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,

Defendants – Appellees,

and

BRADLEY D. SMITH,

Intervenor – Appellant.

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

REPLY BRIEF OF APPELLANTS

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

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I. NORTH CAROLINA'S ELECTION HISTORY UNDER § 163-122(a)(2) ESTABLISHES THAT THE SECTION IS UNDULY AND UNCONSTITUTIONALLY BURDENSOME.

North Carolina simply cannot escape that its imposition of a four percent voter endorsement requirement for unaffiliated Congressional candidates to qualify for the general election ballot has completely shut out such candidates from appearing on the ballot for over a century. Nor can North Carolina avoid the fact that the Supreme Court has recognized that a demonstrated dearth of successful candidates qualifying for the ballot by petition provides powerful evidence that the State's ballot requirements are overly restrictive. *E.g.*, *Storer v. Brown*, 415 U.S. 724, 742 (1974); *Mandel v. Bradley*, 432 U.S. 173, 177 (1977); *accord*, *Delaney v. North Carolina Board of Elections*, 370 F. Supp. 2d 373, 377 (M.D.N.C. 2004). Given that statewide and new party candidates in the State have been successful in vaulting their two percent signature requirements and given that nearly every other state requires a significantly lower percentage than four percent of registered voters – with correspondingly greater participation by independent candidates – the extraordinarily high four percent requirement in § 163-122(a)(2) can be identified as the culprit.

Appellees point at page 16 of their brief to the fact that a petition drive for Wendell Fant in 2010 netted over 20,000 valid signatures. One successful petition

drive in eleven decades hardly rebuts the inexorable record of futility for unaffiliated candidates. The Fant petition, moreover, must be discounted because it occurred after this case was submitted on summary judgment and was never subjected to factual analysis. Although the facts of the Fant drive are not on the record, it is difficult for the appellants to deny that the drive rendered the 20,000+ signatures. At the same time, it is difficult for the State to deny that Fant's petition drive was the beneficiary of an extraordinary commitment of resources from well-funded organizations that are not available – and never have been – to other unaffiliated candidates in North Carolina.[1]

Appellees also imply in their rhetorical questions on page 17 of their brief that the long-standing historical absence of unaffiliated Congressional candidates on North Carolina's ballots is, perhaps, a function of a failure by such candidates to make the effort or a lack of support for unaffiliated candidates. First, appellees have offered no explanation for why North Carolina would be particularly unreceptive to independent candidates, compared to virtually every other state in the union. Moreover, and more importantly, North Carolina's voter registration numbers indicate that the State should be especially amenable to petitions by

[1]If the Court believes that the Fant petition drive did create significant factual questions, then the Court should remand for the campaign's facts to be fully developed.

unaffiliated candidates. As of January 15, 2011, 1 in every 4.2 registered voters in North Carolina were registered as unaffiliated – that is 23.7%.[2] The failure of the record to reveal other unaffiliated candidates who have attempted to run the gauntlet of § 163-122(a)(2) and come up short is undoubtedly a function of the fact that the State maintains no records regarding such efforts.

Appellees attempt to defend the burdensome petition quota imposed by § 163-122(a)(2) by pointing to the multiplicity of offices in North Carolina that are filled by popular vote. The State can hardly use the length of its ballot to justify squeezing its width to ward off independent candidates. It is true that *Storer v. Brown*, 415 U.S. 724 (1974), and other cases require the challenged provision to be viewed in the context of the entirety of the State's ballot access laws. That examination, however, is conducted to answer the questions of whether "a reasonably diligent candidate [can] be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Id.* at 742. The fact that North Carolina has a long ballot simply is not relevant to whether its ballot access laws are unduly burdensome for the unaffiliated candidate. Moreover, as explained in plaintiffs' previous

[2]Of a total of 6,144,928 registered voters, 1,455,692 listed themselves as unaffiliated. These data were retrieved on January 18, 2011 from: http://www.app.sboe.state.nc.us/NCSBE/VR/VR%20Stats/vr_stats_results.asp?EC=01-15-2011.

memorandum, North Carolina's extremely high candidate filing fee more than adequately enables it to satisfy its interest in keeping frivolous candidates from cluttering the ballot and causing voter confusion.

II. APPELLANTS HAVE STANDING.

Appellants principal brief has adequately articulated why each of them have standing to challenge § 163-122(a)(2). They would add that virtually every, if not every, United States Supreme Court and Fourth Circuit case that has involved a challenge to a ballot access restriction has been brought by a candidate (and his or her supporters) who had failed in a preceding election to meet the requirements to qualify for the ballot. None of those cases even considered denying standing because of a relative lack of success or effort in attempting to qualify.

Appellees appear in their brief to concede the standing of the intervenor Bradley Smith to pursue a challenge to § 163-122(a)(2). To reach the merits on this appeal, the Court needs only one challenger with standing. *E.g., Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

CONCLUSION

This Court should reverse the decision of the district court and remand with instructions to enter judgment for the plaintiffs and to declare the four percent petitioning requirement in § 163-122(a)(2) for Congressional candidates to be unconstitutional.

Respectfully submitted,

Dated: January 18, 2011

/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: January 18, 2011

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 18, 2011, 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/ Tracy Moore Stuckey
Tracy Moore Stuckey
GIBSON MOORE APPELLATE SERVICES, LLC
421 East Franklin Street, Suite 230
Richmond, VA 23219