have routinely invalidated ballot access statutes such as Section 16.1-11-36, which require a showing of support from more than 5 percent of the eligible pool of voters.[1] By contrast, no court has upheld a statute that requires a showing of support from more than 5 percent of the eligible pool. The District Court therefore committed clear error by upholding Section 16.1-11-36, even though the statute requires a showing of support from as much as 15 percent of the eligible pool. R22-R23.

B. The District Court Erroneously Relied on *Munro*, Because Section 16.1-11-36 Is Far More Burdensome Than the Statute Upheld in That Case.

Having failed to consider the facts demonstrating that Section 16.1-11-36 is unconstitutional under *Storer*, *Jenness* and *Williams*, the District Court erroneously concluded that the Supreme Court's decision upholding Washington's minimum

[1] *See, e.g.*, *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006) (striking down Illinois law requiring showing of support equal to 10 percent of last vote); *Obie v. North Carolina State Bd. of Elections*, 762 F. Supp. 119 (E.D.N.C. 1991) (striking down North Carolina law requiring showing of support equal to 10 percent of registered voters); *Greaves v. State Bd. of Elections of North Carolina*, 508 F. Supp. 78 (E.D.N.C. 1980) (striking down North Carolina law requiring showing of support equal to 10 percent of last gubernatorial vote); *Lendall v. Jernigan*, 424 F. Supp. 951 (E.D. Ark. 1977) (striking down Arkansas law requiring showing of support equal to 10 percent of last gubernatorial vote); *American Party of Arkansas v. Jernigan*, 424 F. Supp. 943 (E.D. Ark. 1977) (striking down Arkansas law requiring showing of support equal to 7 percent of last gubernatorial vote); *Lendall v. Bryant*, 387 F. Supp. 397 (E.D. Ark. 1974) (striking down Arkansas law requiring showing of support equal to 15 percent of last gubernatorial vote); *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262 (S.D. Oh. 1970) (striking down

vote requirement disposes of this case. R8-R11 (citing *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986)). The District Court misread *Munro*, however, and overlooked several key points demonstrating that Section 16.1-11-36 is far more burdensome than the Washington statute in that case.

First, the Washington statute in *Munro* permitted candidates to access the general election ballot if they received only 1 percent of the primary election vote for their office. *See Munro*, 479 U.S. at 190. Therefore, unlike Section 16.1-11-36, which clearly exceeds the constitutional limits established by *Storer*, *Jenness* and *Williams*, the Washington statute in *Munro* clearly fell within those limits. Indeed, on its face, the burden imposed by Section 16.1-11-36 is between 4 and 15 times greater than that imposed by the Washington statute.[2] R22.

Second, the minimum vote requirement imposed by Section 16.1-11-36 is even more burdensome as applied, because North Dakota restricts the pool of eligible voters from which it may be satisfied. In *Munro*, minor party candidates could draw from "the entire pool of registered voters" in order to meet Washington's minimum vote requirement, because the state's "blanket primary"

Ohio law requiring showing of support equal to 7 percent of last gubernatorial vote).

permitted voters to vote for any candidate, irrespective of party affiliation. *See Munro*, 479 U.S. at 192, 197. In North Dakota, by contrast, voters are prohibited from voting for candidates of more than one party in the primary election. N.D.C.C. § 16.1-11-22(4). Therefore, the pool of voters from which the Libertarians can draw to meet North Dakota's minimum vote is much smaller than the eligible pool in *Munro* – effectively increasing the percentage of support that North Dakota actually requires. *See Storer*, 415 U.S. at 739.

Finally, the considerations that justified Washington's much lower minimum vote requirement in *Munro* do not apply in this case. Unlike North Dakota, Washington permitted any minor party candidate to access the primary election ballot by submitting a certificate signed by only 100 registered voters at the party's convention. *See Socialist Workers Party v. Munro*, 765 F.2d 1417 (9th Cir. 1985). The Supreme Court found that such "easy access" produced a "long and complicated" primary election ballot, and that this justified Washington's decision to "raise the ante" for access to the general election ballot. *Munro*, 479 U.S. at 196, 199.

---

[2] If the Washington statute in *Munro* applied in this case, Candidate Ames would be required to receive approximately 9 votes (1 percent of 933), Candidate Passa would be required to receive approximately 17 votes (1 percent of 1,654), and Candidate Stewart would be required to receive approximately 30 votes (1 percent of 2,960). R22-R23. Under Section 16.1-11-36, however, these Candidates were required to receive 142, 132 and 130 votes, respectively.

To qualify for the primary ballot in North Dakota, by contrast, minor parties are required to submit a nomination petition signed by 7,000 qualified voters – a burden 700 times greater than that required in *Munro*. *Compare* N.D.C.C. § 16.1-11-30 *with Munro*, 479 U.S. at 190. The District Court's assertion that North Dakota allows "relatively easy" access to the primary ballot is therefore incorrect. R12. On the contrary, access to North Dakota's ballot is relatively difficult: 7,000 voters amounts to more than 1 percent of the eligible pool, a showing of support required by only five other states. R31-R32; *see McLain*, 637 F.2d at 1163 (recognizing 1 percent of the vote for governor as "within the outer boundaries of support the State may require before according political parties ballot position") (quoting *American Party of Texas v. White*, 415 U.S. 767, 783 (1974)). Thus, the state interests found to justify Washington's decision to "winnow" the primary election ballot are not implicated here, because the Libertarians – unlike the candidates in *Munro* – clearly have demonstrated a substantial modicum of support just by qualifying for North Dakota's primary election ballot. *See Munro*, 479 U.S. at 196.

In sum, North Dakota's minimum vote requirement is unconstitutional under *Storer*, *Jenness* and *Williams*, and cannot be justified by the state interests asserted in *Munro*. By holding Section 16.1-11-36 constitutional without addressing these points, therefore, the District Court committed clear error, and should be reversed.

II. THE DISTRICT COURT ERRED BY FAILING TO ADDRESS THE DISPARATE IMPACT THAT SECTION 16.1-11-36 IMPOSES ON MINOR PARTIES, IN VIOLATION OF THE LIBERTARIANS' RIGHT TO EQUAL PROTECTION.

The District Court also erred by disposing of the Libertarians' equal protection claims without considering the disparate impact that Section 16.1-11-36 imposes on minor parties. "The statute is non-discriminatory because it applies to all political parties equally," the District Court concluded, and dedicated no further analysis to the issue. R9. As the Supreme Court cautioned in *Jenness*, however, "the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness*, 403 U.S. at 442. That is the case here.

In a political system dominated by two older, established political parties, there are "obvious differences in kind between the needs and potentials" of those parties that have "historically established broad support" and new or minor parties, which have not had the benefit of building support among the electorate over many decades. *Id.* One such difference, as this Court has recognized, is that "popular dissatisfaction with the functioning of that [two-party] system sufficient to produce third party movements and independent candidacies does not manifest itself until after the major parties have adopted their platforms and nominated their candidates." *MacBride v. Exon*, 558 F.2d 443, 449 (8th Cir. 1977). Thus, the two-party system itself discourages voters from participating in minor party primaries,

as reflected in their historically low voter turnout, compared to that of major party primaries. R30-R31.

In North Dakota, voters have a particularly strong incentive not to vote for a minor party candidate in the primary election, because voters who do are prohibited from voting for any other party's candidates. N.D.C.C. § 16.1-11-22(4). This prohibition further reduces the size of the pool of eligible voters from which minor parties may draw in order to meet North Dakota's minimum vote requirement. *See supra* Part I.B. In effect, minor parties are relegated to competing for votes from the subset of voters who are motivated enough to participate in a primary election, but willing to forfeit their right to vote for a major party candidate – a vanishingly small percentage, given that minor party primaries are almost always uncontested, and provide voters with little incentive to participate. R31.

Section 16.1-11-36 thus unequally burdens minor parties in three respects. First, the statute requires that minor parties demonstrate, at a nascent stage, the same level of support that the major parties were able to build over decades. Second, the statute requires that minor parties demonstrate such support at a time when voters have little incentive to support a minor party candidate. And third, the statute restricts the eligible pool of voters from which minor parties may draw, by excluding any voter who wishes to vote for a candidate from any other party.

One indication that a ballot access statute's disparate impact violates the Equal Protection Clause is that it "operate[s] to freeze the political status quo." *Jenness*, 403 U.S. at 438. Past experience is therefore an important factor for consideration: "it will be one thing if [minor party] candidates have qualified with some regularity and quite a different matter if they have not." *Storer*, 415 U.S. at 742. In this case, past experience strongly indicates that the disparate impact imposed by Section 16.1-11-36 does in fact operate to freeze the political status quo. Indeed, not one minor party candidate for state legislature has appeared on North Dakota's ballot since 1976. R28.

Because the District Court failed to address any of the foregoing points of law and facts in the record, its Opinion is patently insufficient to dispose of the Libertarians' equal protection claims. Therefore, this case should also be reversed and remanded on that basis, so that the District Court may properly consider whether the disparate impact that Section 16.1-11-36 imposes on minor parties violates the Libertarians' right to equal protection.

CONCLUSION

For the foregoing reasons, the decision below should be reversed, and this case should be remanded to the United States District Court for the District of North Dakota.

Dated: November 26, 2010

Respectfully submitted,

/s/Oliver B. Hall

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294 (ph)
(202) 248-9345 (fx)
oliverhall@competitivedemocracy.org

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a) AND L.A.R. 28A(h)

This brief complies with the word limit requirements of F.R.A.P. 32(a) because:

a. The brief is 4,388 words, and prepared in Times New Roman, 14 Point font.

This brief complies with the electronic filing requirements of L.A.R. 31.1(c) because:

a. The text of this electronic brief is identical to the text of the paper copies;

b. Symantec AntiVirus version 10.0 has been run on the file containing the electronic version of this brief and no viruses have been detected.

/s/ Oliver B. Hall
Oliver B. Hall

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November 2010, I served a copy of the foregoing Brief of Appellant and the accompanying Addendum, on behalf of all Plaintiff-Appellants, by the Court's ECF system, upon the following:

Douglas A. Bahr
Solicitor General
State Bar ID No. 04940
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Counsel for Defendant Alvin A. Jaeger

/s/ Oliver B. Hall
Oliver B. Hall