

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

COUNTY OF WAKE

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,

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Plaintiffs,

*and*

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

Intervenors,

v.

**ORDER**

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

Defendants.

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

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

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

**STIPULATION OF FACTS:**

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

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

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

6. The provision that automatically switched the voter registration of an individual who signed a petition was struck down by a federal court in 1982. *North Carolina Socialist Workers Party v. North Carolina State Board of Elections*, 538 F. Supp. 864 (E.D.N.C. 1982).
7. In 1982, the only year in which 5,000 signatures were required for a new party, only four parties—the Democratic, Republican, Libertarian and Socialist Workers—appeared on the ballot. 1982 was not a presidential election year, nor a year in which governor or Counsel of State members were elected.
8. In 1983, the General Assembly increased the number of registered voter signatures required for recognition of a new political party from 5,000 to two percent of the number who voted in the last gubernatorial election. 1983 Sess. Laws C. 576, § 1. Parties who are seeking recognition as political parties in North Carolina may begin gathering these signatures as soon as the gubernatorial election is over.
9. For the 2008 election, a party must submit 69,734 signatures from registered voters in order to gain recognition as a political party pursuant to N.C.G.S. § 163-96. These signatures must be submitted to the State Board of Elections by the first day of June.
10. The population of North Carolina, the number of registered voters in

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

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

11. In order to retain recognition, a political party has historically been required to receive a threshold percentage of the votes cast statewide in the most recent gubernatorial or presidential election.
12. From 1935 to 1949, the ballot retention requirement was 3% of the

statewide vote. North Carolina Code of 1935 § 5913.

13. In 1948, the States Right Party polled 8.8% of the vote.
14. In the next legislative session, the General Assembly raised the ballot retention requirement to 10% of the statewide vote.
15. Only one party other than the Democratic or Republican Party, the American Party in 1968, has ever met the 10% requirement. The Democratic and Republican Parties are the only two political parties to maintain continuous recognition since the enactment of N.C.G.S. §§ 163-96 and -97.
16. Effective January 1, 2007, after the filing of this action on September 21, 2005, the General Assembly amended N.C.G.S. § 163-96 to lower the retention requirement to 2%. 2006 Sess. Laws C. 234, §§ 1 and 2.

17. Once a political party is officially recognized, under § 163-96 its candidate must receive at least 2% of the statewide vote for governor or president for the party to remain officially recognized and for its candidates to be listed on the ballot for any office anywhere in the state. Thus, even if candidates of the party receive more than two percent of the vote in a particular city or county, they cannot be listed on the ballot and their party identified in ballots in that community if the party did not receive two percent of the vote statewide.
18. The Libertarian Party of North Carolina has been in continuous existence since 1976. The party has bylaws and a party platform; has held an annual convention for each of 25 years; has active local organizations in more than a dozen counties; and maintains a website.
19. At the time the present action was filed on September 21, 2005, the Libertarian Party had over 13,000 registered voters in the state.
20. Between October 1993 and November 2004, the number of registered Libertarian voters in North Carolina increased from 1193 to 12,754.

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

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

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

21. In 2000, the Libertarian Party candidate for Governor received 42, 674 votes (1.5% of the total votes cast) and the Libertarian Party candidate for President received 13,891 (0.5% of the total votes case). The Party did not meet the 10% threshold to retain their access to the ballot. The Party immediately began a petition drive that was successfully completed in 2001. The Party was not de-certified and retained its ballot access through 2004.
22. In 2004, the Libertarian Party candidate for Governor received 52,513 votes (1.5% of the total votes cast) and the Libertarian Party candidate for President received 11,731 (0.5% of the total votes cast). The Libertarian Party candidate for Senate District 36 received over 18% of the total votes cast in that race, in which the only other candidate was the incumbent Republican. The Party did not meet the 10% threshold to retain their access to the ballot. The Party was de-certified by the State Board of

Elections on August 27, 2005.

23. When the Libertarian or any other party is de-certified, the registration of all of its voters is automatically switched to “unaffiliated” pursuant to N.C.G.S. § 163-97.1. The county boards of elections send each affected voter a letter informing them of the automatic change in affiliation and their right to declare a party affiliation as provided by law. This change in registration means that when the party is again recognized voters desiring to be officially affiliated with the party are required to re-register with the party.
24. The North Carolina Green Party organized as a statewide political party in 2000 and has been in continuous existence since that time. The Green Party has established bylaws, maintains a website, elects officers, has regular meetings, has adopted and published a party platform, and has members who support the objectives of the party. The North Carolina Green Party is affiliated with the Green Party of the United States, which has been in existence since the 1980's.
25. Green Party members have never met the state’s petition requirements; have never gained recognition as a political party pursuant to NCGS § 163-96; and consequently, have never received the benefits of party recognition, including the right to run as candidates for public office under the Green Party label.
26. The following parties, in addition to the Democratic and Republican Parties, have qualified to place candidates on the North Carolina ballot in

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

27. All current members of the General Assembly are either Democrats or Republicans.
28. All members of the State Board of Elections are either Democrats or Republicans.
29. The percentage of voters who do not identify as Democrats or Republicans—unaffiliated voters—has increased from 2.5% in 1968 to more than 20% in 2008.

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

30. Without recognition under § 163-96 as political parties, the Libertarian and Green Parties are not automatically entitled pursuant to N.C.G.S. § 163-99 to free access to public schools and other public buildings for party meetings as are the Democratic and Republican parties.
31. When they do qualify for the ballot, candidates of those parties that reflect at least five percent (5%) of statewide voter registration, as reflected in the most recent statistical report by the State Board of Elections, are listed in alphabetical order on the ballot first; they are then followed by candidates

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

32. North Carolina taxpayers may designate on their tax return that \$3.00 of the tax shall be credited to the North Carolina Political Parties Financing Fund for the use of the political party designated by the taxpayer. N.C.G.S. § 105-159.1. Only parties that are formally recognized by the State under N.C.G.S. § 163-96 and 97 are eligible for participation in the program.
33. Upon being recognized for the first time, a recognized political party is required by statute to nominate its candidates by convention while established parties use party primaries. The state pays the cost of conducting party primaries but offers no financial assistance for party conventions.
34. Because their preferred political party is not recognized by the State, voters who support the Green and Libertarian Parties are unable to register in such a way as to signify their party preference. As a result, the State Board of Elections does not maintain and cannot provide to the Green and Libertarian parties lists of those voters who support the Green and Libertarian parties.
35. Campaign finance reports for the North Carolina Democratic Party – State show that O. William Faison, identified as “Attorney, Faison & Gillespie” in Durham contributed \$10,000 on 11/18/05 and \$10,000 on 11/23/05; that Michael A. Brade-Arajae, identified as “Investor, True Pilot, LLC” in

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

36. Campaign finance reports for the North Carolina Republican Party – State show that Robert Luddy, identified as “President, Captive Air” in Raleigh contributed \$5,000 on 1/10/07, \$7,500 on 10/27/06 and \$3,000 on 10/30/06; that Fred Smith, identified as “Home Builder” of Clayton, contributed \$5,000 on 1/25/07; and that Don Walston, identified as “President, Howard, Perry & Walston” of Raleigh, contributed \$5,000 on 10/23/06.
37. In general, individuals may contribute a maximum of \$4,000 per candidate per election. However, G.S. 163-278(13)(e) exempts any national, state, district, or county executive committee of a political party that is recognized under 163-96 from the \$4000 contribution maximum. Because they are not recognized as political parties under NCGS 163-96, the Libertarian and Green Parties are not eligible to receive donations greater than \$4000.
38. Persons desiring to get on the ballot in North Carolina can also qualify as unaffiliated candidates pursuant to N.C.G.S. § 163-122 and as write-in candidates pursuant to N.C.G.S. § 163-123, though in neither

circumstance will the candidate's political party appear with a party label. N.C.G.S. § 163-122 requires unaffiliated candidates for statewide office to submit signatures of registered voters equal to two percent of the voters who voted in the most recent gubernatorial election; for district or local offices, signatures equal to four percent of the registered voters in that district or locality must be submitted. N.C.G.S. § 163-123 requires write-in candidates for statewide office to submit 500 signatures of registered voters.

39. Article III of the North Carolina Constitution requires that all ten members of the Council of State be elected statewide.
40. North Carolina's voting equipment must comply with the requirements of N.C.G.S. 163-165.7 and with the federal "Help America Vote Act" ("HAVA"), 42 U.S.C. § 15481 *et seq.*

#### **FINDING OF FACTS:**

41. From 1983, when the 2% signature requirement for recognition as a new party was adopted, to the present, the General Assembly has made no attempt to increase the 2% signature requirement and has dropped the retention requirement from 10% to 2% of the votes cast for Governor.
42. Only two states – Georgia and Arizona – elect more statewide officers than North Carolina does.
43. Unlike some other states, where those seeking recognition as new political parties must obtain the required number of signatures in periods as short as two weeks or ninety days, North Carolina allows those seeking recognition as new parties to begin collecting signatures on the day of a gubernatorial election. This effectively gives potential new parties approximately three and one-half years to collect the necessary signatures.

44. According to the testimony of Barbara Howe and Sean Haugh, as well as plaintiffs and intervenor's Exhibit 13, five people collected more than 85,000 signatures for the Libertarian Party this election cycle.
45. North Carolina holds its election for U.S. President, ten statewide executive officers, State House members, State Senate members, U.S. Congress in the same general election. If those years also have a statewide race for U.S. Senate, there will be fifteen offices up for partisan election on every ballot in North Carolina. Additionally, there may be non-partisan statewide elections for the North Carolina Supreme Court and the North Carolina Court of Appeals, as well as partisan and non-partisan elections for local offices, including judicial offices.
46. In 1996 North Carolina had long lines and voter dissatisfaction during the General Election. That election had an unusually long ballot; five parties were recognized in North Carolina that year.
47. Nearly eighty percent (80%) of North Carolina counties use optical scan voting machines.
48. There is a limit to the physical size of ballots that can be used on optical scan machines.
49. Longer ballots for optical scan machines have to be two sided and may have to be placed on more than one sheet. As testified to both by the Deputy Director of the North Carolina State Board of Election and by plaintiffs and intervenor's expert, Richard Winger, double-sided optical scan ballots and more than one sheet for a ballot are not desirable for the efficient administration of elections.
50. The longer the ballot, the greater the opportunity for errors and problems in the administration of elections.
51. The State must plan for the possibility for extremely long ballots, not merely for the probability of extremely long ballots.
52. Defendants North Carolina State Board of Elections and its Executive Director bear the legal responsibility and obligation of executing and administering on behalf of the State

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

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

### CONCLUSIONS OF LAW

1. Plaintiffs and intervenors have failed to offer any evidence showing how defendant Roy Cooper, as Attorney General of the State of North Carolina, is a proper defendant to this action. Accordingly, he should be dismissed as a defendant.
2. “All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.” *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989). “[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.” *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991). “If there is any doubt as to the Legislature’s power to act in any given case, the doubt should be resolved in favor of the Legislature’s action.” *Id.* at 338, 410 S.E.2d at 891.
3. Plaintiffs and intervenors have not demonstrated that N.C. GEN. STAT. §§ 163-96 or -97.1, or any other challenged statute, violate the North Carolina Constitution beyond a reasonable doubt.
4. “Strict scrutiny, this Court’s highest tier of review, applies ‘when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.’ Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest.” *Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002) (internal citations omitted).
5. Plaintiffs and intervenors have not alleged and have not shown that they are members of a suspect class.

6. The right to vote on equal terms is a fundamental right. *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002). The statutes challenged by plaintiffs and intervenors, however, do not infringe upon their right to vote on equal terms. Rather, plaintiffs and intervenors in essence posit that voters have a right to have the party of their choice appear on the ballot.
7. There is not a fundamental right to have the party of a voter's choice appear on the ballot. Accordingly, strict scrutiny does not apply to plaintiffs and intervenors challenges.
8. Even if strict scrutiny did apply to plaintiffs and intervenors' challenges, the State has a compelling interest in requiring a preliminary modicum of support before recognizing a political party and placing its candidates on the ballot. "There is a recognized and 'important state interest in requiring some preliminary modicum of support before printing the name of a political organization's candidate on the ballot – the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.'" *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1221-22 (4<sup>th</sup> Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996) (quoting *Jeness v. Fortson*, 403 U.S. 431 (1971)). *Cf. Stephenson v. Bartlett*, 355 N.C. at 376, 562 S.E.2d at 393 (noting with regard to multi-member districts "that ballots containing multi-member districts 'tend to become unwieldy, confusing, and too lengthy to allow thoughtful consideration.'"; quoting *Chapman v. Meier*, 420 U.S. 1, 15 (1975)).
9. "While all states condition ballot access on a showing of some 'preliminary modicum of support,' it is beyond judicial competence to identify, as an objective and abstract matter, the precise numbers and percentages that would constitute the least restrictive means to advance the state's avowed and compelling interests." *McLaughlin*, 65 F.3d at 1222.
10. The provisions challenged by plaintiffs and intervenors cannot be considered in isolation, but "must be assessed as a complex whole," in the context of North Carolina's complete scheme regarding the conduct of elections. *McLaughlin*, 65 F.3d at 1223.
11. In North Carolina, this "complex whole" includes the following:
  - a. The North Carolina Constitution requires that 10 Council of State offices be elected every four years;

- b. The elections for Council of State occur in the same years as the election of the President and Vice-President of the United States;
  - c. If there is also a race for United States Senate in a presidential election year, there will be fifteen offices up for partisan election on every ballot in North Carolina, including members of the United States House of Representatives and the North Carolina Senate and North Carolina House of Representatives;
  - d. There may also be non-partisan statewide elections for the North Carolina Supreme Court and the North Carolina Court of Appeals, as well as partisan and non-partisan elections for local offices, including judicial offices;
  - e. Ballots and voting systems in North Carolina must comply with federal and state laws, which limit the options available to counties in choosing voting systems;
  - f. The majority of North Carolina counties use optical scan voting systems, in which longer ballots increase the possibility of errors or problems in the administration of elections; and
  - g. The more parties there are that are recognized by the State and that place candidates on the ballot, the greater chance there is for ballots that are so long as to be unwieldy and to risk voter confusion and frustration of the electoral process.
12. The provisions of N.C. GEN. STAT. § 163-96 challenged by plaintiffs and intervenors have been found by the United States Court of Appeals for the Fourth Circuit to meet the strict scrutiny test in a challenge under the United States Constitution. *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1221-22 (4<sup>th</sup> Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996).
13. While federal Supreme Court and Fourth Circuit precedents are not binding on State courts considering similar constitutional questions, they are entitled to great weight. *Stam v. State*, 47 N.C. App. 209, 213-14, 267 S.E.2d 335, 339-40 (1980), *aff'd in part and rev'd on other grounds in part*, 302 N.C. 357, 275 S.E.2d 439 (1981).
14. Both the Freedom of Speech clause (Article 1, § 14) and the Equal Protection clause

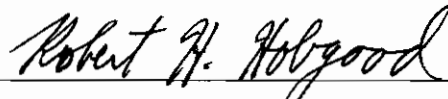
(Article I, § 19) of the North Carolina Constitution, are only 37 years old, having first been adopted with the ratification of the 1971 Constitution. They are modeled on the cognate provisions of the federal Constitution.

15. The North Carolina Constitution does not require a different result in this case than was reached in *McLaughlin, Jenness*, or other federal cases considering challenges similar to the ones brought in this action.
16. Plaintiffs and intervenors have failed to overcome the presumption that the statutes they challenge are constitutional.
17. Neither the 2% retention requirement contained in N.C. GEN. STAT. § 163-96(a)(1) nor the 2% signature requirement contained in N.C. GEN. STAT. § 163-96(a)(2) violate Article I, §§ 1, 10, 12, 14 and 19, or Article VI, §§ 1 or 6, of the North Carolina Constitution.
18. The provisions of N.C. GEN. STAT. § 163-97.1 do not violate Article I, §§ 1, 10, 12, 14 and 19, or Article VI, §§ 1 or 6, of the North Carolina Constitution.

Therefore, it is hereby adjudged, ordered and decreed:

1. That defendant Roy Cooper should be dismissed as a party to this action; and
2. That judgment should be and hereby is entered in favor of defendants.

This the 27<sup>th</sup> day of May, 2008.



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The Honorable Robert H. Hobgood  
Superior Court Judge Presiding