

STATE OF NORTH CAROLINA
WAKE COUNTY

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 HART)
MATTHEWS, as co-chair of the party; NICHOLAS)
TRIPLETT, as a prospective North Carolina Green)
Party candidate for public office; and KAI)
SCHWANDES and GERALD SURH, as members)
of the party and qualified voters,)

Intervenors,)

vs.)

STATE BOARD OF ELECTIONS; and)
GARY O. BARTLETT, as executive director)
of the State Board;)

Defendants.)

**MEMORANDUM OF PLAINTIFFS AND
INTERVENORS OPPOSING MOTION
TO DISMISS**

The defendants State Board of Elections and its executive director have moved to dismiss plaintiffs' Amended Complaint and the Intervenor's Complaint under Rule 12(b)(6), North Carolina Rules of Civil Procedure, for failure to state a claim on which relief may be granted. This brief is submitted by plaintiffs and intervenors in opposition to the motion. Because the claims asserted by the intervenors North Carolina Green Party and its officers and members are the same as those

asserted by the original Libertarian Party plaintiffs, the two parties will be referred to together as plaintiffs.

NATURE OF THE CASE

This is a lawsuit in which the Libertarian Party and Green Party, and officers, voters and candidates of those parties, challenge the constitutionality of a variety of state laws that prevent Libertarian Party and Green Party candidates from being listed on the ballot and that otherwise discriminate against the parties. The essence of the State Board's argument for dismissal is that a similar challenge under federal law was dismissed in *McLaughlin v. North Carolina Board of Elections*, 65 F.3d 1215 (4th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996). *McLaughlin* is not applicable here, however, because (i) the plaintiffs have brought their free speech, due process and equal protection claims under the North Carolina Constitution, not the federal constitution, and the federal court's decision is not binding on a state court; (ii) the plaintiffs have asserted state constitutional claims for which there is no comparable federal provision; (iii) here the Libertarian and Green parties are challenging the entire state scheme of regulation of political parties other than Democrats and Republicans, not just the ballot access statute as in *McLaughlin*; (iv) the *McLaughlin* court did not properly apply the United States Supreme Court's case law on ballot access; and (v) the facts have changed considerably since *McLaughlin* was decided over ten years ago.

FACTS

On defendants' motion to dismiss, the facts as alleged by plaintiffs are to be taken as true. *Hickman By and Through Womble v. McKoin*, 337 N.C. 460, 446 S.E.2d 80 (1984); *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E.2d 282 (1976). The allegations must be viewed as admitted. *Rawls v. Lampert*, 58 N.C. App. 399, 293 S.E.2d 620 (1982). The complaint should not be dismissed even if plaintiffs have stated an incorrect legal theory, if the allegations are sufficient to

state a claim under some other theory. *Stanback v. Stanback*, 297 N.C. 181, 264 S.E.2d 611 (1979). Thus, for purposes of the present motion the State Board of Elections has admitted the Libertarian and Green parties' alleged facts which, as set out in the Amended Complaint and Intervenor's Complaint, are:

The Libertarian Party— The Libertarian Party of North Carolina is a political party which has been in continuous existence in North Carolina since 1976. Despite the state's stringent requirements, the party has succeeded seven different times — *i.e.*, each election cycle except 1988 and currently — in petitioning to have its candidates listed on the ballot. The Libertarian Party of North Carolina is affiliated with the national Libertarian Party, which was founded in 1971 and is active in all 50 states. In 1996 and 2000 the Libertarian presidential candidate was on the ballot in all states, and in 2004 the Libertarian candidate was on the ballot in 48 states (all except New Hampshire and Oklahoma) plus Guam and the District of Columbia.

When this lawsuit began the Libertarian Party had over 13,000 registered voters in the state. In 1992 its candidate for governor received more than 100,000 votes; in the most recent gubernatorial election its candidate drew more than 50,000 votes. The party has bylaws and a party platform; has held an annual convention for 25 years; has active local organizations in more than a dozen counties; has a full-time executive director; maintains a web site, lpnc.org; and has all the other attributes normally expected of a political party. In 2002 the party fielded 145 candidates statewide, including candidates for a majority of seats in each house of the General Assembly. In 1992 three Libertarian legislative candidates received more than 12 percent of the vote in their races, and in 2004 a Libertarian legislative candidate won 21 percent of the vote. Libertarian Party members serve as elected members of three different city councils, five different soil and water conservation district boards and as a county surveyor.

The Libertarian Party has been recognized by the public and news media as a political party in North Carolina for nearly 30 years.

The Green Party— The North Carolina Green Party organized as a statewide political party in 2000. It has established bylaws, maintains a website, elects officers, has regular meetings, has adopted and published a party platform, and has members who pay dues and support the objectives of the party. The North Carolina Green Party is affiliated with the Green Party of the United States, which has existed since at least 1996 and is affiliated with the international Green Party and its organizations in numerous countries. The national Green Party has affiliates in all states and is the fastest growing political party in the country with over 27 percent growth in the last four years.

The Green Party of the United States has held conventions and national meetings in each year since 2000, and North Carolina party delegates have attended each convention. The North Carolina party has local affiliates in the Raleigh-Durham-Chapel Hill (Triangle Greens), Charlotte (Charlotte Area Greens), western North Carolina (Mountain Greens) and Greenville (Greenville Area Greens) parts of the state. Green Party members have participated in public events, fairs, festivals and forums, publicizing their party and its mission. They organized Project Green Bus, a statewide effort to promote alternative fuels; have attended and testified at legislative committee meetings on ballot access reform; and have participated in anti-war demonstrations in North Carolina and in Washington. Student Green Party chapters exist at UNC at Charlotte, Appalachian State, UNC at Wilmington, and North Carolina State University. Campus Greens have sponsored a number of events, registered nearly 5,000 students to vote before the 2004 election, and hosted a series of panels on youth voter issues.

Despite spending thousands of volunteer hours collecting signatures for recognition as a new political party, Green Party members have been unsuccessful in meeting the state's stringent petition requirements. Consequently, Green Party members have been denied the opportunity to run as candidates under the Green Party label.

The petition requirement — To be first recognized and have its candidates placed on the ballot, a new political party must submit a petition signed by two percent of the number of voters who voted in the last gubernatorial election. Today that means 69,733 signatures. In the entire history of the United States there are only four instances in which a new political party has been able to collect that many signatures.

From 1929 through 1981 the North Carolina signature requirement was only 10,000 names. When the Socialist Workers Party got enough signatures to appear on the ballot in 1980, 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 switched automatically to the new party. After that provision on changing affiliation was struck down by a federal court in 1982, the legislature enacted the present two percent requirement, at the time a seven-fold increase in the number of signatures required.

As the experience of the Green Party shows, it is not possible to satisfy the petition requirement through volunteers. Consequently, the Libertarian Party has employed individuals to distribute petitions and collect signatures. Given the number of names required by North Carolina, the cost for a successful petition is approximately \$100,000 to \$150,000. The expenditure of that amount of money depletes most of the Libertarian Party's funds and prevents it from spending to assist its candidates' campaigns.

The ten percent requirement — Once a political party satisfies the petitioning requirement to be officially recognized and have its candidates listed on the ballot, the party must receive at least ten percent of the vote for president or governor in the next election to retain its recognition. From 1929 to 1949 the ballot retention requirement was only three percent of the vote, but it was raised to ten percent in 1949 after the States Rights Party polled 8.8 percent of the vote in 1948. Only one party other than the Democratic or Republican party has ever satisfied the ten percent requirement, the American Party in 1968 with its presidential candidate George Wallace.

Exclusion from election boards — Elections in North Carolina are supervised by the State Board of Elections whose five members must be appointed by the governor from members of the Republican and Democratic parties. The State Board in turn appoints the 100 county boards of election, again following nominations submitted by the Republican and Democratic parties. Members of the Libertarian Party and Green Party, thus, are disqualified from membership on the boards that set and run the election machinery, even if those parties gain ballot status. The county and state elections boards hear and determine all election protests and challenges to voters' and candidates' qualifications.

Decertification of the Libertarian Party — Neither the Libertarian candidate for president or governor received ten percent of the vote in the 2004 election. The State Board of Elections did not declare that the party's recognition was being withdrawn until August 22, 2005, however. The State Board's delay was a good faith attempt to avoid unnecessary switching of registrations and other inconveniences because (a) the Libertarian Party was circulating a petition for new recognition and (b) until the very end of the 2005 legislative session it appeared that the General Assembly might lower significantly the requirements for political party recognition. The legislature failed to act, however, and the Libertarian Party was unable to satisfy the petition requirement of 69,733 names to be recognized.

Exclusion from 2005 and 2006 elections — Unlike most cities in the state, Charlotte and Winston-Salem have partisan elections. With the status of the party in limbo, Libertarian candidates were allowed to file notices of candidacy in the 2005 Charlotte and Winston-Salem municipal elections, but then could not be listed on the ballot once the party was decertified on August 22, 2005. Likewise, Libertarians were not allowed to file as candidates in the 2006 elections for state and county offices, and neither its candidates or the Greens will be listed on the November ballot unless relief is granted by this Court.

ARGUMENT

At issue in this case are the most fundamental of rights in a democratic society: the right of association and the right to vote. The plaintiffs are challenging an entire scheme of regulation by the state, a scheme that keeps their party from being listed on the ballot unless they have gathered an extraordinary number of signatures; that requires unprecedented electoral success for the Libertarians, Greens or any political party other than the Republicans or Democrats to remain on the ballot without repeating the petition process; that disqualifies them from serving on election boards and in precinct offices; that has all their election protests heard by members of the Republican and Democratic parties; that excludes them from public funding of campaigns; that prohibits them from conducting open primaries; and that places their candidates in an unfavorable position on the ballot when they do succeed in being listed. All this is done through legislation enacted by Republican and Democratic legislators to protect their own parties' interest. While supposedly intended to protect the public from the distraction of frivolous political parties and "ballot clutter," the scheme's actual effect is to force a political party — even a party such as the Libertarian Party, which has been in continuous existence in the state for 30 years — to spend all its funds on petitioning for ballot access rather than to support its candidates' campaigns. There is no public interest served by the state's restrictions; the only interest protected is that of the Republican and Democratic parties.

A. Restrictions on voters' and candidates' right to association and freedom of expression are suspect, are subject to strict scrutiny, and must be justified by a compelling state interest.

The plaintiffs bring their claims under Article I, Sections 1, 12, 14 and 19 of the North Carolina Constitution, which provide for rights to freedom of expression and association and due process. They also bring claims under Article I, Section 19's right to equal protection; under Article I, Section 10, which says that "All elections shall be free"; under Article VI, Section 1, which

establishes the right of all voters to vote for candidates of their choice at all elections; and under Article VI, Section 6, which establishes a right of every citizen to run for office.

In *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), the United States Supreme Court set out the basic framework for analyzing political association claims. At issue were Ohio's deadlines for independent candidate John Anderson to be listed on the 1980 presidential ballot in that state. The court held, first, at 460 U.S. 786-87:

The impact of candidate eligibility requirements on voters implicates basic constitutional rights. Writing for a unanimous Court in *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958), Justice Harlan stated that it 'is beyond debate that 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.'

The court then emphasized the heavy burden placed on associational rights by laws that keep candidates off the ballot:

As we have repeatedly recognized, voters can assert their preferences only through candidates or parties or both. 'It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues.' *Lubin v. Panish*, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L.Ed.2d 702 (1974). The right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.' *Ibid.*; *Williams v. Rhodes*, *supra*, 393 U.S., at 31, 89 S.Ct., at 10. The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens.

Anderson, 460 U.S. at 787-88.

Finally, the court described the process for determining the validity of those laws which exclude candidates and parties from the ballot:

[A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It 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. 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 strength

of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Id., 460 U.S. at 789 (emphasis added). The analytical process, thus, is to first determine the nature and magnitude of the harm to the political party and voters' associational rights, then to "identify and evaluate the precise interests" put forward to justify those restrictions. Such identification and evaluation of precise interests cannot occur without a searching inquiry into the state's justifications.

The *Anderson* court's analysis of the Ohio restriction, which it struck down, included this observation on the importance of third political parties in the democratic form of government::

Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. *Illinois Elections Bd. v. Socialist Workers Party*, *supra*, 440 U.S., at 186, 99 S.Ct., at 991; *Sweezy v. New Hampshire*, 345 U.S. 234, 250-51, 77 S.Ct. 1202, 1211-1212, 1 L.Ed.2d 1311 (1957) (opinion of Warren, C.J.). In short, the primary values protected by the First Amendment — 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' *New York Times v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964) — are served when election campaigns are not monopolized by the existing political parties.

Id., 460 U.S. at 794.

The instructions given by the *Anderson* court were not new. As noted by the United States District Court for the Eastern District of North Carolina in 1980 in striking down the requirement that an independent candidate must submit a petition signed by ten percent of the number of voters who voted in the last gubernatorial election:

It is clear beyond doubt that substantial "restrictions on access to the ballot burden two distinct and fundamental rights, 'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.'" *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S. Ct. 983, 990, 59 L. Ed.2d 230 (1979) quoting *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5, 10, 21 L. Ed.2d 24 (1968). When a state statute classifies voters or candidates in such a fashion as to limit these rights, the state must establish that its classification is necessary to serve a compelling interest, *Illinois State Board of Elections v. Socialist Workers Party*, *supra*; *Storer v. Brown*, 415 U.S. 724, 736, 94 S. Ct. 1274, 1282, 39

L. Ed.2d 714 (1974); *Williams v. Rhodes*, *supra* at 31, 89 S. Ct. at 10-11, and that it is the least drastic means available to achieve the legitimate state interest. *Illinois State Board of Elections v. Socialist Workers Party*, *supra* at 185; *Lubin v. Panish*, 415 U.S. 709, 716, 94 S. Ct. 1315, 1320, 39 L. Ed.2d 714 (1974); *Williams v. Rhodes*, *supra* at 31-33, 89 S. Ct. at 10-12. The Fourth Circuit has recently restated these analytical principles as follows: 'In determining the validity of such a restriction, we perceive that we must consider two factors: first, is the restriction necessary to serve a substantial state interest and second, if so, is it unduly burdensome on the right of an independent candidate to gain access to the ballot.' *Anderson v. Morris*, 636 F.2d 55, at 57 (4th Cir. 1980).

Greaves v. State Bd. of Elections of North Carolina, 508 F. Supp. 78, 80-81 (E.D.N.C. 1980).

The fundamental importance of the rights of association and political expression also were emphasized in *Williams v. Rhodes*, 393 U.S. 23, 31, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968), when the Supreme Court struck down Ohio's high petitioning requirement for new political parties:

[W]e have said with reference to the right to vote: 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.' [quoting *Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535, 539-41, 62 S.Ct. 1110, 1112-13, 86 L.Ed.2d 1655 (1942)]

The *Rhodes* court went on to find that the Ohio restrictions gave "the two, old established parties a decided advantage over any new parties . . . and thus place substantially unequal burdens on both the right to vote and the right to associate." 393 U.S. at 31. The court concluded that "also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." *Id.* The court then reiterated that such restrictions are subject to strict scrutiny and may be justified only by a compelling state interest:

In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' *NAACP v. Button*, 371 U.S. 415, at 438, 83 S.Ct. 328, at 341 (1963).

Williams v. Rhodes, 393 U.S. at 31.

In sum, it is well established that restrictions on the ability of candidates and political parties to be listed on the ballot invoke fundamental rights of free speech and freedom of association; that

such restrictions place a heavy burden on those rights; that the restrictions are subject to strict scrutiny; that the state must show a compelling interest to justify the restrictions; and that the state's justification must be clearly identified and must be carefully evaluated by the court.

B. Plaintiffs' claims are not barred by the Fourth Circuit's decision in *McLaughlin v. N.C. Board of Elections*.

Defendants argue that *McLaughlin v. N.C. Board of Elections*, 65 F.3d 1215 (4th Cir. 1995), has conclusively decided the ballot access issue adversely to plaintiffs. In that case the federal Fourth Circuit Court of Appeals upheld the state's two percent requirement for a petition for a new party and the ten percent vote requirement to remain on the ballot. For a number of reasons, however, *McLaughlin* is not controlling in the present case.

1. A federal court decision is not binding on state courts.

McLaughlin was brought in federal court and decided under federal law. Plaintiffs in this case are suing in state court for redress of rights arising under the state constitution. Admittedly, the state constitutional rights to free speech, free association, due process and equal protection have parallels in the federal constitution, and those issues were addressed in *McLaughlin*. A federal circuit court decision does not bind a state court in its interpretation of the same federal constitutional rights, however. *State v. McDowell*, 310 N.C. 61, 310 S.E.2d 301 (1984). When an action is brought under the state constitution, likewise, the state court should consider the federal decision on the comparable federal constitutional provisions, but it is not bound by that ruling.

The North Carolina Constitution, like other state constitutions, has a rich history that predates the federal constitution, and state courts often give a more expansive reading to the same rights. See Exum, James G., Jr., "Rediscovering State Constitutions," 70 N.C. L. Rev. 1741 (Sept. 1992); Martin, Harry C., "The State as a 'Font of Individual Liberties': North Carolina Accepts the Challenge," 70 N.C.L. Rev. 1749 (Sept. 1992). As stated by former Justice William Brennan of the United States Supreme Court:

It is simply that decisions of the [United States Supreme] Court are not, and should not be dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them.

Brennan, William J., Jr., “State Constitutions and the Protection of Individual Rights,” 90 Harv. L. Rev. 489, 502 (1977).

The obligation of the state court to make an independent judgment on an individual right is especially clear when, as here, the wording of the state constitution signifies a higher level of protection. The North Carolina freedom of speech protection is found at the beginning of the Constitution, in the Declaration of Rights in Article I — and not in an amendment adopted later, as with the United States Constitution — and reads:

Sec. 14. *Freedom of speech and press.* Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

The very wording of the free speech provision, thus, declares a greater importance and commitment than appears in the federal document. Moreover, the free speech section, which is the basis for the freedom of association, is supported by other state constitution provisions on free elections, the right to vote for all offices, and the right of all citizens to run for office, which are not found in any form in the federal document. Consequently, a state court is not bound by and should not be limited by the holding in *McLaughlin*.

Additionally, to the extent that *McLaughlin* is to be considered, its analysis of the freedom of speech and association rights is contradicted by other decisions of federal courts. See, e.g., *Baer v. Meyer*, 728 F.2d 471 (10th Cir. 1984) (invalidating state requirement that a political party had to get ten percent of vote in most recent election to protect its name from use by unendorsed candidates); *Gjersten v. Board of Election Commissioners*, 791 F.2d 472 (7th Cir. 1986) (invalidating ten percent petitioning requirement for ward committeeman position); *Blomquist v.*

Thomson, 739 F.2d 525 (10th Cir.1984) (invalidating requirement that majority of signatures for new party petition could not be from the same county).

2. The plaintiffs have brought claims under provisions of the North Carolina Constitution which are not found in the federal constitution and were not considered by the *McLaughlin* court.

In addition to their freedom of speech and association and equal protections claims, plaintiffs have brought claims under provisions of the State Constitution which have no counterpart in federal law. Because state constitutions preceded the federal constitution they often “contain more detailed protections for the individual and, in some cases, protections which have no parallel in the federal document.” Exum, James G., Jr., “Rediscovering State Constitutions,” *supra*, at 1741 “[S]tate constitutions generally contain a longer list of individual rights than the Federal Constitution, and their language is generally richer, more detailed, and more specific than that of the federal document.” *Id.*, at 1746. Exum notes, for example, that the North Carolina Constitution includes a Declaration of Rights, as the very first article, with 36 discrete provisions. “While the Bill of Rights speaks in terms of prohibitions against government action, the North Carolina ‘Declaration of Rights,’ like similar articles in other state constitutions, speaks positively and contains broad grants of power to the people.” *Id.*, at 1746-47. The North Carolina Constitution also, in Article I, Section 36, declares that the specific enumeration of rights “shall not be construed to impair or deny others retained by the people.”

As already discussed, the free speech right in the North Carolina Constitution is more forceful and given greater prominence than in the federal constitution. The importance of the free speech provision is illustrated by the North Carolina Supreme Court’s recognition in *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992), of a citizen’s direct claim against the state for violation of the constitutional right. “The North Carolina Constitution is the people’s timeless shield against encroachment on their civil rights.” Martin, “The State as a ‘Font of Individual Liberties’: North Carolina Accepts the Challenge,” *supra*, at 1757.

The Declaration of Rights in the North Carolina Constitution, also states in Article I, Section 10 that “All elections shall be free.” That section is derived from the provision in the English Declaration of Rights of 1689 that “election of members of parliament ought to be free.” John V. Orth, *The North Carolina State Constitution*, 47 (1993). “The meaning [of the North Carolina provision] is plain: free from interference or intimidation.” *Id.* Freedom from interference includes freedom from undue restrictions on whom may be listed on the ballot, as demonstrated by the courts’ reliance upon Article I, Section 10 to invalidate ballot restrictions such as excessive signature requirements for unaffiliated candidates to be listed, *Obie v. North Carolina State Bd. of Elections*, 762 F. Supp. 119 (E.D.N.C. 1991), and party loyalty oaths, *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964).

Plaintiffs also assert claims under Article VI, Sections 1 and 6 of the State Constitution — state constitutional rights to vote in all elections and to run for office — which are not found in the United States Constitution and were not at issue in *McLaughlin*. Article VI, Section 1 declares that every citizen of the state “shall be entitled to vote at any election by the people of the State . . . ,” while Section 6 makes “[e]very qualified voter in North Carolina who is 21 years of age . . . qualified for election by the people to office.” The rights to vote in all elections, and for all qualified voters to be candidates, are meaningless if the General Assembly, controlled by two political parties, can keep off the ballot any person who wishes to be identified with a third party.

3. Plaintiffs are challenging more than the restrictions on ballot access considered in *McLaughlin*.

McLaughlin does not control the outcome of this case because the *McLaughlin* plaintiffs challenged *only* ballot access, whereas plaintiffs here are taking on the state’s entire scheme of regulation of minority parties. While a barrier to the ballot may be upheld when considered by itself, it may well be unconstitutional when considered as part of an overall regulatory scheme of elections. “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*, 65 F.3d at 1223 (quoting *Williams v. Rhodes*, 393 U.S. at 34). In the most recent Supreme Court decision on state regulation of political parties Justice O’Connor further explained how the cumulative effect of political party restrictions must be considered. Expressing disappointment that questions about other Oklahoma restrictions had not been raised earlier in the challenge to the state’s closed primary law, she stated:

Nevertheless, respondents’ allegations are troubling, and, if they had been properly raised, the Court would want to examine the *cumulative* burdens imposed by the *overall* scheme of electoral regulations upon the rights of voters and parties to associate through primary elections. A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition. Even if each part of a regulatory regime might be upheld if challenged separately, one or another of these parts might have to fall if the overall scheme unreasonably curtails associational freedoms.

Clingman v. Beaver, __ U.S. __, 125 S. Ct. 2029, 2042 (2005) (O’Connor, concurring) (emphasis in original).

When viewed as a whole, North Carolina’s regulation of minority parties is among the most restrictive in the country. The statutory scheme is designed to and does impede the ability of political parties other than Democrats and Republicans to place their candidates on the ballot and otherwise enjoy the benefits of state recognition as an organized political party. Among the features of North Carolina’s restrictive election law challenged by plaintiffs, in addition to the two percent petitioning requirement and the ten percent vote to remain on the ballot, are the disqualification of members of parties other than the Democratic and Republican parties from the State Board of Elections and their exclusion from county elections boards and other election offices; the requirement that party recognition be based on statewide results; the unfavorable placement on the ballot of candidates from parties other than the Democratic and Republican parties; the prohibition

against a political party allowing registered voters of other parties to vote in its primary; the involuntary change in registration of voters affiliated with a political party when the party is decertified; the denial of political parties other than the Democratic and Republican parties to have the same use of public buildings as Democrats and Republicans; the denial of placement on the presidential ballot of nationally recognized candidates of parties other than the Democratic and Republican parties; and the exclusion of parties other than the Democratic and Republican parties from public funding.

Although the *McLaughlin* court paid lip service to the need to review the totality of the state's scheme of regulating third political parties, in fact it did not have those other provisions before it and did not consider them. Even if the two percent petition and ten percent retention laws might be considered reasonable when judged by themselves, they are unconstitutional when placed in the larger context of all the other forms of discrimination against the Libertarian Party, the Green Party and other third parties.

4. The Fourth Circuit did not apply the law on freedom of association correctly in the *McLaughlin* decision.

In *McLaughlin* the Fourth Circuit Court of Appeals correctly stated the legal test for judging voters', candidates' and political parties' freedom of association claims, but the court failed to apply the test. The court rightly found that "state laws that restrict a political party's access to the ballot always implicate substantial voting, associational and expressive rights protected by the First and Fourteenth Amendments." *McLaughlin*, at 1221. The court also rightly found that strict scrutiny applies because "the burden that North Carolina's ballot access restrictions impose on protected interests is undoubtedly severe — that is, as history reveals, those regulations make it extremely difficult for any 'third party' to participate in electoral politics." *Id.* The court then stated that its duty was to determine whether the state had adopted the "least restrictive means to achieve the '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.” *Id.*, at 1221-22, quoting *Jenness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971). Missing from the analysis of the state's interest, however, was any real inquiry into the validity of the state's justification.

As the *Anderson* court stated, when the plaintiff shows that its associational and speech rights are severely burdened, the court “then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Anderson*, 460 U.S. at 789. A common sense reading of that language requires a court to do far more than the “analysis” given in *McLaughlin*. “The first thing to note is that a plain reading requires, at a minimum, that an interest be *put forward* by the state.” Evseev, D., “A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections,” 85 Boston Univ. L. Rev. 1277, 1324 (2005). The boilerplate kind of justification accepted in *McLaughlin* is not sufficient:

Second, the focus must be on the *precise* interests at issue. In other words, it is arguable that generalized boilerplate justifications for ballot access are insufficient, because they are not sufficiently precise. For instance, frequently advanced justifications such as voter confusion, ballot integrity, and orderly elections may be insufficient if advanced in the abstract, without a specific explanation of how they apply in the particular circumstances.

Id., at 1324.

The *Anderson* court itself carefully reviewed and evaluated, one by one, each of the interests put forward by Ohio for its early petition requirement — voter education, equal treatment for partisan and independent candidates, and political stability — and found them all lacking. By contrast, the *McLaughlin* court did no more than list the state's purported interests in summary fashion with no analysis whatsoever. Even a cursory review of prior case law would have cast doubt on the supposed interest in avoiding ballot clutter. As the Supreme Court noted in *Williams v. Rhodes*:

Finally Ohio claims that its highly restrictive provisions are justified because without them a large number of parties might qualify for the ballot, and the voters would then be confronted with a choice so confusing that the popular will could be frustrated. But the experience of many States, including that of Ohio prior to 1948, demonstrates that no more than a handful of parties attempts to qualify for ballot positions even when a very low number of signatures, such as 1 % of the electorate, is required.

Williams v. Rhodes, 393 U.S. at 33.

Had the Fourth Circuit truly evaluated the state's justifications for its ballot restrictions — avoiding ballot clutter and voter confusion — it would have seen that they are hollow. First, there is no factual basis to support the contention that an excessive number of parties might get on the ballot if the two percent petition requirement or ten percent vote rule were eliminated. From 1929 to 1981 North Carolina required only 10,000 signatures for recognition of a new political party, and there was no ballot clutter. When the Socialist Workers Party qualified in 1980, the legislature lowered the number of signatures to 5,000 but provided that the party affiliation of anyone who signed a petition would be changed automatically. Upon invalidation of the automatic registration change in *North Carolina Socialist Workers Party v. North Carolina State Board of Elections*, 538 F. Supp. 684 (E.D.N.C. 1982), the state was left with only the 5,000 signature requirement. Still, in 1982, the only year in which the petition requirement was so low, only four parties appeared on the ballot: the Democrats, Republicans, Libertarians and Socialist Workers. Four parties hardly constitutes clutter.

Richard Winger, the editor of *Ballot Access News*, has studied the effect of ballot access laws and whether ballot clutter truly is an issue. His research article, "How Many Parties Ought to be on the Ballot?: An Analysis of *Nader v. Keith*," soon to be published in the *Election Law Journal*, is attached (and cited as "Winger"). He notes, first, that up until the end of the 19th century there were no government-printed ballots, the ballots were printed and distributed by political parties themselves, and during that time there were the fewest number of parties. "[W]hen one looks at the data, one finds that the number of parties was smallest during the years when there were no

government-printed ballots. In the years since the United States started using government-printed ballots, the number of parties has remained fairly constant even though the ballot access laws have changed drastically.” Winger, at 6. Additionally, although states such as Colorado, Florida, Hawaii, Louisiana, Maryland, Michigan and Montana have significantly reduced the barriers to new parties in the last eight years there have been no new political parties created since the Reform Party in 1995. Winger, at 16. As Winger explains, new political parties arise because of specific political issues, not just because a state reduces its petition requirement. Reducing the petition requirement will not spawn new parties and create ballot clutter, it will only make it simpler and much less expensive for parties that already are established to have their candidates listed on the ballot.

Winger also researched whether a large number of political parties on the ballot truly confuses voters. He notes 68 instances in 30 states from 1972 through 2004 in which a party had ten or more candidates on a presidential primary ballot, with no reported confusion and no resulting changes in access laws. Winger, at 19. He also notes that New Hampshire’s first-in-the-nation presidential primary, in which anyone can run by paying a fee of \$1,000, is always the most crowded ballot, but seems never to have generated any confusion. Winger, at 20-21. Mississippi, whose citizens presumably are no better educated than those of North Carolina, since 1890 has allowed any political party to be listed that requests to be on the ballot, but has no reported problem with voter confusion. Winger, at 18. According to notes Justice Harry Blackmun kept during court deliberation in the case of *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), Justice Antonin Scalia rightly declared, “The cluttered ballot argument is phony.” Winger, at 22.

Winger’s conclusion, after his extensive research, is: “If a state requires as few as 5,000 signatures, it is virtually guaranteed to have a statewide ballot that is not crowded.” Winger, at 26. Support for his conclusion includes the recent experience in Arkansas which, as the result of an attorney general’s opinion, from 1979 through 1997 allowed all independent candidates who requested to be on the presidential ballot. The number of candidates rose from seven in 1980 to

13 in 1992 and 12 in 1996. The enactment in 1997 of a modest requirement of 1,000 signatures reduced the number of candidates to seven in 2000 and six in 2004. Winger, at 26.

Neither in *McLaughlin* nor at any other time has the state offered a justification for North Carolina's highly restrictive ballot access laws other than to repeat the mantra of cluttered ballots and voter confusion. An objective assessment of that justification, however, shows that it does not hold water, that there is no need to require nearly 70,000 signatures to keep the ballot manageable. And just as elsewhere in the country, North Carolinians are smart enough to work their way through four or five or six or seven political parties on the ballot without any difficulty.

5. The facts have changed significantly in the eleven years since *McLaughlin* was decided.

Eleven years have passed since *McLaughlin*, and the factual landscape has changed dramatically since that decision. There has been another decade of sustained activity by the Libertarian Party which should remove any question that it is an ongoing, established political party whose candidates should be listed on the ballot. The Green Party has arisen as a new, international political party and has become a factor in presidential elections. Just since 2000 the Libertarian Party has placed over 300 candidates on the ballot in North Carolina, for every office from president to county soil and water district supervisor. In 2002 a total of 145 candidates ran as Libertarians, and Libertarians ran for a majority of seats in each house of the General Assembly.

Libertarian Party members in North Carolina currently serve as elected members of three different city councils, five different water and sewer district boards and as a county surveyor. About a dozen other Libertarians serve on appointed city and county boards across the state. As of August 2005, there were just over 13,000 voters registered as affiliated with the Libertarian Party statewide.

The national Libertarian Party likewise has proven its long-term validity, currently having over 200,000 registered voters and holding more than 600 elected offices. The Libertarian presidential

candidate was on the ballot in all states in 1996 and 2000, and in the 2004 election was on the ballot in 48 states (all except New Hampshire and Oklahoma) plus Guam and the District of Columbia.

The Green Party, likewise, has become an established entity in the United States and in North Carolina. Many commentators considered Green candidate Ralph Nader a decisive factor in the 2000 presidential election. The state party is recognized in the news media as an ongoing political party; it has regular, dues-paying members, a party platform, a website, local affiliates in various parts of the state, and campus chapters. State Green Party members have been attending national conventions, appearing before legislative committees, registering voters, and otherwise actively participating in the political process.

The record clearly establishes the legitimacy of the Libertarian Party and the Green Party in North Carolina and nationwide. There is no state interest which is served by keeping the Libertarian Party and the Green Party off the ballot today in light of their sustained histories and general recognition within the state as legitimate political parties. There is no state interest in denying Libertarian and Green voters the right to vote for candidates of their choice.

CONCLUSION

Defendants' motion to dismiss should be denied. Plaintiffs clearly have stated viable claims under numerous provisions of the North Carolina Constitution. To the extent that comparable provisions in the federal constitution were addressed in *McLaughlin*, this court is not bound by that federal decision. Moreover, the federal court clearly did not apply the federal standard correctly, failing to evaluate the state's purported justification for its ballot restrictions. Plaintiffs also rely upon other provisions of the North Carolina Constitution, provisions with no counterpart in federal law, that are intended to directly protect voting rights.

The only purpose served by North Carolina's ballot restrictions is to require the Libertarian Party and the Green Party, and any other party which wants ballot access, to spend large sums of

money in each round of general elections to have its candidates listed on the ballot, thereby depriving the party of campaign funds. The state regulation is, in effect, an extraordinarily high political party "filing fee" which is intended to keep all candidates other than Republicans and Democrats off the ballot. As such, it runs afoul of voters' right to freedom of association and expression:

It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues. This does not mean every voter can be assured that a candidate to his liking will be on the ballot, but the process of qualifying candidates for a place on the ballot may not be measured solely in dollars.

Lubin v. Panish, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L.Ed.2d 702, 716 (1974).

RESPECTFULLY SUBMITTED this ____ day of April 2006.

THARRINGTON SMITH, L.L.P.

Michael Crowell, State Bar # 1029
Deborah Stagner, State Bar # 23899
209 Fayetteville Street Mall
Post Office Box 1151
Raleigh, North Carolina 27602-1151
Telephone: (919) 921-4711
Facsimile: (919) 829-1583
mcrowell@tharringtonsmith.com

Attorneys for Libertarian Party plaintiffs

ELLIOT PISHKO MORGAN, P.A.

Robert M. Elliot, State Bar #7709
426 Old Salem Road
Winston-Salem, North Carolina 27101
Telephone: (336) 724-2828
Facsimile: (336) 724-3335
rmelliot@epmlaw.com

Attorneys for Green Party intervenors

CERTIFICATE OF SERVICE

I certify that a copy of this **MEMORANDUM OF PLAINTIFFS AND INTERVENORS OPPOSING MOTION TO DISMISS** was served by hand delivery to the following:

Susan K. Nichols
Special Deputy Attorney General
Department of Justice
114 W. Edenton Street
Raleigh, North Carolina 27601

This _____ day of April 2006.

Michael Crowell