No. COA23-298 JUDICIAL DISTRICT 15B

NORTH CAROLINA COURT OF APPEALS

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Connor P. Fraley, Plaintiff-Appellant	)	
v.	)	From Orange County
Orange County Board of Elections, Defendant-Appellee	)	No. 23-CVS-63

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PLAINTIFF-APPELLANT'S BRIEF

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ISSUE PRESENTED

I. What is the proper interpretation of N.C. Gen. Stat. § 163-122(a)(3), which lays out requirements for nomination by petition for unaffiliated candidates for county offices, as applied to elections for Orange County Commissioner, District 2, which follow the model set out in N.C. Gen. Stat. § 153A-58(3)(c) and is codified in Orange County Code of Ordinances § 13-3(b)(2)?

STATEMENT OF THE CASE

Defendant implements its elections under the interpretation that the required signature threshold for a candidate seeking ballot access for Orange County Commissioner, District 2, is 4% of the *entire county*. R. 7-8. Plaintiff sued for Declaratory Judgment to establish that the proper signature threshold is 4% of the *nominating district*. R. 5-6. Both parties moved for summary judgment. R. 10, 12.

Hon. Allan Baddour, Jr., superior court judge, denied Plaintiff's motion for summary judgment and granted Defendant's motion for summary judgment, ruling that the statutes are properly interpretated as requiring signature from 4% of the entire county. R. 14. Plaintiff promptly filed a written notice of appeal to this Court on March 23, 2023. R. 16. The record was filed and docketed on April 4, 2023.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Plaintiff appeals the final order granting Defendant's motion for summary judgment and denying Plaintiff's motion for summary judgment. The trial court granted summary judgment under Rule 56 because only a question of law arose based

on the undisputed facts. *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 186, 835 S.E.2d 411, 415 (2019). Here, that was a question of statutory interpretation of first impression. Plaintiff maintains that the trial court's resolution of the question of law presented is incorrect.

BACKGROUND

North Carolina's counties are subject to certain requirements imposed by the General Assembly. *See generally* N.C. Gen. Stat. § 153A. A number of those requirements relate to the manner of governance in the counties, including the composition of and rules for electing the County Boards of Commissioners. *See* § 153A, Article 4. The General Assembly has authorized a limited number of electoral schemes that the Counties may choose to adopt for their Boards' elections. § 153A-58(3). Orange County is in a small minority of counties in its adoption of the hybrid nomination-election option laid out in § 153A-58(3)(c).

Orange County Code of Ordinances § 13-3(b)(2), which adopted the § 153A-58(3)(c) option, provides in relevant part:

> [T]he qualified voters of each district shall nominate candidates who reside in the district for seats apportioned to that district, and the qualified voters of the entire county shall nominate candidates for seats apportioned to the county at large; and the qualified voters of the entire county shall elect all the members of the board.

(emphasis added)

While all seven seats are voted on by the whole county in the general election, five of the seven seats are nominated from and by only the voters of the two districts.

This arrangement is the only of the approved options in which the pools of voters that nominate and the pools of voters that elect are not always identical.[1] [2]

The most popular method for nominating candidates is through party primaries, but the General Assembly has adopted a method for nominating non-partisan candidates as well—collecting signatures of registered voters in the relevant district. N.C. Gen. Stat. Art. 11, §§ 163-122 et. seq., "Nomination by Petition."

Defining the requirement for county-level nominations, N.C. Gen. Stat. § 163-122(a)(3) reads, in relevant part:

> If the office is a county office… [the petition] must be signed by qualified voters of the county equal in number to four percent (4%) of the total number of registered voters in the county… except if the office is for a district consisting of less than the entire county and only the voters in that district vote for that office, the petitions must be signed by qualified voters of the district equal in number to four percent (4%) of the total number of voters in the district according to the voter registration records of the State Board of Elections as of January 1 of the year in which the general election is to be held.

(emphasis added)

The trial court adopted the interpretation advanced by the Orange County Board of Elections regarding § 163-122(a)(3) and Code § 13-3(b)(2) that in order for a qualified citizen to be nominated for Orange County Board of Commissioners, District

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[1] For example, Wake County has seven districts in which nominees must live, but the whole county votes in primaries and the general election for all seven districts, following § 153A-58(3)(d). Forsyth County has seven seats, one of which is nominated and voted on by the county at large, and the other six are divided between districts that vote exclusively in the primary and general election, following § 153A-58(3)(b). Neither arrangement has different pools of voters nominating and electing for any individual seat.

[2] Wake County's Board organization is currently in flux due to legislative concerns regarding the propriety of that particular method. The comparison is equally instructive even if it is historical.

2 as an unaffiliated candidate, that citizen must timely submit a petition signed by 4% of the registered voters of the *entire county*. R. 7-8. Plaintiff timely appealed, R. 16, disputing this interpretation and arguing that in order to be nominated for a district seat, the proper number of signatures required is 4% of the registered voters of the *nominating district*, who are the only voters eligible to vote for that office when making nominations via the primary election. R. 5-6.

ARGUMENT

I. THE TRIAL COURT ERRED IN ITS INTERPRETATION OF N.C. GEN. STAT. § 163-122(a)(3) AS IT APPLIES TO ELECTIONS FOR ORANGE COUNTY COMMISSIONER, DISTRICT 2.

The Court reviews questions of statutory construction and orders granting summary judgment *de novo*. *Reynolds-Douglass v. Terhark*, 381 N.C. 477, 487, 873 S.E.2d 552, 560 (2022); *Quad Graphics, Inc. v. N.C. Dept. of Revenue*, 383 N.C. 356, 361, 881 S.E.2d 810, 815 (2022). Under *de novo* review, the Court considers the questions of law anew and freely substitutes its judgment for that of the trial court. *Id.*

The Court should reverse and grant declaratory judgment to the Plaintiff because the trial court's adopted statutory interpretation is not statutorily authorized and, regardless of whether the statutory provisions are ambiguous or not, the canons of statutory interpretation require a different conclusion than the trial court reached.

A. THE TRIAL COURT ERRED BECAUSE ITS ADOPTED STATUTORY INTERPRETATION, ON ITS OWN TERMS, CONTRADICTS STATUTORY REQUIREMENTS.

Orange County requires that candidates for County Commissioner District seats reside in and be nominated by the qualified voters of the district. Orange County Code of Ordinances § 13-3(b)(2); N.C. Gen. Stat. § 153A-58(3)(c).

Here, the trial court nevertheless held that a nonpartisan candidate seeking nomination by petition for a district seat may be placed on the ballot if they collect signatures from 4% of the voters of the entire county. This result directly contradicts the relevant statutes—District 1 voters could have their signatures counted on petitions for District 2 nominations, and even select a District 2 nominee entirely on their own. Though the county continues to separate the districts for nominations by primary, the trial court's interpretation leaves open a backdoor for out-of-district nominations by petition, meaning that not all candidates for District 2 must be nominated by the district voters. Not only does this uneven arrangement directly violate the election scheme adopted by Orange County, it doesn't match *any* of the approved options in § 153A-58(3).

Principles of statutory interpretation demand a different result. When multiple statutes address the same subject matter, they must be construed together. *DTH Media Corp. v. Folt*, 374 N.C. 292, 300, 841 S.E.2d 251, 257 (2020). Unless it is impossible, statutes must be harmonized to give effect to each provision. *Id.* Because both § 163-122(a)(3) and Code § 13-3(b)(2) address the manner in which

Commissioners are nominated and elected, the provisions address the same subject matter and must be construed together.

The provisions are not irreconcilable. If, as the trial court held, § 163-122(a)(3) refers to voting in the general election, then the statute contradicts Code § 13-3(b)(2), which requires that "the qualified voters of each district shall *nominate* candidates who reside in the district for seats apportioned to that district." However, if the statute refers to primary elections, it harmonizes with § 13-3(b)(2), since only the signatures of qualified voters of the district would be allowed to nominate district candidates by petition. This would ensure that nominations by primary and by petition are made by the same group of voters, as § 13-3(b)(2) requires. It thus follows that the nomination by petition statute must be interpreted as referring to the primary election and the trial court's finding to the contrary was in error.

B. THE TRIAL COURT ERRED BECAUSE ITS ADOPTED STATUTORY INTERPRETATION LEADS TO ALMOST CERTAINLY UNCONSTITUTIONAL RESULTS.

"Where a statute is susceptible of two interpretations, one of which will render it constitutional and the other will render it unconstitutional, the former will be adopted." *Hobbs v. Moore Cnty.*, 267 N.C. 665, 671, 149 S.E.2d 1, 5 (1966).

N.C. Gen. Stat. § 163-122(a)(3) is susceptible of two interpretations, one of which will render it constitutional and the other will render in unconstitutional. The key phrase is "and only the voters of that district vote for that office." § 163-122(a)(3). The statute does not specify to which election it refers. Because it could refer to voting

in the primary election or the general election, the phrase is readily susceptible to multiple meanings. While this ambiguity doesn't make a difference in some county electoral models,[3] it is relevant as applied to Orange County's model. Only the voters of the district vote for the Orange County Commission district offices when nominating by primary, but they do not do so alone in the general election. To avoid an unconstitutional result, this ambiguity must be interpreted to refer to the *primary election*.

If the statute refers to the general election, such an interpretation almost certainly renders the statute unconstitutional due to: (1) violations of the fundamental rights to associate for the advancement of political beliefs and to cast votes effectively, and (2) equal protection issues.

Citizens have fundamental rights to associate for the advancement of political beliefs and to cast votes effectively. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Regulations restricting ballot access and confining nonpartisan candidates to write-ins burden those candidates with a disability, and are "no substitute for a place on the ballot." *Id.* at 37 (Douglas, J., concurring). On the other hand, states have an important interest in decluttering ballots and requiring a showing of a "significant modicum of support" before granting access to the ballot. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Even pursuing this interest, the state may not use a means that

[3] The statute is easily applied to a Wake (§ 153A-58(3)(d)) or Forsyth County (§ 153A-58(3)(b)) model. The same groups of voters vote in both primary and general elections, so it doesn't matter to which election the statute refers. Nomination in one of Forsyth County's districts clearly requires only 4% of the district (other than the at-large seat), and nomination in one of Wake County's districts clearly requires a full 4% of the county. *See supra*, n.1.

"unnecessarily restrict[s] constitutionally protected libert[ies]" and as such must adopt regulations which are the "least restrictive means" of advancing the state interest in question. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 174 (1979). When weighing these interests, the U.S. Supreme Court has never upheld a signature requirement of greater than 5% of the relevant electorate. *Greaves v. State Bd. of Elections of N.C.*, 508 F.Supp 78, 81 (E.D.N.C. 1980). The Supreme Court suggested that 5% may be the upper limit in remanding a case for further factfinding when the record suggested that the de facto requirement may have exceeded a facial 5% requirement by a nontrivial amount. *See Storer v. Brown*, 415 U.S. 724, 740 (1974). Notably, Justice Brennan did not think such further factfinding was necessary, finding that the actual requirement appeared to be 9.5% on the record and that "a percentage even approaching the range of 9.5% serves no compelling state interest which cannot be served by less drastic means," *Id.* at 764 (Brennan, J., dissenting).

Here, § 163-122(a)(3) used to require 10% of the nominating district for an eligible citizen to make it onto the ballot. The court ruled in *Obie v. North Carolina State Board of Elections* that the 10% requirement was an unconstitutional ballot access restriction, and thus violated the right to associate for the advancement of political beliefs and to cast votes effectively. 762 F.Supp 119, 121 (E.D.N.C. 1991) (rehearing denied).

The current 4% threshold and nominating district language was adopted in response to this litigation with the intent to advance the constitutional interests that

had previously been violated. *See* 1991 N.C. Sess. Laws c.297. The trial court nevertheless held that the statutes require a District 2 candidate for Orange County Commissioner to collect signatures of about 9.7% of the nominating district. If the Court interprets the statutes to call for this result, the resulting scheme almost certainly would not pass constitutional muster.

The trial court's ruling also presents an equal protection issue. Regulations that impose burdens which "fall unequally on… independent candidates impinge[ ], by [their] very nature, on associational choices protected by the First Amendment." *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983). First Amendment principles are supported when "election campaigns are not monopolized by the existing political parties." *Id.* Ballot access cases are analyzed in the degree to which the restrictions "operate as a mechanism to exclude certain classes of candidates from the electoral process." *Id.* at 793. The magnitude of the restrictions determine the level of scrutiny the court will apply to the unequal treatment. *See Storer*, 415 U.S. at 729. "Substantial burdens… are constitutionally suspect," *Id.*, while reasonable, nondiscriminatory restrictions generally will pass muster, *Burdick v. Takuashi*, 504 U.S. 428, 434 (1992). Burdens can often be measured by their fruits. "It will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." *Anderson*, 460 U.S. at 742.

Here, the burdens are "substantial" and the disparate treatment between partisan and non-partisan candidates would unlikely pass constitutional muster. Most starkly, the trial court interprets the statute in a manner that would continue

to allow nomination by district in party primaries, but not by petition. This in itself gives partisan candidates a significant and unjustified advantage in a way that does not advance any state interest, but rather serves to exclude certain classes of candidates and entrench the current party status quo. To the extent the County has an interest in decluttering the ballot, its pursuit of this interest has been devastatingly successful. Since 2006 when Orange County adopted the new electoral scheme, not a single nonpartisan candidate has successfully made it onto the ballot for a County Commissioner race. In fact, the seats have rarely even been contested, leaving voters with the "choice" of a single candidate—"monopolized," indeed.

Even without these results, in the context of local elections that are significantly grassroots, low-dollar, and inherently closer to the people, the significant bar that independent candidates have to clear compared to simply filing for the primary for partisan candidates is itself already a steep hill to climb, even without the trial court's interpretation making the hill even steeper.

If, however, the statute refers to the primary election, such an interpretation avoids the constitutional issues laid out above. Partisan and non-partisan candidates would be treated equally in the nomination stage by having identical groups of voters nominating both and the ballot access provision itself would fall generally within the case law on least-restrictive-means testing for restricting ballot access.

Claims that applying the nomination by petition statute to the nominating districts creates constitutional issues by violating the "one man, one vote" principle fall flat. To the extent that district nomination gives more weight to the district

members in nominations to the exclusion of out-of-district voters until the general election, such a differential is both (1) equalized because members of the other district also get that disproportionate nominating power in a number of seats approximately equal to their proportion of the county, and (2) *explicitly required* by the statute and *already in practice* for partisan candidates in the primaries. The contention that seeking district nomination to a county-wide seat only from the voters of the nominating district is somehow trying to bypass a part of the electorate that has a stake in who is nominated is belied by the fact that this arrangement is exactly what the electorate voted for when it adopted Code § 13-3(b)(2) by referendum. Such a concern is no bar to the Court adopting the primary-election interpretation.

The myriad constitutional issues raised by the trial court's statutory interpretation strongly suggest it erred in so holding.

C. THE TRIAL COURT ERRED BECAUSE EVEN IF THE STATUTES ARE UNAMBIGUOUS, THE CANONS OF STATUTORY INTERPRETATION STILL REQUIRE A DIFFERENT CONCLUSION THAN THE TRIAL COURT REACHED.

Although the statutes are ambiguous on this point, even if the Court finds that they are not, such a finding does not compel the Court to affirm. "[W]here a literal interpretation of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control." *State v. McLymore,* 380 N.C. 185, 195, 868 S.E.2d 67, 75 (2022). A literal interpretation of the statutes in question leads to statutorily unauthorized and

unconstitutional results, *see supra*, and contravenes the manifest purpose of the legislature.

The *Obie* decision came down on April 16, 1991. After the 10% requirement was invalidated, the legislature quickly moved to change the law, reducing the threshold to 4% of the county and *adding* the provision which provided for nomination by 4% of voters in in-county districts. *See* N.C. Sess. Laws 1991, c.297. The Bill made its final passage on June 17, 1991. *Id.* To the extent that it can be difficult to divine the intent of the legislature in adopting the change, the name of the Bill may give us a subtle hint:

> **"AN ACT TO CONFORM THE PETITION REQUIREMENTS FOR UNAFFILIATED CANDIDATES TO A RECENT COURT RULING."**

Id.

The manifest purpose of the legislature was to change the non-partisan nominating system into one that does not violate the U.S. and N.C. Constitutions. In spite of this stated intent, the trial court held, in effect, that the General Assembly managed to accomplish the exact opposite of their manifest purpose.

While some may argue this is giving them too much credit, if we take the General Assembly at its word, it strains credulity to think that it so utterly failed at achieving its stated goal or otherwise had the intent to leave in place unconstitutional nomination procedures under the guise of remediating those very procedures. Even if it finds the hastily-adopted plain language in the statute is not ambiguous, the Court is not compelled to literally interpret those words in a manner that is a full one-eighty from the manifest legislative purpose for the statute.

* * * * *

"Only the voters in that district vote for that office" *in the primary election* is the only interpretation that is consistent with the General Assembly's manifest remedial purpose, is statutorily authorized, harmonizes the provisions, and is free from statutorily unauthorized and unconstitutional results. Even if the Court finds the language is not ambiguous, the canons of statutory construction still demand this interpretation.

CONCLUSION

Because of the foregoing, the Court should reverse the court below and enter declaratory judgment for the Plaintiff, establishing the signature threshold for nomination under N.C. Gen. Stat. § 163-122(a)(3) for the Orange County Board of Commissioners, District 2, at 4% of the nominating district, and award costs to Plaintiff.

Respectfully submitted by:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the N.C. Rules of Appellate Procedure, the undersigned Plaintiff-Appellant certified that the foregoing brief, which is prepared using a proportional font, is less then 8,750 words (excluding cover, index, table of authorities, caption, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 4th day of April, 2023.

/s/ Connor P. Fraley

Connor P. Fraley, Plaintiff

CERTIFICATE OF SERVICE

I, Connor P. Fraley, Plaintiff, do hereby certify that I served the foregoing Plaintiff-Appellant's Brief on Joseph Herrin & Martha Bordogna, attorneys for defendant pursuant to Rule 26(c) of the N.C. Rules of Appellate Procedure by uploading a copy of same to the electronic-filing site and emailing them a copy of same at the email address of record below.

This the 4th day of April, 2023.

/s/ Connor P. Fraley
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