

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,

v.

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

Defendants. )

FILED  
2006 FEB 24 PM 3:56  
WAKE COUNTY, C.S.C.  
BY \_\_\_\_\_

**DEFENDANTS' MEMORANDUM OF  
LAW IN SUPPORT OF THEIR  
MOTION TO DISMISS**

NOW COME defendants, by and through their undersigned counsel, and in support of their Motion to Dismiss, show the Court as follows:

**INTRODUCTION**

Plaintiffs have brought this action seeking a declaratory judgement that the North Carolina election statutes governing recognition of political parties are unconstitutional. Originally plaintiffs also brought this action to seek preliminary injunctive relief on ballot access and party registration but did not receive such relief.

In this phase of the lawsuit, plaintiffs contend that the entire regulatory framework for

political parties in North Carolina puts them at a disadvantage that is unconstitutional.

Specifically, Plaintiffs challenge the statutory requirements for petitioning to be recognized as a political party, the requirement that a party receive ten percent of the vote statewide to retain recognition, the requirement that party recognition be based on statewide results, the placement of minority party candidates on the ballot, 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 inability of unrecognized parties to use public buildings, the different placement on the presidential ballot of recognized candidates of minority parties, and the exclusion of unrecognized parties from public funding. Plaintiffs also contend that persons other than members of the two largest political parties are disqualified to serve on the State and county boards of election. (*See, e.g.*, Amended Complaint at Paragraph 1)

Plaintiffs ask this Court to declare all of North Carolina's political party statutes unconstitutional, and to enjoin the defendants from enforcing those statutes. They also ask this Court to substitute the Court's judgment for the General Assembly's by declaring the Libertarians a recognized political party in North Carolina although they have not met the requirements for achieving such recognition set by the General Assembly. The remedy they request should not be granted and their complaint should be dismissed for failure to state a claim upon which relief can be granted.

As will be set forth in more detail below, the United States Court of Appeals for the Fourth Circuit has already determined in a case brought by the Libertarian Party of North Carolina that

the North Carolina rules that govern a party's ability to place its candidates on the general election ballot are 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."

*McLaughlin v. North Carolina Board of Elections*, 65 F.3d 1215, 1221-1222 (4<sup>th</sup> Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996)(quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)). The Fourth Circuit assessed North Carolina's ballot access restrictions "as a complex whole," *id.* at 1223, and upheld some of the provisions plaintiffs now challenge under the State Constitution. It is undoubtedly because the *McLaughlin* Court and the United States Supreme Court have upheld election laws intended to insure the integrity, efficiency and manageability of the elections process, *see, e.g., American Party of Texas v White*, 415 U.S. 767 (1974); *Jenness v Fortson*, 403 U.S. 431 (1971), that plaintiffs have brought this action under novel State law theories.

#### **STATEMENT OF THE CASE AND THE FACTS**

Plaintiffs filed a verified complaint in Wake County Superior Court on September 21, 2005, seeking to have North Carolina election laws regulating political parties declared unconstitutional. Contemporaneously, they filed a Motion for a Temporary Restraining Order to enjoin the defendants from removing the names of Libertarian Party candidates from the Charlotte and Winston-Salem 2005 municipal elections and to enjoin the defendants from changing the party affiliation of voters registered with the Libertarian Party. In opposing the motion, the defendants filed the affidavit of Gary O. Bartlett, Executive Director of the North Carolina State Board of Elections, who provided information about his communications with the Libertarian Party of North Carolina following the 2004 general election. He stated that soon after

the 2004 election he had discussed decertification of the Libertarian Party with Libertarian Party Executive Director Sean Haugh, one of the plaintiffs in this case, because the Libertarians had failed to receive sufficient votes to keep their party certified under state law. Mr. Haugh asked him to delay decertification because the Libertarian Party was planning to support legislation in the 2005 N.C. General Assembly that would lower the percentage requirements for a political party to maintain recognition. The State Board waited as long as possible before contacting voters to let them know the party had not retained recognition. This was done in order to allow the party to seek legislative changes or to attain certification as a new party through the petition process; it was also done so as not to confuse voters should the Libertarian Party quickly regain recognition. However, the State Board met on August 22, 2005, to direct that voters registered as affiliated with the Libertarian Party be notified of their options since the Party had not retained status as a recognized political party.

The motion for a temporary restraining order was heard at the September 26, 2005, session of Wake County Superior Court, with the Honorable Ronald L. Stephens presiding. Judge Ronald Stephens denied the motion for a temporary restraining order.

On October 13, 2005, the plaintiffs filed an amended complaint and contemporaneously filed a motion for preliminary injunction requesting that defendants be enjoined from removing the names of Libertarian Party candidates from ballots for the general elections to be held November 8, 2005 and that they be enjoined from changing the party affiliation of voters registered with the Libertarian Party. On October 13, 2005, plaintiffs delivered a letter to the Honorable Donald W. Stephens, Senior Resident Superior Court Judge for Wake County, explaining why the matter needed to be taken up expeditiously. On October 18, 2005, the

defendants sent their own letter to Judge Donald Stephens, explaining that the names of Libertarian candidates were never on the general election ballots and that the plaintiffs were seeking to change the status quo rather than to preserve it. By letter of October 20, 2005, Judge Donald Stephens informed the plaintiffs that in view of the previous denial of a temporary restraining order in the case, no further need for expedited hearing hearings appeared appropriate or necessary. Judge Donald Stephens invited plaintiffs to set the motion for preliminary injunction at the first available date. On October 26, 2005, plaintiffs withdrew their hearing request.

On November 10, 2005, defendants filed a motion for enlargement of time to and including December 12, 2005 to answer the complaint, which motion was granted by order of the same day. On December 12, 2005, defendants filed a motion to dismiss the complaint pursuant to Rule 12 (b)(6) of the North Carolina Rules of Civil Procedure. By agreement of the parties, a hearing on the motion to dismiss has been requested for early April. The parties have agreed on a briefing schedule, with this memorandum of law the first of two briefs the defendants will file.

### ARGUMENT

#### **PLAINTIFFS HERE CAN ASSERT NO BASIS FOR DECLARATORY RELIEF BECAUSE THE COMPLAINT DOES NOT ALLEGE A COGNIZABLE CLAIM.**

It is black letter law in North Carolina that when the record shows that there is no basis for declaratory relief, or the complaint does not allege an actual, genuine existing controversy, a motion for dismissal under G.S. 1A-1, Rule 12(b)(6) will be granted. *Gaston Bd. of Realtors, Inc. v Harrison*, 311 N.C. 230, 316 S.E.2d 59 (1984). Plaintiffs cannot show an actual, existing controversy in this case. Both State and federal courts have examined constitutional allegations

similar to the Plaintiffs' and found those constitutional allegations insufficient to establish a claim for relief. Plaintiffs are not entitled to relief as a matter of law.

**I. Under State Law Plaintiffs Have not Asserted a Legal Basis that Can Support their Complaint; It should therefore be Dismissed.**

Plaintiffs contend that North Carolina's election statutes regulating political parties violate their State constitutional rights to run for office, to equal protection, to freedom of expression and association, to free elections, and to vote for all offices. Plaintiffs assert their claims under the State Constitution, presumably so that they can contend that analyzing North Carolina's political party ballot access statutes produces different results under a State constitutional analysis than under a federal constitutional analysis.

Using a similar approach, plaintiffs in *Royal v State*, 153 N.C. App. 495, 570 S.E.2d 738 (2002), *appeal dismissed for lack of a constitutional question*, 356 N.C. 677, 576 S.E.2d 111 (2003), alleged that the way elections were financed in North Carolina violated, among other things, their State constitutional rights to hold office, to equal protection, to freely associate, and to free elections. Although ultimately decided on standing grounds, the *Royal* court gave no indication that it was persuaded by the plaintiffs' State constitutional arguments or that it should reach a different result than had federal courts that had faced the issues in the campaign finance context. Moreover, under North Carolina law, candidacy is not a fundamental right. In *Martin v State*, 330 N.C. 412, 410 S.E.2d 474 (1991), our Supreme Court declined to find any fundamental right of candidacy in the North Carolina Constitution. Instead, the right to seek office "is a political privilege." *State ex rel. Martin v Preston*, 325 N.C. 438, 455, 385 S.E.2d 473, 482 (1989).

Nor can plaintiffs establish as a matter of law that North Carolina election statutes regulating political parties violate equal protection. Article I, section 19, the “law of the land” section of the North Carolina Constitution, cited by the plaintiffs as a primary basis for their constitutional claims, is equivalent to the federal Fourteenth Amendment “due process of law” provision. *State v Smith*, 90 N.C. App. 161, 368 S.E.2d 33 (1988), *aff’d* 323 N.C. 703, 374 S.E.2d 866, *cert. denied*, 490 U.S. 1100 (1989). Federal court interpretations of the Fourteenth Amendment, though not binding, are highly persuasive in construing North Carolina’s Constitution. *Id.*

Plaintiffs here also contend that North Carolina laws regulating the election of minority parties violate the sections of the North Carolina Constitution guaranteeing the right to freedom of expression and association, Article I, Sections 1, 12, 14 and 19, the right to free elections, Article I, Section 10, and the right to vote for all offices, Article VI, section 1. The provisions of the North Carolina Constitution relied upon by plaintiffs have not been interpreted by this State’s courts in the manner suggested by the plaintiffs. The allegations of the complaint, even when taken as true, are not sufficient to allege claims upon which relief may be granted to plaintiffs.

**II. Federal Courts have Examined the Very Constitutional Claims Plaintiffs Make Here and Have Found North Carolina’s Political Party Regulations Do Not Violate the Federal Constitution.**

Under federal law, states can have a compelling interest in enacting elections laws designed to insure the integrity, efficiency and manageability of the elections process. *See, e.g., American Party of Texas v White*, 415 U.S. 767 (1974); *Jeness v Fortson*, 403 U.S. 431 (1971).

In *McLaughlin*, the Libertarian Party, its national candidate for President and its candidate for North Carolina governor for the 1992 general election sued the State attacking, among other

things, the requirement that a party must poll 10% of the vote in the prior gubernatorial or presidential election to maintain party status under N. C. Gen. Stat. 163-97. The *McLaughlin* Court noted that North Carolina has a two-tier ballot access provision: (1) To be recognized as a political party, a group must present a petition signed by registered voters numbering at least 2% of the total number of votes cast in the most recent general election for Governor; and (2) To maintain status as a political party, a group must get 10% of the votes cast in the most recent gubernatorial or presidential elections. Citing a U.S. Supreme Court case that upheld such a two-tiered system in Georgia, *Jenness v Fortson* 403 U.S. 431, and decisions in the Fourth Circuit that up held two-tiered systems of party registration in Virginia, *Libertarian Party of Virginia v Davis*, 766 F.2d 865 (4<sup>th</sup> Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986), and West Virginia, *Social Workers Party v Hechler*, 696 F. Supp 190 (S.D. W.Va. 1988), *aff'd in part*, 890 F.2d 1303 (4<sup>th</sup> Circ. 1989), *cert. denied*, 495 U.S. 932 (1990), the *McLaughlin* Court nevertheless went on to analyze whether North Carolina's two-tiered system for political party ballot access as a whole imposed an unconstitutional burden on voting and associational rights. Citing *American Party of Texas v White*, 415 U.S. 767 (1974), the *McLaughlin* Court found that North Carolina's two-tiered approach to political party ballot access does not unconstitutionally burden the right to association. Looking at the system as a whole, the Court agreed "with the district court that the ballot access rules do not unconstitutionally burden rights guaranteed by the First and Fourteenth Amendments." *McLaughlin* at 1225. Plaintiffs have not distinguished their claims in this case from those analyzed in *McLaughlin*.

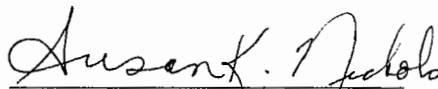
### CONCLUSION

Federal courts have upheld the two-tiered ballot access provisions required by North

Carolina's election statutes regulating political parties. Review under a State constitutional analysis should produce no better results. As a matter of law, North Carolina's election statutes governing political parties are constitutional and plaintiffs have not asserted a claim for which declaratory relief may be granted. For these reasons, the defendants respectfully request this Court to grant their Motion to Dismiss.

Respectfully submitted this 24<sup>th</sup> day of February 2006.

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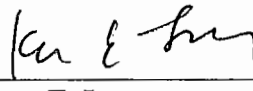
**CERTIFICATE OF SERVICE**

I hereby certify that I have this date served the foregoing DEFENDANTS'

MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS on counsel for  
Plaintiffs by facsimile transmission and also by placing a copy of same in the United States mail  
by hand delivery as follows:

Mr. Michael Crowell  
Ms. Deborah Stagner  
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This the 24th day of February, 2006.



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Karen E. Long  
Special Deputy Attorney General