

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;)
ELENE 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;)
and HART MATTHEWS and GERALD SURH,)
as members of the party and qualified voters,)

Intervenors,)

v.)

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.)

**BRIEF IN OPPOSITION TO MOTION
FOR SUMMARY JUDGMENT
OF PLAINTIFFS AND
INTERVENORS**

NATURE OF THE CASE

The Libertarian and Green Parties challenge North Carolina's requirements for a political party to gain and retain a place on the ballot set forth in N.C. GEN. STAT. § 163-96 as

unconstitutional under various provisions of the North Carolina Constitution. The statute defines a political party for purpose of North Carolina's election laws as either:

- (1) Any group of voters which, at the last preceding general State election, polled for its candidate for Governor, or for presidential electors, at least two percent (2%) of the entire vote cast in the State for Governor or for presidential electors; or
- (2) Any group of voters which shall have filed with the State Board of Elections petitions for the formulation of a new political party which are signed by registered and qualified voters in this State equal in number to two percent (2%) of the total number of voters in this State who voted in the most recent general election for Governor. [The statute further provides that the petition must be signed by 200 voters from each of four congressional districts, and sets the deadlines by which petitions must be submitted.]

N.C. GEN. STAT. § 163-96 (a)(1) & (2) (2007). This statute and others dealing with the formation of political parties and ballot access for unaffiliated and write-in candidates are set forth in the Appendix to this brief.

The Plaintiffs and Intervenors ask this Court to further declare unconstitutional and enjoin the enforcement of “the state statutes governing the recognition of political parties” although they do not specify which statutes in addition to N.C. GEN. STAT. § 163-96 that they consider to be encompassed in the requested relief. Finally, in addition to asking this Court to declare N.C. GEN. STAT. § 163-96 and other statutes to be unconstitutional, they also request that it grant official recognition to both the Libertarian and the Green Parties as political parties in North Carolina.

While it is appropriate that constitutional claims presenting only questions of law be decided by summary judgment, *Baugh v. Woodard*, 56 N.C. App. 180, 182, 287 S.E.2d 412, 413, *appeal dismissed and cert. denied*, 305 N.C. 759, 292 S.E.2d 574 (1982), Defendants oppose the motion for summary judgment of the Plaintiffs and Intervenors because they are not entitled to judgment as a matter of law. Summary judgment is appropriate in favor of the nonmovant under Civ. P. Rule 56

when there is no disputed issue of material fact, and the nonmovant is entitled to summary judgment as a matter of law. *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979). Applying this standard, Defendants are entitled to summary judgment on Plaintiffs' and Intervenors' claims.

FACTS

As noted by the Honorable Frank Bullock in *DeLaney v. Bartlett*, 370 F.Supp. 2d 373, 377-78 (M.D.N.C. 2004), "Election data demonstrates that minor party candidates obtain a place on the North Carolina general election ballot with some regularity." In fact, 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, Natural Law, Socialist; 1996 - Libertarian, Natural Law, Reform; 1998 - Libertarian; 2000 - Libertarian, Reform; 2002 - Libertarian; 2004 - Libertarian. See *Bartlett Aff.* ¶ 9 and website cited therein.

It is undisputed that the Libertarian Party has qualified for ballot access through the petition process every presidential election year since 1976, except in 1988. *Haugh Aff.* ¶ 6. The Green Party has never qualified for ballot access in North Carolina. *Bartlett Aff.* ¶ 9. In order to meet North Carolina's definition of a political party for the 2008 election, an organization must gather verified signatures of registered voters equal to 2% of the votes cast in the 2004 gubernatorial elections – 69,734. As of January 24, 2008, petitions supporting recognition of the Libertarian Party have been submitted with 50,811 verified signatures and separate petitions supporting recognition of the Green Party have been submitted with 1,204 verified signatures. *Bartlett Aff.* ¶ 10. The deadline for submitting petitions for 2008 is June 2nd. N.C. GEN. STAT. § 163-96(a)(2).

It is also undisputed that both the Libertarian and Green Parties in North Carolina have very small memberships. In response to discovery by the Defendants, the Libertarians reported that the

organization currently has 375 members. (Plaintiffs' Responses to Defendants' First Set of Interrogatories, item I-6(1)) The North Carolina Libertarian Party also reported that its greatest number of members was on August 29, 2005, when it had 13,006 members by virtue of having registered to vote as Libertarian, plus approximately 450 more members. (Plaintiffs' Responses to Defendants' First Set of Interrogatories, item I-6(2))

The Green Party can show even fewer members. In response to a discovery request by the Defendants, the Greens reported that they currently had 61 members who had paid dues to the state party for 2007, and added to that could be members belonging to local organizations, perhaps as many as 116 (Intervenors' Responses to Defendants' First Set of Interrogatories, item I-6(A)) The Green Party also reported that its highest membership was at the end of 2006 when it had 108 members. (Intervenors' Responses to Defendants' First Set of Interrogatories, item I-6(B))

The State's interest in regulating ballot access is in the orderly and fair administration of elections. The length of the ballot is a crucial factor in the successful administration of elections. In presidential election years, North Carolina has an exceptionally long ballot in both the primary and the general election, irrespective of the number of parties fielding candidates. Under Article III of the North Carolina Constitution, the ten members of the Council of State are elected. Only three other states have ten or more elected executive offices. Bartlett Aff., Ex. 1. In addition, the offices of President, United States Senate, and justices and judges of the appellate courts appear on the ballot statewide as do any constitutional amendments or statewide bond referenda. Every ballot will also have legislative, congressional, trial court and county offices. Each political party adds to the number of candidates on these exceptionally long ballots. In the opinion of Gary Bartlett, Executive Director of the State Board of Elections, the lengthy ballot in 1996 contributed to long lines at the

polling places and voter dissatisfaction. Bartlett Aff. ¶ 6. Johnnie McLean, Deputy Director for Administration of the State Board, explains the difficulties presented by long ballots – taxing the optical scan voting equipment used in almost 80 North Carolina counties, printing on both sides of the ballot which may confuse voters, and increasing the opportunities for errors at the precinct, county, and State levels. McLean Aff. ¶¶ 5-9.

ARGUMENT

A. Statutes adopted by the General Assembly are presumed constitutional.

The North Carolina Supreme Court has often said that “[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) (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)). This is so because the acts of the legislature are effectively the acts of the people.

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). *See also Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (The legislative power rests “with the people and is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people’s elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution*” (emphasis in original, citations omitted)). Moreover, “[i]f 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.” *Baker v. Martin*, 330 NC at 338, 410 S.E.2d at 891.

B. The challenged components of North Carolina's ballot access statutes have been upheld by federal courts considering challenges brought under the United States Constitution.

The Fourth Circuit Court of Appeals in 1995 decided a challenge brought by the North Carolina Libertarian Party and others to North Carolina's ballot access statutes. *McLaughlin v. North Carolina Board of Elections*, 65 F.3d 1215 (4th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996). It upheld the two aspects of N.C. GEN. STAT. § 163-96 now challenged by the Plaintiffs and Intervenors in this case. The *McLaughlin* court made several key points:

- “[E]lection laws are usually, but not always, subject to ad hoc balancing. When facing any constitutional challenge to a state's election laws, a court must first determine whether protected rights are severely burdened. If so, strict scrutiny applies. If not, the court must balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests in ensuring that ‘order, rather than chaos, is to accompany the democratic processes.’ *Storer v. Brown*, 415 U.S. 724, 730, 39 L.Ed. 2d 714, 94 S.Ct. 1274 (1974). ‘The results of this evaluation will not be automatic; . . . there is ‘no substitute for the hard judgments that must be made.’” *Anderson [v. Celebreeze]*, 460 U.S. 780,] 789-90 (quoting *Storer*, 415 U.S. at 730).

65 F.3d at 1221.

- “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.”

65 F.3d at 1222 (emphasis added).

- 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.”

65 F.3d at 1221-1222 (quoting *Jenness v. Fortson*, 403 U.S. 431, 442, 29 L.Ed. 2d 554, 91 S.Ct. 1970 (1971)(emphasis added)).

- In *Jenness*, the United States Supreme Court upheld Georgia’s “election laws that distinguished between ‘political parties’ and ‘political bodies’ in ways similar to the different treatment that North Carolina accords established and ‘new’ political parties. In particular, Georgia termed any political organization whose candidate received at least 20% of the vote in the most recent presidential or gubernatorial election a ‘political party’ and provided that it must nominate candidates to be placed on the general election ballot by primary election. Any other political organization was termed a ‘political body.’ A nominee of a political body could get his name printed on the general election ballot only by filing a nominating petition signed by at least 5% of the total number of electors eligible to vote in the last election for the office which he sought.”

65 F.3d at 1222 (citing *Jenness*, 403 U.S. at 433). The *McLaughlin* court noted that similar two-tiered schemes had been uniformly upheld. Nevertheless, the court understood that it should assess North Carolina’s ballot access restrictions as a “complex whole.” 65 F.3d at 1223. After making such an assessment, the court concluded that “the provisions at issue pass constitutional muster.” 65 F.3d at 1225.

The United States Supreme Court just this month favorably cited the *Jenness* opinion in upholding New York’s requirements for candidate access to primary ballots. *New York State Board of Elections v. Lopez Torres*, No. 06-766, slip op. at 7, 10 (U.S. Jan. 16, 2008)). 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).

C. Plaintiffs’ and Intervenors’ claims under the North Carolina Constitution are novel and have never been accepted by our State’s courts.

The Libertarian Plaintiffs and the Green Intervenors allege five claims for relief grounded in the North Carolina Constitution. These are novel claims, never accepted by North Carolina’s courts with respect to the specific statutes they challenge.

1. Plaintiffs' rights to freedom of expression and association are not violated by the challenged statutes.

In their first claim for relief, Plaintiffs and Intervenors assert that their rights to freedom of expression and freedom of association, as guaranteed by Article I, §§ 1, 12, 14 and 19, of the North Carolina Constitution are violated by the statutory scheme of political party recognition. Article I, § 1, entitled "The equality and rights of persons," provides:

We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

This section was added in the 1868 North Carolina Constitution and plainly echoes in substantial part the words of the Declaration of Independence. JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION: WITH HISTORY AND COMMENTARY* 38-39 (1993) (hereinafter ORTH, N.C. STATE CONSTITUTION). The "life, liberty and pursuit of happiness" language has not been the subject of much litigation, *id.*, and the list of enumerated rights is exemplary, not exhaustive. *Id.* at 39. Thus the substantive rights that plaintiffs allege are unduly burdened by ballot access laws are contained in other sections of the State Constitution and this section has little if any bearing on their claims.

Article I, § 12, entitled "Right of assembly and petition," provides:

The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.

Article I, § 14, entitled "Freedom of speech and press," provides:

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.

North Carolina's Freedom of Speech Clause is only 35 years old, having been adopted as part of North Carolina's third Constitution – the 1971 Constitution. “It is curious, but true, that North Carolina's first two constitutions contained no specific provision protecting freedom of speech; the present safeguard was inserted only in 1971.” ORTH, N.C. STATE CONSTITUTION, 51. Thus, it is clear that North Carolina's Freedom of Speech Clause is modeled after the First Amendment to the United States Constitution.

“Although decisions of the Supreme Court of the United States construing federal constitutional provisions are not binding on our courts in interpreting cognate provisions in the North Carolina Constitution, they are, nonetheless, *highly persuasive*.” *Stam v. State*, 47 N.C. App. at 213-14, 267 S.E.2d at 339-40 (emphasis added). Plaintiffs cannot establish that § 12, guaranteeing the right to assembly, and § 14, modeled after the First Amendment's guarantee of free speech, prevent North Carolina from enacting and enforcing reasonable ballot access laws for minority parties. As the highly persuasive federal analyses in *McLaughlin*, *Jenness* and *Anderson* make clear, two-tiered ballot access laws, even those more restrictive than North Carolina's, do not impermissibly burden the rights to free speech and assembly given the State's compelling interest in promoting governmental stability, integrity of elections and prevention of voter confusion.

Moreover, the Libertarian Party is, as a plaintiff in *McLaughlin*, collaterally estopped from suggesting that *McLaughlin* was incorrectly decided. “Under collateral estoppel as traditionally applied, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies.” *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986).

2. Plaintiffs' and Intervenors' rights to free elections is not violated by the challenged statutes.

Plaintiffs and Intervenors also allege that the challenged statutory scheme violates Article I, § 10, of the North Carolina Constitution. That provision, entitled “Free elections,” provides simply, “All elections shall be free.” Plaintiffs and Intervenors allege that this section “establishes a constitutional right of citizens to organize political parties, campaign freely and have their candidates listed on the ballot without unreasonable and unnecessary restriction.” (Lib. Am. Compl, ¶ 65; Green Compl., ¶ 30) They cite two cases that refer to this section of the Constitution. In the federal case of *Obie v. North Carolina State Bd. of Elections*, 762 F. Supp. 119 (E.D.N.C. 1991), the United States District Court for the Eastern District of North Carolina held that North Carolina’s requirement that unaffiliated candidates for county office in North Carolina had to collect signatures of qualified voters of the county equal in number to 10% of the total number of registered voters in the county was an unconstitutional ballot access restriction for unaffiliated candidates in violation of the First and Fourteenth Amendments to the Constitution of the United States, and Article I, §§ 10 and 19, of the Constitution of North Carolina. The court stated that the challenged state law in that case was similar to the one at issue in *Greaves v. State Bd. of Elections*, 508 F. Supp. 78 (E.D.N.C. 1980).

Both *Obie* and *Greaves* involved petition requirements for unaffiliated candidates that were far in excess of the petition requirements for third party candidates (10% for unaffiliated candidates versus 2% for third party petitioners). In *Obie* and *Greaves* it was not the ballot access requirement *per se* that violated § 10. Indeed, *Greaves* contains no reference to or discussion of § 10 or the right to free elections, while *Obie*, which expressly adopts the reasoning of *Greaves*, simply refers to §

10 without any analysis of that provision or how it was violated. Rather it was the unequal protection for unaffiliated candidates compared to third party candidates that caused the challenged statutes to run afoul of constitutional protections. A similar result was reached by the United States District Court for the Middle District of North Carolina. *See DeLaney v. Bartlett*, 370 F. Supp. 2d at 377-78 (more restrictive requirements for unaffiliated candidates than for new parties could not be justified).

In *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964), our Supreme Court struck a party registration loyalty oath required by the State Board. The loyalty oath required a voter switching from one party registration to another to swear or affirm that he or she would support the nominees of the party for which she or he was registering. The Court, citing § 10, held that such a regulation was void because it “violate[d] the principle of freedom of conscience. It denies a free ballot – one that is cast according to the dictates of the voter’s judgment.” *Id.* at 143, 134 S.E.2d at 170.

In his treatise on the history of the North Carolina Constitution, Professor Orth provides this background for understanding Article I, § 10:

According to the laconic Section 10, shortest in the Constitution, elections shall be “free.” The word originally derives, by way of a section of the Virginia Declaration of Rights, from the English Declaration of Rights (1689): “election of members of parliament ought to be free.” In 1776 North Carolinians adapted the idea to their new institutions: “Elections of Members to serve as Representatives in the General Assembly ought to be free.” In 1868, as elective officers proliferated, the section attained substantially its modern form: “All elections ought to be free.” The meaning is plain: free from interference or intimidation. Sadly it must be said that North Carolina’s black voters have not always found them so.

ORTH, N.C. STATE CONSTITUTION, 47. Article I, § 10, guarantees a right to vote without restraint of conscience or intimidation. It does not grant minority parties ballot access free of legitimate regulation by the State, just as the voters themselves are subject to legitimate registration

requirements and qualifications.

3. Plaintiffs' and Intervenors' rights to equal protection are not violated by the challenged statutes.

In their next claim for relief, Plaintiffs and Intervenors allege that the challenged statutory scheme deprives them of equal protection of the laws as guaranteed by Article I, § 19. That section, entitled “Law of the land; equal protection of the laws,” provides:

No persons shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlaws, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national original.¹

Plaintiffs and Intervenors cite § 19 of the State Constitution in contending that North Carolina’s ballot access laws deny them equal protection of the laws.

All political parties, however, must comply with the laws of ballot access and political party recognition. Like the law in *American Party of Texas v. White*, 415 U.S. 767, 94 S. Ct. 1296, 39 L. Ed. 2d 744 (1979), North Carolina’s ballot access and political party recognition scheme “afford[] minority political parties a real and essentially equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more.” *Amer. Party*, 415 U.S. at 787-88. The Equal Protection Clause of § 19, derived from the Equal Protection Clause of the Fourteenth Amendment, requires no more.

¹ The Equal Protection Clause of the North Carolina Constitution, like the Freedom of Speech Clause, is only 35 years old. While our Supreme Court has stated that the concept of equal protection, “made explicit in the Fourteenth Amendment to the Constitution of United States,” was inherent in our Constitution prior to being expressly added, *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971), the Equal Protection Clause of Article I, § 19, was not expressly incorporated into the Constitution until the revision of 1971. Thus, it is not a basis for arguing that the rights secured by the North Carolina Constitution are more expansive than those provided by the United States Constitution.

Plaintiffs and Intervenors also assert that when taken as a whole, North Carolina's regulation of minor parties impedes the ability of parties other than the Democratic and Republican parties to enjoy the benefits of State recognition as organized political parties. Apart from ballot access provisions, they challenge the disqualification of persons other than members of a recognized party to be on the State Board of Elections and county boards of election, the requirement that party recognition be based on statewide results, 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 uncertified parties to use public buildings, the different placement on the presidential ballot of the recognized candidates of minority parties and the exclusion of unrecognized parties from public funding. (Lib. Am. Compl, ¶ 1; Green Compl., ¶ 1)

In making these allegations, they constantly refer to the current two major political parties in the State, Republican and Democratic, as if they were specifically recognized by statute rather than being subject to the same recognition requirements as every other party. To the contrary, most of the statutory provisions that plaintiffs challenge refer to "recognized political parties," not to the Democratic Party or the Republican Party. All of the things about which Plaintiffs and Intervenors complain flow from a group's status as a political party. For example, once a party is recognized, members of the two political parties having the highest number of registered voters may serve on the State Board of Elections, N.C. GEN. STAT. § 163-19, while any voter may be named to a County Board of Elections, N.C. GEN. STAT. § 163-30. Any recognized political party may use public buildings. N.C. GEN. STAT. § 163-99. Persons registered for an unrecognized political party are automatically reassigned to the unaffiliated registration, N.C. GEN. STAT. § 163-97.1, but are notified

and may change their registration. *Id.* Unaffiliated voters can participate in whichever primary a recognized political party allows. N.C. GEN. STAT. § 163-119. Currently, both major parties allow unaffiliated voters to vote in their primaries.

All the matters about which Plaintiffs and Intervenors complain flow from recognition, or lack thereof, as a political party. As has already been shown, North Carolina's ballot access and political party recognition statutes do not violate plaintiffs' equal protection rights. This being so, Plaintiffs' and Intervenors' equal protection rights are not violated by anything that results from the lack of political party recognition.

4. Plaintiffs' and Intervenors' right to vote and to run for office are not violated by the challenged statutes.

Plaintiffs' and Intervenors' fourth and fifth claims for relief allege that the challenged statutes violate their right to vote in all elections and to run for office as guaranteed by Article VI, §§ 1 and 6, of the North Carolina Constitution. Article VI, § 1, entitled "Who may vote," provides:

Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided.

Article VI, § 1, simply states which persons are eligible and entitled to vote in North Carolina. Likewise, Article VI, § 6, simply provides that no one but a qualified voter shall be eligible for election.² ORTH, N.C. STATE CONSTITUTION, 136.

These straightforward provisions are not requirements that individuals be allowed to vote for any party or any candidate they wish, whether or not that candidate or party meets North Carolina's

² Article VI, § 6, entitled "Eligibility to elective office," provides: "Every qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office."

valid qualifications for ballot access. Otherwise, North Carolina would be constitutionally unable to deny recognition to *any* political party or to deny ballot access to *anyone* who desired to run for office. The State must be allowed, in order to require a showing of a “significant modicum of support” by a potential political party or candidate, *see DeLaney*, 370 F. Supp. 2d at 380, to establish *some* ballot access and political party recognition requirements.

Moreover, these fourth and fifth claims are predicated upon the underlying and false premise that it is the General Assembly that has kept the Libertarian and Green parties from being recognized as political parties. The General Assembly has merely stated objective requirements - requirements that the Libertarians and others have met in the past. It is failure to demonstrate sufficient support in the electorate to maintain ballot access (in the case of the Libertarian Party) or to even gain ballot access (in the case of the Green Party) that keeps them from recognition. The fault is not in the challenged statutes.

D. This Court would have to substitute its judgment for that of the General Assembly’s in order to award the relief requested by the Plaintiffs and Intervenors.

Plaintiffs and Intervenors request this Court not only to enjoin enforcement of North Carolina’s ballot access statutes, but to recognize both the Libertarian Party and the Green Party as political parties in North Carolina. Not only would this leave the State without any ability to protect its compelling state interest in maintaining the integrity of the election process by requiring the demonstration of a modicum of support before a political party is granted ballot access, it would also substitute this Court’s judgment for that of the General Assembly.

Article I, § 6, of the North Carolina Constitution provides: “The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each

other.” Inherent in this is the understanding that it is the General Assembly, as the elected representatives of the people, that determines public policy, while the role of the Court is limited to determining whether legislative actions violate the Constitution. A court is not entitled to “substitute its judgment for that of the legislature” in matters related to public policy. *In re Appeal of Broad & Gales Creek Community Ass’n*, 300 N.C. 267, 277, 266 S.E.2d 645, 653 (1980); *Duggins v. North Carolina State Bd. of Certified Public Accountant Exam’rs*, 294 N.C. 120, 134, 240 S.E.2d 406, 413 (1978). Recognition of the Libertarian and Green Parties in a vacuum, without application of an objective standard, would require this Court to venture into the realm of legislative policy making.

The Libertarian Party currently has obtained 50,811 verified signatures of registered voters on petitions in support of their receiving ballot access. *Bartlett Aff.*, ¶ 10. The Green Party currently has submitted 1,411 signatures of which 1,204 have been verified. *Id.* These are very different showings of support and are consistent with the Libertarian Party’s repeated qualification for the ballot in North Carolina while the Green Party has never achieved ballot access. To grant both parties ballot access on these facts would open the door to party recognition for any entity, regardless whether that entity could make a showing of any modicum, much less a significant modicum, of support. But granting the Libertarian Party ballot access and not the Green Party would require this Court to impose a standard other than the one adopted by the General Assembly. This Court cannot provide the relief Plaintiffs and Intervenors seek without violating constitutional principles of separation of powers by substituting its judgment for that of the people as reflected in the enactments of the General Assembly.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that Plaintiffs' and Intervenor's Motion for Summary Judgment be denied, and that summary judgment be rendered against them and in favor of Defendants pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure.

Respectfully submitted this 25th day of January, 2008.

ROY COOPER
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF PLAINTIFFS AND INTERVENORS** with **APPENDIX** in the above-titled action upon all other parties to this cause by:

- [] Hand delivering a copy hereof to each said party or to the attorney thereof;
- [X] Transmitting a copy hereof to each said party via facsimile email; or
- [X] Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

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Counsel for Green Party Intervenors

This the 25th day of January 2008.

_____/s/_____
Susan K. Nichols
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